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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. **37977-5-II**

COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

MICHAEL D. McPHEE d/b/a THE MICHAL D. McPHEE COMPANY

Appellant,

v.

STEINHAUER FAMILY INVESTMENTS, LLC,
a Washington limited liability company

Respondent.

AMENDED BRIEF OF APPELLANT

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I. ERRORS AND ISSUES

A. ASSIGNMENTS OF ERROR

1. The trial court erred by ruling that RCW 7.04A[1] did not apply to arbitration agreements entered into before July 1, 2006.

2. The trial court erred by ruling that the Court had not entered a stay of proceedings, but only issued an Order suspending the Case Schedule.

3. The trial court lacked jurisdiction for dismissing Mr. McPhee's case for want of prosecution.

4. The trial court erred by ruling that the Clerk's dismissal was not a clerical mistake.

5. The trial court erred by ruling that Mr. McPhee did not bring his Motion to Vacate Order of Dismissal and Reopen the Case within a reasonable time under CR 60(b).

B. ISSUES

1. Did the trial court err when it ruled that the Revised Uniform Arbitration Act ("RUAA" or "Act") governed only arbitration agreements entered into after July 1, 2006, rendering all previous arbitration agreements unenforceable?

2. Did the trial court err when it ruled that the Court Order of October 24, 2001, transferring the case into private arbitration did not stay the legal

[1] The Revised Uniform Arbitration Act (RUAA).

proceedings until the arbitration was held, as was required under RCW 7.04.030[2]?

3. Did the trial court lack jurisdiction over a case governed by the RUAA, which provides that the court has limited jurisdiction to confirm, modify, or vacate an arbitrator's award and where the Court Order of October 24, 2001 specified that the Court retained jurisdiction (to enter and enforce the Arbitrator's decision) and for no other stated purpose?

4. Did the trial court err when it ruled that the Clerk's April 27, 2007 administrative dismissal of a case that has been transferred to private arbitration was not a clerical mistake, correctable at any time on motion of a party?

5. Did the trial court err when it ruled that Mr. McPhee's compliance with the timelines set forth in CR 60(b) were not within a reasonable time under CR 60(b), particularly where Mr. McPhee engaged in no unacceptable litigation practices?

II. STATEMENT OF THE CASE

On October 6, 2000, the parties entered into a construction contract. CP 11-21. The contract provides an arbitration clause requiring that any claim or controversy arising out of or related to the contract be

[2] RCW Ch. 7.04, formerly known as the Uniform Arbitration Act (UAA) was repealed in 2005 (eff. 1/1/06) and replaced by RCW 7.04A, the Revised Uniform Arbitration Act (RUAA).

submitted to the American Arbitration Association ("AAA"). CP 20. Since the AAA does not have jurisdiction over the foreclosure of a mechanics and materialman's lien[3], Mr. McPhee brought an action in Pierce County Superior Court on June 28, 2001. CP 1-21.

The Defendant compelled Mr. McPhee to remove the case from Superior Court into private AAA arbitration, citing the parties' contract provisions. CP 174; CP 179. The parties stipulated that "*[the] matter...be stayed and the case schedule set aside so that the parties may pursue private arbitration, as required by contract by the parties.*" CP 34-36. On October 24, 2001, the court entered an Order reflecting the parties' stipulation, staying the legal proceedings, and transferring the case into private arbitration[4]. *Id.*

AAA is an extremely expensive dispute resolution process. CP 47-52. Due to Mr. McPhee's financial situation, he was not able to immediately proceed with AAA arbitration. CP 41-42. Mr. McPhee saved the money necessary to proceed with AAA and paid his $1,500.00 non-refundable administrative fee and $892.25 toward the arbitrator's review expenses. CP 43. The arbitration date was set for August 17-18th' 2004.

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[3] The Appellant had recorded a Claim of Lien after having not been paid any money by the Respondent for his work (valued at $142,492.60). CP 9

[4] Note: The Court's first Order signed on October 24, 2001 AND the second Order signed on October 31, 2005 were both entered in this case while the provisions of the former UAA (the "Act") (RCW 7.04.030) applied.

CP 41-42. In July 2004, an AAA Administrator called Mr. McPhee's counsel, Klaus Snyder, and informed him that the Defendant had advised that it could not pay its portion of the AAA fees. CP 42. Mr. Snyder confirmed the information with Defendant's counsel. *Id.*

AAA offered to go forward with the arbitration if Mr. McPhee paid the full arbitration fees, estimated between $8,000.00-$11,000.00. CP 43. Mr. McPhee did not have enough money to proceed and, as a direct result of the Defendant's failure to pay its share of the arbitration costs, the arbitration did not move forward. *Id.*

On October 13, 2005, Mr. McPhee brought a Motion for Order Removing Case from Arbitration and Setting Trial Date and Other Relief. CP 40-52. The Defendant's attorney, Michael Norman, filed a Notice of Intent to Withdraw effective October 28, 2005. CP 53-56. The Defendant submitted a response objecting to Mr. McPhee's Motion. CP 57-61. It asserted that 'its financial condition had improved such that it was now capable of undertaking the financial responsibilities in connection with the arbitration process.' *Id.* Mr. Norman appeared at the hearing on behalf of the Defendant and on October 31, 2005, the trial court entered an order

denying Mr. McPhee's motion, refusing to remove the case from the contractual arbitration process.[5] CP 79-81; CP 201.

After the hearing Mr. Snyder and Mr. Norman met briefly and discussed getting the case "back on track." CP 201. Mr. Snyder sent Mr. Norman a letter following up on the conversation on November 1, 2005. CP 201; CP 207-208. Mr. Snyder began working with Mr. Norman, at Mr. Norman's suggestion, to coordinate a site visit to ascertain if the Defendant was in fact ready to proceed with AAA. CP 201-202; CP 210-211. Shortly thereafter, Mr. Norman stopped working on the case. CP 201. Neither Mr. McPhee, nor his counsel, heard from the Defendant after Mr. Norman left the case. *Id.*

While gearing up for the arbitration the first time (in 2004), Mr. McPhee had been working with an engineer, John Bastian, who knew and understood Mr. McPhee's financial situation and had been working with him. CP 202. In 2005, Mr. Bastian's schedule no longer allowed him to work with Mr. McPhee. *Id.* Mr. McPhee began saving money to hire another engineer and, in 2007, hired David Hedges of Hedges Engineering to make sure that he still had a strong and viable claim, after the years of delay the Defendant caused. CP 202; CP 212-214.

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[5] Effectively leaving in place the Court's first Order of October 24, 2001, staying the court case pending the arbitration hearing.

The Plaintiff's attorney, received Notice on February 2, 2007 that the court clerk was going to dismiss the case for "want of prosecution". CP 82. Mr. Snyder dictated a letter, that his electronic computer file and billing records reflected was transcribed and was supposed to have been sent to the Clerk, with copies mailed to the attorneys (Tracey A. Thompson and Michael D. Norman) that had appeared in the case. CP 301-2; CP 305. On April 26, 2007, the Clerk administratively dismissed Mr. McPhee's action for want of prosecution. CP 83.

Mr. McPhee, through Mr. Snyder, then hired an engineering firm (Hedges Engineering) to investigate the matter to make sure that his claim was viable, before spending more money to return to the litigation and arbitration process. CP 202-3. Mr. Snyder later advised Mr. McPhee that the court clerk had mistakenly dismissed the case and that he would need to bring a Motion to Reopen the Case. CP 308.

Since the process had already been quite expensive for Mr. McPhee, and as he did not yet have a written report from an engineer that confirmed Mr. McPhee's work as "being acceptable" and within industry standards, Mr. McPhee wanted to make sure that he still had a viable claim before proceeding further with the case. CP 217. In March 2008, Mr. Hedges, the engineer, provided Mr. McPhee verification that Mr. McPhee did in fact have a viable claim and that it could be successfully

prosecuted. *Id.* Mr. McPhee, through Mr. Snyder, began preparing his Motion to Vacate the Order of Dismissal and Reopen the case. *Id.*

On April 14, 2008, Mr. McPhee brought his Motion to Vacate the Order of Dismissal and Reopen the Case pursuant to RCW 7.04A.070, CR 60(a) and/or CR 60(b)(1) & (11). CP 84-128. Defendant opposed Mr. McPhee's motion, claiming Mr. McPhee was guilty of laches. CP 135-139. Defendant claimed that it was prejudiced by Mr. McPhee's delay, but did not cite nor produce any specific evidence of prejudice. CP 131-132.

While the trial court did not hold that Mr. McPhee was guilty of laches, it denied Mr. McPhee's motion ruling that (1) Mr. McPhee failed to comply with the applicable filing limitations set forth in CR 60; (2) that the Clerk did not commit a clerical error or mistake; (3) that the Court did not enter a stay of proceedings (in October 2001) but only issued an Order suspending the Case Schedule; and (4) that the mandatory stay provision of RCW 7.04A did not apply. See Verbatim Report of Proceedings, dated May 23, 2008 (VRP).

On June 2, 2008, Mr. McPhee brought a Motion for Reconsideration. CP 287-300. He argued that the action was stayed as per Washington's RUAA (and the former RCW 7.04.030) and, therefore, it was an error on the part of the Clerk to dismiss the case. *Id.* The

Defendant opposed Mr. McPhee's motion claiming that RCW 7.04A did not apply as the parties had not agreed to be bound by the RUAA. CP 313-323.

III. STANDARD OF REVIEW

The trial court has the authority to consider a CR 60 Motion to Vacate a CR 41 dismissal. *See e.g. Vaughn v. Chung*, 119 Wash.2d 273, 830 P.2d 668 (1992).

Vacating a judgment or an order is reviewed for abuse of discretion. *See e.g. White v. Holm*, 73 Wash.2d 348, 438 P.2d 581 (1968) (*citing Yeck v. Department of Labor and Indus.,* 27 Wash. 2d 92, 176 P.2d 359 (Wash., 1947)); *see also Griggs v. Averbeck Realty Inc.*, 92 Wash.2d 576, 599 P.2d 1289 (1979). In this vein it is pertinent to observe that where the determination of the trial court results in the denial of a trial on the merits is an abuse of discretion may be more readily found than in those instances where the default judgment is set aside and a trial on the merits ensues. *White*, 73 Wash.2d 348 (*citing Agricultural and Livestock Credit Corp. v, McKenzie*, 157 Wash. 597, 289 P. 527 (1930); *Graham v. Yakima Stock Brokers, Inc.*, 192 Wash. 121, 72 P.2d 1041 (Wash., 1937)). Abuse of discretion is less likely to be found if the default judgment is set aside. *Griggs*, 92 Wash.2d 576.

The trial court should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between parties be fairly and judiciously done. *White*, 73 Wash.2d 348. *See also Pybas v. Paulino*, 73 Wash.App. 393, 869 P.2d 427 (Div. 2, 1994) The fundamental guiding principal and overriding reason should be whether or not justice is being done. *Griggs*, 92 Wash.2d 576. Justice might, at times, require a default or delay. *Id.* What is just and proper must be determined by the facts of each case, not be a hard and fast rule applicable to all situations regardless of the outcome. *Id.*

Dismissals for want of prosecution are punitive or administrative in nature and every reasonable opportunity should be afforded to permit the parties to reach the merits in controversy. *See e.g., Landberg v. State, Dept. of Game and Fisheries*, 36 Wash.App. 675, 676, P.2d 1026 (Div. 3, 1984).

IV. LEGAL AUTHORITY AND ARGUMENT

C. RCW 7.04A, the Uniform Arbitration Act, governs the parties' arbitration agreement.

i. RCW 7.04A.030 clearly and unambiguously governs the parties' arbitration agreement.

If a statute is unambiguous, courts are required to apply the statute as written and assume the legislature means exactly what it says. *See e.g. Plouffe v. Rock,* 135 Wash.App. 628, 147 P.3d 596 (Div. 1, 2006) (*citing*

State v, Radan, 143 Wash.2d 323, 330, 21 P.3d 255 (2001)). An unambiguous statute is not subject to judicial construction and courts have declined to insert words where the language, taken as a whole, is clear and unambiguous. *Plouffe*, 135 Wash.App. 626 (*citing Tenino Aerie v. Grand Aerie*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002)). When the language is clear, courts cannot construe a statute contrary to its plain language. *Plouffe*, 135 Wash.App. 626 (*citing City of Kirkland v. Ellis*, 82 Wash.App. 819, 826, 920 P.2d 1996)).

RCW 7.04A, Washington's Uniform Arbitration Act, was enacted January 1, 2006 to replace RCW 7.04, the former arbitration act. Washington's Uniform Arbitration Act has multiple relevant sections applicable to the present case. RCW 7.04A.030 explains when the Uniform Arbitration Act applies:

> (1) Before July 1, 2006, this chapter governs agreements to arbitrate entered into:
> (a) On or after January 1, 2006; and
> (b) Before January 1, 2006, if all parties to the agreement to arbitrate or to arbitration proceedings agree in a record to be governed by this chapter.
> **(2) On or after July 1, 2006, this chapter governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.**
> (3) This chapter does not apply to any arbitration governed by chapter 7.06 RCW.
> (4) This chapter does not apply to any

> arbitration agreement between employers and employees or between employers and associations of employees. (**Emphasis** provided).

RCW 7.04A.070(6) reads in relevant part: *"If the court orders arbitration, the court* ***shall on just terms stay any legal proceeding*** *that involves a claim subject to the arbitration."* (***Emphasis*** added).

The trial court held that RCW 7.04A did not apply to these proceedings under RCW 7.04A.030. CP 314, VRP p. 3. Therefore, RCW 7.04A, the provision governing the court ordering a stay of legal proceedings, was rendered, unenforceable. CP 290. The court based it decision on RCW 7.04A.030(1) and on the premise that since RCW 7.04A did not take effect until after July 1, 2006, covered contracts entered into after January 1, 2006. *Id*, VRP p. 3. A close examination of RCW 7.04A.030 shows the trial court's reasoning was fatally flawed.

Under *Plouffe*, the court must apply RCW 7.04A.030's clear and unambiguous language. 135 Wash.App. 626. The court must not insert any words to RCW 7.04A.030. *Id.* RCW 7.04A.030 lists two timelines to deal with the change in arbitration acts. The first timeline, RCW 7.04A.030**(1)**, is enacted to transition litigants into the new Act and governed for the first six (6) months of the new Act. Any time before July 1, 2006, a litigant was governed by RCW 7.04A.030**(1)**.

Since July 1, 2006, a litigant has governed by RCW 7.04A.030**(2).** Mr. McPhee brought his Motion to Vacate April 15, 2008, well after July 1, 2006. CP 84-128.

RCW 7.04A.030**(2)**, as it is written, does not distinguish between arbitration agreements entered into before January 1, 2006 from those entered into after January 1, 2006. Since July 1, 2006, RCW 7.04A.030(2), has applied to **all** arbitration agreements.

The court and the Defendant both applied RCW 7.04A.030**(1)** to the parties' arbitration agreement. CP 319, VRP p. 3. The Defendant cited and emphasized the RCW 7.04A.030(1)(b). CP 319. The court applied RCW 7.04A.030**(1)**'s language when it distinguished the parties' arbitration agreement from arbitration agreements entered into after January 1, 2006. VRP p. 3. Subsection **(1)** is the only subsection in RCW 7.04A.030 that discusses and distinguishes the arbitration agreement date. The trial court made the determination on May 23, 2008, and then again on June 20, 2008. The clear and unambiguous language in RCW 7.04A.030 requires that after July 1, 2006, subsection **(2)** governs. Both dates are well after July 1, 2006 -the date that the UAA began to govern ALL arbitration agreements. As such, the UAA clearly governs the parties' arbitration agreement. Under the UAA, once the court orders arbitration, it **must** stay all legal proceedings pending arbitration. RCW

7.04A.070. The court had already stayed the legal proceedings pending arbitration in October 2001. Four years later, it ordered that the case stay in the arbitration process. Since the court ordered arbitration, under the UAA, it does not have discretion over a stay. *Id.* It MUST stay the legal proceedings. *Id.*

ii. Even if the court proceeded under the repealed RCW 7.04, the results would not change.

The former RCW 7.04.030, titled "Stay of action pending arbitration" states:

> If any action for legal or equitable relief or other proceedings be brought by any party to a written agreement to arbitrate, the court in which such action or proceeding is pending, upon being satisfied that any issue involved in such action or proceedings is referable to arbitration under such agreement, shall, on motion of any party to the arbitration agreement, **stay the action or proceeding <u>until an arbitration has been had</u> in accordance with the agreement.** (**Emphasis** provided).

Even if the RUAA[6] did not apply, RCW 7.04, the statute in effect when the parties entered their arbitration agreement, would require the same result. Under RCW 7.04.030's clear language, once the court orders arbitration, the action is stayed until the parties arbitrate their dispute. Under RCW 7.04, the court ordered the parties' arbitration as per their

[6] RCW 7.04A.

agreement. CP 34-36; CP 79-81. Once those court orders were entered, the statute required the court to stay the action until the arbitration was held.

B. The trial court entered an Order staying the legal proceedings on October 24, 2001.

i. The Court stayed legal proceedings by the clear and unambiguous language of the court order.

On October 24, 2001, the parties presented the court with a stipulation and order. CP 34-36. The document was a three page document, with page numbers on the bottom (numbered 1-3), and the body was divided into two sections: I. Stipulation and II. Order. *Id.* The Court did not make any changes to the document and signed the third page of the document. *Id.* The documents were filed with the Court as one document and have been treated as one document since its entry into the court record. *Id.*

Under the section titled I. STIPULATION, the parties stipulated that the "matter...be **stayed** and the case schedule set aside so that the parties may pursue private arbitration, as required by contract by the parties." *Id.* (**Emphasis** added).

Under the section titled II. ORDER, the court ordered that "this matter shall be transferred to private arbitration as required by the contract

between the parties, and that the case schedule on this matter shall be set aside." *Id.* It further ordered that the Court retain jurisdiction "for the purposes of entry and enforcement of the Arbitrator's decision, once arbitration has been had." *Id.*

The trial court erroneously ruled that the October 24, 2001 order did not stay the legal proceedings, but instead merely suspended the Case Schedule. CP 314, VRP p. 4.

The Stipulation was clearly intended by the parties and the Court to be a part of the court order. The Stipulation and the Order were obviously meant to be incorporated into one document (given the sections and the page numbers) and the Court entered the entire document as the Court Order. On October 24, 2001, the parties and the court all understood the Court Order stayed legal proceedings pending arbitration. The Court evidenced its intent by ordering that the Superior Court lacked jurisdiction until after the parties had their arbitration.[7]

Instead of enforcing the Court Order's obvious intent, the trial court found that the court order's effect was to "suspend" the case schedule - language that is not found anywhere on the Stipulation and

[7] Though the parties entered this Oct. 2001 Order by "stipulation", if either party had filed a motion to compel the contractual arbitration, it would have been incumbent on the court to grant the motion (per the parties' contact) and the statutorily mandated "stay" (regardless of the wording of the Order) would have been in effect until the arbitration was held.

Order and completely conflicting with the Court's Order absolving the Superior Court of jurisdiction until after the parties arbitrated. A Case Schedule ends on the trial date. Since the Court, by its own Order, would not have jurisdiction until AFTER the last date of the Case Schedule, the trial court's interpretation of the Court's October 24, 2001, does not make any practical sense.

Further, it is undisputed by the plain language of the Court's October 24, 2001 Order that the Court completely set aside. If the Court intended to merely "suspend" the Case Schedule instead of eliminating it (setting it aside) from the present case, its Order would have reflected that intent.

ii. The Court ordered Arbitration-staying the legal proceedings under RCW 7.04A & RCW 7.04.

The undisputed and clear language of the Court's October 24, 2001 ordered the case into arbitration (ordered "that this matter shall be transferred to private arbitration..."). Under RCW 7.04A.070(6), once the court orders arbitration, the trial court is required to stay legal proceedings ("[i]f the court orders arbitration, the court shall on just terms stay any legal proceeding that involves a claim subject to the arbitration"). Under RCW 7.04.030 once arbitration is ordered, stay of the court proceeding

was also mandatory ("shall ... stay the action or proceeding until an arbitration has been had in accordance with the agreement").

Under both Court Orders and both RCW 7.04A.070(6) and RCW 7.04.030, the present case was stayed pending the holding of the arbitration hearing. The trial court refused to give effect to the Court Orders and the UAA and, by doing so, committed reversible error.

C. The Court lacked Subject Matter Jurisdiction.

In Washington, a judgment is void for lack of jurisdiction and is assailable at any time. *Allied Fidelity Insurance Co. v. Ruth*, 57 Wash.App. 783, 790 P.2d 206 (Div. 1, 1990) (citing *Columbia Valley Credit Exch., Inc. v. Lampson*, 12 Wash.App. 952, 956, 533 P.2d 152 (1975)). The determination of whether a court has subject matter jurisdiction is a question of law reviewed de novo. *See e.g., Equity Group, Inc. v. Hidden*, 88 Wash.App. 148, 943 P.2d 1167 (Div. 2, 1997) (citing *Bour v. Johnson*, 80 Wash.App. 643, 646, 910 P.2d 548 (1996)).

A judgment may be properly rendered against a party only if the court has the authority to adjudicate (hear and determine the case upon its merits) the type of controversy involved in the action before the court. *See e.g. Marley v. Department of Labor and Industries of State*, 125 Wash.2d 533, 886 P.2d 189 (1994); *See also Harting v. Burton*, 101 Wash.App. 954, 6 P.3d 91 (Div. 3, 2000). A tribunal lacks subject matter jurisdiction

when it attempts to decide a type of controversy over which it has no authority to adjudicate. *Marley*, 125 Wash.2d 533.

A judgment entered without subject matter jurisdiction is void. *See e.g., Shoop v. Kittitas County*, 108 Wash.App. 388, 30 P.3d 529 (Div. 1, 2001) (citing *In re Marriage of Ortiz*, 108 Wash.2d 643, 649-50, 740 P.2d 843 (1987)).

Superior Courts have broad subject matter jurisdiction, but will be found to have a lack of jurisdiction under compelling circumstances, such as when it's specifically limited by the Legislature and/or Congress. *Harting*, 101 Wash.App. 954.

The UAA gives the Superior Court the limited jurisdiction to enter, confirm, modify, correct, or vacate an arbitrator's award. RCW 7.04A.220; RCW 7.04A.230; RCW 7.04A.240.

A court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, but only when no court rule or statute governs the circumstances presented. *See e.g., Foss Maritime Co. v. City of Seattle*, 107 Wash.App. 669, 27 P.3d 1228 (Div. 1 2001) (citing *Snohomish County v. Thorp Meats,* 110 Wash.2d 163, 166-67, 750 P.2d 1251 (1988).

i. The trial court ordered that it retain only limited jurisdiction to enter and enforce the Arbitrator's decision, once an arbitration has been had.

On October 24, 2001, the court clearly and unambiguously ordered that the present case be transferred into private arbitration. CP 36. It further ordered that "the Court...retain jurisdiction for the purposes of entry and enforcement of the Arbitrator's decision, once arbitration has been had." *Id.* In other words, on October 24, 2001, the Court ordered that it no longer had jurisdiction over the case until the parties conducted arbitration and an arbitrator presented an award. After October 24, 2001, the court's jurisdiction was contingent upon completion of the arbitration. Until the parties conduct arbitration, the court does not have subject matter jurisdiction over the case and the clerk clearly had no authority to dismiss the case for want of prosecution.

ii. RCW 7.04A gives the Superior Court only limited jurisdiction over matters once the case has been ordered into Arbitration.

As discussed in detail above, the UAA applies to the parties' arbitration agreement. RCW 7.04A.030. Under the UAA, once the Court orders arbitration, all legal proceedings must be stayed until after the parties arbitrate. RCW 7.04A.070(6). The parties to an arbitration

agreement cannot waive the stay of legal proceedings. RCW 7.04A.040(3).

The UAA very clearly and unambiguously limits the Superior Court's jurisdiction to confirming, modifying, correcting, and vacating the arbitrator's award. RCW 7.04A.220-240. The Legislature specifically limited the Superior Court's subject matter jurisdiction in matters submitted to arbitration. Under the UAA, any action between the stay of legal proceedings and confirming, modifying, correcting, or vacating the Arbitrator's award is outside the Superior Court's subject matter jurisdiction. In other words, once the Court orders a matter into arbitration, the Superior Court can no longer hear or determine the case.

On April 26, 2007, the Court entered an Order of Dismissal for Want of Prosecution on the court clerk's administrative request. The Court entered the award after the Court had ordered arbitration and before the arbitration took place. Since the parties had not yet arbitrated their case, the Court was not confirming, modifying, correcting, or vacating the arbitrator's award. As such it was not within the limited jurisdiction that the Court retained per its order of October 24, 2001. The Superior Court did not have subject matter jurisdiction to enter the Order of Dismissal.

Not only did the UAA's provisions absolve the Superior Court of its jurisdiction to dismiss the action for want of prosecution, Washington

courts hold that since a specific statute governed the present case's circumstances, the Superior Court is without power to dismiss an action for want of prosecution. *Foss*, 107 Wash.App. 669 (citing *Snohomish County*, 110 Wash.2d 163.

The trial court acted outside its subject matter jurisdiction by dismissing a case that it did not have the authority to hear and determine. In doing so, it's Order of Dismissal, and the subsequent Orders that it entered, are void.

iii. Washington courts recognize that when a Court stays legal proceedings and orders that the matter be decided by a specific court or tribunal, any other tribunal that acts during the stay is without subject matter jurisdiction.

When a court Orders a stay of legal proceedings and specifies a court or tribunal to hear the matter, absolving it of jurisdiction, all other courts and tribunals lack subject matter jurisdiction. *See e.g., Allied Fidelity Insurance Co., v. Ruth*, 57 Wash.App. 783, 790 P.2d 206 (Div. 1, 1990). In *Allied Fidelity Insurance Co.*, the bonding company sought reimbursement from its bail bond agent for forfeitures it paid to the State of Hawaii. *Id.* at 784. The agent counter-claimed for funds that he had paid into a fund maintained by the bonding company. *Id.* at 785.

The agent brought a Motion for Summary Judgment to dismiss the Complaint and grant his counter-claim. *Id.* The hearing was continued so

that the bonding company could get documentation for its claim from Hawaii. *Id.* The Court gave the bonding company a specific deadline by which, if it had not submitted the evidence, the Court would grant the agents Motion. *Id.* The bonding company did not submit evidence and the Court granted the agent's Motion for Summary Judgment. *Id.*

Four and a half (4.5) months later, the bonding company brought a Motion to Vacate the summary judgment. *Id.* The bonding company attached a copy of an Order by the Marion County Circuit Court in Indiana staying all claims against the bonding company and prohibiting any court outside of Indiana from entering money judgments against Allied. *Id.* Even with the copy of the stay before it, the trial court denied the Motion to Vacate. *Id.*

The Washington Uniform Insurers Act ("Washington Act") applies to all insurance companies being liquidated in Washington and in all reciprocal states. *Id.* The court determined that Indiana was considered a reciprocal state under the Washington Act. *Id.* The court determined that since Indiana and Washington were reciprocal states, the Washington courts were bound by the stay, absolving it of jurisdiction in favor of the Indiana courts. *Id* at 790.

The above case is extremely similar in effect to the present case. In *Allied*, the Indiana had the authority to stay legal proceedings and

absolve the Washington court of jurisdiction. *Id* at 785. In the present case, on October 24, 2001, the Pierce County Superior Court had the authority to stay the legal proceedings and absolve itself of jurisdiction pending arbitration (and then having jurisdiction only to enter and enforce the arbitrator's award).

In *Allied*, the court dismissed the case without knowledge of the Indiana court order implementing a stay of legal proceedings and absolving all other tribunals of jurisdiction. *Id.* at 785. In the present case, the Clerk's office mistakenly administratively dismissed the case, apparently without a file review to realize that the matter had been stayed and that the Superior Court did not have authority to do so.

In *Allied*, the Washington court refused to vacate the erroneous dismissal, despite the bonding company presenting the court order and advising it that all legal proceedings had been stayed and only Indiana courts retained jurisdiction. *Id.* In the present case, the trial court refused to vacate the erroneously entered administrative Order of Dismissal despite Mr. McPhee presenting the court with its own Orders staying the case and advising it that the case needed to be arbitrated before the Superior Court could exercise limited jurisdiction: the entry and enforcement of the arbitrator's award.

The *Allied* court held that the Washington court did not have jurisdiction and **should have vacated the judgment once the order from Indiana was brought to the Court's attention.** (**Emphasis** provided) *Id.* at 790. Similarly, the Superior Court should have vacated the Clerk's administrative dismissal when it learned that the case had been stayed and that it did not have jurisdiction over the matter.

D. The Clerk's dismissal was a clerical mistake under CR 60(a).

CR 41(b)(1) is procedural and remedial in nature and purpose. *See e.g. Yellam v. Woerner*, 77 Wash.2d 604, 464 P.2d 947 (1970). It involves **no substantive or vested rights.** *Id.* (**Emphasis** provided).

A clerical mistake is mechanical in nature, is usually apparent in the record, and does not involve substantive legal decisions or judgments. *See e.g., In re Marriage of King*, 66 Wash.App. 134, 831 P.2d 1094 (Div. 1, 1992).

If a trail judge signs a decree through misplaced confidence in the attorney who presents it, or otherwise, which does not represent the court's intentions in the premises, an error contained therein may be corrected under CR 60(a). *King*, 66 Wash.App. at 138.

A type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney. *Id.* (citing *Foster v. Knutson*, 10 Wash.App. 175, 177, 516 P.2d 786 (1973)); *See also In re Marriage of Stern*, 68 Wash.App. 922, 846 P.2d 1387 (Div. 1, 1993).

A judicial error is an error of substance. *Stern*, 68 Wash.App. at 927 (citing *King*, 66 Wash.App. at 138)). A judicial error involves an intentional act of the court. *See e.g., In re Marriage of Getz*, 57 Wash.App. 602, 789 P.2d 331 (Div. 1 1990) (citing *In re Kramer's Estate*, 49 Wash.2d 829, 307 P.2d 274 (1957); *Wilson v. Henkle*, 45 Wash.App. 162, 724 P.2d 1069 (Div. 1 1986)).

The test for distinguishing between judicial and clerical error is whether based on the record the judgment embodies the trial court's intention. *King*, 66 Wash.App. 138 (citing *Marchel Bunger*, 13 Wash.App. 81, 84, 533 P.2d 406).

CR 60(a) reads in relevant part:

> (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.

The trial court erred when it held that the Clerk of the Court did not commit a clerical error or mistake. VRP p. 7. After applying the factors and test to the Clerk's Dismissal, it is clear that (1) dismissals for want of prosecutions are mechanical/clerical court functions; (2) the clerk erroneously dismissed the present case; and (3) the clerk commit a clerical error and such mistake can be corrected at any time, by the court or on motion of a party.

i. Dismissals for want of prosecutions are a mechanical/clerical court function.

First, Washington Supreme Court defined the dismissal for want of prosecution to be procedural and remedial involving **no substantive rights.** *Yellam*, 77 Wash.2d at 608. Washington appellate courts hold that dismissals for want of prosecution are punitive or administrative in nature. *Landberg*, 36 Wash.App. at 676-677. Washington courts hold that, since dismissal for want of prosecution is NOT substantive, litigants should be given every reasonable opportunity to reach the merits of the controversy. *Id.* Since the Washington Supreme Court does not consider a dismissal for want of prosecution to be a substantive legal decision, it must be a mechanical function of the court.

ii. The Court Clerk erroneously dismissed this case.

As discussed in detail above, this case had been stayed pending arbitration, by court order pursuant to the mandatory provisions of the UAA. Both the court order and the UAA absolved the Superior Court of jurisdiction until after the arbitration and then only to enter and enforce the arbitrator's award. The Clerk of the Court cannot dismiss a case that has been stayed pending arbitration and cannot dismiss a case over which the court does not have subject matter jurisdiction.

The dismissal is clearly erroneous and the Court must decide if it is a clerical mistake or a judicial mistake. By applying Washington courts' factors and tests for determining if a mistake is clerical or judicial, it is clear that this was a clerical mistake.

As stated above, dismissals for want of prosecution are a mechanical function of the court. It logically follows that if the court (or, in this case, the court clerk's office) makes a mistake in processing or administering the dismissals, that mistake must also be mechanical. In other words, the Clerk's office cannot make substantive legal decisions. Any mistake that it makes cannot involve substantive legal decisions (a distinguishing factor between clerical and judicial mistakes).

Washington courts consider a mistake to be clerical when a judge signs an order through misplaced confidence on the attorney who presents it, or otherwise, and that order is inconsistent with the court's intentions as

evidenced by the record or other clear evidence before the court. *King*. 66 Wash.App. 134. In the present case, the Honorable Commissioner Dicke did not physically sign the Order of Dismissal. CP 83. Instead, her signature was electronically generated. *Id.* The court generated and entered the order through misplaced confidence in the clerk's office, which represented to it that the court had the ability and jurisdiction to dismiss the case for want of prosecution. Since the Clerk made a mistake, the court's confidence in the same was misplaced.

In addition, the dismissal for want of prosecution is inconsistent with the Court's clear intent that (1) the case was stayed; (2) the Court ordered private arbitration; and (3) the Court absolved itself of jurisdiction until the parties completed arbitration. The court first evidenced its intent in its October 24, 2001 order. The court affirmed its position when it denied Mr. McPhee's Motion to Remove the Case From Arbitration. CP 79-81. Every substantive legal decision that the Court made evidences its intention to stay legal proceedings until the completion of the arbitration. The order of dismissal for want of prosecution is the only part of the record inconsistent with the court's unequivocal intent.

Washington courts hold that the test for distinguishing between judicial and clerical error is whether based on the record, the judgment embodies the trial court's intention. *King*, 66 Wash.App. at 138. Clearly,

the dismissal did not embody the trial court's intention based on the record.

Washington courts also consider if the mistake involved a legal decision or judgment by an attorney. *King*, 66 Wash.App. at 138 (citing *Foster v. Knutson*, 10 Wash.App. 175, 177, 516 P.2d 786 (1973)); *See also In re Marriage of Stern*, 68 Wash.App. 922, 846 P.2d 1387 (Div. 1, 1993). The court did not hear any motion or argument on this issue. Neither Mr. McPhee's attorney, nor the Defendant's attorney presented a legal decision or judgment.

A mistake is judicial only if it's one of substance and involves an intentional action by the court. As discussed above, Washington courts do not consider dismissals for want of prosecution to be substantive and, therefore, lack substance. The court did not intentionally enter this order. The Commissioner did not consider legal arguments or decisions of attorneys. Instead, the Clerk's office administratively processed the Order and electronically generated the signature.

iii. CR 60(a) allows the court to correct a clerical error at any time.

As stated above, a clerical error can be corrected by the court at any time. Mr. McPhee asked the Court to correct the error less than a year after the Court Clerk made the error. The trial court erred when it refused

to do correct the mistake and reopen the case. Washington's Civil Rules refuse to uphold judgments and orders based on clerical mistakes. The drafters recognized that upholding a clerical order that does not embody the court's intent, and that is made without legal arguments or decisions, would result in extreme and significant injustice. The drafters specifically ordered the Court to correct the error as soon as the Court realized the error, without time limitations.

Washington case law supports CR 60(a)'s language's usual and ordinary meaning. In the present case, the Court Clerk's office committed a clerical error when performing a mechanical court function. Mr. McPhee drew the error to the Court's attention. The Court refused to correct the error. The Court's refusal resulted in the extreme and significant injustice the drafters of CR 60(a) enacted it to prevent.

The Washington Supreme Court has defined dismissals for want of prosecution as lacking substantive rights and being procedural and remedial in nature. The clerk's mistake was mechanical and did not involve a substantive legal decision. The dismissal did not embody the trial court's clear intention as evidenced by the record. Neither parties' attorney presented decision or argument for the dismissal for want of prosecution. The court did not act intentionally when the clerk dismissed the case for want of prosecution. This was very clearly a clerical error that

CR 60(a) allows to be correct at any time. The trial court erred in its finding.

E. Mr. McPhee brought his motion within one (1) year and also within a reasonable time under CR 60(b).

CR 60(b) reads in relevant part:

> "**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...[t]he motion shall be made within a reasonable time... not more than 1 year after the judgment, order, or proceeding was entered or taken."

The finality of judgment is an important value of the legal system. *See e.g., In re Marriage of Thurston*, 92 Wash.App. 494, 963 P.2d 947 (Div. 1, 1998). However, in both civil and criminal cases, circumstances arise where finality must give way to the even more important value that justice must be done between the parties. *Id.* CR 60 is the mechanism to guide the balancing between finality and fairness. *Id.*

What constitutes reasonable time depends on each case's facts and circumstances. *See e.g., Luckett v. Boeing Co.*, 98 Wash.App. 307, 989 P.2d 1144 (Div. 1, 1999); *Thurston*, 92 Wash.App. 494. (citing *In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989)). The

major considerations of timeliness are: (1) prejudice to the nonmoving party caused by the delay and (2) whether the moving party has good reasons for failing to take appropriate action sooner. *Id.* The mere passage of time between the entry of the judgment and the motion to set aside is not controlling. *Thurson*, 92 Wash.App. 494. Rather, a triggering event for the Motion may arise well after the entry of the judgment that the moving party seeks to vacate. *Id.*

Federal Courts in the Ninth Circuit that have considered the reasonableness requirement in conjunction with CR 41(b) dismissals hold that, while a dismissal could be granted if the Debtor proves prejudice to her defense, "**there must be specific evidence of actual prejudice".** *See e.g., In re Daily,* 124 B.R. 325, 330 (Bkrtcy. D. Hawaii, 1991).

The trial court found that Mr. McPhee did not bring his Motion to Reopen within a reasonable time under CR 60(b). CR 314, VRP pp 5-7. The trial court did not make affirmative findings of actual prejudice to the Defendant. The trial court failed to balance finality against fairness.

F. Mere inaction is not reason enough to deny a Motion to Vacate a Dismissal for Want of Prosecution.

The Washington Supreme Court and Division One has ruled on Motions to Vacate Dismissals for Want of Prosecution. The legal

authority unequivocally holds that inaction is not enough.[8] In *Thorp Meats,* the Washington Supreme Court stated that a trial court has inherent authority to dismiss an action for want of prosecution **only when a party has engaged in unacceptable litigation practices other than inaction**. *Snohomish County v. Thorp Meats*, 110 Wash.2d 163,167, 750 P.2d 1251 (1988).

The cases that the trial court relied on in its decision are consistent with this principle. In *Vaughn* the court cites *Thorp Meats* and explained that it's holding giving trial courts the authority to vacate a dismissal for want of prosecution is consistent with *Thorp Meats*. *Vaughn v. Chung*, 119 Wash.2d 273,281, 830 P.2d 668 (1992). Taken together, *Vaughn* states that trial courts have the authority to vacate CR 41 dismissals and must use that authority consistent with the holding in *Thorp Meats*, that a trial court can only dismiss an action for want of prosecution when a party has engaged in unacceptable litigation practices **other than inaction**. *Thorp Meats*, 110 Wash.2d at 167. According to *Thorp Meats*, the trial court did not have the authority to dismiss under CR 41 and, therefore, the case should be reinstated.

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[8] *See e.g. Snohomish County v. Thorp Meats,* 110 Wn.2d 163, 167, 750 P.2d 1251 (1988); *See also Foss Maritime Co. v. City of Seattle*, 107 Wash.App. 669, 27 P.3d 1228 (Div. 1, 2001)

Similarly, in *Luckett* the attorney failed to appear at court hearings and follow the case schedule. 98 Wash.App. 307 In *Plouffe*, as in the present case, the Defendant only alleged inaction and the court found that the case should properly have been reopened and determined that it was an abuse of the trial court's discretion to deny the request to reopen the case. 135 Wash.App. @ 632-633.

Washington courts, and federal courts interpreting the federal civil rules parallel to CR 60, all agree that the facts and circumstances of each case determine what is reasonable. Mr. McPhee, as the Plaintiff, has the burden of proof in this case. Before he paid his attorneys to reopen the case, he needed to make sure that he could still prove his case, given the time that had passed, as a direct result of the Defendant's delays. The facts and circumstances surrounding Mr. McPhee's caution are unique and deserve consideration.

As discussed above, this action started out unexceptionally. Mr. McPhee filed a lien foreclosure action in superior court. As per the parties' contract, the Defendant compelled Mr. McPhee to arbitrate the case in AAA, among the most expensive dispute resolution alternatives possible. Mr. McPhee paid his attorney to litigate his case, claiming over $100,000.00. Mr. McPhee geared up for the arbitration. He paid the AAA his half of the non refundable arbitration fee, totaling approximately

$1,500.00. About a month before the arbitration, the Defendant could not pay its half of the arbitration fees and, through no fault of and to the prejudice of Mr. McPhee, the arbitration process halted.

Mr. McPhee lost a lot of money the first time he tried the arbitration process. He could not afford to pay the AAA another set of fees. He prepared to have the case moved back into superior court - a more affordable forum for all parties. The Defendant objected and the court ordered that the parties arbitrate the case. Mr. McPhee had already paid to start the AAA process once, had already began to gear up for arbitration, and had engaged in another legal battle so that his case could be heard. Mr. McPhee began saving his money for a third attempt to prosecute this case.

Despite Mr. McPhee's counsel's good faith effort to keep the case open, the Clerk's office dismissed the case. Mr. McPhee's counsel advised that he would need to do a Motion to Vacate. Mr. McPhee decided to proceed only if he still had a viable claim after all these years. As soon as Mr. McPhee's engineer gave him a firm verification that he did have a viable claim, Mr. McPhee brought his Motion to Vacate.

Mr. McPhee's circumstances are unique in that he had been trying, in good faith, to litigate his claim, and get paid over $140,000.00 for work he performed and materials he supplied, for 7 years. All of his

attempts were halted by the Defendant, first because the Defendant could not come up with its half of the AAA fees, and then because it objected to a forum that Mr. McPhee could afford (after having lost a significant amount of money paying non refundable AAA fees and gearing up for the initial arbitration).

In addition, Mr. Hedge's verification that Mr. McPhee had a viable claim and that he could carry his burden of proof "triggered" his Motion to Vacate. Mr. McPhee brought his Motion to Vacate within weeks of the triggering event.

As discussed above, mere inaction is not enough-the trial court must find **specific evidence of actual prejudice**. *In re Daily*, 124 B.R. 325,330 Bkrtcy. D. Hawaii, (1991) (**Emphasis** added). The trial court did not find specific evidence of actual prejudice. While the Defendant made a few conclusory, self-serving statements, some of which contained hearsay, it did not present any specific evidence of actual prejudice.

Douglas Steinhauer, agent for the Defendant, testified that defense costs had increased. CP 132. The Mr. Steinhauer did not address the change in counsel as the possible reason for the price increase. *Id.* Mr. Steinhauer testified that witnesses have lost or forgotten valuable information and some have moved away. *Id.* He testified that he believed

that there was "no need" for the witnesses to keep the information in their possession. *Id.*

His hearsay testimony is not backed up with any concrete facts, i.e., who these witnesses are, what information they have; why Mr. Steinhauer can no longer reach these essential witnesses that he has purportedly kept in contact with over the years, given email, fax machines, etc.. Mr. Steinhauer did not state what information that these witnesses had in their possession, and why the witnesses were purportedly keeping the information for the sole purposes of this action.

Mr. Steinhauer further stated that he purged his files. *Id.* He did not state what information those files contained. Mr. Steinhauer did not make a single specific allegation of prejudice, or prove the same. In fact, his testimony proves the he can't come up with a single way that he has been prejudiced.

Mr. Steinhauer asserts that he redirected his funds. *Id.* His testimony is that he cannot presently afford AAA arbitration - placing him exactly in the same place he was when the parties' first began to arbitrate this matter. Mr. Steinhauer's testimony supports Mr. McPhee's contention that the Defendant has not been prejudiced and only time has passed. The Defendant was not prejudiced by this delay (largely caused by the Defendant itself).

After determining if the nonmoving party has been prejudiced, Washington courts look to deciding whether the moving party has good reasons for failing to take the appropriate action sooner. *Luckett*, 98 Wash.App. 307.

As discussed above, Mr. McPhee's decision to wait was not only reasonable, it was completely necessary. Seven (7) years had passed since Mr. McPhee first filed this lawsuit. He, as the Plaintiff, has the burden of proof. His case is contingent on industry experts finding that his work was within industry standards. As soon as he learned from an engineer (whom he finally could afford to hire) that he still had a viable case, he filed his Motion to Vacate.

Mr. McPhee's counsel, in good faith, had every reason to believe that the letter he had dictated was sent to the court. He thought that the matter would remain open. When the court clerk erroneously dismissed the case, Mr. McPhee and his counsel wanted to make sure that he could still prove his case before expending even more money for a third legal battle with the Defendant. Had Mr. McPhee not waited for his engineer to verify his work, he may have wasted the court's time and resources, as well as his own, opening a case that no longer had merit. Mr. McPhee's actions are reasonable and further the public policy in supporting judicial economy.

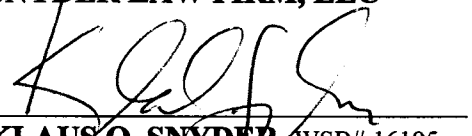
V. CONCLUSION

RCW 7.04A030(2) governs the parties' arbitration agreement. The Court ordered that legal proceedings be stayed, that the case be privately arbitrated, and that it retain jurisdiction only for the entry and enforcement of an arbitrator's award, after an arbitration has been conducted. The superior court did not have subject matter jurisdiction over this case when it dismissed it for want of prosecution, The clerk's dismissal for want of prosecution was a clerical error that can be corrected at any time. Mr. McPhee brought his Motion to Vacate within a reasonable time.

For the foregoing reasons, this case should be remanded for arbitration by the American Arbitration Association.

RESPECTFULLY SUBMITTED this **4th** day of **February, 2009**.

SNYDER LAW FIRM, LLC



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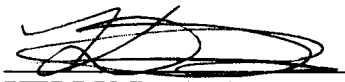

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NO. **37977-5--II**

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL D. McPHEE d/b/a THE MICHAEL D. McPHEE COMPANY, Appellant, vs. STEINHAUER FAMILY INVESTMENTS, LLC, a Washington limited liability company Respondents	**CERTIFICATE OF SERVICE**

I hereby certify that on **FEBRUARY42, 2009**, I caused a true and correct copy of the **AMENDED BRIEF OF APPELLANT** to be served on the following counsel of record via email per prior agreement under GR 30

DAVID J. CORBETT, WSB #30895
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The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the foregoing is true and correct.

DATED this **4TH** day of **February**, at **Sumner, WA.**

KLAUS O. SNYDER