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I. RESPONDENT'S RESTATEMENT OF THE ISSUES

Most of the issues raised by Appellant Michael D. McPhee ("McPhee") boil down to the question of whether the trial court had subject matter jurisdiction to order a CR 41(b)(2) dismissal of this case. For example, whether the trial court should have applied Chapter 7.04A RCW or its predecessor Chapter 7.04 RCW to this case matters only if the relevant statute stripped the court of the power to issue a dismissal (McPhee's issues number 1 and 3). Similarly, the question of whether or not the trial court Order of October 24, 2001 stayed the case is only relevant if such a stay would have deprived the court of jurisdiction to dismiss the case almost seven years later (McPhee's issues number 2 and 3). Finally, because the only reversible error alleged by McPhee related to the dismissal is the court's purported lack of jurisdiction, the classification of the alleged error as "clerical" is a non-issue: if there was a jurisdictional error, it would be correctable at any time, regardless of whether it was classified as "clerical" (McPhee's issue number 4). However, if the court had jurisdiction, there was no error to correct.

Only McPhee's issue number 5, pertaining to the timeliness of his CR 60 motion to vacate the dismissal, has a bearing on this appeal independent of the issue of jurisdiction. A charitable reading of that motion and Appellant's Brief might construe them as seeking relief from McPhee's own mistake in not responding to the notice of dismissal within the required time period. Accordingly, whether McPhee's failure to respond to that notice constituted excusable neglect, and whether he

brought his CR 60 motion within a reasonable time are also issues in this case.

II. RESPONDENT'S RESTATEMENT OF THE CASE

This case arises out of a construction contract executed by Respondent Steinhauer Family Investments LLC ("Steinhauer") and McPhee on or about October 6, 2000. CP 11-21, 65-75. The contract contains both a provision requiring arbitration of any dispute and a clause awarding attorneys fees to the prevailing party. CP 74 (¶ 2.30--arbitration); CP 72 (¶ 2.18--attorney's fees).

Steinhauer hired McPhee to do earthmoving and fill work on a parcel of real property Steinhauer owns in the town of Pacific. The contract incorporated detailed specifications for the work to be performed. CP 66 (¶ 2.2). After McPhee began the work, Steinhauer was informed by his soils engineer that McPhee was not complying with the contract's requirements. CP 229-230. Ultimately, Steinhauer did not pay McPhee, and McPhee sued in Pierce County Superior Court on June 29, 2001 to force payment. Steinhauer answered and counterclaimed on September 5, 2001. CP 1-21 (Complaint); CP 23-28 (Answer and Counterclaim).

On October 18, 2001, counsel for the parties submitted a "Stipulation for Transfer to Private Arbitration and to Set Aside Case Schedule" ("Stipulation") to then-Superior Court Judge Marywave van Deren. CP 34-36. The Stipulation was accompanied by an Order, which stated in pertinent part that "this matter shall be transferred to private arbitration as required by the contract between the parties, and . . . the case

schedule on this matter shall be set aside.” CP 36. Judge van Deren signed the Order on October 24, 2001.

For approximately the next 30 months, nothing happened in the case because McPhee could not afford to pay for arbitration before the American Arbitration Association (“AAA”). CP 41-42. Eventually, in the spring or early summer of 2004, McPhee was able to make a deposit to the AAA, but by that time Steinhauer’s financial situation did not allow him to pay his share of the arbitration costs. CP 42. McPhee could not come up with the entire amount required by the AAA, and the AAA responded by cancelling the arbitration in or around August, 2004. CP 43. It was never resumed.¹

Approximately fourteen months after the arbitration was cancelled, on October 13, 2005, McPhee filed a motion with the trial court seeking to remove the case from arbitration. CP 40-52. Steinhauer objected to the motion, noting that his finances had improved so that he could now afford to arbitrate. CP 63. By order dated October 31, 2005, the trial court denied McPhee’s motion. CP 79-81. The order stated in pertinent part that “[t]his case shall not be removed from the contractual arbitration process at this time.” CP 80.

The record on review in this case shows that for about a week after the order of October 31, 2005, counsel for the parties had brief

¹ There is nothing in the record indicating that the AAA ever had any involvement with this case after it cancelled the arbitration in or around August, 2004.

communications regarding a site-visit to the Steinhauer property where McPhee had performed his work. CP 208, 210. The record is devoid of any evidence that the parties communicated thereafter on any subject until McPhee filed his CR 60 motion. *See also* CP 201-202 (counsel for McPhee asserting that he had no communications from Steinhauer or his attorney after early November, 2005). The record is similarly devoid of any evidence of communications between the parties and the AAA after February 1, 2005, nor is there any evidence of continued AAA involvement after the arbitration was cancelled. CP 128 (AAA account statement bearing date of 2/1/2005).

On February 2, 2007, some 15 months after the last action of record in this case, the clerk of the trial court sent a notice of dismissal pursuant to CR 41(b)(2) to both parties. CP 82. Counsel for McPhee concedes that he received the clerk's notice shortly after it was sent, and did not respond. Appellant's Brief, p. 6. He also concedes that he received the Order of Dismissal which was filed April 26, 2007, and did not even notify his client for almost ten months. CP 83; CP 89, lines 16-17; CP 297, lines 5-6.² Not until almost exactly a year after the trial court

² This last reference is to Plaintiff's Motion for Reconsideration, wherein counsel for McPhee states that McPhee "did not become personally aware of the dismissal until about 2 months before the Motion to reopen was filed." Since the dismissal was filed on April 26, 2007 (CP 83)—and McPhee's counsel has nowhere alleged any delay in his receipt of the dismissal—and the Motion to Reopen was filed almost exactly twelve months later, on April 15, 2008 (CP 84), it follows that about ten months elapsed from the time the dismissal was entered to the time McPhee's counsel alerted him to it.

issued its Order of Dismissal did McPhee file a CR 60 motion for relief, alleging that the dismissal was a “clerical” mistake and that the court lacked jurisdiction to dismiss because it had stayed the matter pending arbitration. On May 23, 2008, the trial court denied McPhee’s CR 60 motion, and on June 20, 2008 it denied his motion for reconsideration. CP 285-86; CP 340-341. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The primary issue on appeal in this case is whether the trial court had jurisdiction to enter a CR 41(b)(2) dismissal for lack of prosecution when no arbitration was pending, no action of record had occurred for more than 12 months, and neither party had responded to the notice mandated by CR 41(b)(2)(A). Since the trial court had jurisdiction to enter the dismissal, it committed no error with regard to the dismissal—clerical or otherwise—and it properly denied Appellant Michael McPhee’s (“McPhee’s”) CR 60 motion.

According to McPhee, whether the trial court had jurisdiction to enter the dismissal depends on whether it had previously stayed the matter pending contractual arbitration. Appellant’s Brief, pp. 9-17. The trial court denied McPhee’s CR 60 Motion in part on the grounds that it had in fact not stayed the proceedings, but had instead merely set aside the case schedule. RP (5/23/2008) p. 3, lines 23-25; p. 4, lines 1-7. The plain and unambiguous language of the “Stipulation for Transfer to Private Arbitration and to Set Aside Case Schedule” confirms that the trial court did not err in so finding. CP 34-36. However, even if the trial court

stayed the matter, nothing deprived it of jurisdiction to enter a CR 41(b)(2) dismissal in the circumstances of this case, when arbitration had been cancelled some two and a half years before the clerk's notice of dismissal and never recommenced.

To the extent that McPhee's CR 60 Motion can be read as seeking relief from his own mistake or "excusable neglect" in not responding to the notice of dismissal, the trial court did not abuse its discretion by denying it. McPhee's failure to respond to the notice was not excusable neglect, and his eventual request for relief was untimely. For all of the above reasons, this Court should affirm the trial court, and deny McPhee's appeal. Pursuant to RAP 18.1(b), Steinhauer has also included a separate section in this Brief establishing his right to recover his reasonable attorney's fees on appeal.

IV. ARGUMENT

1. The Standard of Review

A trial court's denial of a motion to vacate under CR 60(b) will not be disturbed absent a showing of a manifest abuse of discretion. Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A trial court abuses its discretion only when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. In re marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989). This abuse of discretion standard applies in this case to the issue of whether the trial court erred in finding McPhee's CR 60 motion to be untimely. However, the primary issue raised by McPhee on appeal is whether the trial court had

jurisdiction to issue a CR 41(b)(2) dismissal for lack of prosecution. This Court subjects lower court decisions regarding subject matter jurisdiction to *de novo* review. See, e.g., In re marriage of Thurston, 92 Wn. App. 494, 497, 963 P.2d 947 (1998).

2. The trial court did not stay this matter pending arbitration, and never surrendered jurisdiction to enter a dismissal

McPhee asserts that the trial court stayed this matter pending arbitration, but this is simply not what the court Order at issue says. Because the trial court did not stay the matter, but instead simply set aside the trial schedule, it directly retained the power to manage its docket, and committed no error when it issued the notice of dismissal pursuant to CR 41(b)(2).

The Order in question, signed by then-Superior Court Judge Marywave Van Deren, states in its entirety as follows:

II. Order

THIS MATTER having come on regularly for hearing upon the stipulation of the parties above contained, and the court being fully advised in the premises, now, therefore, it is hereby **ORDERED, ADJUDGED, AND DECREED** 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. It is **FURTHER ORDERED, ADJUDGED, AND DECREED**, that the Court shall retain jurisdiction for the purposes of entry and enforcement of the Arbitrator's decision, once arbitration has been had.

CP 36.

Because the Order by its own terms does not use the term “stay,” but rather simply “set[s] aside” the case schedule, MCPhee is reduced to

offering arguments about how the Order should be interpreted to mean something other than what it actually says. All of these arguments fail.³

Appellant's Brief first asserts that the Order includes the terms of the Stipulation that precedes it. It is certainly true that the Order appears as the third page of a document bearing the title "Stipulation for Transfer to Private Arbitration and to Set Aside Case Schedule." CP 34.⁴ It is also true that the Stipulation contains the following language: "[the parties] stipulate to the following: This matter should be stayed and the case schedule set aside so that the parties may pursue private arbitration." CP 34. However, it does not follow that the language of the Stipulation formed part of the Order.

A stipulation is "an agreement between the parties." State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993). If such an agreement is "incorporated by reference into and made part of" a court order, it will be treated as part of that order. *See, e.g., Robinson v. Robinson*, 37 Wn.2d

³ McPhee's arguments regarding the issuance of a stay also contradict his first position of record on this matter. In counsel's declaration accompanying McPhee's Motion for Order Removing Case from Arbitration, he describes the Order of October 24, 2001 as "remov[ing the case] from the Superior Court trial track." CP at 41-42. In other words, the Order "set aside" the trial schedule, but did not amount to a stay. Moreover, when McPhee filed this initial motion, he could not have believed that the court had stripped itself of all jurisdiction over the case schedule. If he had, his motion would arguably have been in violation of CR 11.

⁴ The Order is marked off from the Stipulation by its own distinct heading, and separated from the Stipulation by the first of two signature blocks for the parties. CP 35.

511, 512, 225 P.2d 411 (1950). Absent incorporation into an order, however, a stipulation does not “have the compelling power of the court behind it.” *Id.* at 517. In this case, the Order clearly did not incorporate the Stipulation by reference. The Order merely refers to the Stipulation (“[t]his matter having come on regularly for hearing upon the stipulation of the parties above contained”), but it does not incorporate its terms either explicitly or implicitly. CP 36. *See, e.g., Howard v. Howard*, 681 N.Y.S.2d 460 (1998) (holding that even language referring to a stipulation as “annexed hereto and made a part hereof” did not suffice to incorporate the terms of the stipulation into the order). Accordingly, the language of the Stipulation in this case does not form part of the Order, and the Order makes no reference to a stay.

McPhee also devotes a lengthy section of his brief to arguing that both RCW 7.04A.070(6) and its predecessor RCW 7.04.030 required the court to issue a stay. Appellant’s Brief, pp. 9-14. The point seems to be that even if the trial court did not order a stay, it should have done so, and that the Order must be read as doing what it should have done. This Court need not address the dubious proposition that the Order must be interpreted to say what it “should” have said, however, because it simply is not the case that the relevant law required the trial court to issue a stay.⁵

⁵ McPhee cites no authority for the contention that a court order may be interpreted as stating what it should have said, as opposed to what it actually plainly did say. At the very least this proposition is counter-intuitive: if a court order is wrong, the proper course is to seek to revise it via a motion for reconsideration, CR 60 motion, or appeal, rather than to

In order to determine what the trial court may have been required to do on October 24, 2001 (and to interpret what it did do), it is necessary to look at the requirements imposed by the law in effect at that time. This was clearly the now-superseded RCW 7.04.030, and not the currently effective RCW 7.04A.070(6), which did not go into effect until January 1, 2006.⁶ As the “Savings” provision of the new law explicitly puts it, “[t]his act does not affect an action or proceeding commenced or right accrued before January 1, 2006.” RCW 7.04A.903. This action commenced on June 29, 2001, so Chapter RCW 7.04A RCW does not apply to it.

Turning to the relevant provision of the statute that does apply to this case, the former Chapter 7.04 RCW, it provided as follows:

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 until

expect that its “proper” meaning will be divined years later. In this regard, it is not irrelevant to point out that a court order denying a motion to stay pending arbitration is appealable as a matter of right. *See, e.g. Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 17 P.3d 1266 (2001). In any event, the propriety of the trial court’s Order of October 24, 2001 is not properly before this Court, not least because it was not listed in McPhee’s Notice of Appeal. CP 342-346.

⁶ McPhee concedes that “[t]he 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 provisions of the former UAA (the “Act”) (RCW 7.04.030) applied.” Appellant’s Brief, p. 3, note 4. McPhee’s mistake regarding the applicable law consists in his belief that somehow the new Chapter 7.04A RCW came to govern this case after January 1, 2006.

an arbitration has been had in accordance with the agreement.

RCW 7.04.030 (bold emphasis added). Here, the fact of the matter is that in October, 2001 there was no motion before the court seeking a stay. Instead there was a stipulation and order, presented on the pleading paper of McPhee's then-counsel, which asked the trial court to order that the trial schedule be "set aside." CP 34-36. The court did precisely what the parties asked it to do, and in so doing it did not violate RCW 7.04.030. The trial court was under no obligation to impose a stay when the Order prepared by the parties did not request one.

Finally, it is important to note that the Order's jurisdictional clause was not exclusive. The trial court ordered that it "retain jurisdiction for the purposes of entry and enforcement of the Arbitrator's decision, once arbitration has been had," but did not say that it retained jurisdiction only for these purposes. CP 36. As a court of general jurisdiction, the Superior Court retained jurisdiction to control its docket, and in particular, to issue a CR 41(b)(2) dismissal.

All of these arguments point to one conclusion: the trial court did not order this matter stayed on October 21, 2001, but rather simply "set aside" the trial schedule. The terms of the Stipulation between the parties were not incorporated into the Order, and the Order cannot be construed to mean something other than what it says on the basis of a law which was not even a gleam in the eye of the legislature in 2001 (and which expressly renounces its own application to any "action . . . commenced . . . before January 1, 2006"). RCW 7.04A.903.

Because the trial court merely set aside the case schedule, there is simply no support for McPhee's contention that the court lacked jurisdiction to enter a CR 41(b)(2) dismissal. The distinction between setting aside a case schedule and issuing a stay may be a fine one, and is not well-explicated by Washington case law authority. However, a case with no case schedule clearly remains a case subject to the power of the court, and the mandate of CR 41(b)(2) to send a notice of dismissal in the event of a 12-month absence of action explicitly applies to "all civil cases." CR 41(b)(2)(A) (emphasis added).

It follows that the trial court had the power to send the dismissal notice in this case. Once the notice was sent, the burden shifted to one or both of the parties to respond by "tak[ing] action of record or fil[ing] a status report indicating the reason for inactivity and projecting future activity and a case completion date." *Id.* McPhee's counsel acknowledges receiving the notice, and further acknowledges not responding. Appellant's Brief, p. 6.⁷ As a result, the trial court committed no error when it dismissed this matter some 83 days after it had mailed the required notice. CP 83.

Because the court committed no error in issuing the dismissal (McPhee does not even allege any court error other than acting without

⁷ Although McPhee's counsel asserts that he drafted a letter that "should" have been sent to the court, he does not assert that the letter was sent, nor does the proffered copy of the letter bear his signature. CP 305.

jurisdiction), the court correctly rejected McPhee's CR 60 Motion in so far as that motion purported to correct an error of the court.

3. Even if the trial court did stay the matter, it possessed jurisdiction to issue the CR 41(b)(2) dismissal

Even if the trial Court's Order setting aside the case schedule was the functional equivalent of a stay pending arbitration, the trial court still had jurisdiction to issue the CR 41(b)(2) dismissal. The terms of the rule itself, relevant Washington case law, and the language used in Chapter 7.04 RCW all support the power of a trial court to issue a dismissal for lack of prosecution in the circumstances of this case.

To begin with, CR 41(b)(2) clearly confers upon the trial courts both the power and the duty to dismiss for lack of prosecution in "all cases" in which the prerequisites of the rule are met. The rule states as follows:

In all civil cases in which no action of record has occurred during the previous 12 months, the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution unless, within 30 days following the mailing of such notice, a party takes action of record or files a status report with the court indicating the reason for inactivity and projecting future activity and a case completion date. If the court does not receive such a status report, it shall, on motion of the clerk, dismiss the case without prejudice and without cost to any party.

CR 41(b)(2)(A). The rule's repeated use of the term "shall" clearly indicates its mandatory character. As the State Supreme Court stated in analyzing a closely related rule, "[w]e have consistently held that where

the provisions of [the rule] and its predecessors apply, dismissal of an action is mandatory; there is no room for the exercise of a trial court's discretion." Snohomish County v. Thorp Meats, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988) (discussing CR 41(b)(1) and the trial court's inherent power to dismiss as opposed to the administrative dismissal power of CR 41(b)(2)).

As previously noted, regardless of whether this case was stayed pending arbitration, it remained a "case" potentially subject to the application of the rule. Moreover, McPhee does not dispute that the prerequisites to the application of the rule were met.⁸ There had been no action of record in this case for 15 months before the clerk sent the notice of dismissal. CP 79-81; CP 82. The notice of dismissal was sent by the clerk to counsel for all parties more than thirty days prior to dismissal (and McPhee acknowledges having received it). CP 82; Appellant's Brief, p. 6. No response was made to the notice. CP 83. Accordingly, CR 41(b)(2) required the court to dismiss this case. The trial court, as a court of general jurisdiction, may be presumed to have the jurisdiction to do what it was required to do by the civil rules. *See, e.g., In re marriage of Thurston*, 92 Wn. App. 494, 498 (1998) (noting that "courts of general jurisdiction . . . have the power to hear and determine all matters, legal

⁸ McPhee has even conceded that "the Court Clerk was within their [sic] normal authority to dismiss out a case when 'no action has occurred for 12 months.'" CP 189, lines 7-8.

and equitable, . . . except in so far as these powers have been expressly denied”).

Although there is no Washington case law that directly considers a court’s ability to issue a CR 41(b)(2) dismissal in a matter that has been stayed pending arbitration, there is authority that indirectly upholds trial court jurisdiction to do so. In particular, in Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 28 P.3d 823 (2001), Division I of the Court of Appeals upheld a dismissal for lack of prosecution even though the trial court had previously issued a stay for arbitration, when some four years had elapsed between the granting of the stay and the issuance of the notice of dismissal. Tjart, 107 Wn. App. at 891.⁹ The Tjart court did not explicitly address the jurisdiction question, but instead clearly presumed that such jurisdiction existed. Id. at 893.¹⁰

If the trial court in this case actually issued a stay pending arbitration, then this case falls squarely within the implied holding of Tjart. It is unclear from the record whether an arbitrator had even been appointed by 2004, but in any event, the AAA cancelled the arbitration by

⁹The court in Tjart does not explicitly state that it is dealing with a dismissal under CR 41(b)(2), but this appears to have been the case in light of the discussion on page 891 of the opinion, where no mention is made of a motion for dismissal and the court acted consistent with the timelines set forth in CR 41(b)(2).

¹⁰ The Court followed the parties in accepting that apart from appealability, “the sole remaining issue in this case is whether Tjart must arbitrate her claims.” Tjart, 107 Wn. App. at 893. It can nonetheless be read as implicitly determining that there was proper jurisdiction for the dismissal.

August of that year and never resumed it. *Supra*, pp 3-4. Three years later, after no action on record for 15 months, the trial court issued its CR 41(b)(2) notice of dismissal, to which there was no timely response.¹¹ Tjart clearly supports the conclusion that the trial court in this case had jurisdiction to act as it did.

None of the case law cited in Appellant's Brief is to the contrary. In particular, although Allied Fidelity Insurance Co. v. Ruth, 57 Wn. App. 783, 790 P.2d 206 (1990)—cited extensively in Appellant's Brief at pp. 21-24—supports the point that a court order staying a matter strips other courts of jurisdiction to hear the stayed matter, it says nothing about the effect of any stay on the issuing court's authority, let alone about the effect of a stay pending arbitration on the issuing court's powers. In other words, it has no bearing on the issue posed by this case.

As for Foss Maritime Co. v. City of Seattle, 107 Wn. App. 669, 27 P.3d 1228 (2001), it concerns both a court's discretionary exercise of its inherent power to dismiss actions for lack of prosecution and dismissal upon motion of the opposing party, but not a mandatory dismissal under CR 41(b)(2). More importantly, although Foss does support the general point that a specific rule or statute might strip a court of jurisdiction to

¹¹ In Tjart, there appears to have been a timely response to the notice of impending dismissal, but not one that succeeded in articulating good cause for refraining from dismissal. See Tjart, 107 Wn. App. at 891 (court's 45 day notice was sent May 12, 1999, and Tjart's motion in response was filed on June 24, 1999). In the instant case, there has been neither a timely response to the notice nor good cause shown for not dismissing.

dismiss under CR 41, neither Foss nor any other authority cited by McPhee has identified any such rule or statute that applies in this case.

Certainly nothing in the former Chapter 7.04 RCW stripped the trial court of the power to issue a dismissal under CR 41(b)(2). That Chapter confers jurisdiction on trial courts to confirm, vacate, and modify arbitration awards, but nowhere states that trial court jurisdiction over a matter stayed for arbitration is limited to these things. *See* RCW 7.04.150 (confirmation), RCW 7.04.160 (vacation), and RCW 7.04.170 (modification).¹² *See also* Burnside v. Simpson Paper Co., 66 Wn. App. 510, 517, 832 P.2d 537 (1992) (*overruled on other grounds by* Mackay v. Acorn Custom Cabinetry, Inc., 127 Wash.2d 302, 898 P.2d 284) (noting that “[i]f a Legislature has shown no indication of its intention to limit jurisdiction, an act should be construed as imposing no limitation”).

Moreover, RCW 7.04.070 expressly states that “[t]he court shall have power to direct the arbitrators to proceed promptly with the hearing and determination of the controversy.” This unambiguous grant to trial courts of the power to issue orders to arbitrators regarding the schedule of the case strongly suggests the existence of a lesser-included-power to issue orders to the parties regarding dilatory prosecution, particularly when no arbitrator is actively involved in the case. *Compare* In re Cartwright, 104 S.W.3d 706, 713 (Texas Ct. App. 2003) (applying Texas law similar to the

¹² Looking at Chapter 7.04A RCW rather than Chapter 7.04 RCW would not change this conclusion. There is nothing in the current statute that explicitly or implicitly deprives the trial court of the power to issue a CR 41(b)(2) dismissal.

former Chapter 7.04 RCW, noting that “[a] trial court has the inherent authority to control the disposition of cases on its docket,” and holding that “[t]he trial court was not required to postpone disposition of this case indefinitely while the parties argued about setting the arbitration”).

The trial court’s power to apply CR 41(b)(2) in a matter stayed for arbitration is also consistent with the fundamental public policy underlying both the civil rules and Chapter 7.04 RCW: that there be a “just, speedy, and inexpensive determination of every action.” *See* CR 1. Regardless of whether an arbitration is pending, receipt of a court notice under CR 41(b)(2)(A) is a salutary reminder to parties that they must not be dilatory in resolving their dispute. At the same time, such a notice should not significantly interfere with an active arbitration. Under the terms of the rule, a status report pointing to an active arbitration proceeding should normally suffice to avert dismissal. CR 41(b)(2)(A). Stripping trial courts of the power to send a CR 41(b)(2)(A) notice merely because a matter has been stayed for arbitration would thus deprive the courts of a useful device for prodding the parties into activity and managing their dockets, without producing significant offsetting benefits for the parties or the arbitration system.

In this case, of course, arbitration had been cancelled approximately 30 months before the court sent its notice. Neither party responded to the court’s notice within the relevant deadline. As a result, this case does not pose the issue of what to do if a trial court should send a CR 41(b)(2)(A) notice in the midst of an active arbitration and the parties

fail to respond within the deadline. Although this Court need not resolve this hypothetical issue, it appears that the civil rules provide an adequate mechanism for averting injustice in such a case: a timely CR 60 motion focused on whether the parties' failure to respond with a status report showing an active arbitration constituted excusable neglect. That an aggrieved party could bring such a motion effectively undermines any claim that justice or public policy demands that trial courts be stripped of jurisdiction to issue a CR 41(b)(2)(A) notice whenever there has been a stay pending arbitration.¹³

In sum, McPhee has failed to produce any plausible reason why the trial court should have continued to allow this case to persist in limbo with no active arbitration, and certainly has not offered a compelling argument that that court was required to ignore the mandatory language of CR 41(b)(2). The terms of both that rule and Chapter 7.04 RCW clearly establish that the trial court did not exceed its jurisdiction when it sent the notice required under CR 41(b)(2)(A), nor did it err in dismissing the case for lack of prosecution when neither party responded to that notice within thirty days.

¹³ As discussed in detail in the next section below, McPhee's CR 60 motion can be construed as seeking relief from his own excusable neglect in not promptly responding to the trial court's notice of dismissal. However, the trial court clearly did not abuse its discretion in denying the motion.

4. The Trial Court did not abuse its discretion in denying McPhee's request for relief under CR 60(b)(1)

Because the trial court had jurisdiction to send a notice of imminent dismissal under CR 41(b)(2), and because all of the prerequisites for application of the rule were met, the trial court did not err when it issued its initial dismissal.¹⁴ As a result, the entire discussion in Appellant's Brief devoted to explaining what constitutes a "clerical" error is simply irrelevant. *Cf.* Appellant's Brief, pp. 24-30. CR 60(a) is clearly concerned with errors committed by the court or incorporated by the court in its orders. *See, e.g., In re Marriage of King*, 66 Wn. App. 134, 831 P.2d 1094 (1992). Where, as here, the trial court neither committed nor incorporated any error in its order of dismissal, there can be no "clerical" error. Accordingly, the fact that a clerical error can be corrected at any time has no bearing on this case.

Unlike the trial court, however, McPhee clearly erred in connection with the initial dismissal: he failed to submit a timely response to the court's notice. Although McPhee's original CR 60 motion made no effort to describe this failure as "excusable neglect," he did ask for relief under CR 60(b)(1), which pertains to mistakes by a party as opposed to the court. CP 84 (listing CR 60(b)(1)), *but compare* CP 84-88 (containing no explicit reference to or argument about excusable neglect). McPhee's Memorandum of Law Re: Civil Rule 60, submitted at the request of the

¹⁴ McPhee does not even allege that there had been any action of record in the twelve months before the notice of dismissal was issued, nor does he deny receiving the notice and not responding to it.

trial court, referred in more detail to excusable neglect, as did his Motion for Reconsideration. CP 193-194; 294-300. In light of these earlier pleadings, Appellant's Brief may with some charity be read as contending that the trial court erred, if not in its initial dismissal, then in its refusal to relieve McPhee of the consequences of his own mistake under CR 60(b)(1). Appellant's Brief, pp. 30-38.

Unfortunately for McPhee, in so far as his CR 60 motion sought relief for his own error, the trial court did not abuse its discretion in denying the motion. This is so for two independent reasons. First, McPhee's failure to file a timely response to the notice of dismissal was not excusable neglect. Second, McPhee's CR 60(b)(1) motion was not filed within a reasonable time.

In so far as McPhee is seeking relief from his own mistake or excusable neglect, his appeal is governed by the terms of CR 60(b)(1) and the case law interpreting it. The rule itself states in pertinent part as follows:

(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 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

CR 60(b)(1) (bold in original). Under Washington case law, what constitutes "excusable neglect" must be determined on a case-by-case basis. City of Goldendale v. Graves, 88 Wn.2d 417, 423, 562 P.2d 1272 (1977). Generally, however, "the incompetence or neglect of a party's

own attorney is not sufficient grounds for relief from a judgment in a civil action.” Lane v. Brown & Haley, 81 Wn. App. 102, 107, 912 P.2d 1040 (1996).

In the instant case, McPhee’s explanation for why he did not timely respond to the notice of dismissal shows neglect, but not excusable neglect. His counsel acknowledges receiving the notice of dismissal shortly after it was mailed by the trial court. Appellant’s Brief, p. 6. Counsel claims that he drafted a letter to the court in response to the notice, but does not maintain that the letter was actually sent. Appellant’s Brief, p. 6; CP 302 (acknowledging that counsel “could not locate verification that these letters had in fact been sent to the Court”).¹⁵ McPhee cites to no case law suggesting that an attorney’s failure to follow through on mailing a draft letter constitutes excusable neglect. This Court should decline McPhee’s implicit invitation to treat an averment of intent to mail as a substitute for actually mailing.

Moreover, it is not clear that the draft letter would or should have sufficed to put off dismissal, even had it been sent. In particular, the letter does not—and could not—assert that there was an active arbitration proceeding underway, but instead only states that “[t]he parties are in the process of attempting to place this into arbitration.” CP 305 (emphasis added). Even this assertion is contradicted by the record on review. In

¹⁵ The letter attached to the Declaration of Klaus O. Snyder in Support of Plaintiff’s Motion for Reconsideration is not signed by counsel for McPhee. CP 305. Moreover, counsel for Mr. McPhee submitted no affidavit from any office personnel regarding the mailing of the letter.

particular, McPhee's own counsel has averred that he had no communication with Steinhauer or his counsel between November 8, 2005 and May 12, 2008. CP 201, lines 21-22; 202, lines 4-5; CP 210 (reproducing email from Steinhauer's then-counsel dated November 8, 2005 as the purported last communication from Steinhauer). In addition, the billing records for McPhee's counsel give no indication that he was involved in any attempt to place the matter in arbitration between October 28, 2005 and March 1, 2007. CP 306. The record thus strongly suggests that McPhee's "neglect" went beyond simply failing to respond to the court's notice of dismissal, and extended to failing to undertake any action to pursue this case after November of 2005. In these circumstances, McPhee's failure to actually and effectively respond to the trial court's notice of dismissal was plainly not excusable neglect.

Even if McPhee's failure to respond within thirty days to the trial court's notice of dismissal could conceivably be deemed excusable neglect, McPhee did not move for relief from his mistake within a "reasonable time," and thus is not entitled to relief under CR 60(b). That rule states in pertinent part that a motion for relief from a judgment "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." CR 60(b). It is beyond dispute that the "reasonable time" and one year requirements are independent of one another, and that "a motion brought under CR 60(b)(1), (2) or (3) is timely only if it meets both time

requirements.” Luckett v. Boeing Co., 98 Wn. App. 307, 311, 989 P.2d 1144 (1999).

Under Washington law, what constitutes a “reasonable time” for the bringing a motion under CR 60 “depends on the facts and circumstances of each case.” Id. at 312. The courts have acknowledged that “[t]he mere passage of time between the entry of judgment and the motion to set it aside is not controlling. Rather, a triggering event for the motion may arise well after the entry of the judgment that the moving party seeks to vacate.” In re marriage of Thurston, 92 Wn. App. 494, 500, 963 P.2d 947 (1998). To determine whether a CR 60 motion has been timely brought, courts typically consider “whether the moving party has been prejudiced by the delay and whether the moving party has a good reason for failing to take action sooner.” Id. However, these two factors need not each be present: in Luckett, a CR 60 motion was held to be untimely although the defendant had not even alleged prejudice, where the plaintiff had “fail[ed] to put forth any good reason for her . . . four month delay.” Luckett, 98 Wn. App. at 313.

In the instant case, Steinhauer was prejudiced by McPhee’s one year delay in seeking relief from the dismissal. Because the statute of limitations on McPhee’s contract claims had lapsed, Steinhauer relied on the dismissal and cleared out his files of relevant materials. CP 132; RP (5/23/2008) p. 7, lines 7-9.

Secondly, and most importantly, McPhee has simply failed to articulate a good reason for his one-year delay. Luckett provides

compelling support on this point. The Court of Appeals summarized the relevant facts in that case as follows:

The record shows that Lockett's attorney became aware in August, 1996 that the action had been dismissed but waited until December 31, 1996 to file a motion to vacate the order of dismissal. Although Boeing does not show how it is prejudiced by Lockett's delay, Lockett fails to put forth any good reason for her attorney's four month delay in bringing a motion to vacate. . . . Her attorney states that the delay resulted from his agonizing over the matter.

Id. at 312. Here, almost a year elapsed between the time McPhee's counsel learned of the dismissal and the time he filed his motion to vacate. McPhee's asserted reason for the delay—that he needed to hire an expert to evaluate whether his case had merit—only confirms that he was not actively pursuing the case in the years before the dismissal was issued. *Cf.* Appellant's Brief, pp. 5-6. If McPhee and his attorney hadn't performed a reasonable inquiry to determine that his claim was well grounded in the facts and warranted by the law by April of 2007, he should have dismissed his case himself (or never filed it) rather than waiting for the court to do so.¹⁶ McPhee's desire to save money—or the desire to perform investigative tasks that could and should have been performed earlier—were no more good reasons for delay than was “agonizing over the matter” in Lockett.

Finally, there was no external “triggering event” that created a need for a CR 60 motion after the Order of Dismissal was entered. *Compare In re marriage of Thurston*, 92 Wn. App. at 500-501 (finding

¹⁶ *Cf.* CR 11.

that opposing party's change of position regarding implementation of court decree set a new starting point for measuring the timeliness of a motion to vacate that decree). What "triggered" the need for a CR 60 motion was the dismissal itself. This is obvious from the contents of McPhee's pleadings, starting with his Motion to Vacate Order of Dismissal, which—together with its attached Declaration of Counsel—makes no reference to any triggering event other than the dismissal itself. CP 84-128. Even Appellant's Brief continues to stress the purported lack of trial court jurisdiction to enter the dismissal, which alleged defect was obvious (to McPhee, at least) from the date of entry of the Order. As for the completion of McPhee's expert's report, the timing of this was under McPhee's exclusive control, and in no way qualifies to set a new starting point for measuring the timeliness of McPhee's motion. *Cf.* Appellant's Brief, p. 36. McPhee waited almost a year from the only triggering event—the entry of the Order of Dismissal—to file his CR 60 motion, and the trial court did not abuse its discretion in finding this delay to be unreasonable.

McPhee's attempts to mount a counterargument on this point are vitiated by a series of confusions. Appellant's Brief, pp. 31-38. First of all, he attempts to leap from the valid point that prejudice to the non-moving party is a factor to consider when evaluating the timeliness of a CR 60 motion to the baseless claim that "there must be specific evidence of actual prejudice." Appellant's Brief, p. 32, citing to In re Daily, 124 B.R. 325, 330 (Bkrcty. D. Hawaii, 1991). The errors in this effort are

legion, but perhaps the most important is that neither In re Daily in general nor the quoted passage in particular has anything to do with the timeliness of a motion to vacate a judgment. No one had brought a motion to vacate a judgment in In re Daily, and the court there naturally says nothing about the principles governing such motions. Instead, the Bankruptcy Court was concerned with the narrow issue of when a dismissal for lack of prosecution has a res judicata effect on an identical complaint. In re Daily, 124 B.R. at 329-330. In re Daily does not (and as the product of a Federal Bankruptcy Court could not) overrule Luckett on the point that prejudice to the non-moving party is simply one factor to consider—and not an indispensable one—when evaluating the reasonableness of the timing of a CR 60 motion to vacate. Luckett, 98 Wn. App. at 313.¹⁷

McPhee then repeats and compounds the above error by asserting that “mere inaction is not enough to deny a motion to vacate.” Appellant’s Brief, p. 32. This is a perplexing claim on its face, as it implies that a party could know of grounds for vacating a judgment, do nothing for an indefinite period, and then successfully bring a CR 60 motion.¹⁸ This

¹⁷ In re Daily also is not a valid guide to the trial court’s dismissal powers under CR 41. This is not only because the Federal Rule at issue in In re Daily has no equivalent to CR 41(b)(2). *Cf.* Fed. R. Civ. P. 41. In re Daily is also not concerned with the validity of a dismissal for lack of prosecution, but rather discusses the different question of whether such a dismissal—presumed to be valid—has a res judicata effect. In re Daily, 124 B.R. 325. In re Daily’s assertion about “specific evidence of actual prejudice” is aimed at determining whether a valid dismissal has a preclusive effect. *Id.* at 330.

¹⁸ It is true that “[t]he mere passage of time between the entry of judgment and the motion to set it aside is not controlling” when evaluating the

would effectively read the “reasonable time” requirement out of CR 60(b). A cursory review of the authorities cited in support of this claim, however, reveals that in fact they do no such thing.

McPhee relies on Snohomish County v. Thorp Meats, 110 Wn.2d 163, 750 P.2d 1251 (1988) and Foss Maritime Co. v. Seattle, 107 Wn. App. 669, 27 P.3d 1228 (2001). Like In re Daily, neither of these cases has anything to do with the criteria for evaluating the timeliness of a motion to vacate brought under CR 60, because no such motion figures in either case. Instead, both cases focus on the limits to a trial court’s inherent authority to dismiss an action for lack of prosecution. As the Foss Maritime court explained, “a trial court has inherent authority to dismiss an action for want of prosecution only where dilatoriness of a type not described by CR 41(b)(1) is involved. ‘Dilatoriness of a type not described by CR 41(b)(1)’ refers to unacceptable litigation practices other than mere inaction, whatever the duration.” Foss Maritime, 107 Wn. App. at 674 (emphasis added; internal citations omitted). Clearly, the requirement of “unacceptable litigation practices other than mere inaction” is related to dismissals for lack of prosecution based on a court’s inherent authority to dismiss, and has nothing to do with the criteria for evaluating whether a CR 60 motion is timely or not.¹⁹

timeliness of a CR 60 motion. In re marriage of Thurston, 92 Wn. App. at 500 (emphasis added). However, “the mere passage of time” is not the same thing as “mere inaction,” since “mere inaction” implies knowledge of the circumstances that would warrant a motion to vacate, whereas “mere passage of time” does not.

¹⁹ It is worth noting that the limitations imposed by Thorp Meats and Foss

Because McPhee fails to understand that dismissals under CR 41 and motions to vacate under CR 60 are two distinct things, and are governed by distinct principles, his effort to show that his CR 60 motion was brought within a reasonable time comes to naught. Given that McPhee also does not establish that his original failure to respond to the notice under CR 41(b)(2) was excusable neglect, it is clear that the trial court did not abuse its discretion in denying McPhee's CR 60(b)(1) motion.²⁰

V. RESPONDENT'S REQUEST FOR FEES

Paragraph 2.18 of the contract between the parties contains an attorney's fee provision that states as follows:

ATTORNEY FEES. In the event either party institutes an arbitration proceeding or suit in court against the other party or against the surety of such party, in connection with any dispute or matter arising under this Contract, the prevailing party shall be entitled to recover reasonable

Maritime on a court's "inherent authority" to dismiss likewise have no bearing on the validity of the dismissal at issue in this case, as it was based on CR 41(b)(2). Under CR 41(b)(2), "mere inaction"—provided that it is of sufficient duration—is clearly sufficient to justify a dismissal.

²⁰ In his Motion to Vacate Order of Dismissal, McPhee cursorily requested relief under CR 60(b)(11) as well as under CR 60(b)(1). CP 87. On appeal, McPhee devotes no argument specifically to CR 60(b)(11). Washington courts have consistently held that the use of CR 60(b)(11) should be limited to situations involving extraordinary circumstances not covered by any other section of CR 60(b). *See, e.g., In re marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). McPhee's allegations clearly fall under CR 60(b)(1) and—in so far as they address jurisdiction—CR 60(b)(5). CR 60(b)(11) does not apply to this case. In any event, motions brought under CR 60(b)(11) are subject to the same "reasonable time" requirement as are motions under CR 60(b)(1). Even if McPhee's claim for relief under CR 60(b)(11) is still alive, it fails for lack of timeliness just as does his request for relief under CR 60(b)(1).

attorney fees in addition to any other relief granted by the arbitrator or court, including appellate proceedings.

CP 18. If this Court upholds the decision below, Steinhauer will be the prevailing party and will be entitled under the Contract to his reasonable attorneys fees.

The conclusion that Steinhauer is entitled to his fees on appeal follows from the above-cited contractual provision and the application of the law to the facts of this case. Clearly if this Court affirms the trial court, Steinhauer will have prevailed on appeal. It was McPhee who sought to reopen the case, not Steinhauer. It is McPhee who seeks to reverse the trial court's Order of Dismissal on Appeal, whereas Steinhauer seeks to uphold it. Affirmance of the trial court will be a victory for Steinhauer, and as the prevailing party on appeal he is entitled to his fees under the terms of the parties' contract.

Affirmance of the trial court will also protect Steinhauer once and for all from exposure to McPhee's claim for \$142,492.60 plus interest, at a cost of foregoing a counterclaim for approximately \$40,000 plus interest.²¹ CP 9, CP 202. Thus, even if the proper question were which party has prevailed overall, as opposed to the narrower question of which party has prevailed on appeal, the answer is clearly Steinhauer. The fact that Steinhauer will have prevailed by virtue of a dismissal for lack of prosecution is no bar to his designation as the prevailing party. *See, e.g.,*

²¹ Because the statute of limitations has run on both McPhee's claims and Steinhauer's counterclaim, neither party will be able to re-file in the event this Court affirms the trial court.

Baratta v. Valley Oak Homeowner's Ass'n., 891 So.2d 1063 (Fla. Ct. App. 2004) (holding party which secured dismissal for lack of prosecution of opponent's claim was prevailing party and entitled to fees). Nor is there any requirement that there be a final judgment in Steinhauer's behalf for him to be the prevailing party. Compare Wachovia SBA Lending v. Kraft, 138 Wn. App. 854, 158 P.3d 1271 (2007) (*review granted*, 163 Wn.2d 1011).²²

Finally, the fact that a dismissal under CR 41(b)(2) is without prejudice is also no bar to the recovery of fees, particularly since the underlying claims are time barred and may not be re-litigated. See also Marassi v. Lau, 71 Wn. App. 912, 859 P.2d 605 (1993) and Walji v. Candyco, Inc., 57 Wn. App. 284, 288, 787 P.2d 946 (1990) (holding that "at the time of a voluntary dismissal, the defendant has prevailed in the common-sense meaning of the word"). If this Court affirms the trial court's dismissal, Steinhauer will have clearly prevailed, both on appeal and overall, and will be entitled to his reasonable attorneys fees incurred in this appeal according to the contract of the parties.

²² The attorney's fee provision at issue in Wachovia was one-sided, purporting to grant fees only to the bank should it prevail. It thus could benefit the defendant, Kraft, only by virtue of RCW 4.84.330, which requires there to be a final judgment for there to be a prevailing party. In this case, the contractual attorney's fee provision is not one-sided, and no recourse need be had to RCW 4.84.330 to interpret it.

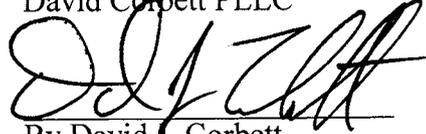
VI. CONCLUSION

The trial court in this matter clearly had jurisdiction to issue the notice of dismissal pursuant to CR 41(b)(2), and to dismiss this case for lack of prosecution when it received no response to that notice. The court had not stayed this matter pending arbitration, nor was it required to have done so by the relevant statute that applies to this case, Chapter 7.04 RCW. Even if the trial court had stayed this matter, it would have had the authority to dismiss the case given that all of the prerequisites for a dismissal under CR 41(b)(2) had been met, no statute expressly stripped it of jurisdiction, and there was no active arbitration in process. The trial court committed no error when it dismissed this case.

The trial court also did not abuse its discretion when it rejected McPhee's CR 60 motion to vacate the dismissal. McPhee failed to show excusable neglect or other good cause for his failure to respond promptly to the CR 41(b)(2) notice, and his CR 60 motion was not brought within a reasonable time, since he waited almost a year after the relevant "triggering" event to bring that motion. This Court should affirm the trial court, and award Steinhauer his reasonable attorneys fees incurred on this appeal.

Respectfully submitted this 2nd day of January, 2009

David Corbett PLLC

A handwritten signature in black ink, appearing to read "D. J. Corbett", written over a horizontal line.

By David J. Corbett

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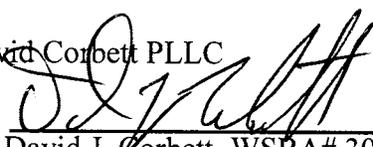
CERTIFICATE OF SERVICE

I certify that on January 2, 2009 I sent a copy of the attached Brief of Respondent via email PDF attachment to Klaus Snyder, attorney for Appellant, at ksnyder@sumnerlawcenter.com. Mr. Snyder has agreed to accept service of pleadings via email. I also deposited the Brief of Respondent with the United States Post Office in Tacoma, postage pre-paid, for delivery by first class mail to:

Klaus Snyder
Snyder Law Firm LLC
920 Alder Ave., Suite 201
Sumner, WA 98390-1406

Dated this 2nd day of January, 2009.

David Corbett PLLC

By: 

David J. Corbett, WSBA# 30895
Attorney for Respondent

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