

83151-3

No. 37281-9-II.  
DIVISION II COURT OF APPEALS OF THE STATE OF WASHINGTON

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TED SPICE AND PLEXUS DEVELOPMENT, LLC,

Appellants

v.

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

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OPENING BRIEF OF APPELLANTS  
TED SPICE AND PLEXUS DEVELOPMENT, LLC.

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## **I. ASIGNMENTS OF ERROR**

**A. The Trial Court Erred in Denying Petitioners' CR 60(b) Motion to Vacate.**

## **II. ISSUE RELATED TO ASSIGNMENT OF ERROR NO. ONE**

**A. Did the Court Lack Jurisdiction to enter an Order of Involuntary Dismissal With Prejudice where Petitioners had already voluntarily dismissed their appeal pursuant to CR 41(a)? YES.**

**B. Is the Trial Court's Order Void Where Court Lacked Jurisdiction To Enter An Order Dismissing The Matter With Prejudice Pursuant To CR 41(b), Where Rule Limits Court Authority To Dismissal Without Prejudice? YES.**

**C. Did the Court Err in Denying Petitioner's CR 60(b)(5) Motion based on Passage of Time; Where Time is Not Relevant When Judgment is Void? YES.**

**D. Did the Trial Court Err in Denying CR 60(5) Vacation of Order Where Court Lacked Jurisdiction /Order Was Void? YES.**

**E. Did the Court Err in Denying Petitioner's CR 60(b)(11) Motion based on Passage of Time; Where Motion Was Brought Within Reasonable Timeframe? YES.**

**F. Did the Court Err by Denying Petitioner's CR 60(b)(5) Motion Where CR 41(b) Involuntary Order of Dismissal Was Entered Prematurely After Only Ten Months and Where CR 41(b) Requires Lapse of One Year? YES.**

## **III. INTRODUCTION**

Appellants appeal the Trial Court's denial of Appellants' Motion for Relief from Judgment pursuant to CR 60(b)(5), CR 60(b)(11), and CR 41

to vacate an Order of Dismissal with prejudice. Previously the Court had issued an Order granting Pierce County's Motion to dismiss Petitioners' appeal **with prejudice**. However, Pierce County's Motion to Dismiss was brought **after** Petitioners' CR 41(a) voluntary non-suit. On appeal, the Dismissal Order should be vacated pursuant to CR 60 (b)(5) and or CR 60(b)(11) because Petitioners' prior-filed voluntary dismissal under CR 41(a)(1) divested the Court of jurisdiction to decide a case on the merits.

Alternatively as a result of this appeal, the Order granting Pierce County's Motion to Dismiss **with prejudice** should be vacated pursuant to CR 60 (b)(5) and or CR 60(b)(11) because the relief exceeds the Court's ability to grant pursuant to the clear language of CR 41(b), whereby the Court is limited to the mandatory relief of dismissal **without** prejudice.

#### IV. FACTS

On or about 2 February, 2006, Petitioner Ted Spice and Plexus Development, LLC, by and through their attorneys, Carolyn A. Lake of the Goodstein Law Group PLLC, filed a Chapter 36.70C RCW Land Use Petition Act (LUPA) appeal seeking review of a Pierce County Deputy Hearing Examiner Decision. Although the Deputy Examiner granted Reconsideration and provided nearly all the remedies sought by Petitioners, Petitioners appealed in order that the Court may provide the

full measure of relief to Petitioners, i.e., to **unconditionally** require that the City of Puyallup abide by its duty to provide water service to these Petitioners and other property owners similarly situated. The appeal was also and primarily filed to provide a mechanism for the two jurisdictions involved to reach a **non-judicial**, global agreement for how future, similar water disputes could be resolved.

After the appeal was filed, Petitioners concentrated time and attention to pursuing the non-judicial resolution of the water service issue, seeking dialogue and probing possible global dispute resolution processes. This was pursued as an alternative to and in lieu of the judicial appeal pathway. On 17 November 2006, Petitioners withdrew their Petition for LUPA appeal. CP 29. The Withdrawal was served on all counsel. CP 32-33.

On November 22, 2006, **after** Petitioners' voluntary dismissal of their appeal, the Respondent Pierce County filed a Motion asking the Court to "dismiss" the appeal **with prejudice** pursuant to CR 41(b). CP 34-37.

On December 6, 2006, Petitioners' counsel moved to continue the hearing date of the Motion to Dismiss. Counsel had suffered the recent and untimely loss of her brother-in-law the prior days, and also cited to three conflicting court appearance in Thurston County. CP 43-46. Pierce County Counsel refused to set over the Motion hearing.

On December 8, 2006, this Court entered an Order Dismissing Petitioners Appeal **with Prejudice**. CP 69-70. That Order should be vacated pursuant to CR 60 (b)(5) and (11), because (1) the Court lacked jurisdiction to enter an Order where Petitioners had already voluntarily dismissed their appeal pursuant to CR 41(a); and (2) the Court lacked jurisdiction to enter an Order dismissing the matter “with prejudice” pursuant to CR 41(b). Later, Petitioners moved to set aside the Order pursuant to CR 60(b)(5) and (11) and 41(b). CP 96-128, 148-174. The Court denied the Motion. CP 175-176.

## V. ANALYSIS.

### A. Standard of Review for Denial of CR 60 Motion

This is an appeal of the Trial Court’s denial to grant a Motion to vacate pursuant to either CR 60(b)(5) or CR 60(b)(11). Those Rules provide for relief as follows:

CR 60 -Motion for Relief from Judgment. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (5) The judgment is void;**
- (11) Any other reason justifying relief from the operation of the judgment.**

The standard of review on appeal is different for CR 60(b)(5) and CR 60(b)(11). A motion to vacate a final order pursuant to CR 60(b)(5) for

**lack of jurisdiction** as void is reviewed de novo. *Brickum Inv. Co. v. Vernham Corp.*, 46 Wash.App. 517, 520-21, 731 P.2d 533 (1987).

On the other hand, a decision whether to grant a motion to set aside a final order under CR 60(b)(11) on the grounds of “any other relief” is reviewed for an abuse of discretion. *Lockett v. Boeing Co.*, 98 Wash.App. 307, 309-10, 989 P.2d 1144 (1999), *review denied*, 140 Wash.2d 1026, 10 P.3d 406 (2000). A trial court abuses its discretion if it is based upon untenable grounds or for untenable reasons. *Id.*

Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b)(5) motion to vacate a default judgment for want of jurisdiction is reviewed de novo. *In re Marriage of Wilson* (2003) 117 Wash.App. 40, 68 P.3d 1121, *Scott v. Goldman*, 82 Wash.App. 1, 6, 917 P.2d 131, *review denied*, 130 Wash.2d 1004, 925 P.2d 989 (1996). *Allstate Ins. Co. v. Khani*, 75 Wash.App. 317, 323, 877 P.2d 724 (1994); *Brickum Inv. Co. v. Vernham Corp.*, 46 Wash.App. 517, 520, 731 P.2d 533 (1987). See also *Dobbins v. Mendoza* (1997), 88 Wash.App. 862, 947 P.2d 1229, (Trial court's decision to grant or deny a CR 60(b)(5) motion to vacate default judgment for want of jurisdiction is reviewed de novo).

On review of an order denying a motion to vacate a judgment, only the propriety of the denial, not the impropriety of the underlying judgment, is

before the reviewing court. *Barr v. MacGugan* (2003) 119 Wash.App. 43, 78 P.3d 660. *Wright v. B & L Properties, Inc.* (2002) 113 Wash.App. 450, 53 P.3d 1041, review denied 149 Wash.2d 1014, 69 P.3d 876, *State v. Gaut* (2002) 111 Wash.App. 875, 46 P.3d 832.

**B. Court lacked jurisdiction to enter an Order of Dismissal With Prejudice where Petitioners had already voluntarily dismissed their appeal pursuant to CR 41(a).**

Here, Petitioners' 17 November 2006 pleading which unequivocally withdrew their Land Use Petition Act (LUPA) appeal substantially complied with CR 41(a)(1)(B), the Civil Rule that addresses voluntary dismissal by a party plaintiff. CP 29. Pursuant to CR 41, the granting of Plaintiff's voluntary dismissal is **mandatory**.

(1) **Mandatory**. Subject to the provisions of rules 23(e) and 23.1, any action **shall** be dismissed by the court:

**...(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.**

**RULE 41(a) DISMISSAL OF ACTIONS -Voluntary Dismissal.**

Petitioners' withdrawal was filed and served on all parties, leaving the parties no doubt that Petitioners did not intend to pursue the appeal. CP 32-33.

The effect of a voluntary dismissal of a complaint is to render the proceedings a nullity and leave the parties as if the action had never been

brought. *Wachovia SBA Lending v. Kraft* (2007) 158 P.3d 1271. Voluntary nonsuit does **not** result in adjudication on merits, and no judgment is entered. *Cork Insulation Sales Co.*, 54 Wash.App. at 705, 775 P.2d 970.

An action dismissed without prejudice, under subd (a)(1)(B) of this rule [CR41] is **not** final determination and, accordingly, is **not** res judicata as to any claims or issues contained therein. *Keron v. Namer Inv. Corp.* (1971) 4 Wash.App. 809, 484 P.2d 1152.

On November 22, 2006, **after** Petitioners' voluntary dismissal of their appeal, the Respondent Pierce County filed a Motion asking the Court to "dismiss" the appeal **with prejudice** pursuant to CR 41(b). CP 34-37.

However, Petitioners' voluntary dismissal of the appeal occurred **prior** to Pierce County's Motion to Dismiss. Therefore, Court lacked jurisdiction to entertain and enter Pierce County's requested Motion to Dismiss with prejudice. A voluntary dismissal under CR 41(a)(1) generally **divests a court of jurisdiction** to decide a case on the merits. *Hawk v. Branjes* (1999) 97 Wash.App. 776, 986 P.2d 841. As a result, the court retains jurisdiction **only** for limited purposes, such as consideration of a defendant's motion for fees.

In the present case, Pierce County made no such motion for fees after Petitioners' voluntary dismissal, but instead, prodded the Court to enter an order of dismissal on the merits, where the Court lacked jurisdiction to do

so. The Order granting Pierce County's Motion to dismiss Petitioners' appeal **with prejudice**, brought after Petitioners' CR 41(a) voluntary non-suit, should be vacated pursuant to CR 60 (b)(5) and or CR 60(b)(11).<sup>1</sup>

**C. The Court Lacked Jurisdiction To Enter An Order Dismissing The Matter With Prejudice Pursuant To CR 41(b).**

Alternatively, on an wholly independent basis, the Order granting Pierce County's Motion to Dismiss should be vacated on appeal pursuant to CR 60 (b)(5) and or CR 60(b)(11) because the relief exceeded the Trial Court's ability to grant.

Pierce County's Motion to Dismiss **with Prejudice** was brought pursuant to CR 41(b). CR 41(b) proscribes dismissing an action for want of prosecution. That rule specifically limits the scope of the Court's relief to dismissal "**without prejudice**".

Any civil action **shall** be dismissed, **without prejudice**, for want of prosecution whenever the plaintiff or cross-complainant shall neglect to note the action for trial or hearing within one year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who

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<sup>1</sup> CR 60 -Motion for Relief from Judgment. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

**(5) The judgment is void;**

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

makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after notice to the adverse party.

CR 41(b). By use of the word "shall", the rule requires mandatory compliance. The trial court cannot exercise its inherent powers in contravention of this provision. *Snohomish County v. Thorp Meats*, 46 Wash.App. 13, 728 P.2d 1084 (1986)(applying CR 41(b). Therefore, even assuming arguendo that Petitioners' voluntary dismissal was in-effective, the Court was without jurisdiction to grant Pierce County's requested relief of dismissal **with** prejudice.

Historically, the courts have had the inherent authority to dismiss an action for want of prosecution. *Langford v. Murphey*, 30 Wash. 499, 500, 70 P. 1112 (1902). The rule was construed in *State ex rel. Lyle v. Superior Court*, 3 Wash.2d 702, 705-06, 102 P.2d 246 (1940) as follows:

**Rules which may be deemed directory merely may be disregarded; but where, in establishing rules, the court has not reserved therein the right of exercise of discretion, those rules cannot justifiably be disregarded-there is no room for the exercise of discretion.**

**The mandatory provision of the rule is that any civil action shall be dismissed, without prejudice, if the plaintiff or cross-complainant fail to note the action for trial or hearing within one year after any issue of law or fact has been joined.**

*Snohomish County v. Thorp Meats*, 46 Wash.App. 13, 728 P.2d 1084 (1986).

The policy reason for limiting a Motion to dismiss for want of prosecution to dismissal **without** prejudice pursuant to CR 41 (b) is consistent with the Courts' strong preference to decide cases on the merits. Since the case was not prosecuted, there is no decision on the merits. From a policy standpoint, judgments prior to trial or adjudication on substantive issues are not favored as they prevent controversies from being determined on the merits. *Housing Authority of Grant County v. Newbigging* (2001) 105 Wash.App. 178, 19 P.3d 1081.

The Order granting Pierce County's Motion to Dismiss **with prejudice** should be vacated pursuant to CR 60 (b)(5) and or CR 60(b)(11) because the Court was **without** jurisdiction to grant Pierce County's requested relief of dismissal **with** prejudice.

**D. The Trial Court Erred in Denying CR 60(5) Vacation of Order Where Court Lacked Jurisdiction /Order Was Void.**

CR 60(b)(5) provides for the setting aside of void judgments. A judgment is void for purposes of CR 60(b)(5), if the court **lacked jurisdiction** over the parties or the subject matter of the suit or **if it lacked the inherent power to make or enter the particular order involved.** *Bergren v. Adams County* (1973) 8 Wash.App. 853, 509 P.2d 661.

Under CR 60, which permits vacation of a judgment that is void, the inquiry is whether the court had the power to enter the judgment, and not

whether the judgment is erroneous. *Metropolitan Federal Sav. & Loan Asso. v. Greenacres Memorial Asso.* (1972) 7 Wash.App. 695, 502 P.2d 476.

A judgment is void if entered by court without jurisdiction of parties or subject matter, or if entered by court which lacks inherent power to make or enter particular judgment involved. *Long v. Harrold* (1994) 76 Wash.App. 317, 884 P.2d 934. *Bour v. Johnson* (1996) 80 Wash.App. 643, 910 P.2d 548.

**No exercise of discretion is involved in vacating a judgment entered without jurisdiction.** *Brickum Investment Co v. Vernham Corp* (1987) 46 Wash.App. 517, 731 P.2d 533.

Where judgment is invalid as for want of jurisdiction either of person or of subject matter, or of question determined and to give particular relief granted, rendering judgment void as distinguished from merely voidable or erroneous, **it is duty of court to annul such judgment.** *Wiles v. Department of Labor & Industries* (1949) 34 Wash.2d 714, 209 P.2d 462.

Accordingly, the Trial Court erred when it denied Petitioners' Motion to vacate the County's requested Order, for which the Court lacked jurisdiction to enter.

**E. The Court Erred in Denying Motion based on Passage of Time; Time is Not Relevant Where Judgment is Void**

At hearing on the CR 60 Motion, Counsel for Pierce County and City of Puyallup contended that Petitioners' motion to modify was untimely and thus barred under the doctrine of laches. CP129-147, TR 11:1-17. The elements of laches are: (1) knowledge or reasonable opportunity by a plaintiff to discover a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; and (3) damage to the defendant resulting from the unreasonable delay. *Buell v. Bremerton*, 80 Wash.2d 518, 522, 495 P.2d 1358 (1972). See also *Valley View Indus. Park v. Redmond*, 107 Wash.2d 621, 733 P.2d 182 (1987); *Kelso Educ. Ass'n v. Kelso Sch. Dist.* 453, 48 Wash.App. 743, 750, 740 P.2d 889, review denied, 109 Wash.2d 1011 (1987).

Although not articulated in the written Order, the Court's verbal ruling describes that the Court accepted this argument and denied the Motion based on passage of time. See Transcript at 15:7-13.<sup>2</sup> This is error. The void judgment can be attacked at any time.

CR(60)(b)(1), (2), and (3) motions must be made within one year. However, if a judgment is void, it will be vacated irrespective of the lapse

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The Court: "... it just makes no sense to me that more than a year after the events you can come back and claim that the judgment is void to begin with. I don't want to go back and rehash the argument, but the defects I see are that it's not void to begin with. It's not timely brought. It did need to be brought within the one year." Transcript at 15: 7-13.

of time. *In re Marriage of Leslie*, 112 Wash.2d 612, 618-9, 772 P.2d 1013 (1989). See *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 370, 83 P.2d 221, 118 A.L.R. 1484 (1938); accord, Restatement (Second) of Judgments § 74, comment *a*, at 203 (1982). See also *Brenner v. Port of Bellingham*, 53 Wash.App. 182, 765 P.2d 1333 (1989); *In re Marriage of Maxfield*, 47 Wash.App. 699, 703, 737 P.2d 671 (1987).

Here, to the extent that the Court entered a dismissal “with prejudice,” the judgment was void for purposes of CR 60(b)(5), because the Court lacked the inherent power to make or enter the particular order involved. *Bergren v. Adams County* (1973) 8 Wash.App. 853, 509 P.2d 661. On appeal, this court should find that the void portion of the judgment was not time barred. *In re Marriage of Leslie*, 112 Wash.2d 612, 619-20, 772 P.2d 1013 (1989).

**F. The Court Err in Denying Petitioner’s CR 60(b)(11) Motion based on Passage of Time; Where Motion Was Brought Within Reasonable Timeframe**

Alternatively, CR 60(b)(11) motions must be made within a “reasonable time.” CR 60(b). *Kingery v. Dep’t of Labor & Industries*, 132 Wash.2d 162, 167-68, 173, 937 P.2d 565 (1997) (holding that 8 years is too long to justify equitable relief from judgment under CR 60(b)(11)). Here, the Motion for Relief was brought just over one year, which is reasonable. No party cited or claimed prejudice. TR 11:1-17, TR 5:25-6:1.

**G. Court Erred by Entering CR 41(b) Dismissal Prematurely.**

CR 41(b) authorizes involuntary dismissal of actions for want of prosecution, where no action has occurred **after one year**.<sup>3</sup> The action subject of the Dismissal Order was filed February 2, 2006. The Court entered the Order dismissing for want of prosecution pursuant to CR 41(b) on December 8, 2006 **which is less than the passage of a year, as required by CR 41(b)**. This is a fourth reason to vacate the Order on appeal.

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<sup>3</sup> **(b) Involuntary Dismissal; Effect.** For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) *Want of Prosecution on Motion of Party.* Any civil action shall be dismissed, **without prejudice**, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing **within 1 year** after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

(2) *Dismissal on Clerk's Motion.*

(A) Notice. 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.

## VI. CONCLUSION.

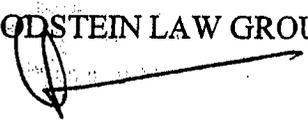
The Order granting Pierce County's Motion to dismiss Petitioners' appeal **with prejudice**, brought after Petitioners' CR 41(a) voluntary non-suit, should be vacated on appeal pursuant to CR 60 (b)(5) and or CR 60(b)(11) because Petitioners' prior-filed voluntary dismissal under CR 41(a)(1) divests the Trial Court of jurisdiction to decide a case on the merits.

Alternatively, the Order granting Pierce County's Motion to Dismiss **with prejudice** should be vacated on appeal pursuant to CR 60 (b)(5) and or CR 60(b)(11) because the relief exceeds the Court's ability to grant pursuant to CR 41(b), whereby the Court is limited to the mandatory relief of dismissal without prejudice.

Where judgment is invalid as for want of jurisdiction either of person or of subject matter, or of question determined and to give particular relief granted, rendering judgment void as distinguished from merely voidable or erroneous, **it is duty of court to annul such judgment.**

DATED this 2nd day of June 2008.

GOODSTEIN LAW GROUP PLLC

By:   
\_\_\_\_\_  
Carolyn A. Lake, WSBA #13980  
Attorneys for Petitioners

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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No. 37281-9-II.

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following document:

1. OPENING BRIEF OF APPELLANTS TED SPICE AND PLEXUS DEVELOPMENT.

to be served on June 3, 2008, on the following parties and in the manner indicated below:

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Deputy Prosecuting Attorney  
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- by United States First Class Mail  
 by Legal Messenger  
 by Facsimile  
 by Federal Express/Express Mail  
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Puyallup, WA 98371

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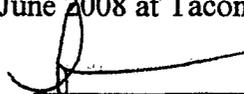
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 by Federal Express/Express Mail  
 by Electronic Mail

Michael C. Walter  
Keating Bucklin McCormack Inc PS  
800 Fifth Avenue, Ste. 4141  
Seattle, WA 98104-3175

by United States First Class Mail  
 by Legal Messenger  
 by Facsimile  
 by Federal Express/Express Mail  
 by Electronic Mail

I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED this 3 day of June 2008 at Tacoma Washington.

  
\_\_\_\_\_  
Carolyn A. Lake