No. 61063-9-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

SKAMANIA COUNTY ROD & GUN CLUB,
a Washington Nonprofit Corporation, and CRAIG and
BERINDAH MCKEE, a married couple,

Respondents.

v.

CITY OF NORTH BONNEVILLE,
a Washington municipal corporation,

Appellant,

BRIEF OF APPELLANT

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A. INTRODUCTION

The Uniform Declaratory Judgment Act ("UDJA") is not a vehicle to answer hypothetical questions or resolve immature disputes. A party must present an actual, concrete controversy or the claim is not justiciable.

Here, potential property developers are considering building three new houses on a lot, resulting in at least three new water connections to the City of North Bonneville's ("the City's") sewer system. The costs of such new connections are borne by the developer, not the City, and, at informal meetings discussing draft proposals, the City gave the developers in this case, Craig and Berindah McKee, several options for doing so.

Rather than submit mandatory sewer connection applications or bring a lawsuit regarding specific expenses incurred for connecting to the City sewer system, the McKees sued the City under the UDJA asking for the trial court to declare that the City had a duty to maintain and repair a nearby lateral sewer line. They also asked to have it declared to be six inches

in diameter, a figure they knew was in doubt, because they believed this would accommodate larger development on the property.

Just days after the City answered the complaint, and knowing full well the City planned to physically inspect the sewer on their property, the McKees brought a CR 12(c) motion for judgment on the pleadings, which the trial court hastily granted. In doing so, it issued an unhelpful order that does not resolve any actual dispute. And it incorrectly found that the pipe is six inches in diameter based on how the City answered the complaint, even though the City presented evidence on reconsideration that it obtained after digging up the pipe that its diameter was actually four inches and cannot accommodate more hookups based on building standards.

The trial court's orders should be reversed.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its January 2, 2025,

Order Granting Plaintiffs' Motion for Judgment on the Pleadings and Declaratory Judgment. CP 48-50.

2. The trial court erred in entering its February 27, 2025, Order Denying Defendant's Motion for Reconsideration. CP 102-03.

3. The trial court erred in entering its March 19, 2025, Order Denying Defendant's Motion for Leave to Amend Answer. CP 104-05.

(2) Issues Pertaining to the Assignments of Error

1. Did the trial court commit reversible error by deciding a non-justiciable controversy and issuing an order that does not conclusively resolve any dispute between the parties, something that it cannot do under the UDJA? (Assignments of Error Numbers 1-2).

2. Did the trial court misapply CR 12(c) by assuming facts and admissions in the light most favorable to the moving party? (Assignments of Error Numbers 1-2).

3. Did the trial court abuse its discretion in refusing to reconsider an order that was unsupported and incorrect in fact in what amounted to a severe sanction, rather than employing a liberal interpretation of the rules to arrive at the truth as the correct legal standard requires? (Assignments of Error Numbers 1-2).

4. Did the trial court abuse its discretion by refusing to grant the City leave to amend its complaint? (Assignments of Error Number 3).

C. STATEMENT OF THE CASE

This case is brought by Craig and Berindah McKee after entering into a purchase and sale agreement ("PSA") with Skamania County Rod & Gun Club ("Rod & Gun Club") to purchase a parcel of undeveloped real property in Skamania County. CP 10-18.[1] The McKees alleged that the sale was apparently contingent on the connection to a lateral sewer line; a contention by representatives of the McKees as to the proper process by which that connection is to be made delayed the closing of the sale. CP 10.

The McKees did not attempt to apply for connection to the City sewer or a sewer extension. CP 22, 67. In late July 2024,

[1] This brief will generally refer to the Plaintiffs/Respondents collectively as the McKees, as they are the parties that have driven the litigation in this case. No confusion is intended, the Rod & Gun Club remains a party, though somewhat in the background.

they submitted a draft short plat application and conceptual site plan for the property. CP 66. They hypothetically planned to develop the property into three short-plat, single-family lots, that would each connect to the 12-inch City-owned mainline via a smaller, lateral line that extended to the property. CP 30, 76. They believed that the lateral line needed repair, at the City's expense, to accommodate such development.

The City refuted that repair was the real issue; instead the smaller lateral line simply could not accommodate the conceptual multi-plat development. CP 66. The City met with the McKees on August 7, 2024, to discuss their draft plan. The City informed them that they would likely have to bore into the existing, 12-inch mainline, which at the other end of the property at a depth of 15-20 feet, or they would need to install and maintain E1 pumps – sewage pumps that grind up waste from a home and pump it to the public sewer system – if they wanted to

hook into the smaller lateral line. CP 66-67.[2] Again, these were just possibilities; the McKees never submitted an actual sewer connection plan, nor did the City ever deny or rule on a sewer connection application from them.

The City explained in prelitigation communication to the McKees' lawyer that North Bonneville municipal code ("NBMC") allows sewer service connections to the City sewer main or manhole per NBMC 13.12.030. CP 27-28. A formal service extension request is required to illustrate the points of desired hookup, method, location and materials required to

[2] The McKees have and likely will try to make great hay out of the fact that the property is next to the Mayor's house, which also hooks into the lateral line in question. CP 20. They have tried to paint this case as a grand conspiracy to prevent development near the Mayor's property or to force the McKees to "fix the City's line for the Mayor's benefit." CP 11. But *nothing* in the record suggests any truth to these allegations. The City suggested *two* possibilities to develop the area, boring into the larger mainline or installing E1 pumps. The City never said a connection to the system can't take place, or even that it must take place a particular connection location. CP 27. The McKees simply do not the options discussed over *draft* plans because they would rather have the city pay the cost of the *potential* new connections to the City's sewer system.

connect to existing facilities. CP 27-28. Part of this process requires the plan approval to evaluate the demand flow requirements for sewage and the financial obligation of the property owner to meet the demand flow. CP 27.[3]

The City admitted that it would have a duty to fix the lateral line, for example, it would assume responsibility to clear tree root blockages or malfunctions caused by road maintenance. CP 27. But it denied that it had any duty "to improve a sewer service connection line to meet increased demand" caused by new, private construction. CP 27. Private developers, not city taxpayers, must bear the construction costs and pay fees to connect to the City sewer system. *See* NBMC 13.12.030-.050 (discussing sewer connection plans that must be developed and submitted by the developer and inspections that occur to oversee the developer's construction connecting to the system), .140

[3] Demand flow under 13.12.020 means "the flow of municipal waste from any single element, structure, development or complex of developments within the City that places a direct demand for collection and processing upon the system."

(connection fees). The City informed the McKees that should it provide this cost for free to private developers it would violate the constitutional prohibition against gifting public funds and resources to private entities. CP 27 (Wash. Const., art. XIII, § 7).[4]

The McKees also knew that the City was unsure whether the lateral line was indeed six inches in diameter, as some historic plans showed, or whether it was actually smaller based on observations from scopes in the area. CP 74. The fact that the true diameter was in doubt was discussed at a City Council meeting the McKees' attorney attended in late September 2024. CP 73. The McKees believed that the lateral line was six inches in diameter and sufficient to accommodate their hypothetical

[4] This section of our Constitution prohibits gifting of public property: "No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation."

development, without installing E1 pumps or boring to the mainline, based on other six-inch lines supporting other developments in the area. CP 30; *see also,* CP 86 (prelitigation communication where the McKees claim that a six-inch pipe can accommodate "hundreds of single-family residences.").

Again, the McKees did not submit official permits or any applications for sewer connection. CP 22. Their draft short plat application was missing this essential component. CP 65-67.[5] Instead, on October 22, 2025, the McKees, also listing the Rod & Gun Club as co-plaintiffs, sued against the City in Skamania County Superior Court, seeking declaratory relief. CP 10-18 (first amended complaint). The McKees asked that the court "immediately intervene to declare that the City is legally responsible for maintaining and repairing the main and lateral

[5] Two days before filing their lawsuit, the McKees submitted another short plat application that was also incomplete and missing the sewer connection application component. CP 65-67. The City asserted in its answer that it never received a sewer connection application. CP 22.

line at issue in this case and that the City cannot impose the cost or responsibility of maintaining or repairing these lines onto Plaintiffs." CP 18.

Within six weeks, the City answered the complaint. CP 19-25. The City primarily defended on the grounds that the matter was not ripe, the plaintiffs lacked standing because the dispute was hypothetical, and that the plaintiffs failed to provide any "sewer site plan as required under NBMC 13.12.030 which would detail the method, location, and materials required to connect to the City sewer system," so addressing the specifics of the plaintiffs' hypothetically-planned connections was premature. CP 22.

The City admitted many of the basic factual assertions in the complaint, but it maintained that it lacked sufficient knowledge to admit or deny many of them. This included whether the lateral line was even defective and in need of any repair. CP 22. Among the City's admissions included an admission that the lateral pipe was six inches in diameter – a

number based on the only evidence available to the City at the time, historic documents. CP 62.

But, again, the McKees knew the true diameter was in doubt; moreover, their lawyer attended the City Council meeting in late September 2024 where the size of the lateral line was publicly questioned. CP 73. Their lawyer also admitted that the day after receiving the complaint that the City told him that it planned to physically inspect the pipe to conclusively determine its condition and size. CP 73, 86.

The City also included a reservation of rights in its answer, stating that it reserved "the right to amend this Answer should additional information become available, or to assert additional Affirmative Defenses or Counterclaims." CP 23. In other words, the City planned to investigate, and reserved the right to amend its answer, which it submitted in the earliest of stages in the case. *Id.*

Even though the McKees knew the City planned to physically inspect the pipe, just six days after the City answered,

they moved for judgment on the pleadings under CR 12(c). CP 29-34. They based their entire motion on a single sentence of the City's answer, which apparently admitted that the lateral line was six inches in diameter. CP 31. They asked that the lateral line be declared to be six inches in diameter, as a matter of fact, and for a declaration that the "City is responsible for any defects within the lateral line" under its duty to maintain its sewer system. They honed in on NBMC 13.12.010, which states:

> The City assumes no responsibility for the adequacy, reliability, or maintenance of the sewer line construction between the building and the City sewer line. If blockage or other malfunction occur in this segment of line they shall be corrected at the property owner's expense. The City's maintenance crew will respond to complaint calls to determine if the problem is a public or private concern. If the problem is on the public side of the connection, the City staff will address the issue at no cost to the property owner.

CP 33. Again, because the McKees plans were *hypothetical*, it is hard to see what this requested relief would afford them, but it appears they believed that the City must make the lateral line sufficient to accommodate *new* development and pay for the cost

of making *new* connections to the system. CP 33-34.

Because this was not a motion for summary judgment, subject to the 28 days-requirement in CR 56(c), the City had just over a week to respond to the motion. CP 37-42. The City primarily argued that the case is not ripe. CP 37-42. It argued that under principles of justiciability and RCW 7.24.060, a court should generally "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." CP 38. The City pointed out that no party had requested or been denied a sewer connection, nor had any permit for development been considered or denied by the City. CP 39-42. The City analogized the case to appeals from land use decisions, where courts have held that a party must exhaust all administrative remedies before seeking court relief. *Id*. The City maintained that it had a duty to repair blockages in the pipe, not develop it for greater capacity for private development. *Id*.

In reply, the McKees seized on a tiny portion of the City's argument on reply, arguing that municipal sewer decisions are not decisions governed by the Land Use Petition Act ("LUPA") (chapter 36.70c RCW), so exhaustion of administrative remedies is not a precondition to suit. CP 43 (citing *Pioneer Square Hotel Co. v. City of Seattle*, 13 Wn. App. 2d 19, 461 P.3d 370 (2020)).

The trial court, the Honorable Randall C. Krog, granted the McKees' motion. CP 48-50. It "rejected" the City's argument that the plaintiff "lacked standing or failed to exhaust administrative remedies." CP 48. In granting the motion it determined:

> a The lateral line adjoining the Plaintiffs (sic) property is owned by the City of North Bonneville
>
> b The lateral is a 6 inch public sewer line and
>
> c The City is therefore responsible for its maintenance and repair as depicted in Illustration 2 of paragraph 4 5 of the 1st Amended Complaint

CP 48. The court entered that order as a judgment on January 2,

2025, less than a month after the City answered the complaint and before any discovery or inspection of the site took place. CP 48-49.

The City brought two motions after the judgment entered. It moved to amend its answer to be more specific that the lateral line of limited capacity only "appears to be six inches in diameter based on the as-built plans" but deny the diameter of the line until established by measurement. CP 51, 57. It also timely moved for reconsideration. CP 61-71. It explained that it needed to access the property to measure the pipe and did not have permission to do so from the McKees until January 17, 2025. CP 63, 71.[6] That inspection revealed that the pipe is indeed four inches in diameter. CP 71. The City submitted a declaration of its contracted City Engineer, who confirmed that the lateral line is four inches, not six as the historic as-built plans stated, and he

[6] The City is prohibited from entering private property to inspect sewer systems without a court order or the property owner's consent. NBMC 13.12.195.

confirmed that "industry and engineering standards do not support the connection of more than one residence on a 4 inch lateral line." CP 67.

Even in the face of this *unrefuted* evidence, the trial court refused to reconsider its order and denied both motions. CP 102-05. It did not even correct its factual declaration that the lateral line is six inches in diameter, despite the evidence that it is four inches. *Id.* It dug in so far that it even imposed CR 11 sanctions on the City for bringing its motions, awarding the McKees attorney fees for any fees incurred responding to them. CP 102-03.

This timely appeal follows. CP 106-07.

D. SUMMARY OF ARGUMENT

The trial court erred in deciding a non-justiciable controversy. The McKees never completed a sewer connection application or even a short plat application, their plan to develop their property and make several new connections into the City's sewer system was purely hypothetical. The trial court committed

legal error by misapplying the rules of justiciability, especially in the context of a CR 12(c) proceeding.

At the very least, the trial court erred in refusing to reconsider its rushed order when an examination of the site confirmed that the lateral sewer line in question is four inches in diameter not six as the trial court declared as a matter of fact. The City timely raised this additional evidence and moved to amend its complaint, which CR 15 liberally allows even after judgment has entered if pleadings do not conform to the evidence. The trial court's illogical order is untenable.

This Court should reverse with instructions to dismiss a non-justiciable controversy. At the very least it should reverse with instructions to allow the City to amend its complaint. In any outcome, the Court should also reverse the misguided CR 11 sanction award entered against the City.

E. ARGUMENT

(1) Standard of Review

CR 12(c) motions are rare; they must be granted only

"sparingly and with care" typically in "unusual case[s]." *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 189, 252 P.3d 914 (2011). (quotations omitted). "The rule is that the party who moves for judgment on the pleadings admits, for the purposes of the motion, the truth of every fact well pleaded by his opponent and the untruth of his own allegations which have been denied." *Pearson v. Vandermay*, 67 Wn.2d 222, 230, 407 P.2d 143 (1965) (quotation omitted). A court "must take the facts alleged in the [pleadings], as well as hypothetical facts, in the light most favorable to the nonmoving party." *M.H.*, 162 Wn. App. at 189.

This Court reviews orders on motions for judgment on the pleadings *de novo*. *Pasado's Safe Haven v. State*, 162 Wn. App. 746, 752, 259 P.3d 280 (2011).

This Court reviews "a trial court's denial of a motion for reconsideration and its decision to consider new or additional evidence presented with the motion to determine if the trial court's decision is manifestly unreasonable or based on

untenable grounds." *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013) (reversing because expert declaration submitted on reconsideration created a material issue of fact that defeated summary judgment). A trial court abuses its discretion if it "applies the wrong legal standard" "relies on unsupported facts" or if its decision is "contrary to law." *Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016).

(2) The McKees Did Not Present a Justiciable Controversy

As a basic prerequisite to suit, even under the UDJA, a plaintiff must present a justiciable controversy. *Alim v. City of Seattle*, 14 Wn. App. 2d 838, 847, 474 P.3d 589 (2020); RCW 7.24.060. A justiciable controversy exists where there is a controversy:

> (1) presenting an actual, present, and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) involving interests that are direct and substantial, rather than potential, theoretical, abstract, or academic, and (4) of which a judicial determination will be final and

conclusive.

Id. "Absent these elements, the court steps into the prohibited area of advisory opinions." *Bloome v. Haverly*, 154 Wn. App. 129, 141, 225 P.3d 330 (2010) (quotation omitted). "Standing and ripeness are inherent in the four declaratory judgment justiciability requirements." *Brain v. Canterwood Homeowners Ass'n*, 27 Wn. App. 2d 1032, 2023 WL 4574816, *4 (2023) (unpublished).

Hypothetical disputes are not enough. "When a person…alleges a threatened injury, as opposed to an existing injury, the person or corporation must show an immediate, concrete, and specific injury to themselves." *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 129, 272 P.3d 876 (2012). "If the injury is merely conjectural or hypothetical, there can be no standing." *Id.* (quotation omitted).

Bloome is instructive. There, Division I reversed the trial court's ruling affording declarative relief in a case involving hypothetical development. 154 Wn. App. at 142. In that case, a

view restriction covenant may or may not have prevented certain construction between uphill and a downhill neighbors. But Division I held that the trial court committed reversible error in affording declarative relief because no concrete plans for development were ever presented, thus, no justiciable controversy existed:

> Bloome has not put forth any construction plan over which the parties have had the opportunity to litigate as to its conformance with the covenant. Nor has he established that it is, in fact, impossible to construct a building on the downhill parcel without interfering with the view from the uphill parcel. In the absence of a dispute over whether actual building plans satisfy the covenant or of other evidence establishing a necessary minimum degree of interference with the view from the uphill property, a declaratory judgment as requested by either party would not conclusively settle the controversy between them.

Id. at 142.

Likewise, in *Brain,* 27 Wn. App. 2d 1032, this Court held that a trial court wrongfully afforded declarative relief to a class of members who owned property subject to CC&Rs enforced by a homeowner association. The plaintiffs argued that the

association should be estopped from enforcing certain vegetation restrictions near the community's golf course due to its selective enforcement of those restrictions in the past. The trial court agreed, but this Court reversed because the case did not present a justiciable controversy. *Id.* at *5. Importantly, this Court found that no actual applications had been made by the homeowners, so any dispute was hypothetical:

> [T]he plaintiffs argue that the selective enforcement of section 5.2 of the guidelines damaged the properties that were required to preserve large numbers of trees as those trees dropped debris onto their lawns and drainage systems. But the plaintiffs have not shown that they applied to the ACC to remove or otherwise alter the trees on their property. Nor is there evidence that the HOA engaged in an enforcement action against them regarding the guidelines, or even threatened such an action. Thus, even assuming that maintaining large numbers of trees damaged their property, there is no justiciable controversy as there is no actual dispute regarding the guidelines.

Id. at *5.

The City made the same argument as reflected in the above authorities to the trial court. The Court must assume, and the

McKees must admit, that the McKees made no application to connect to the sewer system, because that was what the City (the non-moving party) asserted in its answer. CP 22. NBMC 13.12.030 *requires* such a sewer site plan, which the McKees never submitted. The City never took any final, adverse enforcement action against the McKees. Rather, the parties merely discussed a *hypothetical* plan to subdivide the property and were told in a meeting to discuss their *draft* proposal that they would likely need to bore to the mainline or install E1 pumps.

Here, one can see the trial court's error. Whether or not an analogy to exhausting administrative remedies under LUPA was proper, the City argued that the case was not ripe and speculative. CP 23, 37-42. Assuming *arguendo* the McKees did not need to exhaust the City's entire appeal procedure, they needed to at least submit an actual application and show that their development plans were concrete, rather than speculative. Ripeness is inherent in the justiciability requirements and

requires the "mature seeds" of a concrete controversy. *Bloome*, 154 Wn. App. at 140.

There is no live controversy until the McKees show that their actual sewer connection plan was finalized and rejected. Mere speculation about what they might develop in the future is not enough. Construction at the site has not begun, there is no evidence that they plan to follow through with any plan to connect to the City's sewer system. This is purely a hypothetical dispute, and the trial court erred in issuing an unhelpful, and factually incorrect, advisory opinion. *Bloome*, *Brain*, *supra*.

Indeed, the case is not justiciable because the trial court's final order is not "final and conclusive." *Bloome*, 154 Wn. App. at 140. It merely states that the City is "responsible for [the lateral line's] maintenance and repair." CP 48. That declaration does not solve the primary disputes – whether the line can support the development of several homes and whether the City must pay to alter the line to accommodate such increased use.

The City never disputed that it must maintain and repair

the line for existing connections. But this lawsuit arose because it told the McKees at a meeting over their *draft* plan, that they would need to bore to the mainline or pay for E1 pumps if they wanted to subdivide and develop multiple homes on the lot. *Nothing* in the trial court's order on declarative relief prevents the City from continuing to impose those conditions. All it does is resolve something that was not in dispute (the City's general *maintenance* and *repair* duty) and declare the diameter of the pipe, which the parties know is now incorrect, a fact that would surfaced have within a few weeks had normal discovery been pursued rather than a fast-tracked CR 12(c) motion filed six days after the City answered the complaint.

The trial court erred in resolving a non-justiciable case. The Court should reverse with instructions to dismiss.[7]

(3) <u>The Trial Court Committed Legal Error in Granting CR 12(c) Relief</u>

[7] This "court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2.

The trial court's error in resolving a non-justiciable controversy is made even worse by its misapplication of CR 12(c). Again, this is an unusual remedy that must be applied sparingly and with care. *Pearson*, 67 Wn.2d at 230; *M.H.*, 162 Wn. App. at 189. The facts in the pleadings – including admissions and denials in the answer – and any hypothetical facts must be construed in favor of the non-moving party, in this case the City. *Id.*

The McKees cannot overcome this standard of review. For one, there is no agreement that the lateral line is damaged or in need of repair. CP 20 (answer to paragraph 1.3 where the City denies that the lateral line is defective); CP 22 (answer to paragraph 4.17, same). Thus, for CR 12 purposes, it must be assumed that the line is *not damaged*. A declaration that the City has a duty to repair a non-damaged pipe is not a live controversy; it is an advisory opinion. For purposes of a case resolved at a CR 12 hearing, the trial court's ruling solves absolutely nothing.

It may be that upon inspection, discovery, and the

presentation of evidence, there is a factual dispute over whether the line needs repair.[8] Experts might come to different conclusions about what needs to be or can be done to the lateral line. But it is reversible, legal error to assume that such a dispute exists at the CR 12(c) stage, when the City denies that the lateral line is even defective. *See, e.g., Klein v. Delgado*, 180 Wn. App. 1043, 2014 WL 1711430, *1-2 (2014) (it is reversible error to grant CR 12 relief without first construing the facts in the light most favorable to the non-moving party) (unpublished).

Of course, this is not a case about fixing a defective pipe – the McKees *are not currently connected to that pipe*. This is about *future* development. Key to this entire lawsuit is the McKees' factual assertion at paragraph 4.17 of their complaint that the pipe is six inches and can accommodate future development. They assert:

Without cooperation from the City, the Plaintiffs

[8] The McKees would still face the hurdle of showing that the City owes any duty to *future developers* to pay for upgrades to systems to accommodate *new* development. It does not.

> had to retain a sewer expert to investigate the problem. The expert confirmed the 6-inch lateral line, which, if working correctly, would be sufficient to support the development of the Plaintiff's (sic) Lot. He also confirmed that the lateral line was defective and must be fixed to allow for additional users.

CP 15-16. The City denied that allegation in its answer. CP 22. Thus, it must be accepted as true for purposes of a CR 12(c) motion that the line, as is, cannot "support the development of the Plaintiff[s'] Lot." The trial court had to presume at the CR 12 hearing that some other connection was required because the lateral line was (a) not defective; and (b) nevertheless could not accommodate the development.

The trial court's order does not resolve this key issue, which the McKees did not even plead. Again, the City never disputed that it must maintain and repair the line for existing connections. But this lawsuit arose because it told the McKees at a meeting over their *draft* plan, that they would need to bore to the mainline or pay for E1 pumps if they wanted to subdivide and develop multiple homes on what is now a single lot, making

multiple *new* connections into the lateral line. The trial court's order does nothing to prevent the City from continuing to impose those conditions. It merely confirms an issue that was never disputed – the City's general duty to maintain and repair – and states the pipe's diameter, a figure the parties already know is inaccurate and that would have been corrected within weeks through ordinary discovery, had the McKees not rushed to file a CR 12(c) motion just six days after the City answered.

Any resolution of this case was premature. The matter should be dismissed until the McKees actually apply for a sewer connection and a final decision is made. At that time, the parties will know whether a live controversy exists, *or not*.[9] But at the

[9] So much has changed in the many months since the trial court entered its order, including massive upheaval brought by a new federal administration affecting the prices of goods, the price and availability of labor, and other factors that bear on the construction market. *See, e.g.*, Alex Viega, *Prices for home remodeling outpaced inflation in the second quarter due to labor costs*, SEATTLE TIMES (Sept. 30, 2025), https://www.seattletimes.com/business/prices-for-home-remodeling-outpaced-inflation-in-the-second-quarter-due-to-labor-costs/. It is entirely speculative that the McKees even still plan to develop

very least, CR 12(c) was misapplied. The McKees *at least* needed to show, either at trial or through a summary judgment motion supported by adequate opinion and/or evidence, that there existed some defect that the City even had a duty to correct.

This Court should reverse. The trial court misapplied the UDJA and legal standards used to evaluate CR 12(c) motions.

(4) The Trial Court Abused Its Discretion in Denying the City's Post-Judgment Motions

As discussed above, declaratory relief was inappropriate and accomplished nothing, failing to resolve any controversy, in this case. The only thing the trial court's order did conclusively establish is that the pipe is six inches in diameter – a "fact" the parties now know to be *false*. At the very least, the trial court abused its discretion in refusing to the City leave to amend its answer and reconsider this inaccuracy. The trial court's decisions run contrary to the purpose of litigation – to seek the truth. And it prematurely foreclosed the City from conducting

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the lot.

discovery and making factual inquiries into the lateral line's condition. Justice was simply not done.

(a) A Trial Court Abuses Its Discretion If It Refuses to Reconsider and Correct an Order that Is Unsupported by the Facts

It is fundamental that our courts must strive toward "the ascertainment of truth." *Matter of Stroh*, 97 Wn.2d 289, 295, 644 P.2d 1161 (1982). Dispositive motions are designed to seek the truth and reach the merits of the case, rather than "cut litigants off from their right to a trial." *Haley v. Amazon.com Services, LLC*, 25 Wn. App. 2d 207, 522 P.3d 80 (2022) (discussing summary judgment). The right to access our civil courts and have juries try "nonfrivolous factual" disputes, is constitutionally based and "fundamental" to our system of civil justice. *Id.* (citing Wash. Const., art. I, § 21).

Likewise, cases must not be dismissed early because the right of civil discovery is "integral to the civil justice system" and has a constitutional dimension. *Lowy v. Peacehealth*, 174 Wn.2d 769, 776-77, 280 P.3d 1078 (2012). All "procedural

rules…are to be liberally construed in order that full discovery proceedings will be afforded in all instances where factual inquiries are in order." *Barnum v. State*, 72 Wn.2d 928, 931, 435 P.2d 678 (1967).

Entering judgment on the pleadings, with no opportunity for discovery, while ignoring additional evidence presented on reconsideration is particularly unjust, given that the modern civil rules "are intended to allow the court to reach the merits, not to dispose of cases on technical niceties." *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 227, 734 P.2d 533 (1987). It is "sound public policy" to resolve cases on their merits rather decide them on procedural grounds. *Fode v. Dep't of Ecology*, 22 Wn. App. 2d 22, 33, 509 P.3d 325 (2022) (citing *Crosby v. Spokane County*, 137 Wn.2d 296, 303, 971 P.2d 32 (1999)); *see also*, CR 1 (rules must be interpreted to secure just results). Put another way, "the rules of civil procedure should be applied in such a way that substance will prevail over form." *First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 781-82,

613 P.2d 129 (1980).

Moreover, while reconsideration decisions are reviewed for an abuse of discretion, "a court abuses its discretion when it relies on unsupported facts." *State v. Greenfield*, 21 Wn. App. 2d 878, 887, 508 P.3d 1029 (2022) (reversing where facts did not support the trial court's ultimate decision). In support of the overarching goal of seeking the truth and correctly resolving the facts and law presented by a case, courts have routinely granted reconsideration when evidence presented on reconsideration shows that the court's original order was unjust or untrue.

For example, in *Rinehold v. Renne*, 198 Wn.2d 81, 96, 492 P.3d 154 (2021), our Supreme Court considered additional evidence in the form of historic aerial maps and a surveying expert's opinion submitted for the first time on reconsideration in a boundary dispute. It concluded that this evidence (which dated back to the 1950s) created a material question of fact and required reversing a dispositive motion decision.

In *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530,

542, 269 P.3d 1038 (2011), Division III considered "additional evidence" submitted to the trial court for the first time on reconsideration, but that had been used during a mandatory arbitration proceeding to conclude that a dispositive motion must be reversed.[10] It was reversible error not vacate the dispositive order, given the additional evidence created an issue of fact. *Id.*

Martini v. Post, 178 Wn. App. 153, 159-60, 313 P.3d 473 (2013), is a case where a nonmoving party presented an additional expert declaration on reconsideration after the trial court dismissed their case via a dispositive motion. That expert specifically offered an opinion as to causation. *Id.* at 159-60.

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[10] *See also, e.g., Maynard v. Sisters of Providence*, 72 Wn. App. 878, 880, 866 P.2d 1272 (1994) (court considered "weather records" submitted as "additional evidence" in motion for reconsideration to reverse a summary judgment ruling because that evidence created a disputed question of fact); *State v. Glenn*, 115 Wn. App. 540, 545, 62 P.3d 921 (2003) (court considered additional evidence submitted on reconsideration of a recent wedding ceremony performed to conclude that defendant was church clergy); *White River Feed Co. v. Kruse Fam., LP*, 3 Wn. App. 2d 1044, 2018 WL 2021881, *5 n.7 (2018) (court considered declaration of expert for the first time on reconsideration).

Thus, this Court held that the "trial court's denial of [the] motion for reconsideration was manifestly unreasonable considering all the evidence proffered, including the newly submitted evidence" offered on reconsideration. *Id*. at 164.

The trial court's order here is not supported by the facts. It was an abuse of discretion given the physical examination of the pipe revealed it was four and not six inches as the trial court declared, based on its interpretation of the pleadings. Just as in *Martini*, the trial court abused its discretion by refusing to reconsider its decision when presented with facts that made its prior ruling incorrect. Instead, after rushing to judgment, it stubbornly insisted on the *wrong* facts about the sewer pipe diameter. That is a reversible abuse of discretion.

The McKees argued that reconsideration was improper because the pipe's diameter was not newly discovered evidence under CR 59(b)(4), arguing that the pipe's diameter could have been discovered sooner with sufficient diligence. CP 86-93. This argument fails for two reasons.

First, the City acted diligently. It needed permission to access the private property under NBMC 13.12.195, permission it did not receive until after the McKees pushed through their rushed CR 12(c) motion. The City had no opportunity to conduct *any* discovery – the McKees filed for dispositive relief six days after the City answered, on a 10-day motion timeline during the holiday season.

But second, even if a court disagreed and determined that the City was not diligent, it would make no difference. While the City moved under the newly discovered evidence prong of CR 59(b)(4), that was not the only prong it cited. CP 82. It also moved under CR 59(b)(7) and (9), arguing that the verdict was not supported by actual evidence and substantial justice was not done. *Id.* "[N]othing in CR 59 prohibits submission of new or additional material on reconsideration," newly discovered or not. *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn. App. 852, 865, 851 P.2d 716), review denied, 122 Wn.2d 1018 (1993) (disagreed with on other grounds in *Mackay v. Acorn Custom*

Cabinetry, Inc., 127 Wn.2d 302, 308, 898 P.2d 284 (1995)).

CR 59(c) specifically allows a motion to be based on affidavits, *i.e.*, evidence not already in the record. And CR 59(g) allows a court to reopen a judgment and "take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." The rules are specifically designed to allow a court to reach the truth, rather than bury its head in the sand once a judgment is entered.

Again, as the cases above show, courts often consider *additional*, rather than newly discovered evidence, when determining whether to reconsider a dispositive decision. *E.g.*, *Rinehold*, *Plese-Graham*, *Martini, supra*. Failing to do so when the facts are clear is reversible error, as this Court found in *Martini* and others have found in cases like *Plese-Graham*.

Our Supreme Court has also held that refusing to consider key, but late, evidence that would defeat a dispositive motion is reversible error as an overly severe sanction. *Keck v. Collins*,

184 Wn.2d 358, 369, 357 P.3d 1080 (2015). In *Keck*, the non-moving party submitted a late declaration from its expert in a medical malpractice claim. Our Supreme Court reversed a summary judgment dismissal because refusing to consider the untimely and successive declaration amounted to a severe sanction because it "affect[ed] a party's ability to present its case." *Id.* at 368-69.

Here, too, the trial court's steadfast refusal to reconsider, even if the City presented late evidence, affected the City's ability to present its case. It should not be severely sanctioned by ignoring facts submitted through a technically late expert declaration, CP 65-68, without considering the harm done or lesser sanctions that could have rectified any ill effect.

Simply put, dispositive motion practice "is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth." *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (discussing summary judgments). The trial

court abused its discretion in failing to apply this correct liberal legal standard, "designed for arriving at the truth." *Id.*

At the end of the day, the trial court's factually incorrect ruling is absurd. One must ask – what is its practical effect? Must the City replace the four-inch pipe that actually exists on the property to conform to the order? Are contractors required to treat it as six inches because a court said so, facts and industry construction standards be damned?

The order is an *Orwellian untruth*, and the trial court committed reversible error in refusing to correct it. *E.g.*, *Martini*, *Keck*, *supra*.

(b) The Trial Court Should Have Granted the City's Motion to Amend Its Answer, as CR 15(b) Says Is Necessary, Even After Judgment, When the Pleadings Do Not Conform to the Evidence

If they do not concede that reconsideration should be granted, the McKees are likely to blame the City for answering the complaint the way it did. But the City tried to amend its answer to be more specific that the lateral line of limited capacity

only "appears to be six inches in diameter based on the as-built plans but deny the diameter of the line until established by measurement." CP 51, 57. The trial court should have granted that request – it is manifestly unreasonable to establish an untruth as true, merely because the City was not as specific as it should have been in its first answer to the complaint.

Under CR 15, pleadings are broadly construed. A party may amend their pleadings by leave of court or by written consent of the adverse party. CR 15(a). Leave shall be *freely given* when justice so requires. *Id*. Civil Rule 15 serves to "facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party." *Chadwick Farms Owners Ass'n v. FHC, LLC*, 139 Wn. App. 300, 313, 160 P.3d 1061 (2007).[11]

[11] Commentators have noted that "a party is permitted to recover whenever she has a valid claim, even though her attorney

Amendments should be freely granted unless the opposing party is *genuinely* prejudiced by the amendment. *Olson v. Roberts & Schaeffer Co.*, 25 Wn. App. 225, 227, 607 P.2d 319 (1980); *see also*, *Walla v. Johnson*, 50 Wn. App. 879, 884, 751 P.2d 334 (1988) (finding trial court abused its discretion denying defendant leave to amend answer brought three months before trial in the absence of concrete prejudice to the non-moving party).

Parties are also permitted to clarify initial pleadings in the course of dispositive motion proceedings. *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987). That is exactly what the City tried to do here.

The timeliness of a motion to amend alone, without more, is generally an improper reason to deny a motion to amend. *Quality Rock Products, Inc. v. Thurston Cnty.*, 126 Wn. App.

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fails to perceive the proper basis of the claim at the pleading stage." Jack H. Friedenthal et al., *Civil Procedure* 259 (3d ed. 1999). The converse is true of a defense.

250, 273, 108 P.3d 805, 816 (2005). Washington courts have permitted amendments *years* after pleadings were initially filed.

In *Caruso v. Local 690,* 100 Wn.2d 343, 670 P.2d 240 (1983), for example, the plaintiff filed an action seeking damages for interference with business relations. The court allowed the plaintiff to add a defamation claim over five years after the filing of the original complaint – *less than one month before trial*. The *Caruso* court emphasized that the purpose of pleadings is to enable a proper decision to be made on the merits, and not to erect formal and burdensome impediments to litigation. *Caruso,* 100 Wn.2d at 349. Thus, even in that far more extreme example, leave to amened was proper.

Importantly, CR 15(b) directly addresses the situation at hand and states that "amendment of the pleadings as may be *necessary* to cause them to conform to the evidence and to raise these issues *may be made upon motion of any party at any time, even after judgment*." (emphasis added). That is precisely what the City sought to do here. It became necessary to conform its

answer to the evidence, and this is true even after judgment was rendered. Only after a rushed decision on the McKees' CR 12(c) motion, did the parties have the opportunity to conclude that the pipe is four inches in diameter, not six. CR 15(b) makes it necessary to permit the City a chance to amend its pleadings to conform to the evidence, given this critical new information.[12]

CR 15(b) goes hand in hand with the courts' responsibility to seek truth and resolve cases on their merits, not strictly enforce pleading technicalities or put form and timeliness over substance. *Rinke*, 47 Wn. App. at 227; *Fode*, 22 Wn. App. 2d at 33; *First Fed. Sav. & Loan*, 93 Wn.2d at 781-82. The trial court should have put substance and the merits first in this case but did not.

Reversal is warranted, at the very least, to allow the City to amend its answer.

[12] The irony should not be lost on this Court that the McKees amended their complaint once, CP 10-18, showing that matters evolve especially during the initial pleading stage. The City was not afforded this opportunity.

(5) The Court Should Reverse the Sanction Award

Because the trial court committed legal error granting CR 12(c) relief and refusing to reconsider its order, this Court should necessarily reverse the trial court's decision to sanction the City and award fees for responding to the reconsideration motion. CP 102-03. A party is entitled to attorney fees only if a contract, statute, or recognized ground of equity permits fee recovery. *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994).

"The purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). CR 11 sanctions must be carefully considered because they have an inherent "chilling effect" on legal advocacy. *Id.* "If a [pleading] lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim." *Id.* at 220 (emphasis in

original). The failure to prevail is not dispositive; CR 11 sanctions are not a "mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable." *Id.*

CR 11 is the only basis for a fee or sanction award in this case. Given the arguments above, incorporated herein, it cannot be said that the City acted for an improper purpose or without due regard for the facts and law. The City had no improper purpose in meeting with the McKees and proposing sewer connection options when discussing *draft* development plans. The McKees never followed through with a final and complete sewer connection application or even a complete short plat application. The City did not abuse the judicial system – it never denied the McKees *anything*, thus forcing them to sue; *they have not applied to connect to the sewer*.

As far as researching the facts and law, the City did its best to answer a complaint that asserted a non-justiciable controversy, and it admitted and denied facts the best it could, including the

pipe's diameter, based on historic documents. The McKees knew that the City doubted and planned to physically inspect the pipe, located on their private property, CP 73, 86, something that would be afforded to any defendant conducting discovery in a case. But rather than allow that investigation to occur, they pushed through a CR 12(c) motion six days after the City answered to obtain improper relief. The City acted diligently in moving to amend its answer and seeking reconsideration, once new facts came to light, as permitted by the civil rules. CR 15(b), CR 59(c). Sanctions were not warranted under CR 11.

The trial court erred in entering a rushed, CR 12(c) ruling over a non-justiciable claim. And it should have reconsidered its incorrect factual determination that the pipe was six inches in diameter, an error which would have been quickly uncovered had the City been given any chance to conduct discovery, including investigating the site which required the McKees' permission. The City took proper steps under the circumstances and had no improper motive.

The sanction award should be reversed, along with the trial court's other orders.

F. CONCLUSION

The Court should reverse the trial court's orders referenced herein. The City submits that it would be proper to reverse with instructions to dismiss because this claim is not justiciable. At the very least, judgment on the pleadings was improper, and the case should be remanded for further proceeding with instructions to allow the City leave to amend its answer. Regardless of the remedy, the sanction award should also be vacated.

This document contains 8,390 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3d day of October, 2025.

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APPENDIX

NBMC 13.12.010 Authority and intent.

Pursuant to the statutes of the State of Washington and the powers granted the City of North Bonneville, the City does declare its intention to acquire, own, construct, equip, operate and maintain sanitary sewers, sewage pump lift stations, sewage treatment plants and outfall sewers; to extend and expand the existing sewer system to areas exclusively within the incorporated municipal boundaries; and to reconstruct or replace the existing sanitary sewers, sewage pump lift stations and sewage treatment plants as determined necessary by the City Council.

NBMC 13.12.020 Definitions.

As used in this chapter, the following terms are defined:

“As Built Construction Drawing” A revised set of drawings submitted by a contractor upon completion of a project or a particular job. They reflect all changes made in the specifications and working drawings during the construction process, and show the exact dimensions, geometry, and location of all elements of the work completed under the contract.

“Base capacity” means the existing capacities of the sewer system prior to any sizing for increased demand flows.

“BOD” means biochemical oxygen demand.

“Building Official” means City representative charged with review of building plans in accordance with International Fire and Building Codes.

“Building sewer” means sewer line construction between the building and the City sewer line.

“Capacity” means the physical capability of the collection and treatment system to receive and process municipal sewage as measured on a volume scale of gallons per day or hour or by other accepted measurements.

“City” means the City of North Bonneville, Washington.

“City Administrator” means the employee charged with administration of this chapter.

“Commercial” means any premise connected to sewer that operates as a business including a home-based business.

“Commercial zone” means areas zoned for commercial use including, but not limited to, Central Business District (CBD), Commercial (Cl), Commercial Recreation (CR), Industrial / Business Park (I/BP) and Mixed Use (MU).

“Connection fee” means a service connection fee charged for accessing the City's sanitary sewer system. The fee is due and payable at the time of building permit issuance.

“Demand flow” means the flow of municipal waste from any single element, structure, development or complex of developments within the City that places a direct demand for collection and processing upon the system.

“Equivalent service use” means any nonresidential use which has been reasonably found to place an additional demand on the City sewage system and based on an equivalent residential unit ERU.

“Industrial” means industrial sewer hookups for lots or land parcels zoned industrial.

“Minimum monthly charge” is the minimum fee charged to each customer who has water sewer service.

“Multifamily dwelling” means:

1. A building containing two (2) or more dwelling units, designed to house two (2) or more families living independently of each other; or

2. A cluster of buildings, each building being designed to house one (1) or more families living independently of each other.

“Natural outlet” means, but not limited to, streams, ponds, drainage ditches, bioswales, catch basins, lakes and sloughs.

“Property Owner” means a person, association, company, partnership or corporation ultimately responsible for payment of all City utility rates, charges and fees.

“Utility Supervisor” means the City representative authorized to perform the duties designated in this chapter.

“Pumping unit” means a pump for raising or lifting sewage to gravity flow level of sewage line.

“Sanitary sewer” means a sewer which carries sewage and intended to exclude storm, surface and groundwater.

“Sewer availability” means the availability of public sewer to a habitable structure reliant upon a septic system where the public system is located within proximity to the subject property.

“Service connection” means the sewer piping between the connection point of the building sewer line and City sewer line at the property line.

“Sewage” means a combination of waste water and grey water from residences, business buildings, institutions and industrial establishments, together with such ground, surface, and stormwaters as may be present.

“Sewage treatment plant” means any arrangement of devices and structures used for treating sewage.

“Sewer” means a pipe or conduit for carrying sewage.

“Sewerage system” means all City-owned facilities for collecting, pumping, treating and disposing of sewage.

“Sizing” means the increased physical sizing of lines, equipment, physical plant and elements of the collection and treatment system necessary to accommodate existing or proposed sewerage demand flows.

NBMC 13.12.030 Sewer service extensions--Site plan.

A property owner requesting a sewer service extension shall provide the City with a sewer site plan and statement of use for which the request is made signed by civil engineer licensed in the State of Washington. The statement of use shall include technical information concerning demand flow and sizing of the system. The site plan shall illustrate and identify the location of all extensions, points of desired hookup to existing facilities, and stub-outs for all service connections within a development. The plan shall illustrate and describe the method, location and materials required to connect to any City sewer main or manhole. A property owner intending to divide land through a land use process shall submit detailed plans for City review and approval. The site plan and service request shall be evaluated based upon the demand flow, base capacity and development sizing

requirements. The plan approval process shall note the property owner's financial obligation to meet demand flow requirements.

NBMC 13.12.040 Building sewer connection--Site plan.

When a property owner applies to connect into an existing sewer stub-out they shall supply information about the location and elevations of the building sewer connection points at the building foundation. The building site plan shall note the location of the building sewer line, methods of connection and proposed material applications including bedding and backfilling. The property owner shall provide the City with "As Built Construction Drawings" upon completion of the project or particular job.

NBMC 13.12.050 Call for inspection.

It shall be the property owner's responsibility to request a sewer hookup inspection prior to connection and/or backfilling of ditches. Failure to request and obtain on-site inspection prior to backfilling shall be a basis for denying a certificate of occupancy for a structure requiring sewer service. The Building Official shall deny the certificate of occupancy until compliance is assured. The Building Official has the authority to insure that proper inspections are carried out prior to use of the system to include requiring the owner to uncover any sewer line or connection point backfilled or covered prior to final inspection.

NBMC 13.12.140 Sewer connection fee--Levied and imposed.

A. A property owner will be charged a connection fee for connecting their property into the City's sanitary sewer system. The fee is based upon the existing or intended use of the property at the time the application is made for connection.

B. Properties served by pumping units shall be subject to the sewer connection fee. The City Council may determine to impose other charges for properties reliant on these types of systems.

NBMC 13.12.195 Inspectors-Powers and authority--Authorized.

A. City employees may enter private property connected to the City's sewer or water systems with the Owner's permission, according to directives found in documents, and/or court authorization for the purposes of inspection, observation, measurement, sampling and testing in accordance with the provisions of this chapter.

B. City employees shall limit their inspections and inquires to those concerns relating to the City's sanitary sewer or water systems.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Brief of Appellant*** in Court of Appeals, Division II Cause No. 61063-9-II to the following parties:

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

DATED: October 3, 2025 at Seattle, Washington.

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