Supreme Court No. 93189-5
Court of Appeals No. 46095-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DOUGLAS VERDIER and TODD VERDIER,

Appellants,

vs.

GREGORY BOST AND LAURIE BOST,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Defendants/Respondents Gregory and Laurie Bost submit the following answer to the petition for review that was filed by plaintiff Douglas Verdier and counterclaim defendant Todd Verdier (hereinafter "Verdier").

The petition for review should be denied. This case presents a narrow issue regarding the effect of a proper amendment of a pleading. No issue of substantial public interest is presented. The decisions by the trial court and the Court of Appeals are not in conflict with any other decisions of this Court or the Court of Appeals. The trial court properly denied Verdier's motions to strike or dismiss because the Bosts rendered the issue moot by amending their counterclaims so as to eliminate the allegations that were at issue with those motions. (CP 43-44).

A. The Courts' Decisions Do Not Conflict With Any Other Reported Decision.

Verdier asserts many false "conflicts" to make the argument that the decision at issue conflicts with other reported decisions. This argument does not withstand scrutiny.

It is beyond question that the Bosts were within their rights to file the amended counterclaims, and that leave of court was not required for them to do so. Verdier had not filed replies to the counterclaims at the

time the amended counterclaims were filed. Instead, they had filed special motions to strike or dismiss under RCW Ch. 4.24.

Such motions are not responsive pleadings. CR 15(a) provides that a party may amend his pleading as a matter of course if it is one for which a responsive pleading is required and no responsive pleading has been filed. This Court has made clear what constitutes a responsive pleading. *See Lybbert v. Grant County*, 141 Wn.2d 29, 43 (2000):

> To the degree the dissent suggests that a notice of appearance is the functional equivalent of an answer or other responsive pleading, we disagree....The rules are quite clear as to what constitutes a pleading. *See* CR 7(a) (A pleading is one of the following: a complaint, *an answer*, a reply to a counterclaim, an answer to a crossclaim, a third party complaint, and a third party answer). Absent from this list is a notice of appearance. (Emphasis by court.)

Similarly absent from the list is a motion to strike. Perhaps that is why Verdier has never raised the argument that the Bosts were required to obtain leave of court to file the amended counterclaims until they filed this petition for review. That argument should therefore be deemed waived.

Verdier is also unable to cite any authority for the novel proposition that amending one's counterclaims is the equivalent of a voluntary nonsuit, rendering Verdier the prevailing party. That is because there is no such authority. It is well-established

that filing an amended pleading simply renders the prior pleading inoperative. *See, e.g., Fluke Capital & Mgmt. Co. v. Richmond*, 106 Wn.2d 614, 619 n.4 (1986). There was no decision on the merits regarding the omitted allegations, so it is impossible for Verdier to have "prevailed."

None of the decisions cited by Verdier support the conclusion that the Court of Appeals' decision was in conflict with any other reported decision. To the contrary, the decision was in harmony with the Court of Appeals' decision in *Henne v. City of Yakima*, 177 Wn. App. 583 (2013). This Court declined to consider the mootness issue when it decided *Henne v. City of Yakima*, 182 Wn.2d 447 (2015). The current state of the law is as held by the Court of Appeals in *Henne*, and both the decisions of the trial court and the Court of Appeals in this case are consistent with *Henne*.

B. This Case Presents No Issues of Substantial Public Interest.

This case presents the narrow issue of whether an anti-SLAPP motion to strike is rendered moot when the opposing party amends its pleadings so as to eliminate the allegations at issue. In this case the amendment was done as a matter of course because Verdier had not filed a

responsive pleading to the Bosts' counterclaims. Had a responsive pleading been filed, the Bosts would have had to obtain leave of court in order to amend their counterclaims. Rather than presenting an issue of substantial public interest, litigants can avoid this factual scenario by simply filing a responsive pending before filing a motion to strike.

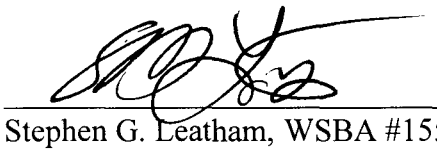
While this issue may be of interest to litigators who seek a financial windfall via anti-SLAPP motions, it is not an issue in which the public can reasonably be expected to have any interest whatsoever.

II. CONCLUSION

The merits of this lawsuit have been placed on hold for over two years by Verdiers' attempt to make a superseded pleading a vehicle for an anti-SLAPP monetary award. The Court should deny Verdiers' petition for review and allow this case to at long last be litigated on the merits.

DATED this 21 day of June, 2016.

HEURLIN, POTTER, JAHN, LEATHAM, HOLTMANN & STOKER, P.S.



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CERTIFICATE OF SERVICE

I certify that I caused the foregoing ANSWER TO PETITION FOR REVIEW to be served on the following:

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