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**COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I**

TODD HUSO and SUSAN HUSO, a
married couple,

Appellants.

vs.

PHOENIX DEVELOPMENT, INC.,
a Washington Corporation, and the
CITY OF WOODINVILLE, a
municipal corporation,

Respondents.

NO. 632426

APPELLANTS' REPLY BRIEF

SPENCER LAW OFFICES PLLC
Paul A. Spencer, WSBA 19511
11100 NE 8th Street, Suite 350
Bellevue, Washington 98004
206/464-1001

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I. REPLY

Appellants' offer this brief in Reply to Respondents' consolidated Response Brief.

A. Factual Clarifications and Reply.

Much of Respondents' response attempts to paint the picture for the Court that Appellants' were plotting all along to delay the case for consideration by (1) failing to advise the Court and Respondents' that they were looking for counsel; (2) delaying to harass the Respondents'; and (3) causing delay to increase Respondents' costs and expenses.

1. Appellants' purported failure to advise the Court and Respondents' that they were seeking counsel. Respondents' argue that Appellants' did not tell anyone or "take action of record" advising the Court that they were seeking counsel. (Respondents' Brief at p.12) The inference of course Respondents' are seeking is that Appellants' were not actually attempting to retain counsel. First, Respondents' argument makes little sense as the Appellants' did ultimately locate counsel.

Second, Appellants' are unaware of any requirement or authority that a pro-se party must advise the opposition or the Court that they are seeking counsel. Third, perhaps more importantly, there is no mechanism in the Court rules or otherwise that Appellants' could have utilized to

so advise the Court.

2. Appellants' purported attempt to delay the case to the prejudice of Respondents' is not supported. Respondents' go to great lengths in their brief to attempt to paint a picture that Appellants' purported goal was to delay consideration of the case to harass and cause needless expense. However, the record does not support such an argument or a motive. To the contrary, it appears that it is the Appellants' who were the victims of a number of mishaps from an administration standpoint. Some history is required.

First, the Trial Court's Order entered in October of 2008 expressly denies Respondent's Motion for Summary Judgment and at the same time recognizes Appellants' entitlement to additional discovery which required a continuance of the trial date.(CP 458-459) The aforementioned Order required the parties to submit dates for the depositions of any remaining witnesses.(CP 459) Appellants' complied with the Order.

Shortly thereafter, Appellants' attempted to note up the deponents they timely identified.(CP 465) From the record, it appears a rather lengthy course of correspondence was exchanged between Respondents' counsel and Appellants' relating to the adequacy of the notices. Ultimately, Appellants' filed their first motion to compel and to extend

discovery cutoff on November 26th 2008. (CP 464-504) The motion was noted for consideration by the Court on December 9th 2008 without oral argument. CP 546-547.

A typographical error was discovered on one of the pleadings. Therefore Appellants' Motion to Compel was re-filed on December 1st 2008 for consideration on December 9th .(CP512-545)

On December 12th a second Motion to Compel was filed by Appellants' with respect to third-party depositions. CP 610-643. The motion was noted for consideration by the Court for December 23, 2008. (CP608-609) Responses were filed to the above motions by Respondents' and the parties waited. Both of the above motions were noted before the Honorable Monica Benton. Inexplicably, no ruling or explanation came from the Trial Court and time continued to pass and the February trial date set by Judge Benton in October of 2008 loomed.

On January 22nd 2009 after receiving no word from the Court on either of their prior motions (and trial less than a month away), Appellants' filed and served on Respondents' a Motion to Continue the trial based upon not receiving any response to their discovery motions filed in December of 2008. CP 748-1038. The Motion was noted for consideration by the Court on January 30th 2009. Responses were

received from both Respondents'. CP 695-699; CP 700-705.

While Appellants' motion was pending, the newly assigned Trial Judge ruled on Appellants' second motion to compel, denying it based in part upon the meet and confer requirements under KCLR 37. CP 689-690. At the same time, the Court issued a 2nd Order Continuing the Trial Date and extending several case schedule deadlines. CP 691-692. The case was continued under the Order due to the Trial Court's unavailability. (CP 691) This ruling came 1 day shy of 7 weeks from when the Appellants' first motion to compel was noted. The latter ruling included a new case schedule setting abrupt deadlines in light of the brief 28 day continuance.

At this point, Appellants' were unsure as to what the Trial Court had done with their recent motion for a continuance which was noted for January 30th. As Appellants' waited for the Court's ruling on this motion, they continued their efforts to retain counsel. At the same time, Respondents' seized the narrow window and filed new Motions for Summary Judgment. CP1043-1060; CP 1061-1109.¹ Respondents' did so despite the fact that both had previously filed motions for summary judgment that had been denied.

¹ The dispositive motion deadline had already passed under the two prior case schedules issued in the case.

After numerous attempts by Appellants' to contact the Trial Court and ascertain the status of the January 30th Motion for a continuance, on February 20th 2009 the Trial Court held a telephonic hearing and denied Appellants' motion. CP 1110-1111. As indicated in this Order, Appellants' had finally found counsel willing to represent them, if a continuance could be obtained, as their potential counsel had a conflict with the scheduled trial date. Respondents' both opposed the continuance.

Following the Trial Court's denial, and because Appellants' could not locate counsel who could represent them with the then current trial date (at that point roughly one month prior to trial), Appellants' filed their Motion for a Voluntary Non-suit, noting it without oral argument for March 2, 2009. CP 1112-1113. Respondents' requested oral argument and the motion was moved for consideration on March 4th 2009.

Appellant Susan Huso filed a Declaration in Support of the Motion for Non-suit that delineates the reasoning and the history behind the predicament that Appellants' found themselves in. CP 1172-1175. As this declaration makes clear, the motion was not filed out of any ill will or to harass or burden anyone. CP 1174. To the contrary, if Appellants' had simply wanted to cause delay and expense, they could have non-suited the case rather than request the brief continuance they had requested to

accommodate their new counsel's schedule.

3. Respondents' made no showing that they would have been prejudiced by the brief continuance requested. Against the clear administrative issues and delay experienced by the Appellants', which were caused in no part by their own efforts, Respondents' demanded the case go to trial in March 2009. At the same time, Respondents' made no showing that the brief continuance would cause any prejudice to them.

Respondents' contend that they were effectively ready for trial, and that having to prepare again would involve duplication of time and effort. However, Appellants' Motion was filed over a month prior to the scheduled trial date. Appellants' could have waited, instead they immediately brought their motion for nonsuit before the Trial Court.

B. The Appellants' Trial Continuance Request was supported by extraordinary circumstances. With the above history in mind, it is clear that the Trial Court abused its discretion in denying the requested continuance. The record before the Trial Court indicated that multiple motions had been filed by Appellants' to compel Defendants and third parties to participate in depositions and to extend the discovery cutoff. The Trial Court inexplicably took 7 weeks to rule on Appellants' first motion and over a month to rule on the 2nd motion, both decisions coming

after the discovery cutoff had passed under the prior case schedule and less than a month before the then scheduled trial date.

When Appellants' contacted the Trial Court, they were advised that the Court had sustained a hard drive failure of some sort. CP 1173. Notably, the area had severe weather at or around this time as well. Finally, it appears that in large part the motions fell through the cracks when there had been a change in the Trial Judge Assignment. All of these factors clearly led to the delay – and none of these issues were caused in whole or in part by Appellants'.

It is difficult to conceive of a set of more extraordinary circumstances that would justify the brief continuance requested. Respondents' argue that because the Trial Court ultimately denied these motions, it simply did not matter. (Respondents' Response at p. 17) However, had the Trial Court timely ruled on or about the dates each of the motions were noted, Appellants' could have solved the deficiencies in noting the depositions or the deficiencies associated with their motions to compel. Because of the Trial Court's delay and the clerk's office mishaps, neither option was available at the point that the decision was ultimately made.

Respondents' also repeatedly argue that conduct in noting

depositions and conducting discovery was harassment – yet the record is void of any motion on Respondents’ part for a protective order.

The Trial Court did enter summary findings (See CP 1192-1195) finding that “plaintiffs engaged in abusive, harassing and oppressive activity, insulting the City’s representatives and officials, and seeking to abuse the discovery process by noting depositions....” (CP 1193) There simply was not any evidence to support this “finding”. Again, if indeed such conduct was taking place, why didn’t the Respondents’ file a motion for a protective order – rather than just not showing up for depositions.

The Court also entered a finding that Appellants’ motion was filed “for the purpose of causing unnecessary delay and needless increase in the cost of litigation” (See CP 1194). The Trial Court specifically struck Respondents’ proposed language in their order that the motion was somehow “improper” or some form of “harassment”. In short, the finding simply states that further delay was in the Trial Court’s view unnecessary and would cause a needless increase in cost of the litigation.

Appellants’ for the numerous reasons identified above believe that this finding is also not supported.

Respondent’s argue that the denial was literally mandated by State Policy in favor of expeditious review of land use decisions.(See

Respondents' Brief at p.18) However, none of the cases cited by Respondents' support the position that a 120 day continuance would be an unreasonable delay. Moreover, if Respondents' had truly been in a hurry to complete the trial, why didn't they move earlier in the case for an expedited trial date ?

In this case, the Trial Court did abuse its discretion in denying the requested continuance because it failed to factor in both its own delay on ruling on Appellants' Motions relating to discovery and the Clerk's office mishandling these motions. Further, under the circumstances where no showing of prejudice had been made for the brief continuance requested, it was not reasonable and was in fact an arbitrary decision.

C. The Trial Court Abused its discretion in denying the Appellants' request that their claims be dismissed without prejudice.

All parties seem to agree that this Court's decision in Escude v. King County Public Hospital District, 117 Wn.App. 183, 69 P.3d 895 (2003) sets forth the appropriate standard for a CR 41 (a)(1)(B) motion.

1. The existence of a pending trial date did not create any presumption of undue prejudice to Respondents'. Respondents' argue throughout their response [as they did to the Trial Court] that they were ready to go to trial at the time the Court considered Appellants' motion

and therefore they would be substantially prejudiced (both in time and cost) if the case were dismissed without prejudice.

If this Court were to accept Respondents' argument and the Trial Court's reasoning, then a claimant would always be precluded from dismissing their claims without prejudice at or just prior to trial. However, CR 41 (a)(1)(B) expressly states that a claimant may dismiss a claim at any time before they rest their opening case. The rule clearly contemplates that a Plaintiff may dismiss his or her action even during a pending trial. Moreover, the rule doesn't imply that the claim should be presumptively dismissed *with prejudice* at that point. Rather, the presumption works the other way – the dismissal is presumed to be *without prejudice* unless otherwise stated.

Notably, Respondents' cite Spokane County v. Specialty Auto and Truck Painting, 153 Wn.2d 238, 103 P.3d 792 (2004) and CR 1 for the proposition that Washington Court's should interpret the Court Rules to advance the underlying purpose of these rules which is to reach a just determination in every action – and that the rules are intended to allow the Court to reach the merits of an action ... whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form. (See Respondents' Brief at p.22; Spokane County at p. 245)

Such a rule of construction works directly against a dismissal with prejudice in the case at bar.

In Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009) the Trial Court dismissed claims without prejudice under a CR 41(a)(1)(B) motion brought on the first day of trial. The decision was upheld on Appeal. The Wachovia Court stated “a voluntary dismissal leaves the parties as if the action had never been brought.” Wachovia at p. 492 citing Beckman v. Wilcox, 96 Wn.App. 355,359, 979 P.2d. 890 (1999).

In short, simply because the scheduled trial date in the case at bar was a month away, did not in and of itself result in prejudice to the Respondents’. Further, taking into consideration the policy mandate of CR 1 as set out in the Spokane County decision, the Trial Court erred in dismissing the action with prejudice as the case has not been decided on its merits.

2. Respondents’ reliance on the Grover and Dietz decisions is not supported. Respondents’ state that Escude cites with approval Grover v. Eli Lilly & Co. 33 F.3d 716 (6th Cir. 1994) for the proposition that the primary purpose of CR 41(a)(2) is to protect the non-moving party from unfair treatment. (See Respondents’ Brief at p. 20). However, the

only mention of the Grover decision in Escude is in footnote No. 5 at p. 191 wherein the Escude Court states:

See Grover ex rel. Grover v. Eli Lilly & Co., 33 F.3d 716 (6th Cir. 1994) (voluntary dismissal should be with prejudice where claims not viable under state law)

Contrary to Respondents' contention, the Escude decision sites Grover in support of the viable claim component.

Similarly, Respondents' cite Farmers Insurance Exchange v. Dietz, 121 Wn.App. 97, 87 P.3d 769 (2004) as supporting their position that dismissal was warranted with prejudice due to the expense that a subsequent action would result in. Notably, the Dietz decision involved the timing/filing of counterclaim and dismissal under CR 41(a) (3), which is clearly not at issue in the case at bar. However, as stated in Dietz at p. 106:

We start with the premise that the mere prospect of a second lawsuit does not constitute the type of prejudice with which the rule is concerned.

The Dietz Court goes on to reference in Footnote No.24 "[T]he mere fact that added legal expenses will be incurred if a suit is reinstated is not a sufficient ground for denial of a motion to dismiss without prejudice." Citing Tyco Labs, Inc. v. Koppers Co., 82 F.R.D. 466,468, 27 Fed. R. Serv.2d 906 (E.D. Wis 1979)

Lastly, Respondents' cite Spokane County v. Specialty Auto and Truck Painting, Inc., 153 Wn.2d 238, 103 P.3d 792 (2004) in support of a

basic policy argument that CR 41 (a) is intended to protect defendants. However, the issue involved in the Spokane County case involved the policy basis for granting or denying a Defendant's motion to dismiss a Plaintiff's claim that had twice been dismissed before. The Spokane County case involved CR 41(a)(4) which addresses the two dismissal rule.

3. Respondents' contention that CR 41 (d) is inadequate is not supported. As indicated in Appellants' opening brief, CR 41(d) provides a mechanism to Defendants like the Respondents' in this case that are concerned over a subsequent action duplicating costs. This rule expressly gives the Trial Court in a subsequent action, the ability to shift such duplicate costs back to the Plaintiff. Appellants' recognize that this rule doesn't provide for reimbursement of attorneys fees. However, if the Court were to adopt the Respondents' contention, every case that was actively being litigated that resulted in a CR 41 motion would have to be dismissed with prejudice. Such an interpretation is not consistent with the rule itself and the prior decision reached relating to the rule such as Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009).

4. Claims are viable. Respondents' accurately state that the standard of review for the decision at issue is properly set out in

Escude v. King County Public Hospital District No.2, 117 Wn.App. 183,187, 69 P.3d 895 (2003).

A trial court's discretion under CR 41(a)(4) to order a dismissal with prejudice should only be exercised in limited circumstances where dismissal without prejudice would be pointless.

Respondents' argue that this standard should not apply to the instance case because of prior requests for Trial Continuances. Respondents' point out to the Court that no such circumstances were before the Court in Escude.(See Response at p.25) We do not know how proximate the case was to trial in Escude, but we do know that the only relevant issues considered by this Court were the viability of each of the underlying claims.

(a) Claims for Declaratory Relief are subject to a six year statute of limitations. As set out in Escude, a Trial Court abuses its discretion in dismissing a claim with prejudice unless to do so without prejudice would be pointless.Escude, at p. 187. In Escude, the Court upheld the dismissal with prejudice of the claims below because the only claims that had been dismissed below would otherwise have been subsequently barred by statutes of limitation that had passed or were about to pass. Escude at p.191-192.

In the case at bar, the parties disagree over the applicable statute of

limitations that applies to Appellants' claims for Declaratory Relief relating to the Dedication of the roadway at issue. Respondents' argue that Appellants' claim is subject to the two year catch-all statute of limitations set out in RCW 4.16.130. Respondents' offer no authority to support this position.

Respondents' also argue that the decision as to whether or not the roadway at issue was dedicated was an administrative decision – and that the most analogous “appeal period” would be that found under LUPA requiring an appeal be made within 21 days of the decision. However, the question of whether the roadway at issue was a dedicated right of way dates back many years. The roadway was either dedicated and is therefore a public right of way or it is not. If so dedicated, then it is undisputed that Respondents' would have to comply with the process of vacating the dedicated roadway. The Woodinville City Counsel did not make this administrative decision in 2007 or otherwise, the decision was made many years prior thereto.

The underlying issue involves the dedication and use of a roadway. RCW 4.16.040 expressly states that a six year statute of limitations applies to claims relating to “....the use and occupation of real estate”. The very essence of Appellants' claims relates to the use and occupation of the right

of way at issue and clearly falls under this statute. Accordingly, Appellants' claims for Declaratory Relief are not subject to either a 21 day or two year period of limitations. Rather, the six year statute of limitations set out in RCW 4.16.040 applies and Appellants' declaratory claims are still viable.

(b) Respondents' do not contest that Appellants' Claims for prescriptive rights is viable. Appellants' other primary cause of action relates to their personal use of the roadway in question for in excess of twelve years satisfying the prescriptive period. Respondents' admit in their response that this claim is not time barred and would be viable.(See Respondents' Brief at footnote #3 p. 26)

5. Respondents' Pending Motion for Summary Judgment should not impact whether the dismissal of Appellants' claims was with or without prejudice. Respondents' argue that because they had filed motions for summary judgment [that had not been argued], the dismissal should have been with prejudice. However, as this Court held in Morris v. Swedish Health Services, 148 Wn.2d 771,777, 200 P.3d 261 (2009) a Plaintiff has a right to a voluntary nonsuit until a summary judgment motion has been submitted to the court for actual determination. The result of a voluntary nonsuit is to "render the proceedings a nullity

and leaving the parties as if the action had never been brought”. Morris, at p. 777.

In this case, Appellants’ had viable claims and acted reasonably and rationally attempting to steer this matter to trial. Through no fault of their own, they were placed in an extremely difficult predicament and in light of the Court’s unwillingness to continue the action despite the extraordinary circumstances, they were left no alternative but to nonsuit the case. It would be extremely inequitable to deny them the right to re-file this action and have it determined on its merits.

C. No CR 11 sanctions were requested nor were any granted by the Trial Court. Respondents’ argue that they are entitled to reasonable attorneys fees on appeal pursuant to CR 11 and RAP 18.1. First, there was no motion for sanctions against Appellants’ nor against Appellants’ Counsel before the Trial Court in the case at bar. Had any such motion been brought it would have been vigorously opposed. Therefore, there is no issue before this Court relating to CR 11 sanctions.

Respondents’ cite Steinberg v. Rettman, 54 Wn.App. 841, 776 P.2d. 695 (1989). However, the Steinber case is inapplicable. Steinberg directly and explicitly involved CR 11 sanctions issued by the trial court and the appeal of those sanctions. In this case, there was no motion

brought for sanctions and no ruling entered by the Trial Court on this issue.

Second, although not argued, Respondents' attorneys attempted to insert language into the Trial Court's Order that would have effectively given Respondents' a basis to attempt to impose sanctions. The Trial Court expressly declined to adopt this language related to CR 11 as proposed. (CP 1194) Notably, the Respondents' did not take issue with the Trial Court's decision and have not raised the issue on Appeal.

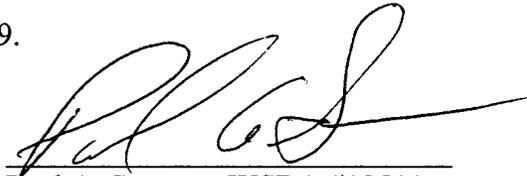
RAP 18.1 requires that a party identify the basis for an award of fees on Appeal. Respondents' have not done so. There was no CR 11 request or award even considered below. Respondents' had ample opportunity to make such a request and declined to do so.

II. CONCLUSION

Appellants' brought the underlying action in order to secure rights to an adjacent roadway that (1) they and their guests and local residents had used for over twelve years, continuously and uninterrupted and (2) that had been expressly set out on multiple maps approved by the Respondent City of Woodinville and recorded with King County. Under this Court's standard adopted in Escude, the Trial Court abused its discretion in denying Appellants' motion for a continuance and in dismissing

Appellants' claims with prejudice when all of Appellants' claims were and are still viable. Accordingly, Appellants' respectfully request this Court reverse the Trial Court's decision dismissing Appellants' claims with prejudice and dismiss Appellants' claims without prejudice.

Dated this 17th day of December 2009.

A handwritten signature in black ink, appearing to read 'P. A. Spencer', written over a horizontal line.

Paul A. Spencer, WSBA #19511
Spencer Law Offices, PLLC
Attorneys for Appellants'
Suite #350, 11100 NE 8th Street
Bellevue, Washington 98004
206-464-1001