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COURT OF APPEALS
STATE OF WASHINGTON
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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' OPENING BRIEF

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

Todd and Susan Huso (“Huso”), assign error to the following decisions of the Trial Court:

1. The Trial Court’s decision of February 20th 2009 denying Appellants’ Motion for a Trial Continuance.
2. The Trial Court’s decision of March 4, 2009 denying Appellants’ Motion for a CR 41(a)(1)(B) non-suit without Prejudice.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Trial Court erred in denying Appellants’ motion for a trial continuance when Appellants’ had filed two separate Motions to Compel Respondents’ and third parties to participate in discovery and the Trial Court, due to a change in trial judge assignment and a computer error, failed to timely rule on said motions. (Assignment of Error No.1)

2. Whether the Trial Court erred in denying Appellants’ CR 41(a)(1)(B) motion for a voluntary non-suit without prejudice, when the Trial Court based its decision on the fact that dismissing the case without prejudice would simply delay the matter, and when the Trial Court failed find that all of Appellants’ claims would not be viable in a subsequent filing, if dismissed without prejudice. (Assignment of Error No.2)

III. STATEMENT OF THE CASE

A. Introduction. Appellants' are owners of real property located in Woodinville, Snohomish County Washington, directly north of the boundary of King County Washington. CP 4-6 ("Appellants' Parcel") Respondent Phoenix Development is the owner of a 16.48 acre parcel ("Respondent's Parcel") of real property located immediately adjacent to the Appellants' parcel. CP22-24 Appellants' contend that Respondent Phoenix Development's Parcel was subdivided into five separate parcels by its predecessor in title in 1976. CP 5 As part of that process, Appellants' contend that a portion of Respondent Phoenix Development's parcel was a Publicly Dedicated Right of Way. CP4-5. It is depicted in the 1976 one-page (plus attached plat map) CCR by standard boilerplate language still in use present time for public street dedications, as well as described by the footnote in the legal description and easement assignments. CP10-11 The content of the page contains approximately 80% language addressing the public road dedication/Right of Way. CP10 The remaining content belongs to the notarized signatures of parties and notary seal. CP 9-15 Respondents' deny that any Public Right of Way Dedication ever occurred. CP24 The publicly dedicated portion of the

Right of Way is generally described as running west to east connecting NE 204th Street doglegging to NE 205th Street along the King Snohomish County border adjoining with 156th Ave NE in King County (75th AVE SE in Snohomish County) – and refers to the Right of Way as NE 204th St. on its Westerly end and NE 205th Street on its easterly end. CP10

Respondent Phoenix Development submitted an application to Respondent City of Woodinville for a sub division to create 66 new residential lots. CP23 Appellants' contend that the application submitted by Respondent Phoenix Development contemplates building residential lots over the publicly dedicated Right of Way. CP5 Respondent Phoenix Development denies Appellants' claim that any Right of Way was ever dedicated. CP24

Appellants' use of the Right of Way in question has been continuous since they purchased their primary residence in 1996. CP253-271. Appellants have a shop on the rear portion of their property which is accessed over the Right of Way in question and has been so accessed since 1996. CP255. Appellants' usage of the Right of Way was well documented early on for the Trial Court and included transportation of building materials, landscaping materials, recreational structures as well as recreational usage. CP255 Appellants and their family and guests

regularly used the Right of Way in question for work and social events a number of which were depicted in photographs offered by Appellants'.CP 253-271.

B. Procedural History. Appellants' filed the underlying action against Respondent Phoenix Development on May 16, 2007, seeking declaratory and injunctive relief effectively establishing the Right of Way and to prohibit Respondent Phoenix Development from developing building lots in the Right of Way.CP1-15 In its answer, Respondent Phoenix Development admitted that it had not made any attempt to vacate the alleged Right of Way, rather, Respondent contended that no Right of Way had ever been dedicated to the City. CP 24

1. Respondent Phoenix Development's Motions for Summary Judgment. In July of 2007, Respondent Phoenix Development filed its first motion for Summary Judgment of dismissal on procedural grounds – contending five separate grounds existed to dismiss Appellants' action.CP26-40 Respondent Phoenix Development later filed a second Motion for Summary Judgment on substantive grounds.CP208-223 Respondent Phoenix Development contended in the latter motion that no genuine issue of material fact existed – there had been no dedication as a matter of law. CP208-209. While Respondent Phoenix Development's

Motions were pending, Appellants moved to Amend their Complaint to add a claim for Prescriptive Rights for use of the roadway in question.CP278-289

On February 29, 2008, the Trial Court granted Appellants' motion to Amend their complaint to add the prescriptive claim.CP299-300; CP 306. On the same dated, the Trial Court denied both of Respondent Phoenix Development's motions.CP301-302;CP303-304 However, the Trial Court required Appellants' to join Respondent City of Woodinville to the action.CP304

2. Appellants Amended Complaint. Appellants' filed their First Amended Complaint for Declaratory Judgment and Injunctive Relief on June 4, 2008.CP307-321 The Amended Complaint included amongst other causes of action, the claim for Declaratory Relief on the Public Right of Way as well as a claim in the alternative for Prescriptive Rights.CP311-312 Respondents' both answered Appellants' Amended Complaint, however, neither respondent asserted any counterclaim. CP 322-328;CP 329-334

3. Respondent City of Woodinville's Motion for Summary Judgment and Continuance of Trial Date. On September 3rd 2008, Respondent City of Woodinville filed its first Motion for Summary

Judgment.CP335-350 The Respondent City's Motion sought a determination as a matter of law that the roadway in question was not dedicated as part of the original plat approval.CP335 Respondent Phoenix Development joined in the aforementioned motion[effectively bringing its third motion for summary judgment]CP351-352 In partial response to the Respondents' motions, Appellants' filed a motion to conduct depositions and to briefly continue the then scheduled trial date so that the depositions of several key witnesses for the Respondent City of Woodinville could be taken.CP411-415

On October 3rd, 2008, the Trial Court heard argument on the Respondents' motions for Summary Judgment of Dismissal and on Appellants' motion for Discovery and to continue the trial date.CP458 On October 16, 2008, the Trial Court denied Respondents' Motions for Summary Judgment.CP458-459. In the same Order, the Trial Court granted Appellants' request for discovery and continued the trial date from October of 2008 until February 23rd 2009.CP 459

Between the date of the oral argument on the Respondents' Summary Judgment motions and the actual decision, Appellants' then counsel filed a Motion to Withdraw. CP 445-448 On October 16th 2008 the Trial Court granted counsel's motion.CP460-461 Thereafter,

Appellants' searched for replacement counsel and attempted to pursue the discovery which had been authorized by the Court – and which led them subsequently to filing several motions to compel Respondents to participate in the Court ordered discovery.CP 1172-1175; CP 458-459.

4. Appellants' Discovery Issues. Between October of 2008 and January of 2009, Appellants (now representing themselves pro se) encountered significant issues in discovery that had been previously authorized by the Trial Court. On November 26, 2008, Appellants filed a Motion to Compel Depositions and/or Bench Order Depositions and Extend Discovery Deadline.CP464 The Motion was re-filed on December 1st 2008, and noted for consideration by the Court on December 9th 2008 CP512 -545 before the then assigned Judge Monica Benton.CP546-547 At the same time the case was in the process of being transferred to Judge Barbara Mack.CP462-463 The transfer was not effective until January 12, 2009. CP462. During that time inclement weather in the form of severe snow put unusual stress on the entire area, including the courthouse during the month of December 2008.CP752.

A second Motion to Compel was filed on December 12, 2008, relating to other subpoenas issued in discovery.CP610-643 The second Motion was noted for consideration by the Court on December 23rd

2008.CP608-609.

Unfortunately, Judge Benton never ruled on the aforementioned motions and the Clerk's office advised Appellants that their motions (or portions of them) had been lost/misplaced by the Court in part by a computer failure.CP1173 This was discovered by Appellants who alerted the court on January 22, 2009. Immediately Appellants' drafted and served on all parties a Motion for Continuance due to the Court not timely ruling on their prior motions- the motion was noted for consideration by the Trial Court on January 30th 2009.CP748 Appellants' requested a 120 day continuance of the then scheduled trial date (ie. February 23, 2009)CP754 The Motion was misplaced until January 29th. CP 748 However, Respondents' clearly received the motion on the 22nd because both Respondents responded to the motion on January 28th 2009.CP 695; CP700

In the meantime, the Trial Court apparently discovered through Ms. Huso's inquiry that Appellants' motions had not been ruled upon, and on January 26th 2009 – the Court filed its decision continuing the trial date 30 days [until March 23rd] and re-adjusting the case schedule. CP 691-692 At the same time, the Court issued an Order denying Appellants motions to compel for failing to comply with KCLR 37 and on other grounds.CP

693-694

After the dispositive motion deadline had expired (or was set to expire) under two prior case schedules (CP18 & CP456-457) , on February 5th 2009 Respondent Phoenix Development filed its fourth Motion for Summary Judgment.CP1039-1040; CP1043-1060 Respondent City of Woodinville filed on the same date its second motion for Summary Judgment.CP1061-1109 When it was called to the attention of the Trial Court that the Court had not timely ruled on Appellants' request for a continuance filed in January 2009 (CP 748) – the Court on February 20th 2009 denied the requested continuance.CP 110-1111

C. Appellants' Motion for Non-suit and the Trial Court's

Dismissal With Prejudice. Appellants' had been actively seeking counsel and finally located counsel who could represent them, however he had a direct conflict with the March 23rd trial date.CP 1172-1175;CP 1176-1180; Nonetheless, as indicated above, the trial Court was unwilling to continue the trial to accommodate the appearance and schedule of new counsel. On February 20, 2009 Appellants' counsel, following the filing of a Limited Notice of Appearance, filed a Motion for a Voluntary Nonsuit.CP1112-1113;CP 1114-1120 The motion was originally noted without oral argument for March 2nd 2009. CP 1112

Respondents' objected to Appellants' request that the dismissal be without prejudice.CP1126-1166;CP1167-1171 Respondents' further requested that the Court take oral argument on the motion. Subsequently, on March 4th 2009, the Trial Court took oral argument on Appellants' Motion for Non suit without prejudice and granted Appellants' Motion to take the non suit, but denied the portion of the motion with respect to the nonsuit/dismissal being without prejudice, instead dismissing the Appellants' claims with prejudice.RP 22; CP 1188 The basis for the Trial Court's decision was related solely to the Trial Court's perception that Appellants only reason for bringing the motion was delay of the underlying case. RP23

The Trial Court stated the following:

This case has been going on for a long time.
Plaintiffs' were ready to go to trial, everybody
was ready to go to trial apparently last fall.RP 23

The Trial Court did not make any findings that Appellants' claims would otherwise be pointless if dismissed without prejudice.RP23-24 This appeal ensued.CP1190-1197

IV. ARGUMENT

A. The Trial Court erred in denying Appellants' Motion for a Voluntary Non Suit Without Prejudice.

Appellants' found themselves a little over one month away from trial with counsel who could represent them if the trial date could be continued for a brief period of time. Due to inclement weather, changes in the Trial judge and errors on the part of the Clerk's office, it took the court almost two months to rule on Appellants' discovery motions. Nonetheless, the Trial Court would not continue the case to allow counsel to participate. Consequently, Appellants' were left with only two options: they could attempt to try the case themselves and risk losing significant legal rights that they were entitled to due to the fact that they were not equipped to try their own case; or Appellants' could take a non-suit under CR 41(a)(1)(B) and re-file the action with new counsel. Appellants opted for the latter alternative believing that they would and should receive the dismissal without prejudice to re-filing.

Instead, the Trial Court denied Appellants' request for dismissal without prejudice. The Trial Court did so based upon the Respondents' argument that a non-suit would result in needless delay.RP23. The Trial Court found that "Plaintiffs [Appellants] were ready to go to trial,

everybody was ready to go to trial apparently last fall.” RP23.

1. The Trial Court’s decision is not supported by the record. As indicated above, it appears the primary basis for the Trial Court’s decision was its assumption that everyone was ready for trial in the fall of 2008. However, the record is clear that this was not the case. Appellants’ had moved for and obtained a continuance of the case to allow them to conduct discovery which the respondents were actively circumventing. CP 458-459. Further, Appellants were actively trying to locate new counsel. CP 1172-1173. At the same time, as the Appellants’ were trying to navigate a contentious discovery process with Respondents’ counsels that resulted in them filing multiple motions to compel.

In short, it was very clear that Appellants’ were not ready for trial in the fall of 2008 nor the spring of 2009 for that matter. Appellants’ did finally locate counsel, who was able to handle the case in late spring of 2009, however both respondents’ opposed the continuance and the Court was not willing to grant Appellants’ any additional time.

Ironically, both Respondents then argued as their centerpiece argument in response to the non-suit issue “delay”. Had the Respondents simply agreed to the 120 day continuance – there would not have been any significant “delay” but they would have had to produce the requested

discovery that has yet been complied with in this case. In essence, Respondents created their own argument of delay in opposing Appellants' request for the brief continuance. Moreover, obviously, any claim that is brought and dismissed under CR 41(a) – and then re-filed will result in a “delay” under the very essence of the rule. However, delay is not the determining factor in a CR 41(a)(1)(B) motion.

2. The Trial Court's decision is subject to an abuse of discretion standard of review. The Trial Court's decision is subject to review by this Court under an abuse of discretion standard of review. Escude v. King County Public Hospital District No. 2, 117 Wn.App.183,190, 69 P.3d 895 (2003). “Abuse occurs when the ruling is manifestly unreasonable or discretion was exercised on untenable grounds.” Escude, at p. 190. This Court stated in Escude at the outset of its decision:

A trial court's discretion under CR 41(a)(4) to order dismissal with prejudice should only be exercised in limited circumstances where dismissal without prejudice would be pointless. Escude at. p. 187.

3. Appellants' had an absolute right to dismissal of their claims under CR 41(a)(1)(B) . CR 41(a)(1)(B) provides that a Plaintiff has an absolute right to dismiss his/her own action.(See Appendix A) There is no dispute that neither Respondent alleged any counterclaim nor is there any

dispute that Appellants' claims had not been brought and dismissed previously. The only issue raised by Respondents' [and addressed by the Trial Court] was whether the dismissal of Appellants' claims should be with or without prejudice.

4. Appellants' claims should have been dismissed without prejudice under this Court's standard set out in Escude. CR 41(a)(4) provides that a dismissal granted under this rule is without prejudice unless otherwise specified in the Order. In Escude, the plaintiff advanced several claims of medical negligence. Prior to Escude Plaintiff filing her motion under CR 41(a)(1)(B), the Defendants in Escude moved for summary judgment of dismissal. In response to defendants' motion, the Plaintiff in Escude conceded that several of her claims were not viable. Escude, at p.187. The trial court in Escude dismissed all of the claims pursuant to CR 41(a)(1)(B) without prejudice except for the claims that the Escude Plaintiff had conceded in response to the summary judgment motion were not viable, these claims were dismissed with prejudice. Escude, at p. 187 footnote 1. This Court affirmed the trial court in Escude and held:

The Escudes conceded a number of claims in their response to summary judgment and it was only these conceded claims that were dismissed with prejudice in

the case. The trial courts did not err in granting the motions for voluntary nonsuit with prejudice under the facts of these cases. Escude at p. 192.

Notably, the other actions that were consolidated in the Escude case involved claims that were dismissed with prejudice but in each instance the claims were already barred by an applicable statute of limitations. Escude at pgs.189-190

In the case before this court, there was no argument or contention that the Appellants' had conceded anything. To the contrary, there had been multiple motions for summary judgment filed by Respondents prior to the original trial date [October of 2008] each of which had been denied. The case had been hotly contested since its outset.

Second, the Trial Court in this case mentions in its decision a potential statute of limitations issue with respect to one of Appellants' claims, however, the Court made no finding as to the appropriate statute of limitations. Perhaps most importantly, the Trial Court didn't even mention or discuss findings that all of Appellants' claims were not viable in the event of a dismissal without prejudice. As indicated above, the Trial Court's discretion to dismiss claims with prejudice under a CR 41(a)(1)(B) motion is only to be exercised "under limited circumstances where dismissal without prejudice would be pointless". Escude, at p. 187.

5. Appellants' claims are viable if the matter were re-filed. In this case, Appellants' advanced a number of causes of action including but not limited to declaratory relief with respect to the dedication of the road and prescriptive rights [Appellants' had been using the road since they moved in over ten years prior to commencement of the action]. Respondents did not argue, and the Trial Court did not discuss and/or mention, how Appellants' claim for prescriptive rights would be pointless. Further, the parties disagreed as to the appropriate statute of limitations that should be applied to the declaratory relief claim relating to the roadway at issue.

(a) Interpretation of the Short Plat Right of Way Dedication is subject to a six year statute of limitations. The action with respect to the Right of Way Dedication was brought under RCW 7.24. This statute states in pertinent part:

Rights and status under written instruments, statutes, ordinances.

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a

declaration of rights, status or other legal relations thereunder. RCW 7.24.020

The Declaratory Judgment Act (RCW 7.24 et seq) does not contain a period of limitations. In Cary v. Mason County, 132 Wn.App. 495,501, 132 P.3d 157(2006), the Court held that actions under the Declaratory Judgment Act must be brought within a reasonable time.(Citing Brutsche v. City of Kent, 78 Wn.App.370,376, 898 P.2d 319(1995). What constitutes a reasonable time is determined by analogy to the time allowed for an appeal of a similar decision prescribed by statute, rule of court , or other provision.Cary, at p. 501 citing Brutsche, at 376,377. The Cary case involved a challenge by tax payers to a local ordinance adopted by Mason County. The case at bar involved the interpretation of language on a short plat.

The applicable statute of limitations relating to actions under this writing is six years from the date that a differing interpretation occurs: RCW 4.16.040 states in pertinent part:

Actions limited to six years.

The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

.....

(3) An action for the rents and profits or
for the use and occupation of real estate.

There was simply no evidence offered that any period of limitations has run and/or is about to run over the issue surrounding the interpretation of the short plat language when the applicable six year limitation of action period is applied.

(b) Appellants' claim in the alternative to prescriptive rights is not subject to a "period of limitations". Unlike a claim for breach of a written instrument or negligence, claims for prescriptive rights are dependent on extended usage. By their very nature, claims for prescriptive rights don't even accrue until the use has matured after a ten year period. Dunbar v. Heinrich, 95 Wn.2d 20, 22-23, 622 P.2d 812 (1980).

B. CR 41(a) provides the Court a mechanism to regulate costs in a successive action. Implied within the Trial Court's decision is the concept that a subsequent filing of the Appellants' claims may involve increased costs. Respondents' argued in the underlying motion that such increased costs should be a basis to force the dismissal of the claims with prejudice. However, Escude does not support such an argument. Moreover, in the event of a successive filing, the trial Court in that case has the ability to hold Appellants' accountable for costs/expenses if

appropriate. CR 41(d) states:

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The real crux of Respondents' arguments before the Trial Court were that if the action were re-filed they would be forced to re-litigate the issues at great additional expense. In fact, there is little likelihood that this concern would ever come to fruition – there is no reason why the same discovery would not be used and acceptable. However, even if Respondents' argument was potentially a valid concern at some level, under CR 41(a)(4) the rules already have a built in protection for Respondents.

C. The Trial Court erred in denying Appellants' Motion for a trial continuance.

Appellants' also seek review of the Trial Court's decision of February 20th 2009, denying Appellants' motion for a continuance. CP1110-1111. The Trial Court in this case denied Appellants' motion because no extraordinary circumstances had purportedly been shown (CP1111) and because "discovery was complete". In the context of

this decision this Court should consider the following: First, Appellants had lodged two motions to compel (one noted for December 9th and one noted for December 23rd 2008) neither of which was ruled upon until the end of January 2009, due to errors in the Clerk's office as mentioned above. Second, Appellants' had circulated the motion at issue on January 22nd 2009 to counsel (which included the 120 day request for continuance) and it took the Trial Court almost a month to rule on this motion. Third, by the time that the Trial Court finally ruled on Appellants' request for a continuance of 120 days, discovery cutoff was less than two weeks away and the counsel that they located was not going to be able to participate as he was involved in preparing another case for trial.

Simply put, what more extraordinary circumstances could exist then a hard drive failure by the Court and the subsequent misplacement of several motions ? Had these motions been timely considered, Appellants could have resolved the discovery issues prior to cutoff and likely have been in a much better position to retain counsel or try the case.

Instead, it appears that the Trial Court did not factor in the delays caused by the Clerk's office [not Appellants] and denied their motions.

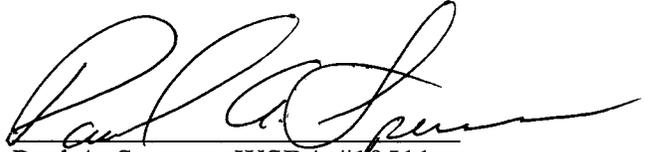
The Civil Rules are not designed to perpetuate such an injustice. CR1 provides that the Civil Rules are to be construed and administered to secure the “just, speedy, and inexpensive determination of every action”. Justice is not served by penalizing the Appellants’ for the Clerk’s office internal failures. Moreover, the very claimed expense of a second action could have easily been avoided had the Court granted the 120 day continuance. The Trial Court’s decision under the circumstances was clearly an abuse of its discretion.

V. 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. They became embroiled in a very contentious case that ultimately led them to request the withdrawal of their attorney and forced them to attempt to briefly continue the case to allow new counsel to come on board. The Trial Court left them no alternative but to take a non-suit or risk losing the case. Unfortunately, the Trial Court did not apply the correct standard when dismissing the matter upon Appellants’ motion. Accordingly, this Court

should reverse the Trial Court's decision with respect to the dismissal and
dismiss Appellants' claims without prejudice.

Dated this 26th day of June 2009.

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

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(e) **Continuances.** A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain; and if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

(f) **Change of Judge.** Any right under RCW 4.12.050 to seek disqualification of a judge will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit is filed with the court no later than thirty days prior to trial before a pre-assigned judge. For purposes of this rule, "trial" includes any review or appeal from an administrative body. If a case is reassigned to a different judge less than forty days prior to trial, a party may then move for a change of judge within ten days of such reassignment, unless the moving party has previously made such a motion.

[Amended effective October 19, 1999.]

RULE 41. DISMISSAL OF ACTIONS

(a) Voluntary Dismissal.

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

(A) By Stipulation. When all parties who have appeared so stipulate in writing; or

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

(2) *Permissive.* After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

(3) *Counterclaim.* If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(4) *Effect.* Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

(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.

(B) *Mailing Notice; Reinstatement.* The clerk shall mail notice of impending dismissal not later than 30 days after the case becomes eligible for dismissal because of inactivity. A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

(C) *Discovery in Process.* The filing of a document indicating that discovery is occurring between the parties shall constitute action of record for purposes of this rule.

(D) *Other Grounds for Dismissal and Reinstatement.* This rule is not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise.

(3) *Defendant's Motion After Plaintiff Rests.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the

plaintiff, the court shall make findings as provided in rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under rule 19, operates as an adjudication upon the merits.

(c) **Dismissal of Counterclaim, Cross Claim, or Third Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of Previously Dismissed Action.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of taxable costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) **Notice of Settlements.** If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court *promptly* of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk. [Amended effective September 1, 1997.]

RULE 42. CONSOLIDATION; SEPARATE TRIALS

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.

RULE 43. TAKING OF TESTIMONY

(a) Testimony.

(1) *Generally.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute.

(2) *Multiple Examinations.* When two or more attorneys are upon the same side trying a case, the attorney conducting the examination of a witness shall continue until the witness is excused from the stand; and all objections and offers of proof made during the examination of such witness shall be made or announced by the attorney who is conducting the examination or cross examination.

(b) and (c) [Reserved. See ER 103 and 611.]

(d) Oaths of Witnesses.

(1) *Administration.* The oaths of all witnesses in the superior court

(A) shall be administered by the judge;

(B) shall be administered to each witness individually; and

(C) the witness shall stand while the oath is administered.

(2) *Applicability.* This rule shall not apply to civil ex parte proceedings or default divorce cases and in such

cases the manner of swearing witnesses shall be as each superior court may prescribe.

(3) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions.

(1) *Generally.* When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(2) *For Injunctions, etc.* On application for injunction or motion to dissolve an injunction or discharge an attachment, or to appoint or discharge a receiver, the notice thereof shall designate the kind of evidence to be introduced on the hearing. If the application is to be heard on affidavits, copies thereof must be served by the moving party upon the adverse party at least 3 days before the hearing. Oral testimony shall not be taken on such hearing unless permission of the court is first obtained and notice of such permission served upon the adverse party at least 3 days before the hearing. This rule shall not be construed as pertaining to applications for restraining orders or for appointment of temporary receivers.

(f) Adverse Party as Witness.

APPENDIX B

RCW 4.16.040

Actions limited to six years.

The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement.

(2) An action upon an account receivable. For purposes of this section, an account receivable is any obligation for payment incurred in the ordinary course of the claimant's business or profession, whether arising from one or more transactions and whether or not earned by performance.

(3) An action for the rents and profits or for the use and occupation of real estate.