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NO. 68804-9-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DIANNE ROMMEL,

Appellant/Plaintiff

vs.

JAMES TORPEY and TONYA HARLIN,

Defendants/Respondents.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
NO. 09-2-33915-5 KNT

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**BRIEF OF RESPONDENTS**

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COURT OF APPEALS, DIVISION I

**ORIGINAL**

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## I. INTRODUCTION

Plaintiff Diane Rommel spent years at the trial court ignoring court rules and refusing to prosecute her case. She had filed suit, claiming a number of violations against her property allegedly perpetrated by Defendants James Torpey and Tanya Harlan. Throughout discovery, however, she utterly failed to present any evidence that these violations actually occurred beyond her own unsubstantiated claims. She also failed to obtain an expert to testify as to what damages, if any, she suffered.

Plaintiff only provided discovery responses when compelled by the trial court. Each time the case was set for trial, she would move to continue it. When the case was set for mediation, on a date Plaintiff had previously agreed, she and her counsel refused to appear even though she was permitted to appear by telephone. The only motions she ever filed were those seeking continuances. In short, Plaintiff spent years obstructing the ability of Defendants to have any resolution on the frivolous claims she made against them. When Plaintiff inevitably moved for her sixth continuance of the trial date, nearly three years after she had filed suit, the trial court finally dismissed her claims for lack of prosecution. It would be error for this Court to find that the trial court abused its discretion in dismissing the frivolous and unsubstantiated claims Ms. Rommel has refused to prosecute.

## II. ISSUES ON APPEAL

1. Should this court uphold the dismissal of Plaintiff's case when she failed to prosecute it for years?
2. Should this Court uphold the dismissal of Plaintiff's case when the trial court's decision to dismiss without prejudice is irrelevant to a determination of whether she failed to prosecute her case?

## III. STATEMENT OF THE CASE ON RESPONSE

### A. **The Plaintiff has refused to prosecute her case.**

Plaintiff Diane Rommel filed this suit in September of 2009. CP 1-9. From the beginning she has refused or been unable to prosecute her claim. The plaintiff moved for continuances on six separate occasions. CP 27-30; 38-45; 80-84; 98-104; 117-20 and 125-128. In each instance, she has proclaimed a need to obtain an expert, or she has claimed that an illness has prevented her from prosecuting her own claim.

When the defendants submitted discovery, the plaintiff refused for months to respond until the defendants filed a motion to compel. Dkt. 8, March 8, 2010 Motion to Compel. Then the plaintiff's prior attorneys used various litigation tactics to try to avoid the hearing rather than simply responding to the discovery. Finally, the plaintiff responded to discovery on or about March, 2010. Yet the responses failed entirely to reveal any expert opinions or set forth the plaintiff's purported damages. Dkt. 51,

August 25, 2011 Declaration of Tyler Firkins at ¶1.<sup>1</sup> Instead, the plaintiff promised to supplement her responses when her experts prepared a report that was supposedly in the works. *Id.* No report was ever been produced. *Id.* Further, the evidence indicates that Ms. Rommel's claims are frivolous. Defendants' counsel reviewed photos of Plaintiff's property from the relevant time period, and it appears that the trees she claims Defendants cut down never actually existed. CP 88.

On October 13, 2011, this Court granted the plaintiff's fifth motion to continue. CP 112-13. The Court expressed significant doubt as to whether the parties would not simply be faced with yet another motion to continue, but reluctantly agreed to continue the case. The Court entered an order that required the plaintiff to participate in mediation on or before February 10, 2012. *Id.*

Previously, during the course of the defendants' depositions taken on July 27, 2011, the parties agreed to participate in mediation as required by KCLR 16. Dkt. 51, Aug. 25 2011 Firkins Dec. at ¶5. The plaintiff was present when the agreement was made and specifically agreed to the date established. *Id.* She was not ill in appearance. Less than 30 days later the mediation occurred on August 23, 2011. *Id.*

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<sup>1</sup> Included in the Supplemental Designation of Clerks Papers filed concurrently herewith.

On the agreed upon date, one of the attorneys for the plaintiff showed up and negotiated a settlement of the defendants' counterclaims. The plaintiff and her counsel refused to appear. *Id.* The defendants and the mediator offered to permit the plaintiff to appear by telephone. *Id.* She refused. *Id.*

In early February, Ms. Rommel was once again contacted to set up the Court ordered mediation. Dkt. 74, February 16, 2012 Declaration of Tyler Firkins at ¶3. The plaintiff refused, again, to participate in mediation. The plaintiff never explained why she could not even speak to her attorneys to mediate on her behalf or participate by telephone. *Id.* She simply refused to participate in a lawsuit that she herself filed.

The plaintiff has steadfastly refused to participate in her own case. The defendants in the meantime have been compelled to spend thousands to respond to six motions to continue, and were barred from having their day in court on a patently frivolous case. The defendants were blocked from obtaining a dismissal by Ms. Rommel's continual dialatory acts. Defendants were further hindered in preparing a full defense to Ms. Rommel's frivolous claims because of her refusal to disclose any of her experts.

In summary, Ms. Rommel refused to respond to discovery, refused to participate in mediation, refused to disclose expert opinions of witnesses

she purports she will call, and refused to move her case forward to trial. *Id.* at ¶5. A simple review of the docket makes clear that the only motions Ms. Rommel has filed in this case were those asking for a continuance. *Id.* A review of the appellate docket shows that she has simply continued her practice of missing deadlines and seeking extensions. The trial court properly dismissed Ms. Rommel’s case.

#### IV. ARGUMENT

##### A. The trial court properly dismissed this case.

A trial court has discretion to continue trial under appropriate circumstances and may impose terms as a condition of the continuance. CR 40(d), (e). Appellate courts review a decision to grant or deny a continuance for a manifest abuse of discretion. *Swope v. Sundgren*, 73 Wn.2d 747, 749, 440 P.2d 494 (1968). The trial court abuses its discretion only if its “decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)). Here, the record contains ample reasons supporting the trial court’s dismissal of Ms. Rommel’s claims.

Pursuant to CR 41(b), a trial court may upon its own motion or upon the motion of the defendants, dismiss a matter for failure to prosecute. CR 41(b) states:

(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.

CR 41 In this case, the trial court repeatedly extended deadlines and reset the matter for trial by way of case schedule. Ms. Rommel nonetheless failed to prosecute her case. She failed to respond to discovery, and she repeatedly made motions to continue the trial. Ms. Rommel also failed to participate in mandatory mediation in accordance with KCLR 16. Even if she was too ill to herself attend, she was permitted to attend by telephone or to have her attorney represent her interests at the mediation. She was unwilling to do either. Plaintiff's health issues did not preclude her from providing her attorney with adequate information to mediate on the agreed-upon date, and it did not preclude attorney from participating in her case.

Defendant has not met the high burden necessary to demonstrate an abuse of discretion when the trial court dismissed this case. Ms. Rommel

must show that the trial court's actions were manifestly unreasonable. *Rohrich*, 149 Wn.2d at 654. She cannot. To the contrary, the record demonstrates that the trial court granted Ms. Rommel not less than five continuances, and afforded her extensive leeway on her refusal to mediate this case. She failed to disclose discovery until she was compelled, and never disclosed an expert able to present evidence of her alleged damages. Ms. Rommel was repeatedly warned by the trial court that it would consider dismissal if she continued to refuse to participate in her own case. Her behavior at the appellate level, failing to meet deadlines and asking for multiple extensions, exhibits her inability to prosecute her case even if the trial court had not dismissed. Dismissal was proper. The plaintiff's refusal to move forward with her own claim should not be approved by this Court.

**B. The trial court did not abuse its discretion simply because the statute of limitations has run.**

Plaintiff's argument that a dismissal was an abuse of discretion because the statute of limitations has run is without merit. Plaintiff is correct that the statute of limitations is limited to three years under RCW 4.16.080(1), and thus expired, but has not cited any authority for the proposition that dismissal of a case without prejudice is abuse of discretion simply because the statutory time period for filing has run. The

expiration of the statutory filing period merely makes the dismissal a final decision that is appealable. *Munden v. Hazelrigg*, 105 Wn.2d 39, 44, 711 P.2d 295 (1985). CR 41(b)(1) makes no mention of the statute of limitations when discussing failure of a party to prosecute, however, and Defendants were not able to locate any authority for this proposition.

Even if this matter were remanded for trial, the record demonstrates that Ms. Rommel will just seek more continuances. There was no other end in sight for this case, and Ms. Rommel's refusal to prosecute for years deprived defendants of their day in court. Defendants should not be required to sit in limbo, accruing endless attorney fees, because the Plaintiff is unwilling to prosecute or otherwise resolve her case. Further, despite extensive leeway from the trial court, Ms. Rommel has never disclosed any expert capable of providing evidence of her damages. It is exceptionally unlikely that she would prevail on her claims on the basis of the evidence she has disclosed. The trial court properly dismissed Ms. Rommel's claims based on her failure to prosecute her case. It would be error for this Court to reverse that decision

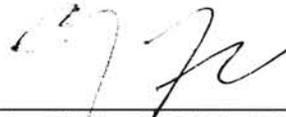
## **V. CONCLUSION**

Plaintiff Rommel was given many opportunities by the trial court to prosecute the case that she brought. She refused to do so, instead delaying discovery, refusing to participate in mediation, and moving for

continuances no less than five times. Defendants deserve finality in this unreasonably drawn-out and frivolous case. The trial court properly dismissed Plaintiff's case. This Court should affirm.

DATED this the 7<sup>th</sup> day of August, 2013.

VAN SICLEN, STOCKS & FIRKINS



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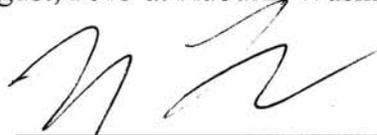
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**Certificate of Transmittal**

I hereby certify that the foregoing Brief of Respondent was filed with the Court of Appeals – Division I and sent via ABC Legal Messenger to the following counsel:

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DATED this 8<sup>TH</sup> day of August, 2013 at Auburn, Washington.



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Tyler K. Firkins