

FILED
Court of Appeals
Division II
State of Washington
2/24/2020 3:45 PM
No. 54057-6-II

WASHINGTON STATE COURT OF APPEALS
DIVISION II

JOHN DOE L, *et al.*,

Plaintiffs-Respondents,

vs.

DONNA ZINK,

Requestor-Appellant.

LEVEL I RESPONDENTS' BRIEF

Nancy Talner, WSBA # 11196
ACLU of Washington Foundation
P.O. Box 2728
Seattle, WA 98111

Reuben Schutz, WSBA No. 44767
Gordon Thomas Honeywell LLP
1201 Pacific Ave., Ste. 2100
Tacoma, WA 98402

Attorneys for Plaintiffs-Respondents John Doe L, et al.

TABLE OF CONTENTS

I. INTRODUCTION 3

II. ISSUES PRESENTED 4

III. STATEMENT OF THE CASE..... 4

IV. SUMMARY OF ARGUMENT 7

V. ARGUMENT..... 8

 A. The Trial Court Correctly Dismissed Plaintiffs’ Claims
 Under CR 41 8

 B. Appellant’s Challenge To Plaintiffs’ Motion To Proceed
 In Pseudonym Is Moot In Light Of The Dismissal 15

VI. CONCLUSION..... 17

TABLE OF AUTHORITIES

Cases

<i>Beritich v. Starlet Corp.</i> 69 Wn.2d 454, 457, 418 P.2d 762 (1966).....	8, 9
<i>Condon v. Condon</i> 177 Wn.2d 150, 298 P.3d 86 (2013).....	10
<i>Dep't of Labor & Indus. v. Brugh</i> 135 Wn. App. 808, 824, 147 P.3d 588 (2006).....	3
<i>Doe L v. Pierce County</i> 7 Wn. App. 2d 157, 164, 433 P.3d 838 (2019).....	4, 14, 15, 17
<i>Goin v. Goin</i> 8 Wn. App. 801, 802, 508 P.2d 1405 (1973).....	8
<i>Gutierrez v. Icicle Seafoods, Inc.</i> 198 Wn. App. 549, 394 P.3d 413 (2017).....	9, 10, 11
<i>State v. Collins</i> 110 Wn. 2d 253, 258 n.2, 751 P.2d 837 (1988).....	13
<i>State v. McEnroe</i> 174 Wn.2d 795, 279 P.3d 861 (2012).....	12

Rules

CR 23(b)(3).....	8
CR 23(c)(2).....	8
CR 23(e).....	8
CR 41.....	3, 5, 6, 7, 8, 10
CR 41(a)(1)(A).....	6, 7, 13, 14
CR 41(a)(1)(B).....	5, 6, 7, 8, 11, 12
CR 41(a)(2).....	5, 11, 13
GR 15.....	12, 15
GR 15(b)(4), (5).....	15
RAP 2.5(a).....	13

Rules (Continued)

RAP 9.1.....	3
RAP 9.11.....	3
ER 201(b).....	3
Rule 23.....	8
Rule 23(e).....	8

Other Authorities

Article 1, section 10 of the Washington Constitution.....	12
Wash. Prac., Rules Practice CR 23 (6th ed.)	8

I. INTRODUCTION

This Court has already addressed the merits of this Public Records Act (PRA) case. Ms. Zink has obtained the records she sought. Despite the absence of any remaining controversy between the parties, Ms. Zink continues to pursue an order directing Plaintiffs to put their names into the public record. To that end, she now appeals an order granting Plaintiffs' motion to voluntarily dismiss with prejudice all of the Plaintiffs' claims.

These consolidated class actions—only a few of the many involving Ms. Zink's numerous blanket requests to agencies across the state for records about sex offenders—have already spanned years and generated hundreds of filings. Nothing in Article I, Section 10 or the applicable rules requires the courts or the parties to continue devoting resources to the litigation of claims that are now moot. This Court should affirm the trial court's order of dismissal and put an end to Ms. Zink's litigation that has already produced the records she requested.

Additionally, Plaintiffs-Respondents are simultaneously filing a motion to strike Appendix A to Ms. Zink's opening brief and references to it from Ms. Zink's brief. *See* Zink Opening Br., Jan. 23, 2020 (hereinafter "Zink Br."), at App'x A. Although it is not clear from her brief what exactly this document is, it plainly is not part of the record in this case, is not helpful in resolving this appeal, and does not fit the criteria for judicial notice. *See*

RAP 9.1; RAP 9.11; ER 201(b); *Dep't of Labor & Indus. v. Brugh*, 135 Wn. App. 808, 824, 147 P.3d 588 (2006) (granting motion to strike document in appendix to appellate brief and portions of brief citing to it because document was not part of the record and was not appropriate for judicial notice).

II. ISSUES PRESENTED

(1) Whether affirmance should be ordered because the trial court properly granted Plaintiffs' motion for voluntary dismissal with prejudice under CR 41. *See* CP 339–42.

(2) Whether affirmance should be ordered because Appellant's challenge to Plaintiffs' motion to proceed in pseudonym was rendered moot by dismissal of Plaintiffs' claims. *See* CP 339–42.

III. STATEMENT OF THE CASE¹

These consolidated cases arise out of several of Ms. Zink's myriad requests under the Public Records Act (PRA) for records pertaining to people with sex offense convictions.

Plaintiffs-Respondents John Does L–O are people with convictions for sex offenses who were designated as “low risk” for recidivism (“Level

¹ Because the facts and procedural history of this case are detailed in this Court's prior opinion, Plaintiffs-Respondents set forth the procedural history and facts pertaining to the Level I Does only briefly, for the Court's convenience. *See Doe L v. Pierce County*, 7 Wn. App. 2d 157, 164, 433 P.3d 838 (2019).

I”) and accordingly were not identified publicly in the state Sex Offender Registry or subject to community notification requirements. CP 1–2, 4.² They filed a class action suit in 2014 seeking a declaration that the Pierce County records Ms. Zink sought were not subject to disclosure under the PRA and an order enjoining the release of the records pertaining to them. *See* CP 1–20. The Plaintiffs also filed a motion for permission to proceed in pseudonym. *See* CP 49–58.

Does L–O’s class action was consolidated with a Level II and Level III class action, a suit brought by an individual Doe, and a suit by the County to enjoin the release of juvenile records in its possession. *See Doe L v. Pierce County*, 7 Wn. App. 2d 157, 164, 433 P.3d 838 (2019).

The trial court certified the Level I class (*see* CP 88–91), granted Does L–O’s motion to proceed in pseudonym (*see* CP 92–94), and ultimately granted the Level I Plaintiffs’ motion for summary judgment (*see Doe L*, 7 Wn. App. 2d at 164).

In 2019, this Court affirmed the certification of the Level I and Levels II and III classes. *Id.* This Court also held that some, but not all, of the records Ms. Zink sought were exempt from the PRA, affirming the trial court’s ruling in favor of Plaintiffs in part and reversing in part. *See id.* at

² John Doe M and John Doe N were adjudicated in juvenile court for sexual offenses and were designated as “Level I.” *See* CP 1–2. John Doe L and John Doe O were convicted as adults. *Id.*

192–94 (summarizing holdings). Finally, this Court held that the trial court erred by allowing Plaintiffs to litigate in pseudonym without first holding an *Ishikawa* hearing and analyzing the *Ishikawa* factors. *Id.*

On remand, the Level I Plaintiffs moved to voluntarily dismiss their claims under CR 41(a)(1)(B) because all substantive issues in the case had been decided, noting that granting dismissal was mandatory when a plaintiff moves to dismiss prior to resting at the conclusion of her case. *See* CP 250. In a reply brief, Plaintiffs also noted that dismissal for good cause was appropriate under CR 41(a)(2). CP 334. After a full hearing, and having considered the parties’ briefs and the relevant record, the Court signed the Plaintiffs’ proposed order in support of the motion, specifically dismissing Plaintiffs’ action with prejudice and dismissing Plaintiff Does L-O and the Class of Level 1 offenders from the case.³ *See* CP 339–42. Ms. Zink moved for reconsideration. *See* CP 343–50. The Court denied her motion. *See* CP 351.

IV. SUMMARY OF ARGUMENT

Ms. Zink contends in this appeal that voluntary dismissal was improper under the terms of CR 41(a), and that the trial court was not

³ Plaintiffs’ proposed order in support of the motion to dismiss, which the trial court signed, erroneously cited CR 41(a)(1)(A) instead of CR 41(a)(1)(B). Defendant Pierce County consented to the dismissal, but Requestor Ms. Zink did not. *See* Proposed Order, July 31, 2019 (signed by Pierce County).

permitted to dismiss the case without first holding an *Ishikawa* hearing to determine whether allowing Plaintiffs to continue proceeding in pseudonym would be consistent with Article I, Section 10 of the Washington Constitution.

First, Ms. Zink is wrong as to the meaning of CR 41. Her arguments are not consistent with the jurisprudence recognizing that granting Plaintiffs' voluntary dismissal motion was mandatory here.

Second, even if being allowed to proceed by pseudonym implicates the public's right of access to court proceedings, this does not mean that the trial court was required to hold an *Ishikawa* hearing before allowing Plaintiffs to voluntarily dismiss their claims. The case had not yet gone to trial, and there was no counterclaim pending against the Plaintiffs. Accordingly, they were permitted under CR 41 to voluntarily dismiss rather than continue litigation. *See* CR 41(a)(1)(A)–(B). Because their claims were dismissed with prejudice, the propriety of Plaintiffs proceeding in pseudonym is now a moot issue.

V. ARGUMENT

A. The Trial Court Correctly Dismissed Plaintiffs' Claims Under CR 41.

The trial court properly granted Plaintiffs' motion for voluntary dismissal under CR 41(a)(1). *See* CP 339–42. Indeed, the court had no discretion to deny the motion.

Washington courts have previously ruled that CR 41(a)(1) means what it says: granting a motion for voluntary dismissal is mandatory when all parties have stipulated to dismissal or by motion of the plaintiff “any time before ‘plaintiff rests at the conclusion of his opening case’ during trial.” *League of Women Voters of Wash. v. King County*, 133 Wn. App. 374, 379–80, 135 P.3d 985 (2006) (quoting CR 41(a)(1)(B)).

As *League of Women Voters* confirms, even without the consent of the parties, Plaintiffs had the right to voluntary dismissal. Here, Plaintiffs moved to voluntarily dismiss the action well before trial, and there was no counterclaim pending against them. Accordingly, granting dismissal was mandatory. *See* CR 41(a)(1)(B). The “plaintiff’s right in this respect is absolute and involves no element of discretion on the part of the trial court.” *Goin v. Goin*, 8 Wn. App. 801, 802, 508 P.2d 1405 (1973).

Although CR 41 is “subject to the provisions of rule[] 23(e),” Rule 23 does not change analysis in this case. Rule 23(e) requires court approval

of voluntary dismissal and notice to the class “in such manner as the court directs.” CR 23(e). Here, the Court approved dismissal and explicitly ruled that since the Level I class “was certified under CR 23(c)(2); accordingly, notice of dismissal of the action to the class is not required”, which makes sense because (b)(2) class members “do not have a right to notice and the opportunity to opt out, as they do in class actions brought under CR 23(b)(3).” 3A Wash. Prac., Rules Practice CR 23 (6th ed.). Ms. Zink’s opening brief does not argue otherwise.

Ms. Zink misreads the Supreme Court’s decision in *Beritich v. Starlet Corp.*, 69 Wn.2d 454, 457, 418 P.2d 762 (1966) as holding that “a decision by a trial court on summary judgment prohibits voluntary dismissal[.]” Zink Br. 2. *Beritich* does not stand for so broad a proposition. There, the plaintiffs sought to avoid the effect of an adverse summary judgment ruling (which had been announced by the court orally but not yet reduced to writing) by voluntarily dismissing the action and securing a judgment of nonsuit. *Beritich*, 69 Wn.2d at 455–59. The Supreme Court held that the RCW governing nonsuit, which predated the adoption of a summary judgment procedure in Washington, did not permit them to do so. *Id.* at 458. But here, by voluntarily dismissing their claims in this case, the Level I Does were not seeking to avoid the effect of an adverse ruling, nor were they maneuvering to retain the ability to refile their claims. Rather,

they voluntarily terminated the lawsuit—with prejudice to renewal—in order to avoid further litigation when the merits of the case had already been decided and there was no remaining controversy between the parties. Nothing in the Court’s holding or reasoning in *Beritich* suggests that Plaintiffs were barred from voluntary dismissal here.

Ms. Zink’s reliance on *Gutierrez v. Icicle Seafoods, Inc.*, 198 Wn. App. 549, 394 P.3d 413 (2017), is likewise misplaced. *See* Zink Br. 2, 13. To begin with, it supports Plaintiffs’ reading of *Beritich* as prohibiting voluntary dismissal only where the plaintiff seeks to use it “to evade an unfavorable summary judgment decision before entry of a written order.” *Gutierrez*, 198 Wn. App. at 555. And the Court of Appeals in *Gutierrez* held only that the plaintiff had an “absolute right” to voluntary dismissal after filing a response to the defendant’s motion for summary judgment. *Id.* at 556; *see also Paulson v. Wahl*, 10 Wn. App. 53, 516 P.2d 514 (1973) (plaintiff is entitled “as a matter of right” to voluntary dismissal even after summary judgment motion filed). The *Gutierrez* court had no occasion to rule on whether voluntary dismissal would be prohibited at a later phase of litigation.

Ms. Zink also incorrectly cites *Condon v. Condon*, 177 Wn.2d 150, 298 P.3d 86 (2013) for the proposition that “if the merits have been decided on summary judgment, voluntary dismissal is prohibited.” Zink Br. 12.

Condon in no way supports that proposition. The *Condon* Court discussed whether dismissal with prejudice divests a trial court of jurisdiction to enforce a settlement agreement. *Condon*, 177 Wn.2d at 157–61. But the case did not present the question of whether summary judgment precludes dismissal under CR 41, and nothing in the Court’s ruling suggests the answer to that question.

Nor has Ms. Zink cited any other case that held that dismissal is precluded under the circumstances of this case.

Indeed, as the Court of Appeals pointed out in *Gutierrez*, even after the plaintiff rests her case at trial, courts may still grant permissive voluntary dismissal upon a showing of good cause and appropriate conditions under CR 41(a)(2). *Gutierrez*, 198 Wn. App. at 553. Clearly, that standard was met here. The merits of the case had been resolved. The unrebutted evidence in the record demonstrates a significant risk of harm to the Plaintiffs from disclosure of their identities, and Ms. Zink’s efforts to unmask the Plaintiffs threatened to continue for the foreseeable future. Moreover, the trial court granted dismissal with prejudice, extinguishing Plaintiffs’ claims once and for all.

In addition, dismissal for good cause is justified by the circumstances and equities of this case. The Does brought this litigation to protect against the disclosure of their identities. They submitted into the

record personal declarations containing private details about their mental health and families. *See* CP 49–58. They signed these declarations under pseudonym. If the superior court had denied their motion to proceed in pseudonym, they would have chosen not to proceed. At that time, they would have had an absolute right to dismiss their case under CR 41(a)(1)(B). However, the court granted the Does permission to proceed in pseudonym and the Does relied on that permission. CP 92–94.

In suits where a party seeks to protect his or her identity to avoid potential harms, they *must* be able to voluntarily dismiss their claims if the court does not grant them the right to proceed in pseudonym. An analogous principle was discussed by the Supreme Court in *State v. McEnroe*, 174 Wn.2d 795, 279 P.3d 861 (2012), a case involving documents filed contemporaneously with a motion to seal. The *McEnroe* Court specifically addressed whether “a party may withdraw documents provided to the court contemporaneously with a motion to seal if the motion is denied” under General Rule 15 (GR 15) and Article 1, Section 10 of the Washington Constitution. *Id.* at 804. The Court determined that a party moving to seal should not be forced to choose between:

withhold[ing] supporting materials that support and fully advise the trial court regarding motions the defendant deems necessary to his defense or risk the trial court releasing information that may seriously prejudice his ability to present his defense or select an impartial jury.

Id. at 808. The Court ultimately held that a party may withdraw documents submitted to the court in connection with a motion to seal if the court denies the motion. *Id.*

This principle applies equally to motions to proceed in pseudonym. Otherwise, parties with real, well-founded claims will choose to not pursue an action simply for fear of losing on a motion to proceed in pseudonym. Sound policy and case law dictate that upon losing a motion to proceed in pseudonym, a party must be permitted to voluntarily dismiss his or her case.

The Does were granted permission to proceed in pseudonym prior to the Supreme Court issuing new guidance on this issue. If the Does are not permitted to voluntarily dismiss under these circumstances, they will be effectively punished for seeking to protect their identities and avoid serious harms. The Court should decline to order the trial court to reopen this case in order to conduct a hearing that might have the consequence of exposing Plaintiffs to the very harm they sought to avoid through this litigation.

In sum, dismissal was appropriate under CR 41(a)(1)(A) and CR 41(a)(2). This Court can affirm the trial court's order dismissing the case on any of the available alternative grounds for affirmance. *See* RAP 2.5(a); *State v. Collins*, 110 Wn. 2d 253, 258 n.2, 751 P.2d 837 (1988) (en banc) (“An alternate theory can be used to uphold a result below, even if not relied on there, if it is established by the pleadings and supported by proof.”).

Notably, nothing in Ms. Zink’s opening brief suggests that she is in any way harmed by the dismissal of the Plaintiffs’ claims, or that she is still awaiting the release of any of the Pierce County orders she seeks. It is unclear what she seeks to gain through a reversal of the order dismissing Plaintiffs’ claims.

B. Appellant’s Challenge to Plaintiffs’ Motion to Proceed in Pseudonym Is Moot in Light of the Dismissal.

This Court reversed and remanded the trial court’s order granting Plaintiffs’ motion to proceed in pseudonym, holding that the court had applied the wrong standard. But now that Plaintiffs have dismissed their claims with prejudice, that issue is moot, rendering the appeal moot as well.

Plaintiffs do not dispute that this Court’s prior ruling in this case made clear that the Superior Court was required to hold an *Ishikawa* hearing before allowing Plaintiffs to continue litigating in pseudonym. But this Court did not hold that the Plaintiffs were required to continue litigating. The fact that Ms. Zink wants to continue litigating in the hope that she may be able to expose Plaintiffs’ identities in the process does not mean she has a constitutional right to do so.⁴

⁴ Ms. Zink seems to be under the impression that if she prevails in this appeal, this Court would remand with instructions to order Plaintiffs to use their real names. See Zink Br. 19. The question of who would prevail in an *Ishikawa* hearing is not properly before this Court. But if it were, the record already contains sufficient evidence to support a finding that proceeding in pseudonym is justified in this case. See *Doe L*, 7 Wn. App. 2d at 169 (Plaintiffs’ “supporting evidence documented harm

Nor does this Court’s prior ruling mean that allowing Plaintiffs to dismiss their claims without first holding an *Ishikawa* hearing was “a constitutional violation.” Zink Br. 1. Despite Ms. Zink’s insistence on describing the use of pseudonyms as a form of “sealing,” there is in fact nothing sealed in the case. Although both pseudonyms and sealing implicate Article I, Section 10, they are different in important respects. Under GR 15, a court filing is “sealed” or “redacted” when the filing, or portions of it, are available to authorized court personnel, but not available to the public.⁵ Here, though, everything available to the trial court was—and still is—available to the public.

Appellant Zink’s argument that the pseudonym issue is not moot seems to be predicated on a belief that an error in granting the use of pseudonyms can *never* be moot because of the public’s right of access to court proceedings protected by Article I, Section 10. But this Court’s prior opinion in this case ruled the pseudonym issue moot as to Doe D and Doe

to the offenders and to the public’s interest in effectively treating the sex offenders that would result from disclosure.”); *id.* at 192 (“the offenders’ and the County’s evidence was detained and substantiated harm not only to the offenders but to third parties, vital governmental functions, and the public in general.”).

⁵ “To seal,” the rule says, “means to protect from examination by the public and unauthorized court personnel.” GR 15(b)(4). An order to redact “shall be treated as . . . [an] order to seal,” and to “redact” means to protect “a portion or portions of a specified court record” from “examination by the public and unauthorized court personnel.” GR 15(b)(4), (5).

G, demonstrating the falsity of Ms. Zink's premise. *Doe L v. Pierce County*, 7 Wn. App. 2d 157, 164, 201 n.22, 433 P.3d 838 (2019) (holding that the pseudonym issue was moot as to Doe D and Doe G because Ms. Zink had obtained their names even though the caption still lists them as John Does).

Ms. Zink's citation to *Indigo Real Estate Servs. v. Rousey*, 151 Wn. App. 941, 215 P.3d 977 (2009) in support of her argument that the pseudonym issue was not mooted by dismissal is puzzling. That case held that the trial court erred by denying a domestic abuse victim's motion, filed after the parties agreed to voluntary dismissal, to redact her name from the caption of a suit. *Indigo* says nothing about whether a motion to proceed in pseudonym filed before dismissal is mooted out by dismissal.

In sum, the trial court was not required to conduct an *Ishikawa* hearing because any question as to the propriety of Plaintiffs' use of pseudonyms was mooted out by their voluntary dismissal with prejudice.

VI. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the order below voluntarily dismissing this action with prejudice. Plaintiffs are simultaneously filing a separate motion to strike Appendix A and references to it from Ms. Zink's opening brief.

RESPECTFULLY SUBMITTED this 24th day of February, 2020.

ACLU OF WASHINGTON
FOUNDATION

By: /s/Nancy Talner

Nancy Talner, WSBA 11196

GORDON THOMAS HONEYWELL LLP

By: /s/Reuben Schutz

Reuben Schutz, WSBA No. 44767

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Holly Harris, declare under penalty of perjury under the laws of the State of Washington that I served the foregoing document via CM/ECF electronic service and email on the following:

Elizabeth Petrich at Elizabeth, petrich@co.thurston.wa.us

Donna Zink at dlczink@outlook.com

Jeff Zink at jeffzink@outlook.com

Karen Horowitz at karen.horowitz@co.thurston.wa.us

Nancy Talner at talner@aclu-wa.org

DATED this _____ day of February, 2020 at Tacoma, Washington.

By: /s/ Holly Harris
Holly Harris, Legal Assistant

GORDON THOMAS HONEYWELL LLP

February 24, 2020 - 3:45 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54057-6
Appellate Court Case Title: John Doe L., et al., Respondents v. Pierce County et al, Appellants
Superior Court Case Number: 14-2-14293-1

The following documents have been uploaded:

- 540576_Briefs_20200224154409D2267498_9335.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Respondents' Brief.pdf

A copy of the uploaded files will be sent to:

- Harrywilliams4@gmail.com
- amy@amymuthlaw.com
- dlczink@outlook.com
- harry@harrywilliamslaw.com
- ian@amymuthlaw.com
- jeffzink@outlook.com
- jholder@gth-law.com
- mluna@co.pierce.wa.us
- msommer@co.pierce.wa.us
- pcpatvecf@piercecountywa.gov
- talner@aclu-wa.org

Comments:

Sender Name: Leslee Hooper - Email: lhooper@gth-law.com

Filing on Behalf of: Reuben Schutz - Email: rschutz@gth-law.com (Alternate Email:)

Address:
1201 PACIFIC AVE
STE 2100
TACOMA, WA, 98402
Phone: (253) 620-6500

Note: The Filing Id is 20200224154409D2267498