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NO. 63242-6

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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TODD HUSO and SUSAN HUSO, a married couple,

*Appellants,*

v.

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

*Respondents.*

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BRIEF OF RESPONDENTS PHOENIX DEVELOPMENT INC. AND CITY  
OF WOODINVILLE

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## **APPENDICES**

- A. Order Denying Motion for Voluntary Non-Suit
- B. Declaration of Robert Vick

## **A. INTRODUCTION**

Appellants Todd and Susan Huso (“Husos”) have asked the Court of Appeals to reverse two decisions of the trial court. Both decisions, however, were well within the trial court’s discretion. Accordingly, the Husos’ appeal must be dismissed.

The first decision the Husos claim was in error was the trial court’s decision to deny their motion for a third continuance of the trial date. Since the Husos had already received two trial date continuances, and because discovery was complete, the trial court acted well within her discretion in denying the Husos’ motion.

The second decision the Husos claim was in error was the trial court’s decision to grant their motion for nonsuit, but with, rather than without, prejudice. A copy of the trial court’s decision is attached as Appendix A.

The Husos’ counsel has conceded that the only reason the motion for nonsuit was filed was because of the trial court’s denial of the Husos’ motion for a third trial continuance. The trial court accordingly found that the motion for voluntary dismissal was “clearly interposed for the purpose of causing unnecessary delay and needless increase in the cost of litigation.” CP 1192-1195.

Moreover, during the preceding five months, the trial court found the Husos, while acting pro se, had “engaged in abusive, harassing and oppressive activity, insulting the City’s representatives and officials, and seeking to abuse the discovery process by noting the depositions of City councilmembers, the City’s attorneys, and totally unrelated third parties.” Id.

At the time the motion for nonsuit was filed, the trial date was only six weeks away, the case had been pending for 21 months, discovery was complete, defendants had expended in excess of \$130,000 in attorney fees in preparation for trial, defendants had briefed and noted for hearing their summary judgment motions, and the Husos had failed to file any response to the motions. Id.

In response to the uncontroverted facts of this case, the trial court acted well within her discretion in granting the Husos’ motion for voluntary dismissal with, rather than without, prejudice. *Escude v. King County Public Hospital Dist.*, 117 Wn.App. 183, 69 P.3d 895 (2003); *Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716 (6<sup>th</sup> Cir. 1994); *Pace v. Southern Express Co.*, 409 F.2d 331 (7<sup>th</sup> Cir. 1969).

## **B. STATEMENT OF THE ISSUES**

Respondents Phoenix Development, Inc. (“Phoenix”) and City of Woodinville (“City”) restate the issues as follows:

1. Did the trial court abuse her discretion in finding that no extraordinary circumstances justified the Husos' third motion for trial continuance, when discovery was complete and two continuances had already been granted at their request? (Assignment of Error No. 1).

2. Did the trial court abuse her discretion in granting the Husos' motion for voluntary dismissal with, rather than without, prejudice, when the unchallenged findings of fact, verities on appeal, demonstrate, among other things: that the Husos have utilized the litigation process to abuse, oppress and harass; that their motion was clearly interposed for the purpose of causing unnecessary delay and needless increase in the cost of litigation; that the Husos failed to respond in any way to contest the new evidence provided by the City and the argument and authorities by Phoenix in their pending summary judgment motions establishing the invalidity of their substantive claims; and that allowing the Husos to re-file their action would substantially prejudice Phoenix and the City? (Assignment of Error No. 2)

### **C. STATEMENT OF THE CASE**

#### **1. Withdrawal of Attorney Daudt.**

This lawsuit was filed on the Husos' behalf by attorney Michael Daudt on May 16, 2007. CP 3-15. Originally, the lawsuit named Phoenix Development as the sole defendant. The lawsuit contends that a driveway

located on property that is owned by Phoenix is not a private driveway but a publicly dedicated right of way owned by the City. The City denies owning the driveway, and Phoenix denies the driveway was ever dedicated to the public. CP 21-25, 322-328. The Husos subsequently amended the lawsuit to assert, in the alternative, that the Husos have obtained a prescriptive easement interest in the driveway. CP 307-321. Phoenix has presented substantial evidence to the court that the Husos and their predecessors-in-interest have always used the driveway permissively, rather than adversely. CP 1043-1060; 1370-1474.

The original trial date was October 27, 2008. CP 18. Pursuant to the Order Setting Civil Case Schedule, the parties exchanged discovery requests and conducted numerous depositions. Both the Husos and Phoenix Development filed and argued summary judgment motions that were heard and decided by the Honorable Susan Craighead on February 29, 2008. CP 26-40, 208-223, 224-237. Judge Craighead denied both the Husos' and Phoenix's motions, determining that there were material facts in dispute. She did find, however, that the City of Woodinville was a necessary party to this action, and ordered the Husos to join the City as a defendant. CP 301-304. The City was subsequently joined in the litigation.

In September 2008, one month prior to the then-scheduled trial date, the City filed its first motion for partial summary judgment, in which Phoenix joined. CP 335-352.

Attorney Daudt filed a response to the City's motion for partial summary judgment on September 22, 2008. CP 353-367. The next day, on September 23, 2008, attorney Daudt filed a motion for continuance of the October 27, 2008 trial date, a motion to allow additional discovery after the discovery cutoff date, and a notice of withdrawal as counsel to the Husos. CP 411-414, 425-426. The motion for continuance was based on the Husos' desire to conduct additional discovery after the discovery cutoff date. The notice of withdrawal was based on the instructions of Mr. Daudt's clients, the Husos, that he withdraw, and disagreements regarding his legal fees. CP 449-450. Earlier, in June 2008, Mr. Daudt's prior law firm had filed a notice of lien for unpaid attorney fees in the amount of \$62,882.54 plus interest. CP 1202-1203.

Phoenix objected to attorney Daudt's proposed withdrawal, since the scheduled trial date was only four weeks away. CP 452-455. Phoenix asked the Court to condition any withdrawal on maintenance of the scheduled trial date. However, the Honorable Monica Benton (the newly assigned judge) granted Mr. Daudt's motions, allowed him to withdraw, and granted a trial continuance. CP 458-461. The new trial date was four

months later, February 23, 2009. Judge Benton also denied the City's motion for partial summary judgment, finding that there were potentially contestable factual issues set forth in the two declarations of Derwin Roupe, the surveyor of record for the subdivision at issue.<sup>1</sup> Id. With respect to discovery, Judge Benton allowed both parties to conduct additional discovery, in accordance with the Civil Rules, with a revised discovery cutoff date of January 5, 2009. Id. Contrary to the statements of the Husos in their brief, however, she made no ruling mandating the City to allow any particular discovery or depositions. Id.

## **2. Husos as Pro Se Plaintiffs.**

For the five month period from September 2008 through early February 2009, the Husos represented themselves as pro se plaintiffs. CP 1204. During this time, they never suggested to defendants or to the court that they were seeking new counsel to replace attorney Daudt, whom they had directed to withdraw. Indeed, to the contrary, they affirmatively represented to counsel for defendants that they intended to remain as pro se plaintiffs, because of advantages they believed accrued to them in doing so. They wrote to the defendants' attorneys:

There are certain disadvantages to representing ourselves which you clearly and eagerly are attempting to exploit. We would

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<sup>1</sup> At the time of this motion and the submission of his two declarations (one by the City, the other submitted by the Husos), Mr. Roupe had not been deposed.

expect this and we would agree there are downsides. But there are also upsides.

As non attorney's (sic), we are not bound to that not-so-secret unspoken lawyer convention to withhold audacities that may happen outside the court's view, due to the expectation that one would likely have to work together in some future litigation another time.

While as our own counsel we no longer have to worry about our own attorney who may have those same concerns.

As non attorneys, we can speak the truth with no expectation of having to meet to debate with you, the city or the high profile developer Phoenix another day...

You can give it your best lawyer shot to cloak what you can (and truly we expect that you will), but we, as non attorneys, will not be misusing "attorney-client privilege" to protect nefarious behaviors...

In any event, we are preparing to continue going forward with this case, complete with all its warts and boils.

CP 578-586.

During this five month period also, additional discovery was conducted. Derwin Roupe, the surveyor responsible for the subdivision at issue and the one surviving witness most knowledgeable about the creation of the subdivision and status of the alleged road, testified that it was his opinion that the subdivision did not dedicate a public road. CP 1212-1221. David Seversike, the predecessor in title to the Husos, testified unambiguously that use of the Phoenix driveway was at all times explicitly permissive. CP 1225-1246. Ms. Huso personally also took the

depositions of the Woodinville City Manager, the Woodinville Planning Director, and witness Christy Diemond. CP 591-592.

During this time, the Husos filed several motions *pro se* with the Court. CP 464-475, CP 610-620. The Husos filed motions to compel discovery and to continue the trial date (a second time). The Husos sought to compel depositions of each of the Woodinville City Councilmembers, of the attorneys representing the City in this matter, and of the proprietors of community internet blogs who had published entries that the Husos felt placed the Husos in a bad light. In connection with these motions, the Husos submitted materials that badgered, insulted, and abused City employees and their legal representatives.

On January 26, 2009, the Honorable Barbara Mack (the fourth judge assigned to the case) issued three orders. CP 689-694. She denied the *pro se* motions to compel discovery, granted a 30-day trial continuance to March 23, 2009, and extended the discovery cutoff date to March 2, 2009. As of the date of this order, then, the original trial date had been postponed twice for a total of five months – all at the request of the Husos.

On February 5, 2009, the City filed its second summary judgment motion on the right of way/road status issue, based in part on the newly obtained deposition testimony of surveyor Derwin Roupe which confirmed that no right-of-way had ever been dedicated to the public on

the Phoenix property. CP 1061-1084. Phoenix joined in that motion, and also moved for summary judgment on the issue of the Husos' alternative claim of prescriptive easement, based in part on the newly obtained deposition testimony of David Seversike which confirmed that the use of the Phoenix driveway by its neighbors was at all times permissive. CP 1043-1060. The Husos did not file responses to either motion.

On Friday, February 13, 2009, Judge Mack held a conference call with the parties to address the Husos' third request for continuance. The conference included attorney Paul Spencer, who had recently filed a notice of appearance for the limited purpose of seeking a delay in the trial date. At the conclusion of the call, Judge Mack denied the requested continuance, given the two continuances that had already been granted, the fact that discovery was complete, and the fact that two summary judgment motions were pending. To accommodate attorney Spencer's trial conflict, she stated that she would delay commencement of the Huso trial beyond March 23, so it would not commence until the completion of Attorney Spencer's March 23 Snohomish County trial. She entered an order on the continuance later that day. CP 1110-1111, 1192-1195.

### **3. Attorney Spencer's Motion for Nonsuit.**

Immediately following the Court's denial of the Husos' request for a third continuance of the trial date, attorney Spencer noted, on behalf of

the Husos, a motion for voluntary dismissal *without prejudice*. CP 1114-1116. Since the Court denied his request for a delay in the adjudication of this matter, he sought to use the provisions of CR 41(a)(1) to obtain the same result – delay – by another means. As he pointed out in a colloquy with the trial court:

THE COURT: [I]s it correct that the only reason you're asking to voluntarily dismiss this case is because the court denied your motion for a continuance?

MR. SPENCER: Well, I think it's correct from the standpoint that plaintiffs are unable to proceed or perceive themselves unable to proceed on their own...

RP 9. Mr. Spencer was able to provide no explanation, however, why the Husos had failed, in the preceding period of five months since their decision to fire Mr. Daudt as their attorney, to retain any counsel available to represent them on the March 23 trial date. The only counsel they did retain, Mr. Spencer, demanded a four-month trial continuance as a condition of representing them.

**4. Prejudice to Phoenix and the City, Fees and Costs to Date.**

Undisputed evidence provided to the trial court and the Husos confirmed that additional delay in resolution of this matter would be prejudicial to Phoenix. Phoenix owns the property which includes the disputed road. It is currently pursuing a major development of the

property. The pendency of this lawsuit clouds Phoenix's title to the property, and interferes with its development and sale. See Declaration of Robert Vick, attached as Appendix B.<sup>2</sup> See also CP 1126-1166, 1475-1515.

Furthermore – also undisputed -- as of the date of the motion for voluntary dismissal, Phoenix had incurred legal fees and expenses in excess of \$81,556. See Appendix B; see also CP 1126-1166. The City had incurred legal fees and expenses in excess of \$50,000. CP 1123-1125. All discovery was complete. Summary judgment motions by the City and Phoenix to address the merits of the case were pending, and no response to them had been filed by the Husos. In the event summary judgment was not granted, defendants were prepared to proceed to trial in six weeks. If the Husos were not prepared to proceed to trial, it was due to no one's fault but their own. Further delay would significantly prejudice Phoenix and would only impede the objectives of CR 1 to provide "a just, speedy, and inexpensive determination" of the action.

#### **5. Trial Court's Findings of Fact and Order of Dismissal.**

After oral argument on the Husos' motion for voluntary dismissal, the trial court granted the motion, but *with*, rather than *without*, prejudice.

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<sup>2</sup> The Declaration of Robert Vick, attached as Appendix B, was filed with the Superior Court on February 26, 2009, and is identified in the Superior Court Clerk's File as

The trial court made findings of fact and entered an order dismissing the Husos' complaint. CP 1192-1195. Each of the trial court's findings of fact is supported by substantial evidence in the record, as follows:

- *This case has been pending for twenty-one months, and the plaintiffs have already received at their request two trial continuances.*

CP 3-15, 411-414, 459-461.

- *During the subsequent five months, plaintiffs took no action of record to engage new counsel, and then engaged new counsel who entered a limited notice of appearance for the sole purpose of seeking additional trial delay* RP 5-6, 9; CP 1172-1175.

- *During those five months, plaintiffs engaged in abusive, harassing and oppressive activity, insulting the City's representatives and officials, and seeking to abuse the discovery process by noting the depositions of City councilmembers, the City's attorneys, and totally unrelated third parties.* CP 464-504, 578-586, 600-607, 610-643, 681-688, 706-747.

- *Here, the voluntary dismissal is being sought for no other reason than the denial by this court of the Huso's motion to continue the March 23 trial date, and was scheduled the day before the summary*

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Subnumber 195. It has been designated by Phoenix Development in its Second

*judgment scheduled for March 5. RP 5-6, 9; CP 1041-1042, 1039-1040, 1112-1113.*

- *The Husos and its limited appearance attorney Paul A. Spencer rejected an offer by the court to allow the trial date to be continued on a day to day basis while Mr. Spencer was in trial in Snohomish County beginning March 23, 2009 as he informed the court.*

- *The Husos have not informed the Court of any other efforts to obtain the services of any other attorney and/or why another attorney without a conflict on March 23, 2009 was not being considered. See CP 1172-1175, which is the only record reference regarding efforts by the Husos to retain counsel.*

- *If RCW 4.16.130 applies to this cause of action, the two year statute of limitations (RCW 4.16.130) for a declaratory judgment action on the issue of whether or not a public road exists across Lot 1 of the Summer's Addition Plat apparently will expire on or about March 15. CP 1123-1125.*

- *The Husos have failed to submit to the court any declarations or other evidence to contradict the new evidence before the Court on summary judgment found in the declarations of Summer's Addition Plat Surveyor Derwin Roupe, David Seversike the Huso's*

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Supplemental Designation of Clerk's Papers filed today, October 20, 2009.

*predecessor in title, Ray Sturtz the Woodinville expert in subdivision regulation, and the declaration of Greg Rubstello to which all the King county subdivision regulations in effect in 1976 are attached. CP 1043-1109. CP 1205-1474.*

- *The defendants have completed all discovery and expended considerable resources to prepare the pending summary judgment motions and prepare for trial. CP 1123-1125; 1475-1515.*

- *The PLAINTIFF'S MOTION FOR VOLUNTARY NON-SUIT signed by attorney Paul A. Spencer on behalf of the Husos is clearly interposed for the purpose of causing unnecessary delay and needless increase in the cost of litigation. RP 5-6, 9; CP 748-1038, 1114-1120.*

- *A dismissal without prejudice would allow the Husos to continue and prolong the cloud over the title to the Summer's Addition Plat, which will prejudice Defendant Phoenix Development, and will inhibit the ability of the City of Woodinville to approve any application for the subdivision or development of Lot 1 of the Summer's Addition that may be submitted by its owner. See Appendix B; see also CP 1123-1125; 1475-1515.*

- *Both defendants have expended substantial effort and funds to prepare for the pending summary judgment motions and trial, if*

*necessary, scheduled for March 23, 2009.* CP 1043-1109, 1123-1125, 1475-1515.

The trial court's findings of fact have not been challenged by the Husos. Appellants' Opening Brief at 1.

In the trial court's order, the Husos were given the option of electing *not* to proceed with their proposed voluntary non-suit. This would have had the effect of their proceeding to hearing on summary judgment on March 5 and trial on March 23, 2009. The Husos rejected that option, and chose instead to request a voluntary non-suit with prejudice. CP 1195; RP 36.

**6. Husos' Notice of Appeal.**

The Husos filed a notice of appeal to the Court of Appeals on March 27, 2009. The Husos appealed the trial court's decision to deny their third request for continuance, and also appealed the trial court's decision to grant their motion for nonsuit *with*, rather than *without*, prejudice. CP 1190-1197.

**D. ARGUMENT**

**1. Unchallenged Findings of Fact Are Verities on Appeal.**

An appellate court reviews a trial court's findings of fact to determine whether they are supported by substantial evidence in the record. *City of Seattle v. Megrey*, 93 Wn.App. 391, 394, 968 P.2d 900

(1998). Unchallenged findings of fact are verities on appeal. *State v. Houvener*, 145 Wn.App. 408, 415, 186 P.3d 370 (2008); *State v. Moore*, 161 Wn.2d 880, 884, 169 P.3d 469 (2007); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002); *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 129, 869 P.2d 66 (1995); *Ellenburg v. Larson Fruit Company, Inc.*, 66 Wn.App. 246, 228, 835 P.2d 225 (1992); *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 792 P.2d 500 (1990).

In this case, the Husos have challenged none of the trial court's findings of fact. Compare Trial Court Order, CP 1192-1195, with Appellants' Opening Brief at 1. Accordingly, they are verities on appeal. Even had they been challenged, however, substantial evidence in the record supports them. See Section C.5, *supra*.

**2. The Trial Court Acted Well Within Her Discretion in Denying the Husos' Request for a Third Trial Continuance.**

The Husos' motion for continuance was filed two months after the deadline to change the trial date and was, accordingly, tardy. CP 456, 748. The Husos had already received, at their request, two trial date extensions. CP 455, 691.

Under King County Local Rule 40(d)(2), a tardy motion to change a trial date will not be granted "except under extraordinary circumstances."

The sole circumstance cited by the Husos in their motion as supporting their request for the third trial continuance was a delay in ruling on their motion to compel depositions. CP 748-1038. However, that motion was ultimately denied. CP 689-690, 693-694. Discovery was complete. There was accordingly no reason to postpone the trial date to accommodate discovery that was not available to the Husos in the first place.

Subsequently, the Husos added an additional argument in support of their motion to continue the trial date: That the trial date should be postponed in order to accommodate the schedule of their newly retained legal counsel.

In the telephonic conference in which this issue was discussed, the trial court indicated that she would be willing to accommodate attorney Spencer's trial conflict by scheduling the trial of this matter for the day following the completion of attorney Spencer's trial in Snohomish County, a trial that was also planned to commence on March 23. CP 1192-1195. However, the trial court's accommodation was insufficient for the Husos, who demanded a postponement of four full months.

There is an additional reason why the trial court's denial of the requested third continuance was not only proper, but mandated. "State policy favors expeditious review of land use decisions so that legal

uncertainties can be promptly resolved and land development not be unnecessarily delayed by litigation-based delay.” *Bellewood No. 1 LLC v. Loma*, 124 Wn. App. 45, 49, 97 P. 3d 747 (2004). There is a strong public policy supporting prompt resolution of land use actions, codified in state statutes and recognized in the case law. *See, e.g.: City of Federal Way v. King County*, 62 Wn. App. 530, 538, 815 P. 2d 790 (1991) (the “consistent policy in this state is to review decisions affecting use of land expeditiously so that legal uncertainties can be promptly resolved and land development not unnecessarily slowed or defeated by litigation-based delays”); *Jewell v. Kirkland*, 50 Wn. App. 813, 820-21, 750 P. 2d 1307 (1988) (presiding judge “must consider the judicial policy in this state of expeditious review of land use regulatory decisions ...”); *National Homeowners v. Seattle*, 82 Wn. App. 640, 644-65, 919 P. 2d 615 (1996) (judicial review of land use matters “must be prompt”); and *Deschenes v. King County*, 83 Wn. 2d 714, 717, 521 P. 2d 1181 (1974) (prompt resolution of land use issues is necessary, otherwise “no owner of land would ever be safe in proceeding with development of his property.”).

In light of the fact that the trial date had already been continued twice, that discovery was complete, that the Husos had enjoyed a period of five months to locate legal counsel that could provide timely assistance, that two summary judgment motions were pending, and the strong public

policy favoring prompt resolution of land use decisions such as the road right of way issue here, it is incontrovertible that the trial court acted properly, pursuant to King County Local Rule 40(d)(2), in denying the continuance request. The Husos identified no “extraordinary circumstances” justifying their request. The decision to grant or deny a continuance is at the discretion of the trial court, and its decision will be upheld absent an abuse of discretion. *Harris v. Drake*, 152 Wn.2d 480, 493, 99 P.3d 872 (2004); *Podrebarac v. G.V.*, 124 Wn.2d 288, 295, 877 P.2d 680 (1994). A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary. *Harris*, 152 Wn.2d at 493; *Podrebarac*, 124 Wn.2d at 295; *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000). In this case, the trial court did not abuse her discretion, and her order denying the Husos’ request for a third trial continuance should be affirmed.

**3. The Trial Court Acted Well Within Her Discretion in Granting the Husos’ Motion for Nonsuit With, Rather than Without, Prejudice.**

**a. The Decision to Grant a CR 41(a)(1) Motion for Nonsuit *With Prejudice* or *Without Prejudice* is a Matter Left to the Sound Discretion of the Court, Reviewed Under the Manifest Abuse of Discretion Standard.**

The applicable standard for the adjudication of the Huso’s motion for nonsuit is set forth in *Escude v. King County Public Hospital District*,

117 Wn.App. 183, 190, 69 P.3d 895 (2003):

The appellants ask this court to determine that a trial court erred when it granted their motions for voluntary nonsuit pursuant to CR 41(a)(1)(B) *with* prejudice. This court reviews an order regarding a motion to dismiss for manifest abuse of discretion. Abuse occurs when the ruling is manifestly unreasonable or discretion was exercised on untenable grounds.

CR 41(a)(4) provides: “Unless otherwise stated in the order of dismissal, the dismissal is without prejudice...” Under the plain language of the rule it is evident that a trial court may dismiss a claim with prejudice, otherwise the language of the rule would be superfluous. Our Supreme Court has held that a trial court has the discretion to grant a nonsuit with or without prejudice, especially as part of the court’s inherent power to impose a sanction of dismissal in a proper case. *In re Det. Of G.V.*, 124 Wn.2d 288, 297-98, 877 P.2d 680 (1994).

*Escude* cites with approval *Grover ex rel. Grover v. Eli Lilly & Co.*, 33 F.3d 716, 718 (6<sup>th</sup> Cir. 1994), as a case that properly interprets “the analogous federal rule, Federal Rule of Civil Procedure 41(a)(2)...” *Id.*

In *Grover*, the court states:

Whether dismissal should be granted under the authority of Rule 41(a)(2) is within the sound discretion of the district court... The primary purpose of the rule in interposing the requirement of court approval is to protect the nonmovant from unfair treatment... Generally, an abuse of discretion is found only where the defendant would suffer “plain legal prejudice” as a result of a dismissal without prejudice, as opposed to facing the mere prospect of a second lawsuit...

In determining whether a defendant will suffer plain legal prejudice, a court should consider such factors as the defendant’s effort and expense of preparation for trial,

excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment has been filed by the defendant. *Kovalic*, 855 F.2d at 474 (citing *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7<sup>th</sup> Cir. 1969)).

33 F.3d at 718.

In *Famers Insurance Exchange v. Dietz*, 121 Wn.App. 97, 106-107, fn.25, 87 P.3d 769 (2004), the Court of Appeals, in the context of construing CR 41(a)(3) in a factual situation where “neither party [appeared] to have expended an inordinate amount of time, resources, or effort in the course of [the] short-lived action,” cited with approval the holding in *Pace v. Southern Express Co.*, 409 F.2d 331 (7<sup>th</sup> Cir. 1969) (*Pace* is also cited with approval in *Grover, supra*).

In *Pace*, the United States Court of Appeals for the Seventh Circuit “concluded that the district court was justified in denying a motion to dismiss without prejudice where the case had been pending for one and one-half years, considerable discovery had been undertaken at a substantial cost to the defendant, and the defendant had already briefed its motion for summary judgment.” See *Farmers Insurance Exchange*, 121 Wn.App. 106-107, n. 25. The *Pace* case is closely analogous to the facts before this Court.

Finally, additional guidance for the exercise of the Court's discretion is provided by the Washington Supreme Court's holding in *Spokane County v. Specialty Auto & Truck Parking*, 153 Wn.2d 238, 103 P.3d 792 (2004). In construing CR 41(a)(4), the Supreme Court hearkened back to CR 1:

CR 1 requires the Washington courts to interpret the court rules in a manner "that advances the underlying purpose of the rules, which is to reach a just determination in every action"... The court 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...

The narrow purpose of CR 41(a)(4) is to prevent the abuse and harassment of a defendant and the unfair use of dismissal.

[T]he language [of CR 41(a)(4)]... allows court discretion to direct whether a dismissal is with or without prejudice...

153 Wn.2d at 245-246.

In this case, that discretion was properly applied to direct a dismissal *with prejudice*, in order to prevent continuing abuse and harassment of defendants and the unfair and prejudicial use of dismissal.

**b. The Trial Court Properly Dismissed the Husos' Complaint *With Prejudice*.**

The Husos affirmatively misrepresent the basis for the trial court's ruling. In their Brief, they write that "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." Appellants' Opening Brief at 12.

A review of the trial court's findings of fact, however, shows that this representation is false. The bases for the trial court's decision were numerous, including: That the case had been pending for twenty-one months; that two continuances had already been granted; that plaintiffs during a five month period when they acted pro se took no action of record to engage new counsel, and then did so for the sole purpose of seeking additional delay; that during that five month "pro se" period plaintiffs engaged in abusive, harassing and oppressive activity; that the defendants had summary judgment motions pending (which the Husos had not responded to); and that defendants would be prejudiced by further delay. CP 1192-1195.

Moreover, the plaintiffs' motion to compel discovery had been denied over two weeks earlier, and the discovery cutoff date had passed. CP 689-690, 693-694. If plaintiffs were not ready for trial, it was due to no one's fault but their own.

Indeed, applying the *Grover* and *Pace* tests to the facts of this case indicates that the trial court properly dismissed the Husos' complaint *with prejudice*. As in *Pace*, this action had been pending for over eighteen months (twenty-one months, in fact), considerable discovery has been

completed (discovery was in fact complete), defendants had incurred substantial costs to prepare for trial (in excess of \$130,000), and defendants had already briefed their respective motions for summary judgment, motions to which plaintiffs did not even bother to respond.

In addition, the facts of this case render a dismissal *with prejudice* even more compelling than in *Pace*. In this case, plaintiffs had already obtained not one, *but two*, trial continuances. The conceded basis for the Husos' voluntary nonsuit was to make a procedural end-run around the Court's order denying the Husos' motion for a third continuance. The key reason plaintiffs were unprepared to proceed to trial on the originally scheduled trial date was disagreement with their attorney including the non-payment of their attorney's fees, which led to their attorney's withdrawal, over the objection of defendants. During the subsequent five months, plaintiffs took no action to engage new counsel, but waited until the eleventh hour, and then engaged new counsel solely to seek additional trial delay. Moreover, during those five months, plaintiffs engaged in abusive, harassing and oppressive activity, insulting the City's representatives and officials, and seeking to abuse the discovery process by noting the depositions of City councilmembers, the City's attorneys, and totally unrelated third parties.

Granting the proposed voluntary nonsuit *without prejudice* would result only in the continued enabling of this inappropriate behavior, behavior wholly at odds with the requirements of CR 1 and CR 11.

In their brief, the Husos rely exclusively on dictum contained in *Escude v. King County Public Hospital District No. 2*, 117 Wn.App. 183, 190, 69 P.3d 895 (2003) to support their appeal:

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.

In *Escude*, since dismissal without prejudice would have been pointless, due to passing of the statute of limitations, the Court of Appeals affirmed the decision of the trial court to dismiss the action *with* prejudice. Here, the applicable statute of limitations had either already expired or was to expire eleven days following the date of the hearing on the motion for voluntary nonsuit.

Moreover, the Court in *Escude* did not address the facts set forth in this case, where two trial continuances had already been granted, where the purpose of the motion was to cause unnecessary delay and needless increase in the cost of litigation, where the plaintiffs had engaged in abusive, harassing and oppressive activity, where the sole reason for the plaintiffs' motion for voluntary dismissal was because the court had

denied the request for continuance, and where allowing the plaintiffs to re-file would result in substantial prejudice to defendants.

In the circumstances of this case, the decision of the trial court was well within her discretion, and consistent with the authority cited in *Escude* and other applicable cases cited above, including *Grover, supra*; *Pace, supra*; and *Spokane County, supra*. The decision of the trial court must be affirmed.

**c. If the Matter Were Re-Filed, the Husos' Claim that the Phoenix Driveway was Dedicated to the Public Would be Time-Barred.**

As indicated in the prior section of this response brief, the trial court acted well within her discretion to dismiss this matter with prejudice, whether or not the Husos' claims remain viable if this matter were re-filed.

Nonetheless, it is also clear that the Husos' claim that the Phoenix driveway is a publicly dedicated right-of-way is now time-barred by the applicable statute of limitations.<sup>3</sup>

The uncontroverted evidence in the record demonstrates that on March 15, 2007, the Phoenix Development Plan for its proposed Montevallo Subdivision for the Summer's Addition Plat was shown and explained at a public hearing before a hearing examiner. Susan Huso was

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<sup>3</sup> Respondents do not assert that the Husos' claim for prescriptive easement is time-barred.

in attendance. City staff and Phoenix Development representatives explained the single access to the subdivision from 156th Ave. N.E. would be from a roadway south of the existing driveway alleged by the Husos to be a dedicated public road. A row of building lots is situated between the proposed road and the Huso property on the strip of property where the existing driveway alleged by the Husos to be a public road is located. CP 1192-1195.

In Woodinville's response to the Husos' motion for voluntary nonsuit, Woodinville argued that the appropriate statute of limitations for a declaratory judgment action of this kind is determined by looking at the underlying claim. *Unisys Corporation v. Senn*, 99 Wash.App. 391, 944 P.2d 244 (2000). The underlying claim of this action is that the existing driveway across Lot 1 of the Summer's Addition Plat is a dedicated public road and the court is being asked to declare such to be the case. Looking to Ch. 4.16 RCW, the two year statute of limitations in RCW 4.16.130 accordingly would be the appropriate statute of limitations for this claim, as there is no other limitation period provided for with respect to such an action. Therefore, since by March 15, 2007 the Husos had actual knowledge that neither the City nor Phoenix Development were treating the existing driveway as being a public road that needed to be vacated before approval of the proposed Montevallo Subdivision, their claim for

declaratory judgment action had accrued as of March 15, 2007 and has now expired under the statute.

At the March 4, 2009 hearing on the Huso's motion for nonsuit the Woodinville attorney also noted in his oral argument to the Court (RP 11-12) that the City's decision not to recognize the driveway as a public road was an administrative decision for which there was no specific statute of limitation.

Therefore, the most closely analogous appeal period for an administrative decision should be applicable. A LUPA appeal is required within 21 days of issuance of a land use decision. RCW 36.70C.040. An appeal of an administrative decision under the Administrative Procedures Act is required within 30 days of the decision. RCW 34.05.542. Woodinville Municipal Code section 17.17.060 requires any judicial appeal of a land use decision to be filed within 21 days, consistent with LUPA.

Respondent Phoenix Development timely filed its 21-day LUPA appeal of the City's underlying land use decision denying its subdivision application for the Montevallo subdivision made August 20, 2007. See *Phoenix Development v. City of Woodinville*, case number 62167-0-1 pending before this Court. Although the lawsuit brought by the Huso's against the City of Woodinville was not designated as an appeal of its land use decision, its claim that the City of Woodinville wrongly has refused to

acknowledge the driveway is a public road is in essence a collateral attack of that decision and the time period of an appeal of a land use decision should be recognized as a jurisdictional time limit which had long expired before March of 2009 and the dismissal of the Huso's lawsuit with prejudice. See *Sterling v. Spokane County*, 31 Wn. App. 467, 642 P.2d 1255 (1982) and *Akada v. Park 12-01 Corp.*, 103 Wn.2d 1255 (1985). The applicable statute of limitations had either already expired or was soon to expire when this case was dismissed with prejudice.

The Husos contend that the six-year statute of RCW 4.16.040(1) and (3) is applicable to their claim, either because it is "an action upon a contract in writing," or because it is "an action for the rents and profits or for the use and occupation of real estate." However, they cite no case that supports the proposition that an action seeking a declaration that a driveway is a publicly dedicated road is either "an action upon a contract in writing," or "an action for the rents and profits... of real estate." To the contrary, no contract is involved in this case, and the claim that the Phoenix driveway has been dedicated to the City is not "an action for the rents and profits of real estate."

The Husos' claim that the Phoenix driveway was dedicated to the public is accordingly time-barred. Re-filing the lawsuit as to that issue would be futile.

**4. CR 41(a) Does Not Provide a Mechanism to Remedy the Prejudice to Respondents.**

The Husos suggest that any prejudice to Respondents from allowing the Husos to re-file their lawsuit would be remedied by the application of CR 41(a). Appellants' Opening Brief at 18-19. This is false for two reasons. First, CR 41(a) allows only an award of "taxable costs." The attorney fees spent as of the date of the motion for voluntary nonsuit, including fees necessary to prepare the summary judgment motions that were pending at the time of the Husos' nonsuit motion, and the fees necessary to prepare for the trial that was scheduled to begin in less than three weeks, amounted to in excess of \$130,000. CP 1123-1125; 1475-1515. Unfortunately for the defendants, CR 41(a) does not afford the court discretion to require the Husos to pay even a small *fraction* of those expenses.

Second, the prejudice caused by the pendency of the Husos' claim is not limited to monetary damages. As the trial court found in her findings of fact, "A dismissal without prejudice would allow the Husos to continue and prolong the cloud over the title to the Summer's Addition Plat, which will prejudice Defendant Phoenix Development, and will inhibit the ability of the City of Woodinville to approve any application for the subdivision or development of Lot 1 of the Summer's Addition that

may be submitted by its owner.” CP 1192-1195. See also Declaration of Robert Vick, Appendix B. This finding was not challenged by the Husos and is therefore a verity on appeal. CR 41(a) does not remedy that prejudice.

**5. Respondents Are Entitled to Reasonable Attorney Fees on Appeal.**

RAP 18.1 provides that if applicable law grants a party the right to recover reasonable attorney fees, the party must devote a section of its opening brief to a request for fees.

Respondents in this case are entitled to attorney fees as CR 11 sanctions. This rule is applicable to appeals. *Steinberg v. Rettman*, 54 Wn.App. 841, 776 P.2d 695 (1989).

CR 11 provides:

(a)... The signature of a party or of an attorney constitutes a certificate by the party or attorney ... that to the best of the party’s or attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading, motion, or legal memorandum is signed in violation of this rule, the court... may impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney’s fee.

In this case, the trial court found, and its finding is a verity on appeal, that the Husos during the course of this litigation “engaged in abusive, harassing and oppressive activity;” and that the Husos’ motion for voluntary non-suit “signed by attorney Paul A. Spencer on behalf of the Husos is clearly interposed for the purpose of *causing unnecessary delay and needless increase in the cost of litigation.*” CP 1192-1195.

The Husos’ appeal is a continuation of the same practice of abuse, harassment, and oppressive use of litigation for the purpose of causing unnecessary delay and needless increase in the cost of litigation. This is an appropriate case for the imposition of sanctions, and they are accordingly hereby requested.

**E. CONCLUSION**

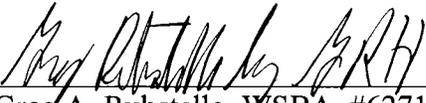
The City and Phoenix respectfully ask the Court of Appeals to dismiss the Husos’ appeal and to award attorney fees on appeal to the respondents.

DATED this 20<sup>th</sup> day of October, 2009.

MCCULLOUGH HILL, P.S.

By:   
G. Richard Hill, WSBA #8806  
Attorneys for Respondent Phoenix  
Development, Inc.

OGDEN MURPHY WALLACE

By:   
Greg A. Rubstello, WSBA #6271  
Attorneys for Respondent  
City of Woodinville

KEATING BUCKLIN ETC.

By:   
Michael C. Walter, WSBA #15044  
Attorneys for Respondent  
City of Woodinville

# APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

TODD HUSO and SUSAN HUSO, a )  
married couple, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
PHOENIX DEVELOPMENT, INC., A )  
Washington corporation; and THE CITY )  
OF WOODINVILLE, a municipal )  
corporation, )  
 )  
Defendants. )

NO. 07-2-15983-5 SEA  
ORDER DENYING  
MOTION FOR VOLUNTARY NON-SUIT

This matter coming on for hearing on the motion of the Plaintiffs Todd and Susan Huso for a voluntary non-suit under CR 41(a)(1)(B); and the court having considered the pleadings filed both in support of and in opposition to the motion as well as the court record, concludes that the Plaintiffs are entitled to a voluntary non-suit, but that a dismissal without prejudice is not appropriate for the following reasons, which shall be deemed findings of fact supporting this Order:

- This case has been pending for twenty-one months, and the plaintiffs have already received at their request two trial continuances.
- ~~The key reason plaintiffs were unprepared to proceed to trial on the originally~~

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~~scheduled trial date was disagreement with their attorney including the non-payment of their attorney's fees which led to their attorney's withdrawal, over the object of defendants.~~

- During the subsequent five months, plaintiffs took no action <sup>by record DTM</sup> to engage new counsel, and then engaged new counsel who entered a limited notice of appearance for the sole purpose of seeking additional trial delay.
- During those five months, plaintiffs engaged in abusive, harassing and oppressive activity, insulting the City's representatives and officials, and seeking to abuse the discovery process by noting the depositions of City councilmembers, the City's attorneys, and totally unrelated third parties.
- Here, the voluntary dismissal is being sought for no other reason than the denial by this court of the Huso's motion to continue the March 23 trial date, and <sup>was</sup> ~~to avoid~~ <sub>DTM</sub> <sup>scheduled the day before the</sup> summary judgment scheduled for March 5.
- The Husos and its limited appearance attorney Paul A. Spencer rejected an offer by the court to allow the trial date to be continued on a day to day basis while Mr. Spencer was in trial in Snohomish County beginning March 23, 2009 as he informed the court.
- The Husos have not informed the Court of any other efforts to obtain the services of any other attorney and/or why another attorney without a conflict on March 23, 2009 was not being considered.
- <sup>DTM</sup> ~~The~~ <sup>RCW 4.16.130 applies to this cause of action</sup> two year statute of limitations (RCW 4.16.130) for a declaratory judgment action on the issue of whether or not a public road exists across Lot 1 of the Summer's Addition Plat will expire on or about March 15. <sup>apparently DTM</sup>
- The Husos have failed to submit to the court any declarations or other evidence to contest the new evidence before the Court on summary judgment found in the

1            declarations of Summer's Addition Plat Surveyor Derwin Roupe, David Seversike  
2            the Huso's predecessor in title, Ray Sturtz the Woodinville expert in subdivision  
3            regulation, and the declaration of Greg Rubstello to which all the King County  
4            subdivision regulations in effect in 1976 are attached.

5            • ~~It is now clear that there are no material issues of contested facts preventing~~  
6            ~~summary judgment on either the issue of whether or not a public road exists across~~  
7            ~~Lot 1 of the Summer's Addition or the issue of whether or not the Husos have~~  
8            ~~acquired a prescriptive easement over the existing driveway.~~

9            • The defendants have completed all discovery and expended considerable resources  
10           to prepare the pending summary judgment motions and prepare for trial.

11           • The PLAINTIFF'S MOTION FOR VOLUNTARY NON-SUIT signed by attorney  
12           Paul A. Spencer on behalf of the Husos is clearly interposed for the ~~improper~~  
13           purpose of ~~harassing and causing unnecessary delay and needless increase in the~~  
14           ~~cost of litigation, all prohibited by CR 11(a)(2). A condition of dismissal with~~  
15           ~~prejudice on the Order of Dismissal is an appropriate sanction permitted by CR~~  
16           ~~H.~~

17           • A dismissal without prejudice would allow the Husos to continue and prolong the  
18           cloud over the title to the Summer's Addition Plat, which will prejudice Defendant  
19           Phoenix Development, and will inhibit the ability of the City of Woodinville to  
20           approve any application for the subdivision or development of Lot 1 of the  
21           Summer's Addition that may be submitted by its owner.

22           • Both defendants have expended substantial effort and funds to prepare for the  
23           pending summary judgment motions and trial, if necessary, scheduled for March  
24           23, 2009.

25           NOW, THEREFORE, it is hereby ORDERED that:  
26



## **APPENDIX B**

1 THE HONORABLE BARBARA MACK  
2 Trial Date: March 23, 2009  
3 Noted for: Wednesday March 4, @8:30 a.m..  
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8 IN THE SUPERIOR COURT OF THE  
9 STATE OF WASHINGTON FOR KING COUNTY

10 TODD HUSO and SUSAN HUSO, a married  
11 couple,

12 Plaintiffs,

13 vs.

14 PHOENIX DEVELOPMENT, INC., a  
15 Washington corporation, and CITY OF  
16 WOODINVILLE, a Washington municipal  
17 corporation,

18 Defendants.

No. 07-2-15983-5SEA

DECLARATION OF ROBERT VICK

19 I, Robert Vick, declare:

20 1. I am General Manager of Phoenix Development, Inc. I am competent to testify  
21 and make this declaration based on my personal knowledge.

22 2. In November of 2004, Phoenix submitted a preliminary plat application for  
23 approval of the Montevallo proposal, which involved the development of 66 homes on 16 acres,  
24 directly south of the Husos' property. The driveway that the Husos contend is a public road is  
25 located on the Phoenix property.  
26  
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28 DECLARATION OF ROBERT VICK- Page 1 of 2

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**MCCULLOUGH HILL, P.S.**

701 Fifth Avenue, Suite 7220  
Seattle, WA 98104  
206.812.3388  
206.812.3389 fax

1           3.       Phoenix's subdivision was approved by the City's Hearing Examiner in 2007. A  
2 rezoned proposal for the property was denied by the City Council in 2007, and is currently on  
3 appeal to the Court of Appeals. Oral argument is expected in April. When the Court of Appeals  
4 directs approval of the proposed rezoned thereafter, Phoenix intends promptly to proceed with  
5 development of the property. And in any event, the pending Huso lawsuit places a cloud on title,  
6 which frustrates development and marketing of the property, which causes prejudice to Phoenix.  
7 Phoenix, particularly in the current harsh economic climate, needs a prompt resolution of the  
8 Huso lawsuit. Any further delay in that resolution poses substantial hardship.

9  
10           4.       To date, Phoenix has incurred legal fees and expenses in excess of \$81,556 to  
11 defend against the claims made by the Husos. Phoenix is ready to go to trial and to fully and  
12 finally resolve the claims that have been brought by the Husos.  
13

14           I declare under penalty of perjury under the laws of the State of Washington that the  
15 foregoing is true and correct.

16           Executed this 26<sup>th</sup> day of February, 2009, at Lynnwood, Washington.

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Robert Vick