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No. ~~72509-0-1~~

IN THE COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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CARLOS GUTIERREZ

Plaintiff/Respondent,

v.

ICICLE SEAFOODS, INC.

Defendant/Appellant.

Appeal from King County Superior Court  
No. 15-2-06480-1 SEA

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**BRIEF OF APPELLANT  
ICICLE SEAFOODS, INC.**

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## I. INTRODUCTION

Respondent Carlos Gutierrez (“Gutierrez”) brought maritime personal injury claims against his former employer Appellant Icicle Seafoods, Inc. (“Icicle”), arising out of an alleged failure to provide him appropriate medical attention when an extremely rare illness manifested itself as a common cold/sore throat while Gutierrez was onboard the vessel P/V. R. M. THORSTENSEN as she operated off the Northeastern point of St. Paul Island, Alaska.

On May 4, 2016, Gutierrez filed a motion for voluntary dismissal of the action without prejudice under Civil Rule 41(a)(1)(B). Gutierrez’ motion came after the trial court had entered several discretionary rulings, after the close of regular discovery, after Icicle had to compel Gutierrez to participate in the CR 35 examination process, after Icicle had to twice compel Gutierrez to provide adequate and complete expert disclosures; after Icicle had deposed all of Gutierrez’ many expert witnesses, after Icicle had prepared its own panel of expert opinions (including five medical doctors), after the parties filed ER 904 disclosures, after Icicle noticed and filed a motion for summary judgment, and after Gutierrez had fully and comprehensively responded to, and without qualification or any request for CR 56(f) relief, opposed the summary judgment motion. Despite this procedural history and status, the trial court granted Gutierrez’ motion and dismissed the action.

Appellant respectfully asserts that the trial court's grant of plaintiff's motion for voluntary dismissal was erroneous and an abuse of discretion. Specifically, the trial court failed to properly apply and distinguish precedential case law, recognize critical and material distinctions present in this matter, and did not harmonize operation of CR 41 and 56 in this context. The trial court further failed to recognize and appreciate the permissive nature of the reply brief and the non-evidentiary nature of oral argument. Accordingly, Icicle seeks reversal of the trial court's erroneous grant of voluntary dismissal under CR 41(a)(1)(B) as Respondent was not entitled to this relief at the time his motion was filed. Alternatively, in the event the grant of voluntary dismissal is upheld, Appellant seeks remand of the decision to amend the terms of dismissal to provide with prejudice dismissal of all claims affirmatively abandoned by Gutierrez in the action below and to allow Icicle the opportunity to present a motion for relief under Civil Rule 37(c) as respects denied requests for admission on claims that Gutierrez conceded and/or abandoned in the course of this litigation.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred as a matter of law and fact in granting Respondent's motion for voluntary dismissal under CR 41(a)(1)(B). Respondent was not entitled to voluntary dismissal at the time his motion was filed.

2. Alternatively, the trial court erred as a matter of law and fact in failing to dismiss with prejudice all claims conceded and/or abandoned in this litigation and in preemptively precluding Icicle the opportunity to file a motion for Civil Rule 37 relief.

### **III. STATEMENT OF THE CASE**

Respondent Carlos Gutierrez (“Gutierrez”) joined the P/V R. M THORSTENSON (“RMT”) as a processor for 2014 A Season. CP 156. 159-65. While onboard the RMT, as the vessel operated outside the remote Northeastern point of St. Paul Island, Gutierrez developed cold/flu symptoms. He left the vessel for further evaluation, and was ultimately diagnosed with a rare and serious medical condition (descending necrotizing mediastinitis). *See* CP 36-43.

On March 23, 2015, Gutierrez sued Appellant Icicle Seafoods, Inc. (“Icicle”), the owner and operator of the RMT, asserting claims for additional seaman’s benefits, Jones Act negligence and unseaworthiness. CP 1-5. On April 10, 2015, Icicle timely answered Gutierrez’ complaint, denying liability and asserting several affirmative defenses. CP 6-11.

Thereafter, discovery commenced in earnest. On multiple occasions, Icicle had to request trial court intervention to secure Gutierrez’ timely participation and compliance with rudimentary discovery obligations. Throughout this process, the Honorable Johanna Bender,

King County Superior Court Judge, utilized substantial discretion and decision-making functions to enter the following orders:

- (1) February 1, 2016, Order Granting Defendant's Motion for Rule 35 Examinations of Plaintiff by defense expert psychiatrist Dennis Chong, M.D. and psychologist Peter Roy-Byrne, M.D. CP 12-18.
- (2) March 22, 2016, Order Granting in Part and Denying in Part Defendant's Motion to Compel Discovery Regarding Expert Witnesses and For Related Relief, which required Plaintiff to produce expert disclosures within deadlines set therein and granted Icicle an extension of time in which to conduct expert depositions and produce rebuttal expert reports. CP 21-24.
- (3) April 8, 2016, Order on Civil Motion, which granted Icicle's motion to strike as unripe for consideration Gutierrez' Motions in Limine Nos. 1-4 without prejudice to refile at the conclusion of discovery. CP 25-26.
- (4) April 14, 2016, Order Granting in Part and Denying in Part Defendant's Motion to Quash Plaintiff's CR 30(b)(6) Deposition Notice in Part and for Protective Order, which limited and defined the scope, date and location of Gutierrez' noted CR 30(b)(6) deposition. CP 28-32.

(5) April 26, 2016, Order Granting Defendant's Motion to Enforce Court's Order and Requiring Payment of Attorney's Fees regarding untimely and insufficient disclosure of opinions by Respondent's expert witness John Fountaine. CP 524-26.

(6) April 27, Order Granting Defendant's Motion to Enforce Court Order and Imposing Attorneys' Fees regarding untimely and insufficient disclosure of opinions by Respondent's expert witness Captain Joseph Derie. CP 527-30.

On March 18, 2016, Icicle noticed hearing on its Motion for Summary Judgment for Friday May 13, 2016. *Amended Note for Hearing* (CP 19-20).

On April 15, 2016, Icicle timely filed a Motion for Summary Judgment, with multiple supporting declarations and exhibits. *Amended Note for Hearing* (CP 34-35); *Motion for Summary Judgment* (CP 36-60); *Declaration of Dennis Chong, M.D. with Exhibits* (CP 61-110); *Declaration of Raymond Jarris, M.D. with Exhibits* (CP 111-123); *Declaration of Peter Hashisaki, M.D. with Exhibits* (CP 124-139); *Declaration of Patricia Gilmer, M.D. with Exhibits* (CP 140-155); *Declaration of Erin Ivie with Exhibits* (CP 156-194); *Declaration of Todd Zey* (CP 195-196); *Declaration of David Bratz with Exhibits* (CP 197-512, 1682-1911). The Motion for Summary Judgment affirmatively sought dismissal on all of Plaintiff's claims—including failure to pay seaman's

benefits (maintenance, cure, unearned wages), Jones Act negligence liability (no notice, no medical causation), unseaworthiness liability (no medical causation), and claims for punitive damages (no managerial/company knowledge, inability to establish reprehensible conduct, no basis for imposing in regard to provision of maintenance or post-vessel departure cure, and unavailability as a matter of law). *See Motion for Summary Judgment* (CP 36-60) and *Exhibit H to Decl. of Bratz Opposing Motion for Voluntary Dismissal* (CP 1595-99).

On April 25, 2016, Icicle filed designations of the deposition testimony of treating thoracic surgeon Dr. Thomas K. Varghese Jr., for presentation at trial. *Defendant's Deposition Designation of Thomas K. Varghese, Jr., M.D.* (CP 521-23).

On April 29, 2016, Icicle filed its Evidentiary Rule 904 Disclosures. CP 531-555. Respondent likewise filed his Evidentiary Rule 904 Disclosures on that same date. CP 556-572.

On May 2, 2016. Respondent filed his comprehensive opposition to Icicle's Motion for Summary Judgment. *Plaintiff's Response Opposing Defendant's Motion for Summary Judgment* ("Opposition") (CP 573-96). Respondent's Opposition was accompanied by several supporting declarations and numerous exhibits. *See Declaration of Captain Joe Derie with Exhibits* (CP 597 – 617); *Declaration of James Rockwell, M.D. with Exhibits* (CP 618-30); and *Declaration of Scott David Smith, with Exhibits*

(CP 631-865). The Opposition affirmatively withdrew any claims related to an alleged “failure to pay maintenance or cure,” and substantively opposed Icicle’s motion in regard to his ability to establish Jones Act liability, unseaworthiness liability, and entitlement to punitive damages for failure to provide cure. *See Opposition (CP 573-96) and Exhibit I to Decl. of Bratz Opposing Motion for Voluntary Dismissal (CP 1638-60)*. Respondent’s opposition did not request leave, under Civil Rule 56(f) or otherwise, to acquire additional evidence or conduct additional discovery in order to oppose Icicle’s summary judgment motion.

On May 4, 2016, Respondent filed a Motion for Voluntary Dismissal. *Notice & Motion for Voluntary Dismissal (CP 866-870)*. The Motion sought dismissal, without prejudice, of all of Respondent’s claims under Civil Rule 41(a)(1)(B). *Id.*

On May 6, 2016, Icicle filed designations of the deposition testimony of witness Tonja LaDue for presentation at trial. (CP 874-78).

On May 6, 2016, the trial court issued an order regarding the noting dates of outstanding motions, with no change to the briefing schedule as to any pending motion. *Order on Civil Motion (CP 873)*.

On May 9, 2016, Icicle filed its reply in support of its motion for summary judgment with supporting declarations and exhibits. *See Defendant’s Reply Supporting Motion for Summary Judgment (CP 879-84); Second Declaration of David C. Bratz with Exhibits (CP 885-1485)*:

*Declaration of Nicolas J. Vikstrom with Exhibit* (CP 1487-92);

*Declaration of Karen Conrad with Exhibit* (CP 1493-1510).

On May 9, 2016, Icicle filed its trial witness and exhibit list, as required by the case scheduling order. *Defendant's Trial Witness and Exhibit List* (CP 1511-39).

Also on May 9, 2016, the parties filed the required Joint Confirmation of Trial Readiness. *Joint Confirmation of Trial Readiness* (CP 1540-42).

On May 10, 2016, Icicle timely filed its opposition to Gutierrez' motion for voluntary dismissal, with supporting declaration and exhibits. *See Defendant's Opposition to Motion for Voluntary Dismissal* (CP 1543-62); *Declaration of David C. Bratz with Exhibits* (CP 1563 – 1663). Icicle opposed Plaintiff's motion for voluntary dismissal, and in the alternative sought the following conditions in the event the motion was granted: (1) the Court retain jurisdiction to determine Icicle's attorney fee entitlement based on the orders of April 26 & 27, 2016; (2) that all of Icicle's litigation costs be imposed on Respondent if he refiled his claims and that Respondent be unilaterally stayed from pursuing his claims until those costs were paid; (3) that all claims affirmatively withdrawn or abandoned be dismissed with prejudice; and (4) that the court retain jurisdiction to determine Icicle's entitlement to CR 37(c) sanctions for Respondent's

denial of requests for admission regarding claims he ultimately withdrew and/or abandoned.

Also on May 10, 2016, Gutierrez filed his trial witness and exhibit list. *See Plaintiff's Exhibit and Witness List* (CP 1664-68).

On May 11, 2016, Respondent filed his reply in support of his motion for voluntary dismissal. *Plaintiff's Reply re Motion for Voluntary Dismissal Without Prejudice ("Non-Suit")* (CP 1669-73).

On May 12, 2016, the trial court entered an Order of Dismissal Pursuant to CR 41(a). *Order of Dismissal* (CP 1674-78). The trial court concluded that a motion for summary judgment is not "submitted for decision" within the meaning of CR 41(a) until oral argument on a motion for summary judgment has commenced or has been waived. Under this logic, the trial court dismissed the matter without prejudice under CR 41(a), excepting the claims of failure to pay maintenance and cure Respondent unequivocally withdrew in response to Icicle's motion for summary judgment which were dismissed *with* prejudice. *See id.* The trial court's order did not address the unearned wage or economic loss claims that Gutierrez affirmatively abandoned in the course of the litigation. The trial court retained authority to enter attorneys' fees awards against Respondent according to orders entered prior to filing of the motion for voluntary dismissal, but declined to consider any other sanctions (*i.e.*, allow Icicle to file a motion in regard to Gutierrez' denials of certain

requests for admission). Finally, the trial court found unripe Icicle's requests to condition Respondent's refiling and prosecution of his claims on payment of Icicle's costs incurred in the underlying matter. *Id.* (CP 1676). On that same day, the trial court entered an order striking the May 31, 2016 trial date. *Order on Civil Motion* (CP 1679-81).

On May 13, 2016, Icicle timely filed its Notice of Appeal of the trial court's May 12, 2016 order.

#### **IV. LEGAL ARGUMENT**

##### **A. Standard of Review**

Trial court orders regarding a motion to dismiss are reviewed for abuse of discretion. *Farmers Ins. Exch. v. Dietz*, 121 Wn. App. 97, 100, 87 P.3d 769 (2004); *Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003). A trial court abuses its discretion when the decision is "manifestly unreasonable or discretion was exercised on untenable grounds." *Escude*, 117 Wn. App. at 190. "The application of a court rule to undisputed facts is a matter of law that [is reviewed] de novo." *Farmers Ins. Exh.*, 121 Wn. App. at 100.

##### **B. The Trial Court Erroneously Granted Respondent's Motion for Voluntary Dismissal.**

###### **i. Available Precedential Case Law is Factually and Materially Distinct from the Procedural Posture of this Matter.**

Gutierrez moved for voluntary dismissal under Civil Rule 41(a)(1)(B), which provides in relevant part:

(a) Voluntary Dismissal.

(1) *Mandatory*. . . any action shall be dismissed by the court: . . .

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

CR 41(a)(1)(B)(2016). A plaintiff's right to a voluntary dismissal is measured by the posture of the case at the precise moment in time in which the motion is made, because any possible right to dismissal is fixed at that point in time. *Calvert v. Berg*, 177 Wn. App. 466, 472, 312 P.3d 683 (2013); *Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514 (1973). A plaintiff's entitlement to voluntary dismissal under CR 41(a)(1) in the context of summary judgment proceedings has been substantively addressed in only three opinions of precedential value—all which addressed factual circumstances materially distinct from that presented here.<sup>1</sup> We discuss each in turn.

First, in *Beritich v. Starlet Corp.*, 69 Wn.2d 454, 418 P.2d 762 (1966), a workplace personal injury action, the defendant filed a motion for summary judgment, which was fully briefed by both parties and following argument the trial court orally announced a decision in favor of Defendant and asked for presentation of an order of dismissal with prejudice consistent with the ruling. *Id.* at 455-56. Before the order

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<sup>1</sup> As dictated by General Rule 14.1(a), the unpublished opinions of the Court of Appeals may not be cited by any party as authority in any subsequent matter.

granting defendant's motion for summary judgment was presented for signature, the Plaintiff moved for voluntary nonsuit. *Id.* at 456. The trial court granted Plaintiff's motion for voluntary nonsuit without prejudice and refused to enter Defendant's order for dismissal on the merits. *Id.* Defendant appealed. The *Beritich* Court articulated the inquiry as follows: "Should a nonmoving plaintiff in a summary judgment procedure be entitled, as a matter of right, to a voluntary nonsuit after the motion for summary judgment has been submitted to the court?" *Id.* at 458. Given the specific procedural posture presented, the *Beritich* Court found that the summary judgment motion had been submitted prior to filing of Plaintiff's motion for voluntary nonsuit, thus extinguishing Plaintiff's right to voluntary nonsuit. The *Beritich* Court reversed the order granting voluntary dismissal without prejudice and remanded for proceedings consistent with its opinion.

The *Beritich* decision, while establishing the "submission" inquiry for evaluating motions for voluntary nonsuit in the context of a motion for summary judgment, and recognizing important immutable principles regarding the summary judgment process,<sup>2</sup> is factually distinguishable from the present matter. In *Beritich*, the trial court had orally issued a

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<sup>2</sup> The Court recognized that a summary judgment motion was "in substance, if not form, a prayer for affirmative relief," *Beritich*, 69 Wn.2d at 457, and that "the summary judgment procedure, at least from defendant's viewpoint, would become a virtual nullity if a plaintiff can 'exit stage left' upon hearing an adverse decision of the trial judge on the summary judgment motion." *Id.* at 458-59.

decision on the motion for summary judgment before the plaintiff filed a motion for voluntary nonsuit and thus the matter had clearly been submitted for determination by the court. Indeed, beyond submitted the motion had actually been decided. *Beritich* does not speak to, however, the earliest point in the summary judgment procedure at which the motion is deemed submitted—only that an oral decision following oral argument on such a motion would constitute submission and divest the plaintiff of any right to a voluntary nonsuit.<sup>3</sup>

Second, in *Paulson v. Wahl, et al.*, 10 Wn. App. 53, 516 P.2d 514 (1973), a medical malpractice action, the defendants filed motions for summary judgment with supporting affidavits. *Id.* at 54. Instead of filing an opposition or responsive pleading, the plaintiff filed a motion for voluntary dismissal. *Id.* The motion for voluntary dismissal was granted, and defendant appealed. *Id.* The *Paulson* court resolved the specific factual scenario before it as follows:

Even though the defendants had filed their motions for summary judgment with supporting affidavits, **plaintiff had not yet served opposing affidavits so, in contrast to the situation in *Beritich*, the motions had not been submitted** to the court for determination when plaintiff's motion for voluntary dismissal was made.

We hold that a reasonable and proper interpretation of CR 41(a)(1)(B) and CR 56 dictates that a nonmoving plaintiff in a summary judgment procedure retains the right

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<sup>3</sup> See, *Paulson v. Wahl, et al.*, 10 Wn. App. 53, 55-56, 516 P.2d 514 (1973), recognizing that *Beritich* does not identify the point in the summary judgment procedure at which the right to a voluntary nonsuit is lost.

to a voluntary nonsuit until the motion for summary judgment has been submitted for decision. **The mere filing of a defense motion for summary judgment with supporting affidavits and the scheduling of the matter for hearing does not constitute the submission of the motion to the court for decision, where no hearing has begun and the court has not otherwise exercised its discretion in the matter.**

*Paulson*, 10 Wn. App. at 57 (emphasis added).

Key to the *Paulson* decision that the summary judgment motion had not been submitted by the time the motion for voluntary dismissal was filed were: (1) that the Plaintiff filed a motion for voluntary dismissal, but had not filed an opposition to the motion for summary judgment, and (2) that the court had “not otherwise exercised its discretion in the matter.”

*Paulson*, 10 Wn. App. at 57. This case differs from *Paulson* in both of these key and material respects. Here, two days before filing his motion for voluntary dismissal the Respondent filed a comprehensive response, without qualification or request for additional discovery under CR 56(f), as well as supporting declarations and evidence, in opposition to Icicle’s motion for summary judgment. Also unlike *Paulson*, the trial court in this matter had, on multiple occasions, exercised its discretion in the litigation prior to the filing of Respondent’s motion for voluntary dismissal. See *February 1, 2016 Order* (CP 12-18), *March 22, 2016 Order* (CP 21-24), *April 8, 2016 Order* (CP 25-26), *April 14, 2016 Order* (CP 28-32), *April 26, 2016 Order* (CP 524-26), and *April 27, 2016 Order* (CP 527-30). Accordingly, *Paulson* is both factually and legally distinct from this

matter and neither dictates nor supports the grant of Respondent's motion for voluntary dismissal. To the contrary, it supports denial.

Third, in *Greenlaw v. Renn, et al.*, 64 Wn. App. 499, 824 P.2d 1263 (1992), a malpractice action, the defendants filed motions for summary judgment. The plaintiff filed no affidavits or opposition. *Id.* at 500-01. The day before oral argument on the motion for summary judgment was scheduled, Plaintiff filed a motion for voluntary dismissal. *Id.* at 501. Hearing on the motion for summary judgment went forward, during which the trial court advised it had not received the motion for voluntary dismissal. Following argument, the trial court granted Defendant's motion for summary judgment, declined to rule on plaintiff's motion for voluntary dismissal, and granted defendant's motion for fees and costs. *Id.* Plaintiff appealed. The *Greenlaw* Court held as follows:

The facts of this case lie somewhere between *Paulson* and *Beritich*. *Greenlaw* filed her motion for voluntary nonsuit after the time for filing affidavits in response to defendants' motion for summary judgment had expired, but before the trial court began the summary judgment hearing.

In our judgment, where a motion for voluntary nonsuit is filed and called to the attention of the trial court before the hearing on a summary judgment motion has started, the motion must be granted as a matter of right. *Beritich* does not mandate a contrary result. Here, *Greenlaw's* motion for voluntary nonsuit was filed before the summary judgment motion had been submitted to the court for a ruling. **Other than the fact that the motion was filed after the time to respond to the summary judgment motion had expired, this case does not differ from *Paulson*.**

**Greenlaw had not, in our opinion, rested her case any more than had the Plaintiff in *Paulson*.** A party resisting a summary judgment motion is entitled to a hearing before the trial court at which arguments can be made, whether or not responsive documents were filed. CR 56(c). Here, the written motion for nonsuit was filed and served before the hearing, well before argument of counsel and the decision of the trial court.

*Greenlaw*, 64 Wn. App. at 503 (emphasis added).

*Greenlaw* is likewise distinguishable from the present matter in that the procedural posture in that instance was adjudged to be substantively identical to that of *Paulson*—the motion for voluntary dismissal was filed *in lieu of* an opposition to a pending summary judgment motion—thus dictating the same outcome. In this case, unlike both *Greenlaw* and *Paulson*, Gutierrez did file a comprehensive and complete opposition to, Icicle’s motion for summary judgment accompanied by supporting declarations and exhibits two days before filing a motion for voluntary dismissal. This is a significant and material distinction that dictates a different outcome: filing an opposition extinguished Respondent’s right to a CR 41(a)(1)(B) voluntary dismissal.

**ii. The Summary Judgment Motion Was Submitted Before the Motion for Voluntary Dismissal Was Filed.**

On May 2, 2016, when Gutierrez filed his comprehensive opposition to the motion for summary judgment, complete with supporting declarations and exhibits, and without qualification or request for

continuance, the matter was “submitted” and Gutierrez’ at that point lost his entitlement to voluntary dismissal under CR 41(a)(1)(B). This outcome is supported and affirmed by a critical review of the civil rules and case law at issue.

First, *Beritech* articulates the “time before plaintiff rests” under CR 41(a)(1)(B) as a function of when the summary judgment is “submitted” to the trial court. *Beritech*, 69 Wn.2d at 458. It is important and imperative that any application of the “submission” test articulated in *Beritech* be true and consistent with the language of the rule itself—which speaks to Plaintiff “resting” his case. The term “submit” is not specifically defined by either *Beritech* or Civil Rule 56. However, the definition accorded the term by Black’s Law Dictionary is as follows:

submit *vb.* To end the presentation of further evidence (in a case) and tender a legal position for decision.

BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014). Under this straightforward legal definition, Respondent’s filing of a comprehensive opposition to the motion for summary judgment ended his “presentation of further evidence” on the motion and “tender[ed] a legal position for decision.” No additional filings are allowed by a nonmoving party in the operative summary judgment procedure. *See* Civil Rule 56(c) (allowing for single oppositional filing and evidence by nonmoving party). And the reply afforded to the movant is strictly a rebuttal, and discretionary, pleading in which new issues cannot be raised. *See* CR 56(c) (“[t]he moving party

may file and serve any *rebuttal* documents . . .”) (emphasis added); *White v. Kent Medical Center, Inc. P.S.*, 61 Wn. App. 163, 168-69, 810 P.2d 4 (1991). This is also consistent with “submission” in the broader sense of the word in that by filing his opposition Respondent affirmatively engaged in, participated in, and consented to, the trial court’s resolution of Icicle’s affirmative request for summary dismissal of his claims. Moreover, this construction is entirely consistent with the holdings of *Paulson*, 10 Wn. App. at 57 and *Greenlaw*, 64 Wn. App. at 503 in finding that where an opposition had not been filed the matter had not been “submitted” in terms of availability of voluntary dismissal under CR 41(a)(1)(B).

Moreover, it is improper to assess “submission,” in the context of CR 41(a)(1)(B) entitlement, relative to whether oral argument on a motion for summary judgment has commenced and/or taken place. The reasons are two-fold. First, the success of a motion for summary judgment is adjudged exclusively on the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any” filed by each party. Civil Rule 56(c). Though oral argument may be allowed on a motion for summary judgment, this argument *is not evidence*. *Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998) (“Argument of counsel does not constitute evidence.”); *Strandberg v. Northern Pac. Ry. Co.*, 59 Wn.2d 259, 265, 367 P.2d 137 (1961) (“argument is not evidence”); *Jones v. Hogan*, 56 Wn.2d

23, 31, 351 P.2d 153 (1960) (“Argument is not evidence . . .”); *see also King County Fire Protection Districts Nos. 16, 36, & 40 v. Housing Authority of King County*, 123 Wn.2d 819, 826 n.13, 872 P.2d 516 (1994) (“A court may not consider inadmissible evidence when ruling on a motion for summary judgment.”). Accordingly, the right to affirmative summary judgment relief stands solely and exclusively on the admissible record evidence, and non-evidentiary argument on the motion, while allowable, does not and cannot compromise the evidentiary predicate necessary for entitlement to affirmative summary judgment relief. The determinative evidence resides solely and exclusively in the written and documentary submissions of the parties.

Second, while oral argument is allowed on a motion for summary judgment, it is not necessarily required or available in all jurisdictions. King County Superior Court Local Civil Rule 56(c)(1) provides: “The court shall decide all summary judgment motions after oral argument, unless the parties waive argument.” Indeed, it is apparent that the trial court in this matter placed substantial weight on the local rule, whose language features prominently in the May 12, 2016 Order:

Based on a review of applicable case law, the Court concludes that a case has been “submitted” for decision only once oral argument on summary judgment is waived or has convened.

*See May 12, 2016 Order* at p. 2, lines 13-15 (CP 1675).

However, Civil Rule 56 itself contains reference to a “hearing” and a “hearing date,” but does not reference “oral argument.” Moreover, the local civil rules of many other county superior courts do not contain the language or directive of King County Superior Court Local Rule 56(c)(1). *Compare* KCSCLR 56(c)(1) *with* Adams County Superior Court Local Rule 1 (generally motion hearing scheduling; no summary judgment specific language regarding oral argument and no local rule dedicated to summary judgment); Clallam County Superior Court Local Rule 77(k) (discusses motion calendar and hearing scheduling; no summary judgment specific language regarding oral argument and no local rule dedicated to summary judgment); Pacific/Wahkiakum Superior Court Local Rule 1 (discusses motion days and calendaring; no summary judgment specific language regarding oral argument and no local rule dedicated to summary judgment); Walla Walla County Superior Court Local Rule 4 (providing procedure on civil motion calendar, specifically not applicable to CR 56 motions; no local rule addressing summary judgment motions): *See also Partridge v. Reich*, 141 F.3d 920, 926 (9<sup>th</sup> Cir. 1998) (district court can decide summary judgment without oral argument if parties have an opportunity to submit their papers to the court); W.D. Wash. Local Rule 7(d)(4) (“Unless otherwise ordered by the court, all motions will be decided by the court without oral argument”). As the requirements and availability of oral argument vary amongst even Washington superior

courts, no party should be held to a standard of “submission” in one such court that could not be applied in equal measure in every superior court. *See, e.g.* CR 83(a) (“Each court . . . may . . . from time to time make and amend local rules governing its practice not inconsistent with these rules.”). Accordingly, the commencement or occurrence of “oral argument,” the timing and availability of which varies from county to county, is an inappropriate measuring stick by which to assess “submission” of a summary judgment motion. It was erroneous for the trial court to assess commencement of oral argument as determining whether a motion for summary judgment had been submitted.

Ultimately, a **non-evidentiary and not uniformly available** feature of the summary judgment procedure should not be a threshold requirement for “submission” in the context of harmonizing Civil Rules 41(a)(1)(B) and 56. To the extent that any reported decision could be interpreted to require commencement of non-evidentiary oral argument in order for a matter to be “submitted” for purposes of extinguishing entitlement to voluntary dismissal under CR 41(a)(1)(B),<sup>4</sup> *Icicle* respectfully asserts that for the reasons articulated in detail herein such a holding is improper and inconsistent with the intent and language of Civil Rules 41 & 56, and should be vacated.

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<sup>4</sup> *See, e.g. Plaintiff’s Reply Re Motion for Voluntary Dismissal (“Non-Suit”)* at p.2-3 (CP 1670-71) (interpreting *Paulson* and *Greenlaw* as holding that a hearing—in the form of oral argument—must officially begin before a motion for summary judgment is “submitted”).

**iii. Fundamental Fairness, Equity and Due Process Dictate that the Right to Voluntary Dismissal under CR 41(a)(1)(B) Must Be Extinguished by Plaintiff's Voluntary and Unqualified Submission to the Summary Judgment Process.**

By the time Respondent filed his motion for voluntary dismissal (only 27 days before the scheduled trial date of May 31, 2016):

- (1) The parties had engaged in extensive discovery in this matter, including the exchange of written and documentary discovery requests, and depositions of lay and expert witnesses;
- (2) The parties had engaged in extensive motion practice—which was predominantly aimed at obtaining Respondent's participation in the CR 35 exam process, obtaining Respondent's compliance with discovery rules and restricting his impermissible discovery demands on Icicle;
- (3) Icicle had procured and issued disclosures for expert opinions of five medical doctors as well as a vocational rehabilitation specialist;
- (4) Icicle had taken the depositions of Respondent's experts Dr. Rockwell, Captain Derie, Dr. Seroussi, Mr. Fountain and Ms. LaDue and had these transcripts reviewed by its panel of experts for preparation of rebuttal reports;
- (5) The parties had both filed Evidentiary Rule 904 notices;
- (6) Icicle had designated deposition testimony of treating

thoracic surgeon Dr. Thomas Varghese for presentation at trial;

- (7) Icicle had filed a motion for summary judgment covering all of Gutierrez' claims in this litigation; and
- (8) Gutierrez filed a comprehensive response to the summary judgment motion which abandoned certain claims and submitted argument and evidence in support of the remainder. The opposition was filed without qualification, reservation, or request for any additional discovery or evidence under CR 56(f) or any other like relief.

After submitting his comprehensive opposition to summary judgment, only days before trial was set to commence, and after having Icicle's entire case preparation strategy laid out before him, Respondent decided he did not like his odds on summary judgment and instead moved to "exit stage left" while reserving the option of a "do over" with the benefit of having nearly tried his case to completion. Grant of Gutierrez' motion for voluntary dismissal at this late stage, particularly after he had affirmatively and comprehensively tendered his legal position on the pending summary judgment motion to the court, is irreparably prejudicial to Icicle. Indeed, by the time Gutierrez filed the motion for voluntary dismissal, Icicle had expended multiple hundreds of thousands of dollars in attorneys' fees in addition to more than a hundred thousand dollars in

costs in preparing the case for summary judgment dismissal and/or jury trial. The grant of the voluntary dismissal without prejudice exposes Icicle to a re-filing of Plaintiff's claims—which were fully ripe for determination on the merits by way of the summary judgment motion—along with duplicate attorneys' fees and cost exposure, and an increased risk of inability to adequately defend against the claims as memories fade, witnesses become unavailable and the evidence becomes stale.

Moreover, on these facts any interpretation of the procedural posture that would allow Respondent the right to a CR 41(a)(1)(B) voluntary dismissal without prejudice (on any claims) is inconsistent with the overarching mandate that all civil rules “**shall** be construed and administered to secure the **just, speedy, and inexpensive** determination of every action.” Civil Rule 1 (emphasis added); *see also Farmers Ins. Exch.*, 121 Wn. App. at 106-07 (analyzing prejudice to nonmovant in reviewing CR 41 motion for voluntary dismissal—including amount of time, resources and effort expended at the point at which the request for voluntary dismissal was filed) (citing *Pace v. Southern Exp. Co.*, 409 F.2d 331, 334 (7<sup>th</sup> Cir. 1969) (no abuse of discretion in denying motion for voluntary dismissal in light of defendant's effort and expense in preparing for trial, lack of diligence on part of plaintiff, insufficient explanation for need for dismissal, and filing of motion for summary judgment by defendant). There is nothing speedy, just or inexpensive in allowing the

Respondent (against the objection of Appellant) to “back out” of the underlying litigation—including the summary judgment procedure in which he affirmatively participated and the trial of this matter set for only two weeks thereafter. Nowhere in the governing civil rules is the defendant in any litigation allowed the opportunity for such a “do over.” Both law and equity favor reversal of the trial court’s order granting Respondent’s motion for voluntary dismissal.

**C. Alternatively, The May 12, 2016, Order Should Be Remanded for Amendment to the Terms of Dismissal.**

For the reasons set forth in detail above, it is Icicle’s position that the trial court abused its discretion and improperly applied the law in granting Gutierrez’ motion for voluntary dismissal under CR 41(1)(a)(B) and that the May 12, 2016 order must be remanded and the motion denied. However, should the Court of Appeals nonetheless uphold the grant of voluntary dismissal, Icicle in the alternative challenges the terms of dismissal in two respects and requests that the order be remanded and amended accordingly.

First, the trial court correctly noted that claims conceded or abandoned by the party seeking voluntary dismissal (Respondent) should be dismissed with prejudice. *See May 12, 2016 Order* at p. 3 (CP 1676); *see also Escude*, 117 Wn. App. at 192 (“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

court did not err in granting the motions for voluntary nonsuit with prejudice under the facts of these cases.”). On this rationale the trial court dismissed with prejudice Respondent’s “claim for failure to pay maintenance and cure.” The trial court failed, however, to address the other claims that Plaintiff had conceded and/or abandoned, or to provide particularity regarding the “failure to pay maintenance and cure” verbiage. Icicle respectfully requests remand for amendment of the terms to include with prejudice dismissal of the following claims that Gutierrez’ affirmatively conceded and abandoned:

- (1) Claims as to the sufficiency of seaman’s benefits paid and received (including, unearned wages, maintenance, cure, achievement of maximum medical improvement on October 16, 2014, and benefit duration);<sup>5</sup>
- (2) Claims for damages of any kind in regard to administration or payment of seaman’s benefits (maintenance, cure, unearned wages) following Gutierrez’ departure from the

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<sup>5</sup> *Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment* (Exhibit I to Declaration of David Bratz) at p.1, fn.1 (CP 1637) (stating withdrawal of claims for failure to pay maintenance and cure in response to Icicle’s assertion of entitlement to judgment as a matter of law that plaintiff had received all seaman’s benefits to which he was entitled—including unearned wages, maintenance, cure, achievement of MMI and benefit duration); *see Motion for Summary Judgment* (Exhibit J to Bratz Decl.) at p.14:10-17:3 (CP1624-27).

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(3) Claims for economic loss (past or future earning capacity).<sup>7</sup>

As the trial court noted, claims abandoned during the course of litigation are appropriately dismissed with prejudice. The court order should accordingly reflect all claims so abandoned with specificity to avoid any unnecessary litigation regarding same should Gutierrez refile a subsequent action against Icicle.

Finally, the trial court improperly refused to allow Icicle the opportunity to present a Civil Rule 37(c) motion in regard to Gutierrez' denial of certain requests for admission. Specifically, in response to Icicle's requests for admission Gutierrez denied that he was paid the full amount of maintenance he was owed, that his medical bills (cure) on account of the injury were paid, that he was paid all unearned wages that he was owed, and that he had reached maximum medical improvement. *See May 7, 2015 Verified Responses to Defendant's First Requests for Admission Nos. 2-5 (Exh. A to Bratz Decl.) at CP 1567-73; October 30, 2015 Verified Responses to Defendant's Second Request for Admission*

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<sup>6</sup> *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* (Exhibit I to Declaration of David Bratz) at p.19, fn.12 (CP 1655) ("As plaintiff has withdrawn his claim for failure to *pay* maintenance and cure, defendant's discussion concerning punitive damages relating to post-departure benefit administration is no longer relevant."); *see Motion for Summary Judgment* (Exhibit J to Bratz Decl.) at p.24:10-20 (CP1634).

<sup>7</sup> *Plaintiff's Verified Response to Interrogatories Nos. 1, 14 and 17* (Exhibit C to Declaration of David Bratz) at CP 1583-90 (expressly stating that Gutierrez was not making any claim for lost wages or impaired future earning capacity).

*No. 10* (Exh. B to Bratz Decl.) at CP 1574-82. In his opposition to Icicle’s motion for summary judgment, Respondent conceded and abandoned all claims to which these requests for admission pertained. *See Plaintiff’s Opposition to Motion for Summary Judgment* at p.1,fn1 & p.19, fn.12 (CP 1637, 1655). Accordingly, Icicle’s right to sanctions under Civil Rule 37(c) was affixed as of the filing of Respondent’s opposition—which was two days prior to filing of his motion for voluntary dismissal. Indeed, these claims were ultimately dismissed by the Court with prejudice. *May 12, 2016 Order* at p.3 (CP 1676). The trial court resolved Icicle’s request to retain jurisdiction to consider a motion under CR 37(c) by stating only that “[t]he Court will not consider any future motions for sanctions under this cause number.” *Id.* This was error.

Though a trial court’s decision in regard to discovery sanctions is reviewed for abuse of discretion, *see Mangana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582-83, 220 P.3d 191 (2009), the use of this discretion to deny a party the opportunity to submit a CR 37(c) motion for consideration is improper. The right to CR 37(c) sanctions (if any) accrued prior to Gutierrez’ filing of his motion for voluntary dismissal, the trial court has the ability to retain jurisdiction under these circumstances to resolve such issues,<sup>8</sup> and the trial court nonetheless refused to allow Icicle the option of

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<sup>8</sup> *See, e.g. Escude*, 117 Wn. App. at 192-94; *Hawk v. Branjes*, 97 Wn. App. 776, 986 P.2d 841 (1999).

even submitting a motion for consideration. Whether the trial court will ultimately determine that CR 37 sanctions are appropriate, after reviewing the parties' submissions in conjunction with the specific factors identified in Civil Rule 37(c),<sup>9</sup> remains to be seen, but the trial court's discretion is never properly exercised to preemptively preclude a party from even filing such a motion for consideration. Icicle should be allowed the opportunity to present a CR 37(c) motion for the trial court's consideration and respectfully contends that it was an abuse of discretion for the trial court to refuse Icicle the opportunity to file and have the court consider the merits of a CR 37(c) motion for conduct that clearly preceded the filing of Respondent's Motion for Voluntary Dismissal.

## V. CONCLUSION

For the reasons set forth in detail in the foregoing brief, Icicle respectfully requests that the Court of Appeals reverse the trial court's grant of Respondent's motion for voluntary dismissal under CR 41(a)(1)(B) and remand for further proceedings consistent with this reversal.

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<sup>9</sup> See Civil Rule 37(c) identifying four factors for consideration in determining whether expenses, including attorneys' fees, are appropriate for a party's failure to admit the truth of a matter in response to a request for admission.

RESPECTFULLY submitted this 28<sup>th</sup> day of July 2016.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day she caused to be served in the manner noted below a copy of the document to which this certificate is attached on the following counsel of record:

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**Via Hand Delivery**

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

Dated this 28<sup>th</sup> day of July 2016.

  
Signed at Seattle, Washington

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