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CR 13

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I. Summary of Reply Brief

A. The Trial Court Improperly Concluded the Motion to Amend was Untimely.

L'Hommedieus claim for lis pendens liability was not a compulsory counterclaim and is wrongfully being treated as such. RCW 4.28.328 requires that a litigant to have a successful outcome in their favor in order to attempt to establish liability under the statute.

The claim for lis pendens liability was not a mature claim, nor was it ripe for adjudication at trial or on appeal. It was an abuse of discretion for Judge Reynolds to deny the L'Hommedieus motion to file an CR 13(e) After-Arising Counterclaim.

It would seem that mere common sense would dictate CR 13(e) claims. When broken down to the elemental level, the crux of this motion is quite simple. The claim did not exist when the L'Hommedieus filed their answer, therefore, it was not compulsory. L'Hommedieu attempted to amend the complaint to assert a counterclaim, which he has the right to do under the civil rules. There was no lis pendens liability under any theory until the appeals were final. Once the appeals were finalized, 8 days after the remand, the L'Hommedieus timely filed their motion to amend their complaint as a CR 13(e) motion.

The mere lapse of time during the appeal process does not equate to an excessive delay. The Lanes were responsible for some of that delay during the appeal, and the passage of time alone is an ordinary result of an appeal process. Under the Lanes theory, the “three and a half years” is excessive. Are the Lanes really opining that the L’Hommedieus are responsible for the amount of time it takes to process an appeal?

The Lanes have taken the position that this should have been brought at the trial level, or soon thereafter. This is contrary to law. The L’Hommedieus get to choose their forum when asserting a counterclaim that was permissive in nature.

B. Whether the claim is a CR 13(e) claim or a CR 13(f) claim, the court abused its’ discretion by failing to allow the amendment.

The standards under CR 13(f) are the same as those governed under CR 15(a) and leave should be freely granted. The trial court wrongly decided that timeliness takes precedence over “when justice so requires” and being “freely granted”.

The Lanes wrongly identify the integration of either CR 13(e) or CR 13(f) claims with CR 15. The standards governing motions for leave to file and after-arising counterclaim are the same as those governing a motion for leave to amend a pleading under CR 15(a). Timeliness of a

motion to amend is the last consideration when determining whether to allow an amended complaint. Leave should only be denied where there is a showing of undue delay, bad faith or prejudice to the opposing party, or to cure unfair surprise.

The Lanes have claimed there was no “actual notice” and they are prejudice, however, there is no factual basis to make this claim. As far as curing surprise, it should come as no surprise to the Lanes that the L’Hommedieus objected to the numerous delays the L’Hommedieus were subjected to during the appeal in *Lane II*. On December 27, 2007 L’Hommedieu filed an OPPOSITION TO APPELLANTS’ MOTION TO ENLARGE TIME TO FILE OPENING BRIEF, which stated:

The undersigned does not ordinarily oppose requests for extensions of time. However, in this case, Respondent believes the Appellants’ appeal is nothing more than an attempt to drag out this litigation, which has been pending for nearly 5 years. Appellants are keenly aware of Respondents’ desire to sell the home that is the subject of this litigation, and that their delay effectively prevents him from doing so.

This same opposition was objected to during the Lanes late filing of their reply brief. The L’Hommedieus filed an OPPOSITION TO APPELLANTS’ MOTION TO ALLOW LATE FILING OF REPLY

BRIEF *NUNC PRO TUNC* on May 22, 2008. The L'Hommedieus again objected:

Unfortunately, it now appears that opposing counsel has been conditioned to believe that failure to follow the appellate rules does not carry a particular sanction. As indicated in Respondents' prior Opposition to Appellant's Motion to Enlarge Time to File Opening Brief, the undersigned does not ordinarily oppose requests for extensions of time. However, in this case, Respondents believe that Appellants' appeal is nothing more than an attempt to drag out this litigation, which has now been pending for nearly 5 years. Appellants are keenly aware of Respondents' desire to sell the home that is the subject of this litigation and their delay effectively prevents them from doing so.

The L'Hommedieus routinely objected to the delay during the appeal. It should come as no surprise to the Lanes that the L'Hommedieus objected to the constant delays by the Lanes during this appeal.

Furthermore, as the philosopher and jurist John Selden once said; "Ignorance of the law excuses no man". The Lanes cannot now claim that they were unfairly surprised or prejudiced that there is a law on the books prescribing *lis pendens* liability. That law is RCW 4.28.328 and has been on the books since 1994. The L'Hommedieus routinely objected to the delay of the Lanes during the appeal process. The Lanes should not be excused from the law.

C. The Appeal is not Frivolous and has Merit

1. A case of First Impression is not Frivolous

The Lanes, for the first time, make the accusation that this appeal is frivolous. This claim is neither supported by argument nor authority and appellate courts normally do not rule on motions that are not supported by argument or authority.

2. This Appeal has Merit.

Again, the Lanes claim this case has no merit. In particular, the Lanes state;

“None of the alleged conduct, even if true, would justify amending an answer to assert a counterclaim that was not raised at any time before trial, during trial, or in the appeal that followed”. (respondents’ reply br., p.4)

The L’Hommedieus have cited ample authority to dispel this notion. This broad statement shows that the Lanes have a complete misunderstanding of CR 13(e), which allows amendments that transpire after a litigant in a lawsuit files their answer. This proclamation is so devoid of merit, common sense, and the law, it is vacuous.

The Lanes are necessarily challenging the courts authority to hold the Lanes accountable for their actions. That is precisely what courts are supposed to do “when justice so requires”. The courts should look at the facts as pled to determine if this case has merit. That was not done and is

precisely why the denial of the L'Hommedieus CR 13(e) Motion to File and After-Arising Counterclaim was an abuse of discretion.

II. Argument

A. The Trial Court Improperly Concluded the L'Hommedieus Motion to Amend was Untimely.

The course of action the L'Hommedieus took actually conserved judicial resources, which is one of the main concerns when ruling on a motion to amend. If this were a compulsory counterclaim the L'Hommedieus would have been compelled to assert it with his original answer. This is not the case. The L'Hommedieus claim is undoubtedly a permissive counterclaim and is brought at the discretion of the defendant.

Here, we have the same situation as in *Warren, Little & Lund, Inc. v. Max J. Kuney Co.*, 796 P.2d 1263 (1990). In *Warren, Id.* there were no cases which involved CR 13(b) motions, so the court looked to the federal interpretation of Rule 13 claims. Here, we have no authority on CR 13(e) in the state of Washington, so it is appropriate to look to federal authority, citing *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn. 2d 34, 37 (1972).

“Under the federal rules, federal courts have long stated permissive counterclaims may be brought at the defendants’ election”
Warren, Id. at 215, citing *Montecatini Edison, S.P.A. v. Ziegler*, 486 F.2d

1279, 1282-1283 (1973); *Switzer Bros., Inc. v. Locklin*, 207 F.2d 483, 488 (1953).

The Lanes in their reply brief refer to the delay on the L'Hommedieus part in filing their CR 13(e) motion to amend to assert and after-arising counterclaim. There is a bit of irony that the Lanes continue to assert that the motion is untimely and that it was "three and a half years prior to the motion to amend being filed" when the Lanes had a hand in prolonging that "three and a half year" timeframe.

Now the Lanes are benefitting from the 3 plus year delay in filing the lis pendens, and they are attempting to profit from their own delay during the appeal process. A double bonus for the Lanes! Essentially, the Lanes are getting the advantage of this being a compulsory counterclaim without it being a compulsory counterclaim.

In L'Hommedieus motion to amend, as in instances of declaratory relief, the Superior Court should have at least looked at the facts of the L'Hommedieus pleadings to determine if the motion was timely filed.

L'Hommedieu asserted in the pleading that Dennis Lane had *ex parte* contact with L'Hommedieus counsel of record during a phase of trial which disrupted the attorney client relationship. L'Hommedieus

counsel now had a conflict of interest of whether to vigorously defend the suit and make the court aware of this *ex parte* communication, or stay silent. L’Hommedieus counsel chose the latter.

In Lane’s reply brief, the Lanes make the bold proclamation that “L’Hommedieus opening brief contains numerous false statements and mischaracterizations of the facts.” The operative wording in this statement is **facts**. The L’Hommedieus should be allowed to try these facts on the merits, rather than a mere denial based on untimeliness of the CR 13(e) Motion. When interpreting the proper use of discretion, or “In the exercise of its discretion, the **court will examine the facts and circumstances of each case**”, *Budd Co. v. Travelers Indem. Co.*, 109 F.R.D. 561, 563 (1986). The trial court did not take into account the facts asserted in the pleadings, therefore, it was an abuse of discretion to deny the motion to amend the complaint.

The facts asserted by L’Hommedieu in their “proposed” Amended Complaint Under RCW 4.28,32... are at the core of the argument that the trial court abused its’ discretion. The trial court did not examine any of the facts asserted by L’Hommedieu. The facts presented in the motion are very relevant when determining whether to accept or deny the motion to amend. The trial court did not reach his conclusion based on any of the

facts alleged in the amended complaint. For this reason, alone, the trial court abused its' discretion when it denied the L'Hommedieus CR 13(e) motion.

L'Hommedieu will be able to conclusively prove that Dennis Lane had *ex parte* contact with his counsel during a phase of trial. He will also be able to conclusively prove that there was discussion about an employment arrangement. The subjective outcome of that conversation is ultimately up to the trier of fact in this case, and it was an abuse of discretion for the court to dismiss this allegation of fact in the pleading, as Washington Courts prefer a decision on the merits of the case . The purpose of CR 15 are to "facilitate a proper decision on the merits" *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987).

L'Hommedieu attempted to add additional evidence of Dennis Lanes *ex parte* communication with L'Hommedieus counsel during the appeal in *Lane II*, however, this court rejected L'Hommedieus MOTION TO SUPPLEMENT THE RECORD in accordance with RAP 9.1. on April 27, 2009. The affidavit of L'Hommedieu outlined the difficulty that L'Hommedieu was subjected to due to the *ex parte* communication.

Dennis Lane is an attorney in the State of Washington. He chose to dance on this razors edge and now the he is asking this distinguished Court to rescue him from this potentially perilous decision and disregard his behavior...without any court hearing the facts.

This information was brought up to Judge Reynolds during L'Hommedieus CR 13(e) motion, yet the court failed to consider the ramifications of the *ex parte* communication and find that there **was** excusable neglect due to the conflict of interest that Dennis Lane caused between L'Hommedieu and his counsel, if in fact this was a CR 13(f) motion as Judge Reynolds stated.

L'Hommedieu will be able to conclusively prove that the Lanes filed the lis pendens because they learned the property was for sale. The L'Hommedieus will be able to conclusively prove that the Lanes were fully aware that the L'Hommedieus intended and did encumber their home with the Lanes knowledge. And L'Hommedieu will be able to prove damages associated with the wrongful filing of the lis pendens.

Under the Lanes logic on timeliness, the L'Hommedieus were required to file a response to the lis pendens either at trial, which would have placed this within the ambit of a compulsory counterclaim, which it is not, or the time between Judge Reynolds judgment and the filing of the

Lanes appeal of this case in Lane II (a timeframe of less than 30 days). Or, continuing on that same line of reasoning...during the actual appeal itself. The appeal put into question the final judgment of trial court, therefore, the judgment was not final nor was L'Hommedieus claim for lis pendens liability ripe for adjudication.

Furthermore, the delay that L'Hommedieu was subjected to in *Lane II* is a quantifiable fact. The trial court should have looked at the issue that L'Hommedieu raised on multiple occasions, including his MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION... filed on March 8, 2010 in front of Judge Reynolds, which directly pointed to the delay tactics the Lanes used during the appeal in violation of the Rules of Appellate Procedure.

Furthermore, the facts presented in L'Hommedieus amended complaint alleged that the questions the Lanes raised on both appeals were contradictory to each other. In section 4.1 through 4.4 of the complaint, L'Hommedieu raised this issue and it appears that Judge Reynolds did not understand the status of the case.

THE COURT: So, are the – is the appeal – are the appeals done now?

MR. VANCE: Appeal is done, the Court of Appeals issued a mandate in January.

THE COURT: Okay. And I see – and then there was a judgment in here in favor of the L’Hommedieus against the Lanes for –

MR VANCE: Correct.

THE COURT: -- \$12,000, plus?

MR VANCE: Well, that part was actually –

MR L’HOMMEDIU: That was washed away.

MR. VANCE: That was overturned by the Court of Appeals.

THE COURT: Oh, that was overturned.

MR VANCE: Correct. (Verbatim RP pp. 9-10)

The remand was on January 13, 2010 while this hearing took place on February 25, 2010.

It is clear from this exchange that Judge Reynolds did not know the status of the case, nor did he know the **facts** of the case and he did not take into account the facts that the L’Hommedieus had asserted in their “proposed” AMENDED COMPLAINT. The trial court should look at the

appeal itself to determine if it was a “substantial challenge to the judgment”, *Peery v. Superior Court of Santa Clara County*, 176 Cal.Rptr. 533, 535, 29 Cal.3d 837, 633 P.2d 198 (1981). The trial court never looked at either of the appeals when making the ruling, nor did the trial court make any finding regarding the juxtaposed arguments Lanes raised on the appeals.

If the trial court did not understand the status or facts of the case how could the court make an informed decision of whether to deny or accept the L’Hommedieus CR 13(e) Motion to File and After-Arising counterclaim.

This is a clear abuse of discretion on the part of the trial court.

B. The Amendment was Proper Under Either CR 13(e) or CR 13(f) as Timeliness Alone, Without More, is an Abuse of Discretion.

Timeliness alone is insufficient to deny a motion to amend the complaint under either CR 13(e) or CR 13(f). Thus, a motions timeliness alone, without more, is generally improper to deny a motion to amend, *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 273 (2005).

The Lanes state “If anything, the standard for a supplemental pleading under 13(e) is higher than an amendment under 13(f)”. This is incorrect and not applicable to the current situation. The L’Hommedieus claim was not ripe for adjudication. Therefore, the motion to amend this **complaint** falls within the ambit of CR 15(a) where leave should be “freely given” and “when justice so requires”.

As previously mentioned, in order to file a motion to amend a complaint under CR 13, the claim must be a “matured” claim. And looking to federal authority under CR 13(e), “But under the specific language of Rule 13(e), **such permission may be given only if the claim is a “matured” one at the time permission is requested**, citing *Stahl v. Ohio River Company*, 424 F. 2d 52, 55 (1970).

Even if L’Hommedieu had attempted to amend his complaint, according to *Stahl, Id.*, the court would have been required to dismiss the complaint as “unmature”, or not ripe , as there is not a Washington case which allows the amendment of a complaint to assert an unripe claim.

L’Hommedieus claim for lis pendens liability was not mature until the remand from this Court of Appeals. The true calculation of time would be from the time of remand from this Court on January 13, 2010 until L’Hommedieu filed his CR 13(e) motion on January 21, 2010, a

mere delay of 8 days. The motion was timely filed and the trial court abused its' discretion when it denied L'Hommedieus CR 13(e) motion.

If this were a CR 13(f) claim, "the mere passage of time between an original filing and an attempted amendment is not a sufficient reason for denial of the motion", *Spartan Grain & Mill Company v. Ayers*, 517 F. 2d 214 (1975).

The federal jurisdictions are replete with references regarding the timeliness of a CR 13 motion. *Magnesystems, Inc. v. Nikken, Inc.*, F. Supp. 944 (1996) provides an in depth analysis on motions to amend the pleading. Although the court came to the conclusion that this patent case would be *res judicata*, the analysis is appropriate under the instant circumstances. It discusses the applicability of CR 13(e) claims in conjunction with CR 15, and provides:

Courts have considered Federal Rule 13 in conjunction with Federal Rule 15, applying factors to consider leave to amend to counterclaims. Federal Rule 15(a) provides that "a party may amend the party's pleading only by leave of the court or by written consent of the adverse party and leave shall be freely given as justice so requires." Fed.R.Civ.P 15(a). In deciding whether to grant leave to amend, "a court must be guided by the underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or technicalities. This policy of favoring amendments to pleadings "is to be applied with extreme liberality." "Four factors are commonly used to determine the propriety of a motion for

leave to amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment. These factors, however, are not of equal weight in that delay, by itself, is insufficient to justify denial of leave to amend.” *Magnesystems, Id. at 947, 948* (citations omitted).

This dispels the argument the Lanes presented that “If anything, the standard for a supplemental pleading under 13(e) is higher than an amendment under 13(f).”

C. The Sergeant Schultz Theory.

The beloved Sergeant Shultz, from the timeless series Hogan’s Heroes, when presented with facts of the prisoners’ covert activities simply declared...”I hear nothing, I see nothing, I know nothing!”

Here, the Lanes make the same type of declaration and ask this Distinguished Court to replicate the actions of Sergeant Schultz. The Lanes proclaim “None of the alleged conduct, even if true, would justify amending an answer to assert a counterclaim...”.

Again, the Lanes are asking this court to blindly look away, to disregard the *ex parte* communication that Dennis Lane had with L’Hommedieus opposing counsel...to disregard their numerous delays during the appeal process (absent any reason)...to disregard the Lanes knowingly letting the L’Hommedieus encumber their property on multiple occasions...to disregard the fact that the appeals in *Lane I* and *Lane II* are

essentially the exact opposite arguments...to disregard the fact the Lanes waited 3 years to file a lis pendens...to disregard the fact the Lanes filed the lis pendens to target the sale of the home...to disregard the fact that the Lanes filed this in Clark County, Wa. **And most importantly to disregard the fact that the Lanes suffered no damage as a result of this litigation.**

Here is the Elizabeth Lane's position on the harm that they are suffering as result of attempting to enforce the restrictive covenant—**the sole reason for filing the lis pendens;**

Mr. Rodabough: Okay. What harm are you currently suffering from Mr. L'Hommedieu's septic system?

Elizabeth Lane: **None that I know of.** (trial VRP at 115)

Here is Dennis Lane's position on the harm imposed upon him by a violation of the covent;

Mr. Rodabough: And you're not suffering any harm at the moment from Mr. L'Hommedieu's septic systems; isn't that correct?

Dennis Lane: **None that I know of.** (trial VRP at 85, 86)

Again, the Lanes would have this Court bury their head in the sand and "see nothing, hear nothing and know nothing" and completely ignore the admitted facts; the Lanes cannot offer any explanation of the harm that they are suffering as a result of this action. And yet, they maintained a lis

pendens on the L'Hommedieus property **“for three and a half years”**
appealing the decision of the trial court based on doctrinal law.

This seems to be a harsh sanction for a defendant who is suffering an enormous harm by the filing of the lis pendens on his property. Isn't this the exact kind of mischief that the lis pendens liability statute was aimed at curing?

D. This Motion to Amend is Not Frivolous and it has Merit.

In the absence of argument and citation to authority, an issue raised on appeal will not be considered. *Transamerica Ins. Group v. United Pac. Ins.Co.* 92 Wn.2d 21, 29, 593 P.2d 156 (1979).

CONCLUSION

The conclusion of Appealants Reply Brief in *Lane II* is very telling. “This case is not a morality play in which the outcome should hinge on the purity of the parties’ motives”.(CONCLUSION of Lanes reply brief in *Lane II*, p.23) This appears to be a tacit recognition that their own claim is totally devoid of morality and their motives are unpure.

The Lanes did not suffer any damage and they were attempting to keep the L'Hommedieus from building a home. And like a pit-bull, once it locks its' jaw on something, it can't let go. The Lanes just couldn't let

this case go and pressed it all the way to our Supreme Court...not to prevent pollution to the Washougal River...to enforce doctrinal law.

The trial court found that the Lanes were using this case to prevent the construction and occupation of the home. As Albert Einstein once said “Don’t listen to their words, fix your attention on their deeds.”

Once this Court looks to the deeds of the Lanes, or the facts of this case, it can come to only one conclusion. The Lanes wrongfully interjected a lis pendens into this action specifically to put an adversary in an inferior position. The trial court abused its’ discretion and improperly denied the L’Hommedieus CR 13(e) After-Arising Counterclaim.

For the foregoing reasons, the L’Hommedieus respectfully request that this court find that the trial court abused its’ discretion by failing to allow the L’Hommedieus to file their CR 13(e) counterclaim. This court should reverse the decision of the trial court and remand the case with instructions to allow the L’Hommedieus to file their amended complaint.

Dated this 31st day of January, 2011.

A handwritten signature in black ink, appearing to read "Lawrence M. L'Hommedieu", is written over a horizontal line. To the right of the signature is a large, empty oval shape.

Lawrence M. L’Hommedieu
(pro se)

COURT OF APPEALS
DIVISION II

11 FEB -3 AM 11:54

STATE OF WASHINGTON
BY E
DEPUTY

DECLARATION OF SERVICE

I, Lawrence M. L'Hommedieu declare:

I reside in the State of Washington and am over 18 years of age;

On January 31, 2010 a true and correct copies of the REPLY BRIEF OF APPELANTS in a sealed, first-class postage-prepaid envelopes, addressed to the attorneys shown, the last-known office addresses of the attorneys and deposited with the united States Postal Service in

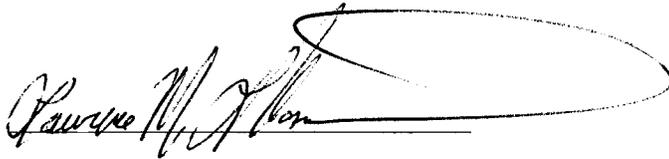
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