

No. 75209-0-I

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COURT OF APPEALS, DIVISION ONE,  
OF THE STATE OF WASHINGTON

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CARLOS GUTIERREZ,

*Respondent,*

v.

ICICLE SEAFOODS, INC., an Alaska corporation,

*Appellant.*

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BRIEF OF RESPONDENT

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Francisco A. Duarte, WSBA # 24056	Walter E. Barton, WSBA # 26408
Scott David Smith, WSBA # 48108	Karr   Tuttle   Campbell
Fury Duarte, PS	701 Fifth Avenue, Suite 3300
710 10th Avenue East	Seattle, Washington 98104
Seattle, Washington 98102	1.206.223.1313
1.206.726.6600	gbarton@karrtuttle.com
1.206.726.0288 (fax)	<i>Attorney for Respondent</i>
fad@furyduarte.com	
scott@furyduarte.com	
<i>Attorneys for Respondent</i>	

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## I. INTRODUCTION

Carlos Gutierrez filed this injury action against Icicle Seafoods, Inc. (“Icicle”) on March 18, 2015 to recover damages for a near-fatal illness and resulting injuries he suffered in 2014 while serving as a crewmember aboard Icicle’s vessel, RM THORSTENSEN. He alleged Jones Act, maintenance and cure, unseaworthiness, and punitive damage claims arising from Icicle’s failures to provide adequate onboard medical care or timely evacuation.

Icicle filed a summary judgment motion to dismiss the entire action on April 15, 2016. A May 13 hearing was set. Gutierrez responded on May 2. Then, on May 4—nine days before the hearing—Gutierrez filed a CR 41(a)(1)(B) motion to dismiss his claims without prejudice. Icicle opposed. On May 12, the trial court entered its CR 41(a) Order dismissing Gutierrez’ failure to pay maintenance and cure claim with prejudice and his remaining claims without prejudice. Icicle appeals the trial court’s CR 41(a) Order.

The primary issue on appeal is whether a plaintiff is entitled to a CR 41(a)(1)(B) dismissal after a defendant files a summary judgment motion if the plaintiff files the CR 41 motion before the summary judgment hearing begins. The trial court, based on clear Washington precedent, properly held that Gutierrez was so entitled. It so doing, it also

properly refused to retain jurisdiction to entertain an unwarranted CR 37(c) motion for sanctions. The trial court's CR 41(a) Order should be affirmed in its entirety.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error.

Gutierrez does not assign error to the trial court's CR 41(a) Order.

### B. Issues Pertaining to Assignments of Error.

Icicle fails to set forth "the issues pertaining to the assignments of error." RAP 10.3(a)(4). Gutierrez states the issues regarding Icicles' alleged errors, RAP 10.3(b), as follows:

1. Did the trial court properly dismiss Gutierrez' claims under CR 41(a)(1)(B) when Gutierrez filed the CR 41 motion nine days before the trial court's hearing on Icicle's summary judgment motion began? (Icicle Assignment of Error 1).

2. Did the trial court properly exercise discretion in dismissing Gutierrez' economic loss claims without prejudice when those claims were not part of Icicle's summary judgment motion, the statute of limitations had not expired, and no other bars existed that would preclude Gutierrez from re-filing the claims? (Icicle Assignment of Error 2).

3. Did the trial court properly exercise discretion in refusing to retain jurisdiction to hear Icicle's unfiled CR 37(c) motion after it dismissed Gutierrez' claims? (Icicle Assignment of Error 2).

## III. COUNTER-STATEMENT OF THE CASE

Gutierrez suffered serious, life-threatening injuries after he fell ill in January 2014 while serving as a crewmember onboard Icicle's vessel, RM THORSTENSEN. *E.g.*, CP 790-801, 634-85. He ultimately developed a

near-fatal descending necrotizing mediastinitis (“DNM”). *E.g.*, CP 639-40, 645-46. He asserts that Icicle failed to provide adequate onboard medical care or timely evacuate him from the vessel, which permitted his medical condition to deteriorate over a 48-hour period and caused his DNM. CP 1-5.

Gutierrez was eventually removed off the ship and flown by medical aircraft from St. Paul, Alaska to Anchorage, Alaska; he was then flown to Harborview, where he underwent critical, life-saving surgery. *See generally, e.g.*, CP 801, 812-16, 841-44, 856-65, 634-85. He was placed in a medically induced coma, endured numerous surgeries, including a median sternotomy, serial chest washouts, and neck debridement, and he remained in inpatient care for weeks. *See generally, e.g.*, CP 634-85.

Gutierrez filed this action against Icicle on March 18, 2015. CP 1-5. He alleged (1) a Jones’ Act claim for failure to provide a safe place to work; (2) a Jones’ Act claim for failure to provide adequate medical care or timely evacuation (*i.e., provide cure*); (3) a seaworthiness claim; and (4) a claim for failure to fully *pay* maintenance and cure. *Id.* He also requested punitive damages, alleging that Icicle’s failures were willful, wanton, and callous. *Id.* Trial was set for May 31, 2016. *See* CP 34.

Icicle filed a summary judgment motion to dismiss all of Gutierrez’ claims, with supporting declarations and exhibits, on April 15, 2016. CP

34-512, 1682-1911. That motion, however, did not address or request summary judgment as to Gutierrez' economic loss claim, *i.e.*, Gutierrez' claim for lost past or future earning capacity. CP 1672 n.2. The hearing was set for May 13, 2016. CP 34. Gutierrez timely responded, with supporting declarations and exhibits, on May 2. CP 573-865. He contested dismissal as to all the claims except the failure to pay maintenance and cure (and related punitive damage) claim, which he instead withdrew. CP 573 n.1.

On May 4, 2016, nine days before the summary judgment hearing, Gutierrez filed a CR 41(a)(1)(B) motion to dismiss all of his claims without prejudice. CP 866-70. Icicle responded on May 10. CP 1543-55. It requested that the trial court deny the motion, arguing that Gutierrez was not entitled to dismissal because the summary judgment motion had been "submitted for decision" when Gutierrez filed his summary judgment response. CP 1543-44. It alternatively requested that the trial court dismiss Gutierrez' failure to pay maintenance and cure claims and economic loss claims with prejudice.<sup>1</sup> *Id.* It also asked the trial court to retain jurisdiction

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<sup>1</sup> Icicle also requested that the trial court require "payment of taxable costs of the action" Gutierrez had just dismissed and stay proceedings in any future action Gutierrez may file under CR 41(d). CP 1543-44. It further requested that the trial court retain jurisdiction to entertain Icicle's two motions for attorney fees based on the trial court's two prior orders awarding fees for Gutierrez allegedly submitting insufficient expert witness disclosures. Despite those orders, Gutierrez maintains that his disclosures more than satisfied the basic facts CR 26(b)(5)(A)(i) requires, *i.e.*, "the subject matter on which the expert is expected to testify" and "the substance and facts of the opinions". He disagrees with, and the rule does not support, the trial court's orders concerning his expert disclosures.

to hear an unfiled CR 37(c) motion based on alleged failures to make CR 36 admissions. *Id.*

The trial court entered its Order of Dismissal Pursuant to CR 41(a) on May 12, 2016. CP 1674-77. It held that the summary judgment motion had not yet been submitted for decision because oral argument at the hearing had not yet begun, and dismissed Gutierrez' claims. CP 1675. The trial court dismissed Gutierrez' claims for failure to pay maintenance and cure with prejudice, because he had withdrawn the claim in his summary judgment response. CP 1676. It dismissed all the other claims without prejudice. CP 1675.<sup>2</sup> It also refused to retain jurisdiction to entertain a CR 37 motion Icicle stated it intended to, but had not yet, filed. CP 1676. Icicle has appealed.<sup>3</sup>

#### IV. SUMMARY OF THE ARGUMENT

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<sup>2</sup> The trial court also retained jurisdiction to entertain Icicle's expert-witness-disclosure attorney fee motions. CP 1676; *see also* discussion *supra* note 1. But it declined to enter an order under CR 41(d). *Id.* Icicle has not assigned error to the CR 41(d) refusal.

<sup>3</sup> Icicle asserts that it was required on multiple occasions to seek the trial court's assistance to secure "timely participation and compliance with rudimentary discovery obligations." App. Brief at 3. Gutierrez strongly disagrees, and the orders to which Icicle cites do not support the discussion. First, a defendant is not entitled to a CR 35 exam—it must obtain an order. CR 35(a)(1). As Gutierrez did not make a negligent or intentional infliction of emotional distress claim, he contested psychological exams. Second, he filed motions *in limine* early to obtain guidance as to whether Icicle could to use certain evidence to attack Gutierrez' character. The trial court simply elected to hear them at a later time. CP 25. And, the trial court only in part granted Icicle's motion to quash Gutierrez' CR 30(b)(6) notice, limiting some of the content Gutierrez sought, but largely allowing the deposition to go forward as noted. CP 28-31; *see also* discussion *supra* note 1.

The trial court correctly dismissed Gutierrez' claims. If a defendant files a summary judgment motion, CR 41 entitles a plaintiff to dismiss her claims "until the motion for summary judgment has been submitted to the court for decision." CR 41(a)(1)(B); *Paulson v. Wahl*, 10 Wn. App. 53, 57, 516 P.2d 514 (1973). A summary judgment motion is not "submitted to the court for decision" until—at the earliest—the hearing has commenced. *E.g.*, *Greenlaw v. Renn*, 64 Wn. App. 499, 503, 824 P.2d 1263 (1992). Because Gutierrez filed his CR 41(a) motion nine days before the summary judgment hearing, the trial court correctly dismissed his claims.

The trial court also properly dismissed Gutierrez' economic-loss claim without prejudice. A CR 41(a) dismissal is without prejudice unless the court, in its discretion, states otherwise. *Id.*(a)(4). Such discretion is to "be exercised only in limited circumstances where dismissal without prejudice would be pointless." *Escude v. King Cty. Pub. Hosp.*, 117 Wn. App. 183, 187, 69 P.3d 895 (2003). Dismissal of the economic-loss claim without prejudice was not pointless. The claim was not a part of the summary judgment motion, the statute of limitations had not expired, and no other bars to re-filing existed.

The trial court also properly refused to retain jurisdiction to entertain a CR 37(c) motion. CR 37 only permits an award of expenses and fees for a party's "failure" to admit a request for admission if the

requesting party “thereafter proves” the matter’s truth. CR 37(c). A plaintiff’s withdrawing a claim does not amount to a party proving a claim. *Dellit v. Perry*, 60 Wn.2d 287, 291, 373 P.2d 792 (1962); *Sessions v. Withers*, 327 S.C. 490, 414-15, 488 S.E.2d 888 (S.C. Ct. App. 1997). Because Icicle had no viable CR 37(c) claim or motion pending when Gutierrez moved for dismissal, the trial court did not abuse its discretion in declining to retain jurisdiction to hear such a motion. *See Calvert v. Berg*, 177 Wn. App. 466, 472, 312 P.3d 683 (2013).

## V. ARGUMENT

- A. The trial court correctly granted Gutierrez’ CR 41(a)(1)(B) motion as a matter of right because Icicle’s summary judgment motion had not yet been submitted to the trial court for decision, as the hearing had not begun, when Gutierrez filed the CR 41 motion.<sup>4</sup>

CR 41 provides for mandatory dismissal of a plaintiff’s claims if the plaintiff moves for dismissal prior to resting his or her opening case:

(1) Mandatory. Subject to the provisions of rules 23(e) and 23.1,<sup>5</sup> 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.

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<sup>4</sup> A trial court’s application of CR 41(a)(1)(B) to the facts, *i.e.*, whether the court properly dismissed as a matter of right, is subject to *de novo* review. *Calvert*, 177 Wn. App. at 471. Icicle has not, with one exception, *see* discussion *supra* Part V.B, requested review of the trial court’s decision to dismiss *without prejudice*, which is subject to abuse of discretion.

<sup>5</sup> CR 23 and CR 23.1 are irrelevant here. They concern class and derivative actions.

CR 41(a)(1). A plaintiff's right to a voluntary dismissal "must be measured by the posture of the case at the precise time the motion is made because the right to dismissal, if any, becomes fixed at that point." *Calvert*, 177 Wn. App. at 472. In the summary judgment context, a plaintiff is entitled to dismissal "until the motion for summary judgment has been submitted to the court for decision." *Paulson*, 10 Wn. App. at 57.

The chief question on appeal is the time at which a summary judgment motion is considered to be submitted to the trial court for decision. Though *Icicle* tries to factually distinguish all of the published cases dealing with the interaction between CR 56 and CR 41(a)(1), the legal holdings in each of the cases clearly provide that submission for decision occurs, at the earliest, when a summary judgment hearing begins. Because Gutierrez submitted his motion nine days before the summary judgment hearing, dismissal was mandatory.

In *Beritich v. Starlet Corp.*, 69 Wn.2d 454, 418 P.2d 762 (1966), a plaintiff filed a CR 41(a)(1)(B)<sup>6</sup> motion after the trial court orally rendered an unfavorable summary judgment order, but before it entered a written order. The trial court granted the CR 41 motion, but the Washington Supreme Court reversed. It held that, once a trial court has orally entered summary judgment, CR 41(a)(1) no longer permits voluntary dismissal as a matter of

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<sup>6</sup> At that time, the Rule was entitled Rule of Pleading, Practice and Procedure 41.08W. Gutierrez refers to the rule by its current title here for clarity.

right, even if a written order has not been entered. *Id.* at 459. In so holding, the Court looked in part to RCW 4.56.120(1) by analogy. *Id.* That statute states, in relevant part, that an action may be dismissed under the following conditions:

(1) Upon the motion of the plaintiff . . . (b) when the action, whether for legal or equitable relief, is to be or is being tried before the court without a jury, *at any time before the court has announced its decision . . . .*

RCW 4.56.120(1)(b) (emphasis added).<sup>7</sup> Analogizing summary judgment to a bench trial, the Court stated that, because the trial court had “announced its decision”, voluntary dismissal was not available. *Beritich*, 69 Wn.2d at 459.

This Court reviewed the issue seven years later in *Paulson v. Wahl*, 10 Wn. App. 53. There, a defendant filed a summary judgment motion, and the plaintiff filed a CR 41 motion prior to the hearing. The trial court granted the CR 41 motion, and this Court affirmed. *Id.* at 57. The Court held:

[A] reasonable and proper interpretation of CR41(a)(1)(B) and CR 56 dictates that a nonmoving plaintiff in a summary judgment procedure retains the right to a voluntary [dismissal] until the motion for summary judgment has been submitted to the court 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.*

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<sup>7</sup> RCW 4.56.120’s pertinent language at the time the Supreme Court decided *Beritich* is identical to that in the current version. *Beritich*, 69 Wn.2d at 457 (quoting RCW 4.56.120).

*Id.* at 57 (emphasis added) (citations omitted).<sup>8</sup> Though this Court noted that the plaintiff had not filed a summary judgment response, it did not hinge its decision on that fact. Rather, it simply held that the matter is submitted to the Court when a hearing begins.<sup>9</sup>

The Court of Appeals revisited the issue 20 years later in *Greenlaw v. Renn*, 64 Wn. App. 499. There, a defendant filed a summary judgment motion, and the plaintiff failed to submit any response. The plaintiff then moved for a CR 41 dismissal the day prior to the summary judgment hearing. *Id.* at 500-01. The trial court denied the CR 41 motion, and the appeals court reversed. *Id.* at 503. In so doing, the Court reaffirmed and solidified *Paulson*'s holding:

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

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<sup>8</sup> While *Paulson* states that “*Beritich* failed to make clear the earliest point in the summary judgment procedure at which the right to a voluntary nonsuit is lost,” the Washington Supreme Court’s analogy to RCW 4.56.120 in *Beritich* strongly suggests that the right is in fact lost only when the “court has announced its decision”. 69 Wn.2d at 459.

<sup>9</sup> *Paulson*'s reference to the trial court exercising discretion is unclear, and in any event would necessarily be limited to the summary judgment process—not the entire case. If a discretionary decision could defeat a right to voluntary dismissal, then CR 41(a) would, like filing an affidavit of prejudice, RCW 4.12.050, only be available until the trial court has exercised its discretion, regardless of whether summary judgment was involved. CR 41(a) states no such requirement. Nor do any cases in fact apply that language. Indeed, the fact that a plaintiff can exercise a right to voluntary dismissal even into trial strongly suggests that a plaintiff can do so regardless of discretionary rulings, which invariably will be made before a case goes to trial.

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*.

64 Wn. App. at 503 (emphasis added).

As in *Paulson*, the *Greenlaw* Court did not hinge its decision on the fact that the plaintiff had not submitted responsive materials. In fact, *Greenlaw* is indistinguishable from this case in that regard. The *Greenlaw* plaintiffs filed their CR 41 motion after the time to respond had passed. They were no more entitled to submit additional briefing or declarations than Gutierrez was here. Yet, they were entitled to dismissal.<sup>10</sup> The Court held that a plaintiff is entitled to a summary judgment hearing, “whether or not responsive documents were filed”, and that a motion for voluntary dismissal is timely if “filed and served before the hearing”. *Id.*

Gutierrez filed his motion for voluntary dismissal on May 4, 2016, nine days before the May 13, 2016 summary judgment hearing. CP 34, 866-70. Thus, under clear, long-standing precedent, the summary judgment motion had not been submitted to the trial court for determination, regardless

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<sup>10</sup> Indeed, Gutierrez’ argument is stronger here. The *Greenlaw* plaintiffs were nearly certain to lose their summary judgment motion when they filed their CR 41 motion, as they had filed no opposition. The same was not true of Gutierrez.

of the fact Gutierrez had filed responsive briefing. Granting of Gutierrez' CR 41 was mandatory, *Paulson*, 10 Wn. App. at 57; *Greenlaw*, 64 Wn. App. at 503,<sup>11</sup> and the trial court properly did so.

The controlling case law also disposes of Icicle's extraneous non-case-law arguments. First, this Court need not look to Black's Law Dictionary to define "submit". App. Brief at 17. *Paulson* and *Greenlaw* state that "submit", in this context, occurs—at the earliest—at the point that a summary judgment hearing has commenced. *Paulson*, 10 Wn. App. at 57; *Greenlaw*, 64 Wn. App. at 503.<sup>12</sup> Moreover, Icicle's proposed definition—that submit means "[t]o end the presentation of evidence *and* tender a legal position for decision", is in fact consistent with the case law. A plaintiff has

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<sup>11</sup> Icicle argues that commencement of "oral argument" is an improper guideline to use to determine when a matter is submitted to the trial court. App. Brief at 18-21. If oral argument is permitted, it is permitted at the motion hearing. Thus, Icicle's argument runs counter to established precedent that holds a motion is submitted when the hearing begins. *Greenlaw*, 64 Wn. App. at 503. Moreover, though Icicle recites at length various superior court rules and federal court rules regarding whether oral argument is allowed, the bottom line is that the summary judgment hearing, to which Gutierrez was entitled, *Greenlaw*, 64 Wn. App. at 503, was scheduled for May 13, 2016, nine days after Gutierrez filed his CR 41(a) motion. CP 34. Thus, the hearing had not commenced, regardless of whether oral argument was permitted.

<sup>12</sup> Indeed, *Beritich* strongly suggests submission does not in fact occur until a trial court has rendered an oral or written decision. 69 Wn.2d at 458-59. *Beritich* provided three reasons a plaintiff is no longer entitled to a voluntary dismissal after the trial court has rendered a decision. First, it would render summary judgment a nullity if a plaintiff could "'exit stage left' upon hearing an adverse oral decision". *Id.* at 458 (emphasis added). That concern is not present here where a motion is made prior to the hearing. Second, the Court looked to CR 56's language, which states that judgment shall be rendered forthwith, *at the hearing*, if there are no genuine issues of material fact. *Id.* at 459. There had been no hearing here. Finally, it analogized the summary judgment procedure to a bench trial in reviewing RCW 4.56.120, which entitles a plaintiff to voluntary dismissal until the trial court has announced its decision. *Beritich*, 69 Wn.2d at 459. The trial court had announced no decision.

not tendered a legal position for decision until the hearing and presentation of legal and factual argument. As *Greenlaw* states, the parties are “entitled to a hearing before the trial court at which [factual and legal] arguments can be made”. 64 Wn. App. at 503.<sup>13</sup>

Nor do “fairness, equity, and due process”<sup>14</sup> arguments apply. App. Brief at 22-24. CR 41(a)(1)(B) is a mandatory provision—no discretion exists. *Spokane Cty. v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 250, 103 P.3d 792 (2004) (Sanders, J, concurring in part and dissenting in part). Thus, the facts that the parties had engaged in extensive discovery and motion practice, expert-witness disclosures had occurred, depositions were taken, ER 904 notices had been filed, and expense and time had been expended, App. Brief at 22-24, which is also true of Gutierrez, is irrelevant. Indeed, CR 41(a)(1)(B) makes clear that dismissal, as a matter of right, is available even after trial begins. *Id.* The exact same fairness and equity arguments would apply equally in that context, yet the law is clear that a plaintiff is entitled to voluntary dismissal as a matter of right regardless of

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<sup>13</sup> It is irrelevant that counsel’s legal argument is “not evidence”. App. Brief at 18-19. To obtain summary judgment, a moving party must show both (1) there is no genuine issue of material fact *and that* (2) *it is entitled to judgment as a matter of law*. CR 56(c). Thus, the legal arguments, both applying the facts to the law and arguing legal interpretation, must be considered in rendering a decision, even if the oral arguments are not “evidence”.

<sup>14</sup> To the extent *Icicle* refers to due process in the constitutional sense, it makes no argument and cites no authority for the proposition that CR 41(a)(1) is unconstitutional as violating due process. The Court should not consider any such argument. RAP 10.3(a)(6).

those considerations.<sup>15</sup> The rule permits a plaintiff a mandatory voluntary dismissal until a summary judgment hearing occurs, which did not occur here. Dismissal was correct.

B. Because the trial court properly dismissed Gutierrez' economic loss claim without prejudice and the order is otherwise clear on its face, this Court should not remand the order to "amend its terms".<sup>16</sup>

CR 41 states that, "[u]nless otherwise stated in the order of dismissal, the dismissal is without prejudice . . . ." CR 41(a)(4). A court's discretion to dismiss with prejudice is narrow and well-defined: "A trial court's discretion under CR 41(a)(4) to order dismissal with prejudice should be exercised only in limited circumstances where dismissal without prejudice would be pointless." *Escude*, 117 Wn. App. at 187.

Icicle requests review of the trial court's decision to dismiss Gutierrez' claims without prejudice only as to Gutierrez' economic loss

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<sup>15</sup> Despite Icicle's argument, CR 1 cannot be used to alter CR 41(a)(1)'s clear language and intent. CR 41 provides a plaintiff with a mandatory, non-discretionary dismissal prior to resting his or her case, despite a defendant's expenditures of time and money. *Id.*; *Specialty Auto*, 153 Wn.2d at 250 (Sanders, J, concurring in part and dissenting in part). Icicle's citation to *Farmers Ins. Exch. v. Dietz*, 121 Wn. App. 97, 87 P.3d 769 (2004), is also irrelevant. *Farmers'* "prejudice" discussion and citation to *Pace v. Southern Exp. Co.*, 409 F.2d 331 (7th Cir. 1969), would only be potentially relevant had Icicle challenged the trial court's decision to grant a voluntary dismissal *without prejudice*. It did not generally contest that part of the decision. That discussion has no bearing on whether a CR 41(a)(1) dismissal is mandatory.

<sup>16</sup> A trial court's decision on whether to dismiss a plaintiff's claims under CR 41(a)(1) *with or without prejudice* is subject to review for abuse of discretion. CR 41(a)(4); *Escude*, 117 Wn. App. at 190. A trial court abuses its discretion if its order "is manifestly unreasonable or discretion was exercised on untenable grounds." *Escude*, 117 Wn. App. at 190; *Magana v. Hyundai Motor Corp.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009).

claim, *i.e.*, past or future earning capacity. App. Brief at 27, 2-3. Because the court properly exercised discretion, its order should be affirmed.

The trial court was clearly aware that it had some discretion to dismiss claims with prejudice. Indeed, it dismissed Gutierrez' claim for failure to pay maintenance and cure with prejudice. CP 1676. In reaching that decision, the trial court specifically stated it dismissed that claim with prejudice because Icicle moved for summary judgment as to the claim, and Gutierrez withdrew the claim in response to the summary judgment motion. *Id.* Icicle did not, however, move for summary judgment as to the economic loss claim. CP 1672 n.2. Thus, the trial court could not have dismissed economic loss claims at the summary judgment hearing. The court was thus well within its discretion in dismissing economic loss issues without prejudice based on that distinction.<sup>17</sup>

*Escude v. King Cty. Pub. Hosp. Dist.*, a consolidated appeal to which Icicle cites, is consistent with the trial court's order. There, various plaintiffs moved to voluntarily dismiss claims, and the trial courts dismissed claims that the plaintiffs had conceded on summary judgment, or over which

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<sup>17</sup> Icicle states that the CR 41(a) "order did not address the unearned wage or economic loss claims". App. Brief at 9. That is false. CR 41 states that a CR 41(a)(1) dismissal is without prejudice unless the order states otherwise. CR 41(a)(1)(4). The trial court's order stated that all of the claims were dismissed without prejudice unless the order stated otherwise. CP 1674. The order then only specifically stated that the failure to pay maintenance and cure claim was dismissed with prejudice. CP 1676. Thus, both CR 41(a)(4) and the Order demonstrate that claim was dismissed without prejudice.

the statutes of limitations had expired, with prejudice. 117 Wn. App. at 190-92. They dismissed all other claims without prejudice. *See id.* at 187-90. This Court found no abuse of discretion. *Id.* at 190-92. Similarly, here, the trial court dismissed the claims that Gutierrez withdrew<sup>18</sup> on summary judgment with prejudice, and it dismissed all other claims—including the economic loss claim that was not subject to the motion—without prejudice. Because the trial court had not otherwise decided the economic loss claims on the merits, the statute of limitations had not run, and no other bars existed to prevent re-filing of those claims, the trial court properly exercised its discretion. *Id.* at 187; *Wachovia v. Kraft*, 165 Wn.2d 481, 487-88 (2009).

Nor should this Court remand the order to “amend its terms” as the failure to pay maintenance and cure claims are concerned. As Icicle argues, the trial court dismissed Gutierrez’ “claim for failure to pay maintenance and cure” with prejudice. CP 1676. Clearly, such a claim necessarily encompasses “[c]laims as to the sufficiency of seaman’s benefits paid and received” and “[c]laims for damages of any kind<sup>19</sup> in regard to administration or payment of seaman’s benefits”. App. Brief at 26.

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<sup>18</sup> There is a significant difference between withdrawing and conceding claims. Gutierrez did not concede his failure to pay maintenance and cure claims; he withdrew the claims for reasons unrelated to their merits.

<sup>19</sup> Of course, Gutierrez may still seek damages for failure to *provide*, rather than *pay*, cure. The trial court properly dismissed the claims relating to a failure to provide cure without prejudice, CP 1674, which Icicle has not challenged on appeal.

Therefore, the trial court's dismissal of the broad "claim for failure to pay maintenance and cure" is unambiguous—claims relating to the failure to pay maintenance and cure were dismissed with prejudice. There is no need to remand the order for any "amendment".

C. The trial court properly exercised its discretion in refusing to retain jurisdiction to entertain a meritless, unripe, unfiled CR 37(c) motion.<sup>20</sup>

CR 37(c) provides that a court may award expenses and attorney fees against a party that fails to admit a matter's truth under CR 36, but only "if the party requesting the admissions thereafter *proves* the . . . the truth of the matter". CR 37(c) (emphasis added). Because Icicle had not proven the truth of any matter Gutierrez denied and had no viable CR 37(c) claim or motion pending at the time Gutierrez moved for CR 41(a) dismissal, the trial court was well within its discretion in declining to retain jurisdiction to hear Icicle's unfiled CR 37(c) motion.

Gutierrez denied various requests for admission as to his failure to pay maintenance and cure claim. He later *withdrew* his claim for reasons unrelated to the claims' merits; he made no concessions as to the claim's validity and did not admit prior CR 36 denials by withdrawing his claims. The claims were not going to be before the trial court in the May 13, 2016 summary-judgment hearing, and no factfinder had heard or concluded that

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<sup>20</sup> Decisions regarding discovery sanctions are reviewed for abuse of discretion. *Magana*, 167 Wn.2d at 582; *see also* discussion *supra* note 16 (detailing abuse of discretion standard).

Gutierrez incorrectly denied the truth of the matters he denied. Thus, Icicle has not proved the truth of the matters. Rather, Gutierrez simply withdrew his claims. *Dellit*, 60 Wn.2d at 287 (“The rule requires the requesting party to *prove* the truth of the matters for which admission is requested before he may obtain his expenses . . . .”); *Sessions*, 327 S.C. at 414-15 (“The Rule does not provide for sanctions if the opposing party voluntarily withdraws the claim with which the request to admit is associated.”).

The “plaintiff’s right to a voluntary [dismissal] must be measured by the posture of the case at the precise time the motion is made because the right to dismissal, if any, becomes fixed at that point.” *Calvert*, 177 Wn. App. at 472. As Gutierrez details above, *see* discussion *supra* Part V.A, he filed his motion to dismiss prior to the time Icicle’s summary judgment motion was submitted for decision and prior to a factfinder concluding defendant proved the matters Gutierrez denied. Thus, even had he not withdrawn his claim, no factfinder found Icicle proved the matters prior to the time Gutierrez filed his motion to dismiss. Nor had Icicle in fact filed a CR 37(c) motion at to the time Gutierrez filed his CR 41(a) motion. Thus, the trial court properly exercised its discretion in declining to retain jurisdiction. *See Calvert*, 177 Wn. App. at 472 (reversing fees in part because no sanctions motion was pending when the plaintiffs filed their dismissal

motion and defendant was not entitled to request sanctions prior to that time).

## VI. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's May 12, 2016 CR 41(a)(1) order in its entirety. The Court should also award Gutierrez costs on appeal.

Respectfully submitted this 29th day of August, 2016.

<u>/s/ Francisco A. Duarte</u>	<u>/s/ Walter E. Barton</u>
Francisco A. Duarte, WSBA # 24056	Walter E. Barton, WSBA # 26408
Scott David Smith, WSBA # 48108	<i>Attorneys for Respondent</i>
<i>Attorneys for Respondent</i>	

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in the manner noted below a true and correct copy of the foregoing *Brief of Respondent* on the facilities and to the parties mentioned below as indicated:

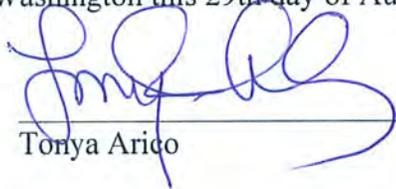
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4025 Delridge Way SW, #500	<input checked="" type="checkbox"/>	Via Electronic Service
Seattle, Washington 98106		

SIGNED at Seattle, Washington this 29th day of August, 2016.

  
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Tonya Arico