IN THE SUPREME COURT OF THE STATE OF OREGON

VILLAGE AT MAIN STREET PHASE II, LLC, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, Defendant-Appellant, and CLACKAMAS COUNTY ASSESSOR, Intervenor-Appellant.	Tax Court No. 5054 Supreme Court No. S063163 (Control)
VILLAGE AT MAIN STREET PHASE III, LLC, Plaintiff-Respondent, v. DEPARTMENT OF REVENUE, Defendant-Appellant, and CLACKAMAS COUNTY ASSESSOR, Intervenor-Appellant.	Tax Court No. 5055 Supreme Court No. S063164

Continued...

VILLAGE RESIDENTIAL, LLC,

Plaintiff-Respondent,

v.

DEPARTMENT OF REVENUE,

Defendant-Appellant,

and

CLACKAMAS COUNTY ASSESSOR,

Intervenor-Appellant.

Tax Court No. 5056

Supreme Court No. S063165

VILLAGE RESIDENTIAL, LLC,

Plaintiff-Respondent,

v.

DEPARTMENT OF REVENUE,

Defendant-Appellant,

and

CLACKAMAS COUNTY ASSESSOR,

Intervenor-Appellant.

Tax Court No. 5057

Supreme Court No. S063174

RESPONDENT VILLAGE RESIDENTIAL'S ANSWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD

Appeal from the judgment of the Oregon Tax Court
The Honorable Henry C. Breithaupt

Continued...

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STATEMENT OF THE CASE

1. Nature of Proceeding and Relief Sought, Nature of Trial and Judgment

This Court's summary of the back story may be condensed thus: Respondents (Taxpayers) in these four consolidated appeals challenged Appellant Clackamas County Assessor's (Assessor) valuation of the **improvements** component of their property taxes; Taxpayers did not challenge the land component. The Magistrate Division of the Tax Court rendered decisions which Taxpayers appealed to the Regular Division of the Tax Court, again challenging only the **improvements** component. Relying on the new provisions of ORS 305.287, the Assessor asserted for the first time that he had undervalued Taxpayers' **land** and he **moved** for leave to file an amended answer; he attached a proposed amended answer as an **exhibit** to his motion. The Tax Court held that ORS 305.287 does not apply to appeals to the Regular Division. ***Village at Main Street Phase II v. Dept. of Rev.***, 356 Or 164, 166, 339 P3d 428 (2014).

On September 18, 2014, this Court concluded "* * * that the Tax Court erred in ruling that the statute does not apply and that the county may not challenge its own land valuations." *Id.* This Court ruled: "The limited

judgments of the Tax Court are reversed, and the cases are remanded to the Tax Court for further proceedings." *Id.,* 356 Or at 185.

Later that same day, before any other administrative or judicial activity intervened, Taxpayers filed their **Notice Of Dismissal** as to all four cases pursuant to Tax Court Rule 54A(1) which provides:

> * * * a plaintiff may dismiss an action in its entirety * * * without order of the court : (a) by filing a notice of dismissal with the court and serving such notice on all other parties not in default not less than five days prior to the day of trial if no counterclaim has been pleaded * * *.

All agree that no trial date had been scheduled. All agree that Taxpayers served all parties. The Assessor and the Oregon Department of Revenue (Department) (sometimes Defendants) contend that the Court should torture the pending motions or some prior filing into a "pleaded" "counterclaim."

Defendants objected to Taxpayers' Notice of Dismissal. The Tax Court entered its General Judgment of Dismissal on March 19, 2015, immediately after receipt of this Court's Appellate Judgment. Defendants moved for relief from this General Judgment of Dismissal. The parties briefed and argued the issue before the Tax Court. The Tax Court denied Defendants' motions for

relief from the General Judgment of Dismissal (ER 72-83).[1] Defendants appealed to this Court. Taxpayers respond in this consolidated brief to Defendants' separate Opening Briefs.

2. Question on Appeal

Did the Assessor or Department plead counterclaims before Taxpayers filed their Notices of Dismissal?

3. Acceptance of Portions of Defendants' Opening Briefs

Taxpayers accept the following portions of the Department's Opening Brief: "Nature of the Judgement [*sic*] to be Reviewed"; "Statutory Basis for Jurisdiction"; "Timeliness of Appeal" (D-Br 2). Taxpayers accept the following portions of the Assessor's Opening Brief: "Basis of Supreme Court Jurisdiction"; "Dates of Entry of Judgment and Filing Notice of Appeal" (A-Br 3). Taxpayers prefer to state more precisely all other required elements of the Statement of the Case.

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[1] "ER refers to the Excerpt of Record provided by Defendant-Appellant Oregon Department of Revenue. "SER" refers to the Supplemental Excerpt of Record filed by these Taxpayers with their Respondents' Answering Brief. "A-Br" refers to the Appellant Clackamas County Assessor's Opening Brief. "D-Br" refers to the Appellant Oregon Department of Revenue's Opening Brief.

4. Summary of the Argument

Defendants never filed any counterclaims before Taxpayers filed their Notices of Dismissal. Defendants' original answers do not plead counterclaims. The Defendants' proposed Amended Answers were not filed before Taxpayers filed their Notices of Dismissal.

5. Statement of Facts

Taxpayers' Nature of Proceeding and Relief Sought, Nature of Trial and Judgment adequately set forth the factual and legal hackground relevant to this appeal. Taxpayers include additional facts in their Argument where appropriate.

6. Statutes and Rules Pertinent to this Appeal

Taxpayers' Appendix reproduces the following Tax Court Rules that are relevant to a consideration of this appeal: Rule 13; Rule 15; Rule 54A. Taxpayers also append ORCP 54A (App-1, App-2).

RESPONDENTS/TAXPAYERS COMBINED ANSWERS TO DEPARTMENT'S ASSIGNMENT OF ERROR

and

ASSESSOR'S ASSIGNMENTS OF ERROR ONE, TWO, AND THREE

THE OREGON TAX COURT COMMITTED NO ERROR IN DISMISSING RESPONDENTS/TAXPAYERS' COMPLAINTS

1. Introduction

As permitted, the Assessor and the Department filed separate briefs. The Department precisely raises a single assignment of error, whether the Tax Court erred in dismissing Taxpayers' complaints in accordance with their proper and timely Notice of Dismissal (D-Br 7, *et seq*). The Assessor has chosen to discuss this single seminal issue by what he terms three separate "assignments of error" (*e.g.* A-Br 7, 14, 19). These three "assignments" raise the identical purported error challenged by the Department; the Assessor really contests the identical ruling by three separate arguments stating three separate reasons. This trifurcation of a single issue necessarily complicates and extends a meaningful response; by this consolidated answer, Taxpayers attempt to eliminate as much duplication as reasonable.

N.B.: While Taxpayers respond to the Assessor's third "assignment" argument, this Court need not reach, consider, or resolve that argument in order to decide this case in Taxpayers' favor.

2. Standard on Review

Taxpayers agree that this Court reviews the issue before it for " * * * errors or questions of law or lack of substantial evidence in the record to support the tax court's decision or order." ORS 305.445. (A-Br 8, 15, 20; D-Br 8).

3. Preservation of Purported Error

Taxpayers agree that the Department and the Assessor adequately preserved their purported errors and assertions for Supreme Court review. Of course, Taxpayers disagree that the original four Answers (SER 1-4) filed by Defendants in these consolidated cases raised any counterclaims, and they further disagree that the proposed amended answers were pled or pending at the time Taxpayers filed their Notices of Dismissal.

ARGUMENT

TAXPAYERS' FUNDAMENTAL ARGUMENT

Taxpayers filed their **Notice of Dismissal** in accordance with Tax Court Rule 54A(1) [2] which directs in relevant part:

> * * * a plaintiff may dismiss an action in its entirety * * * without order of court: (a) by filing a notice of dismissal with the court and serving such notice on all other parties not in default not less than five days prior to the day of trial if no counterclaim has been pleaded * * *.

This was not a "motion to dismiss" as Assessor once argued. The plain language of the Rule **entitles** Taxpayers to file a **notice** of dismissal of its case; no judicial action is required, just as no judicial action is required when a party files a complaint or other initiating pleading. All that is required is the clerical

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[2] Hereafter, Taxpayers will abbreviate references to the Oregon Tax Court Rules as "TCR".

entry of filing the motion, and that took place at a time when the Defendants had not pled any counterclaims. The rule means what it says, and it says what it means, that a plaintiff is **entitled** to dismiss its action by filing its notice at a time when no counterclaim has been pled. Thus, the Tax Court committed no error in entering its General Judgment of Dismissal.

Oregon judicial rules of statutory construction, control and support Taxpayers' position. The lodestone of statutory construction requires judicial adherence to legislative intent. ***Halperin v. Pitts,*** 352 Or 482, 486, 287 P3d 1069 (2012). Construction starts with text since the words selected provide the most persuasive evidence of legislative intent. ***State of Oregon v. Gaines,*** 346 Or 160, 171, 206 P3d 1042 (2009). Particularly relevant to this case, the Court takes procedural statutes - such as TCR 54 - as written. ***State of Oregon v. Gardner,*** 233 Or 252, 259, 377 P2d 919 (1963). In considering statutory text, this Court gives the plain, ordinary meaning to common terms, and employs any well-defined legal meaning to legal language. ***Fresk v. Kraemer,*** 337 Or 513, 520, 99 P3d 282 (2004). Text is read in context, *Id.*, and this Court makes no further inquiry if the legislature's intent is clear from the text and context without more. ***State of Oregon v. Arnold,*** 320 Or 111, 879 P2d 1272 (1994).

Read against the backdrop of these controlling analytical tools, TCR 54 plainly says and means that a taxpayer may dismiss his case by filing his notice

of dismissal if no counterclaims have been pleaded. "Pleaded" requires a "pleading." The "pleadings allowed" by TCR 13B do not include a motion, a declaration, or an exhibit to a motion. Likewise, ORCP 13B does not include motions, declarations, or exhibits as permitted pleadings. Therefore, the Tax Court properly dismissed this case because Taxpayers filed their Notices of Dismissal at a time when no counterclaims had been pled; Defendants had only filed motions with attached exhibits.

Should the Court proceed beyond a textual/contextual analysis, the Oregon Court of Appeals has observed in several cases that the Oregon Legislative Assembly considered and discarded language that would have restricted a party's entitlement to dismiss even when some motions or other matters were "pending." *See, e.g.,* ***Ramirez v. Northwest Renal Clinic,*** 262 Or App 317, 321, 324 P3d 581 (2014); ***Guerin v. Beamer,*** 163 Or App 172, 177-78, 986 P2d 1241 (1999).

ANSWER TO FIRST "ASSIGNMENT OF ERROR"

Defendants' original answers did not plead counterclaims

Defendants boldly assert that they pled counterclaims in their original February 2012 Answers (A-Br 8-14); (D-Br 9-16). They overlook the obvious question: If you pled counterclaims originally in February 2012, why waste all

this judicial time and legal effort concerning your August 2012 motions for permission to file counterclaims?

Since neither Defendant included all of these seminal documents in their extended Excerpts of Record, Taxpayers include the four original answers (SER 1-4) and the four tardy proposed answers (SER 5-13) in their Supplemental Excerpt of Record. [3] Reading these documents reveals that the original answers do not resemble the proposed answers in the slightest: the original answers were exceedingly brief containing terse admissions and denials but, importantly, no counterclaims!

Indeed, the Assessor candidly concedes that his "requests were not pled as counterclaims" (A-Br 12). If they were not "pled as counterclaims," how would Taxpayers, the Tax Court, and any other sentient being recognize them as counterclaims? The Department falls back on the contention that counterclaims need not be pleaded as such (D-Br 10). Perhaps they need not be labeled a "counterclaim" but most certainly they must follow the ordinary pleading rules and they must put the opposing party on notice by pleading ultimate facts.

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[3] The Department includes copies of the Assessor's original answers (ER 67-71) but not copies of the Department's original answers (SER 1-4) which are not materially different.

All four original Assessor Answers contain admissions and denials, but no affirmative claims for relief. "A counterclaim must, of course, contain all of the elements of a cause of action. "***L. B. Menefee Lumber Co. v. MacDonald et al,*** 122 Or 579, 587, 260 P 444 (1927). This Court has ruled that "[a] cognizable counterclaim must plead facts giving the defendant an independent cause of action * * *." ***Rogue River Management Co. v. Shaw***, 243 Or 54, 60, 411 P2d 440 (1966); *see also* ***Chance v. Carter,*** 81 Or 229, 239, 158 P 947 (1916) ("* * * a counterclaim must be complete in itself" and plead facts entitling recovery); ***Hammer v. Campbell Gas Burner Co.,*** 74 Or 126, 135, 144 P 396 (1914) (counterclaim must be pled with the same particularity and precision as a complaint). Contrarily, Defendants' original Answers plead no claims for relief. If a party attempts to plead a counterclaim but fails to state all elements of his claim for relief, the court must dismiss the answer for failure to state a claim for relief. ***Wirth v. Sierra Cascade, LLC,*** 234 Or App 740, 745, 230 P3d 29 (2010).

Defendants attempt to twist their purported prayers into claims for relief. The Department particularly relies on its slightly different Department Answers, pointing to language in the "wherefore" or prayer clause in each instauce (*compare* D-Br 10-12 *with* ER 67-71). The controlling rule of law is to the contrary: A prayer does not comprise a part of a cause of action. ***Elliott***

v. Mosgrove, 162 Or 507, 542-43, 93 P2d 1017 (1939) ("It is well established that the prayer is no part of the cause of suit or action * * * "); ***Williams v. Stockman's Life Ins.,*** 250 Or 160, 167, 441, P2d 608 (1968); ***Employers' Fire Insurance Co. v. Love It Ice Cream Co.,*** 64 Or App 784, 792, 670 P2d 160 (1983) (this rule is well established). For that reason, a court does "* * * not examine the prayer for the purpose of determining, in each instance, whether the complaint states ultimate facts sufficient to constitute a claim * * *." ***Sanok v. Grimes,*** 294 Or 684, 698, n. 22, 662 P2d 693 (1983). Each original Assessor Answer requests the lower court to provide Defendants 'just and equitable relief' (SER 1-4). Both the Assessor and the Department rely on "prayer" language and nothing more pretentious.

Moreover, to assert a claim (or a counterclaim) for relief in a real property tax proceeding, a counterclaiming party - including a tax assessor - must be aggrieved. ORS 305.275; *see also* ***Bear Creek Plaza, Ore. Lmtd., v. Dept. of Rev.,*** 12 OTR 272, 274 (1992). In order for an Assessor to be aggrieved, the Board of Property Tax Appeals or the Tax Court must have reduced the RMV on the tax roll. *Id.* Measured by these controlling legal principles, Defendants' attempt to torture the original Answers into counterclaims fails miserably. Consider each case before this Court individually:

Tax Court 5054 (SER 1): Defendants make admissions and denials, but plead no factual allegations and no counterclaim. Counterclaims cannot be asserted in a prayer. Here, even the prayer contains no cognizable counterclaim; it merely asks the court to sustain the values ordered by the Magistrate. If the Court sustained the values as requested, the tax roll RMV would be **reduced** (SER 27-29). Hence, even the prayer would not provide the Assessor any affirmative relief.

Tax Court 5055 (SER 2): In addition to admissions and denials, the Assessor states: "* * * that the value on the roll for this property for the tax year in question, 2008-09, does not reflect the completed value at 100% completion." (ER 68). This is a mere factual statement, pure and simple, and certainly not a request for affirmative relief. Moreover, the Magistrate denied Taxpayer's appeal in Case 5055, leaving the value on the tax roll unchanged (SER 28-29). Hence, the Assessor was not aggrieved by the decision and therefore had no standing to challenge pursuant to ORS 305.275 and ***Bear Creek Plaza,*** *supra.*

Tax Court 5056 (SER 3): The body of this Answer contains neither factual allegations nor a counterclaim; it consists solely of admissions and denials. The Assessor's prayer - which cannot assert a counterclaim under controlling legal standards - requests an increase in the RMV (ER 70). Even if

the Assessor received this requested valuation, no increase in **property tax** would result because 2008-2009 was not an exception year for this property. Thus, any increased RMV would not increase the assessed value, meaning that the assessor would not be aggrieved because no income in tax would result (SER 28-29).

Tax Court 5057 (SER 4): The answer contains only admissions and denials, and makes no factual allegations, let alone a counterclaim. Similar to Case 5055, the Magistrate denied Taxpayers' appeal, leaving the tax roll RMV in Case 5057 unchanged; as in Case 5055, this status means that the Assessor lacked standing because he was not aggrieved (SER 29). ORS 305.275; ***Bear Creek Plaza,*** *supra.* Therefore, even if counterclaims could be pled in a prayer, Defendants would not be aggrieved and could not state a cognizable claim for relief.

TCR 54A(1), certainly by implication, requires that a counterclaim must be clearly denominated as a counterclaim, or at the very least it must make it plain that specific additional relief is requested, and this plain notice feature must exist without the need for judicial consideration and determination. TCR 54A(1) permits a taxpayer to dismiss its action "without order of the court" where "no counterclaim has been pleaded;" given this directive, a counterclaim

must be evident to an ordinary taxpayer upon cursory examination of the writing.

In these cases, Defendants never intended their answers to contain counterclaims (A-Br12) and any ordinary human would never consider them as such. If they had intended to counterclaim, Defendants certainly would have designated their answers as containing "counterclaims" and they would have fully stated them so that the Taxpayers, the Tax Court, and any common reader would understand them as such. They would not - and should not - leave a court or a taxpayer to wonder if the state taxing authorities intended to make some vague, disguised claim. Pleadings must give fair notice to opposing parties concerning the essence and extent of any claim. ***Murray v. Smucker,*** 252 Or 469, 471, 450 P2d 545 (1969); ***Rothrock v. McCollister***, 247 Or 545, 548, 431 P2d 266 (1967) ("* * * it is reasonable to expect litigants to put each other on notice in the pleadings concerning the factual issues and relevant legal theories * * *.").

Taxpayers agree with the general principle that counterclaims comprise requests for affirmative relief (A-Br 10-14) and that counterclaims "* * * must allege facts which are legally sufficient * * *" to permit recovery (A-Br 10). A counterclaim must set forth a plain, concise statement of all elements of a claim for relief. ***L. B. Menefee Lumber Co. v. MacDonald et al,*** *supra,* 122 Or 579,

587, 260 P 444 (1927); ***Chance v. Carter,*** 81 Or 229, 158 P 947 (1916). It must plead facts establishing an independent cause of action. ***Rogue River Management Co. v. Shaw***, *supra,* 243 Or 54, 60, 411 P2d 440 (1966). In these cases, Defendants did not allege a factual basis for relief; at best, they merely asked for results without allegations establishing their putative claims.

The Department argues that labels are not decisive (D-Br 10). Taxpayers generally agree but common rules of practice require plain statements providing pertinent notice. No one reading the Defendants' original Answers (SER 1-4) would recognize these boilerplate statements as claims for independent relief. Compare the precision and detail in the proposed Amended Answers with the simple admissions and denials of the original Answers: if Defendants intended to state counterclaims in their original answers, surely they would have labeled the counterclaim and pled ultimate supporting facts similar to the extended pleading in the exhibit/proposed amended answers. Defendants forget a cardinal rule of Oregon practice: the law obligates the pleader to notify the adversary of the essence and extent of any claim made. ***Murray v. Smucker,*** *supra,* 252 Or 469, 471; ***Rothrock v. McCollister,*** *supra,* 247 Or 545, 548. Oregon courts do not permit litigants to bushwack their opponents.

Department misunderstands and misstates the effect of the Assessor's value statements. Department proclaims "So, by requesting values different from the roll values, the assessor was seeking affirmative relief from the regular division of the tax court" (D-Br 12, n 4). Department is wrong: The Defendants were merely requesting the Tax Court to affirm the inferior (Magistrate Division) court and nothing more; they sought no affirmative relief.

The Assessor argues that TCR 18A(1) requires that counterclaims assert a "plain and concise statement of the ultimate facts" (A-Br 11) supporting relief. True - no plain factual statement appears in the original Answers, just limited admissions and denials.

The Assessor declares "Each of the answers asked for a higher real market value for the improvements than the values requested by Village on appeal" (A-Br 12). Read the documents (SER 1-4): these are not "requests for affirmative relief" but merely statements in opposition to Taxpayers' claims for relief. Further, even in a most overly-sympathetic reading, these statements reside in a prayer which cannot plead or describe a claim for relief.

Assessor misplaces reliance on TCR 19B (A-Br 13). The original Answers neither pled a claim nor a counterclaim: a most generous reading reveals a mere statement in a prayer, not a pleading of ultimate constitutive

facts. Correction of a mistaken label is one thing; after-the-fact-of-dismissal substantial changes to a document is quite another! If "substantial justice between the parties" (TCR 12A) is the goal (A-Br 13), what is just for a taxpayer if the Department and the Assessor can clandestinely change the essence of documents after the fact and to the detriment of Taxpayers who relied on the documents as filed?

ANSWER TO SECOND "ASSIGNMENT OF ERROR"

Defendants' exhibits did not plead counterclaims

The Assessor asserts as his "second assignment of error" that his counterclaims were "pending" "precluding voluntary dismissal." (A-Br 14). Department agrees (D-Br 18-19). Both Defendants err: all that was pending at the time of filing the notice of dismissal was a **motion** containing an attached **exhibit**. Neither the Assessor nor the Department filed a **pleading**, as described, proscribed, and limited by TCR 13B. The Assessor's contention would render TCR 15B(2) (granting 10 days within which to file an amended pleading) superfluous. Statutes and rules must be read to give meaning to all components. ***State of Oregon v. Haugen,*** 349 Or 174, 203, 243 P3d 31 (2010).

The Assessor errs, claiming that this Court's decision rendered Taxpayers' notice of dismissal superfluous and inconsistent, and that remand barred voluntary dismissal (A-Br 16). The Supreme Court remand directed the

case back to Tax Court for "further proceedings;" it did not command any particular proceeding; it most certainly did not direct Taxpayers to forego their statutory right to voluntarily dismiss their cases at any time without prejudice where no counterclaims were pending; it did not order Taxpayers how to proceed or how not to proceed.

The Assessor complains that Taxpayers' exercise of their entitlement to voluntary dismissal is inconsistent with the "further proceedings" remand of this Court (A-Br 16). He confuses two different matters. The remand is plain: it transmits the case back to the Tax Court where "further proceedings" may take place. To repeat: it does not direct any particular proceeding and it does not truncate or eliminate Taxpayers' right to dismiss. Again, remand does not "mean the amended answers were pending" (D-Br 16, 19); at most, a motion with an attached exhibit was pending. The Oregon appellate decisions make it clear that voluntary dismissal will be upheld even where motions or orders are "pending."

No decisional law exists directly construing TCR 54A(1) but case law under ORCP 54 is useful in analysis of the analogical Tax Court Rule. [4] While certainly not binding on this Court, the Oregon Court of Appeals has analyzed

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[4] The Assessor agrees that judicial analysis concerning ORCP 54 may be useful and instructive when considering TCR 54 (A-Br 9-10).

ORCP 54A(1) in several cases, and its holdings fully adhere to the plain meaning of the rule and fully support Taxpayers in their common construction of TCR 54A(1). For example, consider the recent decision in ***Ramirez v. Northwest Renal Clinic***, *supra,* 262 Or App 317, 320, 324 P3d 581 (2014) where the Court of Appeals stated:

> A notice of voluntary dismissal is not a request or a motion. Ordinarily, it does not provide an opportunity for a hearing, and it presents nothing for the court to deny. As we have observed before, "Under ORCP 54A(1), once plaintiff filed its notice of dismissal, the trial court's only authorized option was to enter a judgment of dismissal without prejudice." ***State of Oregon v. Cigtec Tabacco, LLC,*** 200 Or App 501, 504-05, 115 P3d 978 (2005) * * *.

The ***Ramirez*** Court concluded, ***Id.*** 262 Or App at 321:

> Our case law reflects that a **pending motion** or even the imminent entry of an order on summary judgment does not prevent a plaintiff from exercising that option. [*emphasis added*]

The Court of Appeals explained that the existing case law rested upon a considered legislative policy choice. *Id., citing* ***Guerin v. Beamer,*** *supra,* 163 Or App 172, 177-78, 986 P2d 1241 (1999); *see also,* ***Sohn v. Thi,*** 262 Or App 313, 315, 325 P3d 57 (2014) ("Absent a counterclaim and with five days or more remaining before trial, plaintiff was **entitled** to dismissal without prejudice" [*emphasis added*]). The Legislative Assembly considered and

rejected a more stringent rule which might have limited the entitlement to dismiss a pending case voluntarily. *Id.*

The Court of Appeals has adhered to this standard judicial interpretation in several other cases. *See,* ***Maxwell v. Stebbins,*** 180 Or App 48, 42 P3d 336 (2002) (court obligated to enter notice of dismissal without prejudice effective one day prior to hearing on Rule 21 motions); ***Palmquist v. FLIR Systems, Inc.,*** 189 Or App 552, 558, 77 P3d 637 (2003) (notice of dismissal effective when filed after order on summary judgment was filed but one day before that order was entered, noting that the Oregon Legislative Assembly had rejected a more limiting rule); ***State of Oregon v. Cigtec Tobacco, LLC,*** *supra,* 200 Or App 501, 504-505, 115 P3d 978 (2005) (Once a plaintiff has filed his notice of dismissal under ORCP 54A(1), " * * * the trial court's only authorized option was to enter a judgment of dismissal without prejudice").

In support of their contention that the amended answers were "pending" Defendants offer several foreign state intermediate appellate court cases as their authority (A-Br 16-18; D-Br 17-18). First, these states apparently did not operate under similar rules of civil procedure. Second, there is no evidence that these foreign legislatures made a considered policy choice such as that made by the Oregon Legislative Assembly. Third, this Court normally considers foreign inferior court authorities unhelpful. Fourth, the Oregon

Court of Appeals' decisional law concerning ORCP 54 is extensive, well-reasoned, and should be much more pertinent. In **Oregon**, a pending motion or order does not deprive a party from its entitlement to the legislated right of voluntary dismissal. ***Ramirez v. Northwest Renal Clinic,*** *supra,* 262 Or App 317, 320; ***Sohn v. Thi,*** *supra,* 262 Or App 313, 315; ***Maxwell v. Stebbins,*** *supra,* 180 Or App 48; ***Palmquist v. FLIR Systems, Inc.,*** *supra,* 189 Or App 552, 558; ***State of Oregon v. Cigtec Tobacco, LLC,*** *supra,* 200 Or App 501, 504. [5]

Defendants misunderstand the effect of filed documents. No answer or counterclaim was "effectively pending" (D-Br 19; A-Br 14, 16). What was pending was a motion with an attached exhibit. Motions are not pleadings. TCR 13B. Exhibits are not pleadings. TCR 13B. Defendants presume too much. The Assessor even proclaims that he "raised affirmative claims for relief by filing for leave to amend his answers" (A-Br 18). To repeat: Motions are not pleadings and only pleadings can "raise" issues.

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[5] The Assessor includes ***Mariner Health Care, Inc. v. PricewaterhouseCoopers, LLP,*** 282Ga. App. 217, 638 SE 2d 340 (Ga. App. 2006) in his litany of non-Oregon intermediate court decisions (A-Br 17-18). Assessor's footnote 8 (A-Br 18) concedes that "no counterclaim was pending at the time the voluntary dismissal was filed." (*Id.*). Taxpayers are puzzled why a government official would cite clearly inapposite authority from another state.

The Department asserts that filing a motion for permission to amend with a proposed amended pleading attached as an exhibit "provides the plaintiff with notice that defendant is asserting the counterclaim" (D-Br 17). Careless language abounds. Notice is not an issue in this context. More pertinently, no one is "asserting" a counterclaim: Defendants are moving for leave of court for permission to file an answer containing (for the first time) a counterclaim.

Defendants contend that a proposed amended pleading attached to a motion is effective the instant a motion granting leave to file an amended pleading is approved. Defendants are mistaken: no proposed amended pleading is effective until it is actually filed and served. *See, e.g.* ***Alery v. Alery,*** 193 Or 336, 341 *et seq,* 238 P2d 771 (1951); ***Thompson v. Hibbs,*** 45 Or 141, 145-46, 76 P 778 (1904); ***Walton v. Moore,*** 58 Or 237, 242, 113 P 58, 114 P 105 (1911). TCR 15B(2) governs:

> If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the order otherwise directs.

To overcome Taxpayers' Notices of Dismissal here, the Assessor must actually file his proposed amended answer before any counterclaim contained in that answer becomes a "pleading" in this record. Here, no pleading by amended answer exists; the record prior to the Notice of Dismissal contains mere

motions with attached exhibits, nothing more and most certainly not pleaded counterclaims.

Thus, the record contained motions for permission to file an Amended Answer, with such a proposed answer attached as an exhibit. **Motions, with or without exhibits, are not pleadings.** TCR 13B governs:

> There shall be a complaint and an answer. An answer may include a counterclaim against a plaintiff * * *. * * * * *. A pleading against any person joined under TCR 22C is a third-party complaint. There shall be a reply to a counterclaim * * *. There shall be no other pleading unless the court orders otherwise. [*emphasis added*]

The command of TCR 13B is clear: Defendants must have actually filed an Amended Answer before its counterclaim became a "pleading." TCR 13B plainly excludes "motions" and "exhibits" to motions from the legislatively-limited term "pleading." *Id.*

If Defendants never filed their Amended Answers, would a Reply be required nonetheless? Of course not! Further, Defendants' contrary contention would render TCR 15B(2) superfluous:

> If the court grants a motion and an amended pleading is allowed or required, such pleading shall be filed within 10 days after service of the order, unless the order otherwise directs.

Defendants' convoluted contention would eliminate any meaning of the 10-day

filing requirement. The legislative command in ORS 174.010 concerning the reading and application of statutory language controls:

> **General rule for construction of statutes.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; * * *.

At best, this Court's decision gave Defendants permission in "further proceedings" to create and file an amended **pleading**, and then only after additional Tax Court procedure. Defendants would like to read more into this Court's decision, but its ultimate directive is clear and simple: " * * * the cases are remanded to the Tax Court for further proceedings. "***Village at Main Street Phase II v. Dept. of Rev.,*** *op cit,* 356 Or at 185. Before "further proceedings" took place (as demonstrated by the Tax Court docket) Taxpayers exercised their TCR 54A(1) right to dismiss their cases.

The Assessor also contends that he "raised affirmative claims for relief by filing for leave to amend his answers." (A-Br 18). Again, he is mistaken. He filed a motion with an attached exhibit; motions and exhibits are not pleadings in Oregon. Perhaps recognizing the weakness of his contention, the Assessor resorts to "gamesmanship" name-calling (A-Br 19). It is not improper "gamesmanship" for a party to take tactical advantage of legal rules; after all,

the legislature changed the law by enacting new provisions of ORS 305.287 in the middle of this extended litigation, and the Assessor happily seized upon that legislative gift to further burden these taxpayers.

The Department argues that Defendants' pending motion to add counterclaims "precluded voluntary dismissal" (D-Br 16-19). Interestingly, the Department's authority is a statement from a secondary source, a legal encyclopedia, American Jurisprudence (D-Br 16). Such citations comprise the last refuge for a weak argument.

The Department recognizes that TCR 54A(1) "does not expressly refer to motions to amend" *(Id.)*. The Legislature certainly **could have** included such motions in TCR 54A(1) had it so intended. Again, ORS 174.010 is directive, not merely instructive: courts shall not add what is excluded or overlook what is included. The Court of Appeals has reminded that the extent and sway of ORCP 54 was the subject of extended legislative concern, and that the legislature declined to weaken taxpayers' right to dismiss on notice where no counterclaims were pending. *See, e.g.,* ***Sohn v. Thi, supra,*** 262 Or App at 315; ***Ramirez v. Northwest Renal Clinic,*** *supra,* 262 Or App at 321; ***Guerin v. Beamer,*** *supra,* 163 Or App at 177-178 (discussing legislative history). The rule should be enforced as considered and written, not as the taxing authorities might wish to re-write it. ORS 174.010.

ANSWER TO THIRD "ASSIGNMENT OF ERROR"

Defendants' claims fail because they failed to file a complaint

Taxpayers filed and duly served their Notices of Dismissal before any counterclaims were filed and when no trial date was pending. Therefore, this Court should affirm the General Judgment of Dismissal entered by the Oregon Tax Court notwithstanding the reasoning of the Tax Court Judge.

Taxpayers recognize that Defendants want this Court to consider and overrule the lower court *reasoning* as well as the result. Taxpayers are concerned solely with the *result*. The able and experienced Tax Court Judge set forth his statutory and practical analysis for Supreme Court consideration (ER 75 *et seq*). Taxpayers would deferentially augment that analysis by reiterating that ORS 305.501(5)(a) controls and directs as follows:

> Any party dissatisfied with a written decision of a magistrate may appeal the decision to the judge of the tax court **by filing a complaint in the regular division** of the tax court within 60 days after the date of entry of the written decision. [*emphasis supplied*]

Following the analytical construct of ***State of Oregon v. Gaines,*** *supra,* 346 Or at 171, the legislatively-selected words "filing a complaint" should be given their ordinary meaning. A counterclaim (even if one existed here) is not a **complaint**. If the Oregon Legislative Assembly had intended that a party could "counterclaim" or "cross appeal" in an existing proceeding, it could and would

have so stated. Defendants' assault on the Tax Court Judge' decision, including their repeated lament that it wastes time and is unfair to tax collectors, would be better addressed to their legislators. ORS 174.010 confirms the proper result here: affirm the Tax Court.

CONCLUSION

Taxpayers pray the Supreme Court of the State of Oregon to affirm the Tax Court General Judgment of Dismissal and to enter an Appellate Judgment awarding Taxpayers their due fees and costs.

Respectfully submitted this 7th day of January, 2016.

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CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(b)

I certify that this brief complies with the word count limitation in ORAP 5.05(2)(b), with a count of 5,698 words.

I certify that font size in this brief is Times New Roman 14-point for both the text of the briefs and footnotes, as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 7, 2016, I used the appellate court e-Filing system to file the foregoing **RESPONDENT'S ANSWERING BRIEF** with the:

Appellate Court Administrator
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1163 State Street
Salem, OR 97301-2563

I further certify that, on the date set forth below, true and correct copies of **RESPONDENT'S ANSWERING BRIEF**, were served by electronic notice through the appellate court's ECF system, upon the following:

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