IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR THE NINTH CIRCUIT

MARGRETTY RABANG; OLIVE OSHIRO; DOMINADOR AURE; CHRISTINA PEATO; ELIZABETH OSHIRO, Appellees, vs. ROBERT KELLY, JR.; RICK D. GEORGE; AGRIPINA SMITH; BOB SOLOMON; LONA JOHNSON; KATHERINE CANETE; ELIZABETH KING GEORGE; KATRICE ROMERO; DONIA EDWARDS; RICKIE WAYNE ARMSTRONG, Appellants.	No. 17-35427 APPELLANTS' MOTION FOR VOLUNTARY DISMISSAL OF APPEAL

I. RELIEF SOUGHT

Appellants Kelly move this Court, pursuant to Fed. R. App. Proc. 42(b) to voluntarily dismiss their appeal on terms fixed by the Court. If the Court grants Appellant Kelly's motion, Appellants Kelly understand and agree that they may

be required to reimburse and pay to the Respondents all reasonable costs and attorneys' fees incurred by Respondents in the preparation and other legal work incidental to their defense against Appellants Kelly on this appeal. *Shellman v. United States Lines, Inc.*, 528 F.2d 675, 678 (9th Cir. 1975) cert. denied, 425 US 936, 96 S Ct 1668, 48 L Ed 2d 177 (1976).

II. GROUNDS

Appellants Kelly seek to voluntarily dismiss their appeal based upon a change in circumstances since the appeal was commenced.

III. ARGUMENT

Fed. R. App. P. 42(b) provides in part that "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." *See also* 16 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3988, at 480 (1977).

An appellant's motion to voluntarily dismiss its own appeal is generally granted, although courts of appeal have the

discretionary authority not to dismiss the case in appropriate circumstances. *HCA Health Servs. v. Metro. Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992), *citing United States v. State of Wash., Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978).

"Doubtless there is a presumption in favor of dismissal, but the procedure is not automatic." *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004). Whether or not a dismissal will be granted is within the sound judicial discretion of the court. *Blue Mountain Constr. Co. v. Werner*, 270 F.2d 305, 306 (9th Cir. 1959).

"But, in exercising its discretion, the court is obliged to recognize the rule which has long been followed in both law and equity, and which has traditionally allowed voluntary dismissals without prejudice after payment of defendant's costs in a situation where defendant will not suffer any legal prejudice beyond incidental annoyance of a second litigation on the same subject." *Blue Mountain Const. Co.*, 270 F.2d at 309 (dissent) (construing Fed. R. Civ. Proc. 41(a)(2)).

Generally, denials of motions under Fed. R. App. P. 42(b) have been confined to situations in which the respondent has shown financial or other injury caused by prosecution of the appeal. *United States v. Wash., Dep't of Fisheries*, 573 F.2d 1117, 1118 (9th Cir. 1978). That would not be the case here, as any financial injury to the Respondent will be addressed by Appellant Kelly's payment of reasonable costs and attorneys' fees. *Shellman*, 528 F.2d at 678.

Nor would granting the Rule 42(b) motion deny Respondents of a forum. "We will simply be accepting [Appellants'] decision to let those claims be finally adjudicated before bringing them to this court." *Creaton v. Heckler*, 781 F.2d 1430, 1431 (9th Cir. 1986). In addition, "[i]t is well established that the interest of a litigant in a controversy solely for its effect as precedent is insufficient to sustain an appeal." *Bodkin v. United States*, 266 F.2d 55, 56 (2nd Cir. 1959) (per curiam).

Appellants Kelly understand and agree that they may be

required to reimburse and pay to the Respondents all reasonable costs and attorneys' fees incurred in their defense against Appellants Kelly on this appeal.

This is not "one of the rare occasions where justice requires that a voluntary motion to dismiss be . . . denied." *Am. Auto. Mfrs. Ass'n. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 31 F.3d 18, 23 (1st Cir. 1994). None of the reasons for which courts have exercised their discretion to deny a motion for voluntary dismissal are present here. *See, e.g., Township of Benton v. County of Berrien*, 570 F.2d 114, 118-19 (6th Cir. 1978) (denying motion to dismiss filed by one of two appellants because dismissal "would be a meaningless gesture," where both appellants made same arguments, would be affected by decision); *Blount v. State Bank & Trust Co.*, 425 F.2d 266, 266 (4th Cir. 1970) (denying appellant's motion to dismiss, but granting appellee's because appellant violated briefing schedule and caused appellee to file motion to dismiss); *Local 53, Int'l Ass'n of Heat and Frost Insulators v. Vogler*, 407 F.2d 1047,

1055 (5th Cir. 1969) (denying motion because motion to dismiss was based on unsound argument of mootness and voluntary compliance); *see also Washington Dep't of Fisheries*, 573 F.2d at 1118 (courts "might have grounds" for denying motion to dismiss if sought to evade appellate review and to frustrate court orders). There is no such basis here, as the dismissal of this appeal would simply return jurisdiction to the District Court.

The Court should grant Appellants Kelly's motion.

DATED this 11th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April 2018, I electronically filed the foregoing APPELLANTS KELLY'S MOTION FOR VOLUNTARY DISMISSAL with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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