

SUPERIOR COURT OF WASHINGTON FOR COUNTY OF KING

LARGO WALES, a married woman,
Plaintiff,

vs.

CITY OF AUBURN, WA, a Washington State municipality; NANCY BACKUS, as Mayor of the City of Auburn, and Individually and her marital community; and The Committee to Elect Nancy Backus and its J. Doe committee members thereto; and ROB ROSCOE and his marital community,
Defendants.

NO. 19-2-20274-2 KNT

DEFENDANT NANCY BACKUS’
REPLY BRIEF IN SUPPORT OF CR
12(b)(6) MOTION TO DISMISS
CLAIMS ASSERTED AGAINST
HER INDIVIDUALLY AND
JOINDER IN CITY DEFENDANTS’
REPLY

I. INTRODUCTION TO REPLY

Defendant Nancy Backus and her marital community (“Backus Defendants”) submit this reply in support of their CR 12(b)(6) motion to dismiss plaintiff’s claims asserted against them in their individual capacities. The Backus Defendants join and incorporate the positions of co-defendants, the City of Auburn, Mayor Backus in her official capacity and Rob Roscoe (“City Defendants”) as articulated in their Reply Re: CR 12(b)(6) Motion to Dismiss Plaintiff’s Complaint, dated December 6, 2019.

1 In addition, plaintiff's opposition to this motion failed to even address the argument
2 advanced by the Backus Defendants' opening brief that plaintiff's claims under Section I of
3 the Washington Constitution cannot be asserted against a person acting in his or her own
4 individual capacity. Section I of the Washington Constitution applies only to acts by
5 governmental entities or persons acting under color of law.

6 A person acting in his or her own individual capacity cannot, by definition,
7 simultaneously be acting on behalf of a governmental entity or under color of law. Plaintiff's
8 Second Amended Complaint (**Appendix 3** to the Backus Defendants' opening brief) asserts
9 claims against the Backus Defendants "Individually" as well as in Mayor Backus' official
10 capacity as an elected public official. This motion seeks dismissal of only those claims asserted
11 against the Backus Defendants "Individually" because plaintiff failed to submit any opposition
12 to this argument.

13 **II. ARGUMENT IN REPLY**

14 **A. Plaintiff's Second Amended Complaint Fails to State a Claim Upon Which Relief** 15 **Can Be Granted Under Even the Most Liberal Interpretation of "Notice** 16 **Pleading" Requirements**

17 Plaintiff basically concedes in her opposition brief that she has no authority that is
18 contrary to the well-established Washington common law principle barring private civil claims
19 based on the Washington State Constitution. *See, Blinka v. Wash. State Bar Ass'n*, 109
20 Wn.App. 575, 591, 36 P.3d 1094 (2001), *rev. den.* 146 Wn.2d 1021 (2002). *Sys. Amuse., Inc.*
21 *v. State*, 7 Wn.App. 516, 517, 500 P.2d 1253 (1972); *Spurrell v. Bloch*, 40 Wn.App. 854, 860–
22 61, 701 P.2d 529 (1985); *Reid v. Pierce County*, 136 Wash.2d 195, 961 P.2d 333 (1998). Rather
23 than address that fatal deficiency, plaintiff resorts to that old stand-by of the supposed minimal
24 requirements of "notice pleading" in an effort to salvage a complaint that asserts no legally
25 cognizable cause of action. In other words: "Your Honor, I know I have not articulated a

1 legally recognized basis for recovery or relief – but don’t dismiss the complaint yet, because I
2 may come up with something, someday.”

3 But however liberally a complaint may be construed under the “notice pleading”
4 standard, “notice pleading” does not provide a basis for rescuing a legally deficient complaint.
5 *See, Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984) (dismissal
6 proper where complaint fails to articulate cognizable legal theory for recovery or relief or
7 where alleged facts and all inferences therefrom viewed in light most favorable to plaintiff are
8 insufficient to establish any basis for recovery or relief under recognized cause of action). If
9 that standard is applied to plaintiff’s Second Amended Complaint, there is no question that it
10 fails to state any claim upon which relief can be granted. The Backus Defendants therefore
11 respectfully request that the court dismiss the claims asserted against them in their individual
12 capacities in plaintiff’s Second Amended Complaint with prejudice and with costs pursuant to
13 CR 12(b)(6).

14 **B. The Backus Defendants Incorporate By Reference the Other Arguments**
15 **Advanced by the City of Auburn Defendants**

16 The Backus Defendants noted in their opening brief on this CR 12(b)(6) motion that
17 plaintiff’s Second Amended Complaint is devoid of any federal statutory, state statutory or
18 other common law or tort basis for plaintiff’s claims. Rather, plaintiff relies solely and
19 exclusively on Washington Constitution Article I §§ 5 and 7 as the basis for her claims in this
20 matter. As noted in the City Defendants’ Reply Brief, without “augmentive legislation”
21 establishing a private civil remedy, there is no legally cognizable claim for the violation of
22 these provisions in Article I of the Washington State Constitution. And there is no such
23 “augmentive legislation” in Washington creating a private civil cause of action for purported
24 violations of Article I. *See, Blinka v. Wash. State Bar Ass'n, supra* at 591.

1 The arguments raised by the City Defendants on this point are equally applicable to the
2 Backus Defendants in their individual capacities. Plaintiff could have asserted timely tort-
3 based claims for defamation, slander, libel or other similar so-called “reputational injury”
4 causes of action against the Backus Defendants. She could have asserted timely claims under
5 federal civil rights statutes¹. She deliberately chose not to do so and instead only asserted
6 claims under Article I of the Washington State Constitution. As noted above, Article I provides
7 no basis for private civil relief. The Backus Defendants respectfully request that the Court
8 dismiss the claims asserted against them individually with prejudice and with costs.

9 **C. The Backus Defendants “Individually” Are Not Subject to Article I §§ 5 and 7 of**
10 **the Washington Constitution**

11 Finally, plaintiff utterly failed to address what is, in many ways, the most compelling
12 argument advanced by the Backus Defendants – namely Article I §§ 5 and 7 apply only to
13 governmental entities and government officials acting under color of law. *See, State v. Ludvik,*
14 *40 Wn. App. 257, 262, 698 P.2d 1064, 1067 (1985)* (Article I of Washington State Constitution
15 does not apply to individual acting in a private, non-governmental capacity). Plaintiff brought
16 claims against Ms. Backus² in her both her official capacity as Auburn’s Mayor and
17 “Individually.” But by definition, the Backus Defendants *individually* are not state actors –
18 they are individuals. Plaintiff’s opposition materials fail to even address this argument. On that
19 basis alone the Backus Defendants are entitled to dismissal of the claims asserted against them
20 in their individual capacities. They respectfully request that the court do so with prejudice and
21 with costs awarded the Backus Defendants.

22 //

23 ¹ Had plaintiff asserted a timely 42 U.S.C. § 1983 claim for civil rights violations, the Backus Defendants would
24 have removed this case to federal court on “federal question” jurisdiction pursuant to 28 U.S.C. § 1331.

25 ² And her marital community.

1 **III. CONCLUSION**

2 For the foregoing reasons the Backus Defendants respectfully request that the court
3 dismiss with prejudice and with costs all claims asserted against them individually in this
4 matter pursuant to CR 12(b)(6).

5 DATED this 9th day of December, 2019.

6 WAKEFIELD & KIRKPATRICK, PLLC

7 I certify that this memorandum contains 1010 words, in
8 compliance with the Local Civil Rules.

9 By: s/ Scott C. Wakefield

10 Scott Wakefield

11 WSBA #11222

12 Attorneys for Nancy Backus, Individually

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of: Wakefield & Kirkpatrick, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served in the manner noted the document(s) entitled: DEFENDANT NANCY BACKUS' REPLY BRIEF IN SUPPORT OF CR 12(b)(6) MOTION TO DISMISS CLAIMS ASSERTED AGAINST HER INDIVIDUALLY on the following person(s):

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DATED this 9th day of December, 2019, at Seattle, Washington.

s/ Erica Solbrig

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