

**RICHARD KAMMERMAN, P.C.**  
**ATTORNEY AT LAW**  
3139 W. HOLCOMBE, NO. 175  
HOUSTON, TEXAS 78731  
TELEPHONE 512-343-2424 FAX 512-233-2763  
FAX: 713-669-0826  
e-mail: [richardkammerman@sbcglobal.net](mailto:richardkammerman@sbcglobal.net)

August 6, 2007

Via Fax: (512) 239-2311 and U S Mail First Class

Ms. LaDonna Castanuela  
Chief Clerk  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 AUG - 8 AM 9:33  
CHIEF CLERKS OFFICE

Re: Motion for Extension of Hearing Request Deadline

Application of Lerin Hills, Ltd. For TPDES Permit No. WQ0014712001

**RESPONSE OF LERIN HILLS, LTD. TO MOTION FOR EXTENSION OF  
HEARING REQUEST DEADLINE**

Dear Ms. Castanuela:

I represent Lerin Hills, Ltd., the Applicant for the above described TPDES Permit ("Permit").

I have received a copy of a document called a Motion for Extension of Hearing Request Deadline ("Motion") filed by Mountainview at Tapatio, L.P., Tapatio Springs Real Estate Holdings, L.P., Kendall County Utility Company, Mr. Bob Webster, Mr. Rick Wood, and Mr. Edgar Blanch who are referred to in the Motion as "Requestors".

This is the Response of the Applicant to that Motion.

The only basis for the Motion is that "Prior to 5:00, a legal assistant at Lowerre & Frederick placed this request in a fax machine for sending to the TCEQ." Further, according to the Motion, the machine did not work so the legal assistant immediately sent the hearing request via fax "using an alternate machine." Because of these purported "mechanical difficulties," the request was not received on Thursday, July 26 since it was received at 5:02 p.m. and thus, was, under the Rules, treated as received on July 27. Hence, it was late.

The Requestors seek sympathy, but an analysis and upon reflection of the Motion will lead the Commissioners to conclude that any such sympathy is misplaced. Here is why.

2007-1178-MWD

**Absence of diligence—Blame the Fax.** The Requestors admit in their Motion that they received the Response of the Executive Director to Comments regarding the Application. They admit it was sent on June 26, and there is nothing in the Motion to suggest that any of the Requestors or their Counsel did not know that their Request for Contest Case Hearing had to be filed by the end of the business day on Thursday, July 26. There are no facts alleged showing any reason for not timely filing the Request other than the Requestors waited (literally) until the very last minute to have the legal assistant fax the Requests to the Office of the Chief Clerk.

Counsel for the Requestors have their only office in Austin, so it would not have been a problem to have finished the Request at any time prior to 5:00 of the 26th and faxed or taken it to the Office of the Chief Clerk via courier or legal assistant. The Requestors waited until just before the deadline (5:00 p.m.) to deliver their Request. This clearly indicates an absence of due diligence on the part of the Requestors. They did not take the time to make sure that the Request was timely filed, and now Requestors blame the fax machine for an untimely filing. The Requestors choose to blame an inanimate object for their own failures.

**Procrastination is not Good Cause.** The Requestors have not shown any unique circumstances that prevented the Requestors from timely filing their Request. Procrastination is not an element of unique circumstances. The Requestors cite 30 TAC 55.201 (g) (2) as authority for the Commissioners to extend the time allowed to file a request for reconsideration or a request for a contested hearing. That Rule states:

The commission may extend the time allowed to file a request for reconsideration, or a request for a contested hearing.

There are no standards in the Rule to guide the Commission in determining whether it should extend the time allowed to file a request for a contested hearing. In the absence of standards, it is suggested that the Commission look to Rule 5 of the Texas Rules of Civil Procedure. In that Rule, the person seeking to enlarge the time for filing must show "good cause".

A faulty fax machine is not good cause especially since there were obviously other fax machines in the area that were in good working order and available just as easily as the one that is claimed to have been faulty. When there is a deadline, it is the obligation of the party required to file within that deadline to make such filing, but if such filing cannot be made timely, then good cause must be shown to obtain an extension of the deadline. Respectfully, good cause has not been shown in this case.

Procrastination is not good cause.

Instead, all that the Requestors have shown is negligence and a disregard of the Rules. There is no dispute that the Requestors had notice of the deadline date, July 26, and that the Requestors could easily have finished their two page letter to the TCEQ an hour earlier (and surely days earlier if they so chose) and had it hand-delivered no less faxed to the Chief Clerk on July 26 prior to 5:00 p.m. The Requestors chose not to do so.

Office of the Chief Clerk  
TCEQ  
Response of the Applicant  
August 6, 2007  
Page 3

In the case of *Duwe v. Duwe*, \_\_\_ SW3rd \_\_\_ (Tex. Civ. App., 2<sup>nd</sup> District, Fort Worth, 2007) (attached), the Court of Appeals affirmed the trial court's denial of a motion to continue and a motion for late filing of a counter petition even though the movant said her "...reasons for the continuance were based on her oversight of her dying grandmother's out-of-state medical care, which had caused her to spend insufficient time with her attorney to prepare for trial..." (at Page 1).

In *Duwe*, the Trial Court denied the Motion based on "failure to show good cause". The Trial Court stated that "as much as I can sympathize with the situation you find yourself in personally, it's the reason the rules provide for 45 days notice so you can get your affairs in order in order to prepare for the final hearing."

The facts in *Duwe* are more compelling than here, yet the Trial Court in *Duwe* recognized that people may have personal problems, but that is why the Rules provide adequate time for the particular action. Here, it is undisputed that thirty days is adequate time for the Requestors to file their request for a contested hearing. The reasoning of the Court in *Duwe* should govern.

**Taking Risks—the Consequences-Accountability.** The Requestors took a risk that their duties and responsibilities could be accomplished moments before the deadline.. The Requestors waited until moments before 5:00 to send the fax which consisted of 12 pages (ten of the pages were letters previously sent to the TCEQ by certain Requestors and addresses). When they took that risk, they also took the consequences of that risk, namely, there may be a problem with the transmission of the fax or any of a number of problems. The Requestors did not have to take that risk. They could have filed their Requests at any time prior to July 26, but the Requestors voluntarily elected to take that risk that the transmission would occur properly. They lost the risk, and now they ask the TCEQ to absolve them of their risk taking without any consequences to them. The Requestors have to be accountable and held responsible for their voluntary decisions. .

**Who is harmed?** The Requestors in their Motion disingenuously state that "the small delay in receipt of the request will not prejudice any other party or delay consideration of the request". In reality, the Applicant is prejudiced and damaged because to grant the Motion is to create the opportunity for more delays in the issuance of the Permit. The Application was filed on May 3, 2006, and the draft permit circulated in June, 2006. A public meeting was held on October 24, 2006. During all of these times, the Requestors were active in sending letters and speaking their minds on the Application. The Applicant has followed the Rules regarding its Application, and the Requestors ought to be required to follow the Rules also.

The public process through which this Application has been vetted has been extensive. Public participation has occurred with many people speaking at the meeting. The ED staff has responded to the public comments (44 of them) and has found that the Permit Application "meets the requirements of applicable law."

If the Commissioners grant this Motion, then there is the opportunity for more hearings arguing over the Application when, in reality, the concerns of the downstream landowners have been addressed by the Applicant's filing of an Application to use the treated effluent on its own land pursuant to a Chapter 210 permit. The protest by Tapatío Springs and its affiliates is one of an adjacent landowner not wanting to compete with the Applicant in the sale of land in Kendall County.

Ms. LaDonna Castanuela  
Office of the Chief Clerk  
TCEQ  
Response of the Applicant  
August 6, 2007  
Page 4

The Applicant's project has been delayed and delayed. This has created a great burden on the Applicant. It is now time for the Permit to be issued.

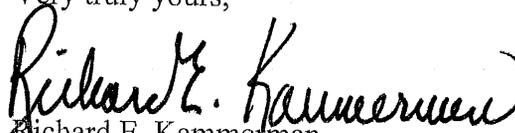
The Applicant should not bear the burden of the poor decision making of the Requestors.

The Requestors must be held accountable for their conduct in this situation, and their failure to be diligent.

The sole issue in this case is procrastination, and that is not good cause.

Thus, Lerin Hills, Ltd. asks the Commissioners to deny the Motion.

Very truly yours,



Richard E. Kammerman  
SBN 11086000

Copies sent to those on the  
Attached list

Attachment:  
*Duwe v. Duwe*

Ms. LaDonna Castanuela  
Office of the Chief Clerk  
TCEQ  
Response of the Applicant  
August 6, 2007  
Page 5

cc:  
Eric Allmon  
Counsel for the Requestors

Via Fax: 512-482-9346  
and U S Mail First Class

Kathy Humphries,  
Staff Attorney  
TCEQ  
P. O. Box 13087  
Austin, Texas 78711-3087

Via Fax: 512-239-0606  
and U S Mail First Class

Mary Ann Dimakos Airey, Technical Staff  
TCEQ  
Via Water Quality Division MC-148  
P. O. Box 13087  
Austin, Texas 78711-3087

Fax: 512-239-4114  
And U S Mail First Class

Ms. Bridget Bohac, Director  
TCEQ  
Office of Public Assistance MC-108  
P. O. Box 13087  
Austin, Texas 78711-3087

Fax: 512-239-4007  
and U S Mail First Class

Mr. Blas Coy, Attorney  
TCEQ  
Public Interest Counsel  
P. O. Box 13087, MC-103  
Austin, Texas 78711-3087

Fax: 512-239-6377  
and U S Mail First Class

The Honorable Eddie J. Vogt  
Kendall County Judge  
210 E. San Antonio, Suite 120  
Boerne, Texas 78006

Via U S Mail First Class

Mr. Patrick Linder  
Attorney at Law  
7550 W. IH-10 Suite 800  
San Antonio, Texas 78229-5815

Fax: 210-349-0041  
and U S Mail First Class

Ms. Ladonna Castanuela  
Office of the Chief Clerk  
TCEQ  
Response of the Applicant  
August 6, 2007  
Page 6

Mr. Abel Godinas  
Mr. Teague Harris, P. E.  
Mr. Charles Hallenberge, P. E.

Via email  
Via email  
Via email

Mr. William R. Wood  
306 State Highway 46 W.  
Boerne, Texas 78006-8104

Via U S Mail First Class

Mr. Grady B. Jolley  
Attorney at Law  
1580 S. Main Street, Suite 210  
Boerne, Texas 78006-3311

Via U S Mail First Class

Mr. & Mrs. Lee Roy Hahnfeld  
306 State Highway 46 W.  
Boerne, Texas 78006-8104

Via U S Mail First Class

**2007 S.W.3d (2-06-053-CV); Duwe v. Duwe;**

REBECCA DUWE APPELLANT v. MONTE J. DUWE APPELLEE

COURT OF APPEALS SECOND DISTRICT OF TEXAS FORT WORTH

NO. 2-06-053-CV

FROM COUNTY COURT AT LAW NO. 2 OF WICHITA COUNTY

MEMORANDUM OPINION(fn1)

Appellant Rebecca Duwe brings five issues in this divorce action appeal. She asserts that the trial court abused its discretion by denying her motions for a **continuance** and for leave to file a counter-petition and a trial amendment, and by requiring her counsel to make her bill of exceptions to the court reporter after trial had concluded and without court being in session. We affirm the trial court's denial of her motions and so do not reach her other complaints.

## BACKGROUND

In early 2005, Appellee filed for divorce. In April, Appellant filed her answer, entering a general denial and seeking attorney's fees and a name change. She received notice of the trial setting in July and met with her attorney in August, but testified that she made no request for a **continuance** at that time because she was not advised to do so.

On September 8, 2005, the day before trial, Appellant filed a motion for a **continuance** and for late filing of a counter-petition. The counter-petition contained an allegation of cruel treatment and sought a community property division in her favor based on fault, reimbursement for community funds used to enhance Appellee's separate property, and spousal maintenance. During trial, Appellant's motion to file a trial amendment set forth the same new claims by incorporating the counter-petition.

Appellant's affidavit supporting her motion for **continuance** and for late filing was contained within the motion itself. Her reasons for requesting the **continuance** were based on her oversight of her dying grandmother's out-of-state medical care, which had caused her to spend insufficient time with her attorney to prepare for trial, and on the need for additional discovery. The trial judge denied the **continuance**, stating, "as much as I can sympathize with the situation you find yourself in personally, it's the reason the rules provide for 45 days' notice so you can get your affairs in order and prepare for a final hearing." In his subsequently-filed findings of fact and conclusions of law, the trial judge overruled the motion for **continuance** for failure to show good cause.

Appellee objected to Appellant's late counter-petition based on unfair surprise, asserting that he had received it at 3:23 p.m. on the day before trial. The trial judge stated that the new petition added a new cause of action for fault, and "obviously, that would be a surprise since there are no fault pleadings of record to this point." The trial judge noted that fault was "the kind of thing that could have been included in an original answer or an amended answer, especially when the setting was obtained 45 days ahead of time." He overruled Appellant's motion for late filing based on failure to show good cause and refused to consider her counter-petition because it was untimely filed.

Appellant moved for a trial amendment after Appellee objected to her introduction of evidence. Appellee based his objection on relevance, because Appellant's evidence went only to items that were raised in the counter-petition, which the trial court had declined to consider. Appellant admitted that she

was re-urging as a trial amendment what she had tried to raise in her counter-petition.(fn2) The trial court overruled her motion for a trial amendment for failure to show good cause and to follow court rules.

After the trial court sustained Appellee's objection to Appellant's line of questioning, Appellant "offered to prove up her bill." The trial court declined to hear Appellant's bill of exceptions at that time, informing Appellant that she could prove up her exceptions after the trial was over. At the end of the trial, Appellant protested that the trial court was ruling before hearing her bill of exceptions.(fn3) The trial court overruled the objection and reiterated the basis for his decision, stating,

The Court has ruled the way it has today because I believe that these last minute pleadings are not fair, it's as simple as that. They come at the eleventh hour, with no warning, and they raise a number of issues which were not in this case up until 24 hours ago. . . . These are issues, that had they been serious issues, . . . should have been thoroughly developed a long time ago through discovery or otherwise.

After granting the divorce, the trial court informed Appellant's attorney that he had a prior engagement, but that she could prove up her bills on the record without him that afternoon because they were her "bill to show what you would have proven had the court ruled otherwise." Instead of scheduling another time at which the judge could be present and which would have been more convenient for Appellee's attorney,(fn4) Appellant chose to proceed that afternoon.

At the first hearing on Appellant's motion for new trial, after a comment by Appellant about the trial judge's absence during the bill of exceptions, he responded:

I think it was mentioned in the record that I would not be here, but if Counsel chose to go forward, she certainly could. So, I don't want it to be inferred today that the court didn't show up for trial. In fact, the court advised the parties that I had to leave at noon that day, and if you wanted to prove up your bill, you could do it that afternoon but I wouldn't be here. You had a choice between doing it then or the next week, and it's my understanding you chose that afternoon.

At the second hearing on her motion for new trial, Appellant indicated that she had tried three ways to get her counter-claims before the court: through the motions for **continuance**, for leave to late file the counter-petition, and for the trial amendment. She argued that she had a good excuse and that there was no surprise because the same issues had been raised in Appellant's answers to Appellee's interrogatories.(fn5)

#### ABUSE OF DISCRETION

Appellant argues in her first, second, and third issues that the trial court abused its discretion when it denied her various trial motions. To determine whether a trial court abused its discretion, we must decide whether the trial court acted without reference to any guiding rules or principles; in other words, we must decide whether the act was arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), cert. denied, 476 U.S. 1159 (1986). Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Id.*

#### *Motion For Continuance*

In her first issue, Appellant complains that the trial court abused its discretion by denying her motion for a **continuance**. Whether the trial court grants or denies a motion for **continuance** is within its sound discretion. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002). Therefore, its ruling will not be reversed unless the record shows a clear abuse of discretion. *Id.* No **continuance** shall be granted without "sufficient cause supported by affidavit," *see* Tex. R. Civ. P. 251, and a litigant who fails to diligently use the rules of civil procedure for discovery purposes is not entitled to a **continuance**. *See State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988). In deciding whether a trial court abused its discretion in denying a motion for **continuance** seeking additional time to conduct discovery, we consider factors such as the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the **continuance** has exercised due diligence to obtain the discovery sought. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004).

Appellant incorporated her affidavit into her motion. She did not specify, either in the affidavit or at the **continuance** hearing, why she needed more time, beyond referring generally to discovery and additional preparation time for trial because of time spent caring for her sick grandmother. She agreed that she had received at least forty-five days' notice of trial setting and had filed her answer in April, before starting to oversee her grandmother's care in May. Based on these facts, we cannot say that the trial court's conclusion that Appellant failed to show good cause for a **continuance** was arbitrary or unreasonable, and therefore, we must conclude that denying her motion for a **continuance** did not constitute an abuse of discretion. *See id.* We overrule Appellant's first issue.

#### *Motions For Leave To File Counter-Petition & Trial Amendment*

Appellant argues in her second issue that the trial court abused its discretion by denying her motion for leave to file a counter-petition. She claims in her third issue that the trial court also abused its discretion by denying her motion for leave to file a trial amendment.

Rule 63 governs pretrial amendments; rule 66 governs amendments at trial. *See* Tex. R. Civ. P. 63, 66. Under rules 63 and 66, a trial judge has no discretion to refuse an amendment unless (1) the opposing party presents evidence of surprise or prejudice or (2) the amendment asserts a new cause of action or defense, and the opposing party objects to the amendment. *Greenhalgh v. Service Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990); *see also State Bar of Tex. v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex.), *cert. denied*, 512 U.S. 1236 (1994). Surprise may be shown on the face of the amendment when it would reshape the cause of action to the prejudice of the opposing party. *Greenhalgh*, 787 S.W.2d at 940-41. However, merely because an amended pleading asserts a new cause of action does not make it prejudicial to the opposing party as a matter of law. *Dunnagan v. Watson*, 204 S.W.3d 30, 38 (Tex. App.--Fort Worth 2006, no pet.).

An amendment is prejudicial on its face if (1) it asserts a new substantive matter that reshapes the nature of the trial itself, (2) the opposing party could not have anticipated the amendment in light of the prior development of the case, and (3) the opposing party's presentation of the case would be detrimentally affected. *Id.* The burden of showing surprise or prejudice is on the party resisting the amendment. *Id.* But when the record shows a lack of diligence in bringing the reshaped cause before the court and the matter pleaded appears to have been known by the party seeking to amend and is not based on any newly discovered facts, the court does not abuse its discretion in refusing to allow the amendment. *See In re Marriage of Loftis*, 40 S.W.3d 160, 164 (Tex. App.--Texarkana 2001, no pet.).

Here, Appellant's counter-petition and her trial amendment, which incorporated her counter-petition, reshaped the claim for divorce by presenting a new ground, fault based on cruel treatment, and new claims for economic contribution, reimbursement, and spousal maintenance. *See Bishop v. Bishop*, No. 14-02-00132-CV, 2003 WL 21229476, \*5 (Tex. App.--Houston 14th Dist. May 29, 2003, no pet.) (mem.

op.) (holding that equitable lien would not be imposed when spouse failed to plead economic contribution); *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982) (requiring party claiming right of reimbursement to plead and prove it). Prior to the day before trial, none of these items had been pled to put Appellee on notice that he would be required to defend his suit against them. Appellee objected to both the counter-petition and to the trial amendment based on untimeliness and unfair surprise, and the trial judge sustained those objections. On these facts, we cannot conclude that the trial court acted arbitrarily or unreasonably in denying both of Appellant's motions. We overrule Appellant's second and third issues.

### CONCLUSION

Because we conclude that the trial court did not abuse its discretion in denying Appellant a **continuance** or leave to late file her counter-petition or to make a trial amendment, we do not reach her evidentiary claims, which address issues raised only in her counter-petition and trial amendment. *See* Tex. R. App. P. 47.1; *see also* *Benavides v. Cushman, Inc.*, 189 S.W.3d 875, 881 (Tex. App.--Houston 1st Dist. 2006, no pet.) (stating that "it is not . . . proper to admit evidence unless it is addressed to or bears upon some issue raised by the pleadings").(fn6) We affirm the trial court's judgment.

DIXON W. HOLMAN JUSTICE

PANEL B: LIVINGSTON, DAUPHINOT, and HOLMAN, JJ.

January 25, 2007

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#### Footnotes:

1. *See* Tex. R. App. P. 47.4.

2. Appellee argued against allowing it, stating, "a trial amendment would be an amendment to a pleading that is on file, live, and in consideration, not an entire counter-petition. That's not a trial amendment, that's a whole new pleading, urging whole new remedies."

3. Appellant's exceptions addressed the exclusion of evidence pertaining to issues in her counter-petition.

4. Appellant's attorney stated, "I am not personally inclined to extend courtesies to Mr. Hale Appellee's attorney."

5. In response to the trial judge's question regarding why, when sufficient notice of trial setting was provided, she failed to timely file the counter-petition, Appellant's attorney replied:

As a practical matter in my law practice, I work closely with my clients and I don't have a tickler--tickler system on my own, and I depend a great deal on my clients keeping in touch with me, and because of the fact that Appellant was unable to do that because of her--her problems with taking care of her grandmother, the--it just didn't happen in this case.

6. We note, however, that Appellant is not complaining about the *exclusion* of her evidence as it relates to those claims. Rather, she complains about the *procedure* by which her objections to the exclusion of evidence were preserved. Rule 103 of the Texas Rules of Evidence provides that to