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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

37357-2-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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MARK HENDRIX,

Respondent,

V.

DAVID W. DEVIN,

Appellant.

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BRIEF OF RESPONDENT

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## **I. INTRODUCTION**

Attorney John Bertram Jackson, III filed this personal injury action for plaintiff Mark Hendrix. Unfortunately, Mr. Jackson did not prosecute Mr. Hendrix's suit in a timely fashion and his case was dismissed on the Clerk's Motion for Want of Prosecution on July 12, 2006. Mr. Jackson was disbarred on April 18, 2007. Mr. Hendrix did not receive any notice of the Clerk's Motion to Dismiss and was unaware that his case had been dismissed until he was advised of this fact by his new attorneys last summer.

The trial court set aside the order dismissing the case and reinstated Mr. Hendrix's lawsuit on December 14, 2007 pursuant to CR 41(b)(2)(B). This Court should affirm the order reinstating the case.

## **II. ISSUES**

1. Was plaintiff properly served with notice of the Motion for Reinstatement of Suit?
2. Did the trial court abuse its discretion in reinstating the case?

## **III. STATEMENT OF THE CASE**

The majority of the statements contained in defendant's Statement of the Case constitute unsupported hearsay concerning his version of the facts relating to the underlying action and should not be considered by the

Court. The following facts are relevant to the issue of whether the trial court properly reinstated this case:

1. Mr. Hendrix's case was dismissed on the Clerk's Motion for Want of Prosecution on July 12, 2006. (CP 14)
2. The Washington State Bar Association disbarred Mr. Hendrix's former attorney, John Bertram Jackson, III on April 18, 2007. (CP 19)
3. Mr. Hendrix did not receive any notice of the Clerk's Motion to Dismiss and was unaware until the summer of 2007 that his lawsuit had been dismissed. (CP 17)
4. Mr. Hendrix does not know what his former attorney might have received by way of notice. (CP 17)
5. Mr. Hendrix filed a Motion for Reinstatement and requested a hearing date of December 14, 2007. He mailed notice of the motion to Mr. Devin on December 4, 2007. (CP 22)
6. The trial court set aside the July 12, 2006 Order of Dismissal and reinstated the case by Order dated December 14, 2007. (CP 26)
7. The trial court denied defendant's motion for reconsideration on January 15, 2008. (CP 34)

#### IV. ARGUMENT

A. Defendant Received Proper Notice of the Motion for Reinstatement.

Mr. Hendrix served Mr. Devin with notice of the hearing 6 days before the hearing, as allowed by CR 6(d). (CP 22) Mr. Devin's claim to the contrary is without merit.

B. The Trial Court Did Not Abuse Its Discretion in Reinstating Mr. Hendrix's Case.

CR 41(b)(2)(B) provides, in relevant part:

. . . A party who does not receive the clerk's notice shall be entitled to reinstatement of the case, without cost, upon motion brought within a reasonable time after learning of the dismissal.

The rule does is "not a limitation upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise." CR 41(b)(2)(D).

The civil rules contain a preference for deciding cases on the merits rather than on procedural technicalities. *See Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668 (1992). The decision to reinstate a case is reviewed for abuse of discretion. *Plouffe v. Rook*, 135 Wn. App. 628, 632-633, 147 P.3d 596 (2006). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable

grounds. *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 130-131, 896 P.2d 66 (1995).

Mr. Hendrix's former attorney was disbarred in April 2007. Mr. Hendrix never received any notice of the clerk's notice of dismissal. He does not know what his former attorney might have received. (CP 17) He only learned of the fact that his case had been dismissed when his new attorneys informed him of this in the summer of 2007. (CP 17) The trial court's decision to reinstate based on these circumstances was reasonable.

Defendant has failed to identify any basis for claiming that the trial court abused its discretion, other than to claim that the trial court was confused when it made its ruling. The following exchange illustrates that the trial court understood the issues and the circumstances:

THE COURT: At the very core of what's happening here, the gentleman [Mr. Hendrix] says he was not [provided with notice of the dismissal], sir. You're relying on the fact that his lawyer would have given him notice of what happened. It's not clear to me, since that fellow was disbarred at the time –

MR. DEVIN: No, he wasn't at the time. It was 18 months later he was disbarred.

THE COURT: Well, whatever was happening to him, it ended up with him being disbarred.

And you can still make all these arguments, but I'm going to allow this case to go forward at this time. You're both entitled to your day in court. You're both entitled to justice, which is fairness, and I'm not going to use this

technicality that there wasn't progress on this case to stop it being decided on its merits.

(RP 6-7)

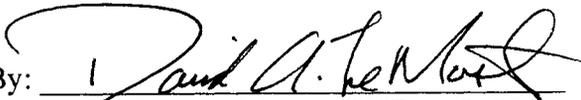
**V. CONCLUSION**

The Court should affirm the trial court's order reinstating this case.

DATED this 26<sup>th</sup> day of August, 2008

Respectfully submitted,

PORTER, KOHLI & LEMASTER, P.S.

By:   
David A. LeMaster, WSBA #22874  
Attorney for Respondent

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COURT OF APPEALS, DIVISION II  
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DAVID W. DEVIN, Appellant,

NO. 37357-2-II

v.

MARK HENDRIX, Respondent,

CERTIFICATE OF  
SERVICE

The undersigned declares under the penalty of perjury that on August 26, 2008 she sent for delivery via U.S. MAIL, postage pre-paid, a copy of Brief of Respondent to:

To:

David W. Devin  
2229 47th Street NW      and      2215 47th Street NW  
Gig Harbor, WA 98335      Gig Harbor, WA 98335

And to:

The Court of Appeals, Division II  
950 Broadway, #300  
MS TB-06  
Tacoma, WA 98402

Signed in Seattle, Washington this 26th day of August, 2008.



\_\_\_\_\_  
Linda Voss  
Hackett, Beecher & Hart