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COURT OF APPEALS  
DIVISION II

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Court of Appeal No. 47116-7-II BY Cm DEPUTY

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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LEONARD DeWITT,

Appellant/Cross-Respondent,

v.

SHAWN MULLEN and KRISTINA LeMAY, and the marital community  
comprised thereof, ALBERT V. HUNIUI and JANE DOE HUNIUI, and the  
marital community comprised thereof,

Respondent/Cross-Appellant,

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**APPELLANT'S OPENING BRIEF**

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**I. INTRODUCTION**

This is an appeal of the Pierce County Superior Court's dismissal of Appellant Leonard DeWitt's personal injury case on December 1, 2014.

**II. ASSIGNMENTS OF ERROR**

**A. Error One**

The trial court erred and abused its discretion by dismissing DeWitt's case with prejudice resulting in a gross miscarriage of justice.

**B. Issue One**

Whether the trial court properly considered and weighed all relevant factors under Washington law on the record before imposing the death penalty of dismissal?

**III. STATEMENT OF THE CASE**

On December 16, 2011, Shawn Mullen and Albert Huniu entered Leonard DeWitt's home, bashed Mr. DeWitt over the head with a golf club and robbed him of \$100.00 at knifepoint. *DeWitt Declaration CP 63-64.*

Both Mullen and Huniu were convicted of First Degree Burglary and First Degree Robbery in Pierce County Superior Court and are now serving their sentences. *DeWitt Declaration, CP 64.*

On November 27, 2013, DeWitt filed a personal injury lawsuit alleging assault and battery in Pierce County Superior Court against Mullen, Huniu, and Mullen's ex-wife, Kristina LeMay.

On April 28, 2014, DeWitt filed a Motion for Default against LeMay and Huniu. *DeWitt Declaration CP 6.* LeMay's lawyer sent a letter asking DeWitt not to go forward with the hearing and DeWitt honored his request. *DeWitt Declaration CP 64.*

DeWitt did not confirm the motion, as required by local rule, so he thought the motion would be automatically stricken. *DeWitt Declaration CP 64-65.* Counsel for LeMay and counsel for Mullen appeared in court anyway and demanded sanctions which the court granted.<sup>1</sup>

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<sup>1</sup> The trial court ordered DeWitt to pay \$1,000.00 to counsel for Mullen and LeMay. It should be noted that DeWitt's default motion was not against Mullen. Therefore, Mullen's counsel had no reason to appear at the hearing, let alone request sanctions.

DeWitt failed to appear for trial on December 1, 2014. Defendant Huniu also failed to appear. DeWitt's counsel was surprised and could not explain his client's absence. *Malden Declaration, CP 75-77*. DeWitt's counsel advised the court, however, he was authorized to request transfer of the case to mandatory arbitration.<sup>2</sup>

Counsel for LeMay and Mullen moved to dismiss the case against all defendants with prejudice for non-compliance with the Case Schedule and the court granted their motion.

DeWitt filed a timely Motion For Reconsideration. In a supporting declaration, DeWitt stated:

10. "I am very sorry for missing my trial date and inconveniencing the court and counsel. It was not intentional.
11. I have not been able to work since the assault. I have problems with memory and concentration, headaches, neck pain and psychological problems. I was diagnosed with Post Traumatic Stress Disorder, but I cannot afford to pay for treatment.

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<sup>2</sup> DeWitt's counsel informed opposing counsel of his intention to request a transfer to arbitration before trial. *Malden Declaration CP 75-77*.

12. I am very sorry I missed the last court date. I need constant reminders since the attack. I meant no disrespect to the court or to opposing counsel. If I get another chance, I will make sure I never happens again.
13. My attorney told me that he was questioned about why I had not paid sanctions for missing a court hearing on a default motion in May. So I would like to explain what happened. Because there is no pattern here of unexcused “no shows.”
14. I filed my Motion for Default against defendants on April 28, 2014 with the assistance of Michael Haan. The lawyers for Mullen and LeMay asked me not to go forward with the hearing on the Motion *and I honored their request*. I intentionally did not confirm the Motion so it should have been automatically stricken from the calendar. Just as my attorney said in court, the court record shows my Motion was not confirmed and should therefore have automatically stricken. See Exhibit 1. I relied on good faith on the local court rule and should not have been sanctioned.

15. I do not understand why opposing counsel insisted on going to the hearing and requesting sanctions against me. Surely, they know how to check if a motion was confirmed. I do not understand why the Judge sanctioned me for not attending a hearing I never confirmed, and should have been stricken.
16. Until recently, I wanted to take my case to trial. I tried to secure funds to pay for the medical experts to testify, live of at deposition. But, it takes thousands of dollars and I eventually realized that I couldn't do it. It was not realistic. I should have realized it sooner. But, these felons caused me serious injury that messed my head up and I do not always think clearly.
17. I ask the court to reinstate my case and transfer it to arbitration so that I may seek a fair civil award against these men who broke into my home and beat me up, giving me permanent life-changing injuries.
18. I realize I made some mistakes with the handling of my case and communicating with my attorney. But, it will not happen again. I

ask for another chance.” *DeWitt Declaration CP 63-65, and Exhibits at CP 67 and 68.*

Michael Haan submitted a declaration in support of the Reconsideration Motion, which stated:

1. “I am 53 years old.
2. I reside at 2106 South 25<sup>th</sup> Street in Tacoma, Washington.
3. Leo DeWitt has lived with me at this address for approximately 8 or 9 years.
4. I was working the night Shawn Mullen and Albert Huniu staged their home invasion robber and beat up Lao on December 16, 2011.
5. Leo took a terrible beating and was smashed in the face and head. He could have been killed.
6. Leo sustained serious physical and mental injuries in the attack. His memory and concentration are still impaired. He can be very forgetful about times, dates and appointments.

7. I helped Leo file his motion for default on April 28, 2014. I have worked as a paralegal so I have some knowledge.
8. After the motion was filed, opposing counsel sent a letter asking Leo to take it off calendar. *In accordance with their request, we did not confirm the motion with the court.*
9. We knew the Court's rule that if a motion was not confirmed, it is stricken. The Court will not hear an unconfirmed motion so we were sure we did the right thing.
10. I even called opposing counsel's office about one hour before the hearing and left a message with a legal assistant confirming that the motion was stricken which is what I believed.
11. We were stunned to discover that Leo was sanctioned by the Court for not showing up for the hearing because I thought he followed the rules. I am not a lawyer, but I did read the court's local rule on confirming motions. I do not understand how these defense lawyers persuaded the court to award them money for attending a hearing that was never confirmed and should have been stricken.

12. Leo made a mistake missing his last court date. But, this is *not* a pattern of missing court dates as opposing counsel apparently argued.”

IV. **ARGUMENT**

A. **The Trial Court’s Dismissal of DeWitt’s Case With Prejudice Was an Abuse of Discretion that Resulted in a Miscarriage of Justice**

A trial court has the authority to dismiss an action for noncompliance with a court order or court rules but “it is the general policy of Washington courts not to resort to dismissal lightly.” Rivers v Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686 (2002) (citations omitted). This means that before resorting to default or dismissal, the most severe sanctions available under the rules, the court must consider, on the record, whether a lesser sanction would suffice. Id. See also Snedigar v. Hoddersen, 114 Wash.2d 153, 170 (1990).

“Under CR 41(b), When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it must be

apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. A party's disregard of a court order without reasonable excuse or justification is deemed willful." Rivers v Washington State Conference of Mason Contractors, 145 Wn. 2d 674 (2002)(citations omitted).

Before a trial court dismisses an action for failure to provide discovery, constitutional due process considerations require that the moving party prove "a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial." White v. Kent Medical Center, Inc., P.S., 61 Wash. App. 163 (Div. 1 1991) quoting Associated Mortgage Investors v. G.P. Kent Constr. Co., 15 Wash. App. 223, 228-29, review denied, 87 Wash.2d 1006 (1976).

LeMay and Mullen's counsel complained to the trial court that discovery deadlines had not been met. Yet, they were never sufficiently

concerned about missing discovery to get a court order and there was no violation of any discovery order.

In this case, the trial court did not perform the necessary weighing of factors on the record sufficiently to support the death penalty sanction of dismissal. The trial court did not consider willfulness, prejudice, or the appropriateness of a lesser sanction. The trial court even dismissed defendant Huniu who was absent from court and never requested a dismissal!

### **CONCLUSION**

For all of the foregoing reasons, Leonard DeWitt requests this court reverse the trial court's dismissal of his case and remand to Superior Court.

DATED: This 15 day of July, 2015.



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**AMENDED DECLARATION OF SERVICE**

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I, Sara E. Lillie-Lugo, do hereby declare as follows:

1. I am over age 18.
2. On July 15, 2015 I forwarded a true and correct copy of Appellant's Opening Brief, without the required Table of Contents, to counsel for Respondents/Cross-Appellants, Mark E. Bardwil and Mike Ritchie by e-mail and in-person delivery.
3. On July 15, 2015 I forwarded a true and correct copy of Appellant's Opening Brief, including the required Table of Contents, to counsel for Respondents/Cross-Appellants, Mark E. Bardwil and Mike Ritchie by First Class U.S. Mail.
4. Below are the mail and e-mail addresses used for service:

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Mike Ritchie

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I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED: This 16 day of July, 2015.

  
SARA E. LILLIE-LUGO  
Legal Assistant to Nigel S. Malden