

FILED
COURT OF APPEALS
DIVISION II

2015 OCT 14 PM 4:44

STATE OF WASHINGTON

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

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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,

CONSOLIDATED REPLY BRIEF

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I. Introduction – Reply Consolidation

DeWitt hereby presents his consolidated reply to the opposition briefs submitted by Mullen and LeMay.

II. Legal Argument

A. The Motion for Reconsideration Was Proper Under CR 59

When the trial judge dismissed the case, she said that DeWitt could file a motion for reconsideration to explain why he failed to appear on the day of trial. Malden Declaration CP 75-77. DeWitt followed the court's suggestion and filed a motion for reconsideration under CR 59(a)(7) and CR 59(a)(9).¹

The gist of this appeal is that the trial court abused its discretion by dismissing the case against all defendants without considering all relevant factors, including whether DeWitt's mistakes were intentional, or unfairly

¹ CR 59 states that a party may ask the court to vacate any verdict or decision which is "contrary to law" or because "substantial justice has not been done." See CR 59(a)(7) and CR 59(a)(9).

prejudicial, and whether a sanction lesser than death penalty dismissal would suffice.

B. The Trial Court Made No Findings Sufficient To Justify The Death Penalty Sanction of Dismissal For Violations of the Case Schedule or the Discovery Rules

DeWitt should have followed the case schedule, communicated better with his counsel, and not failed to appear in court on the day of trial. That DeWitt made mistakes is not disputed.

However, the issue here is not just whether DeWitt made mistakes. Its whether the trial court properly weighed all relevant factors on the record before concluding DeWitt's mistakes were so egregious and unfairly prejudicial as to justify the death penalty sanction of dismissal of his entire case.

A trial court should carefully consider several factors on the record before dismissing a care with prejudice for discovery or case schedule violations. When a trial court chooses the harshest possible sanction

allowable under CR 37(c), “it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed and whether it found that the disobedient party’s refusal to obey a discovery order was willful and deliberate and substantially prejudiced the opponent’s ability to prepare for trial.” Burnett v. Spokane Ambulance, 131 Wn. 2d 484, 494 (1997) (citations omitted).

In this case, DeWitt’s case schedule and discovery “violations” were quoted by the court as one reason for dismissal.² Yet, there is no record proving the trial court specifically considered whether any lesser sanction would suffice, whether DeWitt’s errors were willful and deliberate, and whether they substantially prejudiced his opponents’ ability to prepare for trial. Consequently, the trial court’s order of dismissal was a manifest abuse of discretion that should be reversed on appeal.

² The court’s dismissal order as to all defendants states: **“This matter having come on for trial on December 1, 2014, and Plaintiff having failed to appear, but Nigel Malden, attorney having appeared on his behalf, and further that Plaintiff has failed to comply with the Case Schedule order on multiple respects, and is not prepared to move forward to trial, therefore, it is hereby ordered, adjudged and decreed that this case is dismissed as to all defendants with prejudice.”**

**1. The Respondents Never Moved To Compel Discovery and
There Was No Violation Of Any Discovery Orders**

Two of the three defendants in the case, Mullen and Huniu were convicted of beating and robbing DeWitt. This means they had no defense to liability; they were civilly liable to DeWitt for his injuries as a matter of law.

Mullen sat through a criminal trial and listened to DeWitt's testimony. He knew what DeWitt was going to say in any civil trial, at least as to the facts of the incident. A transcript of DeWitt's testimony is public record.

The respondents complain that they received DeWitt's witness disclosure beyond the deadline specified in the case schedule. However, this was still six months before trial, so it's hard to imagine any unfair or substantial prejudice. If respondents had been able to prove prejudice, the court could have considered excluding witnesses rather than dismissing the whole case.

Although the respondents complain they did not receive timely witness lists and so forth, they also never filed a motion to compel discovery or sought any other order claiming prejudice.

2. The Respondents Failed To Show “Substantial Prejudice”

The respondents make no credible argument they were unfairly and substantially prejudiced by any violations of the case schedule. The court made no record that it considered prejudice before dismissing DeWitt’s case. Consequently, the dismissal was a manifest abuse of discretion and should be reversed on appeal.

C. DeWitt’s Failure To Appear At Trial Did Not Mandate Dismissal As A Matter Of Law

CR 41 states that “when a cause is set and called for trial, it shall be tried or dismissed unless good cause is shown for a continuance. The

court may in a proper case, and upon terms, reset the same.” CR 41 gives discretionary authority to the trial court which is reviewable on appeal.³

The respondents’ opposition brief relies exclusively on Wagner v. McDonald, 10 Wash. App. 213 (1973), because it allegedly involved the same “precise facts” as our case.

It’s true that Wagner involved a plaintiff who failed to appear at trial like DeWitt, after his attorney withdrew. However, there are key factual differences between Wagner and our case including the following:

- 1) The plaintiff in Wagner did not show on the day of trial but neither did any lawyer on his behalf;
- 2) The plaintiff in Wagner never filed a motion for reconsideration with supporting declarations explaining his absence the day of trial;
- 3) The plaintiff in Wagner did not timely appeal the dismissal; he waited eighteen months and then filed an identical lawsuit.

³ The parties to this appeal agree that the standard of review is manifest abuse of discretion.

D. Failing To File A Second Notice of Appearance Is A Non-Issue

Respondents complain that DeWitt's counsel violated RCW 4.28.210 by appearing in court for DeWitt without filing a second Notice of Appearance on the day of trial. However, RCW 4.28.210 defines an "appearance" by a "defendant" and explains how to serve pleadings in cases, so the statute is not relevant, and was not violated.⁴ The trial judge never questioned counsel's identity, credentials or authority to speak for DeWitt. If the trial court thought it was necessary, counsel could have signed and filed a Notice of Appearance in 5 minutes, so surely this is no genuine issue on appeal.

⁴ RCW 4.28.210. states:

"A defendant appears in an action when he or she answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his or her appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him or her. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance."

**E. The Trial Court Had Discretionary Authority to Vacate Its
Prior Sanctions Order Against DeWitt**

The respondents are appealing the trial court's decision to vacate a \$1,000.00 sanction award entered against DeWitt. It's difficult to imagine a more frivolous appeal.

Respondents complain that DeWitt's counsel provided minimal legal argument to justify questioning the sanctions. But, that is because the dispute is over \$1,000.00 and there is no need for complex legal argument. The trial court has discretionary authority to quash or modify its own orders as justice requires. See e.g. Burnett v. Spokane Ambulance, 131 Wn. 2d 484 (1997). Justice required quashing the sanctions in this case under the circumstances, because:

- 1) DeWitt reasonably expected the trial court to strike the hearing on his unconfirmed motion;
- 2) Respondents' counsel never checked the court calendar to verify whether DeWitt's motion was confirmed, so they failed to exercise

reasonable diligence before appearing in court and demanding sanctions;

- 3) The sanctions award was unsupported by any sworn declarations or affidavits describing the attorneys' actual time spent, their hourly rates, or their fee agreements;
- 4) Mullen had no legal interest in the outcome of the hearing involving LeMay, so his attorney's attendance was voluntary;
- 5) DeWitt was not represented by counsel.

F. DeWitt's Appeal Is Not Frivolous

Under Washington law, a "frivolous action" is one that cannot be supported by any rational argument on the law or facts. Rhinehart v. Seattle Times, 59 Wn. App. 332 (1990). An appeal is frivolous if no debatable issues are presented upon which reasonable minds might differ, i.e. it is devoid of merit that no reasonable possibility of reversal exists. Alexander v. Sanford, 181 Wn. App. 135 (Div. 1 1014) (citations omitted). For the reasons discussed in this brief, DeWitt should prevail on

this appeal. If this court decides otherwise, however, no sanction against DeWitt or his counsel should be imposed as they have pursued legitimate legal arguments in good faith.

III. Conclusion

For the reasons stated in his Opening and Reply Briefs, DeWitt asks this court to reverse the dismissal of his case, and remand to the trial court to reset the case for trial, transfer the case to arbitration, or to reconsider its dismissal in light of all relevant factors, including prejudice to respondents, and whether a lesser sanction is appropriate for violation of the case schedule or any discovery rule or order.

DATED: This 14 day of October, 2015.



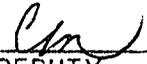
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Attorney for Plaintiff Leonard DeWitt

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I, Sara E. Lillie-Lugo, hereby declare that this 14th day of October, 2015, I served true and correct copies of Appellant DeWitt's Consolidated Brief by First Class U.S. Mail and E-Mail on counsel for Mullen and LeMay, to the following:

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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 14 day of October, 2015.


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