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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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Court of Appeal No. 47116-7-II

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,

Respondents/Cross-Appellants,

RESPONDENT LEMAY'S CORRECTED BRIEF

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I. INTRODUCTION

This is Respondent Kristina Lemay's response to Appellant's appeal of the trial court's order dismissing Appellant's case with prejudice on December 1, 2014.

This is also Kristina Lemay's brief of her cross-appeal of the court's Order Granting Plaintiff's Motion to Set Aside Monetary Sanctions, entered on December 19, 2014, which set aside monetary sanctions previously awarded against Appellant by a different trial court judge on May 9, 2014.

II. ASSIGNMENT OF ERROR

The trial court erred by setting aside an order awarding monetary sanctions previously entered by a different trial court judge on May 9, 2014.

III. ISSUES RELATED TO RESPONDENT'S ASSIGNMENT OF ERROR

1. Did the trial court lack authority to reverse sanctions awarded by another trial court judge, in that reconsideration of the previously ordered sanctions was time-barred?
2. Even if the trial court did have authority to reverse the monetary sanctions, did the court err in doing so?

3. Should the Court award sanctions to Respondent Lemay and against Appellant and/or Appellant's counsel for bringing this frivolous appeal and/or for maintaining frivolous opposition to the award of sanctions by the court below?

IV. STATEMENT OF THE CASE

A. Factual and Procedural Background.

The trial court dismissed Appellant Leonard DeWitt's lawsuit against Shawn E. Mullen and his former spouse Kristina Lemay on December 1, 2014, when Mr. DeWitt failed to appear for trial. (CP 58, 59). The court's order dismissing the claims against Mr. Mullen also accurately reflects that the Appellant previously failed to comply with multiple aspects of the case schedule. (CP 59). Appellant was unrepresented at the time of trial, as his attorney, Nigel Malden, had filed a Notice of Intent to Withdraw on November 14, 2014, effective November 24, 2014, and did not re-appear until December 8, 2014, a week after the order of dismissal. (CP 55, CP 72). Mr. Malden was present in court on the morning of trial, but he did not file a notice of appearance that morning. Mr. Malden offered no explanation for Mr. DeWitt's absence on the day of trial. (Appellant's Opening Brief, page 3, line 2).

Shawn E. Mullen and Kristina M. Lemay both appeared, through counsel, and were ready and able to proceed to trial. (CP 58, CP 59). Since Appellant was not present and unable to proceed to trial, and Mr.

Malden (no longer formally his counsel) could neither provide any explanation as to his whereabouts, nor did he provide any grounds for a continuance, the court dismissed the case, with prejudice. (CP, 58, CP 59).

Mr. Malden filed a Motion for Reconsideration of the court's order on December 5, 2014. (CP 60). Mr. Malden also filed a Motion to Set Aside Monetary Sanctions that were ordered against Mr. DeWitt on May 9, 2014. Mr. Malden provided no legal authority for setting aside the sanctions, procedurally or substantively. (CP 80-81). In fact, no legal authority was cited in any of the materials filed in support of either the Motion for Reconsideration or the Motion to Set Aside Monetary Sanctions.

Respondent Lemay filed a Declaration of Michael Ritchie, Ms. Lemay's counsel, and a Declaration of Sue P. Willett, countering several factual misrepresentations set forth in Mr. DeWitt's Motion to Set Aside Monetary Sanctions and the Declarations submitted by Appellant. (CP 83-89, CP 90-91).

As set forth in the Brief of Respondent Mullen, the procedural history of the underlying lawsuit prior to trial is replete with instances of Appellant failing to act in a timely manner, failing to follow the court rules, and failing to comply with the Order Setting Case Schedule. (CP

138). In addition to the instances recited by Respondent Mullen, Appellant never coordinated mandatory alternative dispute resolution, as required by the Order Setting Case Schedule and PCLR 16(c). (CP 138). [The Court will note that this pattern of failure to adhere to the court's deadlines and procedures has persisted in this appeal, to the point where Appellant has barely escaped having sanctions imposed by the Court sua sponte.]

Kristina Lemay was never personally served with the Summons and Complaint in the underlying lawsuit, and accordingly the court never acquired personal jurisdiction of the claims brought by Appellant against her. (CP 150-151, Declaration of Kristina Lemay filed on May 7, 2014).

As Ms. Lemay testified in her Declaration, she only became aware of the lawsuit and the alleged service of process after being informed by Mark Bardwil, her ex-husband Shawn Mullen's attorney. (CP 150, ¶ 1). She did not reside at the address set forth in the Return of Service filed by Mr. DeWitt, and she never had. (CP 150, ¶ 2).

Ms. Lemay was separated from Mr. Mullen at the time of the allegations of the Complaint, and she was not involved in any way with any of the actions alleged to have occurred on December 16, 2011. (CP 151, ¶ 3).

On May 1, 2014, Ms. Lemay had filed an Answer and Affirmative Defenses to the Complaint setting forth the defenses of insufficient service of process and lack of personal jurisdiction. (CP 26-27).

Despite the filing of an Answer and the lack of personal service having been brought to Mr. DeWitt's attention, Mr. DeWitt refused to comply with Ms. Lemay's request that he strike the Motion for Default that he had filed. (See Declaration of Michael E. Ritchie filed May 7, 2014, CP 152-156.) Accordingly, Ms. Lemay and her attorney asked the trial court to award terms, in the amount of \$825.00, for the cost of responding to the motion. (CP 150-151 and CP 152-156).

Judge Susan Serko heard the argument of Ms. Lemay's counsel at the hearing on May 7, 2014, and Mr. DeWitt failed to appear at the motion hearing he had noted. (CP 33). Accordingly, Judge Serko granted Ms. Lemay's request for terms in the amount of \$825.00. (CP 33).

Mr. DeWitt did not timely file and note for hearing a motion for reconsideration of Judge Serko's ruling. Instead, he filed the Motion to Set Aside Monetary Sanctions on December 11, 2014, seven months after Judge Serko's order had been entered. (CP 80-81).

V. ARGUMENT

A. The Trial Court Properly Dismissed Appellant's Claims Against Kristina Lemay When Appellant Failed to Appear for Trial.

1. CR 40(d) mandates dismissal when a Plaintiff fails to appear for trial and there is no ground for continuance.

Respondent Lemay joins in the well-articulated legal argument set forth at pages 8 – 21 of Respondent Mullen's Brief on appeal regarding the trial court's authority to dismiss the lawsuit.

In particular, Respondent Lemay asserts that the trial court's dismissal of this case with prejudice was appropriate, if not mandatory, pursuant to CR 40(d).

To summarize, when a case set for trial is regularly called for trial, CR 40(d) clearly requires final disposition, a continuance upon a proper showing, or resetting.

Wagner v. McDonald, 10 Wash. App. 213, 216, 516 P.2d 1051 (1973) (emphasis added).

The Court should note that in Appellant's own Brief he acknowledges that he failed to appear and that no grounds were given for his non-appearance: "DeWitt failed to appear for trial on December 1, 2014. DeWitt's counsel was surprised and could not explain his client's absence". Appellant's Opening Brief, page 3.

Appellant neither appeared on the day of trial nor has he at any time demonstrated good cause for a continuance (and in fact he did not even request a continuance). He has also asserted that he does not have the financial resources to proceed to trial in any event, even if the case had been continued. Appellant's Opening Brief, page 5.

Moreover, as noted above, Ms. Lemay was never personally served with the Summons and Complaint in this case, and thus the trial court never acquired personal jurisdiction of the frivolous claims asserted against her. Since she had not been made a proper party to this lawsuit at the time of trial, dismissal of the case against her would have been warranted even if Appellant had appeared and was ready to proceed.

2. Appellant was not entitled to have the case transferred to arbitration as an alternative to dismissal.

As described in Respondent Mullen's Brief, neither Appellant nor his attorney ever filed a statement of arbitrability in the form prescribed by the court, as required by PCLMAR 2.1 in order to transfer a case to arbitration. Even if he had filed the statement of arbitrability at the time the case was called for trial, that would have been too late, since the rule contemplates allowing other parties to have at least seven days to file a response. PCLMAR 2.1(b).

In this case, Ms. Lemay would have opposed assignment to an arbitrator because she still had not been properly made a party to the lawsuit. Moreover, as asserted in Respondent Mullen's Brief, the case was not subject to mandatory arbitration since Appellant never waived his claims in excess of \$50,000.00.

B. The Trial Court Improperly Set Aside the Monetary Sanctions Ordered Against Appellant Seven Months Earlier.

With respect to the monetary sanctions, Judge Serko was within her authority to award such sanctions against Mr. DeWitt for not striking the motion for default and for not even appearing at the hearing he had noted. At the time of the hearing on such motion, Ms. Lemay had not only filed an Answer and Affirmative Defense, but she had provided evidence to the court that she had not even been served with the Summons and Complaint.

Since Appellant's motion to set aside such sanctions was not filed and noted until December 11, 2014, seven months later, it should not have been considered by the trial court, as it was untimely under CR 59(b), which requires that such motion for reconsideration be filed within 10 days of entry of the order.

In addition, Appellant provided false testimony in support of the motion to set aside sanctions. Michael Haan, Mr. DeWitt's roommate,

claimed in his Declaration that he “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.” (CP 61-62). No such phone call occurred, nor could it possibly have occurred.

The court hearing had been set for the 9:00 a.m. motion calendar on Friday, May 9. Ms. Lemay’s counsel’s office does not open until 8:30 a.m., and that is when legal assistant Sue P. Willett reports to work. (CP 83-89). It would have been impossible for Mr. Haan to have left a message with such legal assistant, or any legal assistant, an hour before the 9:00 a.m. hearing that day. Ms. Willett has filed a Declaration confirming that she did not speak with Mr. Haan that day and that no messages had been left by him, for either Mr. Ritchie or Mr. Bardwil. (CP 90-91).

C. The Court Should Award Attorney’s Fees Against Appellant and/or His Counsel Pursuant to RAP 18.9 and/or RCW 4.84.185 for Bringing This Frivolous Appeal.

This Court should also award attorney’s fees as terms to Respondent Lemay and against Mr. DeWitt and/or his attorney pursuant to RAP 18.9 and RCW 4.84.185. The appeal is frivolous, and not founded upon any legal authority applicable to the court’s dismissal of the case at trial pursuant to CR 40(d). Appellant has acknowledged that he did not

appear at trial, had no legitimate excuse for failing to appear, and that he did not provide the court with any grounds for a continuance. Accordingly, dismissal was mandatory and there is no merit to this appeal.

VI. CONCLUSION

For the above reasons this court should:

1. Sustain the trial court's order of December 1, 2014 which dismissed this case with prejudice, and sustain that portion of its order dated December 19, 2014, which denied the Motion for Reconsideration of the dismissal.

2. Reverse that portion of the court's order dated December 19, 2014, which set aside sanctions ordered against Appellant by Judge Serko on May 9, 2014.

3. Award attorney's fees and costs on appeal to Respondent Lemay, as this court deems appropriate, based on the arguments outlined in Section C above.

Respectfully submitted this 29th day of September, 2015.



Michael E. Ritchie, WSBA #12805
Attorney for Respondent/Cross-appellant,
Kristina Lemay

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CERTIFICATE OF SERVICE
STATE OF WASHINGTON

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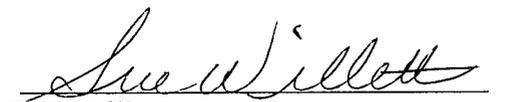
On September 29, 2015, the undersigned personally delivered a copy of Respondent Lemay's Corrected Brief to the following addresses:

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I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed at Tacoma, Washington, this 29th day of September, 2015.


Sue Willett
Legal Assistant to Michael E. Ritchie