No. 93529-7

SUPREME COURT OF THE STATE OF WASHINGTON

HATSUYO HARBORD, PETITIONER,

v.

SAFEWAY INC., RESPONDENT.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

Washington Court of Appeals Case No. 72731-1-I

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I. IDENTIFY OF RESPONDENT

Respondent is Safeway Inc. ("Safeway").

II. CITATION TO COURT OF APPEALS DECISION

In her "Motion for Discretionary Review" (the "Petition"),[1] Petitioner Hatsuyo "Sue" Harbord ("Ms. Harbord") seeks review of the Unpublished Opinion filed on July 25, 2016, by Division I of the Washington State Court of Appeals ("Unpublished Decision"), which: (i) affirmed the King County Superior Court order dismissing Ms. Harbord's claims against Safeway on summary judgment and, in the alternative, for her violation of a discovery order; and (ii) awarded Safeway its attorney fees for Ms. Harbord's frivolous appeal. A copy of the Unpublished Decision is in the Appendix at pages A-1 through A-18.

In her Petition, Ms. Harbord also appears to be making an untimely request for this Court to engage in interlocutory review of the Order Denying Motion to Modify and Denying Remaining Motions Filed through December 31, 2015, which was filed on January 29, 2016 by the Court of Appeals, and which, *inter alia*, denied Ms. Harbord a further

[1] While the docket of the Court of Appeals indicates that Ms. Harbord filed the Petition on August 24, 2016, Safeway did not receive the Petition until August 25, 2015, when it was hand-delivered to the offices of the undersigned counsel. Accordingly, Safeway's answer to the Petition is due on September 26, 2016, pursuant to RAP 13.4(d) (answer to petition for review due 30 days after service) and RAP 18.6 (computation of time excludes day of event from which time begins to run; when last day is Saturday, period extends to next day that is not Saturday, Sunday, or legal holiday).

extension of time to "finish" the appellate brief that she filed on August 6, 2015. A copy of this order is in the Appendix at page A-19.

Ms. Harbord also appears to be inappropriately seeking untimely direct review by this Court of various orders issued in 2014 by King County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

Does Ms. Harbord's Petition fail to meet the applicable requirements for, and the considerations governing acceptance of, review by the Supreme Court, as set forth of RAP 13.4 and RAP 13.5?

IV. STATEMENT OF THE CASE

A. Trial Court Proceedings

Ms. Harbord filed this lawsuit on May 23, 2013 in King County Superior Court against her former employer, Safeway, claiming that Safeway "discriminated against and/or retaliated against [her] on the basis of her age, race, national origin, color or other characteristic" in violation of the Washington Law Against Discrimination, Chapter 49.60 RCW ("WLAD"), and terminated her in violation of public policy for "complaining about lunch and meal breaks." CP 1-7, 22 (¶¶ 4.0-5.2).[2]

On October 24, 2014, the trial court entered an Order Granting Safeway's Motion to Dismiss and Motion for Summary Judgment, thereby

[2] Clerk's Papers are cited herein as "CP".

dismissing Ms. Harbord's lawsuit on two bases. CP 1895-1897. First, the trial court found that Ms. Harbord had "willfully refused to participate in the discovery process in this case in a deliberate disregard for the efficient administration of justice," rendering inappropriate any sanction less than dismissal of her lawsuit. CP 1896; RP 31:1-34:12.[3] The trial court emphasized Ms. Harbord's refusal to comply with its prior order, in which it had compelled her to respond to discovery requests Safeway had served on her over a year earlier and warned her that the "[f]ailure to follow this order and provide timely discovery may result in dismissal of the action." CP 1896; RP 31:1-32:25; CP 1265-1267. Second, the trial court also granted summary judgment for Safeway, because Ms. Harbord "failed to set forth competent admissible evidence sufficient to make a showing that a genuine issue of material fact exists concerning Safeway's purported liability." CP 1896; RP 33:1-23.

B. Proceedings before the Court of Appeals

On November 21, 2014, Ms. Harbord filed her Notice of Appeal addressing the trial court's dismissal of her lawsuit against Safeway. Ms. Harbord sought (and was granted) various extensions of time to file her opening brief.[4] After having already provided Ms. Harbord several

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[3] Report of proceedings ("RP") cites are to the 10/24/14 hearing.

[4] See Ms. Harbord's motions seeking extensions of time, which were filed in the Court of

extensions of time and warning her that no further extensions would be granted,[5] the Court of Appeals entered a ruling on June 18, 2015, providing as follows:

> A fourth extension is granted until August 5, 2015. Harbord shall file her opening brief by August 5, 2015. If she fails to do so without a showing of extraordinary circumstances, this case will be dismissed without further notice of this Court.[6]

Notwithstanding this unequivocal directive with regard to the new August 5, 2015 filing deadline, and the fact that with the various extensions previously granted to Ms. Harbord she had no less than **257 days** from the date she first filed her Notice of Appeal to prepare and file her opening brief, she still failed to timely file her opening brief on August 5, 2016. Instead, on August 6, 2015, she filed a brief she titled "Plaintiff's Preminary [sic] Brief," and then she proceeded to file additional requests

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Appeals on the following dates: 12/13/2014, 1/14/2015, 2/12/2015, 2/23/2015, 2/23/2015, 2/26/2015, 3/3/2015, 3/10/2015, 3/12/2015, 3/13/2015, 4/17/2015, 5/8/2015, 5/29/2015 and 6/10/2015. See also the notation rulings granting extensions of time that were entered by the Court of Appeals on the following dates: 3/16/2015 (ruling granting extension of time for Ms. Harbord to file report of proceedings), 4/21/2015 (ruling extending time for Ms. Harbord to file opening brief to 5/26/ 2015), 6/5/2015 (ruling extending time for Ms. Harbord to file opening brief to 7/ 6/2015).

[5] See Court of Appeals notation rulings entered on 4/21/2015 (granting extension to file opening brief to 5/26/2015 and warning that "no further extensions should be anticipated") and 6/5/2015 (granting extension to file opening brief to 7/6/2015 and warning that "[i]f the brief is not filed the case is subject to dismissal without further notice").

[6] A copy of the 6/18/2015 notation ruling is in the Appendix at page A-20.

to extend time to file and/or finish her opening brief.[7] On September 4, 2015, Ms. Harbord filed a document titled "Part of Brief." On September 8, 2015, the Court of Appeals issued a ruling in which it (i) noted that it had previously granted Ms. Harbord four extensions of time and (ii) ruled that her opening brief would be limited to the "untimely" brief she filed on or August 6, 2015 thereby rejecting the "Part of Brief" she filed on September 4, 2015.[8] After Ms. Harbord filed yet another request for an extension of time on September 8, 2015 (this time seeking a three-month extension), the Court of Appeals issued a ruling denying that motion on September 10, 2015. 9/10/2015 Notation Ruling.

On September 14, 2015, Ms. Harbord filed a document that the Court of Appeals construed as a motion to modify the denial of her requests for an extension of time to file/refile her opening brief ("Motion to Modify"),[9] to which Safeway filed a response on September 28, 2015. On October 2, 2015, the Court of Appeals granted Ms. Harbord's request for an extension of time to file her reply in support of her Motion to Modify. 10/2/2015 Notation Ruling. While a ruling on the Motion to Modify was pending, Ms. Harbord continued to file motions for

[7] See motions Ms. Harbord filed on 8/12/2015, 8/13/2015 and 8/21/2015.

[8] A copy of the 9/8/2015 notation ruling is in the Appendix at pages A-21.

[9] See 9/15/2015 letter from the Court of Appeals to the parties setting the dates for the briefing of the Motion to Modify and stating that "the motion will be submitted to a panel of this court for determination without oral argument. RAP 17.5(b)."

extensions of time and other motions.[10] On December 17, 2015, the Court of Appeals entered a ruling denying these additional motions for more time, as well as Ms. Harbord's motions for an extension of time in connection with her appeal of the dismissal of another lawsuit she filed against Safeway and several other defendants,[11] in which the court noted that "[t]hese appeals have been significantly delayed, in part due to the number and frequency of motions and other papers Ms. Harbord files." 12/17/2015 Notation Ruling. On January 29, 2015, pursuant to RAP 17.7, a three-judge panel of the Court of Appeals issued a decision (i) denying Ms. Harbord's requests for more time to finish her brief, (ii) accepting the untimely brief she filed on August 6, 2015 as her opening brief, and (iii) denying the various other motions she had filed through December 31, 2015. Appendix, page A-19. On March 1, 2015, the Court of Appeals also issued a notation ruling addressing the various challenges that Ms. Harbord subsequently filed to the denial of her Motion to Modify, in which it noted that, pursuant to RAP 12.4(a), "there is no provision in the RAP's for a motion for reconsideration of a panel decision denying a motion to modify." 3/1/2015 Notation Ruling. Ms. Harbord failed to file

[10] See motions filed on 10/7/2015 (requesting oral argument on her Motion to Modify), 10/12/2015 (requesting extension of time), 11/3/2015 (requesting extension of time), and 12/11/2015 (requesting six-month extension of time),

[11] This other appeal is also before Division I of the Washington Court of Appeals and is assigned Case Number 73895-0-I.

a motion for discretionary review by this Court of the denial by the Washington Court of Appeals of her Motion to Modify within 30 days of that denial, as required by RAP 13.5(a).

On July 25, 2016, the Court of Appeals filed its 15-page Unpublished Decision, in which it goes into significant detail in support of its decision to affirm the trial court's dismissal of Ms. Harbord's lawsuit on two alternatively sufficient bases: (i) because Ms. Harbord failed to submit or identify any admissible evidence supporting her claims in response to Safeway's motion for summary judgment; and (ii) as a sanction for her violation of the trial court's discovery order, given her refusal throughout the trial court proceedings to respond to Safeway's discovery requests based on her false assertion that she had no obligation to comply with court rules regarding discovery. Unpublished Opinion at p.1; CP 1895-1897 (trial court's order of dismissal). Accordingly, the Court of Appeals also awarded Safeway its attorney fees pursuant to RAP 18.9, finding Ms. Harbord's appeal to be frivolous. Unpublished Decision at p.15 ("Harbord's complete failure to identify supporting evidence in the record or present any meaningful legal argument addressing the summary judgment standard and discovery sanctions precludes any arguable challenge to the trial court's decision.")

On August 10, 2015, the Court of Appeals issued a ruling denying Ms. Harbord's motion for reconsideration of the Unpublished Opinion. On August 25, 2015, addressing Ms. Harbord's motion to publish the decision of the Court of Appeals (filed on August 12, 2015), in which she offered no argument based on the publication standards in RAP 12.3(e), the Court also issued an Order Denying Motion to Publish, in which it noted that the hearing panel had considered its prior determination and found that "the opinion will not be of precedential value."[12]

V. ARGUMENT

A. The Petition for Review of the Unpublished Opinion Fails to Satisfy any of the Considerations for Acceptance of Review set forth in RAP 13.4(b).

While Ms. Harbord erroneously cites RAP 13.5(b) in her Petition (at p.2), RAP 13.4(b) governs her request for review of the Unpublished Opinion, because it is a decision terminating review of this lawsuit.[13] Pursuant to RAP 13.4(b), a petition for discretionary review of a decision terminating review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in

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[12] A copy of the Order Denying Motion to Publish, filed August 25, 2105, is in the Appendix at page A-23.

[13] RAP 12.3 defines a "decision terminating review" to include an opinion of the appellate court that (1) is filed after review is accepted by the appellate court filing the decision, (2) terminates review unconditionally, and (3) is a decision on the merits or a decision by the judges dismissing review. RAP 12.3(a). The Unpublished Decision meets these criteria.

conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

As a preliminary matter, the Unpublished Decision is unpublished, with the Court of Appeals having correctly determined that "the opinion will not be of precedential value." Order Denying Motion to Publish (8/25/2016). In fact, Ms. Harbord's "Motion to publish RAP 12.3(e)" (filed 8/12/2016) was tellingly void of any argument as to the criteria set forth in RAP 12.3(a) for determination of whether a decision should be published, and instead Ms. Harbord simply repeated her unsupported arguments on the procedure and the merits of the case, while adding the inflammatory allegation of discrimination (at p.2) by the Court of Appeals. Accordingly, the Unpublished Decision, regardless of its content, does not present any conflict with any precedential decision of the courts of Washington.

Regardless, Ms. Harbord also fails to set forth in her Petition any

argument for review of the Unpublished Decision based on the considerations set forth in RAP 13.5(b), nor could any such argument be made with regard to either of the independently sufficient bases for the trial court's dismissal of her claims.

1. Affirmance of the Summary Judgment Ruling

First, the affirmance by the Court of Appeals of the trial court's dismissal of her claims on summary judgment constitutes an entirely unremarkable and routine decision based on the application of well-established precedent. In the Unpublished Decision, the Court of Appeals properly recognized that a party can satisfy its initial burden for summary judgment pursuant to Civil Rule 56 by demonstrating the absence of evidence supporting the nonmoving party's case. Unpublished Decision at p.8 (*citing Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1980)). The Court of Appeals then properly noted that, if the moving party does so, the burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. Unpublished Decision at p.8 (*citing Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991)).

As reflected in its recitation of the facts in the record, the Court of Appeals applied these basic legal precedents and found that "Safeway satisfied its initial burden on summary judgment by submitting evidence

that Harbord's job performance had not been satisfactory for several years." Unpublished Decision at pp. 2-3, 10. In contrast, the Court of Appeals found that, in responding to the summary judgment motion, Ms. Harbord "submitted no admissible evidence supporting her claim of discriminatory discharge" and "failed to identify any supporting evidence" with regard to her claims of retaliation and wrongful discharge in violation of public policy." *Id.* at pp. 10, 12. The Court of Appeals further noted that Ms. Harbord "makes no coherent legal argument on appeal" and "none" of her conclusory allegations in her appellate brief about her employment with Safeway are supported by a reference to admissible evidence in the record. *Id.* at pp. 8, 10-11 (*citing* RAP 10.3(a)(5) (requirement of reference to the record for each factual statement) *and* RAP 9.12 (appellate review of summary judgment order limited to evidence and issues called to attention of the trial court).

Accordingly, the Court of Appeals did not create any viable basis for discretionary review pursuant to RAP 13.4(b) by simply affirming summary judgment for Safeway based on undisputed precedent that a party opposing summary judgment may not rely on allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists, and such affidavits must be based on personal knowledge admissible at trial and not merely on conclusory allegations,

speculative statements or argumentative assertions. Unpublished Decision at p.10 (*citing Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992)). Based on these foundational legal precedents and court rules, the Unpublished Decision does not conflict with any decision of the Supreme Court or the Court of Appeals, nor does it involve a significant question of law under the state or federal constitution, or otherwise involved an issue of substantial public interest. RAP 13.4(b). Consequently, there is no basis pursuant to RAP 13.4(b) to review the Unpublished Decision.

2. Affirmance of Dismissal as a Discovery Sanction

Like the decision of the Court of Appeals to affirm the trial court's summary judgment ruling, its decision to also affirm the trial court's dismissal of Ms. Harbord's claims as a sanction for her refusal to comply with a discovery order provides no basis for any review pursuant to RAP 13.4(b). As the record establishes in this case, "[f]or nearly a year before the trial court entered the order compelling discovery, [Ms.] Harbord refused to respond to any of Safeway's discovery requests or cooperate with Safeway's attempts to schedule a deposition." Unpublished Decision at pp. 4-7, 13. Moreover, as further noted by the Court of Appeals:

> In the September 8, 2014, order compelling discovery, the trial court warned Harbord that the failure to comply could result in the dismissal of the action. The court also

> expressly informed Harbord that she had no lawful basis for her apparent belief that she was not subject to the discovery rules. But Harbord ignored the discovery order and continued to flood the trial court, as she had throughout the proceedings, with documents claiming that she had no obligation to comply with the discovery rules.

Unpublished Decision at p.12.

Faced with such facts, and applying established precedent for determining the appropriateness of the sanction of dismissal pursuant to Civil Rule 37(b)(2), the Court of Appeals determined that the trial court did not abuse its discretion is dismissing Ms. Harbord's action as a sanction for her violation of the discovery order. *Id.* at pp. 12-14 (*citing, inter alia, Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (addressing the standard for determination of whether dismissal of an action is an appropriate sanction for the violation of a discovery order). In fact, in several published decisions, Washington courts have upheld the dismissal of an action as an appropriate sanction for the violation of a discovery order in situations involving violations far less egregious that Ms. Harbord's complete stonewalling of any discovery efforts by Safeway and her blanket claim that she had no obligation to provide any discovery.[14]

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[14] *See Apostolis v. City of Seattle*, 101 Wn. App. 300, 304-05, 3 P.3d 198 (2000) (trial court properly dismissed employee's petition for review as sanction for his deliberate disregard of case schedule and court orders and late-filed brief); *Anderson v. Mohundro*,

Accordingly, in holding that the trial court did not abuse its discretion in dismissing Ms. Harbord's claims as a sanction for her violation of a discovery order that resulted from her complete refusal to provide any discovery, the Unpublished Decision does not conflict with any decision of the Supreme Court or the Court of Appeals, nor does not involve a significant question of law under the state or federal constitution or otherwise involve any issue of substantial public interest. RAP 13.4(b). The same is true of the Court of Appeals' general acknowledgment that, while it is "mindful that [Ms.] Harbord is acting pro se, we will hold self-represented litigants to the same standard as an attorney." Unpublished Decision at p.11 (*citing In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993)).

B. The Petition for Review of the Denial of the Motion to Modify is Untimely and Fails to Satisfy any of the Considerations for Acceptance of Review set forth in RAP 13.5(b).

Ms. Harbord also appears to be attempting to challenge the "1/ /16 Three Judges Panel's decision" (Petition at p.1), presumably referring to the decision issued by a three-judge panel of the Court of Appeals on January 29, 2015, denying Ms. Harbord's Motion to Modify the appellate

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24 Wn. App. 569, 573-75, 604 P.2d 181 (1979) (plaintiff's case properly dismissed for failure to comply with order requiring definitive answers to interrogatories); *Rhinehart v. KIRO, Inc.*, 44 Wn. App. 707, 723 P.2d 22 (1986) (plaintiffs' case properly dismissed for failure to comply with order to produce videos).

court's decision to deny her any further extensions of time to finish her appellate brief and accepting the brief she filed on August 6, 2015 as her opening brief. This decision is clearly an interlocutory decision, because it did not terminate review of this case. RAP 12.3(b). Therefore, if Ms. Harbord wished to file a motion seeking review by the Supreme Court of that interlocutory decision by the Court of Appeals, she was required to file such a motion in this Court within 30 days after the decision was filed. RAP 13.5(a) (party seeking interlocutory review "must file a motion for discretionary review ... in the Supreme Court ... within 30 days after the decision is filed"). Ms. Harbord failed to do so, and thus there is no basis for this Court to review that interlocutory decision. Regardless, even if this challenge had been timely, Ms. Harbord does not (and cannot) make any argument that the Court of Appeals committed any potential error sufficient to satisfy the considerations set forth in RAP 13.5(b) for interlocutory review when it declined to provide her any more time to finish her brief, given that the Court of Appeals had already provided multiple extensions of time to Ms. Harbord and, as a result, she had more than 250 days from the date she filed her Notice of Appeal to prepare and file her appellate brief challenging the trial court's order dismissing her case.

C. The Petition for Review of Trial Court Orders from 2014 is Inappropriate and Untimely

In her Petition, Ms. Harbord also appears to be seeking discretionary review of several trial court orders from 2014. With the exception of the trial court's order dismissing Ms. Harbord's lawsuit, there is no evidence that Ms. Harbord's challenges to any other orders of the trial court were properly preserved and asserted on appeal, much less addressed and ruled upon by the Court of Appeals. Thus, they cannot be reviewed as any decision of the Court of Appeals pursuant to RAP 13.4 or RAP 13.5.

VI. CONCLUSION

For the foregoing reasons, Safeway requests that the Court deny Ms. Harbord's Petition for discretionary review and award Safeway the reasonable attorney fees its has incurred in preparing this response to the Petition as a further sanction pursuant to RAP 18.9 for Ms. Harbord's continued pursuit of a frivolous appeal.

Respectfully submitted this 26th day of September, 2016

K&L GATES LLP

By s/*Daniel P. Hurley*
Daniel P. Hurley, WSBA #32842
Attorneys for Respondent
Safeway Inc.

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

I am and at all times herein after mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, and competent to be a witness in the above action, and not a party thereto; that on September 26, 2016, I caused to be served the foregoing Answer to Petition for Discretionary Review via U.S. Mail, First Class postage prepaid on the following:

Hatsuyo "Sue" Harbord
P.O. Box 112
Sequim, WA 98382

DATED this 26th day of September, 2016.

By s/ *Anita Spencer*
Anita Spencer
Legal Secretary to Daniel P. Hurley

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HATSUYO "SUE" HARBORD, Appellant, v. SAFEWAY, INC., Respondent.	)	No. 72731-1-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: July 25, 2016

BECKER, J. — To defeat a properly supported motion for summary judgment, the nonmoving party may not rely on the allegations set forth in the complaint, but must identify evidence establishing a genuine factual issue for trial. In response to Safeway's motion for summary judgment, Harbord failed to submit or identify any admissible evidence supporting her claims of discriminatory discharge. Moreover, throughout the entire proceedings in the trial court, Harbord refused to respond to Safeway's discovery requests or to appear for a deposition, claiming that she had no obligation to comply with discovery rules. The trial court dismissed Harbord's claims on summary judgment and, in the alternative, for her violation of a discovery order. We affirm and award Safeway attorney fees for a frivolous appeal.

FACTS

Safeway hired Harbord as an office clerk and bookkeeper for its Port Angeles store in September 2004. Harbord's duties included the customer service desk, processing money orders and lottery tickets, filling coin changers, providing cash to the check stand registers, and balancing daily income with total store sales. Over time, Safeway determined that Harbord was unable to perform her duties in an acceptably efficient and timely manner. In 2009, an audit noted various errors, inaccuracies, and discrepancies in Harbord's accounting of the store's daily receipts. Safeway issued multiple disciplinary notices to Harbord in 2008 and 2009, pointing out specific deficiencies. Despite multiple meetings and retraining, Safeway concluded that Harbord's work performance remained unacceptable.

In 2010 and 2011, Safeway continued to cite Harbord for poor work performance, including the failure to complete her duties in an acceptable amount of time and carelessness in performing office procedures. The store manager also discovered that Harbord was spending a significant amount of time during her shift writing notes to herself and copying proprietary and confidential financial information. Harbord later told a Safeway investigator that she took the notes to "protect herself" but provided no further explanation. Video surveillance recordings showed that Harbord was moving her computer terminal during her

shift for no apparent reason. Despite instructions to stop the practice, Harbord continued to move the computer terminal.

In early 2011, Safeway suspended Harbord for three days for multiple incidents involving carelessness and inaccuracy. The store manager observed that Harbord was continuing to spend up to 30 minutes of her shift writing notes to herself.

In March 2011, Harbord completed a $150 money order for which no customer was present. Harbord initially claimed that she did not print out the money order because the transaction was cancelled. Despite Safeway's repeated requests at the time, Harbord provided no further explanation.

In April 2011, Safeway suspended Harbord pending an investigation of her job performance. After concluding that Harbord failed to provide acceptable responses to the investigator's questions, Safeway terminated Harbord's employment on May 6, 2011, for repeated failure to follow instructions, refusal to perform assigned tasks, violations of Safeway's policies regarding confidential information, and inadequate job performance.

On May 24, 2013, Harbord filed this action against Safeway. Harbord, who was represented by counsel, alleged wrongful termination in violation of public policy and violations of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW.

Safeway removed the action to federal district court on the basis of diversity jurisdiction. At some point, Harbord fired her attorney, and the district court granted her motion to proceed pro se. The court later remanded the case back to King County Superior Court after Harbord asserted that her claims involved less than $75,000.

While the case was proceeding in federal court, Safeway served Harbord with initial discovery requests. On March 11, 2014, after asserting that it made repeated unsuccessful attempts to communicate with Harbord about the discovery requests, Safeway moved to compel. Harbord did not file a response to the motion to compel, and the district court remanded the case to state court without ruling on the motion. After the remand, Safeway again attempted to contact Harbord about the discovery requests.

At the trial court's CR 16 conference on August 8, 2014, Harbord claimed that Safeway's failure to provide her with her "personnel file" was "holding" everything up. The trial court noted that Harbord had raised this claim before and had not provided the court with any proof that she ever made a formal discovery request.

Counsel for Safeway explained that he originally provided Harbord's former counsel with the requested documents in searchable PDF format. After Harbord's counsel withdrew, Safeway provided Harbord with hard copies. Recently, Safeway had sent a box containing a third set of the requested

documents, comprising more than 1,000 pages, to Harbord's post office box. Harbord refused the shipment.

Harbord asserted that she rejected the box because counsel for Safeway had not provided an inventory log of the contents on the outside of the box. Counsel for Safeway then offered the still-sealed box to Harbord in court and explained that there was a cover sheet in the box setting forth the contents of the box. The court informed Harbord that she would be unable to determine if any documents were missing unless she opened the box and reviewed the contents.

At the conclusion of the hearing, the court entered an order directing Harbord to accept the discovery documents that Safeway offered. Although Harbord apparently took the box of documents with her when she left the hearing, she later returned it to Safeway's counsel and informed the court that "Plaintiff does NOT want Rule 26, 33, and 34."

On August 20, 2014, Safeway filed a second motion to compel Harbord to respond to discovery requests. Harbord filed a response asserting, among other things, that the parties did not have an "agreement [with the defendant] . . . under rule 26, 33, and 34," that she had a "right to have privilege information/evidence until trial" and "does not need to release information until trial date," that she "is NOT doing this case with rule 26 discovery . . . rule 33 interrogatories, rule 34 producing documents," that she did not ask for interrogatories, and that she returned the box of documents because "Plaintiff does not agree with rule 26, 33,

and 34." Harbord also claimed that the trial court was unfair to her during the August 8, 2014, hearing.

On September 8, 2014, the trial court granted the motion to compel, finding that Safeway had made repeated good faith efforts to obtain the requested discovery without court action. The court directed Harbord to respond within 10 days to the discovery requests that Safeway had served more than 10 months earlier and ordered Harbord to pay Safeway's reasonable costs, including attorney fees, incurred in preparing the motion to compel. The order informed Harbord that the failure to comply could result in dismissal of the action. The court later awarded Safeway reasonable costs, including attorney fees, of $2,600.

In a separate order, the court found that despite having time to file more than 75 motions in federal and state court, Harbord had refused to confer in good faith with Safeway about its discovery requests. The court also emphasized that Harbord's apparent belief that she was not subject to discovery rules was incorrect.

On September 19, 2014, Safeway moved for summary judgment, contending that Harbord had failed to submit any evidence supporting crucial elements of her discrimination and wrongful termination claims. Safeway also moved to dismiss the action as a sanction under CR 37(b) for Harbord's ongoing refusal to respond to discovery requests, her failure to appear for a deposition,

and her refusal to comply with the court's September 8 order compelling a response to discovery requests.

Harbord did not comply with the order compelling discovery or file a response addressing the merits of Safeway's summary judgment motion. Rather, she continued to file multiple documents insisting that she had no obligation to comply with discovery rules and that she had a right to a jury trial. See, e.g., "an open refusal based on an assertion that no valid obligation exists for discovery," filed September 23, 2014; "Pro se Plaintiff did not agree with summary judgment . . . Pro se has rights to go to trial," filed September 25, 2014; "Pro se asks the court for new trial without Rule 26-37," filed October 13, 2014; and "Pro se did not have any obligation for discovery," filed October 21, 2014.

On October 24, 2014, the day of the summary judgment hearing, Harbord filed several documents, including a purported declaration containing allegations about her employment with Safeway. The trial court noted that the documents were untimely, unsworn, lacked any declaration that they were made under penalty of perjury, included irrelevant and inadmissible allegations, and contained no admissible evidence that would create a material issue of fact. See CR 56(c).

At the conclusion of the hearing, the trial court granted Safeway's motion for summary judgment. In the alternative, the court dismissed Harbord's claims under CR 37(b) as a sanction for her complete failure to participate in discovery. The court denied Harbord's motion for reconsideration on November 18, 2014.

Standard of Review

When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). We consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

The moving party can satisfy its initial burden under CR 56 by demonstrating the absence of evidence supporting the nonmoving party's case. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial. Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6, 118 Wn.2d 1, 8-9, 820 P.2d 497 (1991).

Discriminatory and Retaliatory Discharge

Although Harbord makes no coherent legal argument on appeal, her primary contention appears to be that Safeway fired her in violation of the WLAD.

RCW 49.60.180(2) makes it unlawful for employers to discharge any person from employment because of age, sex, marital status, race, creed, color, or national origin.

In examining such claims, courts in Washington consider the three-part burden of proof test established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), overruled on other grounds by McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). First, the plaintiff bears the burden of proving a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802. Second, if the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. McDonnell Douglas, 411 U.S. at 802. Third, if the defendant satisfies this burden, the plaintiff must prove that the defendant's proffered reasons are, in fact, pretextual. McDonnell Douglas, 411 U.S. at 804. If the plaintiff fails to establish a prima facie case, the defendant is entitled to summary judgment. Callahan v. Walla Walla Hous. Auth., 126 Wn. App. 812, 819, 110 P.3d 782 (2005).

The nature of a prima facie case necessarily depends on the particular form of discrimination alleged. Generally, to establish a prima facie case of discrimination, the plaintiff must demonstrate that he or she (1) is in a protected class, (2) suffered an adverse employment action, (3) was doing satisfactory

work, and (4) was replaced by or treated differently than someone in a nonprotected class. See Kirby v. City of Tacoma, 124 Wn. App. 454, 468, 98 P.3d 827 (2004), review denied, 154 Wn.2d 1007 (2005).

Safeway satisfied its initial burden on summary judgment by submitting evidence that Harbord's job performance had not been satisfactory for several years. When the moving party has met its initial burden on summary judgment by demonstrating the absence of evidence to support the nonmoving party's case, the nonmoving party

> may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. Additionally, any such affidavit must be based on personal knowledge admissible at trial and not merely on conclusory allegations, speculative statements or argumentative assertions.

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (footnote omitted).

In response to the motion for summary judgment, Harbord submitted no admissible evidence supporting her claim of discriminatory discharge. Nor has she identified any evidence in the record indicating that she was performing satisfactory work or that Safeway acted in a manner supporting an inference of discrimination.

Harbord's appellate brief contains numerous conclusory factual allegations about her employment at Safeway, none of which are supported by a reference to admissible evidence in the record. See RAP 10.3(a)(5) (party must include

reference to the record for each factual statement in brief); RAP 9.12 (when reviewing order granting summary judgment, appellate court "will consider only evidence and issues called to the attention of the trial court"). Although we are mindful that Harbord is acting pro se, we will hold self-represented litigants to the same standard as an attorney. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993).

Because Harbord failed to establish a prima facie case of discrimination, the trial court properly dismissed her claims on summary judgment.

Harbord's complaint also alleged claims of retaliation and wrongful discharge in violation of public policy.

To establish a prima facie case of retaliation under RCW 49.60.210(1), a plaintiff must show that "(1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal link between his or her activity and the other person's adverse action." Currier v. Northland Servs., Inc., 182 Wn. App. 733, 742, 332 P.3d 1006 (2014), review denied, 182 Wn.2d 1006 (2015). To prevail on a claim of wrongful discharge in violation of public policy, the plaintiff must prove (1) the existence of a clear public policy, (2) that discouraging the conduct in which the plaintiff engaged would jeopardize the public policy, (3) that the plaintiff's public-policy related conduct caused the dismissal, and (4) that the defendant has not offered an

overriding justification for the dismissal. Rickman v. Premera Blue Cross, 184 Wn.2d 300, 310, 358 P.3d 1153 (2015).

Because Harbord failed to identify any supporting evidence, the trial court properly dismissed her claims of retaliation and wrongful termination in violation of public policy on summary judgment.

Discovery Sanction

The trial court also dismissed Harbord's claims as a sanction for her complete refusal to participate in discovery. CR 37(b)(2) authorizes the trial court to impose sanctions, including dismissal of the action, if a party fails to comply with a court order compelling discovery. The trial court necessarily has broad discretion in choosing sanctions for violation of a discovery order, and we will not overturn the court's ruling on appeal absent a manifest abuse of discretion. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). The trial court abuses its discretion if its ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Associated Mortg. Inv'rs v. G.P. Kent Constr. Co., 15 Wn. App. 223, 229, 548 P.2d 558, review denied, 87 Wn.2d 1006 (1976).

When imposing severe sanctions for violation of a discovery order, such as dismissal, the trial court must consider, on the record, (1) whether the discovery violation was willful, (2) whether the violation substantially prejudiced the other party's ability to prepare for trial, and (3) whether a lesser sanction

would suffice. Burnet, 131 Wn.2d at 494. Here, the trial court expressly considered all three factors, and the record supports the trial court's determination.

For nearly a year before the trial court entered the order compelling discovery, Harbord refused to respond to any of Safeway's discovery requests or cooperate with Safeway's attempts to schedule a deposition. In the September 8, 2014, order compelling discovery, the trial court warned Harbord that the failure to comply could result in the dismissal of the action. The court also expressly informed Harbord that she had no lawful basis for her apparent belief that she was not subject to the discovery rules. But Harbord ignored the discovery order and continued to flood the trial court, as she had throughout the proceedings, with documents claiming that she had no obligation to comply with the discovery rules. The record clearly establishes that Harbord's failure to comply with the discovery order was willful and deliberate. See Rivers v. Wash. State Conf. of Mason Contractors, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002) ("A party's disregard of a court order without reasonable excuse or justification is deemed willful").

Harbord's failure to comply with the discovery order was also prejudicial. Harbord provided *no* responses to Safeway's discovery requests and refused to schedule a deposition, severely limiting Safeway's ability to make meaningful trial preparations.

The trial court expressly warned Harbord that she was subject to the discovery rules and that the failure to comply with a court order could result in dismissal. The court also awarded Safeway its reasonable expenses, including attorney fees, for having to bring the motion to compel. Nonetheless, Harbord ignored the trial court's order and repeatedly denied any obligation to comply with discovery rules. The record amply supports the trial court determination that a lesser sanction was not sufficient.

The trial court did not abuse its discretion in dismissing Harbord's action as a sanction for violating the discovery order.

Remaining Issues

In her brief, Harbord asserts that Safeway filed a stipulated protective order in federal court without her knowledge, that Safeway failed to serve all documents by certified mail, and that she did not receive Safeway's summary judgment motion in a timely manner. But Harbord fails to support these conclusory allegations with any legal arguments or citation to authority. Accordingly, we decline to consider them. See Saunders v. Lloyd's of London, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (appellate court will decline to consider issues unsupported by cogent legal argument and citation to relevant authority).

Pending Motions

Harbord filed her notice of appeal on November 21, 2014. On August 8, 2015, after multiple extensions of time, Harbord filed an untimely "preliminary brief," which this court is treating as her opening brief. Despite several extensions of time, Harbord failed to file a reply brief. Nonetheless, Harbord has found time to file dozens of various documents and motions.

We have reviewed all of the documents that are briefly summarized in the Appendix to this opinion. To the extent these filings can be construed as motions, including motions to modify commissioners' rulings, the motions are all denied.

Attorney Fees on Appeal

Safeway requests an award of attorney fees for a frivolous appeal. See RAP 18.9(a). An appeal is frivolous "if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." In re Marriage of Foley, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). That standard is satisfied here. Harbord's complete failure to identify supporting evidence in the record or present any meaningful legal argument addressing the summary judgment standard and discovery sanctions precludes any arguable challenge to the trial court's decision. Safeway is awarded reasonable attorney fees on appeal, subject to compliance with RAP 18.1(d).

No. 72731-1-I/16

The motions identified in the appendix are denied. The trial court's dismissal of Harbord's claims is affirmed.

Becker, J.

WE CONCUR:

Schindler, J.

Cox, J.

No. 72731-1-I/17

APPENDIX

July 18, 2016	"Petition for my case . . . Protest for Appeals Court . . ."
June 23, 2016	Motion for Extension of Time to File Reply Brief
June 20, 2016	Motions for Extension of Time, Continuance, and/or Stay
June 17, 2016	Motions for Change of Venue, Japanese Translator, and Oral Argument
June 10, 2016	Demand for Oral Argument and Translator
June 9, 2016	Objections to Commissioner's May 31, 2016 Ruling
June 7, 2016	Motion for Extension of Time to File Reply Brief
May 27, 2016	Motion for Sanctions and Continuance and Objection to Commissioner's May 20, 2016 Ruling
May 24, 2016	Motion for Extension of Time to File Reply Brief and for Preliminary Injunction
May 20, 2016	Motion for Default
May 13, 2016	Petition Opposing Commissioner's May 5, 2016 Ruling, Motion for Stay of Proceedings to Enforce Judgment, Motion for Translator, and Motion on the Merits
May 2, 2016	Opposition to Commissioner's April 20, 2016 Ruling

No. 72731-1-I/18

April 29, 2016	Objection to Commissioner April 20, 2016 Ruling
April 22, 2016	Motion Regarding Respondent's Undelivered Brief, Motion for Extension of Time to File Reply Brief
April 21, 2016	Motion to Correct Mistakes and Fraud
April 15, 2016	Objection to Commissioner's April 6, 2016 Ruling, Motion to Strike
April 13, 2016	Filing Regarding Respondent's Brief
April 5, 2016	Motions for Continuance, Correction of Clerical Mistakes, and Oral Argument
April 1, 2016	Motion for Fraud Against Counsel for Respondent
March 31, 2016	Motions for Due Process by Court of Appeals, Motion for Damages
March 25, 2016	Petition of Certified Questions, Opposition to Commissioner's March 17, 2016 Ruling, Intervention by State Constitutional Question
March 11, 2016	Motion for Sanctions
March 4, 2016	Motion for Preliminary Injunction
February 29, 2016	Motion for Preliminary Injunctions
February 26, 2016	Petition Alleging Bias and Prejudice
February 23, 2016	Notice of Intent to File Amicus Brief
February 8, 2016	Motion for Relief from Proceeding
February 3, 2016	Objection to Receiving Court of Appeals' Orders in Two Appeals on the Same Day

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

HATSUYO "SUE" HARBORD, Appellant, v. SAFEWAY, INC., Respondent.	No. 72731-1-I ORDER DENYING MOTION TO MODIFY AND DENYING REMAINING MOTIONS FILED THROUGH DECEMBER 31, 2015

Appellant Hatsuyo Harbord has moved to modify the commissioner's September 8, 2015, ruling denying a further extension of time to "finish" the brief that she filed on August 6, 2015. Respondent Safeway Inc., has filed an answer, and appellant has filed a reply. We have considered the motion under RAP 17.7 and have determined that it should be denied. Accordingly, the brief filed August 6, 2015 will be accepted as appellant's opening brief. Safeway shall have 30 days from the date of this order to file its respondent's brief.

We have also considered all of the numerous remaining documents that appellant has filed through December 31, 2015, requesting various forms of relief. To the extent that these filings can be construed as motions, the motions are denied for failure to comply with the Rules of Appellate Procedure. Now, therefore, it is hereby

ORDERED that the motion to modify is denied, and the brief filed August 6, 2015 is accepted as appellant's opening brief; respondent's brief is due within 30 days of the date of this order; and, it is further

ORDERED all of appellant's remaining motions filed through December 31, 2015 are also denied.

Done this 29th day of January, 2016.

Appelwick, J

Trickey, J

Spearman, C.J.

The Court of Appeals
of the
State of Washington

RICHARD D. JOHNSON,
Court Administrator/Clerk

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CASE #: 72731-1-I
Hatsuyo Harbord, Appellant v. Safeway, Inc., Respondent

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on June 18, 2015, regarding Appellant's Motion for Extension of Time to File Appellant's Brief:

> This is a civil case where plaintiff Hatsuyo Harbord appeals from the trial court's order of dismissal on summary judgment. This case has been pending in this Court since November 2014. On June 10, 2015, Harbord filed a fourth motion for an extension of the time to file her opening brief, initially due on April 27, 2015. She seeks an extension for one month to take care of her spouse for his "medical problems."
>
> A fourth extension is granted until August 5, 2015. Harbord shall file her opening brief by August 5, 2015. If she fails to do so without a showing of extraordinary circumstances, this case will be dismissed without further notice of this Court.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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September 8, 2015

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CASE #: 72731-1-I
Hatsuyo Harbord, Appellant v. Safeway, Inc., Respondent

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on September 8, 2015:

> This is a civil case where plaintiff Hatsuyo Harbord appeals from the trial court's order of dismissal on summary judgment. This case has been pending in this Court since November 2014. This Court has granted four extensions for Harbord to file her opening brief originally due in April 2015, after a delay in her filing the report of proceedings. In granting the fourth extension by ruling of June 18, 2015, I directed Harbord to file her opening brief by August 5, 2015 and stated that if she failed to do so "without a showing of extraordinary circumstances, this case will be dismissed without further notice of this Court." Harbord filed a brief on August 6, 2015.
>
> Notwithstanding the long delay in filing her brief and her failure to comply with the ruling setting forth the filing deadline, Harbord has filed multiple motions seeking to "finish" her brief. On August 12, 2015, she filed a "Petition to finish Brief," seeking a 3-week extension. On August 13, 2015, she filed a "Second submission" "Extension of Time to Finish 'Brief' Complete." On August 21, 2015, she filed "3rd submission Extension of Time for One month." On September 4, 2015, she filed "Part of Brief."
>
> Harbord's motions are denied. Her brief filed on August 8, 2015 (while untimely) is accepted as her opening brief, and the "Part of Brief" filed on September 4, 2015 is thus rejected. I also note that the "Part of Brief" does not satisfy RAP 10.3 (e.g., factual assertions unsupported by reference to the record).

In light of the uncertainty in the deadline for filing a brief of respondent, respondent Safeway Inc. filed a motion to extend the time to file its response brief from September 8 to October 8, 2015. Safeway's motion is granted. Safeway shall file its response brief by October 8, 2015.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HATSUYO "SUE" HARBORD, Appellant, v. SAFEWAY, INC., Respondent.	No. 72731-1-I DIVISION ONE ORDER DENYING MOTION TO PUBLISH

The appellant, Hatsuyo "Sue" Harbord, having filed a motion to publish opinion, and the hearing panel having considered its prior determination and finding that the opinion will not be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed July 25, 2016, shall remain unpublished.

DATED this 25th day of August, 2016.

For the Court:

Becker, J.

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
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To: 'Spencer, Anita'
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Subject: RE: Harbord v. Safeway - Supreme Court No. 93529-7 - Answer to Petition for Review attached

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Supreme Court Clerk's Office

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From: Spencer, Anita [mailto:anita.spencer@klgates.com]
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Cc: Hurley, Daniel P. <Daniel.Hurley@klgates.com>
Subject: Harbord v. Safeway - Supreme Court No. 93529-7 - Answer to Petition for Review attached

Case Name: Hatsuyo Harbord, Appellant v. Safeway, Inc., Respondent
Supreme Court Number: 93529-7
Filing Attorney: Daniel P. Hurley, WSBA #32842
Phone: (206) 370-8172
E-mail: daniel.hurley@klgates.com

Dear Court Clerk:

Please find Respondent Safeway, Inc.'s *Answer to Petition for Discretionary Review*, attached for filing with the Court.

Thank you

K&L GATES

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