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CAUSE No. 69026-4-I

COURT OF APPEALS, DIVISION ONE  
IN THE STATE OF WASHINGTON

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JAMES BUMP, Appellant,

v.

TAK CHANG, Respondent.

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**BRIEF OF RESPONDENT CHANG**

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**I. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Did the trial court act within its discretion when on June 1, 2012, it denied Appellant Bump's Motion to Reconsider the court's order dismissing all claims against Respondent Chang?

**II. STATEMENT OF THE CASE**

The parties were involved in a motor vehicle accident on or about December 13, 2007. CP 5. On or about December 13, 2010, Appellant Bump filed a Summons and Complaint in King County Superior Court, in which Bump claimed that he was injured as a result of the accident. CP 1-7. Bump appeared pro se from the time he commenced this lawsuit through the discovery process. CP 1-7, CP 34-35.

Bump repeatedly failed to participate in discovery. CP 40-41. On March 29, 2011, Chang mailed interrogatories and requests for production to Bump. CP 41. After Bump failed to respond, Chang's counsel sent Bump a letter on June 6, 2011, reminding Bump of the overdue discovery responses and scheduling a discovery conference for June 15, 2011, at 1:45 p.m. CP 41. Chang's counsel called Bump at the scheduled time; Bump did not answer, so Chang's counsel left a voice mail message. CP 41.

Bump called Chang's counsel back the next day and stated that he would respond to Chang's discovery requests shortly. CP 41. However, Bump never responded to those discovery requests. CP 41.

In addition, Chang's counsel set Bump's deposition for November 8, 2011, at 9:00 a.m., at Chang's counsel's office. CP 41. Bump did not appear for his deposition. CP 41. Bump also failed to provide Chang with a Disclosure of Possible Primary Witnesses due January 3, 2012, or a Possible Additional Witness List due February 13, 2012. CP 41.

Due to Bump's continued failure to participate in discovery, Chang filed a Motion to Dismiss on or about February 15, 2012, asking the court to dismiss all claims against him with prejudice. See King County Superior Court Docket. Bump did not designate Chang's Motion to Dismiss. See Index to Clerk's Papers. Bump retained counsel on April 18, 2012, two days before oral argument on Chang's Motion to Dismiss. CP 38.

The court granted Chang's Motion to Dismiss on April 20, 2012, thereby dismissing all claims against Chang. Bump did not designate the order granting Chang's Motion to Dismiss. See Index to Clerk's Papers.

However, a portion of the order granting Chang's Motion to Dismiss is quoted in a later pleading. CP 41. The court made the following findings of fact in granting Chang's Motion to Dismiss:

1. THAT the plaintiff's failure to answer defendant's interrogatories and request for production of documents, to appear for his deposition, to submit a possible primary witness list, and his failure to submit an additional witness list were willful and deliberate;
2. THAT defendant has been substantially prejudiced by plaintiff's misconduct in preparing for trial; AND
3. THAT, lesser sanctions are inappropriate given the plaintiff's complete lack of responding to discovery requests or to follow the Court's scheduling order.

CP 41.

On or about April 30, 2012, Bump filed a Motion to Reconsider the trial court's order granting Chang's Motion to Dismiss. CP 18-33. Bump submitted a declaration in support of his Motion to Reconsider. CP 34-37. In his declaration Bump stated that he experienced several hardships in the first few months of 2012, beginning with the death of his mother on February 17, 2012. CP 36. She had hit her head a few weeks prior to her death. CP 36. Within a week or two of his mother's death, Bump was robbed and stabbed in the face. CP 36. Not long after that he experienced a chemical burn. CP 36.

The court asked Chang to respond to Bump's Motion to Reconsider, which Chang did on May 29, 2012. CP 40-51. On June 1, 2012, the court denied Bump's Motion to Reconsider. CP 52-54. In its order denying Bump's Motion to Reconsider, the trial court noted that most of Bump's failures to respond to discovery occurred prior to the hardships that Bump allegedly experienced in 2012:

The Court further notes that the substantial majority of factors behind the Order of Dismissal occurred prior to the unfortunate series of events which occurred in Plaintiff's life beginning with the illness then death of his mother. Had these been the reason for Plaintiff's failures, the ruling whould [sic] have, undoubtedly, been different.

CP 52-54.

Bump then appealed to this Court. CP 55-57. Bump's counsel withdrew on or about August 10, 2012. See Court Docket.

### **III. ARGUMENT**

#### **A. A Motion for Reconsideration is Reviewed for Abuse of Discretion.**

Appellate courts review an order denying a motion for reconsideration according to the abuse of discretion standard: "A motion for reconsideration and motion to vacate a dismissal are to

be decided by the trial court in exercise of its discretion and its decision will be overturned only if the court abused its discretion.” Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). “[D]iscretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

Moreover, “a trial court has broad discretion as to the choice of sanctions for violation of a discovery order.” Burnet, 131 Wn.2d at 494. “We review a trial court’s sanctions for discovery violations for abuse of discretion.” Blair v. Ta-Seattle E. No. 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011).

#### **B. Bump Did Not Designate the Full Record**

Bump did not designate the full record on appeal. Thus, the Court may not be able to consider many of the issues of error raised by Bump. Significantly, Bump designated the Clerk’s Papers while he was represented by counsel. See Court Docket, Designation of Clerk’s Papers, Index to Clerk’s Papers.

In particular, Bump did not designate Chang's Motion to Dismiss, Chang's counsel's declaration in support of Chang's Motion to Dismiss, Bump's Response, or the trial court's order granting Chang's Motion to Dismiss. "A party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue." Dash Point Village Associates v. Exxon Corp., 86 Wn. App. 596, 612, 937 P.2d 1148 (1997).

Because Bump did not designate the full record, the Court cannot consider Bump's arguments contained in or regarding those pleadings he did not designate. Reed v. Pennwalt Corp., 93 Wn.2d 5, 604 P.2d 164 (1979) (record failed to show objections regarding instructions); State v. Mannhalt, 33 Wn. App. 696, 658 P.2d 15 (1983) (pro se brief assigned error to motions and orders not included in record; thus, alleged errors could not be considered).

Further, Bump cannot make supplemental arguments on these topics in his reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) (issue raised and argued for the first time in a reply brief is too late to warrant consideration).

**C. The Trial Court Did Not Abuse its Discretion in Denying Bump's Motion to Reconsider.**

The trial court did not abuse its discretion in denying Bump's Motion to Reconsider. The trial court acted wholly within its discretion considering Bump's complete failure to respond to discovery requests, to attend his deposition, and to comply with the case schedule.

**1. Washington Law Allows for Dismissal for Failure to Participate in Discovery.**

Civil Rule 37 specifically allows for dismissal for a party's failure to participate in discovery:

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection.** If a party ... fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule....

CR 37(d). Dismissal is one of the authorized actions allowed under section (C) of subsection (b)(2) referenced above:

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party.

CR 37(b)(2)(C) (emphasis added).

Likewise, Civil Rule 41 allows for dismissal for discovery abuse:

**(b) Involuntary Dismissal; Effect.** For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

CR 41(b). Further, King County Local Civil Rule 4(g)(1) allows for dismissal for failure to comply with the case schedule:

**(g) Enforcement; Sanctions, Dismissal; Terms**  
(1) Failure to comply with the Case Schedule may be grounds for imposition of sanctions, including dismissal, or terms.

KCLCR 4(g)(1).

## **2. The Three Requirements for Dismissal are Met.**

Washington courts have long recognized that discovery misconduct warrants involuntary dismissal of a plaintiff's claim pursuant to the above rules where (1) the misconduct is without reasonable excuse or justification and is therefore willful or is deliberate; (2) the misconduct has substantially prejudiced the

other party; and (3) the trial court has considered sanctions less harsh than dismissal and found them to be insufficient. Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 639-41, 201 P.3d 364 (2009), cited with approval in Blair v. Ta-Seattle East No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011).

In Johnson, the appellate court affirmed the trial court's dismissal for discovery violations, finding that all three elements were met. The Johnson court held as follows regarding prejudice to the other party:

At the time of dismissal, Horizon was defending against an action arising from an incident that occurred 3 years and 10 months earlier. Johnson's failure to disclose witnesses prevented Horizon from preparing a defense for the upcoming trial, which had not been stayed, while 'witnesses are still available and memories are still clear.' [Footnote omitted.] Accordingly, we hold that substantial evidence supports the trial court's finding that Johnson's failure to disclose primary witnesses, together with his failure to comply with the order awarding costs, substantially prejudiced Horizon.

Id. at 640. The Johnson court also found that while a lesser sanction, such as dismissal without prejudice, would have been less harsh, it would not have been sufficient to remedy the prejudice caused to Horizon. Id. at 641.

Just as the court did in Johnson, the trial court here properly dismissed all claims against Chang. All three requirements outlined in Johnson are met here.

**a. Bump's Misconduct was Willful.**

Bump had no reasonable excuse or justification for not responding to discovery or appearing for his deposition, all of which occurred in 2011. The alleged hardships that he faced in 2012, beginning with the illness of his mother, did not occur until after the vast majority of the discovery violations in 2011. The trial court specifically noted this fact in the court's order denying Bump's Motion to Reconsider. Moreover, Bump was certainly aware that he was supposed to respond to discovery and even promised to do so, yet he still did not respond.

Bump claims that his failures to comply with discovery were unintentional. However, the failure to comply with discovery does not need to be intentional or in bad faith in order to result in dismissal.

The trial court did not abuse its discretion in finding that Bump's failure to participate in discovery was "willful and deliberate." These words do not carry their ordinary meaning, including any connotations of bad faith that someone might place

upon them. Rather, they are terms of art, with “willful” defined as being “without reasonable excuse or justification.” Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 638, 201 P.3d 364 (2009).

There is no evidence of any circumstances that constituted a reasonable excuse or justification for Bump’s discovery violations. Rather, Bump’s actions were willful and deliberate in that Bump made the conscious decision to not answer discovery requests and to not appear for his deposition or provide witness lists. Bump obviously knew that he was supposed to respond to Chang’s discovery requests and even promised Chang’s counsel that he would respond, but Bump never did respond.

Moreover, Bump cannot argue that his actions are excusable simply because he was pro se. Bump is not allowed any leniency by the Court due to his pro se status. Pro se parties are held to the same standards as are attorneys: “pro se litigants are bound by the same rules of procedure and substantive law as attorneys.” Westberg v. All-Purpose Structures, Inc., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Therefore, Bump’s request for leniency should be disregarded.

**b. Bump's Misconduct Substantially Prejudiced Chang.**

The trial court did not abuse its discretion in finding that Chang had been substantially prejudiced by Bump's misconduct in preparing for trial. Without any discovery from Bump, Chang could not prepare for trial in any meaningful way. Bump's failure to appear for his deposition and comply with the case schedule alone warrant dismissal under the court rules and Johnson.

Chang has been denied his right to conduct discovery while memories are still fresh. The accident at issue in this lawsuit occurred nearly 5 years ago. If the trial court had granted Bump's Motion to Reconsider and reinstated the case, Chang would have been unduly prejudiced because memories are likely no longer clear, and some witnesses may not be available. The lesser sanction of reinstating the case and amending the case schedule would have been insufficient to remedy the undue prejudice. Indeed, justice required that the case be dismissed due to the undue prejudice experienced by Chang.

**c. The Trial Court Considered Lesser Sanctions.**

The trial court did not abuse its discretion in declining lesser sanctions. The trial court considered lesser sanctions on the

record and found that they were insufficient to remedy the prejudice experienced by Chang. In the court's order granting Defendant's Motion to Dismiss, the court stated that "lesser sanctions are inappropriate given the plaintiff's complete lack of responding to discovery requests or to follow the Court's scheduling order."

The cases cited by Bump are distinguishable. In Blair v. Ta-Seattle East No. 176, 171 Wn.2d 342, 254 P.3d 797 (2011), the trial court's orders did not contain any findings as to willfulness, prejudice, or consideration of lesser sanctions. Id. at 348. In the instant case, the trial court's order granting Chang's Motion to Dismiss contains findings on all three of these topics, specifically that Bump's failures were willful and deliberate, Chang has been substantially prejudiced, and that lesser sanctions are inappropriate given Bump's complete failure to respond to discovery.

In addition, in Blair there was no oral argument prior to the trial court entering its orders. Id. Here, the trial court held oral argument. The trial court fulfilled the requisites that the trial court in Blair did not, and thus Blair is inapplicable.

Fisons does not support Bump's position either. Washington State Physicians Ins. Exchange & Assoc. v. Fisons

Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993). One of the issues the court considered in that case was the appropriateness of discovery sanctions for the drug company's failure to produce smoking gun documents. The Fisons court began its analysis by noting the principles that guide the trial court's consideration of sanctions. Firstly, courts should use the least severe sanction, but not make the sanction so minimal as to undermine the purpose of discovery. Id. at 355-56. Additionally, the wrongdoer should not profit from the wrong. Id. These principles are met here—the trial court considered lesser sanctions but found that they were insufficient. Moreover, dismissing all claims is the only way to ensure that Bump does not profit from his wrongs. Bump should not be allowed to pursue a lawsuit while at the same time not provide the opposing party with any discovery. The trial court complied with the principles outlined in Fisons.

### **3. Chang Abided by the Discovery Rules.**

Bump's claim that Chang failed to conduct a CR 26(i) discovery conference is incorrect. Chang did indeed set a CR 26(i) conference in his letter of June 6, 2011, and his counsel called Bump at the time of the conference. When Bump did not answer his phone, Chang's counsel left a voice mail message. Bump

called Chang's counsel the next day stating that he would provide discovery responses soon. The discovery conference occurred when Bump returned Chang's counsel's telephone call. However, Bump never fulfilled his pledge to provide discovery responses.

Further, Bump is erroneous in his claim that Chang "provided no **certification** that the conference requirements of this rule were met." Bump's Appellate Brief at 5. Chang's counsel properly authenticated the letter of June 6, 2011, in his declaration supporting Chang's Motion to Dismiss. A true and correct copy of the letter was attached to counsel's declaration, and the declaration was signed under penalty of perjury under the laws of the State of Washington.

Regardless, Bump did not designate Chang's Motion to Dismiss or Chang's counsel's supporting declaration, so the Court cannot consider Bump's argument. Reed v. Pennwalt Corp., 93 Wn.2d 5, 604 P.2d 164 (1979) (record failed to show objections regarding instructions); State v. Mannhalt, 33 Wn. App. 696, 658 P.2d 15 (1983) (pro se brief assigned error to motions and orders not included in record; thus, alleged errors could not be considered).

**4. There is No Requirement for Oral Argument on the Record.**

The trial court did not abuse its discretion in dismissing Bump's claims without conducting oral argument on the record. None of the rules or cases cited by Bump states that oral argument must be transcribed in order for a court to dismiss a case based upon discovery violations. Rather, in the portion of the decision cited by Bump, the court in Blair noted that there had been no oral argument in that case. Blair v. TA-Seattle E. No. 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). The Blair court did not hold that oral argument must be on the record. Therefore, in the instant case oral argument was not required to be transcribed for the record in order for the trial court's dismissal to be valid. If Bump wanted oral argument to be transcribed for the record, he could have so requested, but he did not do so.

**IV. CONCLUSION**

Respondent Tak Chang respectfully requests that the Court affirm the trial court's denial of Bump's Motion to Reconsider and allow the trial court's order dismissing all claims against Chang to stand. Regardless of why Bump decided to not participate in discovery, his failure was nonetheless willful and deliberate

because it was without reasonable excuse. In addition, Chang was substantially prejudiced because Chang cannot prepare for trial without this discovery at this late date. Moreover, the trial court expressly held that lesser sanctions were inappropriate. The trial court did not abuse its discretion. Therefore Chang requests that the Court affirm the trial court's order denying Bump's Motion to Reconsider.

RESPECTFULLY SUBMITTED this 16 day of October,  
2012.

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

JAMES BUMP,

Plaintiff,

No. 69026-4-1

**DECLARATION OF SERVICE**

vs.

TAK CHANG,

Defendant.

I, Kirstyn Kono, under penalty of perjury of the laws of the State of Washington, hereby declare as follows:

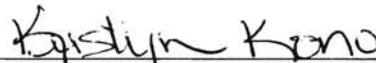
1. I am an employee of the law firm of Hollenbeck, Lancaster, Miller & Andrews, 15500 SE 30th Place, Suite 201, Bellevue, WA 98007-6347, counsel for Defendant, Tak Chang, herein.

2. On October 16, 2012, I did serve a true and correct copy of **Brief of Respondent Chang**, and this Declaration of Service by U.S. First Class Mail – Postage prepaid upon:

James Bump  
5414 25th Avenue SW  
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and

James Bump  
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Kirstyn Kono, Legal Assistant to  
MICHAEL E. ABRAHAMSON