 73895-0

No. 73895-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

FILED
Aug 15, 2016
Court of Appeals
Division I
State of Washington

HATSUYO "SUE" HARBORD,

Appellant,

v.

MATTHEW BEAN; SAFEWAY INC.; MIKE LAGRANGE; SUE BONNETT; KEN BARNES; DANIEL P. HURLEY;

Defendants/Respondents.

BRIEF OF RESPONDENTS SAFEWAY INC., MIKE LAGRANGE, SUE BONNETT, KEN BARNES AND DANIEL P. HURLEY

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I. INTRODUCTION

Appellant Hatsuyo "Sue" Harbord is a former employee of Safeway Inc. ("Safeway"). Safeway discharged her on May 6, 2011, due to longstanding concerns regarding her performance and conduct. CP 3496, 3531-45, 3582-84, 3590-93. Two years later, Ms. Harbord filed a lawsuit ("Lawsuit #1") against Safeway asserting various claims related to her employment with Safeway. CP 3496, 3522, 3595-3600. On September 23, 2014, before the dismissal of Lawsuit #1, Ms. Harbord filed a <u>second</u> lawsuit against Safeway, in which she also named as defendants three Safeway employees, Mike Lagrange, Sue Bonnett and Ken Barnes, and Safeway's counsel in Lawsuit #1, Daniel P. Hurley (collectively the "Safeway Defendants"), as well as her former counsel in Lawsuit #1, Matthew Bean. CP 33-44, CP 3527 (¶34), 3837-39. The trial court's dismissal of her second lawsuit is the subject of this appeal.

Ms. Harbord's claims against Safeway and its employees in this lawsuit, like her claims in Lawsuit #1, pertain to her prior employment with and discharge by Safeway, and her claims against Hurley pertain to his representation of Safeway in Lawsuit #1.[1] After warning Ms. Harbord

[1] *See* CP 33-44 ("Complaint") (raising allegations regarding Hurley's actions in Lawsuit 1 and claims of "wrongful termination, retaliation, discrimination, work injury, harassment" against the Safeway Defendants); CP 142-162 ("Amended Complaint") (same); CP 407-422 ("Additional Amended Complaint") (same).

that her claims were without merit and that they would seek sanctions if she did not dismiss her lawsuit (CP 3502-3503), the Safeway Defendants filed a summary judgment motion ("SJ Motion") in which they demonstrated that: (i) her claims against Safeway and its employees were barred by (a) statutes of limitation, given that more than three years had passed since her discharge, and (b) res judicata and/or collateral estoppel, given the prior resolution of Lawsuit #1; and (ii) her claims against Hurley required dismissal, because (a) he was immune from such claims, and (b) she could not articulate or offer evidence to support any cognizable claim against him. CP 3494-3517. The trial court granted the SJ Motion and sanctioned Ms. Harbord. CP 4314-4316, 6202-6206.

In her Brief of Petitioner (the "Opening Brief"),[2] Ms. Harbord fails to acknowledge, much less address, the facts and law the trial court relied upon in dismissing her claims against the Safeway Defendants and imposing sanctions. Thus, this Court should affirm the trial court's orders on these matters and sanction Ms. Harbord pursuant to RAP 18.9(a) for filing a frivolous appeal.

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[2] Based on the Court's notation rulings entered on May 31, 2016 and June 6, 2016 addressing Ms. Harbord's repeated efforts to seek extensions of time to file a "corrected brief," the Safeway Defendants presently understand the operative Brief of Respondent pursuant to RAP 10.3(a) to be the "Brief of Petitioner" that she filed on May 9, 2016. Regardless, even if the Court were to consider any other documents filed by Ms. Harbord as part of (or in replacement for) the brief she filed on May 9, Ms. Harbord simply cannot set forth a viable basis for her appeal.

II. STATEMENT OF THE ISSUES

1. The trial court properly granted summary judgment dismissing Ms. Harbord's claims against the Safeway Defendants.

2. The trial court did not abuse its discretion in imposing sanctions on Ms. Harbord pursuant to CR 11.

3. The Court should award the Safeway Defendants their attorney fees and costs on appeal pursuant to RAP 18.9(a), because Ms. Harbord's appeal is frivolous.

III. COUNTERSTATEMENT OF THE CASE

A. Ms. Harbord's Prior Employment with Safeway

Safeway maintains a retail grocery store in Port Angeles (the "Store"), which employs approximately 125 employees. CP 3531-32 (¶¶1-3). Mike Lagrange is the Store's manager and oversees all operations at the Store, including employee hiring and termination decisions. *Id*. Store Manager Lagrange approved the hiring of Ms. Harbord as an office clerk and bookkeeper on September 5, 2004. CP 3533 (¶7). After engaging in repeated efforts over the course of several years to address increasing concerns regarding Ms. Harbord's work performance and conduct, culminating in an investigation involving Safeway's Labor Relations Manager Sue Bonnett and Loss Prevention

Investigator Ken Barnes, Lagrange and Bonnett ultimately made the decision to terminate her employment effective May 6, 2011. CP 3496, 3531-45, 3582-84, 3590-93.

B. Ms. Harbord's First Lawsuit against Safeway

On May 24, 2013, while represented by Defendant Bean of Bean Porter Hawkins PLLC, Ms. Harbord filed Lawsuit #1 against Safeway in King County Superior Court in which she alleged that Safeway "discriminated against and/or retaliated against [her] on the basis of her age, race, national origin, color or other protected characteristic" in violation of the Washington Law Against Discrimination, Chapter 49.60 RCW ("WLAD"), and wrongfully terminated her in violation of public policy.[3] Safeway, represented by Hurley of K&L Gates LLP, removed the case to the U.S. District Court for the Western District of Washington (Case No. 2:13-cv-01127-JCC) ("Federal Court") on the basis of diversity of citizenship on July 1, 2013. CP 3521.

1. Stipulated Protective Order in Federal Court in Lawsuit #1

While Lawsuit #1 was proceeding in Federal Court, Safeway provided answers and produced documents in response to discovery

[3] *See* CP 3496, 3522(¶6), 3595-3599 (First Amended Complaint in Lawsuit #1, quoting ¶4.1). A more comprehensive history of Lawsuit #1 is provided in the Brief of Respondent filed in this Court by Safeway on March 1, 2016 in Case Number 72731-1-I (addressing Ms. Harbord's appeal of the dismissal of Lawsuit #1).

requests from Ms. Harbord. CP 3522 (¶7). Some of the documents requested included confidential information, such as personal information pertaining to non-party Safeway employees and financial and/or proprietary information pertaining to Safeway and its customers. *Id*. As a result, Hurley conferred with Ms. Harbord's attorneys at the time, Bean and Christine Porter, and obtained their agreement to the form of, and authority to add their electronic signature to: (i) a Stipulated Motion for Entry of Stipulated Protective Order Regarding Handling of Confidential Material Pursuant to LCR 26(C)(2); and (ii) an accompanying [Proposed] Stipulated Protective Order Regarding Handling of Confidential Material based on the Model Stipulated Protective Order of the Federal Court. CP 3533 (¶¶7-8), 3602-3606, 111-112 (¶¶1-5). Hurley filed those documents with the Federal Court on September 24, 2013, and Judge John C. Coughenour of the Federal Court entered the Stipulated Protective Order on October 1, 2013. CP 3523 (¶¶9-10), 3607-3643.

On November 8, 2013, <u>without</u> the involvement of her attorneys, Ms. Harbord filed a document with the Federal Court challenging the Stipulated Protective Order based on what appeared to a lack of understanding regarding the function, purpose and effect of the Stipulated Protective Order. CP 3523 (¶11), 3644-48. Bean subsequently filed a document on November 14, 2013, signed by Ms. Harbord on November

13, stating: "Plaintiff Hatsuyo Harbord hereby submits that she has read the [Stipulated Protective Order]. Harbord understands the order and will abide by it." CP 3523 (¶12), 3649-51. However, one day later, Ms. Harbord filed a document claiming that she had signed the prior filing on November 14 "under duress" from Bean. CP 3523 (¶13), 3652-56.

On November 21, 2013, Bean filed a Motion to Withdraw as counsel for Ms. Harbord. CP 3523-24 (¶14). While that motion was pending, Ms. Harbord continued to file documents without the involvement of Bean, including confusing documents seeking the removal of the Stipulated Protective Order. *Id*. On January 6, 2014, the Federal Court granted Bean's Motion to Withdraw as Ms. Harbord's counsel and authorized Ms. Harbord to proceed *pro se*. *Id*., CP 3657-60. While noting that the routine Stipulated Protective Order would "not hinder Plaintiff's presentation of her case," the Federal Court was "reluctant to keep in place a document that Plaintiff now says was signed under duress." CP 3659. Accordingly, the Federal Court stated that it would vacate the Stipulated Protective Order after receiving notice from Safeway that Ms. Harbord had returned all material that Safeway had labeled as "Confidential" pursuant to that order (which amounted to less than 60 of the more than 1,100 pages of documents produced). *Id.*, CP 3523-24 (¶¶14-15).

What should have been a simple process of Ms. Harbord and Bean working together to ensure that (i) she received Bean's complete case file, including copies of documents previously produced in electronic form by Safeway in a format she could use (hard copy, presumably), and (ii) all "Confidential" documents were returned to Safeway, instead spiraled into a sequence of filings by Ms. Harbord in which she continued to challenge the Stipulated Protective Order and claimed that she was unable to sort the documents to return those which were labeled "Confidential." *See, e.g.*, CP 3525 (¶20), 3670-73. Hurley, as counsel for Safeway, repeatedly attempted to facilitate Ms. Harbord's return of the documents.[4]

On February 21, 2014, before she had returned any "Confidential" documents, Ms. Harbord filed the first of a series of documents seeking to remand the case to state court by offering conflicting assertions regarding the amount in controversy requirement of 28 U.S.C. § 1332.[5] On April 1, 2014, the Federal Court issued an order finding that Safeway had not provided sufficient evidence of the amount in controversy and thus

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[4] *See* CP 3524-26 (¶15-24), 3661-63, 3674-3695 (showing Hurley's extensive efforts to communicate with Ms. Harbord to effect the return of the "Confidential" documents, including listing the documents by their Bates numbers and re-producing all documents in hard copy excluding a narrowed list of less than 30 "Confidential" documents).

[5] *Compare* CP 3526 (¶25), 3696-3708 (alleging at CP 3706 that her claims were for "less than $75,000"), *with* CP 3526 (¶26), 3709-3766 (at CP 3715: "I will seek as much as the court will allow at King County Court, but if I award more than $75,000, then I would give excess money to charity of my choice").

remanding the case to state court. CP 3526 (¶27), 3766-3774.

On April 28, 2014, almost four months after the Federal Court ordered Ms. Harbord to return the confidential documents and nearly four weeks after its order remanding the case to state court, Ms. Harbord sent some of the "Confidential" material to Hurley. CP 148. Hurley thus sent her a letter on May 2, 2014, stating that, given the Federal Court's remand and lack of jurisdiction, the Stipulated Protective Order "no longer has any effect and you may disregard it," and Safeway considered her "to be released from any obligations" under that order. CP 3526 (¶28), 3775-77

2. Ms. Harbord's Refusal to Respond to Discovery in Lawsuit #1

On October 10, 2013, consistent with the procedures set forth in Civil Rules 33 and 34, Safeway served on Bean a copy of Defendant Safeway Inc.'s First Interrogatories and Request for Production to Plaintiff Hatsuyo "Sue" Harbord (the "Discovery Requests"). CP 3526-27 (¶29). Five months later, after Bean's withdrawal and after receiving no response whatsoever to the Discovery Requests, Safeway filed a Motion to Compel Responses to Discovery in Federal Court on March 11, 2014, detailing Safeway's extensive efforts to get Ms. Harbord to respond to the discovery. *Id*., CP 3778-3788. Ms. Harbord did not respond to this motion, and the Federal Court terminated the motion before issuing a ruling on it, given its remand of the case to state court. CP 3526 (¶27),

3773-74. After Safeway's continued efforts following remand to obtain responses to the Discovery Requests were also unsuccessful, Safeway filed a motion to compel responses in the state trial court on August 20, 2014 (nearly 10 months after the discovery was first served). CP 3527 (¶30), 3789-3801. On September 8, the trial court entered an order granting Safeway's motion, ordering Ms. Harbord to pay Safeway's reasonable costs incurred in preparing the motion, requiring her to respond to the Discovery Requests within 10 days, and warning her that her "failure to follow this order and provide timely discovery may result in dismissal of the action." CP 3527 (¶31), 3802-05. The trial court also noted that Ms. Harbord "appears to believe that the discovery rules do not apply to her. That is incorrect." CP 3527 (¶32), 3808. Ms. Harbord still failed to respond to the Discovery Requests. CP 3527 (¶32).

3. Trial Court Grants Safeway's Motion to Dismiss Lawsuit #1

On October 24, 2014, the state trial court in Lawsuit #1 heard oral argument on a dispositive motion in which Safeway sought dismissal of all of Ms. Harbord's claims on two independent bases: (1) as a sanction pursuant to CR 37(d) for, *inter alia*, her refusal to comply with the order to respond to the Discovery Requests; and (2) pursuant to CR 56(c). CP 3537 (¶33), 3811-35. The trial court granted Safeway's motion on both bases and ordered that "all claims of Hatsuyo 'Sue' Harbord against

Safeway are DISMISSED WITH PREJUDICE." CP 3527 (¶34), 3836-39. On the same date, the trial court entered an order requiring Ms. Harbord to pay Safeway $2,600 for expenses it incurred in connection with her continued and ongoing refusal to respond to the Discovery Requests, which Ms. Harbord has not paid. CP 3537 (¶35), 3840-44.

4. Ms. Harbord's Appeal of the Dismissal of Lawsuit #1

On November 21, 2014, Ms. Harbord filed her notice of appeal of the dismissal of Lawsuit #1 with Division I of the Washington Court of Appeals (Case # 72731-1-I). CP 3537 (¶38), 3883-84. As revealed by even a cursory review of the docket and the notation rulings issued by the Court in that appeal, Ms. Harbord's prolific filing of misguided motions and other documents and her repeated requests for extensions of time greatly prolonged the resolution of that appeal. Regardless, on July 25, 2016, the Court filed is opinion (authored by Judge Becker, with concurrence from Judges Appelwick and Schindler) (the "Opinion"), in which the Court affirmed the dismissal of Lawsuit #1, holding that (a) the trial court: (i) properly dismissed Ms. Harbord's claims of discrimination, retaliation and wrongful discharge in violation of public policy because she failed to establish a *prima facie* case or identify any evidence in support of those claims; and (ii) did not abuse its discretion in dismissing the lawsuit as a sanction for Ms. Harbord's violation of a discovery order.

Opinion at 8-13. The Court also granted Safeway's request for an award of attorney fees pursuant to RAP 18.9(a), holding that Ms. Harbord's appeal of the dismissal or Lawsuit #1 was frivolous. Opinion at 15. In the Opinion, the Court declined to consider Ms. Harbord's assertions "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" (Opinion at 14), all of which are repeated in this appeal, because (as is the case here) she failed "to support these conclusory allegations with any legal arguments or citation to authority." *Id*.

C. **Ms. Harbord's Second Lawsuit against Safeway**

Prior to the trial court's dismissal of Lawsuit #1, Mr. Harbord filed a second lawsuit (the subject of this appeal) on or about September 23, 2014, against Safeway, its three employees, Hurley and Bean. CP 33-34.

1. Ms. Harbord Did Not Serve the Safeway Defendants

Ms. Harbord filed at least three different complaints in this case (the "Complaints").[6] However, she never properly served any of the Safeway Defendants with a summons and complaint, nor did she file any affidavit or other appropriate proof of service documenting compliance

[6] CP 33-44 (Complaint), 142-62 (Amended Complaint), 407-422 (Additional Amended Complaint).

with the requirements of CR 4, despite being warned of this deficiency. CP 3528 (¶¶ 40-41), 3890 (at fn.1), 3901-02. While Ms. Harbord mailed copies of the Complaints to the Safeway Defendants, none of those defendants had any agreement with her to waive the requirements of service or to accept service via mail. CP 3538 (¶¶41-42) 3901, 3078-80, 3087-88 (¶¶4-5). Ms. Harbord also did not file a Confirmation of Joinder of Parties, Claims, and Defenses pursuant to LCR 4.2 (Case Schedule, CP 47), which requires a plaintiff to indicate whether all parties have been served or have waived service. CP 3528 (¶43). On April 2, 2015, Hurley filed (and served by mail) a Notice of Appearance in this matter on behalf of the Safeway Defendants, noting that the appearance was without waiver of "objections as to improper service (including insufficient process and insufficient service of process) or jurisdiction." CP 1179.

2. Defendants Warn Ms. Harbord Regarding CR 11 Sanctions

On February 20, 2015, counsel for the Safeway Defendants mailed a letter to Ms. Harbord in which he informed her that her Complaint against the Safeway Defendants violated CR 11 because it "is not 'well grounded in fact' or 'warranted by existing law,' and it appears to be for an 'improper purpose,' including to 'harass' and 'cause unnecessary delay and needless increase in the cost of litigation.'" CP 3528 (40), 3890-93 (quoting CR 11). The letter explained with citations to legal authority that

Ms. Harbord's claims against Safeway and its employees were barred by (i) the doctrine of res judicata and the prohibition against claim-splitting, given Lawsuit #1 and its dismissal, and (ii) applicable statutes of limitation, given that Safeway terminated her employment more than three years before she filed her first Complaint in this action. CP 3892. The letter also noted that her Complaint set forth no cause of action against Hurley and her allegations against him were unfounded and based on her misunderstanding of applicable rules and law. CP 3891. The letter explained that Hurley acted properly when he conferred with Bean (Ms. Harbord's attorney at the time) to reach agreement on the routine Stipulated Protective Order and that it would have been violation of Washington Rule of Professional Conduct 4.2 for him to directly communicate with her at that time. CP 3892 (at fn.3). The letter cautioned her that if she failed to voluntarily dismiss the Safeway Defendants and thus forced them to file for summary judgment, they would seek sanctions pursuant to CR 11 to recover their reasonable fees. CP 3892-93. Ms. Harbord did not respond to this letter. CP 3528 (¶40).

3. Trial Court Grants Summary Judgment to Bean

On April 3, 2015, the trial court heard oral argument on Defendant Matthew J. Bean's CR 56 Motion for Summary Judgment. CP 68-121 (motion and supporting documents), 124-141 (reply and supporting

documents); 1184-1185 (trial court's Minute Entry). While Ms. Harbord's claims against Bean were unclear, they largely relied on her assertion that he acted improperly during the course of Lawsuit #1 by agreeing with Safeway's counsel (Hurley) to jointly file the Motion for Stipulated Protective Order. CP 36, 43-44, 144-46, 410-12, 416-19. The trial court granted Bean's motion, noting in its oral ruling that Ms. Harbord offered no evidence that Bean's actions violated the attorney judgement rule. CP 1186-87; RP 21:13-23. Counsel for the Safeway Defendants then sent Ms. Harbord another letter in which he again addressed the CR 4 service issues; cautioned her to review his February 20, 2015 letter, setting forth additional information regarding the baseless nature of her lawsuit; and warned her that the Safeway Defendants expected to pursue monetary sanctions and those potential sanctions would only increase if she continued in her refusal to drop her claims against the them. CP 3528 (¶41), 3901-03. Ms. Harbord did not respond. CP 3528 (¶41).

4. Trial Court Grants Summary Judgment to Safeway Defendants

On June 3, 2015, the Safeway Defendants filed their SJ Motion seeking summary judgement on all of Ms. Harbord's claims, noted the motion for hearing on July 2, and served the documents on Ms. Harbord by placing them in the mail on June 1, 2015. CP 3494-3520 (motion), 3521-3909 (supporting declarations), CP 3910-11 (declaration of service).

a. Ms. Harbord Attempts to Deny Service of SJ Motion

Ms. Harbord filed a motion on June 19, 2015 seeking an extension of "more than thirty days" to respond to the SJ Motion, based on her unsworn assertions that: (1) her spouse was having medical problems; and (2) she did not receive the SJ Motion. CP 4005-4008. She also filed a document on June 19 in which she claimed that she did not receive a number of documents from the defendants and demanded proof that these items were sent to her by "certified mail." CP 4020-4034.[7]

On June 23, 2015, the Safeway Defendants filed a response opposing the requested extension. CP 4035-46 (response), 4047-4068 (declarations), 4069-70 (declaration of service). In that response, the Safeway Defendants addressed Ms. Harbord's claims that she did not receive the SJ Motion and other documents by citing each declaration of service demonstrating that those documents were served on her via U.S. Mail, First Class postage prepaid, to the only address she had identified to the trial court. CP 4037, 3910-3911. The response also recounted Ms. Harbord's history in Lawsuit #1 of refusing to accept service of documents, even when ordered to do so by the trial court. CP 4039, 3524 (¶¶ 16-19). Counsel for the Safeway Defendants also explained that he

[7] Ms. Harbord identifies the SJ Motion documents as among those she alleges not to have received by listing their "sub" (trial court docket) numbers (66-69). CP 4020.

did not to send the documents to Ms. Harbord via certified mail, because (i) CR 5 does not require use of certified mail, and (ii) when he used certified mail in the past at her request during Lawsuit #1, the items were returned to him weeks later unaccepted and unopened. CP 4050 (¶5).

Additionally, the Safeway Defendants noted to the trial court that, after receiving a faxed letter from Ms. Harbord after 4:00 p.m. on June 17, in which she "demand[ed] all documents [in] this case" and stated that she would "pick up copies tomorrow," their counsel (despite being under no obligation to do so) went to the trouble to have additional copies of the documents (including the SJ Motion) available for her to pick up at his office the next day, along with a cover letter explaining that he was providing the copies as a courtesy and that she was responsible for monitoring her post office box and receiving and reviewing any documents sent to that address. CP 4050 (¶¶ 3-4), 4053, 4057-58.[8] Shortly before 5:00 p.m. on June 18, Ms. Harbord came to the offices of counsel for the Safeway Defendants, but rather than take the package containing the SJ Motion and other documents she claimed not to have received previously, she spent time reviewing the documents in the law

[8] In this cover letter (CP 4057-58), counsel for the Safeway Defendants explained that he was providing additional copies of all of the documents identified in the "Declaration of Appellant, Hatsuyo Harbord SURPRISE" (CP 3938-43), which included the SJ Motion documents (CP 3941-42 (identifying the SJ Motion docket "sub" numbers of 66-69)).

firm's mailroom and then refused to take them, stating she would come back and pick them up the next day. CP 4038, 4047-48 (¶¶1-3). Ms. Harbord returned the next day (June 19) and hand-delivered her motion to extend time, but she again refused to take the package containing the additional copy of the SJ Motion. CP 4038, 4048. (Mr. Harbord finally took the package of documents when she made yet another visit to the offices of counsel for the Safeway Defendants on June 25. CP 481.)

The Safeway Defendants thus argued that Ms. Harbord's request for an extension of the SJ Motion should be denied or granted only for a limited time period. CP 4040-42. As to her claim of lack of service of the SJ Motion, the Safeway Defendants noted that Civil Rule 5 provides that service by mail, postage prepaid, constitutes service effective as of the third day following the date on which the item is placed in the mail. CR 5(b)(2); CP 4040.[9] Proof of mailing, as provided with regard to the SJ Motion, gave rise to a presumption that the mail was received. CP 4040 (*citing Bank of the W. v. F & H Farms, LLC*, 123 Wn. App. 502, 504, 98 P.3d 532, 534 (2004)). As the person contesting service, Ms. Harbord had the burden to prove by clear and convincing evidence that service was

[9] The Safeway Defendants also noted that Civil Rule 5 does not require use of certified or registered mail. CP 4041-42 (citing CR 5(b)(2)(A); 3A Karl B. Tegland, Washington Practice: Rules Practice, CR 5 at 144 (6th ed. 2013) ("First class mail is sufficient. It is not necessary to use registered or certified mail.")).

improper and that she did not receive the SJ Motion. CP 4040 (*citing State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60, 65, 7 P.3d 818 (2000). The Safeway Defendants argued that she could not meet that burden, given proof of the mailing of the SJ Motion and her twice refusing to accept an additional copy of the motion when one was made available to her at her request. CP 4040-44. With regard to her claim that she needed additional time due to medical problems of her spouse, the Safeway Defendants noted that she had failed to explain how these problems prevented her from timely responding to the SJ Motion. CP 4043.

On June 23, 2015, the trial court granted Ms. Harbord an extension of time to July 6 to respond to the SJ Motion, based on her assertion of a medical emergency, and noted that the court would set the SJ Motion hearing for the earliest available date. CP 4087-88; RP 27:10-17. The court reserved a ruling on a request by the Safeway Defendants for a sanction of Ms. Harbord for her failure to offer evidence to rebut service of documents via mail and her refusal to accept service of documents by hand-delivery, but cautioned her that she was "responsible for diligently monitoring her post office box and reviewing and responding to any documents in this case that are mailed to that address, regardless of whether they are sent by 'certified' mail." *Id*.

b. Ms. Harbord's Untimely Response to the SJ Motion

Despite the additional time provided to Ms. Harbord, she still failed to provide a response to the SJ Motion by the July 6 deadline. In fact, she did not file a response until July 13 (the "SJ Response"). CP 4131-4144. This delay was particularly inexcusable given that, between June 4 (the date service by mail of the SJ Motion became effective pursuant to Civil Rule 5(b)(2)(A)) and the court's July 6 deadline for her response to the SJ Motion, she found time to file twenty other documents, including many in which she made unfounded requests for relief and/or raised baseless complaints about the trial court or the defendants.[10]

Regardless, in her SJ Response, Ms. Harbord did not address the facts and legal arguments raised in the SJ Motion, nor did she articulate any cognizable cause of action, much less set forth admissible facts to support a cause of action, against any of the Safeway Defendants. CP 4131-4144. Instead, without offering citation to or providing any declaration or other admissible evidence, she simply (i) repeated the mistaken assertion that Hurley somehow acted improperly in reaching agreement with Bean regarding the routine Stipulated Protective Order in Federal Court (CP 4132-4135), and (ii) made bald assertions regarding

[10] CP 3930-3933, 3934-3935, 3936-3937, 3938-3989, 3990, 3994-3999, 4000-4002, 4003-4004, 4005-4019, 4020-4034, 4077-4079, 4080-4081, 4082-4083, 4084-4086, 4093-4100, 4101-4108, 4109, 4110, 4115, 4116-4120.

actions allegedly taken by Safeway employees LaGrange, Bonnett and Barnes during her employment (CP 4136-4139).

Having received Ms. Harbord's belated SJ Response on July 13, the Safeway Defendants filed and served their reply in support of the SJ Motion ("SJ Reply") by the June 15 date set by the trial court order. CP 4145-4150, 4151-4173, 4174-4175, 4088. In the SJ Reply, the Safeway Defendants: (i) asserted that the SJ Response should be struck as untimely; (ii) noted that Ms. Harbord failed to identify any cognizable cause of action against any of the Safeway Defendants, failed to offer any admissible evidence to establish the elements of any claim and failed to show that any claim against Safeway or its employees was not barred by the statutes of limitation; and (iii) noted that Ms. Harbord's conclusory assertions in the SJ response were unsupported by any declaration sworn under penalty of perjury, and in many cases defied the possibility of any foundation of personal knowledge, and were thus inadmissible pursuant to Civil Rule 56(e) and General Rule 13(a). CP 4145-4148.

c. The SJ Motion Hearing and Order

When the parties appeared for the SJ Motion hearing on July 17[11] a Japanese interpreter was not available, and Ms. Harbord insisted she

[11] Based on the trial court's availability, the hearing date for the SJ Motion was initially reset to July 17 after the court granted Ms. Harbord's request for additional time to

could not proceed without an interpreter.[12] The court therefore reset the hearing date for July 25. CP 4241. On July 25, with an interpreter present, the trial court heard argument regarding the SJ Motion (RP 33:14-36:19, 39:7-41:2, 42:20-43:11), Ms. Harbord's claim that she was not properly served the SJ Motion (RP 31:13-33:13, 38:15-39:6), and Ms. Harbord's motion for default judgment against the Safeway Defendants (RP 37:24-38:10), all of which were addressed in detail in the briefing the Safeway Defendants had previously provided.[13] The court also heard argument from the Safeway Defendants regarding steps their counsel had taken to warn Ms. Harbord that they would be pursuing sanctions pursuant to Civil Rule 11. RP 36:22-37:19; CP 3502-03.

On July 30, 2015, the trial court entered an order granting the SJ Motion ("the SJ Order"), thereby dismissing with prejudice "all" of Ms.

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respond to the SJ Motion. CP 4087-99, CP 4089-90, CP 4091-92.

[12] RP 26:15-27:5; CP 4241. Unbeknownst to the Safeway Defendants, on June 15, 2015, Ms. Harbord also appeared *ex parte* in King County Superior Court in an effort to compel witnesses, including parties Matthew Bean, Mike Lagrange, Sue Bonnett, Ken Barnes and Daniel Hurley to appear in person and present testimony at the July 17, 2015 hearing of the SJ Motion. CP 4179. The *ex parte* court denied that request, noting that "[s]ummary judgment motions are to be heard on the pleadings and written submissions provided by the parties." *Id*.

[13] *See* CP 3494-3520 (SJ Motion), 3521-3909 (SJ Motion supporting declarations), 4035-46 (opposition to Ms. Harbord's request for extension of time to respond to SJ Motion), 4047-4068 (declarations in support of opposition), 4145-4150 (SJ Reply), 4151-4173 (SJ Reply supporting declaration).

Harbord's claims against the Safeway Defendants. CP 4314-4316.[14] The SJ Order ruled that Ms. Harbord's claims against Safeway and its employees (including "wrongful termination, retaliation, discrimination, work injury harassment") were barred by the statues of limitation and collateral estoppel, and that she had "failed to identify any cognizable cause of action against Hurley or to establish the elements of any cognizable cause of action." *Id.*; RP 29:11-15.

On August 10, 2015, more than ten days after the trial court filed the SJ Order, Ms. Harbord filed a document titled "Consideration," which appeared to be an untimely motion for reconsideration. CP 4329-4361. While this motion for reconsideration cited Civil Rule 59 regarding potential grounds for reconsideration of a court order, the motion failed to set forth any argument or facts that could provide any grounds to grant the motion. *Id.* On August 12, 2015, Ms. Harbord also filed a Motion for Order of Disbursement, seeking to require the Safeway Defendants and Mr. Bean to pay nearly $6,000 for her "copies," "postages," "[f]erries," "transportation," and "gas." CP 4362-63. On August 20, the Safeway Defendants filed an opposition to the Motion for Order of Disbursement (noting that Ms. Harbord was not the "prevailing party" for purposes of

[14] In its SJ Order, the Court made clear that it did consider the untimely opposition (*i.e.*, the SJ Response) filed by Ms. Harbord. CP 4314; RP 28:17-29:9.

costs allowed pursuant to RCW 4.84.010 and 4.84.030) and the motion for reconsideration (noting its general objection but observing that, pursuant to King County Local Civil Rule 59(b), no response is required to a motion for reconsideration unless requested by the court). CP 4380-4382. In that same opposition, the Safeway Defendants again provided notice that it would be filing a motion for sanctions. CP 4382. On September 3, 2015, the court entered an Order Denying Plaintiff's Motion for Reconsideration (CP 5268) and an Order Denying Plaintiff's Motion for Order of Disbursement of Funds (CP 5269-70). The court also subsequently entered formal orders denying Ms. Harbord's Motion for Default Judgment (CP 5356-5357) and various other "post summary judgment motions/pleadings" (CP 5354-5355).

5. Trial Court Grants Safeway Defendants' Motion for Sanctions

On August 27, 2015, the Safeway Defendants filed and served via mail a Motion for Sanctions and Attorney's Fees ("Motion for Sanctions") in which they offered argument and evidence in support of: (i) a conservative award of attorney fees pursuant to RCW 4.84.185, based on the entirely frivolous nature of the action Ms. Harbord brought against them; or in the alternative (ii) monetary sanctions pursuant to Civil Rule 11 for the attorney's fees they incurred in bringing the SJ Motion, responding to an earlier motion for summary judgment by Ms. Harbord,

and bringing the Motion for Sanction. CP 4408-4424 (Motion for Sanctions), 4425-4492 (supporting declaration), 4404-05 (declaration of service), 4406-07 (note for motion). The Safeway Defendants requested a total of $53,755 in fees pursuant to RCW 4.84.185, or in the alternative, $39,255 in fees pursuant to Civil Rule 11. CP 5230, 5309-10, 4425-4492.

On September 4, 2015, Ms. Harbord filed an opposition to the Motion for Sanctions, which failed to understand and address, much less refute, the pertinent facts and legal issues that rendered her claims against the Safeway Defendants meritless and frivolous. CP 5272-5294. On September 9, 2015, Safeway filed its reply in support of the Motion for Sanctions, noting Ms. Harbord's failure to address the sound factual and legal bases for the requested sanctions and addressing Ms. Harbord's tireless claim that she did not receive documents that were mailed to her, as well as her unsupported motion for sanctions against the Safeway Defendants. CP 5299-5303, 5305-08, 5309-10.

On November 12, 2015, the trial court entered an order granting Safeway's Motion for Sanctions ("Sanctions Order"). CP 6202-6206. In the Sanctions Order, the trial court found that Ms. Harbord's "entire action is frivolous pursuant to RCW 4.84.185" and "attorney's fees incurred by the Safeway Defendants in defending against [Ms. Harbord's] frivolous action, and filing the Motion for Sanctions, are reasonable and amount to

$48,525.00. CP 6203-6204. However, for reasons that are not expressed in the Sanctions Order, rather than grant the Motion for Sanctions based on RCW 4.81.185, the trial court instead granted the motion based on CR 11, because Ms. Harbord's Complaints did not meet the standard required by CR 11. CP 6204. Accordingly, the trial court concluded that the attorney fees incurred by the Safeway Defendants in responding to Ms. Harbord's Complaints and in preparing the Motion for Sanctions "are reasonable and amount to $34,025.00." CP 6205. However, the trial court only ordered Ms. Harbord to pay $27,492, "with 2/3 [of that amount] deferred and held in abeyance in anticipation of compliance" with the requirement in the Sanctions Order that Ms. Harbord "is prohibited from filing any subsequent lawsuits (based on the same fact/legal pattern) against any of the Safeway Defendants in this Court without prior approval of the court." CP 6205-06. Accordingly, the trial court only ordered Ms. Harbord to pay $9,164.00 (one-third of $27,492) as of the date of the Sanctions Order.

In its Sanctions Order, the court noted Ms. Harbord's prior lawsuit against Safeway, "her refusal to dismiss her claims against the Safeway Defendants in this case despite being informed of the frivolous nature of those claims, and her prolific and repetitive filing of baseless motions and other documents in this case." CP 6205-6206. The trial court even took

the step of noting that, "given the totality of circumstances, it is observed that the court is invested with inherent power to appoint a guardian ad litem for a litigant upon finding that he or she is incompetent."[15]

IV. ARGUMENT

A. Harbord Fails to Properly Raise any Issue on Appeal

As a threshold matter, Ms. Harbord's appeal must be denied and the SJ Order affirmed because she has failed to provide <u>any</u> citations to the Clerk's Papers or Report of Proceedings to support her bald factual assertions, and she has failed to even identify, much less provide factual or legal citations in support of, any cognizable legal claim against any of the Safeway Defendants or any other legal issue for this Court to consider.[16] Moreover, even if the Court were to undertake its own review of Ms. Harbord's SJ Response, that document fails to identify any cognizable cause of action and amounts only to a string of inadmissible unsworn

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[15] CP 6206 (*citing Vo vs. Pham*, 81 Wn. App. 781 (1996)).

[16] *See* RAP 10.3(a)(5) (party must include references to the record for each factual assertion); RAP 10.3(a)(6) (argument in support of appeal should include "citations to legal authority and references to relevant parts of the record"); *Hous. Auth. of Grant Cnty. v. Newbigging*, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001) (self-serving statements that were unsupported in the record would not be considered); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 513, 857 P.2d 283 (1993) ("Allegations of fact without support in the record will not be considered by an appellate court."); *In re Dependency of K.S.C.*, 137 Wn.2d 918, 932, 976 P.2d 113, 120 (1999) (portions of brief containing factual material not submitted to or considered by the trial court should be stricken).

assertions that, even if accepted as true, provide no basis for her appeal.[17]

Accordingly, given the absence of competent facts and recognizable legal argument and authority in her Opening Brief, Ms. Harbord is in effect untenably asking the Court to: (i) wade through the sea of inadmissible documents she filed in the trial court (which are themselves void of competent evidence) in order to vet her assertions of "fact" and; (ii) speculate as to what legal claims (if any) she is attempting to assert and what issues she is attempting to identify on appeal. Notwithstanding Ms. Harbord's *pro se* status,[18] it is not the role of the Court (or opposing counsel) to attempt to articulate causes of action on

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[17] Pursuant to RAP 9.12, in its review of the SJ Order, the Court should consider only evidence and issues called to the attention of the trial court, as designated in the SJ Order. Accordingly, in Ms. Harbord's case, the Court's review is limited to a review of her SJ Response. CP 4314-16 (SJ Order), 4131-44 (SJ Response). Moreover, as even a cursory review of the SJ Response reveals, the factual assertions contained therein are inadmissible, as they do not meet the requirements of Civil Rule 56(e) that statements in opposition to summary judgment be "made on personal knowledge," "set forth such facts as would be admissible in evidence," "show affirmatively that the affiant is competent to testify to the matters stated therein," and be made under penalty of perjury. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 326, 300 P.3d 431 (2013) (citations omitted) (CR 56(e) requires a sworn affidavit or declaration made under penalty of perjury); *see also* RCW 9A.72.085 (permitting unsworn statement to be considered if statement (i) contains recitation by person that statement is true under penalty of perjury, (ii) is subscribed by person, (iii) states date and place of execution, and (iv) states it is so certified under the laws of state of Washington); General Rule 13(a) (referencing RCW 9A.72.085 and setting forth appropriate language). The Safeway Defendants presented these objections to the SJ Response to the trial court. CP 4147 (SJ Reply).

[18] *See In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983) ("law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws").

Ms. Harbord's behalf or to scour the trial court record for competent evidence relevant to any speculative cause of action or other legal issue.[19] Consequently, the Court should simply affirm the SJ Order based on the total inadequacy of Ms. Harbord's Opening Brief.

However, in the event the Court determines that further analysis of is required, the Safeway Defendants offer additional arguments below.

B. Even if Ms. Harbord's Appeal is Considered on the Merits, the Court Should Affirm the SJ Order

1. 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). The appellate court considers 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,

[19] *See State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (court need not consider *pro se* arguments that were conclusory and did not identify any specific legal issues or cite any authority and thus did not comply with RAP 10.3 and 10.4)*; State v. Valentine*, 75 Wn. App. 611, 618, 879 P.2d 313 (1994), *aff'd*, 132 Wn.2d 1, 935 P.2d 1294 (1997) (court will not engage in conjectural resolution of issues presented but not briefed); *J-U-B Engineers, Inc. v. Routsen*, 69 Wn. App. 148, 152, 848 P.2d 733 (1993) (court will not consider assertions of error consisting of conclusory statements without argument and citation to authority); *Washington v. Boeing Co.*, 105 Wn. App. 1, 17–18, 19 P.3d 1041 (2000) (court declined to review trial court's summary dismissal of employee's claim of negligent infliction of emotional distress where employee provided "no relevant argument or citation to authority" with regard to that claim).

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 Pharm., 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). The nonmoving party may not rely on bare allegations in the pleadings but must set forth specific facts showing a genuine issue of material fact exists for trial. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

2. Claims against Safeway and its Employees Are Time Barred

To the extent Ms. Harbord has identified any cause of action against Safeway and its employees in the present lawsuit that is distinct from those asserted in Lawsuit #1 and is not barred by res judicata and/or collateral estoppel (as discussed below), the trial court properly concluded that such claims are nonetheless barred by applicable statutes of limitation. CP 4315. Ms. Harbord's employment with Safeway was terminated

effective May 6, 2011, more than three years before she filed her initial Complaint in this case on September 26, 2014. CP 3583, 33-44. Consequently, she does not (and cannot): (i) assert any causes of action against Safeway, Lagrange, Bonnett or Barnes that have statues of limitations beyond three years; or (ii) establish that Safeway, Lagrange, Bonnett or Barnes took any actions within three years of the filing the present lawsuit that could support any cause of action against them.[20]

Ms. Harbord's Complaints and the SJ Response make allegations of wrongful termination, discrimination, retaliation and harassment.[21] The statutes of limitation applicable to these claims do not exceed three years. *See, e.g.*, *Milligan v. Thompson*, 90 Wn. App. 586, 591, 953 P.2d 112 (1998) (three-years for claims arising under the WLAD); *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128 (2008) (three years for wrongful discharge in violation of public policy). Moreover, to the extent Ms. Harbord's other vague allegations are construed as any additional cause of action (*e.g.*, work-related injuries, damage to reputation, citations to inapplicable Title 9A RCW Washington Criminal Code statutes related to "harassment," "coercion," "unlawful

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[20] Moreover, because Ms. Harbord did not personally serve Safeway and the defendant employees within 90 days of filing her initial Complaint, the applicable statutes of limitation have continued to run beyond that initial filing date. *See* CR 3(a); RCW 4.16.170; *Fox v. Groff*, 16 Wn. App. 893, 894-896, 559 P.2d 1376 (1977).

[21] *See* CP 41 (Complaint); CP 157 (Amended Complaint); CP 4137 (SJ Response).

imprisonment"[22]), the applicable statutes of limitations for such alleged personal injuries would be three years or less. *See, e.g.*, *Milligan*, 90 Wn. App. at 592 (three years for personal injury, citing RCW 4.16.080(2); two years for defamation, citing RCW 4.16.100(1)); RCW 4.16.100 (two years for false imprisonment). Thus, the statutes of limitation require (and provide an independent basis for) the trial court's dismissal of all of Ms. Harbord's claims against Safeway and its employees.[23]

3. Harbord's Claims against Safeway and Its Employees Are Barred by Res Judicata and/or Collateral Estoppel

Ms. Harbord filed Lawsuit #1 against Safeway in 2013, broadly alleging that Safeway "discriminated against and/or retaliated against [her] on the basis of her age, race, national origin, color or other protected characteristic" in violation of the WLAD and wrongfully terminated her in violation of public policy. CP 3522 (¶6), 3598. After seventeen months of litigation, during which Ms. Harbord filed a staggering number of documents in both the Federal Court and state trial court (CP 3527-28 (¶¶36-37), 3845-3855, 3866-3880) and had ample opportunity to conduct

[22] *See* CP 157-158 (Amended Complaint); CP 420-22 (Additional Amended Complaint); RP 4136-38 (SJ Response). The Opening Brief also includes factual assertions (unsupported by citations to the record) regarding alleged actions of Safeway and its employees (*e.g.*, at 7-9, 20) that, while not tied to any identified cause of action, involve events dating as far back as 2004, with none alleged to have occurred within three years of the date (September 23, 2014) Ms. Harbord filed her first Complaint.

[23] The trial court also explained to Ms. Harbord that she could not assert criminal causes of action against the Safeway Defendants in this lawsuit.

discovery and add any claims and defendants in accordance with court rules, the trial court granted Safeway's motion for summary judgment and dismissed all of her claims against Safeway with prejudice on October 24, 2014. CP 3527 (¶34), 3836-3839. (On July 25, 2016, the Court of Appeals affirmed the trial court's dismissal of Lawsuit #1 and determined that Ms. Harbord's appeal in that case was frivolous.)

Ms. Harbord filed her first Complaint in the present case against Safeway and its employees on September 23, 2014, a month before the trial court in Lawsuit #1 dismissed that action. CP 33-44, 3527 (¶34), 3837-39. While the Complaints, SJ Response and the Opening Brief in this case are dominated by Ms. Harbord's baseless complaints regarding the legal process and alleged actions of Bean and Hurley during the course of the litigation of Lawsuit #1, they also include various assertions with regard to the actions of Safeway and its employees. While Ms. Harbord failed to clearly articulate any cause of action in these documents in order to provide context for her litany of unsupported factual assertions regarding Safeway and its employees, those factual assertions relate to the same events that were at issue in Lawsuit #1 addressing the termination of her employment. Thus, while Ms. Harbord's failure to identify her legal claims makes it difficult to assess in detail the applicability of res judicata and collateral estoppel to her claims, both doctrines appropriately operate

to bar her claims against Safeway and its employees in this lawsuit, as discussed below, as does the trial court's dismissal of Lawsuit #1 as a sanction[24] Ms. Harbord's willful refusal to participate in discovery. CP 3527 (¶34), 3837-3839.

a. Harbord's Claims are Barred by Res Judicata[25]

Pursuant to the doctrine of res judicata (or claim preclusion), a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action. *Schoeman v. New York Life*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986). The purpose of this doctrine is "to prevent piecemeal litigation and ensure the finality of judgments." *Spokane*

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[24] There appears to be a lack of guiding case law regarding whether a dismissal as a CR 37 sanction for a party's refusal to follow a court order to provide discovery can operate as a bar to the subsequent assertion of claims in a new lawsuit filed by the sanctioned party. However, allowing a plaintiff to file a second lawsuit to bring the same claims (or similar claims based on the same nucleus of fact as the claims) that were previously dismissed as a sanction would effectively nullify the power granted to courts pursuant to CR 37(b)(2) to dismiss an action when a plaintiff flatly refuses to comply with a discovery order. Moreover, giving such a dismissal a preclusive effect does not close off the dismissed party from the appropriate avenue of relief–*i.e.*, a timely appeal of the sanction–if the CR 37 dismissal sanction was not justified. Accordingly, the trial court's dismissal of the claims Ms. Harbord asserted in Lawsuit #1 against Safeway as a sanction for her improper conduct during that litigation should operate to bar the claims she has attempted to assert against Safeway and its employees in the present action, because those claims either were, or could have been, asserted in Lawsuit #1.

[25] While the trial court concluded that Ms. Harbord's claims were barred by the doctrine of collateral estoppel (CP 4315), this Court can also sustain the trial court's summary judgment ruling under the doctrine of res judicata if the Court finds that doctrine applicable to any discernable claim of Ms. Harbord. *See, e.g.*, *Carey v. Reeve*, 56 Wn. App. 18, 23, 781 P.2d 904, 907 (1989) (trial court decision may be upheld based an alternate ground on which the summary judgment could have been granted, when supported by "the pleadings and the proof").

Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005).[26] Accordingly, dismissal on the basis of res judicata is appropriate in cases where there was a final judgment on the merits in the prior action[27] and the moving party proves a concurrence of identity between the two actions in four respects: (1) subject matter; (2) claim or cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Spokane Research & Def. Fund*, 155 Wn.2d at 99. In this case, each of the necessary elements are satisfied and res judicata should thus preclude Ms. Harbord from employing the powerful tools of civil litigation to further burden Safeway and its employees with a second costly and vexatious lawsuit.

As an initial matter, the trial court in Lawsuit #1 entered a final judgment on the merits in that case by dismissing Ms. Harbord's claims with prejudice pursuant to CR 56,[28] noting that "there are no triable issues of material fact supporting Plaintiff's allegation that Safeway violated the Washington Law Against Discrimination or that Safeway's discharge of her employment was wrongful or in violation of public policy."

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[26] *See also Landry v. Luscher*, 95 Wn. App. 779, 780-81, 976 P.2d 1274 (1999) (as a general matter, Washington law prohibits claim splitting–the filing of two separate lawsuits based on the same event).

[27] *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (for res judicata to apply, there must have been a final judgment on the merits in the prior action).

[28] *See* 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35.41, at 573 (2nd ed. 2009) (a summary judgment has res judicata effect) (citations omitted).

i. The Subject Matter and Claims are the Same

A review of the Amended Complaint in Lawsuit #1 and the three Complaints filed in the instant case shows that the subject matter and claims as to the Safeway Defendants in this lawsuit are effectively the same as those that were decided in Lawsuit #1. For example, in the Amended Complaint in Lawsuit #1, Ms. Harbord made factual assertions regarding the actions of Safeway's employees, including LaGrange and Bonnett, and alleged that Safeway "discriminated against and/or retaliated against [her] on the basis of her age, race, national origin, color or other protected characteristic" and wrongfully terminated her in violation of public policy. CP 3596-98. [29] Likewise, in the Complaints she filed in this action, she also alleges wrongful termination, retaliation, discrimination, work injury and harassment." CP 42, 157-158, 421-22.

In short, Ms. Harbord attempted in this lawsuit to re-litigate her challenge to Safeway's decision to terminate her employment in May 2011 by making bald assertions regarding the various roles its employees (Lagrange, Bonnett and Barnes) played in the events that precipitated that decision and again claiming that the decision was motivated by

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[29] *See* CP 3496, CP 3522(¶6), CP 3595-3599 (First Amended Complaint in Lawsuit #1, quoting ¶4.1). A more comprehensive history of Lawsuit #1 is provided in the Brief of Respondent filed in this Court by Safeway on March 1, 2016 in Case Number 72731-1-I (Ms. Harbord's appeal of the dismissal of Lawsuit #1).

discrimination or retaliation or otherwise amounted to a wrongful termination.[30] Specifically, in support of her claims in this lawsuit, Ms. Harbord attempted to rely on allegations regarding the same events and actions taken by Safeway through its defendant employees Lagrange, Bonnett, and Barnes (*e.g.*, the suspension of Ms. Harbord pending Safeway's investigation into her actions, review of store security video and efforts to collect information from Ms. Harbord during this investigation, and the resulting decision to discharge her) that she attempted to rely on in her Lawsuit #1.[31] Safeway addressed these claims and the relevant factual background in detail in its dispositive motion in Lawsuit #1 and the trial court resolved those claims in Safeway's favor. CP 3527 (¶¶33-34), 3811-3835, 3837-3839. Accordingly, the subject matter and causes of action between Lawsuit #1 and the present lawsuit are the same for purposes of the application of res judicata, given: (i) Ms.

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[30] Compare the Amended Complaint in Lawsuit #1 (CP 3596-98 at ¶¶ 3.2-5.2) (challenging the events that preceded, and the reasons for, her termination, including the security video and the roles of Lagrange and Bonnett, and alleging discrimination, retaliation, and wrongful termination) with the three Complaints filed in the present lawsuit, all of which focus on and make allegations related to Safeway's decision to terminate Ms. Harbord and the roles of individual Safeway employees in that decision. *See* CP 35, 42 (Complaint - naming Lagrange, Bonnett and Barnes as defendants and asserting "wrongful termination, retaliation, discrimination, work injury, harassment"); CP 142, 156-57 (Amended Complaint - making allegations regarding pre-termination investigatory actions of Lagrange, Bonnett and Barnes); CP 420-21 (Additional Amended Complaint - making allegations regarding pre-termination investigatory actions of Lagrange, Bonnett and Barnes).

[31] *See supra*, fn.30.

Harbord's obvious attempt in both lawsuits to challenge the termination of her employment by relying on the same transactional nucleus of facts with regard to the actions of Safeway's employees; (ii) the trial court's prior rejection of her claim that her termination was motivated by unlawful discrimination or retaliation or was contrary to public policy, combined with her attempt to reassert these same claims here and her failure to articulate any other cognizable claims against Safeway or its employees; and (iii) the fact that she had more than seventeen months during Lawsuit #1 to develop her case and add additional claims and defendants.[32]

ii. Lagrange, Bonnett, Barnes and Safeway Constitute the Same Persons and Parties

Res judicata also applies because the parties and quality of persons involved in Lawsuit #1 are the same as those involved in this lawsuit.

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[32] *See Pederson*, 103 Wn. App. at 72 (to asses whether causes of action are identical, a court may consider: (i) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (ii) whether substantially the same evidence is presented in the two actions; (iii) whether the suits involved infringement of the same right; and (iv) whether the two suits arise out of the same transactional nucleus of facts)*; Kuhlman*, 78 Wn. App. 115, 124, 897 P.2d 365 (1995) (finding the same subject matter even where the claims were different, because the basis of the claims was the plaintiff's alleged deprivation of a constitutional right and tortious harm resulting from false allegations); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 865, 93 P.3d 108 (2004) (res judicata applies not only to points upon which the court was actually required to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties might have brought forward at the time); *See* 14A Karl B. Tegland, Washington Practice**:** Civil Procedure § 35:25, at 527 (2nd ed. 2009) ("The issue of whether the subject matter of the two proceedings is the same usually overlaps with the issue of whether the cause of action or claims are also the same.")

Specifically, while Safeway was the sole defendant in Lawsuit #1, for purposes of the current lawsuit, Lagrange, Bonnett and Barnes should be construed as the same party as Safeway based on their privity with Safeway. *See Thompson v. King Cnty.*, 163 Wn. App. 184, 192-195, 259 P.3d 1138 (2011) (discussing privity between employer and employee).[33]

The circumstantially similar case of *Kuhlman v. Thomas* illustrates the proper application of privity between employer and employee to satisfy the same parties and quality of persons requirements for res judicata. In that case, a plaintiff-employee who had been disciplined for allegedly harassing female co-workers brought an action against his employer claiming the employer breached his employment contract and used a disciplinary procedure that violated his right to due process. 78 Wn. App. at 118. This action was dismissed. *Id.* The plaintiff subsequently brought another lawsuit against individual officers and employees of his employer, alleging due process violations, defamation and wrongful interference with a business expectancy. *Id*. The court found that while these individuals were not parties in the first action, they shared privity with the employer in that action, because the employer's

[33] *See also Ensley v. Pitcher*, 152 Wn. App. 891, 905-07, 222 P.3d 99 (2009) (finding employer/employee relationship sufficient to establish privity, thereby satisfying the (i) same persons and parties and (ii) quality of persons requirements of res judicata; the "quality of persons" requirement of res judicata simply requires a determination of which parties in the second suit are bound by the judgment in the first suit).

liability in the first lawsuit was premised entirely on the actions of its employees. *Id*. at 121-22. Specifically, the plaintiff complained that the employees' accusations of harassment were false and that, as a consequence, the employer's officials had wrongfully suspended and demoted him. *Id*. The suit against the employer was therefore essentially a suit against its employees; in other words, whether the employer violated the plaintiff's rights turned on the propriety of the conduct of its employees. *Id*. Having defended that suit, the employer essentially acted as the employees' representative and protected their interests. *Id*. Under these circumstances, the *Kulman* court determined that the employer and its employees must therefore be viewed as sufficiently the same, if not identical, and res judicata applied to bar the plaintiff's second lawsuit against the employees. *Id*. at 121-25.

Here, like *Kuhlman*, while Safeway was the only defendant in Lawsuit #1, in that action Ms. Harbord was attempting to hold Safeway liable for the actions of its individual employees–specifically, the efforts of Lagrange, Bonnett and Barnes to investigate concerns regarding Ms. Harbord's work performance and conduct (including by, among other things, reviewing footage from store security cameras and requesting information from Ms. Harbord) and the resulting decision of Lagrange and

Bonnett to terminate her employment in May 2011.[34] The court rejected Ms. Harbord's claims that those actions were unlawful when it granted Safeway's motion for summary judgment in Lawsuit #1. CP 3837-3839. While Ms. Harbord could have asserted and attempted to establish claims for personal liability of Lagrange, Bonnett and Barnes in Lawsuit #1, the fact that she failed to do so does not defeat the shared identity of the parties here, where she is again attempting to challenge these same actions and decisions by asserting claims against Lagrange, Bonnett and Barnes as individual defendants. *See, e.g.*, *Ensley*, 152 Wn. App. at 902-03 (patron's lawsuit against bartender for negligent over-service barred by res judicata based on dismissal of patron's prior action against bartender's employer, where employer's liability in first action turned solely on theory of vicarious liability for bartender's actions). Consequently, res judicata bars Ms. Harbord from re-litigating these same issues and claims against Safeway's employees (and Safeway) in the present lawsuit and she does not (and cannot) identify any cognizable causes of action against Lagrange, Bonnett or Barnes that would fall outside the scope of this

[34] *See* CP 3813-3823 (detailing history of problems with Ms. Harbord's performance and conduct and events in Spring 2011 that precipitated the termination of her employment, including the respective roles of Lagrange, Bonnett and Barnes); *supra* p. 36, fn.30 (identifying sameness of Lawsuit #1 and the present case with regard to the factual assertions and legal claims pertaining to Safeway and its employees).

bar.[35]

b. Harbord's Claims are Barred by Collateral Estoppel

To the extent Ms. Harbord has raised any identifiable claims that are sufficiently different from those raised in Lawsuit #1 to avoid the application of res judicata, those claims are otherwise barred by collateral estoppel. Collateral estoppel, or issue preclusion, prevents re-litigation of an issue after the party estopped has already had a full and fair opportunity to present its case. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The requirements for application of the doctrine are: (i) the issue decided in the prior adjudication must be identical with the one presented in the second; (ii) the prior adjudication must have ended in a final judgment on the merits; (iii) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (iv) application of the doctrine must not work an injustice. *Id*. at 562. Here, the issue of whether Safeway and its employees were motivated by unlawful discriminatory or retaliatory animus or instead had legitimate business reasons for their actions in reaching the decision to terminate Ms. Harbord's employment was previously resolved with a final judgment in

[35] For example, at the trial court Ms. Harbord did not (and cannot now) identify any cause of action against any individual defendant that is (i) independent of the facts and causes of action asserted against Safeway in Lawsuit #1, and thus (ii) could result in a finding of independent liability of an individual defendant <u>without</u> conflicting directly with the trial court's ruling in Lawsuit #1 that Safeway was not liable.

Lawsuit #1 by the trial court's granting of Safeway's motion for summary judgment,[36] and the application of collateral estoppel will not work an injustice given that Ms. Harbord had seventeen months to engage in discovery and prepare her case in Lawsuit #1.

c. Harbord Does Not and Cannot State or Establish the Elements of Any Cognizable Claim against Hurley

Ms. Harbord's Complaints, SJ Response and Opening Brief set forth an array of inflammatory and unfounded allegations of wrongdoing by Hurley in his role as counsel for Safeway during the course of Lawsuit #1.[37] These allegations only reveal Ms. Harbord's failure to understand (and/or refusal to accept) the law and applicable court rules. In short, she does not and cannot identify any cognizable legal claim against Hurley, much less establish the facts necessary to support any such claim.

As a threshold issue, even if Ms. Harbord's groundless assertions were supported by admissible evidence (they are not), Hurley has absolute

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[36] 14A Karl B. Tegland, Washington Practice: Civil Procedure § 35:34 at 557 and § 35:42 at 573 (2nd ed. 2009) ("The cases defining the term *final judgment on the merits* in the context of res judicata should also serve to define the term in the context of collateral estoppel."; "There is at least some suggestion that summary judgments may have collateral estoppel effects.").

[37] Contrary to Ms. Harbord's unsupportable assertions: every action Hurley took during his representation of Safeway in Lawsuit #1 was in compliance with applicable rules and laws; Hurley did not misrepresent any fact or law to Ms. Harbord or take any action that was intended to deceive Ms. Harbord; and Hurley in fact went to great lengths in an effort to communicate with her by providing frequent written correspondence (which appears to have been entirely ignored by Ms. Harbord) addressing her concerns and providing context for his actions. CP 3529 (¶47).

immunity pursuant to the litigation privilege for the actions he took as counsel for Safeway during the course of Lawsuit #1. *See McNeal v. Allen*, 95 Wn. 2d 265, 267, 621 P.2d 1285 (1980) ("The privilege of attorneys is based upon a public policy of securing to them as officers of the court the utmost freedom in their efforts to secure justice for their clients."); *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d 931 (2004) (finding attorneys absolutely immune from plaintiff's claims of, *inter alia*, outrage, infliction of emotional distress and civil conspiracy arising from attorneys' representation of parties in lawsuits brought previously against plaintiff); *Wynn v. Earin*, 163 Wn.2d 361, 369, 181 P.3d 806 (2008) (application of immunity is a question of law). Moreover, Ms. Harbord's claims against Hurley amount to her false and unfounded assertions that he violated various Rules of Professional Conduct ("RPC") in his representation of Safeway in Lawsuit #1. *See, e.g.*, CP 37, 157-158, 411; Opening Brief at 9. Such assertions cannot support any cause of action against him. *See Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) ("Because the [Code of Professional Responsibility] and RPC explicitly, and in what we deem to be clear and unambiguous language, disclaim any intent to create civil liability standards, we refuse to hold their violation creates a cause of action for malpractice.").

Furthermore, even setting aside Ms. Harbord's failure to identify a

sustainable cause of action against Hurley, the unfounded assertions in her Complaints, SJ Response and Opening Brief fail to identify any wrongdoing by Hurley and instead simply reveal Ms. Harbord's own confusion and lack of understanding of applicable law and court rules and, at most, amount to routine matters for resolution by the trial court in Lawsuit #1. For example, she is flatly incorrect in her position that Hurley acted improperly when he worked with Bean, her counsel at the time, to reach agreement on the routine Stipulated Protective Order that was filed and approved by Judge Coughenour when Lawsuit #1 was before the Federal Court, rather than communicating directly with her at that time and obtaining her signature on the stipulation. *See, e.g.*, CP 35, 43-44, 144-148, 410-413, 4133-4134; Opening Brief at 9-12. What Ms. Harbord fails to understand (or refuses to accept), of course, is that it was Hurley's responsibility to work with her legal representative at that time and it would have been a violation of Rule of Professional Conduct 4.2 for Hurley to bypass her attorney and communicate directly with her regarding any matter related to her lawsuit against Safeway.[38]

Ms. Harbord also fails to (and simply cannot) explain how she was

[38] RPC 4.2, "Communication with Person Represented by Counsel," provides as follows: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

harmed by the routine Stipulated Protective Order, which: (i) was based on the Federal Court's model order for the handling of confidential information; (ii) gave both parties equal protections; (iii) did not prevent the filing (or guarantee the sealing) of any materials obtained in discovery; and (vi) (in Judge Coughenour's words) did "not hinder Plaintiff's presentation of her case." *Supra*, Part III.B.1. Furthermore, the trial court in this matter granted Defendant Bean summary judgment on Ms. Harbord's claim that he acted improperly by agreeing to enter into the Stipulated Protective Order. *Supra*, Part III.C.3. The trial court did so because Ms. Harbord failed to offer evidence that could support a finding that Bean violated the attorney judgment rule by agreeing to the Stipulated Protective Order. CP 1186-1187; RP 21:13-23. Accordingly, Hurley's actions in working with Bean to agree to this routine order certainly cannot support any cause of action against Hurley.

Ms. Harbord also seems to claim that Hurley acted improperly by not filing a document in Lawsuit #1 with the Federal Court attesting to Ms. Harbord's return of all documents received in discovery from Safeway in Lawsuit #1 that were labeled "Confidential." *See, e.g.*, CP 35, 43-44, 144-148, 410-413, 4133-4134; Opening Brief at 9-12. However, this accusation ignores the fact that, by her own admission, Ms. Harbord did not return any of these materials to Hurley (as Safeway's counsel)

until April 28, 2014 (CP 413), several weeks after the Court's April 1, 2014 order remanding Lawsuit #1 to the trial court and after repeated notices from the Federal Court that it lacked jurisdiction over the matter and thus was no longer the proper place to file submissions. CP 3529 (¶¶44-46), 3904-3909. Accordingly, Hurley sent a letter to Ms. Harbord on May 2, 2015, in which he (i) explained that he did not deem it appropriate or necessary to file anything further regarding the Stipulated Protective Order given the remand of the matter and the Federal Court's lack of jurisdiction, but (ii) assured her that, as far as Safeway was concerned, "the Court's Protective Order no longer has any effect or application and [she] may disregard it" and she was "released from any obligations" under that order. CP 3536 (¶28), 3775-3777.

Ms. Harbord also seems to be asserting that, during Lawsuit #1 Hurley did not produce a copy of her "personal file" and other documents from her time as an employee of Safeway. CP 37, 155; Opening Brief at 16-17. This assertion illustrates the absurd, costly and harassing manner in which Ms. Harbord has conducted herself in both Lawsuit #1 and this matter. Contrary to her assertion, Safeway's employee file and other documents relating to Ms. Harbord were included among the more than 1,100 pages of documents that Safeway produced to her on **three** different occasions during Lawsuit #1 in response to discovery requests that were

served on Safeway when she was represented by Bean. CP 3524-3525 (¶¶15-17). On the second and third productions, when Hurley produced this file and other documents directly to Ms. Harbord in hard copy, she refused to accept and returned the documents to Hurley, despite the fact that Judge Kimberly Prochnau had ordered her in open court to accept the documents. CP 3525 (¶¶17-19), 3669. Accordingly, her suggestion that she has a cause of action against Hurley because she did not receive her personnel file further compounds the sanctionable nature of this lawsuit and her current appeal.[39]

C. The Trial Court Did Not Abuse its Discretion in Addressing Harbord's Various Requests and Complaints

Without supporting citations to the record, Ms. Harbord appears to allege that the Safeway Defendants did not serve her with the SJ Motion and "other [unspecified] documents" and that she "did not have enough time to file," without specifying what documents she allegedly did not have time to file. Regardless, these claims were heard and properly addressed by the trial court with regard to the SJ Motion, the trial court did

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[39] Ms. Harbord's allegation of wrongdoing with regard to Safeway's obligations to produce documents is particularly galling given the repeated efforts of Hurley to produce documents to her in Lawsuit #1 and the fact that the court sanctioned Ms. Harbord in the Lawsuit #1 for flatly refusing to respond in any way to Safeway's discovery efforts, despite a court order requiring her to do so. *Supra*, Part III.B.2 & 3. Ms. Harbord even persists in this case in insisting that she had no obligation to comply with Civil Rules 26, 33 and 34 in Lawsuit #1. *E.g.*, CP 37 at ¶3.11 (denying obligations to comply with CR 26, 33 and 34) and CP 153 at ¶3.36 (same).

grant her an extension of time to respond to the SJ Motion, she was properly served the SJ Motion via mail, and an additional copy of the SJ Motion was made available to her pursuant to her request (and she refused to accept the additional copy on two visits to the offices of counsel for the Safeway Defendants). *Supra*, Part III.C.4. Thus, the trial court did not abuse its discretion in determining the appropriate extension of time to respond to the SJ Motion[40] and resolving her assertion that she was not served with the SJ Motion.[41]

D. Safeway is Entitled to Attorney Fees and Costs on Appeal

Safeway requests an award of reasonable attorney fees and costs incurred in defending against Ms. Harbord's appeal (as well as an express affirmance of the trial court's Sanctions Order (CP 6202-6204), to which Ms. Harbord offers no substantive challenge[42]). RAP 18.9(a) allows for

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[40] *See Alaska Nat. Ins. Co. v. Bryan*, 125 Wn. App. 24, 40, 104 P.3d 1 (2004) (trial court has discretion in determination of whether to grant continuance of motion for summary judgment); *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 364, 617 P.2d 704 (1980) (CR 6(d)'s filing deadlines are not jurisdictional and reversal for failure to comply requires a showing of prejudice); *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 236-41, 88 P.3d 375 (2004) (trial court did not abuse discretion and no showing of prejudice resulting from order shortening time for summary judgment motion).

[41] *Bank of the West v. F & H Farms, LLC*, 123 Wn. App. 502, 504, 98 P.3d 532 (2004) (proof of mailing gives rise to presumption that mail was received; burden of proof is on party claiming lack of service to show it did not receive mailing; weight given to factual assertions on service issue is for trial court to decide); *Petta v. Dep't of Labor & Ind.*, 68 Wn. App. 406, 409, 842 P.2d 1006 (1992) ("substantial compliance" for service requires actual notice or service in a manner reasonably calculated to give notice).

[42] *Watson v. Maier*, 64 Wn. App. 889, 898, 827 P.2d 311, 316 (1992) (trial court retains

such an award when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). 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).

This standard is satisfied here. Ms. Harbord's complete failure to identify supporting evidence in the record and to present meaningful legal argument addressing the undisputed bases for the trial court's SJ Order preclude any arguable challenge to the trial court's decision, particularly given that: (i) counsel for the Safeway Defendants warned Ms. Harbord after she filed this lawsuit that her claims were wholly without merit and that they would seek sanctions if she did not voluntarily dismiss her lawsuit (CP 3502-3503); (ii) the trial court clearly explained in the SJ Order the bases for granting summary judgment to the Safeway Defendants; and (iii) the trial court found that Ms. Harbord's entire lawsuit was frivolous pursuant to RCW 4.84.185 and that her Complaints violated CR 11 (CP 6202-6206). *See Fid. Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 474, 128 P.3d 621, 627 (2005) (awarding attorney fees

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broad discretion as to the nature and scope of award for CR 11 sanctions, which can include the full amount of attorney's fees).

pursuant to RAP 18.9 where appeal was "totally devoid of any relevant authority to support its arguments, and its claims do not have any basis in law"); *In re Guardianship of Cobb*, 172 Wn. App. 393, 406–07, 292 P.3d 772 (2012) (awarding sanctions where appeal was "not based on legal authority or even arguable facts or law," "was done with an apparent lack of research about or knowledge of the proper role of the appellate court" and was pursued "despite the trial court's clear message that continued litigation in this matter was edging on frivolity"); *Stiles v. Kearney*, 168 Wn. App. 250, 267-68, 277 P.3d 9 (2012) (awarding attorney fees where no abuse of discretion in trial court's imposition of sanctions and appellant's other arguments failed because they lacked merit, relied on a misunderstanding of the record, required consideration of evidence outside the record, or were not adequately briefed).

V. CONCLUSION

For the foregoing reasons, Safeway requests that the Court affirm the trial court and award Safeway its fees and costs pursuant to RAP 18.9.

Dated this 15th day of August, 2016

Respectfully submitted,

K&L GATES LLP

By s/Daniel P. Hurley
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Attorneys for Respondents
Safeway Inc., Mike Lagrange, Sue Bonnett, Ken Barnes and Daniel P. Hurley

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 August 15, 2016, I caused to be served the foregoing Brief of Respondent via U.S. Mail, First Class postage prepaid on the following:

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DATED this 15th day of August, 2016 at Seattle, Washington.

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