

72731-1

FILED  
Mar 01, 2016  
Court of Appeals  
Division I  
State of Washington  
No. 72731-1-I

72731-1

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COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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HATSUYO "SUE" HARBORD,

Appellant,

v.

SAFEWAY INC.,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

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

On October 24, 2014, the trial court entered an Order Granting Safeway’s Motion to Dismiss and Motion for Summary Judgment (“SJ Motion” and “SJ Order”), dismissing Ms. Harbord’s lawsuit on two bases. CP 1895-1897. First, the trial court found that Ms. Harbord had “willfully refused to participate in the discovery process in this case in a deliberate disregard for the efficient administration of justice,” rendering inappropriate any sanction less than dismissal of her lawsuit. CP 1896; RP 31:1-34:12.<sup>2</sup> The trial court emphasized Ms. Harbord’s refusal to comply with its prior order, in which it had compelled her to respond to discovery requests Safeway had served on her over a year earlier and

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<sup>1</sup> Clerk’s Papers are cited herein as “CP”.

<sup>2</sup> Unless noted otherwise, report of proceedings (“RP”) cites are to the 10/24/14 hearing.

warned her that the “[f]ailure to follow this order and provide timely discovery may result in dismissal of the action.” CP 1896; RP 31:1-32:25; CP 1265-1267. Second, the trial court also granted summary judgment for Safeway, because Ms. Harbord “failed to set forth competent admissible evidence sufficient to make a showing that a genuine issue of material fact exists concerning Safeway’s purported liability.” CP 1896; RP 33:1-23.

In her Opening Brief (“Op. Br.”),<sup>3</sup> Ms. Harbord makes no attempt to (and cannot) justify her refusal to comply with the Civil Rules and the trial court’s order to respond to Safeway’s discovery. Thus, the trial court’s dismissal of her lawsuit as a sanction for that refusal is uncontested and, standing alone, provides a basis for this Court to affirm the trial court and impose sanctions on Ms. Harbord for her frivolous appeal. Moreover, Ms. Harbord also did not (and cannot) establish the *prima facie* elements of her discrimination, retaliation and public policy claims or otherwise identify evidence to show that Safeway’s legitimate reasons for its actions were unworthy of belief or that discrimination was a substantial factor in any of those actions, and thus the trial court’s granting of summary judgment to Safeway provides a separate basis to affirm the trial court.

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<sup>3</sup> Pursuant to the Order Denying Motion to Modify (dated 1/29/2016), this Court ruled that Ms. Harbord’s opening brief would be limited to the brief she filed on August 6, 2015 (titled “Plaintiff’s Preliminary Brief”). Accordingly, none of the numerous documents Ms. Harbord filed after August 6, 2015 are addressed in this response brief.

## II. STATEMENT OF THE ISSUES

1. The trial court did not abuse its discretion in dismissing Ms. Harbord's lawsuit as a sanction for her refusal to comply with the Civil Rules and the trial court's order compelling her to respond to Safeway's discovery.
2. The trial court properly granted summary judgment on Ms. Harbord's claims of discrimination, retaliation and wrongful termination.
3. The Court should award Safeway its attorney fees and costs on appeal pursuant to RAP 18.9, because Ms. Harbord's appeal is frivolous.

## III. COUNTERSTATEMENT OF THE CASE

### A. Factual Background as Set Forth in Safeway's SJ Motion<sup>4</sup>

#### 1. Safeway and the Port Angeles Store

Safeway is a large retail grocer with supermarkets, manufacturing and processing plants throughout the United States and Canada. CP 1374 (¶3). Safeway maintains a retail grocery store in Port Angeles (the "Store"), which employs approximately 125 employees. *Id.* Employees at the Store are represented by the United Food and Commercial Workers International, Local 21, for collective bargaining purposes. *Id.* Mike Lagrange is the Store's manager and oversees all operations at the Store, including employee hiring and termination decisions. CP 1374-1375 (¶2).

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<sup>4</sup> The facts asserted in this Section III.A were set forth in Safeway's SJ Motion (CP 1335-1361) and its reply in support of the SJ Motion (CP1809-1813), with the citations herein to the declarations supporting (and cited in) those pleadings. CP 1362-1543 (declarations and exhibits supporting SJ Motion); CP 1814-1818 (declaration supporting SJ reply).

Store Manager Lagrange approved the hiring of Ms. Harbord as an office clerk and bookkeeper on September 5, 2004. CP 1374-1375 (¶¶5-7). Her duties included manning the customer service desk, processing money orders and lottery tickets, answering phones, ringing up customer purchases, filling coin changers,<sup>5</sup> making cash loans from the cash office to check stand registers (known as “office calls”) and cashing up.<sup>6</sup> *Id.* She also later worked as a video clerk with office clerk duties. *Id.*

## 2. Ms. Harbord’s Poor Performance and Conduct

While Ms. Harbord was notably slow in the performance of her duties even during the early stages of her employment, she usually managed to perform her duties within the time allotted by the Store. CP 1375 (¶8). However, when faced with an economic recession, Safeway implemented operational changes that reduced the amount of time allotted for certain activities. *Id.* As Safeway’s operational changes called for more efficiency, Ms. Harbord’s performance was no longer adequate compared with her peers. *Id.* Over the last three years of her employment, Safeway issued eight Corrective Action Notices (“CAN”) to

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<sup>5</sup> A coin changer is a machine at each grocery check-stand that automatically provides customers with change for their purchases when they pay in cash. *Id.* (¶6).

<sup>6</sup> The term “cashing up” refers to balancing daily income from sales, checks, debits and cash against the total store sales and cash held in the store safe. *Id.* Basically, cashing up involves balancing the amount of money the store has on hand against how much money the store is supposed to have on hand. *Id.*

her in an effort to identify, and give her the opportunity to correct, its increasing concerns regarding her work performance and conduct.<sup>7</sup>

The disciplinary notices that Safeway issued to Ms. Harbord in 2008 and 2009 addressed range of issues, including her refusals to follow instructions from supervisors, poor quality and quantity of work (despite extensive retraining on her regular job duties), and her refusal to sign routine documents acknowledging important company policies.<sup>8</sup>

*a. Audit Results in Changes to Ms. Harbord's Duties*

In September 2009, Safeway performed an annual Corporate Security Audit of the Store. CP 1379 (¶18). The auditor found numerous deficiencies and errors with Ms. Harbord's work, and her inability to properly perform her duties was apparent. *Id.* She took too long to perform her duties and her cash ups were not accurate, which was one of the critical errors noted in the audit. *Id.* During the audit, Ms. Harbord also failed to lock the safe<sup>9</sup> or account for cash and credit cards in the lost

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<sup>7</sup> Safeway uses CANs when its concerns regarding an employee are too serious and/or recurrent to address with a verbal warning. CP 1375-1376 (¶9). CANs are used to offer employees the opportunity to correct their actions before the Store's disciplinary response escalates to termination and to provide the Store with a written record of employee conduct so the Store can identify patterns and make determinations as to whether an employee's conduct has changed over time. *Id.*

<sup>8</sup> CP 1376-1378 (¶¶ 10-15, Exs. A-F).

<sup>9</sup> Ms. Harbord had previously been told on August 10 that under no circumstances was she to leave the safe open or on "day lock" setting when she left the cash office. CP 1378 (¶17). Leaving the safe on day lock is prohibited when nobody is in the cash office. *Id.*

and found. *Id.* Ms. Harbord was subsequently instructed during two conference calls with Safeway loss prevention (“LP”) personnel to email the LP department whenever a cash-up was off by more than \$50. *Id.*

Of the next 34 cash ups Ms. Harbord performed, she was off by more than \$75 thirty-one times and more than \$500 sixteen times, but she failed to email the LP department on any of these occasions. *Id.* She blamed her problems on the fact that she worked the night shift and could not contact Safeway’s national accounting office with questions about discrepancies between the accounting department’s reports and the Store’s reports. *Id.* (§19). In response, Lagrange changed her shifts so that she would cover the morning-shift cash up and arranged for approximately 80 additional hours of training for her from office clerk mentors/trainers to improve her performance of her duties, particularly cashing up. *Id.*

Despite the additional training, Ms. Harbord’s productivity remained poor and the accuracy of her cash ups worsened. CP 1379-1380 (§20). As a result, Lagrange met with her on December 13, 2009 and informed her that she would no longer perform accounting duties and would be switched to video shifts with continued performance of some office functions, such as office calls and filling the coin changers, though she would no longer perform cash ups. *Id.* Lagrange also offered her the option to work in the floral department or as a checker with the

opportunity for higher wages, but she insisted that she only wanted to perform office and video clerk duties. *Id.* The change to Ms. Harbord's duties necessitated a shift in her work schedule. *Id.* Despite being told in person and on the phone about the change, she insisted on reporting for work at her old start time. *Id.*

*b. Safeway Discovers a Cause of Poor Productivity*

In early 2010, Safeway discovered at least one factor contributing to Ms. Harbord's poor productivity. CP 1389 (¶21). At this time, unbeknownst to her, the security camera pointed at the Store's cash office was adjusted during a cleaning and a corner of the office that had previously been out of the camera's sight was now plainly in view. *Id.* In reviewing the camera footage, Lagrange discovered that Ms. Harbord was standing for large chunks of time—ten to fifteen minute stretches at a time—writing notes to herself in the corner of the office that had previously been out of view. *Id.* From the footage, Lagrange learned that Ms. Harbord was copying down information kept in the cash office that included the day's over/short reports for tills, cash position reports and other confidential financial information maintained in the cash office. *Id.* This violated Safeway's Privacy Awareness Compliance, on which Ms. Harbord had been trained multiple times since 2007. *Id.* (¶21, Exs. J, K, L). On April 1, 2010, Lagrange, Ms. Harbord and her union

representative met to discuss her performance. *Id.* (§22). During this meeting, Ms. Harbord was directed to make two changes to improve her productivity: (1) stop writing notes to herself on company time and stop copying confidential information; and (2) fill coin changers on the desk closest to the safe in order to be more efficient. *Id.*

Another issue Lagrange noticed when reviewing camera footage was that Ms. Harbord inexplicably moved the computer terminal periodically throughout her shift. CP1381 (§23). Concerned that this would damage the computer, Ms. Harbord was instructed not to move the computer terminal during her work shifts. *Id.* Later that same day, camera footage showed her moving the computer terminal. *Id.*

Ms. Harbord also continued to struggle in many facets of her job, including operation of the safe. *Id.* (§24). For example, she left the safe on the day lock setting when she left the cash office on June 22, 2010. *Id.* Upon discovery of this issue by her supervisor, she was told that if she left the safe on day lock again she would be written up. *Id.* Two days later, Ms. Harbord again left the safe on day lock before leaving the cash office at 9:45 p.m. *Id.* She also continued to fail to complete other tasks of her job, including refilling coin changers and responding to office calls when requested. *Id.* Due to her continued poor performance, Lagrange again met with her on November 19, 2010. *Id.* Lagrange told her that it was

unacceptable for her to work past her scheduled shift end time, as she had regularly been doing, and that her failure to accurately complete her tasks within their assigned times would result in progressive discipline. *Id.*

*c. Corrective Actions: December 2010 to February 2011*

On December 30, 2010, Safeway issued a CAN to Ms. Harbord for disregarding safety procedures when she opened a roll of coins using a loose razor blade and injured her finger. *Id.* (¶25, Ex. M). Again, she signed the CAN under protest, claiming that the injury was due to the fact that she had too many duties to perform and not enough time. *Id.* (¶25).

On January 8, 2011, Safeway issued another CAN to Ms. Harbord for quantity of work and poor work performance. CP 1381-1382 (¶26, Ex. N). Ms. Harbord did not clock out of work until 9:57 p.m. on December 31, though her scheduled shift-end time was 9:30 p.m. (*Id.* ¶26). She failed to complete her duties in a timely manner, as she had been repeatedly instructed to do, despite her light customer volume on December 31. *Id.* Ms. Harbord again signed the CAN under protest. *Id.*

On February 9, 2011, Safeway issued two CANs to Ms. Harbord and suspended her from work for three days for a number of specific issues related to carelessness, quantity and quality of work, and wasting of time. CP 1382-1383 (¶¶27-28, Exs. O, P). For example, during her shifts on February 4, 5 and 7, she made multiple significant bookkeeping errors

(*e.g.*, resulting in a \$400 cash shortage) and failed to follow directions regarding cash office procedures (*e.g.*, \$290 left unsecured). *Id.* (¶27). Lagrange, Ms. Harbord and her union representative met on February 9 to review the actions during the course of her shift that slowed her progress or created mistakes. CP 1383-1384 (¶29). Lagrange discovered at this time that Ms. Harbord was still writing notes to herself on company time, copying Safeway's confidential or proprietary information and placing work product the farthest point away from the tools provided to complete her tasks, in direct opposition to what she had previously been told. *Id.* She signed one of the CANs under protest and claimed that her bookkeeping errors were due to the fact that she did not have training materials to reference on those days, even though the tasks on which she committed errors were routine and should not have required reference to such materials. CP 1382-1383 (¶27). She signed the other CAN under protest without giving any reason for her protest. CP1383 (¶28). After the meeting, Lagrange observed that Ms. Harbord continued to spend 30 minutes or more each shift writing notes to herself, which she appeared to try to conceal from the security camera. CP 1383-1384 (¶29).

*d. The March 10, 2011 Money Order Transaction*

On March 10, 2011, Ms. Harbord completed a money order transaction for \$150 with no customer present and for which she did not

print a money order. CP 1384 (¶30). Later in her shift, when she balanced her till, the register was \$150 short. *Id.* She left a note that night that stated: “\$150 MO was cancelled.” *Id.* Wondering why the till was \$150 short, Lagrange asked her on March 11 to provide a written statement explaining the transaction. *Id.* She refused, instead telling Lagrange that she did not have time. *Id.* The next day, she called in sick for her shift. *Id.* Immediately thereafter, she took vacation, and thus never completed the written statement. *Id.*

*e. Safeway Investigates its Concerns*

Given his concerns regarding the mysterious money order transaction, and the fact that he was continuing to observe from the security camera footage that Ms. Harbord was still spending significant amounts of time furtively copying company information and concealing and keeping her notes, Lagrange requested that Safeway Labor Relations Manager Sue Bonnett assist him in investigating his concerns. CP 1384-1385 (¶31). Bonnett in turn reached out to Ken Barnes, a Loss Prevention Investigator for Safeway. *Id.*; CP 1362-1365.

*f. Ms. Harbord’s Suspension and Termination*

Based on Safeway’s concerns regarding Ms. Harbord’s activities, including her suspicious note-writing (despite the directive to cease engaging in that activity) and the unexplained March 10 money order

transaction, Barnes made the decision to suspend her employment in early April 2011 pending completion of Safeway's investigation. CP 1662-1365 (¶3). As part of the investigation, Barnes interviewed Ms. Harbord on April 6 with Lagrange, Jason Ostrander (assistant store manager) and her union representative present. CP 1363 (¶4). Barnes questioned her about her note-taking, to which she stated that she took notes to "protect herself," though she could not explain why or from what she needed protection. *Id.* She also could not explain why she was observed on security camera footage pretending to throw papers away and instead putting them in her pocket. *Id.* Barnes also asked her why she disregarded previous corrective actions to stop copying company information, but she refused to respond. *Id.*

In addition to her note-writing, Barnes asked Ms. Harbord about the March 10 money order. CP 1363-1364 (¶5). She stated that she thought she had failed to void a money order sale earlier in the day. *Id.* When questioned about why she then performed a sale transaction instead of a refund, she did not give an answer. *Id.* When questioned about why she had refused to provide information regarding the money order when Lagrange had asked her to do so, she stated that the note she left was sufficient and she did not have time to provide more information. *Id.* Barnes then asked her why she had come into the Store five nights in a

row during her vacation and inquired as to whether she was watching the other employees.<sup>10</sup> *Id.* Ms. Harbord denied that she was doing so. *Id.*

During the April 6 interview, Barnes requested that Ms. Harbord complete a written statement addressing her: (1) copying of company financial information; (2) failure to write a statement or cooperate regarding the March 10 money order transaction; and (3) appearance in the Store on five nights during her vacation. CP 1364 (¶6). Barnes requested that she provide the statement by 5:00 p.m. on April 8. *Id.* Ms. Harbord demanded to know what would happen if she did not provide the statement and claimed that she did not have enough time (2 days) to do so. *Id.* Barnes told her that if she failed to provide a statement, Safeway would have to make its decision based on the information it had. *Id.*

On April 8, Barnes received Ms. Harbord's faxed statement, which failed to address the issues being investigated. *Id.* (¶7). Subsequently, Barnes discussed the statement with Bonnett, and a decision was made to provide Ms. Harbord with a list of specific questions for her to address. *Id.* (¶8); CP 1366-1367 (¶3). On April 20, Bonnett received a letter from

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<sup>10</sup> Ms. Harbord visited the Store five nights in a row during her vacation and stayed in or near the video department for about 45 minutes each night. CP 1385 (¶32). Other employees reported these incidents to Lagrange, because her presence seemed peculiar and made them feel uncomfortable, as they felt she was watching them. *Id.* Lagrange was also perplexed by these visits, given that Ms. Harbord lived in Sequim, a town that has its own Safeway store and is about a 15 to 20-minute drive from the Store. *Id.* While strange, Ms. Harbord was not suspended or discharged due to these incidents. *Id.*

an attorney providing responses on behalf of Ms. Harbord. CP 1367 (¶4, Ex. A). After reviewing the responses (which still did not address or alleviate Safeway’s concerns), Lagrange and Bonnett made the decision to terminate Ms. Harbord’s employment due to her repeated failures to follow instructions and violations of policies and procedures regarding confidential information, compounded by the long history of her refusals to perform assigned tasks, inadequate job performance and obstinate manner in dealing with her supervisors. CP 1385 (¶34); CP 1367 (¶5). Lagrange notified Ms. Harbord of her termination on May 6, 2011. *Id.*

## **B. Procedural Background**

Ms. Harbord filed her initial Complaint in this matter in King County Superior Court on May 24, 2013, and an Amended Complaint on June 2, 2013. CP 1-7; CP 19-24. At the time, she was still represented by Bean. *Id.* Safeway removed the case to the U.S. District Court for the Western District of Washington (“Federal Court”) on the basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) on July 1, 2013. CP 140-141. The case was subsequently remanded back to the state trial court.<sup>11</sup>

### 1. Ms. Harbord Refuses to Comply with Discovery Obligations

While the case was proceeding in Federal Court, Safeway served

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<sup>11</sup> While at no time during his representation of Ms. Harbord did Bean challenge the basis for removal (CP 140-142 (¶¶2-3)), Ms. Harbord later sought and obtained remand by asserting that her claims were for less than \$75,000. CP 141 (¶¶7-8, Ex. D at 1, Ex. E).

Bean with Defendant Safeway Inc.'s First Interrogatories and Requests for Production to Plaintiff Hatsuyo "Sue" Harbord (the "Discovery Requests") on October 10, 2013, setting forth routine interrogatories and document requests relevant to Ms. Harbord's claims and alleged damages. CP 940 (¶2, Ex. A (Discovery Requests)); CP 19-24 (Complaint). Though Ms. Harbord's objections and responses to the Discovery Requests were by rule due within 30 days after the requests were served, Safeway agreed to a thirty-day extension of this deadline. CP 940. Ms. Harbord did not respond to the Discovery Requests by that deadline. *Id.*

Given Ms. Harbord's failure to respond to the Discovery Requests by the agreed upon deadline of December 9, 2013, Safeway mailed a letter to her on January 8, 2014 (two days after a Federal Court order that allowed her to proceed *pro se* (CP 141 (¶5, Ex. C)), requesting that she respond to the requests. CP 941 (¶3, Ex. B). Safeway attached another copy of the Discovery Requests to this letter and noted that if Ms. Harbord failed to respond to the requests, Safeway would file a motion asking the Federal Court to issue an order compelling her to respond and awarding Safeway its expenses in bringing the motion. CP 941 (¶3, Ex. B at 3). Ms. Harbord still failed to provide any written responses or document productions in response to the requests. *Id.* Safeway nevertheless continued its efforts to communicate with Mr. Harbord regarding the

Discovery Requests and to warn her that it would file a motion compelling her to respond and seeking recovery of its fees. CP 940-943 (¶¶ 1-13, Exs. A-H). This effort involved multiple letters and repeated attempts to communicate with Mr. Harbord via phone between January 2014 and early March 2014. *Id.* Having still received no responses and being unable to engage Ms. Harbord in any meaningful discussion of the requests, Safeway filed a Motion to Compel Responses to Discovery with the Federal Court on March 11, 2014. CP 943 (¶14, Ex. H). Ms. Harbord did not respond to this motion, and the Federal Court remanded the case back to state court prior to issuing any ruling. CP 943 (¶¶14-15, Ex. I). After the remand, Safeway resumed its efforts to obtain responses (and to warn Ms. Harbord that it would seek sanctions for her failure to respond), with letters mailed on April 2, April 30, May 9, July 11 and July 30 and attempts to reach her by phone on multiple occasions in July and August. CP 943-45 (¶¶16-20, Ex. J at 4, Ex. K at 2, Ex. L at 1-2, Ex. M at 2-3,<sup>12</sup> Ex. N at 2); CP 937-39 (¶¶1-3). Ms. Harbord still failed to respond or to

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<sup>12</sup> In this letter, sent on July 11, 2014, Safeway provided yet another copy of the Discovery Requests, warned Ms. Harbord that it would file a motion to compel if she did not respond by July 18 or commit to responding by July 25, and made clear that while the Discovery Requests were prepared and served when the matter was in Federal Court and thus included a few references to the Federal Rules of Civil Procedures and the Federal Rules of Evidence, those references should be read as referring to the state court Civil Rules and Evidence Rules of the same numbers (specifically identifying Rules 26, 33 and 34). CP 944 (¶19, Ex. M at 1-2 & fn.1).

engage in any meaningful communications. CP 944-45 (¶¶ 21-22).

Therefore, on August 20, 2014, ten months after first serving the Discovery Requests, Safeway (again) filed a motion to compel Ms. Harbord to respond (“Motion to Compel”). CP 923-926, 940-1107, 937-39. On August 29, Ms. Harbord filed her response, in which she asserted: (1) there was no “agreement ... under rule 26, 33, 34”; (2) she had a “right to have privilege information/evidence until Trial”; (3) she did “not need to release information until trial date”; and (4) she had no obligation to follow Civil Rules 26 (general discovery provision), 33 (interrogatories) and 34 (document production). CP 1190 at 1-2, *passim*.<sup>13</sup> On September 2, Safeway filed its reply in support of its motion, noting Ms. Harbord’s continued failure to respond to the Discovery Requests or to provide any facts or legal argument in opposition to the Motion to Compel, and asking that the motion be granted and Safeway awarded its fees pursuant to Civil Rule 37(a)(4). CP 1201-1203.

On September 8, the trial court issued two orders addressing the Discovery Requests. In one order, the court denied several motions filed

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<sup>13</sup> In fact, Ms. Harbord repeated her defiance of Civil Rules 26, 33 and 34 in a series of filings, in which she, among other things, accused Judge Kimberly Prochnau of bias and sought a new judge. *See, e.g.*, CP 1184 (filed 8/29/14) (“Plaintiff is NOT doing this case with ... rule 33 interrogatories, rule 34 producing documents. Defendant wants rule 26, 33, 34.”); CP 1207 (filed 9/3/14) (“Plaintiff does NOT want Rule 26, 33, and 34.”); CP 1218 (filed 9/3/14) (same); CP 1239 (filed 9/5/2014) (“challenge to rule 26, 33, and 34”).

by Ms. Harbord and noted her erroneous belief “that the discovery rules do not apply to her or that she can choose not to be bound by them.” CP 1262. In the other order (the “Discovery Order”), the court granted the Motion to Compel and ordered Ms. Harbord to respond to the Discovery Requests “within 10 days of the entry of this Order” and to pay the costs Safeway incurred in preparing its motion. CP 1265-1267.<sup>14</sup> The order warned Ms. Harbord that the “[f]ailure to follow this order and provide timely discovery may result in dismissal of the action.” CP 1266.

Nevertheless, Ms. Harbord did not comply with the Discovery Order and continued to deny any obligation to follow Rules 26, 33 and 34,<sup>15</sup> even after Safeway filed its SJ Motion on September 19 seeking the

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<sup>14</sup> Safeway then filed a Motion for Reasonable Costs for recovery of the fees it was forced to incur in bringing the Motion to Compel. CP 1679-1704 (motion); 1995-1696 (note); 1712-1720 (decl.); 1705-1711 (decl.); 1721-1722 (decl. of service); 1852-1858 (opposition). On October 27, the trial court entered an order requiring Ms. Harbord to pay \$2,600 to Safeway. CP 1898-1901. Ms. Harbord has not complied with this order.

<sup>15</sup> *See, e.g.*, CP 1312-1317 (filed 9/18/14) (seeking “New Trial without rule 26, 33 and 34”); CP 1570-71 (filed 9/22/14); CP 1574-76 (filed 9/22/14) (“proposed order for New Trial Date without Rule 26, 33 and 34”); CP 1577 (filed 9/23/14) (“open refusal based on an assertion that no valid obligation exists for discovery”); CP 1290-1299 (filed 9/29/14) (claiming “no contract” for Rules 26, 33 and 34); CP 1615-1620 (filed 10/2/14) (seeking same); CP 1628-1647 (filed 10/3/14) (same); CP 1723-1727 (filed 10/13/14) (“new trial without Rule 26-37”); CP 1728-1749 (same); CP 1753-1757 (filed 10/14/14) (denying applicability of Rules 26-37); CP 1758-1791 (filed 10/14/14) (seeking “New Trial without rule 26, 33, and 34”); CP 1829-1845 (filed 10/20/14) (same); CP 1852-1858 (filed 10/21/14) (“Pro se did not have any obligation for discovery”); CP 1864-1867 (filed 10/23/14) (denying applicability of Rules 26-37); CP 1868-1873 (filed 10/23/14) (same).

sanction of dismissal. CP 1335-1361.<sup>16</sup> Moreover, even after the trial court granted the SJ Motion on October 24 (CP 1896), Ms. Harbord has continued to deny the applicability of Civil Rules 26 through 37.<sup>17</sup>

2. Harbord Falsely Claims She “Did Not Receive” the SJ Motion

Ms. Harbord asserts without any citation to the record that “she did not receive Defendant’s summary judgment document from Defendant,” and that she “picked [it] up 3 day before Summary Judgment day.” Op. Br. at 11. To the contrary, on September 19, Safeway used a process server to attempt to hand deliver its SJ Motion to Ms. Harbord at her personal residence. CP 1544-45. As Ms. Harbord’s own filing reveals, the process server was not able to find her at her home on that date, and so left the SJ Motion in an envelop pined on “her front porch.” CP 1586-88. Ms. Harbord admits that, at about 8:00 a.m. on September 24, she found this envelop. CP 1586-88. Safeway also mailed another copy of the SJ Motion to her via U.S. Express Mail on September 22. CP 1579-80.

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<sup>16</sup> Safeway also noted in its SJ Motion Mr. Harbord’s repeated return of documents mailed to her by Safeway (including documents the trial court ordered her to accept) and her failure to appear for her deposition, the notice of which Safeway had sent to her via certified mail and attempted to call her to discuss. CP 1423-1427; CP 1347-1350. Safeway further noted in filings on October 8, 2014, that the certified mail sent to Ms. Harbord with the notice of her deposition had been available for her to pick up since August 28 and as of October 8 she had not done so. CP 1669; CP 1685 (¶4).

<sup>17</sup> See CP 1938-1942 (filed 11/3/14) (denying applicability of Rules 26-37). While not to be considered as part of Ms. Harbord’s appellate brief (see this Court’s Order Denying Motion to Modify (dated 1/29/2016)), in the “Part of Brief” she filed on August 6, 2015, Ms. Harbord continues her defiance of Civil Rules 26 though 37 before this Court.

Instead of preparing a response to the SJ Motion, Ms. Harbord embarked on an effort to avoid it. Thus, on the same day she received that motion, she filed a document titled “unacceptable documents,” in which she admits receiving the documents left on her porch, but claims it was an “illegal delivery,” and that “[i]t has to be certified mail to make sure Plaintiff receive, and knows what Plaintiff has received before she opens it.” CP 1588. In that filing, she confusingly asserted that she “submitted Defendant’s delivery material? Unsealed package as evidence A to Judge Kimberley Prochnau’s office.” *Id.* The following day (September 25), she filed another document titled “Extention for hearing date 10/17/2014 RE: Defendant summary Judgment w/unacceptable delivery” (“Motion for SJ Extension”). CP 1590-1598. In this motion, she asserted that she does “not agree with summary judgment” and “has rights to go to trial,” and she sought to extend the hearing date for the SJ Motion and to have it heard “without oral argument.” CP 1590, 1594. She claimed that “Defendant’s delivery was unacceptable procedure without pro se’s signature, and a content list,” and while she admits she “found this package on September 24,” she claims that documents “need to be registered to get Plaintiff’s signature as Proof of delivery by themselves.” CP 1591, 1593, 1594.

On October 3, the trial court entered an order addressing the Motion for SJ Extension. CP1648-1650. In that order, the trial court

noted that Ms. Harbord appeared to be asking that the SJ Motion be “heard without oral argument” and that the hearing be postponed because she did not receive the “package” until September 24 and she is “dissatisfied with the manner of delivery and the lack of an inventory list.” CP 1650. The trial court noted in its order that Ms. Harbord did not comply with local rules in seeking the extension, including the need to provide a note for motion setting a hearing date, and advised her to re-file accordingly. *Id.*

Rather than following the direction from the trial court, Ms. Harbord instead filed a document on October 14 titled: “Pro se did not receive the document which it should be sealed package of motion RE: summary judgment from Defendant.” CP 1792-1793. In that document, she detailed how she had “received from Defendant’s address a package without any material content list on the package,” but she “returned this package.” CP 1792 (emphases added). As exposed by the very content and title of this filing, and its request that “the Court send Defendant’s motion for summary judgment document with material content list on the package,” Ms. Harbord had in fact again received (by mail this time) the SJ Motion, but had simply refused to accept it. CP 1792-1793.<sup>18</sup>

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<sup>18</sup> While Safeway maintains that no further evidence is necessary to resolve this appeal, if the Court determines otherwise on the basis of Ms. Harbord’s bald assertion (contradicted by her own admissions in the clerk’s papers) that she did not receive the SJ Motion, Safeway will move pursuant to RAP 9.11 for the admission of additional evidence in the

### 3. Ms. Harbord's Erroneous Insistence on "Certified Mail"

As the trial court record establishes, particularly through Ms. Harbord's own filings in the days immediately following Safeway's delivery and mailing of the SJ Motion to her and her contradictory assertion that she "did not receive" that motion from Safeway, Ms. Harbord holds the mistaken belief that unless a document is mailed to her with an "inventory list" on the outside of the envelop and sent via certified mail whereby she must (and in fact does) affirmatively sign to accept the document, she is free to ignore it and claim not to have received it.<sup>19</sup> In fact, Ms. Harbord repeatedly documented her refusal to accept packages that were mailed to her by Safeway's counsel.<sup>20</sup> This issue even came up

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form of declarations addressing Ms. Harbord's attempts to falsely deny receipt of the SJ Motion, including: (a) a declaration from the process server confirming the posting of the SJ Motion documents to Ms. Harbord's home on September 19, 2014; and (b) a declaration from Safeway's counsel explaining that (i) the SJ Motion Safeway's counsel mailed to Ms. Harbord on September 22 was returned on October 2 and marked as "unclaimed," and (ii) after again sending the SJ Motion to Ms. Harbord on October 2 via regular U.S. Mail, that package was also returned on October 20 and marked "refused."

<sup>19</sup> See, e.g., CP 828-36 (filed 7/30/2014) ("Defendant(s) Need to Send Material to Plaintiff by Certified Mail"); CP 1572 (filed 9/22/2014) (demanding "certified mail records"); CP 1585 (filed 9/24/2014) (demanding "certified mail tracking numbers"); CP 1604 (filed 9/26/2014) (demand for "certified and/or register mail); CP 1614 (filed 10/1/2014) ("demand for inventory list before taking your package, certified and/or registered mail") (emphasis added).

<sup>20</sup> CP 861-864, 1251-1254 (filed 8/8/2014) (admits she "sent back a parcel" to Safeway's counsel); CP 1792-93 (admits she returned a package received from Safeway); CP 1255-1258 (filed 9/8/2014) (admits she refused to accept two different mailings from counsel for Safeway); CP 1423-27 (¶¶7-10) (attesting to her return of several items previously mailed to her by Safeway's counsel, including her returning on September 15 a box of

at a hearing on August 8, and the trial court ordered Ms. Harbord to take a box of documents from Safeway's counsel that she had previously refused to accept.<sup>21</sup> While Ms. Harbord took those documents with her following the hearing, as shown by her own filings she later defied that order by again returning the documents to Safeway's counsel.<sup>22</sup> Further compounding the issue, on occasions when Safeway's counsel did, pursuant to Ms. Harbord's request, mail items to her via certified mail, she did not accept delivery of the items.<sup>23</sup> In fact, the record shows that Ms. Harbord even failed to accept delivery of a certified mailing from the trial court.<sup>24</sup> On October 8, shortly after serving the SJ Motion, Safeway again raised its concerns to the trial court regarding Ms. Harbord's apparent efforts to avoid and/or deny service of documents.<sup>25</sup>

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documents that had been mailed to her on March 11.)

<sup>21</sup> CP 856 (8/8/2014 order directing her to "accept box of discovery from [defendant]"); CP 852 (clerk's minutes reflecting same); CP 865-871 (copy of cover letter from Safeway's counsel listing box's contents); RP (8/8/2014)14:7-19:14, 41:5-6.

<sup>22</sup> *See, e.g.*, CP 1206-1207 (filed 9/3/2014) (discussing trial court order to accept box of documents and stating that she returned those documents because she "does NOT want Rule 26, 33 and 34"); CP 1218-1219 (same); CP 1204-1205 (notice of returned documents); CP 1423-27 (¶7) (receipt by Safeway of returned documents).

<sup>23</sup> CP 1684-1694 (filed 10/8/2014) (at ¶9) (declaration regarding failure to pick up certified mail); CP 1669-1670 (filed 10/8/2104) (argument to trial court regarding same).

<sup>24</sup> CP 2354-2359 (showing return of order the trial court attempted to send to Ms. Harbord via certified mail on 10/27/2014).

<sup>25</sup> CP 1669-1670, 1671-72, 1685 (¶4) (addressing service and "certified" mail issues raised by Ms. Harbord and her failure to receive certified mail).

#### 4. Trial Court Denies Extension and Grants the SJ Motion

Faced with a trial record documenting Ms. Harbord's overt efforts to deny and/or avoid service of documents from Safeway's counsel, on October 22, 2014, the trial court issued an order denying the Motion for SJ Extension,<sup>26</sup> thus allowing the SJ Motion to be heard by the trial court on October 24. CP 1846-1847, 1894.<sup>27</sup> Ms. Harbord and Safeway (through its counsel) appeared and argued the SJ Motion, which the court granted in Safeway's favor. CP 1876 (clerk's minutes); CP 1895-1897 (SJ Order); RP 1-36. On November 6, the trial court entered an order denying Ms. Harbord's apparent effort to seek reconsideration of the SJ Order, and on November 18, the trial court entered a final judgment in Safeway's favor for \$2,600. CP 2084-2085; CP 2128-2130.

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<sup>26</sup> Despite her claim to need more time to respond to the SJ Motion, from September 24 (the date she admits receiving the SJ Motion on her front porch) through the hearing of that motion on October 24, Ms. Harbord had time to flood the trial court and Safeway with various filings in this case unrelated to the SJ Motion. *See, e.g.*, CP 1585 (filed 9/24/2014); CP 1586-1588 (filed 9/24/2014); CP 1589 (filed 9/25/2014); CP 1590-1598 (filed 9/25/2014); CP 1599-1601 (filed 9/26/2014); CP 1602-1603 (filed 9/26/2014); CP 1604 (filed 9/29/2014); CP 1605-1606 (filed 9/29/2014); CP 1607 (filed 9/29/2014); CP 1608 (filed 9/29/2014); CP 1612-1613 (filed 10/1/2014); CP 1614 (filed 10/2/2014); CP 1615-1620 (filed 10/2/2014); CP 1628-1647 (filed 10/3/2104); CP 1653-1654 (filed 10/6/2014); CP 1655-1666 (filed 10/6/2014); CP 1723-1727 (filed 10/13/2014); CP 1728-1749 (filed 10/13/2014); CP 1750-1752 (filed 10/14/2014); CP 1753-1757 (filed 10/14/2104); CP 1758-1791 (filed 10/14/2014); CP 1792-1793 (filed 10/15/2014); CP 1794-1798 (filed 10/16/2014); CP 1799-1800 (filed 10/16/2104); CP 1829-1845 (filed 10/20/2014); CP 1848-1851 (filed 10/21/2014).

<sup>27</sup> Given Ms. Harbord's protests and efforts to avoid the SJ Motion, on September 24 Safeway re-noted the hearing of that motion from October 17 to October 24. CP 1581-1582 (re-note); CP 1583-1584 (service of same).

5. Ms. Harbord's Preoccupation with Irrelevant Protective Order

For reasons that are entirely unclear, Ms. Harbord to this day remains confused by and preoccupied with a routine Stipulated Protective Order that was agreed to by Safeway's counsel and her former counsel when this case was proceeding in Federal Court. *See* Op. Br. at 10. This issue is irrelevant and has no bearing on this appeal,<sup>28</sup> but in an effort to provide clarity for the Court given the discussion of this issue in Ms. Harbord's brief, Safeway offers the following background information.

After removal of this case to Federal Court, Safeway's counsel worked with Ms. Harbord's counsel to reach agreement on and file a Stipulated Protective Order based on the model agreement parties are encouraged to use by the Federal Court's Local Civil Rule 26(f). *Id.* The Federal Court entered that routine order on October 1, 2013. *Id.* ¶9, Ex. F). Of the nearly 1,200 pages of documents produced by Safeway as of that time, less than 50 pages were labeled "Confidential" pursuant to the Stipulated Protective Order. *Id.* However, even before Bean withdrew as her counsel, Mr. Harbord began filing documents challenging the

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<sup>28</sup> Ms. Harbord filed a second lawsuit naming Safeway, three Safeway employees, her former attorney and Safeway's undersigned counsel as defendants, with her meritless claims against Safeway's counsel appearing to be based on her confusion regarding this protective order. *See* Notice of Appeal, Washington Court of Appeals Case #73895-0-1 (King County Superior Court No. 14-2-26220-5 SEA) (filed 8/28/2015) at pp. 1, 5-6. After having all claims against all of the defendants dismissed on summary judgment, Ms. Harbord is separately appealing the dismissal of her second lawsuit. *Id.*

Stipulated Protective Order and falsely accusing Safeway's counsel of wrongdoing in agreeing to that order with her counsel rather than communicating directly with her. CP 140-143 (¶¶2, 9-15, Ex. A, F-J).

On January 6, 2014, the Federal Court granted Bean's Motion to Withdraw and authorized Ms. Harbord to proceed *pro se*. CP 141 (¶5, Ex. C). While noting that the 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." *Id.* (Ex. C at 2). Thus, the Federal Court agreed to vacate that order after receiving notice from Safeway that Ms. Harbord had returned all material Safeway had labeled "Confidential" pursuant to that order. *Id.*

What should have been a simple process of Ms. Harbord and her former attorney working together to ensure that (1) she received a complete case file and copies of documents previously produced by Safeway in a format she could use (hard copy, presumably) and (2) 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 in order to return those labeled as "Confidential." *Id.* (¶16). Safeway's counsel repeatedly attempted to assist her in meeting her

obligation to return these documents.<sup>29</sup> Safeway's counsel could not, however, compensate for the fact that Ms. Harbord did not have assistance of counsel, and he could not know what had been provided to her by Bean and in what format it was provided. CP 143-144 (¶9).

Regardless, months after the Federal Court issued the order to return these documents (January 6, 2014) and granted Ms. Harbord's motion to remand the matter to the state trial court (April 1, 2014), Safeway received on April 29, 2014 a document from Ms. Harbord to which she attached copies of some of the pages of "Confidential" material. CP 144 (¶18, Ex. L); CP 284. Due to the Federal Court's remand and lack of jurisdiction over the matter, Safeway's counsel sent Ms. Harbord a letter on May 2 indicating that it did not believe it was appropriate or necessary to file anything with the Federal Court to vacate the Stipulated Protective Order since that court no longer had jurisdiction, but also informing her that Safeway considered her to be "released from any obligations" under that order and that the order "no longer has any effect

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<sup>29</sup> CP 143-144 (¶17, Ex. K); CP 941 (¶3, Ex. B at 1-2). Safeway's counsel attempted to facilitate Ms. Harbord's return of the "Confidential" documents by identifying by Bates number every single page that was marked "Confidential," and reproducing all documents less a handful of further narrowed and/or redacted "Confidential" documents so Ms. Harbord could simply destroy all previous productions without worrying about finding the "Confidential" documents and could then certify to their destruction (which she did not do). *Id.* Safeway's counsel also offered to meet and confer with Ms. Harbord to explore alternatives for the production of the few remaining confidential/redacted materials. CP 941 (¶3, Ex. B at 2).

and you may disregard it.” *Id.* (¶19, Ex. M at 1). Despite this assurance and its reiteration in documents filed in court and served on Ms. Harbord (CP 130, CP 144 (¶19, Ex. M), CP 282-283), Ms. Harbord has continued her irrational campaign against the moot Stipulated Protective Order without articulating any legitimate basis for her concern.

#### **IV. ARGUMENT**

##### **A. The Trial Court Properly Dismissed Ms. Harbord’s Case as a Sanction for Her Refusal to Participate in Discovery**

In response to the SJ Motion, in which Safeway sought dismissal of Ms. Harbord’s lawsuit as a sanction pursuant to Civil Rule 37, the trial court granted that motion because it determined that Ms. Harbord had “willfully refused to participate in the discovery process in this case in a deliberate disregard for the efficient administration of justice.” CP 1896. Civil Rule 37(b) provides that, if a party “fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make such orders in regard to the failure as are just,” including “dismissing the action.” CR 37(b)(2). Even in the absence of a violation of a specific order of the trial court, Civil Rule 37(d) authorizes a trial court to impose sanctions, including dismissal pursuant to CR 37(b)(2), against a party for failing to respond to an interrogatory submitted under CR 33, respond to a request for production submitted under CR 34, or appear for a deposition

after being served with proper notice. CR 37(d).<sup>30</sup>

A trial court's decision in the imposition of sanctions for a violation of CR 37 is reviewed only for an abuse of discretion.<sup>31</sup> “[A] trial court has broad discretion as to the choice of sanctions for violation of a discovery order.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). Under the abuse of discretion standard, this Court gives deference to the trial judge. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order, it should be apparent from the record that (1) the party’s refusal to obey the discovery order was willful or deliberate, (2) the party’s actions substantially prejudiced the opponent’s ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed.

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<sup>30</sup> See also King County Local Civil Rule 37(d) (same); CR 41(b) (allowing for dismissal by motion of defendant where plaintiff fails to comply with rules or order of the court).

<sup>31</sup> See, e.g., *RCL Northwest, Inc. v. Colorado Res., Inc.*, 72 Wn. App. 265, 272, 864 P.2d 12 (1993) (reviewing sanction imposed pursuant to CR 37(b)(2)); *Associated Mtg. Invest. v. G.P. Kent Const. Co., Inc.*, 15 Wn. App. 223, 227-31, 548 P.2d 558 (1976) (same); *Johnson v. Jones*, 91 Wn. App. 127, 132-34 & fns. 2-8, 955 P.2d 826 (1998) (abuse of discretion standard applies to sanction imposed pursuant to both CR 37(b)(2) and CR 37(d)).

*Burnet*, 131 Wn.2d at 494. In this case, all three of the elements required to support dismissal of Ms. Harbord's case as an appropriate sanction are present and reflected in the trial court record.

First, the trial court did not abuse its discretion in determining that Ms. Harbord's refusals to respond to Safeway's Discovery Requests and to comply with Discovery Order were clearly willful and deliberate.<sup>32</sup> The Discovery Requests were served on her on October 10, 2013, approximately 11 months before the trial court entered the Discovery Order compelling her to respond. *Supra* Part III.B.1. In between those events, Safeway (1) tried to confer with Ms. Harbord regarding her failure to respond, (2) warned her repeatedly that it would file a motion to compel her responses and would seek sanctions if required to do so, (3) filed such a motion in the Federal Court that was not ruled upon prior to remand to state court, (4) resumed the same efforts and warnings in state court, and (5) filed its Motion to Compel in state court on August 20, 2014. *Id.*

Despite these efforts, Ms. Harbord failed to offer any responses whatsoever to any of the Discovery Requests prior to the trial court's Discovery Order compelling her to respond, nor did she offer any cognizable objection to any of the Discovery Requests. *Id.*; CP 944 (¶5). Instead, she broadly denied any obligation to follow Civil Rules 26, 33

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<sup>32</sup> See CP 1265-1257 (order compelling); CP 1896 (SJ Order); RP 31:2-23:25.

and 34 and claimed she did “not need to release information until [the] trial date.” CP 1190 at 1-2; *supra* Part III.B.1. In response, the trial court entered the Discovery Order on August 8, 2014, compelling her to respond to the Discovery Requests and expressly warning her that her failure to do so “may result in dismissal of the action.” CP 1262; CP 1266. Even when faced with this clear directive, Ms. Harbord ignored the Discovery Order and continued to deny any obligation to follow Civil Rules 26, 33 and 34. CP 1290-1299; CP 1312-1317. Even after Safeway moved to dismiss her lawsuit based on her refusal to comply with the Discovery Order, Ms. Harbord continued to defy that order and asserted an “open refusal” to follow Civil Rules 26 through 37. CP 1577; *supra* Part III.B.1. Thus, the trial court concluded on October 24 (more than a month after the deadline set by the Discovery Order) that she had “willfully refused to participate in the discovery process.”<sup>33</sup> The unassailability of that conclusion is further confirmed by the fact that, even after dismissal of her lawsuit, Ms. Harbord has continued to deny the applicability of the discovery rules. *See* “Part of Brief” at 4 (“Plaintiff did not want Rule 26-37”).

Second, the trial court did not abuse its discretion in determining that Ms. Harbord’s complete stonewalling of Safeway’s efforts to engage

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<sup>33</sup> CP 1896; CP 1265-1267. *See, e.g., Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 130, 896 P.2d 66 (1995) (party’s disregard of a court order without reasonable excuse or justification is deemed willful).

in discovery caused the required prejudice to impose the sanction of dismissal. CP 1896; RP (10/24/2014) 34:1-10. There can be no question that denying a party any discovery (in direct opposition to a court order) meets the requirement of substantially prejudicing that party's ability to prepare for trial, as courts have upheld dismissals in circumstances involving discrete and far less comprehensive violations.<sup>34</sup>

Third, as the record clearly shows by the trial court's issuance of the order compelling Ms. Harbord to respond to the discovery and awarding Safeway its reasonable costs in preparing the Motion to Compel, the trial court did consider and employ lesser sanctions prior to resorting to the dismissal of her lawsuit and even explained to her that the discovery rules did apply to her and warned her that her continued failure to respond could result in the dismissal of her case. CP 1265-1267; CP 1262. Despite these unambiguous warnings from the trial court, Ms. Harbord continued to defy her obligation to respond to the Discovery Requests, thus leading the trial court to properly conclude that any sanction short of

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<sup>34</sup> See *Apostolis v. City of Seattle*, 101 Wn. App. 300, 304-05, 3 P.3d 198 (2000) (trial court properly dismissed employee's petition for review as sanction for his deliberate disregard of case schedule and court orders and late-filed brief); *Anderson v. Mohundro*, 24 Wn. App. 569, 573-75, 604 P.2d 181 (1979) (plaintiff's case properly dismissed for failure to comply with order requiring definitive answers to interrogatories); *Rhinehart v. KIRO, Inc.*, 44 Wn. App. 707, 723 P.2d 22 (1986) (plaintiffs' case properly dismissed for failure to comply with order to produce videos).

dismissal would not be appropriate.<sup>35</sup> Thus, there can be no doubt that the trial court did not abuse its discretion in reaching this determination, particularly given that Ms. Harbord's baseless defiance of the discovery rules and the Discovery Order have continued through to this appeal.<sup>36</sup>

**B. This Court Should Affirm the Trial Court's Order of Summary Judgment on Ms. Harbord's Claims**

In reviewing an order granting summary judgment, this Court engages in the same inquiry as the trial court. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996). A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Morris v. McNicol*, 83 Wn.2d

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<sup>35</sup> CP 1896; RP (10/24/2014) 34:1-10. See *Peterson v. Cuff*, 72 Wn. App. 596, 601-602, 865 P.2d 555 (1994) (prior to dismissal, defendant filed motion compelling plaintiff to appear for deposition and court awarded attorney's fees to defendant and ordered plaintiff to appear for deposition by date certain and warned that failure to comply would result in dismissal with prejudice); *Delany v. Canning*, 84 Wn. App. 498, 502-506, 929 P.2d 475 (1997) (prior to court's entering of default judgment against defendant, plaintiff filed motion to compel and court awarded payment of \$750 to plaintiff and ordered defendant to provide supplemental answers to interrogatories by date certain); *RCL Northwest, Inc.*, 72 Wn. App. at 272 (default judgment appropriate where defendant failed to comply with discovery order despite court's prior threat of default judgment for such failure); *Anderson*, 24 Wn. App. at 574-75 (order required specific answers to interrogatories by date certain and plaintiffs failed to comply); *Rhinehart*, 44 Wn. App. 707, 723 P.2d 22 (order required production of videos by date certain and plaintiffs failed to comply).

<sup>36</sup> See, e.g., CP 1938-1942 and the "Part of Brief" filed in this Court by Ms. Harbord on September 4, 2015.

491, 494, 519 P.2d 7 (1974). “A court weighing a summary judgment motion thus places the emphasis ... upon facts and regards a fact as an event, an occurrence, or something that exists in reality.” *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 22 (2003) (internal quotations omitted). Courts routinely reject conclusory statements or opinions that factors such as race or age were the reason for an adverse action. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). Moreover, questions of fact may be determined as a matter of law when reasonable minds could reach but one conclusion. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

In analyzing claims under the WLAD, courts utilize a three-step burden shifting framework. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180-82, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006). To survive summary judgment, the plaintiff bears the initial burden of setting forth a *prima facie* case of discrimination. *Id.* at 181. If the plaintiff does so, the burden shifts to the employer to articulate legitimate, nondiscriminatory reasons for its action. *Id.* Once the employer does so, the burden shifts back to the plaintiff, who must show that the stated reasons for the action were merely pretext for discrimination. *Id.* at 181-82.

1. Ms. Harbord Offers No Competent Evidence in Opposition to the SJ Motion or in Support of Her Appeal

As a threshold matter, Ms. Harbord's appeal must be denied and the SJ Order affirmed because she: (a) fails to offer in her Opening Brief any citations to the clerk's papers or report of proceedings to support her factual assertions or any citations to relevant legal authority in support of her arguments, as required by RAP 10.3(a)(6); and (b) she failed to offer any competent evidence to the trial court in opposition to the SJ Motion.

As to her failure to provide citations to the record, the unsupported assertions of fact that she has offered should not be considered by the Court. *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."). By failing to offer citations to the trial record, Ms. Harbord has untenably asked the Court and Safeway to wade through the sea of indecipherable and inadmissible documents she filed in the trial court.

Regardless, even if the Court does scour the trial court record, it will find that Ms. Harbord failed to offer any competent evidence in opposition to Safeway's SJ Motion. As an initial matter, Ms. Harbord did

not file any documents prior to the October 24 hearing on the SJ Motion that addressed the substance of that motion. Moreover, while she filed two documents on the very day of the hearing of the SJ Motion titled “Declare of Plaintiff Hatsuyo Harbord” (CP 1877-1888; CP 1890-1893) in which she attempted to assert various facts, these documents were both untimely and inadmissible.

First, these documents were untimely given the requirement in Civil Rule 56(c) that “any opposing affidavits” in response to a motion for summary judgment must be filed “not later than 11 calendar days before the hearing.” CR 56(c). Second, these documents did not comply with CR 56(e), because they lack any certification or declaration by Ms. Harbord as to the truth of their factual assertions and they are replete with asserted facts for which she does not have, and does not demonstrate any basis for, any personal knowledge. CR 56(e). Specifically, Civil Rule 56(e) requires that a statement 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.<sup>37</sup> CR 56(e); *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App.

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<sup>37</sup> These same deficiencies as to the statements Ms. Harbord filed on the date of the hearing of the SJ Motion also exist with respect to the barrage of documents she filed

319, 326, 300 P.3d 431, 435 (2013) (citations omitted) (CR 56(e) requires a sworn affidavit or declaration made under penalty of perjury).<sup>38</sup> Third, it would be untenable for the trial court or this Court to accept and consider self-serving and unsworn declarations from Ms. Harbord when she had blocked all attempts by Safeway to engage in discovery that would have enabled Safeway to specifically test and fully expose as unfounded the assertions and bare conclusions offered by Ms. Harbord.

During the SJ Motion hearing, Safeway raised and the trial court accepted these arguments in reaching its ruling. RP 12:19-13:7, 33:6-34:18. Ms. Harbord does not and cannot argue that the court abused its discretion in rejecting the untimely and incompetent evidence she attempted to introduce at the hearing. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994) (rulings on evidence are reviewed for abuse of discretion, which “is abused only when it is exercised in a manifestly unreasonable manner, or based on untenable grounds.”)

Regardless, even if the Court considers any unsworn declarations filed in the trial court by Ms. Harbord, a review of those declarations will

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after the SJ Order was issued and prior to the trial court’s order denying reconsideration of the SJ Order (CP 2084-2085). Thus, those documents should likewise be disregarded.

<sup>38</sup> See also RCW 9A.72.085 (permitting unsworn written statement to be considered if statement (1) contains recitation by person that statement is true under penalty of perjury, (2) is subscribed by person, (3) states date and place of execution, and (4) 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).

show, as the trial court alternatively concluded (RP 33:1-34:18) and as more fully explained below, that they: (a) fail to create any issues of material fact with regard to the dispositive facts and legal argument Safeway offered in support of its SJ Motion; and (b) amount only to a litany of subjective gripes that Ms. Harbord had regarding her prior employment with Safeway. Additionally, if the Court determines that the factual assertions in any filings merit substantive consideration with regard to the SJ Motion notwithstanding their material deficiencies, such filings also should be appropriately limited only to documents properly called to the attention of the trial court. RAP 9.12 (when reviewing an order granting summary judgment, “the appellate court will consider only evidence and issues called to the attention of the trial court”).

2. Ms. Harbord Did Not Support her Discrimination Claims

a. *Ms. Harbord Failed to Establish a Prima Facie Case*

To establish a *prima facie* case of discriminatory discharge based on race, age or national origin, a plaintiff must show that: (1) she is a member of a protected class; (2) she was discharged; (3) she was doing satisfactory work; and (4) she was replaced by a person outside her protected class. *Hill*, 144 Wn.2d. at 181, 188 (race); *rv. Atlantic Richfield Co.*, 88 Wn.2d 887, 892, 568 P.2d 764 (1977) (age); *Chen v. State*, 86 Wn. App. 183,190, 937 P.2d 612 (1997) (national origin). Here, Ms. Harbord

did not establish the third and fourth prongs of her claims.

Ms. Harbord cannot show that she was doing satisfactory work during her employment with Safeway, given the wealth of evidence to the contrary, including Safeway's extensive and documented efforts to address its concerns regarding her performance and counterproductive conduct over the last three years of her employment, culminating with the mysterious money order in March 2011. *Supra* Part III.A; CP 1376-1384 (¶¶10-30). Ms. Harbord also cannot satisfy the fourth element of her claim, because she does not allege, let alone have competent evidence, that she was replaced by a non-Japanese, non-Asian or younger employee.

*b. Safeway Set Forth Legitimate Reasons for its Actions*

Even if Ms. Harbord had offered sufficient evidence to the trial court to establish a *prima facie* case of discrimination under the WLAD, Safeway nevertheless set forth legitimate, nondiscriminatory reasons for its discharge decision, including: (1) her repeated failure to follow, and routine contesting of, the instructions of her supervisors; (2) her violations of policies and procedures; and (3) the longstanding issues of (and efforts to address) her poor performance, low productivity and frequent errors. *See, e.g., McNairn v. Sullivan*, 929 F.2d 974, 978 (4th Cir. 1991) (failure to follow instructions is a legitimate reason for termination); *Richmond v. Bd. of Regents of Univ. of Minnesota*, 957

F.2d 595, 598 (8th Cir. 1992) (poor work performance showed that plaintiff was not qualified for her job).<sup>39</sup> Similarly, employers need not tolerate confrontational or disrespectful behavior from employees. *See, e.g., Roeber v. Dowty Aerospace Yakima*. 116 Wn. App. 127, 138, 64 P.3d 691 (2003) (“it is not unlawful for an employee to discharge an at-will employee because the employee is perceived to have misbehaved”).

Here, by way of only a few examples, Ms. Harbord refused to follow instructions, perform certain duties, stop writing notes and confidential information and provide a written statement regarding the March 10 money order transaction. *Supra* Part III.A. She also violated Safeway policies and procedures, was generally obstinate when asked to adapt her work habits and refused to accept any responsibility when Safeway attempted to identify and correct the deficiencies in her work. *Id.* Having articulated these nondiscriminatory reasons for Safeway’s discharge decision, any presumption that might have existed had Ms. Harbord established a *prima facie* case “simply drops out of the picture.” *Hill*, 144 Wn.2d at 182 (internal quotation omitted).

*c. Ms. Harbord Has No Evidence of Pretext*

Even if Ms. Harbord had established a *prima facie* case, Safeway

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<sup>39</sup> Courts rely on interpretations of Title VII for guidance in analyzing the WLAD. *See Xieng v. Peoples Nat’l Bank of Wash.*, 63 Wn. App. 572, 578, 821 P.2d 520 (1991).

was still entitled to judgment as a matter of law because she did not (and cannot) demonstrate that Safeway's explanations were mere pretext for intentional discrimination. *Id.* at 182. To establish pretext, a plaintiff must produce "some evidence that the articulated reason for the employment decision is unworthy of belief." *Kuyper v. Dept. of Wildlife*, 79 Wn. App. 732, 738, 904 P.2d 793 (1995). "Speculation and belief are insufficient to create a fact issue as to pretext." *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 372, 112 P.3d 522 (2005) (quotation omitted); *see also Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992) (plaintiff must produce specific and material evidence of a discriminatory motive to create a triable issue of fact under WLAD).

In this case, Ms. Harbord did not set forth any competent evidence of pretext, and instead offered only argumentative, speculative and conclusory assertions. *See Hill*, 144 Wn.2d at 190, fn.14 ("[C]ourts must not be used as a forum for appealing lawful employment decisions simply because employees disagree with them"). Moreover, even if Ms. Harbord had offered any evidence of pretext, her claims would still fail because she did not produce "evidence from which a rational trier of fact could find unlawful discrimination by a preponderance of the evidence," given the overwhelming evidence Safeway has provided regarding the legitimate reasons for her discharge. *Parsons v. St. Joseph's Hosp. & Health Care*

*Ctr.*, 70 Wn. App. 804, 809, 856 P.2d 702 (1993).

Summary judgment on Ms. Harbord's discrimination claims is also supported by the same actor inference, which provides that, when an employee is hired and fired by the same decision-maker, there is a strong inference that the employee was not fired due to any attribute the decision-maker was aware of at the time of the hiring. *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438, 454, 115 P.3d 1065 (2005). The inference applies here, because Lagrange approved of her hiring, and at that time was aware of her national origin and race and had a sense of her age, and then he later initiated and took part in the termination decision. CP 1375(¶7); CP 1385-1386 (¶¶34, 37).

### 3. Ms. Harbord Did Not Establish a Retaliation Claim

To establish a *prima facie* case of retaliation under the WLAD, a Ms. Harbord must show that (1) she engaged in a protected activity, (2) Safeway took an adverse action, and (3) a causal link exists between the protected activity and the adverse action. *Hines*, 127 Wn. App. at 374. If those elements are established, the burden shifts to the employer "to produce admissible evidence of a legitimate, nondiscriminatory, nonretaliatory reason" for the adverse action. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002). To move beyond summary judgment, the plaintiff must then "create a genuine issue of

material fact by showing” that the employer’s reason for the adverse action is merely pretext for a retaliatory purpose. *Id.* at 619.

In this case, Ms. Harbord did not set forth evidence to establish that she engaged in protected activity within the scope of the WLAD, because she offered no evidence that she raised any complaint of unlawful discrimination during her employment with Safeway, much less evidence that the employees who made the decision to terminate her employment were aware of any such complaint. CP 1386 (¶35); CP 1368 (¶7). Moreover, even if she had evidence of any protected activity, her retaliation claim would still fail because she has no evidence to show that Safeway’s legitimate reasons for its actions, which are supported by an abundance of evidence, were mere pretext for retaliation. Thus, summary judgment on her retaliation should be affirmed.

#### 4. Ms. Harbord Did Establish Her Public Policy Claim

Ms. Harbord also alleges a public policy termination claim based on her bald assertion that she was terminated because “she made complaints about being deprived of rest or meal periods at the wrong time.” CP 22 (¶¶5.1-5.2). To prevail on a claim of wrongful discharge in violation of public policy, a plaintiff must prove the following elements: (1) that a clear public policy exists, (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy, and (3)

that the employee's public-policy-related conduct caused the dismissal. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). If the plaintiff does so, the burden shifts to the employer to offer an overriding justification for the dismissal. *Id.* The same burden shifting scheme applies to a public policy claim of improper retaliation for statutorily protected activity, with the plaintiff required to first establish the following *prima facie* elements: (1) he or she engaged in statutorily protected activity, (2) an adverse employment action was taken, and (3) there is a causal link between the plaintiff's activity and the employer's adverse action." *Briggs v. Nova Servs.*, 135 Wn. App. 955, 966, 147 P.3d 616 (2006), *aff'd*, 166 Wn.2d 794, 213 P.3d 910 (2009) (internal quotation and citation omitted). The public policy exception to at-will employment is a narrow one and must be applied cautiously to avoid the exception swallowing the rule that employment is terminable at will. *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001). The plaintiff bears the burden to prove that the termination violated a clear mandate of public policy. *Selix v. Boeing Co.*, 82 Wn. App. 736, 741, 919 P.2d 620 (1996).

In this case, Ms. Harbord must first establish the existence of a public policy and/or that she engaged in statutorily protected activity. However, she does not offer in her Opening Brief, nor did she offer before the trial court, any legal argument or authority on these points, and thus

summary judgment must be affirmed on her public policy claim on this basis alone. Moreover, her complaint is not that she was denied breaks, but rather that she complained of receiving a break at the “wrong time.” CP 20-21 (¶¶3.4-3.5). However, she did not set forth any facts regarding any specific alleged complaint, or any corresponding source of law, to show that the alleged “wrong time” for any of her breaks in fact violated any law regarding the provision and/or timing of rest or meal breaks.<sup>40</sup> Accordingly, she did not and cannot establish that she was attempting to exercise any legal right that could satisfy the public policy element (and/or that she was engaged in statutorily protected activity), and thus she also cannot show that any alleged conduct of Safeway jeopardized any public policy. *Briggs*, 135 Wn. App. at 965 (action was not protected activity because it raised personal managerial style differences and was not attempt to exercise a legal right); *Boring v. Alaska Airlines, Inc.*, 123 Wn. App. 187, 199, 97 P.3d 51 (2004) (alleged actions of employer did not violate law or threaten any public policy founded in law).

Additionally, Ms. Harbord did not and cannot identify any competent evidence to show any causal link between any unspecified complaint regarding the timing of rest breaks or meal periods and Safeway’s termination of her employment. Moreover, even if she had

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<sup>40</sup> See WAC 296-126-092 (setting forth flexible requirements for rest and meal breaks).

done so, or had otherwise established the *prima facie* elements of any public policy retaliation claim, Safeway set forth such an overwhelming amount of evidence as to the legitimate and overriding reasons for her dismissal (and she offered no evidence to suggest these reasons were mere pretext) that no reasonable juror could conclude that she was terminated for making any complaint about the timing of a rest break.

**C. The Trial Court Did Not Abuse its Discretion in Denying Ms. Harbord’s Request for an Extension of the SJ Hearing**

Through her misleading and unsupported assertion that “she did not receive Defendant’s Summary Judgment document from Defendant” and only “picked it up 3 day[s] before Summary Judgment” (Op. Br. at 11), Ms. Harbord appears to be impliedly arguing that she was not served with the SJ Motion and/or should have been granted her requested extension of the hearing on that motion. To the contrary, as shown by the trial court record, including Ms. Harbord’s own filings, Safeway sent (CP 1544-45, CP 1579-80) and she in fact received what she knew to be the “summary judgment” materials on September 24<sup>41</sup> via the posting at her home and again later via mail (CP 1586-88, CP 1590-98, CP 1792-93).

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<sup>41</sup> Given the re-noting of the SJ Motion hearing to October 24 (CP 1581-1582, CP 1583-1584), Ms. Harbord’s receipt of the SJ Motion on September 24 came 33 days before the October 24 hearing, well within the 28-day period set by Civil Rule 56(c). *See* CR 56(c) (motion “shall be filed and served not later than 28 calendar days before the hearing”); *Cole v. Red Lion*, 92 Wn. App. 743, 749, 969 P.2d 481 (1998)(summary judgment motion timely served more than 28 days before the re-noted hearing date).

*Supra* Part III.B.2.<sup>42</sup> Therefore, the trial court did not abuse its discretion in rejecting her various challenges to the delivery of (and her efforts to simply avoid) the SJ Motion and her related request to extend the date for the hearing of the SJ Motion (CP 1649; CP 1846), as the only prejudice she suffered, if any, resulted from her poor decision to ignore the SJ Motion at her peril and spend time filing other documents rather than preparing a timely response.<sup>43</sup> Likewise, the trial court did not abuse its discretion in denying her motion for reconsideration of the SJ Order (CP

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<sup>42</sup> The record in this case shows actual notice and service of the SJ Motion via: (1) Ms. Harbord's receipt of that motion on September 24, creating substantial compliance with the service requirements of CR 5(b)(1) and CR 56(c); and (2) the mailing of that motion on September 22, creating a presumption of service pursuant to CR 5(b)(2) that Ms. Harbord does not and cannot rebut, particularly given her admission that she "returned" a package she clearly understood to be the SJ Motion (CP 1792-1793). *Petta v. Dep't of Labor & Ind.*, 68 Wn. App. 406, 409, 842 P.2d 1006 (1992) ("substantial compliance" with service obligation requires actual notice or service in a manner reasonably calculated to give notice); *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 issue of service is for trial court to decide).

<sup>43</sup> See, e.g., *Alaska Nat. Ins. Co. v. Bryan*, 125 Wn. App. 24, 40, 104 P.3d 1, 10 (2004) (under CR 56(f), trial court has discretion in determination of whether to grant a continuance of a motion for summary judgment); *Bank of the West*, 123 Wn. App. 502, 504, 98 P.3d 532 (2004) (weight given to factual assertions on issue of service is for trial court to decide, not appellate court); *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 364, 617 P.2d 704 (1980) (CR 6(a)'s filing deadlines are not jurisdictional and reversal for failure to comply requires a showing of prejudice); cf. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 236-41, 88 P.3d 375 (2004) (trial court did not abuse discretion and there was no showing of prejudice resulting from order shortening time for summary judgment motion). Notably, Ms. Harbord appears to have sprung to action to respond to the SJ Motion only after the court denied on October 20 her motion to extend the hearing date on the SJ Motion (CP 1846, CP 1894).

2084),<sup>44</sup> thereby reasonably rejecting her claims that she was not well enough to attend the hearing on the SJ Motion on October 24 (CP 1889, CP 1943) when she did in fact attend that hearing (CP 1876) and she had previously made clear she did not want oral argument on the SJ Motion.<sup>45</sup>

**D. Ms. Harbord’s *Pro Se* Status Does Not Excuse Her Willful Noncompliance with Court Rules and Orders**

Ms. Harbord improperly used the tools of litigation in the trial court in a manner that caused harassment, unnecessary delay and needless and extensive costs, in contravention of her obligations pursuant to the Civil Rules, including without limitation CR 11(a), CR 26, CR 33, CR 34, and CR 37. Ms. Harbord’s egregious conduct, and her failure to properly and timely respond to the SJ Motion before the trial court and submit a proper brief before this Court, cannot be excused by her *pro se* status.<sup>46</sup>

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<sup>44</sup> *Holiday v. Merceri*, 49 Wn. App. 321, 324, 742 P.2d 127 (1987) (motions for reconsideration are addressed to sound discretion of trial court and will not be reversed absent a clear or manifest abuse of discretion; abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court).

<sup>45</sup> CP 1600 (“Plaintiff asks for ‘without oral argument hearing’ for summary judgment case.”); CP 1870 (“Pro se did not ask for oral hearing for ‘summary judgment’”); *cf.* *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 696-97, 41 P.3d 1175 (2002) (trial court did not violate employee’s due process rights by failing to hold oral argument on employer’s motion to dismiss gender discrimination action as discovery sanction against employee, where prior to rendering judgment on the motion, trial court considered employee’s memorandum in opposition); *Hanson v. Shim*, 87 Wn. App. 538, 551-52, 943 P.2d 322 (1997) (party does not have a due process right to oral argument); KCLCR 56(c)(1) (parties may waive oral argument on summary judgment).

<sup>46</sup> *See* CP 353 & fn. 9 (trial court order filed warning Ms. Harbord that she must comply with all procedural rules); *see also In re Marriage of Wherley*, 34 Wn. App. 344, 349,

### **E. 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. RAP 18.9 allows the Court to make such an award when a party files a frivolous appeal.

*Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). While Ms. Harbord has a right to an appeal, and this Court should consider the record as a whole and resolve all doubts in her favor, her appeal is frivolous if it presents no debatable issues upon which reasonable minds might differ and is so totally devoid of merit that there is no reasonable possibility of reversal. *Green River Cmty. Coll., Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442-43, 730 P.2d 653 (1986).

In this case, Ms. Harbord's appeal is frivolous in its entirety because every claim and every challenge to any trial court ruling that might be encompassed in her vague appeal is defeated by one threshold ruling on which no reasonable minds could differ -- the trial court's dismissal of her entire action as a sanction because she "willfully refused to participate in the discovery process." CP 1896; *Supra* Part III.B.1. Under these circumstances, her appeal has no reasonable possibility of

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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"); *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999) (appellate court need not consider *pro se* arguments that are conclusory).

reversal and no reasonable minds could differ as to the appropriateness of the sanction of dismissal.<sup>47</sup> Moreover, a sanction pursuant to RAP 18.9 is also otherwise appropriate given Ms. Harbord's failure to identify any competent evidence or legal authority to suggest any merit to her appeal.<sup>48</sup>

## 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.

March 1, 2016

Respectfully submitted,

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By s/Daniel P. Hurley

Daniel P. Hurley, WSBA #32842

Attorneys for Respondent

Safeway Inc.

## CERTIFICATE OF SERVICE

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<sup>47</sup> See, e.g., *Delany*, 84 Wn. App. at 502-506 (awarding attorney fees for appeal of dismissal for refusal to comply with discovery order where appellant cited no authority or rational argument for reversal of trial court); *RCL Northwest*, 72 Wn. App. at 271-73 (granting without discussion request for attorney fees where petitioner unsuccessfully appealed trial court's sanction of default judgment for refusal to comply with discovery order after being warned that such a sanction would result from the refusal to comply); *Johnson v. Jones*, 91 Wn. App. 127, 137-38, 955 P.2d 826 (1998) (imposing sanction for frivolous appeal of trial court's dismissal of action as a sanction for multiple discovery abuses and violation of trial court's express order compelling discovery).

<sup>48</sup> *Stiles v. Kearney*, 168 Wn. App. 250, 267-68, 277 P.3d 9 (2012) (awarding attorney fees where no abuse of discretion in imposition of sanctions and petitioner'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).

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 March 1, 2016, I caused to be served the foregoing Brief of Respondent via U.S. Mail, First Class postage prepaid on the following:

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

DATED this 1st day of March, 2016.

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