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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38953-3-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

ERIN HAMRICK, fka ERIN COLLIER,

Appellant,

vs.

BENJAMIN JAMES COLLIER,

Respondent.

BRIEF OF RESPONDENT

**John A. Hays, No. 16654
Attorney for Respondent**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

 **ORIGINAL**

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STATEMENT OF THE CASE

The case at bar involves a dissolution of marriage action originally filed by Appellant Erin Hamrick (fka Erin Collier) through her original attorney, Robert Falkenstein. CP 73. On April 1, 2008, Respondent Benjamin Collier's attorney served Mr. Falkenstein with the original and a copy of Respondent's First Interrogatories and Requests for Production. CP 2. Appellant failed to respond to these discovery requests. *Id.* On April 28, 2008, Mr. Falkenstein filed a notice of intent to withdraw. CP 73. Thereafter, Ms Hamrick appeared pro se. *Id.* Mr. Falkenstein's notice of intent to withdraw listed an address for Ms Collier in Bonsall, California. CP 4, 73. It did not list a telephone number, and the Bonsall, California address was the only contact Respondent's attorney had for Ms Collier. CP 73-74.

On April 1, 2008, Respondent's attorney mailed another set of Respondent's First Interrogatories and Requests for Production to Ms Hamrick at her listed address in California. CP 4. By May 12, 2008, which was the compliance date, Ms Hamrick had failed to respond. *Id.* As a result, On May 15, 2008, Respondent's attorney mailed a letter to Ms Hamrick at her California address. *Id.* This letter stated as follows:

Please be advised that the discovery request that was mailed to you on 4/1/08 was due on 5/12/08. As of this writing, we have not received your answers to that request or the requested documentation. I will extend the deadline for an additional 20 days (6/04/08) to allow you to provide any and all requested information and documentation.

If I do not receive the requested documentation, I will be filing a Motion to Compel with reference to this matter.

Thank you for your prompt attention to this matter. If you have any questions regarding this correspondence, please contact my office at 360-425-0111.

Thank you for your prompt attention to this request.

CP 4.

By June 28, 2008, Ms Hamrick had still failed to respond to any of Respondent's repeated discovery requests. CP 3-4. As a result, on July 2, 2008, Respondent served Ms Hamrick, who was not back in Washington, with a Motion and Affidavit to Compel Discovery and noted the motion for hearing. CP 1-4. As part of that motion, Respondent requested that the court enter an order compelling discovery, and granting an order of default if Ms Hamrick failed to comply with that order compelling discovery. *Id.* On July 9, 2008, one week after Respondent filed the Motion to Compel, Ms Hamrick served Respondent's attorney with her answers to the discovery request. CP 74.

On July 18, 2008, the parties appeared in court on Respondent's Motion to Compel. CP 82. At that time, the Court found that Ms Collier's responses to Respondent's discovery request were "insufficient and incomplete." CP 74. At Ms Hamrick's request, the court gave her additional time to respond to the discovery requests. CP 83-84. Specifically, the court

ordered her to serve Respondent's attorney with the requested discovery by July 30, 2008, and ordered her to return to court on August 1, 2008, to review the sufficiency of her answers. CP 74. At that time, the court specifically warned her that if her discovery answers were insufficient, the court could strike all of her pleadings and enter an order of default. *Id.* The court's written order on this hearing stated as follows:

1. ERIN COLLIER shall produce the discovery answers to Noelle McLean's office by Wednesday, July 30, 2008, by 12:00 noon.

2. ERIN COLLIER shall appear in court on Friday, August 01, 2008, at 9:00 a.m. to review the completeness and sufficiency of her discovery answers and requested documentation. If the court determines completeness or sufficiency has not been met, then the court may strike all of ERIN COLLIER's pleadings and enter an order of default.

3. The respondent's request for attorney's fees and costs is reserved for further hearing.

4. In all other respects not inconsistent with this Order, the previous order entered in this matter shall remain in full force and effect during the pendency of this action.

CP 87.

On August 1, 2008, the parties again appeared before the court to review the adequacy of Ms Hamrick's responses to Respondent's discovery requests. CP 75, 85. At that time, the court reviewed Ms Hamrick's responses to Respondent's interrogatories and requests for discovery and found that they were inadequate and did not comply with the court's prior

order. CP 85. The clerk's minute sheet for this hearing notes the following on this issue:

Court finds she did not comply with discovery - to provide answers by 8/22. If not answered by 8/22 Ct will find her in default. Ct signs Temp Orders from prior hearing.

CP 85.

The court then imposed \$350.00 in attorney's fees against Ms Collier, ordered her to comply with the discovery requests by August 21, 2008, ordered her to appear again on August 22, 2008 to review her compliance with the court's new orders, and stated that if she did not comply with the court's order, it would enter an order of default against her. CP 89-90. The court's written order stated the following:

1. The court finds that ERIN COLLIER's discovery answers were mostly left blank and that she has an obligation to provide due diligence in producing the requested documentation under her control.
2. ERIN COLLIER shall provide discovery answers to Noelle A. McLean by 8/21/08. On review, if discovery answers remain insufficient, then the court will have no alternative but to enter a default in this matter.
3. ERIN COLLIER shall appear in court on 8/22/08 at 9:00 a.m. in regards to the presentation of this Compel Order as well as reviewing the sufficiency of her discovery answers.
4. BEN COLLIER is awarded a judgment against ERIN COLLIER in the amount of \$350.00 attorney's fees bearing 12% interest per annum.
5. The respondent's request for the children's items in the

petitioner's storage facility in southern Oregon is denied at this time.

6. In all other respects not inconsistent with this Order, the previous order entered in this matter shall remain in full force and effect during the pendency of this action.

CP 89-90.

By August 22, 2008, Ms Hamrick had not filed any additional responses to Respondent's discovery requests. CP 75. In addition, she failed to appear in court on that date. CP 88. As a result, the court entered an order of default. CP 5-7. The court subsequently entered a decree of dissolution, and final parenting plan, and final order of support, and findings of fact and conclusions of law on the dissolution. CP 5-7, 8-14, 15-19, 20-31, 32-37, 38-45. The order of default included the following findings of fact in paragraph 2.2:

- a. Erin Collier's former attorney, Robert Falkenstein, was served with the respondent's discovery request on 04/01/08, and supplemental requests for answers were made on 05/15/08.
- b. Erin Collier appeared in court on 07/18/08 on respondent's motion to compel. The court allowed the petitioner, Erin Collier, additional time to comply with the discovery request with answers to be provided to respondent's attorney no later than 07/03/08. See the Order Re: Motion to Compel entered on 08/01/08 which is incorporated by this reference herein.
- c. Erin Collier produced insufficient discovery answers to the respondent's attorney on or about 07/11/08, and the court allowed her until 08/21/08 to produce sufficient discovery answers. See the Second Order Re: Motion to Compel entered on 8/22/08.
- d. A review date of 08/22/08 was set by the court, with warnings to

the petitioner that her failure to diligently participate in providing discovery would result in a default being entered against her. Erin Collier was sent a proposed copy of the second order on 08/04/08, and she was ordered to appear in court on 08/22/08 to review the sufficiency of her discovery answers.

e. Erin Collier [] appeared [X] failed to appear in court on 08/22/08.

CP 6.

Almost four months after the court entered the August 22, 2008, order of default, Ms Hamrick retained a new attorney to represent her in this matter, who filed a Motion to set aside the Default Order with a supporting affidavit and memorandum. CP 46. In that Motion, Ms Hamrick argued that the order of default was invalid because (1) Respondent had failed to comply with the requirements of CR 26(i), and (2) the court should have utilized some other less severe sanction than default in response to Ms Hamrick's failure to comply with the discovery requests. CP 46, 47-50, 51-59. Respondent filed responsive pleadings, and on January 16, 2009, the parties appeared for argument on the motion. RP i. The court then denied the motion, finding that (1) Respondent's attorney had complied with the requirements of CR 26(i), and (2) default was the only sanction left for the court to use after Ms Hamrick's repeated refusals to comply with the requirements of discovery. CP 73-75. The trial court later entered the following findings of fact and conclusions of law in support of the order denying Appellant's Motion to vacate the Order of Default:

FINDINGS OF FACT

1. The petitioner, Erin Collier, was previously represented by Attorney Robert Falkenstein. Robert Falkenstein entered his Notice of Intent to Withdraw as Attorney on 4/28/08. Said withdrawal included only an address for the petitioner in the State of California and provided no phone number. Respondent's counsel had no other contact information.

2. It is not the fault of Noelle McLean, attorney for respondent, that the only information was a California address for the petitioner.

3. The court finds that CR 26(i) is mandatory and that the appellant court has taken form over function in determining when jurisdiction attaches. The court takes a narrow view of compliance and hold pro se individuals to the same standard as "counsel."

4. In reviewing through the Motion to Compel filed on 7/2/08, and the attached correspondence, the court finds that the attorney offered the fact of a CR 26(i) conference. The correspondence (as the only means available for contact) identified that a motion to compel would follow if discovery was not provided and it invited the petitioner to call the attorney to discuss the contents of the correspondence.

5. The court finds that the Motion to Compel was brought in good faith and through all means available to the attorney.

6. In reviewing through the history of the Motions to Compel, Erin Collier was served with the Motion to Compel on or about 7/2/08. Erin Collier produced insufficient and incomplete discovery answers on or about 7/9/08. Said discovery answers were reviewed at a hearing on 7/18/08. The court allowed Erin Collier additional time until Wednesday, July 30, 2008, to produce the balance of the discovery answers. Erin Collier was ordered to appear in court on 8/1/08 to review the completeness and sufficiency of her discovery answers and was warned if her discovery answers were insufficient, the court could strike all of her pleadings and enter an Order of Default.

7. At the hearing on 8/1/08, the court found that Erin Collier's discovery answers were mostly left blank and that she had an

obligation to provide due diligence in producing the requested documentation under her control. She was allowed to produce discovery answers no later than 8/21/08 to be reviewed by the court on 8/22/08.

8. At the hearing on 8/22/08, Erin Collier failed to appear. Erin Collier failed to provide supplemental discovery answers. The court found that Erin Collier was allowed three opportunities to comply with the discovery request and that she failed to produce sufficient discovery answers and/or documentation such that default was necessary and appropriate. See the Order on Default RE: Motion to Compel entered in Cowlitz County Superior Court on 8/22/08.

CONCLUSIONS OF LAW

1. Attorney Noelle McLean on behalf of the respondent Benjamin Collier complied with CR 26(i). Her letter constituted an offer of a 26(i) conference. CR 26(i) need not be specifically cited.

2. The court had jurisdiction to hear the Motion to Compel and allowed Erin Collier three separate opportunities to comply with the discovery request and the order of the Court. Erin Collier failed to comply.

CP 73-75.

Following entry of this order, Ms Hamrick filed her notice of appeal.

CP 77. Although she did arrange for the transcription of the hearing on her motion to vacate the order of default, she did not arrange for the transcription of the three preceding hearings from July 18, 2008, August 1, 2008, and August 22, 2008. See Statement of Arrangements. In addition, Ms Hamrick has not made Respondent's Interrogatories and Requests for Production, or Ms Hamrick's replies to them part of the record on appeal. See Clerk's Papers.

ARGUMENT

I. THE APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT HAS FAILED TO PERFECT A RECORD SUFFICIENT TO ADEQUATELY ADDRESS THE ARGUMENTS MADE IN THE BRIEF OF APPELLANT.

A party seeking review bears the burden of perfecting the record so that the reviewing court has sufficient relevant evidence before it to assure adequate consideration of the appellant's assignments of error. RAP 9.1, 9.7; *State v. Vazquez*, 66 Wn.App. 573, 583, 832 P.2d 883 (1992). If the record is inadequate for review of an assignment of error, the court will not consider it on direct appeal. *State v. Wheaton*, 121 Wn.2d 347, 850 P.2d 507 (1993). In addition, a party arguing that the trial court erred when it entered a finding of fact has the dual burden of (1) perfecting the record sufficient to allow review of this claim, and (2) proving to the court that the record before the trial court does not contain substantial evidence to support the entry of the findings at issue. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997).

In the case at bar, the brief of appellant assigned five errors on appeal.

These are as follows:

1. The trial court erred by granting the motion for default based on alleged discovery violations without first requiring compliance with CR 26(i).
2. The court erred by granting the motion for default without first considering other alternatives as required in CR 37(b).
3. The court erred in granting the motion for default against a pro

se litigant, who appeared and attempted to answer interrogatories without first setting forth the specifics as to the discovery violations.

4. The court erred in denying the Appellant's motion to set aside the default dated January 10, 2009.

5. The court erred in denying the Appellant's request for attorney's fees on her motion to set aside default.

Brief of Appellant, pages 1-2.

The gravamen of these arguments is that (1) the entry of the order of default was in error because respondent allegedly failed to comply with the requirements of CR 26(i), (2) that the court erred by not setting out the specifics of the discovery violations, and (3) that the sanction of default is excessive. The problem with these arguments is twofold. First, these issues were the subject of the hearings held on 7/22/08, 8/1/08, and 8/22/08, and in order to adequately address these issues on appeal, Appellant should have made arrangements to have these hearings transcribed. Second, to effectively address these arguments, this court needs to review a copy of the discovery and the alleged inadequate responses. Absent the transcription of the listed hearings, and absent a record that includes the discovery that was at issue, this court does not have a sufficient record from which to adequately address Appellant's argument. As a result, this court should dismiss this appeal.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ENTERED THE ORDER OF DEFAULT BASED UPON APPELLANT’S WILLFUL AND REPEATED REFUSAL TO COMPLY WITH RESPONDENT’S DISCOVERY REQUESTS.

As the following explains, the trial court did not err when it found that respondent had met the requirements of CR 26(i), and that it did not abuse its discretion when it granted default based upon Appellant’s repeated and willful violations of discovery under CR 37(b). The following addresses these arguments, beginning with a review of the trial court’s uncontested findings of fact.

(1) Appellant’s Failure to Assign Error to Any of the Findings of Fact from the Order of Default or the Order Denying the Motion to Set Aside Default Makes Those Findings Verities on Appeal.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The courts of appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the findings of fact “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* In addition, when a

conclusion of law contains an assertion of fact, it functions as a finding of fact and is reviewed under the substantial evidence rule. *Estes v. Bevan*, 64 Wn.2d 869, 395 P.2d 44 (1964). Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the case at bar, the trial court entered oral findings of fact on the first motion to compel, written findings of fact on the second motion to compel, written findings of fact on the order of default, and written findings of fact on the order denying the motion to vacate the order of default.

The court's oral finding of fact was entered during the motion to compel held on July 2, 2008, wherein the court noted that "Erin Collier produced insufficient and incomplete discovery answers on or about 7/9/08." The court's first written finding of fact was contained in the order on Respondent's motion to compel argued on August 1, 2008. It stated:

1. The court finds that ERIN COLLIER'S discovery answers were mostly left blank and that she has an obligation to provide due diligence in producing the requested documentation under her control.

CP 90.

The court's written findings of fact entered in support of the order of default stated as follows:

- a. Erin Collier's former attorney, Robert Falkenstein, was served with the respondent's discovery request on 04/01/08, and supplemental requests for answers were made on 05/15/08.

- b. Erin Collier appeared in court on 07/18/08 on respondent's motion to compel. The court allowed the petitioner, Erin Collier, additional time to comply with the discovery request with answers to be provided to respondent's attorney no later than 07/03/08. See the Order Re: Motion to Compel entered on 08/01/08 which is incorporated by this reference herein.
- c. Erin Collier produced insufficient discovery answers to the respondent's attorney on or about 07/11/08, and the court allowed her until 08/21/08 to produce sufficient discovery answers. See the Second Order Re: Motion to Compel entered on 8/22/08.
- d. A review date of 08/22/08 was set by the court, with warnings to the petitioner that her failure to diligently participate in providing discovery would result in a default being entered against her. Erin Collier was sent a proposed copy of the second order on 08/04/08, and she was ordered to appear in court on 08/22/08 to review the sufficiency of her discovery answers.
- e. Erin Collier [] appeared [X] failed to appear in court on 08/22/08.

CP 6.

Finally, the trial court's written findings of fact entered following the motion to vacate the order of default stated the following:

1. The petitioner, Erin Collier, was previously represented by Attorney Robert Falkenstein. Robert Falkenstein entered his Notice of Intent to Withdraw as Attorney on 4/28/08. Said withdrawal included only an address for the petition in the State of California and provided no phone number. Respondent's counsel had no other contact information.

2. It is not the fault of Noelle McLean, attorney for respondent, that the only information was a California address for the petitioner.

3. The court finds that CR 26(i) is mandatory and that the appellant court has taken form over function in determining when jurisdiction attaches. The court takes a narrow view of compliance and hold pro se individuals to the same standard as "counsel."

4. In reviewing through the Motion to Compel filed on 7/2/08, and the attached correspondence, the court finds that the attorney offered the fact of a CR 26(i) conference. The correspondence (as the only means available for contact) identified that a motion to compel would follow if discovery was not provided and it invited the petitioner to call the attorney to discuss the contents of the correspondence.

5. The court finds that the Motion to Compel was brought in good faith and through all means available to the attorney.

6. In reviewing through the history of the Motions to Compel, Erin Collier was served with the Motion to Compel on or about 7/2/08. Erin Collier produced insufficient and incomplete discovery answers on or about 7/9/08. Said discovery answers were reviewed at a hearing on 7/18/08. The court allowed Erin Collier additional time until Wednesday, July 30, 2008, to produce the balance of the discovery answers. Erin Collier was ordered to appear in court on 8/1/08 to review the completeness and sufficiency of her discovery answers and was warned if her discovery answers were insufficient, the court could strike all of her pleadings and entered an Order of Default.

7. At the hearing on 8/1/08, the court found that Erin Collier's discovery answers were mostly left blank and that she had an obligation to provide due diligence in producing the requested documentation under her control. She was allowed to produce discovery answers no later than 8/21/08 to be reviewed by the court on 8/22/08.

8. At the hearing on 8/22/08, Erin Collier failed to appear. Erin Collier failed to provide supplemental discovery answers. The court found that Erin Collier was allowed three opportunities to comply with the discovery request and that she failed to produce sufficient discovery answers and/or documentation such that default was necessary and appropriate. See the Order on Default RE: Motion to Compel entered in Cowlitz County Superior Court on 8/22/08.

CP 73-75.

In the case at bar, Ms Hamrick has failed to assign error to any of

these findings of fact. As a result, they are verities on appeal.

(2) CR 26(i) Does Not Apply in the Case at Bar, and In the Alternative, the Findings of Fact Support the Court's Conclusion that Respondent Met the Requirements of CR 26(i).

In the case at bar, Appellant argues that this court should vacate the order of default based upon Respondent's failure to comply with the requirements of CR 26(i). This rule states:

(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

CR 26(i).

This rule creates two conditions precedent to the imposition of sanctions under CR 37(b) for failure to comply with rules 26 through 37: (1) "counsel" for the moving party "shall arrange for a mutually convenient conference in person or by telephone" with opposing "counsel" to discuss the discovery issue, and (2) the "counsel" for the nonmoving party must willfully refuse or fail to confer in good faith. *Case v. Dundom*, 115 Wn.App. 199, 58 P.3d 919 (2002). Compliance with these two rules is mandatory. *Scannell*

v. *City of Seattle*, 97 Wn.2d 701, 648 P.2d 435 (1982).

Appellant's argument that the trial court erred when it granted the order of default based upon respondent's failure to comply with this rule is wrong for two reasons: (1) the rule does not apply to the facts in the case at bar, and (2) even if it applies, respondent complied with its requirements. The following addresses these argument.

(a) CrR 26(i) Does Not Apply in Cases Where a Litigant Appears Pro Se.

When interpreting a statute or a court rule, a court must first assume that the Legislature adopting the statute or the court adopting the rule means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001); *see also City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003) (court applies rules of statutory construction to interpret court rules). Thus, if the statute or rule is clear on its face, its meaning is derived from the language of the statute or rule alone. *State v. Watson*, 146 Wn.2d 947, 51 P.3d 66 (2002). In *State v. Hall*, 112 Wn.App. 164, 48 P.3d 350 (2002), Division II of the Court of Appeals puts this rule as follows:

Where the meaning of a statute is clear on its face, this court assumes that the Legislature "means exactly what it says" and we give effect to the plain language without regard to rules of statutory construction.

State v. Hall, 112 Wn.App. at 167 (quoting *State v. Warfield*, 103 Wn.App. 152, 156, 5 P.3d 1280 (2000)).

In addition, when looking at the meaning of any particular statute or court rule, the courts give the words within the statute or court rule their common legal or ordinary meaning unless the statute or court rule includes specific definitions. *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997). One of the sources the court uses for determining the common definition of non-technical words is the dictionary. *State v. Chester*, 133 Wn.2d at 22.

The courts also discern the plain meaning of a statute or court rule from the context of the statute containing the provision, related provisions, and the statutory scheme as a whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). The court also attempts to construe statutes and court rules “so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

As the plain language of CR 26(i) indicates, the requirements of the rule only apply to cases in which both parties are represented by “counsel.” The rule does not include a requirement that counsel for the moving party initiate a conference under the rule with a party appearing *pro se*. In this case, the trial court, apparently without any analysis, assumed that the word “counsel” as it appears in the rule should be interpreted to include *pro se* litigants. However, that assumption ignored the plain meaning of the word

“counsel.” The rule does not state that it applies to “counsel or a party appearing *pro se*”; it states that it applies to “counsel.” In adopting or modifying this rule, the Supreme Court could have used the later wording to bring the application of the rule into cases in which a party appears *pro se*. However, it did not.

Indeed, the Washington State court rules are replete with references in which the court specifically includes requirements in cases in which a litigant appears *pro se*. For example, CR 41(e) specifically includes the terms “attorneys or . . . any party appearing *pro se*.” It states:

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, ***it shall be the duty of the attorneys or of any party appearing pro se*** to notify the court promptly of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

CR 41(e) (emphasis added); *see also* GR 47, APR 12, RAP 10.10, and RAP 16.22 for examples of court rules using the term “*pro se*” within the text of the rule. Thus, had the Supreme Court intended that CR 26(i) apply to cases in which a party was appearing *pro se*, it would not have solely used the term “counsel” as opposed to “counsel” or “any party appearing *pro se*” as it did in CR 41(e).

The court’s limitation of the rule’s application to cases in which both parties are represented by counsel is also consistent with the purpose of the

rule. As the drafters of the rule specifically states, one of the purposes of the rule is “to encourage professional courtesy between attorneys.” 4 Washington Practice: Rules Practice, Civil Rule 26, § 22, at 13 (4th ed. Supp.2001). Consistent with this purpose, the court limited the application of the rule to those cases in which both parties are represented by “counsel.” As a result, this rule does not apply in the case at bar.

(b) Respondent Met the Requirements of CrR 26(i).

Even if CrR 26(i) were to apply to cases in which one of the parties appears *pro se*, Appellant’s claim that Respondent did not meet the requirements of this rule is not supported by the record in this case. Indeed, the trial court made a specific finding of fact that Appellant had met the requirements of CrR 26(i). This finding, entered in support of court’s order denying the motion to vacate, stated as follows:

4. In reviewing through the Motion to Compel filed on 7/2/08, and the attached correspondence, the court finds that the attorney offered the fact of a CR 26(i) conference. The correspondence (as the only means available for contact) identified that a motion to compel would follow if discovery was not provided and it invited the petitioner to call the attorney to discuss the contents of the correspondence.

CP 74.

Appellant did not assign error to this finding. As a result, it stands as a verity on appeal and forecloses any argument that Respondent’s attorney failed to offer a CR 26(i) conference. However, even had appellant assigned

error to this finding, the fact is that substantial evidence supports it. In the certification of counsel and the attached letter inviting Appellant to contact her, counsel specifically met the requirements of CR 26(i). Counsel's certification set out the facts surrounding her attempts to get Appellant to comply with Respondent's discovery requests, and gave the following certification:

I hereby certify that the conference requirements of Civil Rule 26(i) were completed when I sent my letter to the pro se party.

CP 3.

Counsel's letter to Appellant, attached to this certification, specifically invited Appellant to call counsel and discuss the discovery issues. As the court noted in its finding of fact on this issue, this letter, sent to the only address counsel had, was counsel's only method of communication with Respondent. Thus, even had Appellant assigned error to the finding of fact that Respondent had met the requirements of CR 26(i), the fact is substantial evidence supports the court's finding.

In addition, Respondent's repeated failure to contact Appellant's counsel, and repeated failure to comply with the court's order that she adequately respond to Respondent's discovery requests supports the conclusions that her refusals were willful. A discovery violation is willful if it is done without reasonable excuse. *Rivers v. Wash. State Conf. of Mason*

Contractors, 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002). Appellant in this case never did respond to counsel's invitation to call her so they could have two-way communication concerning the discovery, in spite of the fact that Respondent's counsel made this invitation by letter dated May 15, 2008. The parties then went to court repeatedly and Respondent still did not avail herself of this invitation. Finally, in her affirmation given in support of her motion to vacate the order of default, Appellant did not present any excuse as to why she had failed to respond to counsel's invitation. Thus, her refusal to confer, without so much as a claim of excuse, constituted willful conduct.

(3) The Trial Court Did Not Abuse its Discretion When it Granted Default under CR 37(b) as the Appropriate Remedy for Appellant's Repeated and Willful Failures to Comply With Respondent's Discovery Requests.

The entry of sanctions under CR 37(b), including an order of default, lies within the sound discretion of the trial court, and will only be overturned on appeal upon a showing of an abuse of that discretion. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). An abuse of discretion only occurs if the trial court's action is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn.App. 223, 229, 548 P.2d 558, review denied, 87 Wn.2d 1006 (1976). However, when the trial court "chooses one of the harsher remedies allowable under CR 37(b), ... it must

be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,” and whether it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wn.App. 476, 487, 768 P.2d 1 (1989), *rev’d in part*, 114 Wn.2d 153, 786 P.2d 781 (1990). A violation of a court order without reasonable excuse is deemed “willful.” *Allied Fin. Servs., Inc. v. Mangum*, 72 Wn.App. 164, 168, 864 P.2d 1 (1993).

In the case at bar, the record reveals that the trial court did everything it thought possible as a lesser sanction prior to entering the order of default. On July 18, 2008, the court ordered Appellant to comply with the discovery requests, the court warned her that default was a possible sanction for her failure, the court ordered her to return on August 1, 2008, to review her compliance, and the court denied Respondent’s request for attorney’s fees. On August 1, 2008, the court again ordered Appellant to comply with the discovery requests, the court warned her that it would grant an order of default if she failed to comply, the court granted attorney’s fees against her as a further sanction, and the court specifically ordered her to return on August 22, 2008, to review her compliance. Finally, on August 22, 2008, Appellant did not even appear in court. Her claim in her affidavit that she didn’t believe that she had to appear is directly contrary to the court’s explicit

order that she appear on that date.

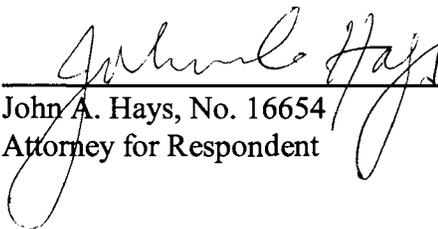
This progression of hearings demonstrates that the trial court did everything within its power to attempt to coerce compliance short of default. Indeed, this was the only option available to the court on August 22, 2008. Thus, in the case at bar, the trial court did not err when it employed the sanction of default as the only possible remedy to it.

CONCLUSION

The trial court did not abuse its discretion when it entered the order of default against appellant.

DATED this 24th day of August, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Respondent

APPENDIX

CR 26(i)

(i) **Motions; Conference of Counsel Required.** The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

CR 37(b)

(b) Failure to Comply With Order.

(1) Sanctions by Court in County Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

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

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

CR 41(e)

(e) Notice of Settlements. If a case is settled after it has been assigned for trial, it shall be the duty of the attorneys or of any party appearing pro se to notify the court promptly of the settlement. If the settlement is made within 5 days before the trial date, the notice shall be made by telephone or in person. All notices of settlement shall be confirmed in writing to the clerk.

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

In re the Marriage of:
BENJAMIN JAMES COLLIER,
Petitioner-Respondent,
and
ERIN SUZANNE HAMRICK, fka, COLLIER
Respondent-Appellant.

COA NO. 38953-3-II
AFFIRMATION OF SERVICE

STATE OF WASHINGTON)
County of Cowlitz) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

- On August 24th, 2009, I personally placed in the mail the following documents
1. BRIEF OF RESPONDENT
 2. AFFIRMATION OF SERVICE
 3. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

to the following:
KURT ANAGNOSTOU
ATTORNEY AT LAW
P.O. BOX 1793
LONGVIEW, WA 98632

BENJAMIN COLLIER
1815 ISLAND DRIVE
LONGVIEW, WA 98632

Dated this 24TH day of AUGUST, 2009 at LONGVIEW, Washington.


CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS

AFFIRMATION OF SERVICE - 1

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084