No. 85425-9-I

WASHINGTON SUPREME COURT

ZAK SMITH,

Petitioner,

v.

GEN CON LLC, a Washington State Limited Liability Company, PETER ADKISON, an individual, and PETER ADKISON AND JANE DOE ADKISON and the marital community composed thereof,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

On February 10, 2019, during the zenith of the #MeToo movement, Petitioner Zak Smith's estranged wife posted a claim on Facebook that Smith committed sexual transgressions on her during their marriage. CP 225 at 27. Smith denied the allegations, but because of his prominent role in the tabletop gaming business, they became a subject of discussion on social media.

In the wake of the accusation, Respondent Gen Con banned Smith from its annual tabletop gaming convention, on which he relied for his livelihood. Gen Con then published a statement on its website stating that "Zak S has been banned from Gen Con and that we flat-out don't tolerate harassers or abusers in our community or at our convention." Gen Con's CEO Peter Adkison posted a statement on Facebook that "There were many people abused by Zak, the evidence was overwhelming. I don't need a court process to uninvite [an] abuser to my party." Similar statements were made by Gen Con and Adkison in many venues.

Smith commenced this action for defamation on February 8, 2021. The defendants filed a Motion to Dismiss under CR 12(b)(6) on March 17, 2021, which the court granted. Smith Appealed, and the Court of Appeals largely reversed and remanded for trial.

When the case was remanded, Smith was concerned that the judge might be biased against his attorney and decided to

retain new counsel, who appeared on December 27, 2022. While Smith's new counsel was working to understand the case, Gen Con filed a Motion to Compel based on discovery served on Smith's first attorney.

Because of a clerical error, Smith's new counsel was unaware of the motion, which the trial court granted on February 14, 2023. The order required Smith to file complete answers by February 28.

Gen Con then brought a motion for an award of attorney fees on the motion. Although the motion was a routine motion to compel and uncontested, Gen Con requested $23,337.50 of fees. CP 792, 801. One reason the amount was so high was that Gen Con requested an hourly rate of $610 for Hannah Parman, who had been an attorney for a little over a year at the time. The court awarded the entire amount requested.

Ensuring that discovery responses were complete was complicated by the fact that there were related cases in Australia and Canada, and by the fact that Mr. Smith had already produced over 9,000 pages of documents. When it became apparent to Smith's new counsel that meeting the February 28 deadline would not be possible, he sent an email to Gen Con's counsel requesting an extension of a few weeks.

Gen Con refused the extension and immediately filed a second motion to compel. The trial court granted the motion and

ordered Smith to immediately provide the discovery responses. Smith provided supplemental responses on March 22, 2023. The responses were verified as accurate by Smith and certified as compliant by his counsel.

Gen Con brought a motion for attorney fees for its second motion to compel, which also was uncontested. This time Gen Con requested $29,945.50 of attorney fees. Once again, the court granted the full amount of the request.

Gen Con then filed a motion asking the trial court to dismiss the case as a discovery sanction. That motion argued that Smith's answers to four interrogatories and two requests for production were deficient. CP 1034-1035.

The trial court granted the motion and summarily dismissed Smith's case a second time. The court did not determine that Smith failed or refused to provide information in his possession. It instead ruled that: "If he does not know what information they have, that should have been disclosed long since," and "If Plaintiff does not know the basis for his damages claim, that should have been disclosed long since."

Smith appealed a second time, and Division One of the Court of Appeals affirmed in a perfunctory decision. The court said that Smith "did not provide this information in signed discovery responses, move for a protective order, or otherwise explain to the trial court his reasons for Smith not responding to

Gen Con's discovery requests." However, Smith did respond to all of the discovery without objection.

Division One rejected Smith's appeal of the fee awards because "the court's orders here show that it considered and rejected Smith's arguments." Slip Opinion at 15. Like the trial court, the court did not address or discuss whether awards of $23,000 and $29,000 for routine, unopposed motions to compel were reasonable.

This Court's decisions make clear that before awarding sanctions, a court must give genuine and deliberate consideration whether less severe sanctions would serve their purpose. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Similarly, when awarding attorney fees, courts must take an active role and not just accept the amounts requested. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998).

Unfortunately, too many courts fail to follow those rules. Here, the trial court dismissed this case because Smith failed to provide information that did not have, and it awarded excessive fee requests without meaningful review. This Court should accept review to ensure that its decisions are followed.

II. STATEMENT OF THE NAME AND IDENTITY OF THE PETITIONER

Appellant Zak Smith seeks review by the Supreme Court.

III. CITATION TO THE COURT OF APPEALS DECISION

Appellant Zak Smith seeks review of the September 30, 2024 unpublished opinion in Court of Appeals Division One Case No. 85425-9, Zak Smith, Appellant v. Gen Con LLC et al, Respondent.

IV. ISSUES PRESENTED FOR REVIEW

Should the Court grant review?

V. STATEMENT OF THE CASE

A. Factual History.

For the sake of efficiency, this brief statement of the background facts is taken from the Court of Appeals decision in this matter. CP 204-206.

Zak Smith was a successful artist successful in the role-playing game ("RPG") world. Gen Con is the largest and longest-running tabletop gaming convention in North America, and its annual convention was an important part of Smith's business.

In February 2019, Smith's estranged wife published a Facebook post accusing Smith of sexual assault during their marriage. Smith alleges that these accusations are false. Shortly afterwards, Gen Con banned Smith from its convention. Smith alleges that Gen Con conducted no investigation before taking that action.

Because of Smith's prominence in the business, his banning became known in the community. Shortly after banning Smith, Gen Con's owner Peter Adkison published a statement on Gen Con's website:

> At Gen Con we have a policy of not disclosing the names of individuals who have been sanctioned or banned from our events. However, our statements regarding a recent ban have caused confusion and more importantly, made people feel that Gen Con doesn't care about attendee safety. To clarify, I want to state that Zak S has been banned from Gen Con and that we flat-out don't tolerate harassers or abusers in our community or at our convention.

CP 366.

Adkison published a post linking to the statement on his personal Facebook page, saying, "In response to the recent outcry against Zak Smith, I've posted an open letter on the Gen Con website uninviting him to Gen Con." In response to a comment on that post characterizing Gen Con's statement as lacking due process, Adkison stated: "There was due process, that's why it took us so long to come around. There were many people abused by Zak, the evidence was overwhelming. I don't need a court process to uninvite [an] abuser to my party." In this lawsuit, Smith contends that Gen Con and Atkison's posts significantly contributed to his reputational harm and caused him to suffer emotional distress.

B. Procedural History.

Smith commenced this case on February 8, 2021. CP 1-21. On March 17, 2021, Gen Con filed a Motion to Dismiss under CR 12(b)(6), which the trial court granted on May 4, 2021. CP 26-66, 192-193.

Smith timely appealed, and on July 11, 2022, this Court reversed in part. CP 201-220. The court ruled that Smith had stated a claim for defamation (including defamation per se), false light, and intentional interference claims, and it reversed the dismissal of those causes of actions. CP 203.

After the mandate was filed. Smith filed a motion for change of judge. CP 344-356. When that motion was denied, Smith concluded that a change of attorney might help, and on December 27, 2022, new counsel substituted for Smith.

On February 1, 2022 Gen Con filed a Motion to Compel. CP 661-680. For reasons that remain a mystery, counsel for Smith was unaware of the motion. CP 987 at ¶ 8. Smith's counsel first learned of the motion when he received the trial court's order granting it on February 15, 2023. CP 785-786. In the process of familiarizing himself with the case, counsel had discovered some documents that appeared to be responsive to discovery requested but had not been produced, and counsel determined that it made more sense to simply comply with the order. CP 987 at ¶ 9.

The order required complete discovery responses less than two weeks later on February 28, 2023. Ensuring that discovery responses were complete was complicated by the fact that there were related cases in Australia and Canada, and by the fact that Mr. Smith had already produced over 9,000 pages of documents. CP 987 at ¶ 6.

It became apparent that the supplementation could not be completed by February 28, and the day before the deadline, Smith's new counsel sent an email to counsel for Gen Con requesting a brief extension of time so that he could complete the work. CP 993-994. However, counsel for Gen Con flatly refused to agree to any extension of time. CP 993. Counsel devoted his efforts to completing the discovery supplementation as quickly as possible. CP 1214.

On February 28, Gen Con filed a Petition for Fees for its unopposed Motion to Compel. Although counsel had expected a relatively nominal fee request, Gen Con requested $23,337.50. Counsel for Smith filed a response arguing that a request for $23,000 for a routine unopposed Motion to Compel was patently unreasonable and suggested that an award of $3,000 would be more in line with custom and reason. CP 912-14. On March 13, 2023, the court granted Gen Con's motion for attorney fees and awarded it the requested amount of $23,337.50. CP 944. The court's order also invited Gen Con to submit additional fee

requests. CP 945 ("The Court will take seriously any further necessary fee requests for work done to obtain requested (and compelled) discovery."). *Id.*

On March 2, 2023, Gen Con filed a second Motion to Compel, this time over the failure to produce the records by the February 28 deadline. CP 877-895. On March 15, 2023, The court granted Gen Con's second Motion to Compel and ordered Smith to "immediately" answer all discovery. CP 947-49.

On March 22, 2023, three weeks after the court's original deadline, and 85 days after Smith's new counsel appeared in the case, Smith served full and complete answers to Gen Con's discovery. CP 1270-2185; CP 989 at ¶ 16. The supplementation included thousands of pages of additional documents and extensive additional answers to interrogatories. *Id.* The supplemental responses were verified by plaintiff and certified by counsel pursuant to CR 26(g). CP 1284-85.

Following the court's invitation, Gen Con filed a second motion for fees on March 20, 2023, allegedly for its work since its February 28 fee motion. CP 952-964. This time, Gen Con requested $29,945.50. Smith filed a response detailing the history of the matter and counsel's efforts to complete the discovery. CP 980-85. Counsel for Smith pointed out that he had made his best efforts to comply with the Court's order, and that full and complete responses had been served. *Id.* On April 4,

2023, the court granted the second motion for fees and once again awarded Gen Con the full $29,945.50 that it had requested. CP 1022-1023.

C. Motion for Termination Sanctions.

On April 17, 2023, Gen Con brought a Motion for Termination Sanctions asking the trial court to dismiss the case. CP 1026-1046. That motion argued that Smith had failed to comply with the trial court's orders, but it did not mention its refusal to grant plaintiff's request for a short extension, nor did it mention that Smith did provide certified responses on March 22.

In fact, the motion argued only that Smith's responses were deficient in four specific aspects: (1) Interrogatory No. 2, "which asks him to identify witnesses and describe what subjects of discoverable information they might have;" (2) Interrogatory 3, which "asks him to describe and quantify his damages;" Interrogatories 10 and 11 concerning causation, which "asked Smith to identify those who banned or canceled contracts with him *because of Defendants' statements*;" and Requests for Production 15 and 16, which "asked for all documents and communications that support Smith's allegations on causation in interrogatories 10 and 11." CP 1034-1035 (emphasis in original).

The court granted the motion on May 10, 2022. For efficiency, the motion and her decision are discussed together.

1. **Interrogatory 2: Information Known to Persons with Knowledge.**

Gen Con's entire argument regarding the facts known first by persons with knowledge consisted of its statement that "Smith provided a laundry list of over 100 names but refuses to answer what subjects of discoverable information most might have." CP 1035. Smith did not provide that information because he did not have it. Those persons were identified because they posted comments about Gen Con's statements in online forums, and Smith knows neither their true identities nor their factual knowledge.

Smith identified those forums in his discovery responses by reference to the internet addresses. CP 1237, 1275-76. The names provided are the handles or online names of people whose actual identity are not known or knowable to Smith without a subpoena to the host of the forums. They include names such as "@byfrancita, Satine Phoenix, Emmy Allen aka Cavegirl, AuraTwilight, Zoe Quinn." CP 1096, 1224 In many cases, names were included on the grounds that the posted "likes" of other posts. CP 1238. Smith does not know the actual names of the persons who posted the relevant comments.

In its ruling dismissing the case, the trial court ignored Smith's explanation and said that he had failed to respond.

> Plaintiff has identified 115 people with discoverable information r

> elated to his claims but has failed to respond to what the subjects of that information are for 111 of those 115 names, leaving the Defendants to simply guess at the potential witnesses and testimony Plaintiff may have.

CP 1305. Smith did not fail to respond. He responded that he did not know.

2. Interrogatory 3: Numeric Proof of Damages.

With respect to Interrogatory 3, Gen Con argued that "Smith alleges that his damages are at least $2,850,000" and that Smith's supplemental response "asserts that determining specific dollar damages amounts would require him to look at his own documents," and that "he told Gen Con to go rummage through his production to figure out whatever surprise damages theory—if any—he might have." CP 1035.

As a factual matter, Interrogatory 3 did not refer to the $2.85 million amount at all. It asked Smith to quantify his damages.

> Identify, quantify, and describe in detail all the damages that you assert that you have suffered as a result of Defendants' alleged wrongful conduct. Please make clear in your answer the damages that you assert are properly categorized as statutory damages, special damages, consequential damages, actual damages, general damages, or emotional distress, explain the basis for the amounts and categories, and link the damages to an asserted cause of action.

CP 1227-1228. The reference to $2,850,000 is found in the Prayer for Relief in the First Amended Complaint, which asks for "damages and punitive damages in an amount not less than

$2,850,000." CP 238. A request for relief is not a factual allegation.

In his supplemental discovery response, Smith stated that "The specific elements and amounts of damage are not yet known with certainty" and proceeded to set forth the categories of damages being sought with a description of each. CP 1273.

As Smith explained in his response to the motion, his primary claim was for defamation *per se*, for which damages are presumed. In the first appeal, the court explicitly reversed the dismissal of Smith's claim for defamation *per se*. CP 372-373. The law is clear that under claims for defamation *per se*, damages are presumed, and "there is no requirement to prove 'actual damages.'" *Reykdal v. Espinoza*, 196 Wash.2d 458, 473 P.3d 1221 (2020). Smith's inability to quantify his damages had no effect on his claim for defamation *per se*.

3. Interrogatories 10 and 11: Persons who banned or canceled contracts with him *because of Defendants' statements*.

Gen Con's motion italicized the words "*because of Defendants' statements*" to emphasize that these interrogatories asked Smith to specify the people who banned Smith or canceled contracts with him specifically because of defendants' statements. CP 1035. Smith responded that he could not answer that question because no one had told him they were taking that action because of the poses. CP 1275-1276.

In its order, the trial court acknowledged Smith's explanation that he could not provide information he did not have, but still granted the motion.

> And now he says that he "does not and cannot know" whether Defendants had anything to do with most of the harm that he claims and refuses to say what he does know did cause some of the harm he alleges. This is wholly inadequate.

CP 1306. If Smith's answer was inadequate, the court could make an order limiting or excluding evidence, but it could not say that he failed to respond.

4. Requests for Production 15 and 16: Documents That Support Smith's Allegations on Causation.

Gen Con claims that Smith "refuses to produce" documents on causation in response to Requests for Production 15 and 16.

Request for Production 15 asked Smith to "Produce all documents and communications from the "relevant game forums" that you allege you were either "blacklisted" or "banned" from because of Defendants' alleged wrongful conduct as stated in paragraph 32 of the Complaint." Request for Production 16 asked: "Produce all documents and communications related to your contention that you were 'blacklisted in the game industry' as stated in paragraph 33 of the Complaint."

Whether Smith "refused to produce" those documents can only be determined from his response itself. Smith's response to both Requests for Production was identical:

> All documents in Smith's possession that appear to be responsive are available for inspection and copying. Pursuant to CR 34(b)(3)(F)(i), plaintiff is producing documents as they are maintained in the ordinary course of business.

CP 1168. Smith did not "refuse to produce" any documents. He agreed to produce, and did produce, all responsive documents in his possession, custody or control. Smith produced his records are they are kept in the ordinary course pursuant to CR 34(b)(3)(F)(i) because separating and identifying the documents "related" to being blacklisted would be impossible.

VI. ARGUMENT

Review Should Be Granted Under RAP 13.4(b)(1)

This Court should grant review because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court (RAP 13.4(b)(1).

A. Dismissal of Case.

The court imposed the harshest discovery sanction possible when she dismissed Smith's claims. Before imposing a harsher discovery sanction, "the record must show three things—the trial court's consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it." *Blair v. Ta/–Seattle East No. 176*, 171 Wn.2d 342, 254 P.3d 797 (2011)

(quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006). Those requirements must be met in substance, not merely in words.

The motion did not concern a party who refused to provide discovery. It did not concern a party who refused to provide specific information or provide specific documents. Instead, it concerned Smith's responses to four interrogatories and two requests for production. Smith's response was not a refusal to answer discovery; it was that he had provided everything that he could.

The record shows no genuine consideration of lesser sanctions. The trial court made no attempt to explain why Smith's position required the dismissal of the case. It never mentioned or considered an order excluding or limiting evidence. It never addressed which of Smith's claims were implicated by the disputed discovery requests. Instead, the trial court stated that "The Court has considered every possible alternative sanction and sees no lesser sanction that will have any effect whatever." CP 1307.

With regard to willfulness, the trial court said that "it is impossible on this record to view the Plaintiff's refusal to provide essential discovery about the basis for his suit as anything other than willful and deliberate." CP 1306. The trial court said that Smith "refuses to say what he does know did cause some of the

harm he alleges," but Smith never refused anything. CP 1306. A statement that a party is unable to answer discovery because of a lack of knowledge is not a refusal to answer.

Smith and his counsel could not have been more clear that all information and documents in Smith's possession had be provided. Smith submitted a declaration stating that he had "included the additional information I could find, and with my supplementation, my answers were complete and accurate." CP 1211. His counsel submitted a declaration stating that

> I certified the March 22, 2023 responses pursuant to CR 26(g) because I was satisfied that I had fully complied with the rules. I hereby again certify that the responses complied with the civil rules and were complete and accurate.

CP 1215.

Lastly, a court must find substantial prejudice arising from the failure to make discovery. The trial court made the conclusory assertion that "The prejudice to Defendants is obvious." CP 1307. It went to say that defendants "cannot determine who to depose and on what topics, prepare for summary judgment or trial, or even learn the basis for Plaintiff's damages and causation claims in his complaint." CP 1307. Smith's responses fully informed the defendants about what information Smith did and did not possess. He could provide no more, and the discovery rules do not require parties to provide information they do not have.

Division One simply parroted the trial court's statements without analysis.

> Finally, the trial court concluded that the "prejudice to Defendants is obvious." It explained that given the inadequate responses, Gen Con is unable to "determine who to depose and on what topics, prepare for summary judgment or trial, or even learn the basis for Plaintiff's damages and causation claims in his complaint." This is a tenable conclusion given the substance of information withheld.

Slip Opinion at 13. The court's statement that the trial court's conclusion was tenable "given the substance of information withheld" would make sense if any information had been withheld. The court's reference to withheld information makes one wonder if it even read Smith's response.

The party prejudiced by Smith's inability to provide responsive information was Smith himself. It is axiomatic that parties may not fail to provide information or documents in discovery and then seek to introduce them at trial. The court could have provided a complete remedy by excluding information and documents that were not produced.

It would have been a simple matter for the court to craft sanctions that fully addressed any discovery violations by excluding any evidence not produced in discovery. Such a ruling would have permitted Smith to proceed with his claim for defamation *per se*, a claim that was wholly unrelated to the discovery at issue here.

The trial court's dismissal of this case as a discovery sanction was simply a continuation of its treatment of the case from the beginning. The Court of Appeals failed to perform its function of correcting such errors. This Court should enforce its requirements for dismissing a case as a discovery sanction, and it should grant review because the decisions of the trial court and the Court of Appeals are in conflict with numerous decisions of this Court.

B. Awards of Attorney Fees.

When awarding attorney fees, a trial court must make an adequate record. Specifically, "a trial court must enter findings of fact and conclusions of law to establish 'an adequate record on review." *Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 1 Wash.3d 711, 532 P.3d 601 (2023) (quoting *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 393 n. 1, 325 P.3d 904 (2014) (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998)). The trial court's orders awarding defendants fees in this case do not even purport to include findings of fact.

The trial court's order granting the defendants' first fee request is two pages long. It states that:

> the Court finds after careful scrutiny of the hours expended and rates charged, were reasonable both as to hours and rates and were reasonably expended by Defendants in connection with Mr. Smith's failure to engage with the

> discovery process, not merely in drafting the motion to compel.

CP 944-945. The second order awarding fees was equally conclusory.

> The Court has reviewed Defendants' submissions closely and concludes the fees expended by defendants in connection with filing their Motion to Show Cause Order and Discovery Sanctions and this fee petition are well supported.

CP 1023.

A court's findings in support of an award of attorney fees must consist of something more than a bare assertion in a single sentence. "Rather, it must supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." *Sentinelc3, Inc. v. Hunt*, 181 Wash.2d 127, 331 P.3d 40 (2014). Likewise, "The court reviewing the award needs to know if the attorney's services were reasonable or essential to the successful outcome." *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009). In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), this Court admonished that "Courts must take an active role in assessing the reasonableness of fee awards," and that "Courts should not simply accept unquestioningly fee affidavits from counsel."

The trial court's one-sentence findings do not meet this standard. Neither order discusses Smith's objection that the time spent was unreasonable for simple discovery motions or the

request for a $610 hourly rate for an attorney with barely a year of experience. Neither order discusses the substance or amount of the requests at all.

This Court has noted that "In the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court's resolution of the issue." *Copper Creek (Marysville) Homeowners Ass'n v. Kurtz*, 1 Wn.3d 711, 532 P.3d 601 (2023). However, in this case, the trial court declined all requests for oral argument, and no oral record exists.

In its opinion here, Division One stated that appellate courts "review an award of attorney fees for an abuse of discretion," and that "The burden of showing that a fee is reasonable rests with the fee applicant." Slip Opinion at 13. Division One then proceeded to affirm the decision without any actual consideration whether the fee requests were reasonable. It instead was satisfied because "the court said it determined that the amount of requested fees was reasonable after 'careful scrutiny of the hours expended and rates charged.'" Slip Opinion at 16.

When attorney fees are awarded without adequate findings, this Court reverses and remands for entry of appropriate findings. *Svendsen v. Stock*, 143 Wash.2d 546, 23 P.3d 455

(2001). Even if the Court affirms in all other respects, it should remand for entry of proper findings on attorney fees.

VII. CONCLUSION

This Court has established clear and specific requirements that must be met before a case can be dismissed as a discovery sanction. It has established clear and specific procedures for awards of attorney fees. Neither the trial court nor the Court of Appeals complied with those requirements, and this Court should grant review.

RAP 18.17 Certificate

I, Matthew Davis, hereby certify pursuant to RAP 18.1 that this Petition for Review contains 4,998 words according to the word processing software used to prepare it.

DATED this 30th day of October, 2024.

MATTHEW F. DAVIS, PLLC

By _____

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VIII. APPENDIX

FILED
9/30/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ZAK SMITH, Appellant, v. GEN CON LLC, a Washington State Limited Liability Company; PETER ADKISON, an individual; and PETER ADKISON AND DENISE FENTON, and the marital community composed thereof, Respondents.	No. 85425-9-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Zak Smith sued Gen Con LLC and Peter Adkison for defamation, defamation per se, false light, and interference with a business expectancy. The trial court dismissed his lawsuit as a discovery sanction. Smith argues the trial court abused its discretion by dismissing his case and granting defendants' requests for attorney fees. We affirm.

FACTS[1]

Smith is an artist who began developing tabletop role-playing games (RPGs) in 2010. Gen Con is the largest and longest-running tabletop convention company in North America. Adkison is the co-owner and board chairperson of Gen Con. Smith regularly attended Gen Con events and generated business

[1] We repeat the relevant facts set forth in our prior opinion as necessary for the issues we address in this opinion. *See Smith v. Gen Con LLC*, No. 82672-7-I (Wash. Ct. App. July 11, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/826727.pdf.

relations, consulting jobs, sales, and other business in the RPG industry from the conventions.

In February 2019, Smith's estranged wife published a Facebook post, accusing Smith of sexual assault during their marriage. Adkison then published a statement in response to the accusations on Gen Con's website, banning Smith from Gen Con events. He also posted a link to his statement on Facebook in support of the ban, declaring that the " 'evidence was overwhelming' " that Smith is an " 'abuser.' "

On February 8, 2021, Smith sued Gen Con, Adkison, and Adkison's wife, (collectively Gen Con), alleging defamation, defamation per se, false light, outrage, interference with a business expectancy, and violation of the Consumer Protection Act (CPA), chapter 19.86 RCW. Gen Con moved to dismiss the complaint for failure to state a claim under CR 12(b)(6), and the trial court granted the motion. Smith appealed the order. We affirmed dismissal of the outrage and CPA claims but reversed and remanded the claims of defamation, defamation per se, false light, and intentional interference with a business expectancy for further proceedings.[2]

On October 21, 2022, Gen Con served Smith with its first requests for production and first set of interrogatories. Smith did not timely respond, so the parties met and conferred about the issue on November 30. Smith submitted his responses on December 2.

[2] *Smith*, No. 82672-7-I, at 12, 17. On November 10, 2022, Smith amended his complaint, alleging only defamation, defamation per se, false light, and interference with a business expectancy.

On December 23, 2022,[3] Gen Con wrote Smith a letter, acknowledging receipt of his discovery responses but explaining that they were provided "12 days past the deadline" and "deficient." Gen Con identified several incomplete responses, including Smith's failure to identity each person likely to have discoverable information related to his claims, and a description of what that information may be. Smith listed several names but did not provide contact information or identify the discoverable information each person possessed. Gen Con also told Smith that he failed to "[i]dentify, quantify, and describe in detail all the damages" he suffered, or each "game forum, company, group, or other organization" he claimed blacklisted or banned him as a result of Gen Con's alleged wrongful conduct.

Around that time, Smith hired a new lawyer, Matthew Davis. Gen Con emailed Davis and attached a copy of the December 23 letter. It asked for interrogatory responses by January 6, 2023. Davis responded by email on December 28, 2022, but did not address the alleged deficient discovery responses. Instead, he asked whether Gen Con would "acknowledge the consequences of its actions for Mr. Smith's life" and, if not, notified Gen Con's attorney that he "will be noting a CR 30(b)(6) deposition of your client for the third week of January." Gen Con responded on December 29. Gen Con's counsel told Davis that "we've been asking for Smith's documents and discovery responses for many weeks now," and we "need those documents so that we can schedule [Smith's] deposition."

[3] The letter is misdated as December 23, 2021.

Davis did not respond to the email, so Gen Con sent another on January 3, 2023, asking if Davis was available to "meet and confer" on January 6. Again, Davis did not respond. So, Gen Con emailed him on January 9, referencing the alleged deficient discovery responses and requesting his availability to meet and confer. On January 11, Gen Con still had not heard from Davis, so it sent another email, urging Davis to register for "e-service,"[4] asking to meet and confer, and explaining that it would "file a motion to compel if we do not receive supplemental responses this week." Davis again did not respond, so Gen Con resent the same email on January 18.

The evening of Wednesday, January 18, 2023, Davis responded, asking to "speak about the discovery on Monday" so he would have "time to get up to speed with it." Gen Con replied the next day. It told Davis that "we are of course available to speak—we've been asking for weeks, after all. You've largely ignored us." It asked Davis to "please send us times that you are available on Monday or Tuesday" and to supplement Smith's interrogatory responses "by Monday end of day." Davis said, "I will be ready to discuss it on Monday."

The next day, Friday, January 20, 2023, Gen Con reminded Davis that "[y]ou still haven't told us when you are available on Monday or Tuesday to confer. Please provide your availability." Davis did not respond. On Tuesday, January 24, Gen Con told Davis it has "tried repeatedly to confer with you but you continue to ignore our requests for a time to speak." It asked Davis again to

[4] "E-service" is a reference to the King County Superior Court electronic filing and service system. Under King County Local General Rule (KCLGR) 30, parties must electronically file and serve all documents unless the rule provides otherwise. *See* KCLGR 30(b)(4)(A), (B)(i).

supplement Smith's interrogatory responses by Friday, January 27, or Gen Con would move to compel responses. Davis did not respond.

On February 1, 2023, Gen Con moved to compel discovery. It asked the court to order Smith to "fully and without objection" answer Gen Con's first set of interrogatories within 14 days. And it requested "reasonable attorneys' fees associated with this discovery dispute." Davis did not respond to the motion.

On February 14, 2023, the trial court issued an order granting Gen Con's motion to compel discovery. The court ordered Smith to produce responses to discovery no later than February 28. And it declared that all objections, other than those based on privilege, are waived, but that Smith must provide a detailed privilege log by February 28. Finally, the court ordered Smith to "pay the reasonable attorneys' fees and costs Defendants have incurred relating to this discovery dispute."

The afternoon of February 14, 2023, Davis emailed the court, acknowledging receipt of the order, claiming he did not receive a copy of the motion to compel, and asking if he could have a chance to respond. Gen Con objected, pointing out that Davis "is signed up for e-service," that Gen Con had served its briefs through e-service, and that Davis received the trial court's order by email, which "is the same e-mail as his e-service." The trial court did not respond to Davis' request.

Later that day, Davis emailed Gen Con directly, explaining that he "was careful not to claim that [he] did not receive the motion," and acknowledging that he is signed up for e-service and has "received other documents that way." Still,

he could find no evidence that he received the motion to compel. He asked Gen Con's attorney to be "as gracious and cordial as the others" Davis had encountered at his firm, Perkins Coie. But Davis also told him that he had "encountered attorneys who made everything difficult and were essentially jerks," and "I would observe that your client faces a far more extensive discovery burden than mine. If that is the way you choose to play it, then I will be forced to play the same way."

On February 27, 2023, a day before the court-ordered deadline, Davis emailed Gen Con, asking for more time to complete the discovery responses. He explained that he was doing his best to be thorough but needed another two weeks, and hoped that it would "accept my statement and allow me time to finish the work." Gen Con responded that Davis had "used variations of the same excuse" for months, that it expects "full compliance by the deadline," and that if he did not comply, it would "bring this issue to the Court's attention in a motion for an order to show cause and for sanctions." Davis told Gen Con to "[d]o what you want. I am working as fast as I can. If you demand the impossible, you probably won't get it."

Smith did not provide supplemental discovery responses on February 28 as ordered by the court. So, on March 2, 2023, Gen Con moved for a show cause order and discovery sanctions. It asked for daily monetary penalties until Smith complied with the court's order, an order to show cause why the court should not hold Smith and Davis in contempt, and an award of attorney fees and costs. Smith did not respond to the motion.

On March 13, 2023, the trial court issued an "Order Granting Defendants' Fee Petition" related to its February 14 order compelling discovery. In the March 13 order, the court told Smith it was aware as of March 10 that he "still had not complied with the February 28, 2023 deadline" in the order compelling production of discovery. And that "failure to comply with discovery can be considered evidence of willfulness, that delay in providing discovery is prejudicial to trial preparation, and that failure to comply with court orders may lead to consideration of more significant sanctions."[5]

On March 15, 2023, the court issued an order on Gen Con's March 2 show cause motion. The court found that Smith "appears to date to have disregarded my February 14" order, and that he "has not provided any explanation for his failure to comply" with the order "or indeed any response at all to this motion." The court ordered Smith to "immediately provide discovery as directed" in the February 14 order and to pay reasonable attorney fees and costs "associated with this present motion." Later, the court granted Gen Con's fee petition related to the court's March 15 discovery order. The court again warned that "continued failure to promptly comply in full with the Court's orders compelling" discovery will "likely lead to much more significant sanctions, including, possibly, dispositive relief."[6]

[5] The trial court awarded Gen Con $23,337.50 in attorney fees. Smith refused to pay the attorney fees. Davis argued alternatively that the court's order was interlocutory and "not enforceable until entry of a final judgment pursuant to CR 54(b)," and that Smith could not afford to pay.

[6] The court awarded Gen Con $29,945.50 in attorney fees. Smith again refused to pay the fees.

On March 22, 2023, Smith provided supplemental responses to Gen Con's interrogatories and requests for production. On March 24, Gen Con emailed Davis with a list of alleged deficiencies in the responses. Gen Con pointed out that Smith still had not identified the discoverable information possessed by the list of people he claimed had such information, provided details of the damages he claimed to suffer, nor provided sufficient details of each game forum, company, group, or other organization he claimed blacklisted or banned him as a result of Gen Con's alleged wrongful conduct.

Davis did not respond to the email. So, on March 28, 2023, Gen Con asked Davis to meet and confer. The parties met on April 3 and agreed that Davis would supplement Smith's responses by April 10. On April 10, Davis emailed Gen Con with Smith's supplemental responses. Davis told Gen Con that "Smith does not have contact information for the persons . . . he listed" as having discoverable information, and that Smith "does not know what knowledge they possess." And he told Gen Con that Smith "has provided all responsive information in his possession or control" about the amount of damages he suffered. He explained that "[y]ou might not like his answer, but it is his answer." Gen Con replied that "the supplemental responses remain as deficient as they were last week."

On April 17, 2023, Gen Con moved for termination sanctions. It argued that Smith willfully refused to comply with several court orders to provide full discovery, and that lesser sanctions have not successfully compelled

responses.[7] And it asked for attorney fees and costs. On April 25, Gen Con replied to its motion, pointing out that Smith had again filed no response.

That same day, Davis responded, claiming that for "the second time in this case," he did not receive notice of Gen Con's motion. Davis asked to move the hearing date so he could adequately respond to Gen Con's motion. Over Gen Con's objection, the trial court rescheduled the hearing date to May 10 and set new briefing deadlines.

On May 1, 2023, Davis filed a "Response to Motion for Termination Sanctions," arguing that Smith "has fully answered defendants' discovery requests," so the court should deny the motion. On May 10, the trial court issued an "Order Granting Defendants' Motion for Termination Sanctions." It determined that Smith had willfully refused to comply with several of the court's orders to fully produce discovery, that he had done so despite the imposition of lesser sanctions, and that the failure to produce prejudiced Gen Con. As a result, the court dismissed Smith's complaint with prejudice. The court denied Gen Con's request for attorney fees and costs, explaining that further monetary sanctions were not warranted.

Smith appeals.

[7] Gen Con also complained about what it characterized as Davis' "threats" throughout their communications. For example, Davis intermittently told Gen Con that Smith would bring his own motion to compel and seek sanctions. He said Gen Con may want to "advise whoever runs Perkins Coie that a motion seeking substantial CR 26(g) sanctions is on the way because of the manner in which you have obstructed discovery." And Davis told Gen Con that "[t]hings are about to get interesting."

ANALYSIS

Smith argues that the trial court erred by dismissing his complaint as a discovery sanction and awarding Gen Con excessive attorney fees.

1. Termination Sanction for Discovery Violations

Smith argues the trial court abused its discretion by dismissing his complaint as a discovery sanction. We disagree.

A trial court has broad discretion in imposing discovery sanctions under CR 37(b), and we will not disturb its determination absent a clear abuse of that discretion. *Mayer v Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015).

> A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take."

Mayer, 156 Wn.2d at 684[8] (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

CR 37 authorizes the trial court to impose sanctions against a party who violates a discovery order. Under CR 37(b)(2), a trial court "may make such orders in regard to the failure [to obey a discovery order] that are just." The rule provides a nonexhaustive list of possible sanctions, which includes "dismissing the action or proceedings or any part thereof." CR 37(b)(2)(C). Generally, the

[8] Internal quotation marks omitted.

trial court should impose the least severe sanction that will adequately compensate the harmed party; deter, punish, and educate the wrongdoer; and ensure that the wrongdoer does not profit from the wrong. *Barton v. Dep't of Transp.*, 178 Wn.2d 193, 215, 308 P.3d 597 (2013).

When a trial court imposes one of the harsher remedies under CR 37(b), the record must clearly show that one party willfully or deliberately violated the discovery rules and orders, that the opposing party suffered substantial prejudice in its ability to prepare for trial, and that the trial court explicitly considered whether a lesser sanction would have sufficed. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009). A court may consider a party's disregard of a court order without reasonable excuse or justification as willful. *Id*. But willfulness does not necessarily follow from the violation of a court order alone. *Jones v. City of Seattle*, 179 Wn.2d 322, 345, 314 P.3d 380 (2013). "Something more is needed." *Id*.

The record supports the trial court's determination that Smith willfully or deliberately violated discovery rules and court orders. Smith's initial response to Gen Con's requests for discovery was late. Then, Gen Con repeatedly explained to Davis what it believed to be deficiencies in Smith's discovery responses and sought to meet and confer about the issues. Davis ignored most of Gen Con's requests to meet and confer and failed to meet the agreed deadline for supplemental responses after a meeting did occur. Smith failed to respond to each of Gen Con's motions to compel and ignored the deadlines established for production of discovery in each of the court's orders. While Davis asked Gen

Con to agree to an extension of the trial court's deadline to produce discovery, he made no motion to the court to extend the deadline.

Davis argues that Smith fully complied with the court's orders. According to Davis, Smith's responses to discovery were complete because he had no ability to determine the information known by the people he identified as witnesses, no duty to provide a "numerical basis" for his damages, and was unable to specifically identify any individual or organization that blacklisted him because of Gen Con's conduct. But Davis did not provide this information in signed discovery responses, move for a protective order, or otherwise explain to the trial court his reasons for Smith not responding to Gen Con's discovery requests. *See* CR 37(d) (the court will not excuse a party that fails to answer properly served interrogatories, or provides "evasive or misleading answer[s]," unless the party failing to act "has applied for a protective order" under CR 26(c)); *Johnson v. Mermis*, 91 Wn. App. 127, 133, 955 P.2d 826 (1998) (if a party disagrees with the scope of production, or wishes not to respond to discovery requests, it must move for a protective order). Instead, Smith produced supplemental responses six months after Gen Con's discovery requests, which Gen Con still alleged were "deficient," and Davis made no effort to explain why he believed the responses were complete until Gen Con moved for termination sanctions.

The record also supports the trial court's finding that lesser sanctions proved inadequate to motivate Davis to respond to Gen Con's discovery requests. The court twice warned Davis that more significant sanctions would

follow if he did not comply. And the court twice shifted attorney fees to Smith. Still, Davis failed to provide additional discovery responses or explain his reasons for not responding by the trial court's deadlines.

Finally, the trial court concluded that the "prejudice to Defendants is obvious." It explained that given the inadequate responses, Gen Con is unable to "determine who to depose and on what topics, prepare for summary judgment or trial, or even learn the basis for Plaintiff's damages and causation claims in his complaint." This is a tenable conclusion given the substance of information withheld.

Under these circumstances, the trial court did not abuse its discretion by dismissing Smith's complaint as a sanction for discovery violations.[9]

2. Attorney Fees

Smith argues that the trial court erred by awarding Gen Con excessive attorney fees for "routine motions to compel discovery." We disagree.

We review an award of attorney fees for an abuse of discretion. *Estrada v. McNulty*, 98 Wn. App. 717, 723, 988 P.2d 492 (1999). The burden of showing that a fee is reasonable rests with the fee applicant. *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013).

Generally, Washington courts apply the lodestar method to calculate attorney fees. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). To arrive at a lodestar award, the court first considers the number of hours reasonably expended on the case. *McGreevy v. Or. Mut. Ins. Co.*, 90 Wn. App.

[9] Because we affirm the trial court's order dismissing Smith's complaint, we need not reach Smith's argument that we should remand to a different judge.

283, 291, 951 P.2d 798 (1998). To this end, the attorney must provide reasonable documentation of the work performed, including the number of hours worked, the type of work performed, and the attorney who performed the work. *Id*. at 292. The court should discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Id*.

Next, the court determines whether the hourly fee charged was reasonable. *McGreevy*, 90 Wn. App. at 291. When attorneys have an established rate for billing clients, that rate is likely a reasonable rate. *Id*. at 293. The usual rate is not, however, conclusively a reasonable fee. *Id*. The court may also consider the attorney's level of skill, reputation, local rates charged by attorneys with similar skill and experience, or other factors relevant to the desirability and difficulty of the case. *Id*. The court then multiplies the reasonable hourly rate by the number of hours reasonably expended on the matter. *Id.* at 291.

Courts must take an active role in assessing the reasonableness of attorney fee awards and should not treat cost decisions as a " 'litigation afterthought.' " *Berryman*, 177 Wn. App. at 657 (quoting *Mahler*, 135 Wn.2d at 434). While the court does not need to "deduct hours here and there just to prove to the appellate court that it has taken an active role in assessing the reasonableness of a fee request," it must issue findings of fact and conclusions of law that "do more than give lip service" to the word "reasonable." *Id*. at 658. The findings and conclusions must be "sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." *SentinelC3, Inc.*

v. Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014). They must show how the court resolved disputed issues of fact and explain the court's analysis. *Berryman*, 177 Wn. App. at 658.

Citing *Berryman*, Smith argues that Gen Con's fees are excessive, and that he should not be required to " 'pay for a Cadillac approach to a Chevrolet case.' " 177 Wn. App. at 662. According to Smith, the amount of fees awarded is unreasonable "for an unopposed motion to compel discovery" and a "routine motion that is opposed." And he asserts the trial court erred because it "awarded Perkins Coie every cent of its requests."

In *Berryman*, the trial court signed a party's proposed findings of fact and conclusions of law "without making any changes except to fill in the blank for the multiplier of 2.0." 177 Wn. App. at 657. The findings did not address the opposing parties' arguments for reducing billed hours to account for duplicative effort and unproductive time. *Id*. Instead, the court "simply found that the hourly rate and hours billed were reasonable." *Id*. We determined that the court's findings were "conclusory" and that there was "no indication that the trial judge actively and independently confronted the question of what was a reasonable fee." *Id*. at 658.

Unlike the trial court in *Berryman*, the court's orders here show that it considered and rejected Smith's arguments. As to the first petition for fees, Smith argued to the trial court that motions to compel "are rote work," and that

"37.4 hours on a routine discovery motion" is unreasonable.[10] In resolving the dispute, the trial court did not simply adopt Gen Con's proposed order without making any changes. Instead, the court said it determined that the amount of requested fees was reasonable after "careful scrutiny of the hours expended and rates charged," and explained that the amount compensates all the hours "reasonably expended by Defendants in connection with Mr. Smith's failure to engage with the discovery process, not merely in drafting the motion to compel."

As to the second petition for fees, Smith made no meaningful challenge to the reasonableness of counsels' billing rate or the time spent responding to his failure to engage in the discovery process. Instead, he belatedly argued that sanctions should not have been imposed in the first place. Smith explained that Davis emailed counsel to warn Gen Con that the discovery would not be timely provided. And if counsel "had just done what every reasonable attorney does in similar situations and worked out an agreement for a short extension," he would have incurred none of the fees. Still, the trial court said in its order that it "reviewed Defendant's [fee] submissions closely" and decided that the fees were "well supported" and "reasonable."

From these orders, we can conclude that the trial judge actively and independently confronted the question of what is a "reasonable" fee. The trial court did not abuse its discretion in awarding Gen Con attorney fees.

[10] Smith also challenged the billing rate for one attorney "with a year of experience" but offered no argument about what he believed a reasonable hourly rate would be.

Because the trial court did not abuse its discretion by dismissing Smith's lawsuit as a discovery sanction and awarding Gen Con attorney fees, we affirm.[11]

Brunner, J.

WE CONCUR:

Feldman, J.

Bjelkie, J.

[11] Smith requests attorney fees on appeal. It appears he seeks fees as the prevailing party in a discovery dispute under CR 37(a)(4) and RAP 18.1. Because we affirm the trial court's orders, Smith is not the prevailing party on appeal. As a result, we reject his request for fees.

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