43004-5-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant

v.

PORT OF TACOMA, et al.

Respondents

RESPONDENT PORT OF TACOMA'S APPELLATE BRIEF

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I. RESPONDENT PORT OF TACOMA'S RESTATEMENT OF ISSUES

Under common law where a Trial Court has discretion to dismiss a case for unacceptable litigation practices, may the Trial Court dismiss a case when Plaintiff fails to meet his burden to timely prosecute his case, engages in unacceptable litigation practice and fails to appear at his own noted reconsideration motion hearing? **YES**.

II. INTRODUCTION/RESTATEMENT OF FACTS

Appellant Mr. West filed this public records litigation subject of this appeal in January 2008 –nearly **five** years ago. *See* Docket, CP 1048; *Compl.*, CP 1-4. Mr. West rushed to the Courthouse to file his litigation without first giving the Port of Tacoma reasonable time to respond to respond to this massive request, in which the Port gathered, reviewed, and released tens of thousands of pages of responsive records. *Dec'l of Michels (Second)* 2-3, CP 709-710, *Dec'l of Howard* 2, CP 802.

In 2008, the Superior Court correctly found Mr. West prematurely filed suit, and issued an Order to govern the records release, with which the Port fully complied in **May 2008.** *See Order Denying Show Cause,* CP 56-58; *Dec'l of Lake filed May 2, 2008,* CP 825-827; *Notice of Presentation filed May 21, 2008,* CP 84-376. Later, after the Port underwent a substantial policy shift for the property which was the subject of the records release, the Port re-assessed its determination of PRA exemptions, found some no longer applied due to the policy shift and completed its release of addition records in **October 2008.** *Dec'l of Wolfe filed October 14, 2008* 1-2, CP 377-

384. Out of the **fifty-one (51) three inch volumes** of responsive records consisting of **6,870** records and **19,923 pages,** the Port determined **175** records exempt and **97** records were released with limited redactions. See Port's January 7, 2011 Reply to Court's Show Cause, Exhibit 2 to Declaration of Counsel CP 1052-1059. All other records were deemed public and had been made available to the Mr. West and the public for review since **October 2008**. Id. From that that date and for nearly two years thereafter, Mr. West made no effort to review the records or to take any action in the trial court, seemingly abandoning the litigation, probably because none was available due to the Port's full PRA compliance. See Docket, CP 1049-1050.

Following the Port's October 2008 updated records release, the Trial Court appointed a special master to review the records and issue a report on the Port's compliance. *Order Appointing Special Master,* CP 585-587. The Special Master's PRA report issued **July 24, 2009,** and still Mr. West took no action in the records litigation and failed to note this matter for ultimate ruling and resolution. *Report of Special Master,* CP 972-980; Docket, CP 1049-1050. Instead, Mr. West filed new complaints and lawsuits in various other courts which he complained about the Court and the Special master appointment. See West Complaint in Pierce County Cause No. 09-2-14216-1, and West Complaint in US Western District Federal Court Cause No. C-10-5547 RJB. *Exhibit 11 attached to Dec'l of Lake filed January 7,* 2011, CP 1235-1267.

Finally, on **January 7, 2011,** the Superior Court self-initiated a hearing for show cause, due to lack of activity in this matter. *Court Notice dated December 8, 2011,* CP 603 Parties appeared. At hearing the Court found Mr. West abandoned his litigation and dismissed the matter pursuant to the Court's inherent power to dismiss and or CR 41(b)(1) and or (2). Mr. West submitted no filings for over 16 months in this case, and failed to note this matter for trial/hearing even after the Court's notice of show cause. *Order of Dismissal,* CP 626-629.

After the Court hearing and verbal dismissal on January 7, 2011, Mr. West filed (1) an appeal with the Supreme Court, and (2) a note for motion with the Superior Court. *Notice of Appeal (First),* CP 606; *Notice for Hearing,* CP 607. The Port timely filed and noted the Port's Proposed Order of Dismissal, for Presentment on January 21, 2011. CP 610-622. The Court re-set the hearing on Presentment to **January 25, 2011**. CP 609. On that date, over objection of Mr. West, the Court signed and entered the Port's proposed Order. CP 626-629. Thereafter, Mr. West filed both a Motion to Vacate and a Motion for Reconsideration of the Court's Dismissal Order. *Motion to Vacate,* CP 630-652. The hearing was set over by the Court to **March 4, 2011.** CP 623. On **March 2, 2011** in advance of the hearing, Port Counsel filed and served Mr. West with the Port's Proposed Order denying the Motion to Vacate and Motion to Reconsider. CP 1334-1339. On **March 4, 2011,** Port Counsel appeared, but Mr. West did not. *Clerk's Memorandum filed March 4, 2011,* CP 655-656. The Court signed and

entered the Port's Proposed Order denying the Motion to Vacate and Motion to Reconsider. *Order Denying Motion to Vacate and or Reconsider*, CP 657-661. Mr. West then sought Direct Review to the Supreme Court, which he later withdrew. *Notice of Appeal (Second)*, CP 662-674.

The issue now on appeal is singular and narrow: whether the Trial Court abused its discretion to manage proceedings and parties before it. Below, the Trial Court found the following in support of its Dismissal Order:

> 6. Dismissal is also an appropriate remedy where the record indicates that
> (1) the party's refusal to obey [a court] order was willful or deliberate,
> (2) the party's actions substantially prejudiced the opponent and
> (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed."
> *See Rivers,* 145 Wash.2d at 686, 41 P.3d 1175.
>
> 7. A party's disregard of a court order without reasonable excuse or justification is deemed willful.
>
> 8. Petitioner West's failure to timely prosecute this PRA case was without justification or excuse, and was therefore willful.
>
> 9. This is a Public Records Act case, in which potentially, a "per day" penalty is at issue.
>
> 10. Imposition of a "per day" penalty is mandatory.
>
> 11. Each day of the Petitioner's delay adds to the risk of the Port incurring a per day penalty, which under existing law, the Port could not be excused from ***even on the basis that Plaintiff caused the delay.***

12. The Court's ruling to dismiss for want of prosecution recognizes and cures this prejudice, which no lesser sanction could do.

Order Denying Motion. CP 657-661. This Appeals Court should find that the Trial Court did **not** abuse its exercise of discretionary authority, and should deny this appeal.

Further, as part of this appeal, Appellant's counsel has been ordered to file **three** revised opening briefs (four total) due to various Washington RAP and ER violations. The Port requests that this Court AFFIRM the Superior Court and Award the Port its costs and fees on appeal, pursuant to RAP 18.1, RCW 4.84.185 and RAP 18.9.

III. FACTS RELATED TO WEST'S UNACCEPTABLE LITIGATION PRACTICE BEFORE THE TRIAL COURT, CAUSE NO. 08-2-04312-1

On or around **December 4, 2007**, Appellant submitted a massive RCW 42.56[1] "Public Records Act" Request with the Port of Tacoma. *Dec'l of Michels* 1, CP 8. The Requested records were "all records related to SSLC[2] from January 1, 2005 to present." Ex. 1 to *Dec'l of Michels*, CP 14-15.

On **December 6, 2007**, per statutory[3] duty, the Port promptly began compiling records to fulfill Appellant's request, which implicated **tens of thousands** of pages of records possibly amenable to

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[1] RCW 42.56 is a recodification of former RCW 42.17; see laws of 2010 ch. 69 §2.
[2] The South Sound Logistics Center (SSLC), the centerpiece of the records request, refers to the joint planning process between the Port of Tacoma and Port of Olympia to evaluate an integrated cargo handling and transportation facility that facilitates the movement of freight from one mode or transport to another at a terminal specifically designed for that purpose. The SSSLC is an intensive, multimillion dollar interlocal project that the Ports terminated long ago.
[3] See then-RCW 42.17, now recodified to RCW 42.56 "Public Records Act."

disclosure and responsive to Appellant's request. *Dec'l of Andy Michels*, 2. CP 9.

From its first contact with the Appellant in this matter, the Port advised him that extensive time was needed to gather, bates stamp, review, and as necessary redact and or create privilege logs for those records deemed exempt by the Port. *Port of Tacoma's Second Supplemental Reply to Show Cause Re: Public Records, Motion to Continue, Motion to Strike & Motion to Shorten Time*, 1. CP 743.

Beginning on December 6, 2007 and carrying through until fulfillment on March 28, 2008, The Port's response consisted of:

1. Notifying all Port staff of the request,
2. Compiling and Organizing multiple Staff & Consultant Responses,
3. Obtaining the technology to identify and pull all subject related emails from the Port's server,
4. Copying and "Bates-numbering" stamping the tens of thousands of pages of documents and emails responsive to the request,
5. Undergoing in-house staff review of the records for responsiveness and completeness,
6. Notification of the affected parties [some of whom had executed confidentiality agreements with the Port],
7. Legal counsel's review of records for compliance with State public disclosure requirements,
8. Creation of a "Privilege Log" identifying records exempt from release pursuant to public record Act exemptions and explaining the exemption. This step is time intensive...
9. [Enlisting] the aid of Sound Legal Technologies, a firm specializing in data production, organization and copying to down load Port computer files of responsive records, organize the records by chronological order, and number records for tracking purposes...
10. [Gathering] 47 volumes (3 inch binders) of records responsive to [the Appellant's] request....

Dec'l of Michels, 2-5. CP7-10.

The Port also addressed Appellant's request by dedicating two fulltime employees and outside technical contractors to record identification and review over the period of approximately twelve weeks between December 6, 2007 and March 28, 2007. *Port of Tacoma's Reply to Show Cause Order.* CP 697.

On January 10, 2008, the Port began its incremental release of records, pursuant to RCW 42.17.320 [now RCW 42.56.520].[4] *Dec'l of Michels,* CP 4-5.

On January 14, 2007, while the Port was responding to the Appellant's records request, Plaintiff nonetheless sued the Port less than five weeks after submitting the massive original request, while scheduled incremental release and review of records was ongoing. *Compl.* CP 4.

Also on January 14, 2007, the Appellant simultaneously moved to for an order of show cause regarding the response. *Motion for Order to Show Cause.* CP 5-6.

The Complaint falsely alleged that the Port had "refused to comply with the disclosure act entirely, and refused to respond promptly with a date for certain disclosure," and also sought "negligence" damages because the "ports in this state act in a covert manner." *Compl* at pp. 2-3, CP 2-3.

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[4] (3) acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request.

On March 28, 2008, the Court denied the relief Appellant sought in his Motion to Show Cause, stating that the Motion to Show Cause was, in fact, "premature." *Order of March 28, 2008*, CP 54-56; *Clerk's Minute Entry of March 28, 2008*, CP 742. The Court signed an Order memorializing two milestone dates by which the Port would make the balance of records available to the Petitioner. *Id.* Also on March 28, 2008, instead of granting the Appellant's Motion for Show Cause, the Court affirmed and adopted the Port's proposed incremental release schedule, duly established pursuant to RCW 42.56.520. *Clerk's Minute Entry of March 28, 2008*, CP 742, *Order of March 28, 2008,* CP 54-56; *see also Dec'l of Michels*, 4 CP 11. Ultimately, the Port fully complied with the release schedule adopted in the Order of March 28, 2008, and made its final release of records to Appellant in May of 2008.

On April 14, 2008, the Appellant sent an email to the (former) local US attorney, State prosecuting attorneys, and various elected officials and media companies entitled "Request for criminal investigation and Complaint of criminal violations of 18 USC 241 and 242, 18 USC 1341 and 1343, and notice of violation of 42 USC 1985(2) by [Port Counsel] Carolyn Lake and Robert Goodstein. EX 2 to *Dec'l of Carolyn Lake*, filed April 30, 2008, CP 813-815.

On April 15, the Port's legal counsel notified the Appellant that the first set of records designated in the Court's Order were available. Email, EX. 2 to *Port of Tacoma's Second Supplemental Reply to Show*

Cause Re: Public Records, Motion to Continue, Motion to Strike & Motion to Shorten Time, 2, CP 770.

On April 18, 2008, the Appellant unilaterally informed the Port of dates and times that he would be viewing the records. The Appellant's emails did not invite or request confirmation from the Port. ("I will be at the Port at 9:00 Monday morning to inspect the records. I expect any exemptions to disclosure that the Port seeks to assert to be filed with the Court and sent to me by [Monday Morning at 9:00 AM]." West email of Friday, April 18, 2008 at 6:38 PM. CP 773. Then on Monday at 11:53 AM Mr. West advised the Port by email: "Since counsel has intervened in the process and determined to make inspection of the SSLC records as difficult as possible, please be advised that I will be reviewing the records this Tuesday-Thursday, between the hours of 10:00 and 5:00.") *Port of Tacoma's Second Supplemental Reply to Show Cause Re: Public Records, Motion to Continue, Motion to Strike & Motion to Shorten Time*, 6-7. CP 748-749; 776.

On April 23, 2008, the Appellant filed a bar grievance against Robert Goodstein, a member of the Port Counsel's law firm, complaining that Mr. Goodstein as senior counsel failed to supervise "junior counsel" to ensure compliance with this Court's Show Cause Order pertaining to Public Records availability by April 15. Ex. 1 to *Dec'l of Carolyn Lake*, filed April 30, 2008, CP 810-811. The Appellant still had not made any effort to review the Port's records; instead, the

appellant had only made attempts to abuse, intimidate, and harass Port employees and legal counsel. *Id.*, *see also* CP 813-815 (Letter to "Alberto A. Gonzalez, U.S. Attorney, King County Prosecutor Norm Maleng, Thurston County prosecutor Ed Holm, assorted Representatives, Counsel, Media")

On April 24, 2008, after failing to attend two scheduled appointments[5] to view the responsive records, the Appellant arrived an hour and a half late to a third viewing appointment. *Dec'l of Tri Howard*, 2, CP 802.

Also on April 24, 2008, the Appellant noted for May 2, 2008 a "MOTION FOR SHOW CAUSE, ETC." *Note of Issue*, CP 57-60. This hearing was a sham to cover-up the fact that the Appellant missed a response date in a dispositive motion, and therefore needed to "create" his own "unavailability." See *West's Response* Ex. 10 to *Port of Tacoma's Second Supplemental Reply to Show Cause Re: Public Records, Motion to Continue, Motion to Strike & Motion to Shorten Time*. CP 793.

The Appellant noted the hearing on a noticed unavailability day for Port Counsel, when he knew or should have been aware that both he and the Port counsel had preexisting motions at that time in

[5] By email of Wenesday, April 23, 2008 at 4:22 PM, the Appellant stated his intention to view records at the Port of Tacoma on Thursday at 11:00 "Due to what can only be described **as your criminal conspiracy to deny access to evidence**, and continuing refusal to confirm appointments in a timely manner, I will be appearing at the Port offices tomorrow at 11L:00 to inspect and obtain records." That same, evening of 4/23, Mr. West then sent an email late Wednesday night at **10:13** PM to Port Staff asking for a response **no later than 8:00 AM Thursday morning.** Mr. West failed to appear to inspect records on Thursday, April 24 at 11:00 AM, and instead arrived nearly two hours late. *Dec'l of Tri Howard* 1-2, CP 801-802.

Thurston County. *Port of Tacoma's Second Supplemental Reply to Show Cause Re: Public Records, Motion to Continue, Motion to Strike & Motion to Shorten Time*, 2, CP 744. Appellant used the May 2 Pierce County Motion for Show Cause to argue he was then unavailable for a previously scheduled Thurston County Superior Court hearing also on May 2, 2008.[6]

Appellant's April 24, 2008 Motion for Show Cause, was filed before the Appellant had even viewed the records on the afternoon of April 24, 2008, yet, for reasons unclear, expressed that Appellant did not feel that the Port complied with the order, and moved for contempt and Public Record Act remedy. *Motion for Order to Show Cause*, CP 57-60.

Appellant's April 24, 2008 Motion for Order to Show Cause also set forth a rambling and procedurally defective attempt to join the Port of Olympia, defendant in the scheduled May 2, 2008 Thurston County Matter. *Motion for Order to Show Cause* 3, CP 59.

On May 1, 2008, the Appellant filed pleadings which argued that CR 11 sanctions are an appropriate remedy for alleged Port "SLAPP-type" litigation practices – when in fact no remote, tenuous or conceivable grounds to invoke SLAPP protections existed - and requested a $10,000 sanction and "maximum public records act

[6] Appellant had in fact missed the date to respond to a Motion to Dismiss in the Thurston County matter filed by the Weyerhaeuser Company, and "created" a sham unavailability by scheduling the improper hearing before the Pierce County Superior Court in this case as an attempt to manipulate two superior court calendars to avoid the operation of the Civil Rules. *Dec'l of Lake* 9, CP 751.

penalties" – citing solely ancient and non-legal literature as "authority." *Motion for CR 11 Sanction*, CP 61-69.

On May 1, 2008, all responsive records were made available to the Appellant, pursuant to the March 28, 2008 Court Ordered release schedule. *2d Dec'l of Lake*, filed May 2, 2008, CP 825-827.

On May 2, 2008, The Court summarily denied all Appellant's motions and found that the Port complied with the record disclosure schedule, thereby extinguishing Plaintiff's original Complaint issues. See Order of May 2, CP 70; *reconsideration denied May 30, 2008*, Clerk's Memorandum, CP 866-867.

On May 15, 2012, Appellant untimely moved to reconsider and also objected the Port's redactions and exemptions as reflected on the Port's privilege log. *Plaintiff's Motion for Reconsideration and for Show Cause*, CP 71-83.

On May 30, 2008, the Court denied Appellant West's (untimely) motion for reconsideration and ordered that a special master would review the tens of thousands of pages of responsive documents. *Clerk's Memorandum of May 30, 2008*, CP 866-867. On June 18, 2008, the Port noted a hearing on assignment of a special master to review the documents. *Notice of Suggestion for Special Master*, CP 389.

On August 26, 2008, the Appellant filed a "Motion for Change of Magistrate," wherein the Appellant moved for a new judge on the theory that Hon. Fleming's medical leave during the summer of 2008 violated the Appellant's Constitutional free speech and civil rights.

Motion for Change of Magistrate, CP 411-413. Also on August 26, 2008, the Appellant filed a fifteen page document in which the Appellant attempted to argue that appointment of a special master constitutes a "prior restraint" on the Appellant's free speech. *Plaintiff's Notice and Memorandum on the Doctrine of Unconstitutional Restraints*, CP 396-410.

On or around October of 2008, the Ports of Tacoma and Olympia abandoned plans to develop the SSLC. *Dec'l of John Wolfe* 1, CP 419.

On October 14, 2008, with the SSLC project abandoned, some of the Port's claimed exemptions no longer applied to the records, and the Port voluntarily released the records newly amendable to disclosure. *Updated Notice of Presentation*, CP 424-581.

On October 17, 2008, the Court (Judge Armijo) denied the Appellant's Motion for a new judge. *Order Denying Motion*, CP 582-583.On March 30, 2009, the Appellant having only "objected" to the Port's suggested special masters by way of legally-insufficient memoranda[7] without actually suggesting any alternatives, the Court appointed Hon. Terry Lukens to review the volumes of responsive records over the Appellant's objection. *Order Appointing Special Master*, CP 585-587.

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[7] *See Notice and Memorandum on the Doctrine of Prior Restraint*, CP 396-410, *Motion for Change of Magistrate*, CP 411-413, *Plaintiff's Objection to Appointment of Special Master* CP 584.

On March 30, 2009, Appellant West claimed in a Motion for Reconsideration of the appointment of a special master, that the Court "unlawfully indulged in nondisclosure," and lacked the "ability to protect basic Constitutional rights." West also attempted to introduce a number of editorial newspaper articles as "evidence".[8] *Motion for Reconsideration*, CP 588-598. Appellant West failed to note his March 30, 2009 Motion for Reconsideration as CR 59[9] requires.

On July 24, 2009, Hon. Lukens completed his review of the privilege logs and disclosed records, and flagged six of the claimed exempt records for further judicial review. *Report of Special Master*, CP 972-980. On September 4, 2009, the Port filed a motion to modify the Special Master's report. *Dec'l of Carolyn Lake*, CP 981-988. On September 15, 2009, the Appellant untimely filed an opposition to the Port's Motion. *Dec'l of Arthur West*, CP 599-600.

Appellant took no further action in the case before it was dismissed, over sixteen months later. Instead, the Appellant undertook a series of extracurricular judicial activities related to this case.

A. Appellant West's self-described "flailing around.[10]"

1. West v. Port et al, Pierce County Superior Court No. 09-2-14216-1

[8] The articles later were the subject matter of two of three orders of Division II causing the Appellant's attorney to re-write the Opening Brief in this matter, for a total of four submissions. See Division II rulings of June 19, 2012 and October 19, 2012, on file.

[9] Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

[10] Description of West Action taken from Fourth Opening Br. Appellant, 24.

On October 6, 2009, the Appellant again sued the Port of Tacoma, its commissioners and its executive director again related to the Port property and public records. Apparently, the Lawsuit was primarily "an action for a declaratory ruling in regard to a pattern of secrecy and negligent administration of the Port of Tacoma that has cost the public over a Quarter of a Billion Dollars ($250,000,000) in needless expenditures for mismanages projects." *Compl.* 1 in Case No. 09-2-14216 1 (Now on appeal as Div. II No. 43704-0-II), Ex. 11 to Dec'l of Lake, CP 1235-1241. Emphasis original.

In that Complaint, Appellant West also sued Pierce County Prosecuting Attorney Mark Lindquist and Hon. Terry Lukens (ret.). Appellant's lawsuit contended that Hon. Fleming was "unlawfully exercising" and had "forfeited" his office due to actions in this 2008 PRA case, subject of this instant appeal. The Appellant sought prosecution of Hon. Fleming by Prosecutor Lindquist. *Compl.* 3, CP 1238. At the same time, the Appellant also argued that Prosecutor Lindquist and Judge Fleming "violated their oaths of office and duties under law." *Compl.* 4, CP 1239. The lawsuit also sought to frustrate the work of Hon. Lukens' review of the responsive records in this case: "Terry Lukens is an independent contractor who has been improperly hired by the Port, with the Collusion of Citizen Fleming and in violation of the Public Records Act to act to obstruct disclosure of public records and to cover up the actions of other private contractors in wasting

public funds on Port of Tacoma boondoogles." Coml. 2-3, CP 1237-1238.

2. West District Court Action – No. C10-5547 RJB.

Next, on August 5, 2010, Appellant West sued the Port of Tacoma, Pierce County, the Port's Legal Counsel [hyperbolically-labeled] "Illegal Special Prosecutor Lake," the Hon. Fleming, Hon. Edwards, Pierce County Presiding Judge Hon. Chushkoff, Secretary of Washington State Sam Reed, and others. *Compl.* 1 in Case No. C10-5547-RJB; Ex. 11 to Dec'l of Lake, CP 1242-1262. Here, West sought habeus corpus relief from visiting Judge Edward's Order finding West in civil contempt in the second West/Port PRA case. Appellant also argued that the defendants had engaged in a conspiracy to deprive the Appellant of civil rights and caused "economic and personal assaults." West also complained that the Port of Tacoma Public Records Response was actually a prior restraint on the Appellant's free speech. *Id.*

3. West Activity: Post Dismissal

On December 8, 2010, the Superior Court filed a letter of intent to dismiss the case for non-prosecution, and set a hearing for January 7, 2010 to show cause why the case should not be dismissed. *Status Conference Letter*, CP 603. Between the written notice of December 8, 2010 and hearing of January 7, 2011, the Appellant continued not to take any action on the record of this case, including not noting the issue for trial. On January 7, 2011, the Court dismissed the case, and

memorialized the dismissal on January 25, 2011. *Order of Dismissal,* CP 603.

On January 7, 2011, the Appellant immediately and unsuccessfully appealed the matter to the Supreme Court of Washington. *Notice of Appeal,* CP 606. Also on January 7, 2011, the Appellant hastily scribbled and "noted" a "notice of hearing" **after** the case had been dismissed. *Notice of Hearing,* CP 607.

On January 21, 2011, **twelve days after** the case had been dismissed, the Appellant filed "Plaintiff's Note for Trial, Declaration, and Objections to CR 41 dismissal." *Note of Issue* CP 610-622.

On January 25, 2011, the Court heard the Appellant's objections, and entered a written CR 41 dismissal Order. *Order of Dismissal,* CP 626-629.

On February 1, 2011, the Appellant moved to vacate the dismissal and noted his purported "Plaintiff's Motion to Vacate Improper Dismissal Issued Without Notice" for hearing. This matter cited CR 59 motions, and was therefore really a Motion for Reconsideration in substance. *Motion to Vacate Dismissal,* CP 630-652.

On March 4, 2011, the Appellant failed to show at his own reconsideration hearing, and the Court signed an Order denying Reconsideration which expanded on the Court's findings in support of the discretionary grounds for dismissal. *Order Denying Motion,* CP 657-661, *See also Clerks Memorandum,* CP 655-656. On March 18,

2011, the Appellant again appealed, seeking direct review by the Supreme Court of Washington. *Notice of Appeal to Supreme Court*, CP 662-674.

4. West Activities on Appeal

A year passed; between March 2011 and March 2012 the Appellant unsuccessfully sought direct Supreme Court of Washington review of this case. On December 2, 2011, the Appellant retained an attorney. *Notice of Appearance*, on file. On March 20, 2012, the Appellant's attorney filed an Opening Brief with this Court. That same day, on March 20, 2012, this Court *sua sponte* struck the Appellant's Opening Brief for "not conform[ing] to the content and form requirements set out in the Rules of Appellate Procedure," and allowed the Appellant an additional ten days to file a revised Opening Brief. Division II Letter of March 20, 2012, attached as **Appendix 1.**

On March 30, 2012, the Appellant filed a Revised Opening Brief. The Revised Opening Brief consisted of numerous references to at least seven different extraneous newspaper articles, press releases and editorial columns. *Port's [First] Motion to Strike,* at p. 6, filed May 31, 2012, on file. The Revised Opening Brief also featured extensive unsupported argument in the purported "facts" section, including a "reconstruction" of a pleading filed by the Appellant that the trial Court expressly stuck from the record below. *Id.* at 9; *discussing Port's Sur-Reply & Motion to Strike of March 26, 2008*, CP 54.

On May 31, 2012, the Port moved to strike the offending Second Brief because the Appellant had violated the most basic of Evidence and Appellate rules. *Port's [First] Motion to Strike*, pp. 8-9, on file. On June 12, 2012, the Court granted the Port's (first) motion to strike, and ordered:

> Respondent's motion to strike the appellant's opening brief is granted. Within 20 days, the appellant will file a revised brief that (1) omits any reference to facts not contained in the admissible evidence not considered by the trial court and (2) makes citations to specific pages in the record before the trial court for each factual assertion.

Division II Ruling of June 19, 2012, attached as **Appendix 2.**Also on June 19, 2012, The Court denied the Port's attorney fee request "without prejudice." *Id.*

On July 9, 2012, the Appellant filed a **Third**, or Second Revised, Opening Brief, titled "West's Revised Opening Brief." The Second Revised Opening Brief also contained references to newspaper articles what had not been considered by the Trial Court in violation of the June 12, 2012 Court Ruling. *Port's Second Motion to Strike* at p. 3, filed August 3, 2012. The Appellant improperly referred to articles that were not considered by the trial court in violation of both basic litigation rules and this Court's June 19, 2012 order, because the articles were attached to a Motion for Reconsideration that the Trial Court never heard due to Appellant's non-compliance with CR 59 notation requirements[11] for Motions for Reconsideration. *Id.* at 13.

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[11] CR 59(b): Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard

On August 3, 2012, the Port filed a Second Motion to Strike the Appellant's Revised Opening Brief for both non-compliance with litigation rules and noncompliance with this Court's Ruling of June 12, 2012. In addition to moving to Strike a second time, the Port renewed its attorney fee request, and requested termination of review due to Appellant non-compliance with the Court's Ruling. *Port's Second Motion to Strike*, on file. On October 19, 2012, the Court granted the Port's Second Motion to Strike, and ordered the Appellant:

> Within 20 days, West will file a further revised brief that does not refer to any materials contained in or attached to the march 30, 2009 Motion for Reconsideration that West filed in the trial Court. While West filed that motion with the clerk, he never brought before the trial court, so those materials were not considered by the trial court and cannot be considered by this court.

Division II Ruling of October 19, 2012, attached as **Appendix 3.** The Court declined to award attorney fees in its October 19, 2012 Ruling. *Id.*

On November 8, 2012, the Appellant filed a **Fourth**, or Third Revised, Opening Brief, titled "Appellant's Second Revised Opening Brief". In this Third Revised Opening Brief, the Appellant continued his efforts to "reconstruct," inadmissible allegations which he first included in and was later stricken from the Appellant's Second Opening Brief by this Court. *Appellant's [Third] Opening Br.* at p. 11: "Though this pleading – Mr. West's Response to which the stricken documents were attached – **is missing from the record**, the Port

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or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

quoted from it in its [*Port's Sur-Reply & Motion to Strike of March 26, 2008*]..." *Appellant's [Third] Opening Br.* at p. 11. Emphasis provided. Appellant's recycled "reconstruction" effort concerns the same twice-stricken pleading, which this Court ordered the Appellant to cease mentioning by Ruling of June 19, 2012, **Appendix 2**, and which the Trial Court expressly struck in 2008. CP 54.

On November 21, 2012, the Port filed a *Third* motion to strike the Appellant's [Fourth] Opening Brief, and requested outright dismissal of this appeal due to the extraordinary number of deficient Briefs the Appellant filed between March 20, 2012 and November 8, 2012. *Port's Third Motion to Strike*, on file. On December 7, 2012, the Appellant Responded that all of the Port's Motions were either "trivial" or "frivolous," despite the fact that this Court had granted all of the Port's motions, and the Appellant had gone on to disobey those Court orders. *Response in Opposition*, on file.

On December 10, 2012, this Court denied the Port's Third Motion to Strike, and instead instructed the Port to address its concerns in the Port's Respondent's Brief. *Ruling on Motion*, on file.

IV. ARGUMENT AND AUTHORITY

The Trial Court below exercised its discretion properly and consistent with long standing recognition of this judicial authority. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v.*

Dunn, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821). This appeal should be denied.

1. Washington Trial Courts undisputedly have vested inherent authority to dismiss cases.

Washington Courts have "such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *State v. Gilkinson*, 57 Wn.App. 861, 865, 790 P.2d 1247 (Div. 2, 1990). The courts derive authority to govern court procedures from Article IV s. 6 of the Washington Constitution. *City of Fircrest c. Jensen*, 158 Wn.2d 384, 395, 143 P.3d 776 (2006). Additionally, "inherent power is authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of is constitutional duties." *In re Mowery*, 141 Wn.App. 263, 281, 169 P.3d 835 (Div. 1, 2007); *quoting In re Salary of Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976).

The Court's power to discretionarily dismiss a case for unacceptable litigation practices is "inherent." *See Business Services*, 174 Wn.2d at 308 ("The sole question is whether CR 41 (b)(1) applies to this case to limit the trial court's inherent discretion to dismiss."); *Snohomish County v. Thorpe Meats*, 110 Wn.2d 163, 166, 750 P.2d 1251 (1988) ("A court of general jurisdiction has inherent power to dismiss actions for lack of prosecution..."); *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997) ("[T]he trial court's inherent

discretion [to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings which are made] is not questioned by our interpretation.").

2. Trial Court Expressly Ruled on & Found Each Criterion for Discretionary Dismissal Is Met.

"Dismissal is an appropriate remedy where the record indicates that '(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.'" *Will v. Frontier Contractors, Inc.*, 121 Wn.App. 119, 129, 89 P.3d 242 (Div. 2, 2004); *quoting Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002).

a. The record expressly shows the Appellant's refusal to obey a court order was willful or deliberate, the first element is met.

The Trial Court's Order Denying Reconsideration, CP 657-661, expressly concludes that the Appellant willfully and or deliberately disobeyed a court order.

6. Dismissal is also an appropriate remedy where the record indicates that "(1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed." *See Rivers,* 145 Wash.2d at 686, 41 P.3d 1175.

7. A party's disregard of a court order without reasonable excuse or justification is deemed willful.

8. Petitioner West's failure to timely prosecute this PRA case was without justification or excuse, and was therefore willful.

Order Denying Motion to Vacate and or Reconsider Order of Dismissal, conclusions of law. CP 657-661. The first element is satisfied.

b. The record expressly shows the Appellant's actions substantially prejudiced the Port, the second element is met.

In its Order Denying Reconsideration, CP 657-661, the Trial Court expressly concludes that the Appellant's disobedience prejudiced the Port.

9. This is a Public Records Act case, in which potentially, a "per day" penalty is at issue.
10. Imposition of a "per day" penalty is mandatory.
11. Each day of the Petitioner's delay adds to the risk of the Port incurring a per day penalty, which under existing law, the Port could not be excused from e***ven on the basis that Plaintiff caused the delay.***

Order Denying Motion to Vacate and or Reconsider Order of Dismissal, conclusions of law. CP 657-661. Emphasis original. therefore, the Trial Court found prejudice to the opposing party, the Port. The second element is satisfied.

Further, trial courts may consider the actions of litigants in other forums when involuntarily dismissing cases. *Mcneil v. Powers*, 123 Wn.App. 577, 97 P.3d 760 (Div. 3, 2004). Even the Appellant on appeal self-describes his actions involving his extracurricular litigation forays involving the Port and related to the subject matter of this lawsuit as "flailing around" and "hard to understand." *Appellant's*

Fourth Opening Br. 24. These actions include West's ill-conceived 2009 lawsuit against the Port and various members of the judiciary, and also West's 2010 Federal lawsuit against the Port of Tacoma and its legal counsel. All of these proceedings were on the record before Hon. Fleming. *See Dec'l of Lake*, CP 1043-1292. The taxpayer-funded Port has been prejudiced by the Appellant's refusal to respect or obey legal processes and orders. Therefore, the second element is met.

c. The Trial Court expressly considered a lesser sanction, the third and final element is met.

The Trial Court's Order Denying Reconsideration, CP 657-661 expressly considers lesser sanctions, and concludes that a lesser sanction will not do.

> 12. The Court's ruling to dismiss for want of prosecution recognizes and cures this prejudice, which no lesser sanction could do.

Order Denying Motion to Vacate and or Reconsider Order of Dismissal, conclusions of law. CP 657-661. The third and final element is satisfied.

3. Sanction of Dismissal Warranted

The sanction levied against Appellant is well-supported by and consistent with the very lengthy history of Washington Court sanctions for litigant malfeasance, which date back to statehood. A Trial Court's inherent authority to dismiss has been upheld for a variety of conduct that positively pales in comparison to the machinations of Appellant West:

- *McDaniel v. Pressler*, 3 Wn. 636, 638, 29 P. 209 (1892): Courts have authority to dismiss lawsuits for abandonment and also for plaintiff's disobedience of an order concerning the proceedings in an action.
- *Plummer v. Weill*, 15 Wn. 427, 430-431, 46 P. 648 (1896): Where the character of the attorneys and parties are not of issue, party's brief that refers to the opposing party in language that is grossly improper and unseemly [as here] warrants discretionary dismissal effectuated through the striking of the offensive brief.
- *Jackson v. Standard Oil of California*, 8 Wn.App. 83, 505 P.2d 139 (Div. 2, 1972); *Rev. denied*: Plaintiff expresses dissatisfaction with court order, leaves courtroom, dismissal with prejudice granted.
- *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 464, 303 P.2d 290 (1956): Inherent dismissal due to refusal to plead further an incoherent complaint.
- *State ex rel. Washington Water and Power Co. v. Superior Court for Chelan County*, 41 Wn.2d 484, 494, 250 P.2d 536 (1953): Court's inherent dismissal powers upheld despite stipulation to waive CR 41-governed dismissal among the parties.
- *National City Bank of Seattle v. International Trading co. of America*, 167 Wn. 311, 316-317, 9 P.2d 81 (1932): Court holds in dicta that CR 41 precursor does not forbid exercise of the inherent power of a court to dismiss an action "whenever in the interests of justice he may deem that the proper course to pursue."
- *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950): Parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of [CR 41 predecessor Rule] because plaintiff failed to continue making filings in the case for a protracted period, then noted a trial to escape operation of CR 41-predecessor.

In *Stickney*, The Supreme Court of Washington granted dismissal in favor of the Port of Olympia. The *Stickney* court held that the Port of Olympia was entitled to a discretionary dismissal for lack of diligent prosecution regardless whether the language in CR 41 was satisfied - because the lack of noted trial date served to preserve all of

the Court's discretion to dismiss the case. 35 Wn.2d at 241. ("The parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of Rule 3[12]"). Emphasis provided.

The Port here is entitled to the same outcome because Appellant West, among many other actions, failed to note a trial date in this case until *after* the order of dismissal, and then failed to show up at his own reconsideration hearing.

Here, Appellant West's misbehaviors far exceed the conduct of prior litigants in other Washington State cases that resulted in discretionary dismissal. This Appeals Court should leave undisturbed the Trial Court exercise of discretion; discretionary dismissal is well warranted on these facts.

4. Appellant Has Not and Cannot Overcome High Standard of Review for Exercise of Discretion.

Trial courts have broad discretion to manage their courtrooms and conduct trials in order to achieve the orderly and expeditious disposition of cases. *In re Marriage of Zigler and Sidwell*, 154 Wn.App. 803, 815, 226 P.3d 202 (Div. 3, 2010); *citing State v. Johnson*, 77 Wn.2d 423, 426, 462 P.2d 933 (1969). When reviewing a dismissal due to unacceptable litigation practices, also referred to interchangeably as a "discretionary dismissal[13]" or "inherent

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[12] The precursor rule to CR 41.
[13] *Business Services of America II, Inc. v. Watertech LLC*, __Wn.2d__, 274 P.3d 1025, 1028 (2012).

dismissal[14]" throughout Washington case law, the standard of review is abuse of discretion: "When the Court's inherent power to dismiss for want of prosecution is at issue the trial court's decision is reviewed under the abuse of discretion standard." *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950); *see also Business Services of America II v. Waftertech, LLC*, __Wn.2d__, 274 P.3d 1025, 1031 (2012, C.J. Madsen, dissenting). The sole dispositive issue in this appeal is whether the trial court abused its discretion in dismissing the case due Appellant's lack of Prosecution beyond that described by CR 41(b)(1).

Abuse of discretion in this involuntary dismissal for unacceptable litigation practices is limited to when the trial court decision to dismiss is "manifestly unreasonable" or "based on untenable grounds." *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 131, 896 P.2d 66 (Div. 1, 1995); *citing Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

A trial court's exercise of discretion is manifestly unreasonable if no reasonable person would concur with the Court's view when the Court applies the correct legal standard to supported facts. *Mayer v. Sto Indu., Inc.*, 156 Wn.2d 677, 684 (2006); *quoting State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A trial court's exercise of discretion rests upon untenable grounds if the trial court relies upon unsupported facts or applies the wrong legal standard. *Id.*

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[14] *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 173, 750 P.2d 1251 (1988).

"We do not reverse a discretionary decision absent a clear showing that the trial court's exercise of its discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *City of Puyallup v. Hogan*, __Wn.App.__, 277 P.3d 49 (Div. 2, 2012).

A discretionary dismissal will be reviewed for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors,* 145 Wn.2d 674, 684-85, 41 P.3d 1175 (2002); *see also Woodhead v. Discount Waterbeds, Inc.,* 78 Wn.App. 125, 129, 896 P.2d 66 (1995) (a court has the discretion to dismiss an action based on a party's willful noncompliance with a reasonable court order). A court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of Littlefield,* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

5. On Appeal, Appellant Only Briefed Collateral Matters, And Therefore Cannot Overcome The Standard Of Review.

Appellant West fails to make the required showing that the Trial Court abused its discretion. The Appellant's omission of the required showing is particularly frustrated by the fact that Appellant failed to identify and/or brief the actual legal issues which are properly appealable. The Appellant's brief identifies three "categories" or issues. One issue pertains to CR 41(b)(1) and (2) notice requirements. *Appellant's Fourth Opening Br.* 2-3. This issue is irrelevant because the Court exercised both discretionary dismissal and CR 41 dismissal. The

remaining two issues pertain to PRA substantive merits, which the Trial Court did not reach. *Appellant's Fourth Brief*, 3-4.

The Appellant failed to identify or brief any cognizable trial court error that could lead to reversal. To prevail on appeal, the Appellant must show manifestly unreasonable court action that no other reasonable person would agree with or untenable grounds. The oversight in Appellant's briefing is fatal to his appeal, which requires a **clear showing** which satisfies the applicable legal standard: here, abuse of discretion. *In re Littlefield,* 133 Wn.2d at 46-47.

Instead of articulating (and then meeting) the appropriate legal standard, Appellant's Opening Brief attempts to revisit the merits of the case from a slanted viewpoint and impugn the actions of the Port in its underlying administration of the SSLC. Consider representative language at *Appellant's Fourth Opening Br.* 8: "Meanwhile, the Port of Tacoma, backpedaling in light of "questions" raised by community members "regarding possible impacts at a site-specific level" retained an independent contractor" to "search, examine, and report on any other feasible site locations for the SSLC..." This argument is irrelevant and has absolutely nothing to do with any salient issue, PRA or otherwise, and represents the tone of the entire [Fourth] Opening Brief.

The issues Appellant attempts bring before the appeals court are in fact *doubly* collateral. The discretionary dismissal of March 4, 2011, rendered the merits of the underlying Public Records Act collateral to

the Appellant's misbehavior. Appellant West's underlying dissatisfaction with the Port's handling of the SSLC, which may have prompted the Appellant's records request in the first place, is itself collateral to the PRA liability-phase lawsuit merits. Yet, the Appellant has dedicated greater than twenty pages to briefing the Appellant's "factual" dissatisfaction with the Port's administration of the now-defunct SSLC.

This Court should deny the appeal– Appellant has failed to articulate or meet the burden of review or provide any cognizable grounds for reversal.

6. Even if the Appellant had properly identified and briefed issues in this case, the Record supports affirming dismissal.

Appellate courts are loath to substitute their discretion for that of the trial court, which is what the Appellant actually requests. *A.G. v. Corporation of Catholic Archbishop of Seattle*, 162 Wn.App. 16, 25, 271 P.3d 249 (Div. 1, 2011), and cases cited therein. ("An appellate court does not substitute its own judgment for that of the trial court, but rather, looks to whether the court's exercise of discretion was manifestly unreasonable, or made for untenable reasons.")

An appellate court does not substitute its own judgment for that of the trial court, but rather, looks to whether the court's exercise of discretion was manifestly unreasonable, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), *Overruled on other grounds by RCW 71.05.390, explained by*

Seattle Times Co. v. Benton County, 99 Wn.2d 251, 263 661 P.2d 964 (1983). The Supreme Court of Washington recently held such substitution to be reversible error. *Teter v. Deck*, __Wn.2d__, 274 P.3d 336, 346, 274 P.3d 336 (2012) ("We will not substitute our own judgment in evaluating the scope and effect of that misconduct").

Here, in an indirect manner, the Appellant asks that this Court engage in exactly the judgment substitution that the Supreme Court expressly prohibits. Appellant advances his relief through a skewed, inexplicably lengthy, thirty-odd page "Facts" section that seems to exist for the sole purpose of highlighting Port policy decisions with which Appellant apparently disagrees. *E.g. Appellant's Fourth Opening Br.* 8. Appellant through these allegations invite this Court to re-weigh the prejudice that the Appellant claims results from the Court's exercise of discretion to dismiss. The invitation to substitute judgment and this appeal should be summarily rejected on the grounds that West requests relief that the Court cannot and should not grant under *Hogan,* 277 P.3d 49 and its log line of prior cases in accord.

Prior courts have "allowed discretionary dismissals for failures to appear, filing late briefs, and similarly egregious sorts of behavior." *Business Services of America*, 174 Wn.2d 304, 311, 274 P.3d 1025 (2012). "Failure to prosecute does not fall within CR 41 (b)(1) for example, when the plaintiff fails to prosecute that action by failing to appear at trial." *Id. citing Wallace v. Evans*, 131 Wn.2d 572, 578, 934 P.2d 662 (1997). "Such dilatoriness also occurs, for example, when there is a

failure to appear at a pretrial conference in combination with general dilatoriness." *Business Services of America, citing Link v. Wabash R.R., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).* Here, Appellant West failed to attend the hearing on his own Motion to Reconsider the dispositive ruling. *Clerk's Memorandum,* CP 655-656. Therefore, *Business Services of America* is directly on point and reinforces the propriety of discretionary dismissal in this case.

The record below supports finding -at the very least- general dilatoriness on the part of the Appellant. Public Records Act matters are entitled to efficient judicial review, because defendants are subject to a per day penalty. Here, the docket clearly demonstrates that the Appellant dragged on this Public Records Act matter for longer than three years. This delay alone constitutes "general dilatoriness" under *Link.* Appellant West has, in fact, gone well above and beyond "general dilatoriness." Inexcusable and unprofessional dilatoriness demonstrated by the Appellant in this case includes:

- The Appellant willfully scheduled sham hearing dates on noticed unavailability dates to mask Appellant's default on two difference Superior Courts, **CP 793**;
- The Appellant filed a patently false bar grievance against the Port's legal counsel, **CP 810-811**;
- The Appellant Scheduled show-cause hearing on non-compliance with the PRA prior to reviewing the released records merely for the purpose of harassment, **CP 801-803, CP 57-60**;
- The Appellant sent an inflammatory email to the (former) local US attorney, State prosecuting attorneys, and various elected officials and media companies entitled "Request for criminal investigation and Complaint of criminal violations of 18 USC 241 and 242, 18 USC 1341 and 1343, and notice of violation of 42 USC 1985(2) by [Port Counsel] Carolyn Lake and Robert Goodstein, **CP 813-815;**

- The Appellant engaged a self-satisfaction exercise entailing citing only ancient, non-legal literature in furtherance of request for outlandish relief – violation of GR 14(d)[15] and CR 11(a), **CP 61-69**;
- The Appellant failed to note a separate reconsideration motion the Appellant on DATE as required by CR 59, *underlying Motion*, **CP 588-598**.

The Appellant's dilatoriness punctuated virtually every juncture of this litigation; exceeding the level of "general" dilatoriness. The "general" dilatoriness test adopted by the Supreme Court of Washington and most recently articulated in *Business Services of America* comes from the Supreme Court of the United States *Link v. Wabash R.R.* In that case, the a party's attorney failed to move along a case, and also provided what the court found to be an inadequate excuse for missing the hearing. *Link*, 370 U.S. at 633. Here, the veritable laundry list of dilatory tactics and extracurricular activities employed by the Appellant tells a story of not only general dilatoriness, but also categorical and intentional dilatoriness. The Appellant's no-show at his own reconsideration hearing coupled with all prior dilatoriness provided proper grounds for the Trial Court to exercise discretion to dismiss the case. See *Link, viz-a-viz Business Servies of America*, Id. The Appellant cannot show any abuse of discretion. Therefore, this Court should affirm the Trial Court.

7. Public Policy Supports Affirming the Dismissal.

[15] (d) Citation Format. Citations shall conform with the format prescribed by the Reporter of Decisions.

Since the beginning in Washington State, the dilatory litigation and extracurricular conduct categorically demonstrated[16] by the appellant warranted harsh sanction. "References and comments of a personal nature...would divert attention from the points at issue". "Such objectionable matter shall be stricken from the files." *Plummer v. Weil*, 15 Wn. 427, 46 P. 648 (1896). Washington Courts are not required to powerlessly stand by and provide a forum for unacceptable litigation practices and abuse of legal process. *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 P.2d 662 (1997). Courts have an inherent discretionary power to dismiss cases in order to sanction unacceptable litigation practices. *Id.* The inherent power of the court to dismiss actions for dilatoriness of prosecution was delineated in *State ex rel. Dawson v. Superior Court*, 16 Wn.2d 300, 304, 133 P.2d 285 (1943) as follows:

> A court of general jurisdiction has the inherent power to dismiss pending actions if they are not diligently prosecuted, and it is its duty to do so in the orderly administration of justice. The dismissal of an action for want of prosecution, In the absence of statute or rule of court creating the power and guiding its action, is in the discretion of the court.

Gott v. Woody, 11 Wn.App. 504, 506, 524 P.2d 452 (Div. 2, 1974).[17]

In this state, inherent authority to dismiss provides the remedy available to the countless victims of Appellant's abuse of process,

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[16] At present count, Port Counsel has been involved in defending approximately one dozen of Appellant's lawsuits.

[17] Coincidentally, the landmark decision upholding inherent dismissal powers also involved another one of the Appellant's frequent litigation targets as Respondent. *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950): "The parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of [CR 41 predecessor Rule]."

including the Respondent Port, and this remedy has been realized here through the discretion of Honorable Fleming in this case. *Order Denying Reconsideration,* CP 657-661.

The Pierce County Superior Court properly remedied for Appellant's unacceptable, dilatory and vexatious litigation practices by granting the involuntary dismissal. By extension of these practices, Appellant here seeks only an impermissible second bite at the litigation apple under the guise of this appeal, where in fact the ONLY proper scope is limited to whether the Pierce County Superior Court acted in a manifestly unreasonable manner or on untenable grounds in dismissing Appellant's case in its discretion. *City of Puyallup v. Hogan,* __Wn.App.__, 277 P.3d 49 (Div. 2, 2012). The Court did not, and this appeal should be denied.

8. Too Late Now for Appellant to Address Proper Standard on Appeal.

In reply, Appellant is barred from now addressing the proper Issues and Standards in this Appeal. Generally, the Court does not consider arguments raised for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.3d 549 (1992); *accord Hawkins v. Diel,* 166 Wn.App. 1, 13 n. 2, 269 P.3d 1049 (Div. 2, 2011). "An issue raised and argued for the first time in a reply brief us is too late to warrant judicial consideration." *Id.*; *citing In re Marriage of Sacco,* 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). Here, in the Opening Brief, the Appellant incorrectly addressed **only** the need for a

de novo review of all orders below. *See Appellant's Fourth Br.*2-4 (Issues memorialized); *Br. at* 33 ("This Court should review all issues de novo."). Therefore, the Appellant is not entitled to address on reply any alleged abuse of discretion, raised for the first time in a Reply Brief – Because such request is "too late." *Hawkins*, 166 Wn.App. at 13 n. 2.

9. Port Motions To Strike & For Sanctions & Fees: Dilatoriness Continues On Appeal: Appellant Has Further Delayed Proceedings By Continuing To Disobey Court Orders And Rules.

In this appeal regarding a *Trial Court's* discretionary exercise of authority to dismiss the Appellant from its calendar, the Appellant has merely extended at the appellate level the same behaviors which lead to the dismissal below. Despite the ample leniency afforded in this case, the Appellant has defied favorable Court orders and continues unabated to flaunt plainly understood court rules. In this appeal from dismissal **for unacceptable and prejudicial litigation practices,** this Court has now thrice instructed Appellant to follow the plain meaning of RAP and ER. On March 20, 2012, the Court ordered:

> The appellant's opening brief you submitted to this court in this matter does not conform to the content and for requirements set out in the Rules of Appellant Procedure for or more of the following reasons: Brief does not include assignments of error ***together with issues*** pertaining to assignments of error. RAP 10.3(a)(4).
>
> The Court will not file the brief as part of the official record....

Division II Court Ruling of March 20, 2012, **Appendix 1**. Emphasis original. On June 19, 2012, the Court ordered:

> Within 20 days, West will file a further revised brief that does not refer to any materials contained in or attached to the march 30, 2009 Motion for Reconsideration that West filed in the trial Court. While West filed that motion with the clerk, he never brought before the trial court, so those materials were not considered by the trial court and cannot be considered by this court.

Division II Court Ruling of June 19, 2012. **Appendix 2**. On October 19, 2012, the Court ordered:

> The Port's motion to strike West's revised brief is granted. Within 20 days, West will file a further revised brief that does not refer to any materials contained in or attached to the March 30, 2009 Motion for Reconsideration that West filed in the trial court. While West filed that motion with the clerk, he never brought before the trial court, so those materials were not considered by the trial court and cannot be considered by this court.

Division II Court Ruling of October 19, 2012, **Appendix 3**. And yet, three drafts and eight months later, the Appellant ***still fails*** to comply with the litigation rules embodied in the various court orders.

Despite this Court's extraordinary patience and leniency, the Appellant chose to demonstrate further unacceptable litigation practices in the Fourth Revised Brief, and practices which this Court has expressly disallowed in a prior ruling in this case. The Appellant's Fourth Revised Opening Brief violates each of the Court's Rulings of March 20, 2012 (Conform to content and form requirements of RAP), June 12, 2012 (Only refer to admissible evidence considered by the Trial Court), and October 19, 2012 (Do not refer to materials stricken by the trial court). **Appendices 1, 2 & 3.** The Court declined to strike the Appellant's Fourth Opening Brief, but instead expressly invited the Port to raise concerns with the Appellant's behaviors on appeal in this

document. *Court's Ruling of December 10, 2012*, **Appendix 4.**

Appellant's inexcusable issues with filing a minimally-compliant Opening Brief in this 2008 lawsuit have caused at least ten months' delay[18] in this matter on appeal. In the unlikely event that the Court sees fit to remand this matter, doing so asks the Port to defend this Public Records Act Matter – at the soonest - in calendar year 2014 regarding events alleged to have occurred in 2007. Such continuation would be highly prejudicial to the Port in this Public Records Act case. In addition to the omnipresent concerns that both memories and witnesses fade over time, it is generally the policy of Washington Courts to fast-track Public Records Act cases in order to resolve any per-day penalty in a matter that accomplishes the purposes of the act and protects the taxpayers. Accordingly, the Port renews its Motion to Strike Appellants Brief, for Dismissal of this Appeal and or for Sanctions and fees imposed against Appellant.

10. Port Should Be Awarded Fees & Costs

The Port requests attorney fees and costs based on this frivolous appeal. RAP 18.1 [19] RCW 4.84.185.[20] and RAP 18.9.[21] A lawsuit is

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[18] The Port acknowledges that it filed one Motion for Extension in this Court during the course of the last year - which would have been obviated, had the Appellant's first two Opening Briefs been minimally compliant with relevant litigation rules.

[19] RAP 18.1. **(a) Generally.** If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.
(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

frivolous when it cannot be supported by any rational argument on the law or facts. *Tiger Oil Corp. v. Department of Licensing,* 88 Wash.App. 925, 938, 946 P.2d 1235 (1997).

The Appellant failed to timely and properly prosecute its case below, and failed to identify, raise, and brief the proper legal issues on appeal. Yet, the Appellant still presses on, requiring scarce Port taxpayer dollars to be spent once again defending against off topic and baseless claims, this time brought through a licensed attorney. The Port requests this Court to order Appellant West to pay its attorney fees and costs for having to respond yet again to these frivolous matters. RAP 18.1, RAP18.9 and or RCW 4.84.185.

An appeal is clearly without merit if the issues on review: (1) are clearly controlled by settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the decision was

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[20] **4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense.** In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non-prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

[21] **RULE 18.9 VIOLATION OF RULES**

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules **to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply** or to pay sanctions to the court.

clearly within the discretion of the trial court or administrative agency. *State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985). Although any one prong under *Rolax* will suffice to entitle the Port to a fee award, this appeal meets all three prongs. It is well settled since ancient times that courts have the ability to discretionarily dismiss cases. The docket here clearly demonstrates that the prerequisites for a discretionary dismissal are met.

Under RAP 18.1 (a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes the Court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, *review denied*, 138 Wn.2d 1022 (1999).

An appeal is frivolous if there are "'no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility' of success." *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)). This appeal is frivolous. West presents no debatable point of law, his appeal (yet again) lacks merit, and the chance for reversal is nonexistent. This was true in his pleadings before the Superior Court; it remains true now. The Appellant was given the several opportunities for a graceful exit, without a monetary penalty to him, but he chooses to persist. Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Eugster v. City of Spokane* (2007) 139

Wash.App. 21, 156 P.3d 912.

V. CONCLUSION

Appellant failed to raise, plead or argue any of the cognizable grounds for reversal either as issues or anywhere else in Appellant's Opening Brief. This Court should affirm the Trial Court's exercise of discretion because the record reflects consideration of all the necessary evidence for an involuntary dismissal, and proper application of the factual findings to law. This Court should also grant the Port's Motion to Strike Appellants Brief, for Dismissal of this Appeal and or for Sanctions and fees imposed against Appellant.

RESPECTFULLY SUBMITTED this 11th day of January 2012.

GOODSTEIN LAW GROUP PLLC

By: _____

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Washington State Court of Appeals
Division Two

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March 20, 2012

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CASE #: 43004-5-II
Arthur West, Appellant v. Port of Tacoma, Respondent

Ms. Bird

The appellant's opening brief you submitted to this court in this matter does not conform to the content and form requirements set out in the Rules of Appellate Procedure for one or more of the following reasons:

☐ Brief does not include assignments of error ***together with issues*** pertaining to assignments of error. RAP 10.3(a)(4).

The Court will not file the brief as part of the official record but will stamp it and place it in the pouch without filing. Therefore, you must submit and re-serve a corrected brief and copy by **March 30, 2012**.

If you have any questions, please contact this office.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:k

APPENDIX 1

Washington State Court of Appeals
Division Two

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June 19, 2012

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CASE #: 43004-5-II
Arthur West, Appellant v. Port of Tacoma, Respondent

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

Respondent's motion to strike the appellant's brief is granted. Within 20 days, the appellant will file a revised brief that (1) omits any reference to facts not contained in the admissible evidence considered by the trial court and (2) makes citations to specific pages in the record before the trial court for each factual assertion. The respondent's request for attorney fees is denied without prejudice.

Very truly yours,

David C. Ponzoha
Court Clerk

APPENDIX 2

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
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October 19, 2012

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CASE #: 43004-5-II, Arthur West, Appellant v. Port of Tacoma, Respondent

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

(1) The Port's motion to strike West's revised brief is granted. Within 20 days, West will file a further revised brief that does not refer to any materials contained in or attached to the March 30, 2009 Motion for Reconsideration that West filed in the trial court. While West filed that motion with the clerk, he never brought before the trial court, so those materials were not considered by the trial court and cannot be considered by this court.

(2) The Port's motion to dismiss the appeal is denied.

(3) West's motions to strike (a) Attachment 3 of the Port's Motion to Strike and (b) Attachment 1 of the Port's Response to West's Motion to Strike are granted. Neither were brought before the trial court and neither are relevant to the issues in this appeal.

(4) All requests for terms and sanctions are denied; each party will bear its own costs.

Very truly yours,

David C. Ponzoha
Court Clerk

APPENDIX 3

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
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December 10, 2012

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CASE #: 43004-5-II
Arthur West, Appellant v. Port of Tacoma, Respondent

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

Respondent's motion to strike the appellant's brief filed on 11/8/12 is denied. Respondent can address its concerns in its brief. The motions to dismiss and for sanctions are denied. Appellant's request for fees is denied. Respondent is granted an extension to 1/10/13 to file its brief.

Very truly yours,

David C. Ponzoha
Court Clerk

APPENDIX 4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST APPELLANT, V. PORT OF TACOMA RESPONDENT.	NO. 43004-5 DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. RESPONDENT PORT OF TACOMA'S MOTION FOR EXTENSION
2. RESPONDENT PORT OF TACOMA'S OPENING BRIEF

to be served on January 11, 2013 served on the following parties and in the manner indicated below:

Stephanie Bird
Cushman Law Firm
924 Capitol Way S
Olympia, WA, 98501-1210
StephanieBird@CushmanLaw.com

[x] by United States First Class Mail
[ ] by Legal Messenger
[ ] by Facsimile
[ ] by Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of January 2013 at Tacoma, Washington.

Carolyn A. Lake