No. 90480-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PORT OF TACOMA, appellant,

Vs.

ARTHUR WEST, respondent

RESPONDENT WEST'S RESPONSE TO PETITION FOR REVIEW

Arthur West
120 State Ave N.E. #1497
Olympia, Washington, 98501

Comes now the respondent, Arthur West, and respectfully opposes the petition for discretionary review filed by the Port of Tacoma in this case.

This case involves an unpublished opinion authored by the honorable Spearman Chief Justice of Division I of the Court of Appeals. Far from there being any disagreement between the Divisions of the Court of Appeals on the law as it applies to the circumstances of this case, Division II, in an opinion authored by the honorable Lisa R. Worswick has recently also authored a nearly identical decision on virtually the same issues, between the same parties.

In addition, on August 5th, a Third, virtually identical case, with almost exactly the same issues, West v. Port of Olympia, 43876-3-II, has also been determined by a third unpublished opinion by the honorable Rich Melnick of Division II of the Court of Appeals, squarely rejecting, for the third time, the very same arguments that the Port attempts to repeat in this petition.

The Ports' counsel has had three bites at the apple, and now seeks to delay and increase the cost of litigation needlessly by filing multiple petitions for review despite the lack of any reasonable or even colorable basis for review by this Court, despite counsel's own admission that the decision does not determine an unsettled or new question of law or constitutional principle, modify, clarify or reverse an established principle of law, or conflict with a prior opinion of the Court of Appeals, and despite the circumstance that the legal issues the Port contests are controlled by black letter precedent that is fatal to the Port's petition.

Appellant Port of Tacoma has filed a petition in this Court that grossly distorts the facts, contains overly lengthy and irrelevant argument, and which is ostensibly based upon 3 cases, Gott v. Woody, 11 Wn. App. 504 (1974), 524 P.2d 452, Snohomish County v. Thorpe Meats, 110 Wn.2d163 (1988), 750 P.2d 1251, and Wallace v. Evans, Wn.2d 572, 934 P.2d 662 (1997). Nothing in any of these cases in any way reasonably supports the Port's position in this case.

In Gott v. Woody, *supra*, Division II of the Court of Appeals **reversed an Order of dismissal** entered by the trial Court for lack of prosecution.

In Snohomish County v. Thorpe Meats, *supra*, this Court ruled that Division I did not err **in reversing a trial Court's CR 41 Order of Dismissal.**

In Wallace v. Evans, *supra*, this Court **affirmed a Trial Court ruling denying a defendant's motion to dismiss after over Six (6) years of inaction.**

As the Court noted in Wallace, and as the petitioner in this case similarly fails to grasp...

> Petitioners erroneously rely on a passage in Thorp Meats which addresses a trial court's inherent authority to dismiss cases as a sanction for violations of other court rules, orders, and calendar settings. Wallace, at 577.
> Significantly, "Other types of failure to prosecute" have been limited to egregious acts deliberately and manifestly obstructing the due course of justice, such as "...abandonment at trial, or failure to attend on the trial date.'" Thorp Meats, 110 Wn.2d at 169 (quoting 4 LEWIS H. ORLAND, WASHINGTON PRACTICE, Rules Practice § 5502, at 241 (3d ed. 1983)(emphasis added)

No matter how much the Port blusters, no such conduct can be alleged in this case. Respondent West did not knowingly violate any Court Order, and the issues do not present a public controversy sufficient to expend this court's precious resources upon, especially when there are many more important and serious matters for this Court's consideration other than whether the Port's counsel Ms. Lake personally believes appellant West to be a bad person. In addition to a lack of authority to support their legal claims, the Port has made material representations contrary to what they seek to argue in this case which are fatal to the claims they now attempt to make.

Attached to and filed with this reply is a true and correct copy of a pleading filed in Division II of the Court of Appeals by the Port of Tacoma that materially contradicts the representations made in the petition for review.

In the various Petitions for Review filed by the Port, counsel asserts that the grounds for Discretionary Review are present including those specified in RAP 13.4 (2) and (4)...

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

However, conversely, in a document filed in Division II, concerning the very same issues (at page 4, lines 13-20), counsel states...

> RAP 12.3 provides **publication may be considered when the decision determines an unsettled or new question of law or constitutional principle modifies, clarifies or reverses an established principle of law, or is in conflict with a prior opinion of the Court of Appeals. These criteria do not apply to the subject opinion**, and it should remain unpublished. (Emphasis added)

Counsel appears to recognize in their opposition to publication that neither of the (virtually identical) requirements for publication (RAP 13.4) or discretionary review (RAP 12.3) are present in these present matters.

CONCLUSION

This case presents no substantial issues of public importance and sets no new precedent. The ruling of the Court of Appeals was in accord with 2 other recent Court of Appeals decisions involving the same counsel and appellant, and was consistent with established precedent and the inherent authority of the Courts.

These fact situations involving a single individual and a single counsel who also might be accused of overzealous advocacy are unique and their review and publication in a published case would be of benefit to no one. Counsel, by obtaining improper dismissals in 3 separate cases has delayed the due administration of justice for a cumulative total of over a decade.

This Court should promptly deny review and allow these various cases to be remanded back to the trial courts so that the cases can be concluded and the records released before everyone involved has passed away and the records have become useless due to the protracted length of time that counsel has been able to evade disclosure by their overly zealous and bellicose litigation tactics.

Respectfully submitted this 26th day of August, 2014.

Arthur West, *pro se Respondent*

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On August 26, 2014, I caused the foregoing document to be filed with this Court and served on the undersigned in the manner indicated:

Carolyn Lake Goodstein Law Group, PLLC 501 South G Street Tacoma, WA 98405 clake@goodsteinlaw.com	_x_ ___ _x_ ___	U. S. Mail Legal Messenger Facsimile/Electronic Mail Hand Delivery

SIGNED at Olympia, Washington this 26th day of August, 2014.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST APPELLANT, V. PORT OF TACOMA RESPONDENT.	NO. 43004-5 RESPONDENT PORT OF TACOMA'S RESPONSE IN OPPOSITION TO APPELLANT WEST'S MOTIONS FOR PUBLICATION & RECONSIDERATION; AND IN OPPOSITION TO UNSOLITICTED COST BILL

I. INDENTITY OF RESPONDING PARTY

Comes now Port of Tacoma (Port), through undersigned counsel, and responds in opposition to the reliefs sought in the Appellant West's "Motion to Publish and Reconsider" and also the Appellant's "Cost Bill and Motion to Stay Pending Clarification".

II. RELIEF SOUGHT

The Port requests that this Appeals Court's February 20, 2014 Slip Opinion remain unpublished. The reasons cited by Appellant for publication are now moot, and also do not meet the criteria for publication required by RAP 12.3.

The Court also should deny Mr West's Motion to Reconsider its Ruling which denied costs and fees, for at least the following

reasons. The Court denied a fee award to either party under RCW 42.55.550(4)[1] on the sound basis that the trial court dismissed Appellant West's suit without making a substantive Public Record Act ("PRA" Chapter 42.56 RCW) determination. The Opinion does not confer prevailing party status under the PRA upon the Appellant, so any attorney fee award has no basis. Numerous other prior published PRA cases are in accord, as discussed herein.

If the Court denies Reconsideration of the fee award, as it should, the cost bill remains superfluous. In an abundance of caution however, the Port also addresses that most of Appellant West's cost bill is flatly not recoverable under the controlling *Lodestar* methodology, and should be disallowed.

III. FACTS

Appellant West filed a massive public records request with the Port of Tacoma concerning the planned South Sound Logistics Center – a complex, joint, planning exercise between the Port of Tacoma and the Port of Olympia. Shortly after submitting the

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[1] RCW 42.56.550(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

request, and while the Port was responding, Mr West also rushed to file suit against the Port, alleging various PRA claims. CP 1-4, and 709-710, 802.

On January 7, 2011, the Pierce County Superior Court dismissed Mr West's case involuntarily under the Court's inherent authority to dismiss cases as a sanction for unacceptable litigation practices. *Order Denying Motion to Vacate and or Reconsider Order of Dismissal*, CP 657-661. In dismissing Mr West's case on this procedural basis, the Superior Court (Trial Court) made no substantive rulings under the Public Records Act. *Order Denying Reconsideration*, CP 657-661.

On March 18, 2011, Appellant West appealed only the Order of Dismissal. *Notice of Appeal* CP 662-674. The Appellant did not and could not appeal any substantive PRA rulings. *Id.* On February 20, 2014, this Appeals Court in an unpublished, slip opinion ("Opinion") ruled that the Trial Court abused its discretion by dismissing the case, and remanded the matter to the Trial Court. *On file.* This Court also ruled that neither party would recover fees. *Id.*

On March 3, 2014, and despite not being awarded any fees or costs, Appellant West filed a pro se cost bill and requested that the

Court stay consideration of his former attorney's cost bill. On March 10, 2014, Appellant West filed a pro se Motion to Publish and Reconsideration of the denial of fees. On March 24, 2014, this Court initially declined to consider Appellant West's pro se pleadings. *Division II Letter of Mar. 24, 2014*, on file. On May 22, 2014, the Court accepted Appellant's pro se pleadings, and also instructed the Port file a respond within ten days to both pleadings. *Division II Order of May 22, 2014*, on file. This is the Port's timely response in opposition.

IV. PORT'S RESPONSE IN OPPOSITION

A. The Decision Should Remain Undisturbed & Unpublished

1. RAP12.3 Criteria Not Met. This Appeals Court determined that the opinion in this case will not be printed in the Washington Appellate Reports. *Op. 17.* RAP 12.3(e) provides publication may be considered when the decision determines an unsettled or new question of law or constitutional principle; modifies, clarifies or reverses an established principle of law; is of general public interest or importance; or is in conflict with a prior opinion of the Court of Appeals. These criteria do not apply to the subject Opinion, and it should remain unpublished.

2. Offered Basis for Publication is Moot. Appellant West

fails to meaningfully address the RAP 12.3(e) criteria and instead suggests only that the Opinion is of general public interest or importance because the opinion might have sway over two pending cases involving similar issues. *Mot.* 3. However, in the intervening time frame after Appellant West moved to publish in February, those pending cases have been considered and/or decided (*West v. Port of Olympia*, Div. II Cause No. 438763, considered without argument May 19, 2014) and *West v. Port of Tacoma*, Div. I Cause No. 71366-3, Unpublished Opinion issued April 28, 2014). Therefore, Appellant West's proffered reasons to publish the Slip Opinion are moot. Courts are loath to rule on moot issues. *Sorenson v. City of Bellingham*, 80 Wash.2d 547, 558, 496 P.2d 512 (1972).

An issue is moot if the matter is "purely academic". *City of Sequim v. Malkasian*, 157 Wash. 2d 251, 258, 138 P.3d 943, 947 (2006). An issue is not moot if the appellate court can provide any effective relief. *Yakima County v. E. Washington Growth Mgmt. Hearings Bd.*, 168 Wn.App. 680, 700, 279 P.3d 434 (2012).

When deciding whether a case presents issues of continuing and substantial interest, as opposed to moot issues, the court considers these factors: (1) whether the issue is of a public or

private nature, (2) whether an authoritative determination is desirable to provide future guidance of public officers, and (3) whether the issue is likely to recur. *Blackmon v. Blackmon*, 155 Wn.App. 715, 720, 230 P.3d 233 (Div. 2, 2010). Here, Appellant West identified an issue of private nature. *See Motion to Publish& Reconsider* 3:6-9: "Further, this decision has application to two pending cases, and publication would ensure uniform decisions as well as preventing similar such actions in the trial courts."

Even if private issues are moot, the Court may review the issues raised by if it finds substantial public interest in their outcome. *Wilma v. Stevens Cnty. Convassing Bd.*, 109 Wash. App. 1042 (Div. 2001). That criterion is **not** met here, in the context Mr West claims, and publication is not warranted. Decisions of moot issues with limited fact situations provide little guidance to other public officials. *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 451, 759 P.2d 1206 (1988). Here, as framed by Mr West, where the interest is limited to a claimed impact on two (now decided cases), the public interest exception does not apply. Therefore, the Court should decline to publish this opinion because the Appellant has not submitted any valid reason to do so.

3. No Other Basis for Publication Exists. The only other

reason for publication that Appellant West argues is "preventing similar such actions in the trial court." *Mot.* 3. But, that is not a cognizable RAP 12.3 criterion to publish. And, likely, the same could be said for every unpublished opinion that reverses a trial court decision, which render's Mr West's rationale meaningless.

The Opinion in this case does not meet any RAP 12.3 publication criteria. Therefore, the Court should affirm its prior determination, and deny the Motion to Publish.

B. <u>Appellant West is not a prevailing party under the Public Records Act; the Opinion correctly ruled that fees are only awarded to prevailing parties.</u>

1. No Prevailing Party- No Fee Award is Proper. Mr West's Motion to Reconsider seeks RCW 42.56.550(4)[2] prevailing party attorney's fees. But the Court correctly noted that Mr. West is **not** a prevailing party under the PRA, so no award is proper:

> Citing RCW 42.56.550(4), West requests attorney fees "on appeal...and upon remand to the Trial Court." Br. of Appellant at 48. We deny the request.

RCW 42.56.550(4) provides in part:

> Any person who prevails against an agency in any action

[2] (4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record

> in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.
>
> A person prevails in a public records suit upon showing that, as a matter of law, the agency failed to disclose records upon request. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005). Because the trial court dismissed West's suit without determining whether the Port failed to disclose records, at this stage RCW 42.56.550(4) provides no basis to award West attorney fees on appeal or upon remand. We deny West's attorney fee request.

Op. 14-15. This Court made clear that its Opinion does not reach any substantial issue or the merits of any PRA arguments:

> West next argues that "the Trial Court refused to consider whether the Port had violated the [Public Records Act], even though the Port's violations were apparent at the times that Mr. West noted up the show cause hearings." Br. of Appellant at 38–39. By making this argument, West is attempting to advance his argument on the merits of his claim. Although neither party questions the propriety of this argument, we do not consider it because it challenges decisions that are neither (1) appealable as a matter of right nor (2) within the scope of West's appeal from the order of dismissal.

Slip Op. at 13.

Significantly, this Appeals Court also noted that the orders pertaining to the Appellant's PRA claim are non-final and not appealable of right:

> Here, West's second notice of appeal sought review of the order of dismissal and "all interlocutory orders," apparently

> including the decisions on West's show cause motions. CP at 662. But a notice of appeal is not a proper method of seeking review of these decisions because they are not appealable as a matter of right....
> Thus the trial court's orders on West's show cause motions are neither appealable as a matter of right nor within the scope of West's appeal from the order of dismissal. See RAP 2.2, 2.4. Therefore, we decline to consider West's argument

Slip Op. at 14. Therefore this Court's opinion only pertains to the dismissal of the Appellant –a procedural matter- and not any of the Appellant's substantive claims under the PRA, no fee award is supported.

2. No Substantive PRA Judgment; No Basis for Fee Award. Appellant West received no PRA substantive judgment in his favor. This case instead considered the application of CR 41 and a Trial Court's judicial discretion, with the result that this Court remanded to the Trial Court to *consider* PRA claims, but no substantive determination on PRA claims has been made. In Washington, to "prevail" a party must receive judgment in that party's favor. *Blair v. Washington State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987). "Determination of the prevailing party in an appeal of a PRA judgment relates to the question whether the records should have been disclosed on request and whether the requestor had a right to receive a response." *Zink v. City of Mesa*, 162 Wn.App. 688, 729, 256 P.3d 384 (Div. 3, 2011). Therefore,

Appellant West is not a prevailing party, based on lack of a judgment on any PRA claim in Appellant's favor.

3. No Substantive Ruling on Merits; No Basis for Fee Award. Appellant cannot recover his fees without a substantive ruling on a claim giving rise to an entitlement for attorney fees. This Court has held that a remand to determine liability does not result in any award of attorney's fees on appeal: "Because we remand this case, neither party is entitled to attorney fees." *Stieneke v. Russi*, 145 Wn.App. 544, 572, 190 P.3d 60 (Div. 2, 2008) (Interpreting prevailing party fee provision in a real estate contract). Here, the Court has remanded the case, and a determination on substantive PRA issues may follow. Therefore, the Opinion does not entitle the Appellant is not entitled to attorney fees and costs.

4. Court's Present Ruling Consistent with PRA Case law. Grant of Reconsideration Would Make New Law. This Court's present Ruling comports with prior cases declining to extend underlying, substantive, attorney fee relief upon procedural issues. The Opinion does not confer prevailing party status under the PRA upon Mr West, so any attorney fee award has no basis.

Numerous other prior published PRA cases are in accord, as discussed herein. "[P]revailing" relates to the legal question of whether filing the suit was required for the records to be disclosed. *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 727, 261 P.3d 119 (2011). Emphasis original.

"[D]isclosure is a necessary prerequisite for attorney fees in a PRA case". *City of Lakewood v. Koenig*, 160 Wn.App. 883, 896, 250 P.3d 113 (Div. 2, 2011) "We have previously held that attorney fees should be granted only when documents are disclosed to a prevailing party, and where further fact finding is necessary to determine whether the PRA was violated, the question of attorney fees should be remanded to the trial court. *O'Neill v. City of Shoreline*, 170 Wash. 2d 138, 152, 240 P.3d 1149 (2010). Emphasis provided.

Citing to *O'Neil*, this Court recently held: "Similarly here, no court has held that the City violated the PRA. Instead, at this point the courts have only been confronted with a discovery dispute. Upon remand to the trial court, the trial court will determine whether the City properly redacted the driver's license numbers. Awarding costs and attorney fees is premature." *Koenig*, 160 Wn.App. at 895. The facts of this case are on point with *O'Neill*,

which justifies this Court's ruling not to grant fees, since there is no finding here that the PRA was violated. Therefore, the Court should not reconsider its ruling on attorney fees.

5. Consideration of Fee Award Procedurally Premature.[3] This Court also does not piecemeal proceedings to determine which party prevailed in discreet phases of litigation when statutory attorney's fees and costs may be available to a prevailing party. Recently, this Court decided *Gorre v. City of Tacoma*, _Wn.App._, 2014 WL 1632233 (Div. 2, Apr. 24, 2014), *Slip Op.* The *Gorre* case remanded a Tacoma firefighter's claims concerning respiratory disease to the Board of Industrial Insurance Appeals. *Id.* at 1. The City of Tacoma argued to this Court that since the City prevailed before the Superior Court, the City should recover its costs for depositions. *Id.* This Court declined to award fees and costs: "Because we reverse and remand to the Board to reconsider Gorre's claim under the applicable law and the City does not prevail on appeal or on its cross appeal, we do not address the City's argument that the superior court erred in failing to award statutory fees for deposition costs it incurred at the Board level under RCW 4.84.010 and RCW 4.84.090." *Id.* at 16, n. 46. Here,

[3] And, in the Port's view, substantively unsupported.

the Opinion similarly remands this Appellant's case to the Superior Court to reconsider the Appellant's PRA claims under the law. Therefore, this Court properly did not and should not now award fees and costs to Appellant.

C. Appellant's Cost Bill Should Not Be Accepted, nor Affirmed.

In the unlikely event that a fee award is considered, Appellant West's premature cost bill should be substantially diminished and or not affirmed under the controlling *Lodestar* analysis. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 594, 675 P.2d 193 (1983) (adopting lodestar method for calculations of attorney fee awards in Washington State courts).

In calculating what should be awarded as reasonable attorney fees, this Court employs the *lodestar* method. Under that method, the Court generally determines a fee by multiplying a reasonable hourly rate by the number of hours reasonably expended by counsel for the prevailing party[4]. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983). The party requesting fees must provide reasonable documentation of work performed, sufficient to inform the court of

[4] Here, as discussed above, Appellant West is not a PRA prevailing party, and the Court's decision to decline an award of costs and fees should stand.

the number of hours worked, type of work, and the category of the attorney who performed the work. The total hours an attorney has recorded for work in a case is to be discounted for hours spent on "unsuccessful claims, duplicated effort, or otherwise unproductive time." *Id.* at 597. Put another way: "Under this method, a court must determine whether counsel expended a reasonable number of hours in securing a successful recovery[5] for the client, exclude any duplicative or wasteful hours, and determine the reasonableness of counsel's hourly rate." *West. v. Port of Olympia,* 146 Wn.App. 108, 122, 192 P.3d 926 (Div. 1, 2008).

Assuming only for discussion Appellant West is owed fees, which he is not, the Court should subtract a significant amount from the Appellant's Cost Bill as duplicative, unnecessary, and wasteful. Appellant West filed four successive, opening briefs, before one was accepted for filing, and then with reservation. The multiple and duplicative briefing resulted from failing to follow Rules on Appeal and Evidence Rules.[6] Specifically, Appellant

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[5] Here, as discussed above, there has been no "successful recovery", because the Appellant is not a PRA prevailing party, and the Court's decision to decline an award of costs and fees should stand.

[6] On March 20, 2012, this Court's clerk *sua sponte* struck the Appellant's Opening Brief, citing to reasons: "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,* on file.

former attorney shunned writing a statement of the case that cited to the Clerk's record. Instead, Appellant West compiled newspaper articles concerning the underlying SSLC development project subject of the PRA request, and presented this hearsay opinion as the factual record of this case. That tactic resulted in the Court *sua sponte* and on the Port's motion striking the first three Appellant West's Opening Briefs. Each time that the Appellant received a Port Motion to Strike, the Appellant's attorney wrote responses opposing the Port's motions to strike. The draft-strike-draft machination occupied an entire year of time, for which the Appellant seeks complete attorney fee reimbursement. These unwarranted and duplicative fees must be subtracted under lodestar.

In particular, Appellant West's attorney billed approximately

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On June 19, 2012, the Court granted the Port's first Motion to Strike over the Appellant's opposition, 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 considered by the trial court and (2) makes citations to specific pages in the record before the trial court for each factual assertion.

Ruling of June 19, 2012, on file.

On October 19, 2012, this Court granted the Port's Motion to Strike the Third draft of the Appellant's Opening Brief over the Appellant's opposition, and 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 Ruling of Oct. 19, 2012, on file.

$25,910.25 between the dates of February 2, 2012 and October, 10, 2012. It was during this time that Appellant's attorney wrote the four opening briefs which repeatedly failed to meet the basic requirements of RAP. The Appellant's attorney also billed for time spent responding unsuccessfully to the Port's two successful motions to strike the Appellant's deficient briefs. In sum, Appellant spent most of 2012 trying to file an Opening Brief that the Court would accept, and also unsuccessfully resisting the Port's successful motions which pointed out Appellant's failure to comply with applicable RAPs. Even if Appellant were due fees and cost – which he clearly is not, Appellant's cost for these unsuccessful and duplicative work is not recoverable. The Court should discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). Therefore, if the Appellant were entitled to fees, at least $25,910.25 of Appellant's $40,195.63 fee request should be subtracted. The Port reserves any and all other objections to the Appellant's premature and unsolicited "cost bill."

D. No Stay Needed to Consider Unsolicited and Unearned Cost Bill.

For reasons described above, Appellant West is not entitled

to fees and costs under the PRA. Appellant's cost bill is therefore unnecessary, and requested stay to consider the unsolicited cost bill should be denied.

V. CONCLUSION

Appellant West fails to argue or support any RAP 12.3 criterion as a basis to publish this Opinion. The Opinion should remain unpublished. Appellant West is not entitled to fees and costs or reconsideration, where the Opinion results in remand and lacks any substantive ruling on the merits of any PRA claim. This Court's express found that Appellant West failed to raise any appealable PRA issue. It follows that Mr West is not a prevailing PRA party. Appellant's cost bill should not have been submitted, and should be rejected. In the remote chance that an award is considered, a significant $25,910.25 portion of Appellant's offered cost bill is not recoverable under lodestar methodology. This Court should deny Mr West's Motion to Publish, Deny Reconsideration, and reject the unsolicited Cost Bill or alternatively disallow the unrecoverable portions. RESPECTFULLY SUBMITTED June 2, 2014.

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