No. 90973-3

No. 43876-3-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

PORT OF OLYMPIA, a municipal corporation of the State of Washington,

Petitioner,

v.

ARTHUR WEST,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

The central issue in this case is the extent of trial court discretion to manage proceedings and, in the face of unacceptable litigation practices, to impose the sanction of dismissal. Respondent, Arthur West, is a self-described "citizen activist" with a history of filing legal actions against Washington governmental entities and officials. By one count, over a roughly ten-year period, Mr. West filed or joined at least forty-nine cases in Washington's state and federal courts. Many of Mr. West's lawsuits have been dismissed for lack of merit, lack of action, or both. Recently, Mr. West was barred by the Federal Court of the Western District of Washington from filing additional lawsuits without express leave of the Court due to the number of cases he filed that the court found to be frivolous or without merit. This ban was upheld this year by the Ninth Circuit Court of Appeals. *See In re West* 552 Fed. Appx. 624 (9th Cir. 2014).[1]

The Port of Olympia (the "Port") has often been a target of Mr. West's litigation. Following the Port's entry into a lease with the Weyerhaeuser Company ("Weyerhaeuser") in 2005, Mr. West initiated a string of lawsuits (including the current action) against a number of public

[1] Indeed, in an action related to the present case, Mr. West was sanctioned for filing a frivolous original action in this Court. *See* CP 77-88.

and private entities challenging various aspects of the lease.[2] After Mr. West took actions over a three-year span that delayed resolution of the instant Public Records Act ("PRA") action against the Port, the trial court concluded, after a thorough review of the record, that Mr. West "deliberately and willfully" hindered the efficient administration of justice and substantially prejudiced the Port, justifying the sanction of dismissal. The trial court pointed to tactics such as Mr. West's filing affidavits of prejudice against almost all judges on the Thurston County Superior Court bench, noting hearings on days opposing counsel and/or the assigned judicial officer had expressly stated they were unavailable, or noting and then simply failing to confirm and/or attend hearings.

Division II of the Court of Appeals reversed, finding the trial court abused its discretion in dismissing Mr. West's case. Substituting its judgment for the trial court's, the Court of Appeals determined that no reasonable court could have possibly concluded that Mr. West's tactics constituted unacceptable litigation practices or refusal to comply with an order of the court under CR 41(b), and dismissal of his case was not therefore justified.

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[2] *See West v. Thurston County*, 169 Wn. App. 862, 282 P.3d 1150 (2012); *West v. Port of Olympia*, 166 Wn. App. 1046 (2012); *West v. Stahley*, 155 Wn. App. 691, 229 P.2d 943 (2010); *In re Recall of Telford*, 166 Wn.2d 148, 206 P.3d 1248 (2009); *West v. Weyerhaeuser*, 2009 WL 1259154 (W.D. Wash. 2009).

The Court of Appeals erred when it reversed the trial court. The Court not only inappropriately second-guessed the trial court's evaluation of the misconduct at issue, the Court's decision places significant limitations on the abilities of trial courts to manage vexatious litigants who spend more time delaying their actions rather than resolving them on the merits. In addition, the Court of Appeals' decision contradicts this Court's precedents regarding trial court discretion in managing litigation. The Port therefore respectfully requests that this Court accept review and uphold the trial court's dismissal of Mr. West's PRA case.

II. IDENTITY OF PETITIONER

The Port of Olympia is a municipal corporation of the State of Washington, Defendant below, and Respondent at the Court of Appeals, and submits this Petition for Review of the Court of Appeals' decision terminating review identified below.

III. COURT OF APPEALS' DECISION TO BE REVIEWED

On August 5, 2014, Division Two of the Court of Appeals issued an unpublished decision reversing a Thurston County Superior Court order dismissing Respondent's PRA lawsuit. On September 12, 2014, the Court of Appeals denied the Port's Motion for Reconsideration. A copy of the Decision, along with the Court of Appeals' Order denying reconsideration, is attached hereto as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Whether, after the trial court expressly concluded that Respondent acted willfully and deliberately in causing excessive delays hindering the efficient administration of justice and prejudicing the Port, the Court of Appeals erred when it concluded that the trial court abused its discretion in dismissing Respondent's claim under the trial court's inherent authority to manage its own proceedings.

2. Whether, after the trial court expressly concluded that Respondent acted willfully and deliberately in causing excessive delays hindering the efficient administration of justice and prejudicing the Port, the Court of Appeals erred when it failed to consider Respondent's violation of court rules, as opposed to court orders, when reviewing dismissal of an action pursuant to CR 41(b).

3. Whether the trial court committed reversible error by substituting its judgment for that of the trial court in determining that no reasonable court could have concluded that Respondent willfully and deliberately caused excessive delays.

V. STATEMENT OF THE CASE

This case, originally filed in 2007, stems from a string of appeals and lawsuits that Respondent, Arthur West, filed against the Port of Olympia, the City of Olympia, Thurston County, Weyerhaeuser, and

various individually named public employees and officials related to a 2005 lease between the Port and Weyerhaeuser.[3] This particular action involves Mr. West's *pro se* suit challenging a State Environmental Policy Act ("SEPA") determination related to the Weyerhaeuser lease and alleging Public Records Act ("PRA") violations against both the Port and Weyerhaeuser. CP 33-54 (Plaintiff's Second Amended Complaint). In 2008, the SEPA claim and the PRA claim against Weyerhaeuser were dismissed, leaving only the PRA claim against the Port.[4] CP 91; 94-95.

The Port timely filed a responsive pleading on Mr. West's PRA claim, thereby demonstrating its readiness to show cause in April of 2008. Yet, Mr. West's PRA action against the Port languished. CP 936-37. By a number of means, and over a period spanning almost four years (May 2008 to January 2012), Mr. West took specific actions that caused numerous delays in reaching a final resolution of the PRA claim.

First, following dismissal of his SEPA and Weyerhaeuser claims, Mr. West took no action in the case for nearly eighteen months (between April 2008 until October 2009). CP 935. On October 16, 2009, Mr. West

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[3] Again, *see West v. Thurston County*, 169 Wn. App. 862, 282 P.3d 1150 (2012); *West v. Port of Olympia*, 166 Wn. App. 1046 (2012); *West v. Stahley*, 155 Wn. App. 691, 229 P.2d 943 (2010); *In re Recall of Telford*, 166 Wn.2d 148, 206 P.3d 1248 (2009); *West v. Weyerhaeuser*, 2009 WL 1259154 (W.D. Wash. 2009).

[4] The SEPA claim was dismissed for lack of standing, and the PRA claim against Weyerhaeuser was dismissed on the grounds that, as a private company, Weyerhaeuser is not subject to the PRA. CP 91; 94-95.

finally filed a "Declaration in Support of Motion for Show Cause Order" on the PRA claim. *Id.* However, for eighteen months following that filing, Mr. West failed to successfully note a show cause hearing despite eight attempts. With regard to those attempts, Mr. West either: 1) noted hearings on dates where the assigned judicial officer was expressly unavailable; 2) noted hearings on dates where opposing counsel[5] had filed advance notices of unavailability; or 3) on those dates where the court and opposing counsel were available, Mr. West simply failed to follow through with hearings he had noted. *See* CP 936. In fact, Mr. West's last three attempts at a show cause hearing (December 9, 2010, December 23, 2010, and April 28, 2011) were all stricken due to Mr. West's failure to appear. CP 1228, CP 1233, CP 2717; *see also* CP 936.

Additionally, Mr. West and his then co-plaintiff, Jerry Dierker[6], filed affidavits of prejudice against all available judges on the Thurston County Superior Court bench, ultimately leading to additional delay.[7] Mr.

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[5] Until the present Petition for Review, the Port was represented by Goodstein Law Group.

[6] Mr. Dierker has been dismissed from Mr. West's PRA claim as he was not a party to the original request to the Port and, thus, lacked standing. Appendix A at 4-5.

[7] Of the eight affidavits of prejudice filed over the course of this action, all but one was filed by Mr. West and/or Mr. Dierker. One affidavit (against Judge Christine Pomeroy) was filed by a non-party, Olympians for Public Accountability, a move that ultimately lead Mr. West and Mr. Dierker to file an original action in this Court against Judge Richard Hicks, Judge Christine Pomeroy, and the Thurston County Superior Court. *See* CP 78-88. As noted above, that action resulted in this Court granting sanctions against both Mr. West and Mr. Dierker for filing a frivolous action. *Id.*

West filed his first affidavit of prejudice against Judge Gary Tabor on July 16, 2007, shortly after filing the initial suit. CP 1062. Mr. West or his co-plaintiff then filed an additional six affidavits against each subsequently assigned judge: Judge Richard Hicks (October 8, 2007); Judge Christopher Wickham (March 20, 2008, May 2, 2008, and August 4, 2010); and, finally, Judge Thomas McPhee (June 10, 2011, and June 24, 2011). *See* CP 1062; CP 1212-1213; CP 1214-1215; CP 1216-1227; CP 306; CP 386; CP 530-32. Mr. West's affidavit against Judge McPhee was filed on the same day—and less than an hour after—the Port filed its June 24, 2011 Motion to Dismiss Mr. West's PRA claims based on undue delay and unacceptable litigation practices. *Cf.* CP 487 (Motion to Dismiss filed at 8:22 A.M.) *with* CP 530 (Affidavit of Prejudice filed at 9:08 A.M.)

The affidavits ultimately forced the Superior Court to hire the Honorable Sam Meyer of Thurston County District Court to serve *pro tem* on Mr. West's case. *See* CP 937. Judge Meyer convened a scheduling conference and set a date for oral argument on the Port's (then year-old) June 2011 Motion to Dismiss. *Id.* After reviewing the entire case file and determining that the Port had been prepared for a hearing on Mr. West's PRA claims as of April 2008, the trial court granted the Port's motion and dismissed Mr. West's PRA claim under the trial court's inherent authority

to manage its cases and dismiss actions based upon unacceptable litigation practices.[8] *See* CP 932-40; *see also*, RP 07/13/12, pp. 6-7.

In doing so, the trial court expressly determined that Mr. West's actions went well beyond mere inaction. RP 07/13/12, pp. 7. Although the court stated that Mr. West's intentions in scheduling hearings on unavailable dates was "not necessarily germane" to the ruling, the court concluded that the totality of Mr. West's (and Mr. Dierker's) actions showed that: 1) the actions were willful and deliberate; 2) the actions caused excessive delays that hindered the efficient administration of justice that substantially prejudiced the Port; and, 3) given the PRA's potential for daily penalties, no less onerous or less extraordinary sanctions would suffice. CP 938-39; RP 07/13/12, pp. 7. After the Court's ruling, but before a final order was entered, Judge Meyer informed counsel that Mr. West had filed a $15 million claim against both himself and Thurston County. *See* RP 07/27/12, p. 3, ll. 16-25.

Division II of the Court of Appeals reversed the dismissal of Mr. West's PRA claim. While recognizing the trial court's inherent discretion to dismiss actions for unacceptable litigation practices that go beyond

[8] Although the court implied in its oral ruling that it was granting the motion pursuant to its inherent authority, the court's written order also contains the elements necessary to sustain dismissal pursuant to CR 41(b) for willful and deliberate failure to comply with court rules or orders. *See* CP 938-39.

mere inaction, the appeals court nonetheless rejected the trial court's conclusions and substituted its judgment for that of the trial court in holding that Mr. West's actions were not willful and deliberate. *See* Appendix A at 7. In doing so, the appeals court specifically noted in the trial court's oral statement that it did not determine whether Mr. West's attempts to schedule hearings on unavailable dates were intentional. *Id.* Yet, the appellate court made no mention of Mr. West's failure to appear or confirm scheduled hearings. *See id.* The Court also took issue with the trial court's findings of fact, expressing its belief that, while the trial court concluded that the affidavits were willful and deliberate actions hindering the efficient administration of justice, the trial court did not make explicit findings that the affidavits of prejudice were a "deliberate delay tactic." *Id.* Finally, the appeals court declined to analyze whether dismissal was appropriate under CR 41(b) after concluding that "the trial court did not find that West or Dierker violated an order to proceed with the case." *Id.* (internal quotations omitted). This appeal follows.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Trial courts have long maintained substantial discretionary authority to manage proceedings before them in order to ensure the orderly and expeditious disposition of cases; this includes the power to dismiss actions as a sanction for a plaintiff's failure to prosecute. *See Link*

v. Wabash R.R. Co., 370 U.S. 626, 629-31, 82 S. Ct. 1386 (1962) (describing the "ancient origin" of trial court power to dismiss for lack of prosecution). Although Washington's CR 41 places some limitations on this authority when mere inaction by plaintiffs is involved, trial courts continue to maintain broad authority to order dismissal for want of prosecution based on unacceptable litigation practices that go beyond mere inaction. *Snohomish Cy. v. Thorp Meats*, 110 Wn.2d 163, 169, 750 P.2d 1251 (1988). As with other matters of trial court discretion, when a court dismisses an action based on such litigation practices, that decision stands unless a reviewing court finds that—based on the entirety of the record—no reasonable person could possibly have adopted the view of the trial court. *See Apostolis v. City of Seattle*, 101 Wn. App. 300, 303, 3 P.3d 198 (2000) (trial court decision to dismiss action based on unacceptable litigation practices reviewed under an abuse of discretion standard).

In this case, following a thorough review of the record, the trial court concluded that Mr. West "deliberately and willfully" undertook conduct that led to almost four years' delay in pursuing his Public Records Act claim against the Port, including failing to appear at hearings he scheduled. As set out below, the Court of Appeals' reversal of the trial court's conclusion severely limits the ability of trial courts to control their dockets and order dismissal of actions where plaintiffs inappropriately

delay final resolution of their actions. The Court of Appeals' decision also conflicts with this Court's precedent as to when dismissal for dilatoriness of a type not described by CR 41(b) is appropriate, as well as the numerous cases regarding when it is appropriate for an appellate court to substitute its judgment for that of a trial court. As a result, the Port respectfully requests that this Court accept the Port's Petition for Review and reverse the Court of Appeals' decision.

A. The Court Should Accept Review Under RAP 13.4(b)(4) To Clarify When Trial Courts Have Inherent Discretion To Dismiss Actions Where Plaintiffs Fail To Appear And/Or Engage In Deliberate Delay Tactics

Courts of general jurisdiction have long had inherent power to dismiss actions for a party's failure to diligently pursue his or her case, a power "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31. This authority is "fundamental" to the management of court dockets. *Wallace v. Evans*, 131 Wn.2d 572, 583, 934 P.2d 662 (1997) (Talmadge, J., dissenting). In Washington, when merely dilatory actions are involved (such as failure to note a matter for trial), this inherent authority has been limited by amendments to CR 41. *Gott v. Woody*, 11 Wn. App 504, 507, 524 P.2d 452 (1974); *see also*, CR 41(b)(1). However, CR 41 does not

restrict a trial court's inherent authority to dismiss an action for "dilatoriness of a type not described" by the rule. *Thorp Meats,* 110 Wn.2d at 169.

"Dilatoriness of a type not described by CR 41(b)(1) refers to unacceptable litigation practices other than mere inaction, whatever the duration." *Wallace*, 131 Wn.2d at 578 (internal quotations and citations omitted). Although "unacceptable litigation practices" obviously encompass a broad spectrum of conduct, in general, they involve activities that cause excessive and unnecessary delays, such as disregarding court orders and rules or failing to appear at scheduled proceedings. For example, in *Wallace v. Evans*, this Court specifically cited actions such as failing to appear at trial and failing to appear at a pre-trial conference as examples of "unacceptable litigation practices." 131 Wn.2d at 577-78, *quoting Gott*, 11 Wn. App. at 508. "Other cases, although not expressly addressing want of prosecution, have allowed discretionary dismissal for failure to appear, filing late briefs," and other types of dilatory behaviors that go beyond simply failing to take action on a matter. *Bus. Servs. Of Am. II v. WaferTech LLC*, 274 Wn.2d 304, 311, 274 P.3d 1025 (2012). It is well within the realm of judicial notice for this Court to recognize the waste of both court and opposing party resources in the face of such tactics.

The Court of Appeals' decision in this case is a significant limitation on the exercise of trial court discretion and one that goes beyond limitations found in CR 41 or in this Court's prior case law. Indeed, if the conduct in this case does not constitute dilatoriness of a type not described by CR 41, yet within the trial court's authority to sanction through dismissal, it is difficult to envision conduct that would.

First, through a variety of actions and inactions, Mr. West failed to bring his PRA claim forward for a span of almost four years. Mr. West failed to appear at the three consecutive show cause hearings that he scheduled between December 2010 and April 2011, finally spurring the Port to file its Motion to Dismiss in June 2011. CP 1228, CP 1233, CP 2717. In the year immediately preceding Mr. West's failure to appear at these scheduled hearings, Mr. West also failed to bring the matter to hearing, either by improperly noting hearing dates or by noting hearings on days when either the judicial officer or opposing counsel had specifically indicated were unavailable. Further still, in the seventeen months prior to Mr. West's first improper attempt to bring the matter to hearing, Mr. West took no action on the case whatsoever, despite the fact that his PRA claims were ripe for hearing as early as April 2008. CP 935-36.

Mr. West's and his co-plaintiff's use of affidavits of prejudice were similarly successful at delaying resolution of this case. Mr. West and Mr. Dierker filed a combined total of seven affidavits of prejudice, ultimately rendering the Thurston County Superior Court bench devoid of judges that could hear the matter. CP 2719. As discussed in greater detail below, at least one of these affidavits was filed immediately following the Port's filing its motion to dismiss, which resulted in a thirteen-month delay in obtaining a final decision on the motion. *Cf.* CP 487 (Motion to Dismiss filed at 8:22 A.M.) *with* CP 530 (Affidavit of Prejudice filed at 9:08 A.M.); *see also*, CP 937.

Even if only Mr. West's consecutive failures to appear at scheduled hearings are considered, Mr. West's conduct falls squarely within the types of unacceptable practices found sanctionable by dismissal under the trial court's inherent authority. *See, e.g., Bus. Servs. of Am.*, 274 Wn.2d at 311; *Gott*, 11 Wn. App. at 508, *citing Wagner v. McDonald*, 10 Wn. App. 213, 516 P.2d 1051 (1973), *and Link*, 370 U.S. 626 (describing circumstances warranting dismissal, including failing to appear at scheduled dates and filing late briefs). Further, Mr. West's failures were found to be deliberate. Although the trial court in its oral ruling stated that it need not determine whether the specific instances of noting hearings on unavailable dates was intentional, the trial court

concluded that the remainder of the scheduling woes, including failing to appear at scheduled hearings, were "willful and deliberate" actions causing excessive delays.[9] CP 938-39; RP 07/13/12, pp. 4-5.

The Court of Appeals' extremely narrow view of trial court discretion to control unacceptable litigation practices undermines centuries of trial court practice and unnecessarily handcuffs trial courts' abilities to reasonably control their dockets. Given the large volume of litigation pending before Washington's courts, this issue will likely re-appear, and this Court should accept review to clarify the circumstances under which a trial court can properly employ its inherent authority to dismiss litigants who deploy unacceptable litigation practices causing unnecessary delay.

B. The Court Should Accept Review Under RAP 13.4(b)(1) Because The Court Of Appeals' Decision Inappropriately Substituted Its Judgment For The Trial Court's In A Manner This Court Has Determined Constitutes Reversible Error

A trial court's discretionary dismissal is reviewed for manifest abuse of discretion and will stand unless a reviewing court finds—based on the entirety of the record—no reasonable person could have possibly taken the view adopted by the trial court. *See Apostolis v. City of Seattle*,

[9] As set out below, because it is undisputed that Mr. West scheduled, and failed to appear at, the hearings without justification, the trial court's conclusion of willfulness is amply established by the record in this case. *See, e.g., Apostolis v. City of Seattle*, 101 Wn. App. 300, 304, 3 P.3d 198 (2000) (holding that missing a briefing deadline is presumed to be willful absent a reasonable excuse or justification).

101 Wn. App. 300, 303, 3 P.3d 198 (2000) (trial court decision to dismiss action based on unacceptable litigation practices reviewed under an abuse of discretion standard). In the context of litigation misconduct, this high level of deference is appropriate because the trial court stands in the best position to evaluate the scope and effect of the proceedings below. *Teter v. Deck*, 174 Wn.2d 207, 227, 274 P.3d 336 (2012). As a result, appellate courts should not substitute their judgment for that of the trial court in such matters, and this Court has previously held that it is reversible error for an appellate court to do so. *See id.* (reversing a court of appeals' decision based, in part, on the appellate court's substitution of judgment on an issue of misconduct). Furthermore, it is well established in Washington that "on appeal, an order may be sustained on any basis supported by the record." *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997) (internal quotations and citations omitted).

In this case, the Court of Appeals inappropriately substituted its judgment for that of the trial court and unnecessarily focused on the trial court's findings rather than the entirety of the record before the court. For example, the Court of Appeals disagreed with the trial court's conclusion that Mr. West "deliberately and willfully caused excessive delays." Appendix A at 7. Apparently relying on a single sentence in the trial court's oral ruling, the Court of Appeals stated that the trial court

"expressly declined to determine whether West's eight failed attempts at setting a hearing were intentional." *Id.* However, this assessment misinterprets the trial court's reasons for its ruling and inappropriately second-guesses the trial court's evaluation of the record before it.

While the trial court indicated that the specific question of whether Mr. West's scheduling hearings on unavailable dates was intentional as "not necessarily germane" to the ruling, the trial court found other actions of Mr. West were indeed willful and deliberate. CP 938-39; RP 07/13/12, pp. 4-5. Both the court's oral ruling and its written order expressly call out Mr. West's failure to confirm and/or appear for scheduled hearings as well as he and his fellow plaintiff's filing affidavits of prejudice against every judge assigned to the case. *See id.* The trial court further stated in its oral ruling that these actions went beyond the realm of the merely dilatory. RP 07/13/12, p. 6, ll. 4-15. (Noting that, as opposed to some situations where causes of action may simply lie dormant for a period of time, "[t]here's a difference in this case..."). Although the court's oral ruling contains more details than the written order entered, there is no requirement that a trial court find that a party deliberately or willfully refused to obey a court rule because a "party's disregard of a court order without reasonable excuse or justification is deemed willful." *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 129, 89 P.3d 242 (2004)

(quoting *Rivers v. Wash. State Conference of Mason Contractors,* 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002); *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584-85, 220 P.3d 191 (2009) (citations omitted) (trial court did not abuse its discretion in finding party willfully violated discovery rules).

Based on the entirety of the record and the docket in the case, the trial court had more than ample reasons to conclude that, under the totality of circumstances before the court, Mr. West deliberately and willfully caused excessive delays. Indeed, it can hardly be said that an abuse of discretion occurred with regard to the trial court's conclusion that Mr. West's failure to appear at three consecutive hearings—that he himself scheduled—were deliberate and willful actions. *See, e.g.*, *Apostolis v. City of Seattle*, 101 Wn. App. 300, 304, 3 P.3d 198 (2000) (holding that missing a briefing deadline is presumed to be willful absent a reasonable excuse or justification). The Court of Appeals' conclusion otherwise, and its failure to take the entirety of the record into account, is precisely the type of substitution of judgment that this Court has repeatedly held that appellate courts should not engage in.

Furthermore, although the trial court's written order did not explicitly state[10] that Mr. West's deployment of affidavits of prejudice were a deliberate delay tactic, the record fully supports the trial court's conclusion that Mr. West's actions were in fact deliberate. For example, Mr. West filed an affidavit of prejudice (his fifth) against the last remaining Thurston County Superior Court judge available to hear the case; this affidavit was filed less than an hour after the Port filed its Motion to Dismiss for failure to prosecute. *Cf.* CP 487 (Motion to Dismiss filed at 8:22 A.M.) *with* CP 530 (Affidavit of Prejudice filed at 9:08 A.M.). This action ultimately led to a year-long delay in hearing the Port's motion to dismiss, after the Superior Court was finally forced to hire an outside judge to sit *pro tem* on the case. Even the Court of Appeals' decision in this case acknowledged that: "West filed his fifth affidavit of prejudice in this case, which resulted in delay." Appendix A at 3. The actual impact of the affidavit in causing delay, combined with the sheer number of affidavits filed, amply supports the trial court's conclusion to survive review under an abuse of discretion standard.

[10] The lack of specific findings regarding this tactic does not constitute an abuse of discretion by the trial court. *See Teter*, 174 Wn.2d at 222-27 (reversing an appeals court's complaints regarding trial court findings that were "too general and nonspecific" to support a conclusion of misconduct).

The Court of Appeals' second-guessing and reversal in this case, as well as its excessive focus of the trial court's written findings (rather than the entirety of the record), is contrary to the role appellate courts should undertake when reviewing matters of trial court discretion, and stands in stark contrast to this Court's prior decisions on when appellate courts may substitute their judgment for that of a trial court. This Court should accept review and reverse the Court of Appeals' error on this point.

VII. CONCLUSION

For the reasons stated above, the Port of Olympia respectfully requests that the Court grant its Petition for Review of the Court of Appeals' decision and reverse the Court of Appeals' determination that the trial court abused its discretion in determining that Mr. West's action should be dismissed for failure to prosecute.

Respectfully submitted this 10th day of October 2014.

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APPENDIX

A. Court of Appeals of the State of Washington, Division Two, Unpublished Opinion. Filed August 5, 2014.

Court of Appeals' Order denying reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST and JERRY L. DIERKER JR., Appellants, v. PORT OF OLYMPIA; WEYERHAEUSER CO. d/b/a WEYCO,; EDWARD GALLIGAN; BILL MCGREGGOR, ROBERT VAN SCHOORL, and PAUL TELFORD, Respondents,	No. 43876-3-II UNPUBLISHED OPINION

MELNICK, J. — Arthur West and Jerry Dierker appeal several court orders culminating in the dismissal of their Public Records Act (PRA)[1] and State Environmental Policy Act (SEPA)[2] claims. West filed a public records request with the Port of Olympia (Port) under the PRA, seeking records related to the Port's lease with Weyerhaeuser. Unsatisfied with the records the Port produced, West filed an action in superior court against the Port and Weyerhaeuser alleging, among other things, violations of the PRA and the SEPA. West later filed an amended complaint that included Jerry Dierker as an additional plaintiff. The trial court bifurcated the PRA claims from the SEPA claims, dismissed the SEPA claims for lack of standing, and dismissed the PRA claims against Weyerhaeuser because it is not a public entity. After over a year of inaction, West attempted to file a show cause hearing on the remaining PRA claims. The Port filed a motion to dismiss the PRA claims under CR 41(b)(1) and the court's inherent

[1] Ch. 42.56 RCW.

[2] Ch. 43.21C RCW.

authority. The trial court dismissed the PRA claims after concluding that West and Dierker deliberately and willfully caused excessive delays.

West and Dierker appeal, arguing the trial court erred when it (1) dismissed the PRA claims for excessive delay, (2) entered and construed the bifurcation order, and (3) dismissed the SEPA claims for lack of standing. West and the Port seek attorney fees on appeal. We hold that the trial court abused its discretion in dismissing the PRA claims because its conclusion that West and Dierker acted willfully is not supported by its findings. We additionally hold that, (1) Dierker does not have standing to enforce the PRA claims, (2) West and Dierker waived their arguments regarding the bifurcation order, (3) the trial court properly concluded that West and Dierker lacked standing for their SEPA claims, and (4) none of the parties is entitled to attorney fees. Accordingly, we affirm the trial court's bifurcation order and order dismissing the SEPA claims, but reverse the order of dismissal of the PRA claims and remand for further proceedings on this claim.

FACTS

On March 17, 2007, West filed a public records request with the Port, seeking records related to the Port's lease with Weyerhaeuser. On June 12, 2007, the Port sent West a letter listing the records it provided and the records it considered exempt. The letter stated that the Port considered the request completed.

On June 18, 2007, West filed a complaint against the Port and Weyerhaeuser for alleged violations of the PRA, SEPA, and the Harbor Improvement Act. That same day, he obtained an ex parte show cause order compelling the Port to appear on June 29 and show cause why it should not be required to release the exempt records. This hearing never occurred. West filed an amended complaint in July 2007 that included Dierker as a plaintiff.

In August 2007, Weyerhaeuser moved to bifurcate the PRA claims from the rest of West's and Dierker's claims. West agreed, and the trial court granted the motion. Over the next few months, all the parties filed multiple motions, mostly regarding the non-PRA claims.

On April 25, 2008, the trial court entered an order dismissing the case with prejudice for lack of standing. Later, the trial court issued a clarifying order stating that the April 25 dismissal referred only to the non-PRA claims and that the PRA claims were not dismissed. On May 2,, the trial court dismissed the PRA claim against Weyerhaeuser.

West and Dierker did not take any action regarding this case until October 16, 2009, when West attempted to note the PRA case for a show cause hearing. Between October 2009 and June 2011, West attempted to set eight show cause hearings. Because of the Port's counsel's or the Judge's unavailability or because of West's failure to confirm the hearings, no hearing took place.

On June 24, 2011, the Port filed a motion to dismiss under both CR 41(b)(1), failure to prosecute, and the court's inherent power to manage a case. West filed his fifth affidavit of prejudice in this case, which resulted in a delay.

On June 29, 2012, the trial court held a hearing on the Port's motion to dismiss. The trial court granted the motion to dismiss, relying on its inherent authority to manage cases. It concluded that (1) West and Dierker "deliberately and willfully caused excessive delays," (2) the delays prejudiced the Port because, if it was found to have violated the PRA, it would be subject to daily penalties, and (3) no lesser sanction than dismissal would suffice. Clerk's Papers (CP) at 938. West and Dierker both filed motions for reconsideration. The trial court denied the motions.

West and Dierker appeal, challenging the trial court's (1) June 27, 2012 dismissal, (2) order denying reconsideration of the June 27 dismissal, and (3) May 30, 2008 dismissal of the non-PRA claims for lack of standing.

ANALYSIS

I. PRA CLAIMS

West and Dierker first argue that the trial court erred when it dismissed their PRA claims for excessive delay. Because the trial court's dismissal was based on untenable reasons, we reverse. We also hold that (1) Dierker does not have standing to enforce the PRA claims and (2) we do not reach the merits of West's PRA claims because the trial court did not rule on this issue.

A. Dierker's Standing for PRA Claims

As an initial matter, the Port argues that Dierker lacks standing to enforce the PRA request. Because Dierker did not join in the PRA request, he has failed to show that he has a personal stake in the outcome; thus, he lacks standing to enforce West's PRA request.

"The doctrine of standing requires that a claimant must have a personal stake in the outcome of a case in order to bring suit." *Kleven v. City of Des Moines*, 111 Wn. App. 284, 290, 44 P.3d 887 (2002). Here, Dierker joined the suit after West had filed his PRA request with the Port and after West had filed his first complaint against the Port. The record does not show that Dierker joined with West in making the PRA request.[3]

[3] Dierker argues that he made his own PRA requests but they were kept out of the record by the Port. First, Dierker could have supplemented the record with his requests. RAP 9.6(a). Second, the complaint in this case does not mention Dierker's alleged PRA requests.

Our courts have found that people other than the person who actually made the PRA request have standing to bring a PRA action under limited circumstances. For example, in *Kleven*, the court held that the plaintiff had standing to sue under the PRA even though his attorney filed the initial PRA request. 111 Wn. App. at 290. The court determined that the complaint clearly indicated that the attorney made the request on behalf of his client. *Kleven*, 111 Wn. App. at 290.

By contrast, here, neither the PRA request nor the complaint state that West made the PRA requests on Dierker's behalf. Unlike the attorney/client relationship in *Kleven*, there is no similar relationship between West and Dierker to show that West acted on Dierker's behalf. Consequently, Dierker does not have standing to enforce the PRA claims and he is not entitled to relief relating to these claims.

B. Dismissal of PRA Claims

West first argues that the trial court erred when it dismissed the PRA claims for excessive delay. Because the trial court's order is based on untenable reasons, we reverse.

We review a trial court's order exercising its inherent power to dismiss a case for an abuse of discretion. *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1949). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

1. CR41 (b)(1)

CR 41(b)(1) governs involuntary dismissal for want of prosecution if the plaintiff fails to "note the action for trial or hearing within 1 year after any issue of law or fact has been joined."

"If the case is noted for trial before the hearing on the motion, the action shall not be dismissed." CR 41(b)(1).

Here, the Port moved to dismiss under both CR 41(b)(1), lack of prosecution, and the court's inherent authority. The trial court granted the Port's motion to dismiss, although it did not specify under which theory. To the extent that the trial court dismissed the order under CR 41(b)(1), this was an error. Dismissal under CR 41(b)(1) is not appropriate because West filed a motion to set a trial date before the hearing on the motion to dismiss.

2. Inherent Authority

"A court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, but only when no court rule or statute governs the circumstances presented." *Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988) (footnote omitted). As we discussed in the previous section, CR 41(b)(1) does not apply here. "'Where dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains.'" *Wallace v. Evans*, 131 Wn.2d 572, 577, 934 P.2d 662 (1997) (quoting *Thorp Meats*, 110 Wn.2d at 169). "Dilatoriness of a type not described by CR 41(b)(1)" refers to unacceptable litigation practices other than mere inaction. *Wallace*, 131 Wn.2d at 577. Dismissal is justified under the court's inherent authority only when a party acts in willful and deliberate disregard of reasonable and necessary court orders. *Apostolis v. City of Seattle*, 101 Wn. App. 300, 304, 3 P.3d 198 (2000); *see, e.g., Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 131, 896 P.2d 66 (1995) (finding the plaintiff willfully and deliberately misled the court by falsely claiming to have effected proper service). Examples include failing to comply with court rulings, failing to appear, and filing late briefs. *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 311, 274 P.3d 1025 (2012); *see*

also Alexander v. Food Servs. of Am., Inc., 76 Wn. App. 425, 430, 886 P.2d 231 (1994) (dismissing case where the plaintiff had notice of the trial and willfully chose not to attend); *Jewell v. City of Kirkland*, 50 Wn. App. 813, 821-22, 750 P.2d 1307 (1988) (dismissing case where plaintiff violated a court order by failing to post funds by a certain date).

In this instance, there are no findings showing "dilatoriness of a type not described by CR 41(b)(1)." *See Wallace*, 131 Wn.2d at 577. The trial court found there existed 17 months of inaction in the proceedings; however, mere inaction is an insufficient basis to support dismissal based on the trial court's inherent authority. *Wallace*, 131 Wn.2d at 577. The Port argues that the trial court found that West and Dierker violated a court order to "proceed with the case," Resp't Port's Br. at 20, but the trial court did not find that West or Dierker violated an order to "proceed with the case."

Additionally, even if plaintiffs' conduct could be characterized as "dilatoriness not described by CR 41(b)(1)," the trial court did not make a finding that West or Dierker acted willfully and deliberately. Here, the trial court concluded that West and Dierker deliberately and willfully caused excessive delays. But the trial court's findings do not support this conclusion. Although the findings list the various delays in this case, nothing in the findings indicates that West and Dierker deliberately and willfully acted to cause the delays. For example, the findings state that five judges were recused from this case. But the trial court did not find the affidavits of prejudice were a deliberate delay tactic. The record shows that the judges were unable to hear the case because of "conflicts and affidavits." CP at 2719. Further, in its oral ruling, the trial court expressly declined to determine whether West's eight failed attempts at setting a hearing were intentional. Because the trial court did not find, and the record

does not show, that West or Dierker acted in deliberate and willful disregard of a court order, the trial court based its order on untenable reasons and we reverse the dismissal of the PRA claims.

3. Merits of the PRA Claim

West asks us to determine the merits of his PRA claim. RCW 42.56.550(1), which governs judicial review of agency actions under the PRA, states that the *superior court* may require the agency to show why it refused to allow inspection of the withheld records. Here, the superior court did not hold a hearing or make a decision on the merits of the PRA claim. We remand this claim to the trial court. *See Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005) (remanding to the trial court where the plaintiff had not yet had a court review the allegedly exempt documents).

II. BIFURCATION

Next, West and Dierker make various claims regarding the trial court's bifurcation order. But because they failed to object in the trial court, this argument is waived on appeal. RAP 2.5(a). Additionally, to the extent they are arguing that the delay in commencing the PRA claims is the result of the bifurcation order and not their own inaction, it is unnecessary to reach this argument in light of our decision to reverse the trial court on this issue.

III. STANDING FOR NON-PRA CLAIMS

West and Dierker next argue that the trial court erred by dismissing their non-PRA claims for lack of standing. Because West's and Dierker's claimed injuries are speculative and nonspecific, we hold that they lacked standing.

To establish standing to challenge an action under SEPA, a party must (1) show that the alleged endangered interests fall within the zone of interests protected by SEPA and (2) allege an injury in fact, which requires evidence of specific and perceptible harm. *Kucera v. Dep't. of*

Transp., 140 Wn.2d 200, 212, 995 P.2d 63 (2000). A party alleging a threatened injury instead of an existing injury must show that the injury will be "immediate, concrete, and specific" rather than conjectural or hypothetical. *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994) (quoting *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992)). The party's interest must be more than the general public's abstract interest in having others comply with the law. *Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002).

Here, the trial court found that West's and Dierker's interests were arguably within the zone of interest protected by SEPA but that they failed to allege an injury in fact. CP at 94 ("Plaintiffs have not alleged immediate, concrete, specific injury required to establish standing or injury particular to them beyond any other member of the public."). Therefore, we review whether West and Dierker have alleged an immediate, concrete, and specific injury.

In *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 831, 965 P.2d 636 (1998), the court held that the plaintiffs had standing to contest a proposed residential development plan because their properties were adjacent to the planned developments and the plan would result in increased traffic on the roads plaintiffs used to access their properties. Similarly, in *Kucera*, the court held that the plaintiffs, who owned shoreline property, sufficiently alleged injury in fact when they claimed that wakes off of a ferry damaged the shorelines. 140 Wn.2d at 213. The plaintiffs in these actions alleged concrete injuries to their specific interests.

By contrast, West and Dierker have alleged only speculative and general injuries. They assert that the Weyerhaeuser lease will result in greater pollution in the area, increased traffic around the port, and negative effects on wildlife. But these harms are not particularized like the harms asserted by the adjacent property owners in *Suquamish Indian Tribe* and *Kucera*.

Furthermore, the claims are hypothetical (e.g., ships may sink; there may be more boat wakes, which disrupt the sand lance habitat and, in turn, affect animals further up the food chain; and the new activity may disturb areas that plaintiffs claim are already polluted). West's and Dierker's allegations were insufficient to establish injury in fact and, thus, they do not have standing.

IV. ATTORNEY FEES

West requests attorney fees under RAP 18.1 and RCW 42.56.550(4). RCW 42.56.550(4) states:

> 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.

A party prevails if "the records should have been disclosed on request." *Spokane Research & Def. Fund,* 155 Wn.2d at 103. Although West successfully argued that the trial court improperly dismissed his PRA claims, he has not yet shown that the Port withheld records that should have been immediately disclosed. Accordingly, he has not prevailed under RCW 42.56.550(4) and attorney fees are not appropriate at this stage in the proceeding.

Dierker also seeks costs and sanctions based on the PRA claims. Because Dierker does not have standing to enforce the PRA claims, we deny his request.

The Port requests attorney fees under RAP 18.9 and RCW 4.84.185 for defending a frivolous appeal. An action is frivolous if, considering the action in its entirety, it cannot be supported by any rational argument based in fact or law. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339, *review denied*, 175 Wn.2d 1008 (2012). West successfully appealed the trial court's dismissal of the PRA claims. This action was not frivolous and we deny the Port's attorney fee request.

We reverse the trial court's dismissal of West's PRA claims and remand for further proceedings. We affirm the trial court's bifurcation order and order dismissing the SEPA claims. We deny all parties' requests for attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Johanson, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST and JERRY DIERKER, JR.,

Appellants,

v.

PORT OF OLYMPIA; WEYERHAUESER CO. d/b/a WEYCO; EDWARD GALLIGAN; BILL MCGREGGOR; ROBERT VAN SCHOORL; and PAUL TELFORD,

Respondents.

No. 43876-3-II

ORDER GRANTING RESPONDENT'S MOTION TO FILE OVERLENGTH MOTION FOR RECONSIDERATION and ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT PORT OF OLYMPIA filed a motion for permission to file an over length motion for reconsideration and a motion for reconsideration of the Court's **August 5, 2014** opinion. Upon consideration, the Court grants the motion to file an over length motion for reconsideration and denies the motion for reconsideration. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Worswick, Melnick

DATED this 12th day of September, 2014.

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

DECLARATION OF SERVICE

I, Deanna L. Gonzalez, declare as follows:

I am a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Phillips Burgess PLLC, whose address is 724 Columbia Street NW, Suite 140, Olympia, Washington 98501.

On October 10, 2014, I sent out for service upon the below-listed party at the address and in the manners described below, the following document appended hereto:

- Petition for Review

Arthur West 120 State Avenue NE, #1497 Olympia, Washington 98501 *Respondent*	☒	U.S. Mail, postage prepaid
	☒	Hand Delivered via Legal Messenger
	☐	Overnight Courier
	☐	Electronic Court Efile
	☒	Electronically via email: ***awestaa@gmail.com***
	☐	Facsimile

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

DATED at Olympia, Washington this 10th day of October, 2014.

Deanna L. Gonzalez

552 Fed.Appx. 624 (Mem)
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

In re Arthur Scott WEST, Appellant.

No. 11–35918. | Submitted Dec. 17, 2013. * | Filed Jan. 02, 2014.

Appeal from the United States District Court for the Western District of Washington, Ronald B. Leighton, District Judge, Presiding. D.C. No. 3:11–mc–05022–RBL.

Before: GOODWIN, WALLACE, and GRABER, Circuit Judges.

***625 MEMORANDUM** **

Arthur Scott West appeals pro se from the district court's order imposing a pre-filing restriction on him as a vexatious litigant. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1056–57 (9th Cir.2007) (per curiam). We affirm.

The district court did not abuse its discretion by imposing a pre-filing restriction against West after giving him notice and an opportunity to be heard, developing an adequate record for review, making findings regarding his frivolous litigation history, and tailoring the restriction to the specific vices encountered. *See id.* at 1057–61 (discussing the four factors for imposing pre-filing restrictions).

We reject West's contentions concerning the district court's jurisdiction to impose the pre-filing restriction, judicial bias, and the validity of the restriction and the "vexatious litigant standards" under federal and state law.

The Port of Tacoma's opposed motion for leave to file an amicus brief, filed on August 16, 2013, is denied. West's request for default and appointment of the U.S. Attorney as amicus curiae, set forth his opposition brief, is also denied.

West's motion for reconsideration, filed on September 27, 2013, is denied.

AFFIRMED.

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R.App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.