NO. 90314-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PORT OF TACOMA, a municipal corporation

Petitioner

v.

ARTHUR WEST

Respondent.

REVISED[1]
PETITION FOR REVIEW BY THE SUPREME COURT

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1.This Revised Petition complies with the Court's July 1, 2014 Order that the Port file a thirty-page Petition by July 21, 2014.

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TABLE OF AUTHORITIES

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I. IDENTITY OF PETITIONER

Petitioner Port of Tacoma asks for the relief designated in Part II. Petitioner is represented by the Goodstein Law Group PLLC.

II. RELIEF REQUESTED.

The Port requests that the Supreme Court to accept review of this case, in which the Port seeks to reinstate the Trial Court's exercise of discretion dismissing the Respondent Mr. West's (West or Mr. West) complaint as a sanction for unacceptable litigation practices.

III. COURT OF APPEALS DECISION

A copy of the Court of Appeals Decision and Order on Reconsideration is attached. RAP 13.4(c)(4). The unpublished Opinion will be cited to as "Slip Op."

IV. SUMMARY & WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following grounds for review of appellate decisions:

> A petition for review will be accepted by the Supreme Court only:
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a decision by another division of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case should be considered under prongs one, two and four of this rule. The primary issue of this Petition is singular and narrow: Whether the Trial Court abused its discretion to exercise its inherent authority to manage parties and proceedings before the Court? No. The Supreme Court should accept review either because the Appeals Court ruling below conflicts with this Court's rulings in *Gott*[2], *Thorp Meat*[3], and *Wallace,*[4] and or to more clearly clarify that CR 41 is not an absolute bar to exercise the Court's exercise of inherent authority.

Gott, Thorp Meats & Wallace v. Evans all expressly allow for dismissal based on "Dilatoriness of a type not described by CR 41(b)". 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. "Dilatoriness of a type not described by CR 41(b)(1)" refers to unacceptable litigation practices other than mere inaction, whatever the duration. *Thorp Meats,* 110 Wash.2d at 169, 750 P.2d 1251.

A Trial Court's inherent authority to dismiss may be based on violations of orders or rules and (2) the dismissal will be upheld where, as here, the record supports the basis for the Trial Court's exercise of its

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[2] Gott v. Woody, 11 Wash.App. 504, 507, 524 P.2d 452 (1974)).
[3] *Thorp Meats,* 110 Wash.2d at 166-67, 750 P.2d 1251 (1988)
[4] *Wallace v. Evans,* 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997).

authority to dismiss[5]. Mr West's pattern of abusive litigation tactics and court rule violations reflected in this record is exactly the dilatory behavior of a type not described by CR 41(b), upon which the Trial Court properly based the dismissal.

Given the lengthy list of Mr. West abuses of process in this case, the Appellate court ignored the clear record and substituted its own judgment for that of the trial court and thereby committed reversible error. The Court should also accept review because the Appeals Court decision contravenes prior Appeals Court and Supreme Court decisions prohibiting such substitutions of judgment. The Court of Appeals' reversal of the dismissal seriously erodes a trial court's inherent discretion to manage its calendar and the efficiency of the Court, and is an issue of substantial public importance that the Supreme Court should decide.

V. ISSUES PRESENTED FOR REVIEW

A. The Limits of Trial Court's Discretion Where Unacceptable Litigation Practices Exist Is An Issue Of Substantial Public Interest, and Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1) (2) and (3).
B. Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1) and (2).
C. Appeals Court Ruling Also Conflicts With Prior Supreme Court Cases Holding That Appellate Substitution Of Discretion In

[5] Further, an Appellate Court "may affirm the trial court on any correct ground, even though the trial court did not consider that particular ground." *Wallace v. Lewis Cnty.*, 134 Wn.App. 1, 12, 137 P.3d 101 (Div. 2, 2006); *citing Nast v. Michels,* 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

Areas Reserved For Trial Court Discretion Constitute Reversible Error. RAP 13.4(b)(1) and (2).

VI. STATEMENT OF THE CASE

Mr. West filed this case first in a line of five[6] related *pro se* litigations involving the Port of Tacoma. All four of the West-initiated lawsuits were, for one reason or another, dismissed. The Federal Court, Western District of Washington, Judge Ronald B. Leighton, *sua sponte* filed the fifth case – a bar order against any further West litigation in federal court that the Ninth Circuit summarily upheld. Some or all the facts concerning these related lawsuits were in the record before the Trial Court in this instant matter and show Mr. West's extensive pattern of dilatory action of a type not described by CR 41(b)(1), all of which support the Trial Court's exercise of its inherent authority to dismiss.

A. Facts Related to Milepost Events in this Case, & West's Parallel Mischief related To This Case.

On or around **December 4, 2007**, West submitted a massive RCW 42.56[7] "Public Records Act" Request with the Port of Tacoma. CP 8. The

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[6] In addition to the instant case, West v. Port of Tacoma, Cause Nos. 08-2-043121-1 (Pierce County Super Ct.), 43004-5 (Division II), 902046 (Supreme Court of Washington); Second, West v. Port of Tacoma, Cause Nos. 09-2-14216-I (Pierce County Super Ct.), 71366-3-I (Division I), 90480-4 (Supreme Court of Washington); Third, In re West, Supreme Court of Washington Cause No. 84837-8; Fourth, West v. Chushkoff, C10-5547-RJB (W. Dist. Wash.), aff'd 11-35603 (9th Cir.); In re Arthur West, Cause No. MC11-5022-RBL (W. Dist. Wash.), aff'd 11-35918 (9th Cir.).

[7] RCW 42.56 is a recodification of former RCW 42.17; see laws of 2010 ch. 69 §2.

Requested records were "all records related to SSLC[8] from January 1, 2005 to present." CP 14-15. On **December 6, 2007**, per statutory[9] duty, the Port promptly began compiling records to fulfill West's request, which implicated **tens of thousands** of pages of responsive records. CP 9. From its first contact with Mr West, 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. CP 743. Beginning on December 6, 2007 and carrying through until fulfillment on March 28, 2008, the Port worked hard to respond to West's PRA request.[10] The Port dedicated two fulltime employees and outside

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[8] 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 was an intensive, multimillion dollar interlocal project that the Ports terminated long ago.

[9] See then-RCW 42.17, now recodified to RCW 42.56 "Public Records Act."

[10] The Port's Response protocol 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

technical contractors to identify and review records over the period of approximately twelve weeks between December 6, 2007 and March 28, 2007. CP 697. On January 10, 2008, the Port began its incremental release of records, pursuant to RCW 42.56.520. CP 4-5. On January 14, 2007, while the Port was responding to West, West nonetheless sued the Port, **less than five weeks after submitting the massive original request,** while scheduled incremental release and review of records was ongoing. CP 4. West simultaneously moved to for an order of show cause, falsely alleged the Port "refused to comply with the disclosure act entirely, and refused to respond promptly with a date for certain disclosure," and sought "negligence" damages because the "ports in this state act in a covert manner." CP 2-6. The Court denied the West's relief stating that the Motion to Show Cause was, in fact, "premature," and instead affirmed and adopted the Port's proposed incremental release schedule.[11] CP 11. 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. CP 54-56. CP 742.

In addition to West's havoc within this case record, Mr. West also

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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....CP 7-10.

[11] Pursuant to RCW 42.56.520, agencies may release records in increments.

spent most of 2008 - 2011 engaged in extracurricular maneuvers related to this case. On **April 14, 2008**, West contacted the (former) local US attorney, State prosecuting attorneys, and various elected officials and media companies with "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.[12] CP 813-815.

On **April 23, 2008**, West 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." CP 810-811. CP 813-815. On **April 24, 2008,** after failing to attend two scheduled appointments to view the responsive records, West arrived an hour and a half late to a third viewing appointment. CP 802.

Also on **April 24, 2008**, West moved for contempt and Public Record Act remedy, CP 57-60[13], noting 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 were unavailable. CP 744. West also moved to join the Port of Olympia, in a rambling and procedurally

[12] Letter to "Alberto A. Gonzalez, U.S. Attorney, King County Prosecutor Norm Maleng, Thurston County prosecutor Ed Holm, assorted Representatives, Counsel, Media".

[13] This sham hearing attempted to cover-up the fact that the Appellant West missed a response date in a dispositive motion in a related case against the Port of Olympia, also defended by undersigned counsel, and therefore West needed to "create" West's own "unavailability." CP 793.

defective pleading. CP 59.

Next, on **May 1, 2008**, West sought CR 11 sanctions as 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 penalties" – citing solely ancient and non-legal literature as "authority." CP 61-69. On **May 1, 2008,** the Port made all responsive records were made available to West. CP 825-827. **On May 2, 2008**, the Court summarily denied all West's motions, found that the Port complied with the record disclosure schedule, thereby extinguishing Plaintiff's original Complaint issues. CP 866-867.

On **May 15, 2012,** West untimely moved to reconsider and also objected the Port's redactions and exemptions as reflected on the Port's privilege log. CP 71-83. On **May 30, 2008**, the Court denied West's (untimely) motion for reconsideration and ordered that a special master would review the tens of thousands of pages of responsive documents. CP 866-867.

On **August 26, 2008**, West filed a "Motion for Change of Magistrate," wherein West (disrespectfully) moved for a new judge on the theory that Hon. Fleming's medical leave during the summer of 2008 violated his Constitutional free speech and civil rights. CP 411-413. West

also argued that appointment of a special master constitutes a "prior restraint" on West's free speech. CP 396-410.

In **October of 2008**, after the Ports of Tacoma and Olympia abandoned plans to develop the SSLC, CP 419, the Port voluntarily released records newly amendable to disclosure. CP 424-581.

On **October 17, 2008**, the Court (Judge Armijo) denied West's Motion for a new judge. CP 582-583. On **March 30, 2009**, the Court appointed Hon. Terry Lukens to review the volumes of responsive records over West's objection[14]. CP 585-587. That day, 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 improperly introduce newspaper articles as "evidence". CP 588-598. West failed to note his Motion for Reconsideration for hearing as CR 59 requires, a court rule violation.

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. CP 972-980. The Port filed a motion to modify the Special Master's report. CP 981-988. On September 15, 2009, West again untimely filed an opposition to the Port's Motion.

[14] West only "objected" to the Port's suggested special masters by legally-insufficient memoranda without suggesting any alternative.

CP 599-600.

Despite the above maneuvers on the record, the Court of Appeals reversed the Trial Court's dismissal for unacceptable litigation practices, because the Trial Court's Dismissal Order did not *cite* to each of the events (Slip Op 13), despite that the record and the applicable standard of review – "manifestly unreasonable, based upon untenable grounds, or made for untenable reasons." *Slip Op.* 11. West took no further action in the case until after the Court filed a Clerk's Motion dismissed this case, in January 2011. Instead, West filed numerous other litigation abuse actions, and sued the presiding Judge Fleming *twice*, all traced back to this instant matter, and all of which are reflected in the record in this case.

B. West's Additional Self-described "flailing around."[15]

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

On **October 6, 2009**, West again sued the Port of Tacoma, its commissioners and its executive director repeating the same PRA claims and "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." CP 1235-1241. West also sued

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

Pierce County Prosecuting Attorney Mark Lindquist and Hon. Terry Lukens. West contended that presiding Judge Fleming was "unlawfully exercising" and had "forfeited" his office due to actions in this 2008 case subject of this instant appeal. West sought prosecution of Hon. Fleming by Prosecutor Lindquist. CP 1238. West also argued that Prosecutor Lindquist and Judge Fleming "violated their oaths of office and duties under law." CP 1239. West 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." , CP 1237-1238.

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

Next, on **August 5, 2010,** 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, ***again directly related*** to this instant case. CP 1242-1262. Here, West sought habeus corpus relief from Judge Edward's Order finding West in civil contempt, and argued that the defendants had

engaged in a conspiracy to deprive West of civil rights and caused "economic and personal assaults." West also complained that the Port Public Records Response was actually a prior restraint on his free speech. *Id.*

C. Dismissal of the Instant Case

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. CP 603. Between the written notice of December 8, 2010 and hearing of January 7, 2011, West did not note the issue for trial. On January 7, 2011, the Court dismissed the case, and memorialized the dismissal on January 25, 2011. CP 603.

D. West Activity: Post Dismissal

On **January 21, 2011**, twelve days after the case had been dismissed, West filed "Plaintiff's Note for Trial, Declaration, and Objections to CR 41 dismissal." CP 610-622.On **January 25, 2011**, the Court heard West's objections, and entered a written dismissal Order. CP 626-629. On **February 1, 2011**, West moved to vacate the dismissal and noted his purported "Plaintiff's Motion to Vacate Improper Dismissal Issued Without Notice" for hearing, citing CR 59 and was therefore really a Motion for Reconsideration in substance. CP 630-652.On **March 4, 2011**,

West 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. CP 657-661, CP 655-656. On **March 18, 2011,** West again appealed, seeking direct review by this Court. CP 662-674. Eventually, Mr. West hired an attorney, filed four different opening brief drafts (due to Mr. West's self-inflicted RAP violations in briefs filed by counsel) before Division II, and had a hearing in the Court of Appeals in late 2013. On February 20, 2014, the Court of Appeals issued the unpublished opinion giving rise to this Petition.

VII. ANALYSIS

A. The Limits of Trial Court's Discretion Where Unacceptable Litigation Practices Exist Is An Issue Of Substantial Public Interest, and Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1) (2) and (4).

Every Court of justice has inherent power to control the conduct of litigants who impede the orderly conduct of proceedings, and accordingly, a Court may, in its discretion, place reasonable restrictions on any litigant who abuses the judicial process. *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997). The Supreme Court should accept review of this issue of substantial public importance because the Appeals Court

ruling below conflicts with this Court's rulings in *Gott*[16], *Thorp Meat*[17], and *Wallace,*[18] and or to more clearly clarify that CR 41 is not an absolute bar to exercise the Court's exercise of inherent authority.

CR 41 was adopted in 1967. The provision barring dismissal when an action has been noted for trial was added to the rule in 1967. *Thorp Meats,* at 167-68. CR 41 is repeatedly cites as a limitation on a court's exercise of inherent authority when dismissal is sought for untimely prosecution. "..[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.*" *Thorp Meats,* 110 Wash.2d at 166-67, 750 P.2d 1251 (emphasis added) (footnote omitted) (citing *State ex rel. Dawson v. Superior Court,* 16 Wash.2d 300, 304, 133 P.2d 285 (1943)).

However, by express terms, CR 41 is **not** a limitation of the Court's independent authority to manage a case, including dismissal where so warranted. CR 41 (b)(2)(D) *Other Grounds for Dismissal and Reinstatement:* "This rule is ***not a limitation*** upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise". Emphasis Added. While the *Gott, Wallace* and *Thorp Meat*

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[16] Gott v. Woody, 11 Wash.App. 504, 507, 524 P.2d 452 (1974)).
[17] *Thorp Meats,* 110 Wash.2d at 166-67, 750 P.2d 1251 (1988)
[18] *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997).

cases all speak to the limitations which CR 41 places on a trial court's authority, each case[19] of these post-1967 adoption of CR 41 also makes clear that Court's discretion is **not limited** by CR 41 where other types of unacceptable litigation practices also exist:

- *Wallace v. Evans*, 131 Wn.2d at 577-578, *quoting Gott*: ("[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.").
- *Gott*, 11 Wn.App. at 504, ("We do not believe, as defendants contend, that this interpretation will seriously invade the discretionary power of the superior court 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. In these areas the trial court's inherent discretion is not questioned by our interpretation.")
- In *Thorp Meats* 110 Wn.2d at 169, this Supreme Court observed that "[t]his interpretation [of CR 41(b)(1)] does not destroy a trial court's inherent authority to manage its calendar. 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."

Gott, Thorp Meats & Wallace v. Evans all expressly allow for dismissal based on "Dilatoriness of a type not described by CR 41(b)".

"Dilatoriness of a type not described by CR 41(b)(1)" refers to unacceptable litigation practices other than mere inaction, whatever the

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[19] See also *Wagner v. McDonald*, 10 Wash.App. 213, 516 P.2d 1051 (1973) (dismissal for want of prosecution where plaintiff failed to appear at trial). See *also Woodhead*, 78 Wn.App. 125, (failure to effect service on any of the defendants during the 4 months after he filed the complaint and for his failure to file a confirmation of service as required by King County Local Rule...4.2).

duration. *Thorp Meats,* 110 Wash.2d at 169, 750 P.2d 1251. Mr West's pattern of abusive litigation tactics and court rule violations noted in the Facts Section of this Petition above is exactly the dilatory behavior of a type not described by CR 41(b), upon which the Trial Court properly based the dismissal. The record before the Trial Court includes at least the following egregious action by Mr West which together form a pattern of dilatoriness of a type not described by CR 41(b)(1), and upon which the Trial Court properly exercised its inherent authority to dismiss this case:

CP 742	Premature noting of Show cause in PRA case (as found by the Trial Court
CP 813-815	Filing request for criminal investigation with US AG office against Port and port counsel
CP 810-11	Filing Bar complaint against Port Counsel
CP 744	Repeatedly Scheduling Sham Show cause hearings in dates counsel unavailable
CP 57-60 CP866-67	Filing baseless contempt motions against Port – dismissed by Court
CP 59 CP 866-67	Improper motion to join Port of Olympia (extra-jurisdictional party)- dismissed by Court
CP 61-69 CP 866-67	Improper motion for CR 11 sanctions alleging "anti slap" violations against Port for port opposing motions-dismissed by Court
CP 71-83 866-867	Filing untimely Motion for reconsideration of court's denial of motions violating CR 59
CP 411-413	Filing Motion for change of Judge alleging trial court violated West's free speech and civil rights
Cp 584	Filing Motion for reconsideration of denial of Special master – failing to note motion per CR 59 and local PCLR 7
CP 1235-1241	Suing the Port of Tacoma, its commissioners and its executive director alleging the *same PRA allegations* and "an action for a declaratory ruling in regard to a pattern of secrecy and negligent administration of the Port of

CP 1239. CP 1237-1238	Tacoma that has cost the public over a Quarter of a Billion Dollars ($250,000,000) in needless expenditures for mismanages projects." And Suing Pierce County Prosecuting Attorney Mark Lindquist and Hon. Terry Lukens (ret.). West contended that Hon. Fleming was "unlawfully exercising" and had "forfeited" his office due to actions in this 2008 case subject of this instant appeal. West sought prosecution of Hon. Fleming by Prosecutor Lindquist. West also argued that Prosecutor Lindquist and Judge Fleming "violated their oaths of office and duties under law."
CP 1242-1262.	Suing in federal court 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, ***again directly related*** to this instant case. Case No. C10-5547-RJB; Here, West sought habeus corpus relief from Judge Edward's Order finding West in civil contempt finding, and also the Appellant argued that the defendants had engaged in a conspiracy to deprive the Appellant of civil rights and caused "economic and personal assaults."
CP 657-661, *See also Clerks Memorandum*, CP 655-656.	Failing to appear his own reconsideration hearing on March 2011, at which time the Court signed an Order denying Reconsideration which expanded on the Court's findings in support of the discretionary grounds for dismissal.

Other post 1967 adoption of CR 41 cases also have allowed discretionary dismissal for **failures to appear, filing late briefs, and similarly egregious sorts of dilatory behavior**. *E.g., Apostolis v. City of Seattle,* 101 Wash.App. 300, 305, 3 P.3d 198 (2000). Here, review should ab accepted because Division II completely ignores these West actions in the

record events and looked only to the Trial Court's order of dismissal. The Appeals Court also substituted its own discretion for that of the Trial Court. *Slip Op.* 13.

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. 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." *Snohomish County v. Thorpe Meats*, 110 Wn.2d at 166. ("[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."). *Wallace v. Evans*, 131 Wn.2d at 577-578.

B. Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1) and (2).

Selected patterns of misconduct from the Washington Court of Appeals and Supreme Court resulting in discretionary dismissal include:

- Division 1 Court of Appeals: The King County Superior Court dismissed the petition for review with prejudice on two separate grounds: first, as a sanction for deliberate failure to follow the case schedule and court orders....*Apostolis v. City of Seattle*, 101 Wn.App. 300, 301, 3 P.3d 198 (Div. 1, 2000).
- Division 1 Court of Appeals: "[W]illful and deliberate failure to effect service and to comply with the case scheduling order and the requirements of KCLR 4.2, together with the deliberate attempts to mislead the court by false claims, justifies the trial court's conclusion that the actions in this case amounted to an abuse of judicial process. *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn.App. 125, 131, 896 P.2d 66 (Div. 1, 1995).
- Supreme Court of Washington: 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. *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950).

Mr. West's behavior support's the Trial Court's discretion to involuntarily dismiss Mr. West. Mr. West's unacceptable litigation actions here eclipses the case law fact patterns above. Reversal of the Superior Court's exercise of discretion is contrary to the Supreme Court and Appellate Court decisions listed above. Therefore, this Court's acceptance of review is supported by RAP 13.4(b)(1) and (2): (1) If the decision of the Court of

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

C. Appeals Court Ruling Also Conflicts With Prior Supreme Court Cases Holding That Appellate Substitution Of Discretion In Areas Reserved For Trial Court Discretion Constitute Reversible Error. RAP 13.4(b)(1) and (2).

A discretionary dismissal will be reviewed for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). Appellate courts are loath to substitute their discretion for that of the trial court, which is what actually occurred here.

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 Cnty*, 99 Wn.2d 251, 263 661 P.2d 964 (1983).

The Supreme Court of Washington recently held such Appeals Court substitution to be reversible error. *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) ("In reaching this conclusion, the Court of Appeals appears to have substituted its own judgment for that of the trial

court...We will not substitute our own judgment in evaluating the scope and effect of that misconduct").

The Appeals Court in this case correctly points out that the dismissal here fell *should* fall within the discretion of the trial court, but they erred in not abiding by that rule. Slip Op. 10 ("We review a trial court's order exercising its inherent power to dismiss a case for an abuse of discretion."). This Court should also accept review because given the lengthy list of Mr. West abuses of process in this case, the Appellate court substituted its own judgment for that of the trial court and thereby committing reversible error and because the Appeals Court decision contravenes prior Appeals Court and Supreme Court decisions prohibiting such substitutions of judgment.

A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Rivers,* 145 Wash.2d 674. The Trial Court Dismissal would be unreasonable ONLY if it was "outside the range of acceptable choices, given the facts and the applicable legal standard." *In re Littlefield,* 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). Here, the record below supports that the trial court's dismissal was reasonable, and thus not an abuse of discretion, for at least the following rationales upon which

exercise of its inherent power to dismiss was based:

(1) West' s willful or deliberate refusal to obey a court order or rule, and
(2) want of prosecution combined with Mr West's abuse of process.

BOTH reasons support the dismissal of West's suit.

1. Courts Have Inherent Authority Dismissal For Willful Violation Of Court Order Or Rule.

The Appeals Court erred in its findings that a Trial Court's inherent authority to dismiss is (1) limited only for violations of Orders, and (2) that a Court's Dismissal Order must expressly state the basis for the dismissal. Instead, (1) a Trial Court's inherent authority to dismissed may be based on violations of orders or rules and (2) the dismissal will be upheld where, as here, the record supports the basis for the Trial Court's exercise of its authority to dismiss. The law is well settled in this state concerning dismissal of a complaint as a sanction. "Under CR 41(b), a trial court has the authority to dismiss an action for noncompliance with a court order or court rules." *Rivers,* 145 Wn.2d 674, *citing Woodhead v. Disc. Waterbeds, Inc.,* 78 Wn.App. 125, 129, 896 P.2d 66 (1995).

When, as here, a trial court imposes dismissal in a proceeding as a sanction, it must be apparent from the record that (1) the party's refusal 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. *Burnet*

v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

"Dismissal is an appropriate remedy where the record indicates that '(1) the party's refusal to obey 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*, 145 Wn.2d at 686. A party's disregard of a court order or rule without reasonable excuse or justification is deemed willful. *Woodhead,* 78 Wash. App. at 130, 896 P.2d 66. Each Criteria is met:

a. First, here, the record below amply supports West's repeated non-compliance with court rules, the first element is met. Accordingly the Trial Court's exercise of inherent authority to dismiss was **not** an abuse of discretion. While the Trial Court's Order Granting the Port's Motion to Dismiss CP 626-629 expressly concludes that West willfully and or deliberately disobeyed a court *order*[20], the record below additionally supports that West routinely violated court *rules* in the over

[20] 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. CP 776.

two years this case was before the Trial Court, sufficient to support the Court's exercise of inherent authority to dismiss.

West repeatedly boasts that he set three show cause hearings (it was actually four), but claims the Trial Court failed to act on the hearings. However it was actually Mr *West's own failure* to follow Pierce County Superior Court rules (PCLCR) that prevent action. The first West Show Cause was expressly found by the Trial Court to be premature[21]; the remaining three hearings Mr. West failed to confirmed as required by local rule PCLCR 7(a)(8)[22], so they were stricken. CP 1043 – 1292. Other West frivolous motions/actions pursued in violation of basic Court Rules include:

- West Motion for Cr 11 Sanctions/ SLAPP Award, And Default, Filed **May 01, 2008** Motion for contempt & to add Port of Olympia, all denied by Court Order See Order of May 2, CP 70;
- **On May 15, 2008,** West untimely moved to reconsider and also objected the Port's redactions and exemptions as reflected on the Port's privilege log. 71-83. Denied on May 30, 2008CP 866-867.
- West Motion For Change Of Magistrate And Declaration Of Unconstitutional Application Of Law, Filed August 26, 2008; CP 411-413, See *Order Denying Motion*, CP 582-583.
- West also failed to note his March 30, 2009 Motion for

[21] March 28, 2008 – Show cause found premature CP 54 65

[22] PCLR 7(a)(8) **Confirmation of Motions.** All motions shall be confirmed by the moving party during the week of the hearing, but no later than 12:00 noon two court days prior to the hearing. Attorneys and any self-represented party shall confirm motions by contacting the judicial assistant of the assigned judicial department or electronically, through the internet by those with LINX accounts and PIN (Personal Identification Numbers), in accordance with the procedures adopted by the Pierce County Superior Court Clerk's Office. Motions filed by those persons physically confined under a court order shall be deemed confirmed at filing. The court may strike motions that are not timely confirmed.

Reconsideration as both PCLR 7(4)[23] and CR 59[24] requires.

- Mr. West also attempted to introduce a number of editorial newspaper articles as "evidence", in violation of Rules of Evidence.[25] CP 588-598.

The record amply supports Mr West's rule violations. Mr West had no reasonable justification or excuse for this behavior. A party's disregard of a court order or rule without reasonable excuse or justification is deemed willful. *Woodhead,* 78 Wash. App. at 130, 896 P.2d 66. The first element for inherent authority for dismissal – willful court rule violation - is satisfied.

b. The record & Court's Order amply shows the West actions substantially prejudiced the Port, the second element is met. In its Order Granting the Port's Motion to Dismiss, CP 626-629 subheading **"Substantial Prejudice to the Port,"** emphasis original, the Court concluded that West substantially prejudiced the Port.

> 9. This is a Public Records Act case, in which potentially, a "per day" penalty is at issue.

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[23] PCLR4(4) **Failure to File or Serve - Sanctions.** If the motion, supporting documents and Note for Motion Docket are not all filed with the clerk, the court may strike the motion. No motion shall be heard unless proof of service upon the opposing party is filed or there is an admission of such service by the opposing party. The court may also, in its discretion, impose terms upon the offending party.

[24] 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.

[25] The same improper 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.

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

The second element to a discretionary dismissal is met.

c. The Trial Court expressly considered lesser sanctions, and concluded that a lesser sanction would not do:

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

CP 657-661. The third and final element for this type of discretionary authority to dismiss is satisfied.

VIII. CONCLUSION.

The record below amply supports that West routinely violated court rules and engaged in dilatory behavior not anticipated by CR 41 sufficient to support the Trial Court's exercise of inherent authority to dismiss. The Court of Appeals ignored that record, substituted it own judgment and unduly eroded the Trial Court's ability to manage its own affairs. This

case should be considered under prongs one, two and four of RAP 13.4(b).

RESPECTFULLY SUBMITTED this 21st day of July, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST, Appellant, v. PORT OF TACOMA, Respondent.	No. 43004-5-II UNPUBLISHED OPINION

WORSWICK, C.J. — Arthur West appeals an order involuntarily dismissing his public records lawsuit against the Port of Tacoma. West argues that the trial court erred by (1) dismissing his lawsuit under both CR 41 and the trial court's inherent power to dismiss cases; (2) failing to conduct a show cause hearing or determine whether the Port violated the Public Records Act, chapter 42.56 RCW (PRA); and (3) appointing a special master to review the Port's claimed exemptions from disclosure. We agree that the trial court erred by dismissing West's case. We decline to consider his other arguments because they do not raise appealable issues. We also deny both parties' requests for attorney fees on appeal. Accordingly, we vacate the order of dismissal and remand for further proceedings.

FACTS

On December 4, 2007, Arthur West requested records from the Port of Tacoma. West requested documents including "[a]ll records and communications concerning the South Sound Logistics Center, from January 1, 2005 to present." Clerk's Papers (CP) at 14. The South Sound

Logistics Center was a proposed and subsequently abandoned joint venture of the Ports of Tacoma and Olympia, for which the Port of Tacoma purchased a 745-acre parcel of land.

The Port of Tacoma (hereinafter "the Port," unless otherwise specified) promptly gave West an expected date for the release of responsive records, but the Port repeatedly pushed back its expected release date. On January 14, 2008, West filed a pro se complaint alleging that the Port's actions violated the Public Records Act. The Port made its first batch of records available to West on January 28. West inspected this batch on January 29 and served the Port with his complaint on January 31.

The procedural history of West's case below is complicated and confusing. In 2008, West filed three motions for show cause orders. First, West's January 14 motion requested an order requiring the Port to appear and show cause "why the requested records should not be disclosed." CP at 5. The trial court granted this motion and ordered the Port to appear on February 12. The Port replied that it was responding in good faith; although it had not yet made all records available, it listed the steps it had taken and sought a reasonable time to claim exemptions and fulfill the request. After setting the show cause hearing over to March 28, the trial court reserved its ruling because the trial court could not yet determine whether the Port's claimed exemptions were justified.

Second, West's April 24 show cause motion sought to join the Port of Olympia as a defendant and order it "to appear to show cause why [it] should not be found in violation of the PRA, since many of the records recovered by the Port of Tacoma and now maintained in Pierce County are also Port of Olympia records which have been destroyed by the Port of Olympia." CP at 58. The trial court denied this motion on May 2.

Third, on May 15, West filed a "motion for reconsideration and for show cause," requesting, inter alia, (1) in camera review of the records responsive to West's request and (2) an order "finding [the Port] in noncompliance with the PRA for failing to disclose records or make exemptions in response to the original request prior to the filing of this suit, and due to [the Port's] continuing misrepresentations and manifest bad faith, [its] destruction of records, and the deliberate policy of concealment of records." CP at 71-72. The trial court denied West's motion to reconsider its earlier rulings.

By May 21—five months after West's original request—the Port had filed in the trial court copies of all responsive records, along with a log of its claimed exemptions. The 6,870 responsive records consisted of 19,923 pages contained in 51 volumes. The Port claimed that 175 records were entirely exempt from disclosure and another 97 records were partially exempt. West challenged all claimed exemptions.

On May 30, 2008, the trial court stated that, pursuant to CR 53.3, it would appoint a special master to review the responsive records and the claimed exemptions. West opposed the appointment, claiming that a special master would cause delays and, alternatively, that the court should appoint a public records expert and not an attorney with general experience in law.

On March 20, 2009, the trial court appointed the Honorable Terry Lukens, a retired superior court judge, as special master.[1] In a report filed July 24, 2009, the special master recommended that the trial court approve most of the Port's claimed exemptions. In response,

[1] The delay in the appointment was apparently caused by the trial judge falling ill for several months and the parties' dispute over the special master's appointment.

the Port filed a request to modify the special master's recommendation as to one rejected exemption. West opposed the Port's request.

In a September 16, 2009 letter, the special master stated that he considered his task complete and that the Port's request and West's opposition were for the trial court to consider. But for 16 months following submission of the special master's letter, West did not file any motions or other pleadings in the case.[2]

Instead, according to his own brief, West commenced "flailing around" by attempting to press his public records request in other fora. Br. of Appellant at 24. Specifically, West (1) asked the Pierce County prosecuting attorney to declare that the trial judge had forfeited his office by failing to issue a timely determination in this case; (2) filed a complaint in the superior court under a new cause number "for negligence, mandamus, quo warranto, and disclosure of public records," CP at 1235; and (3) filed an action in federal district court alleging numerous constitutional claims premised on his allegation that the Port and its counsel turned West's public records request into a "private criminal prosecution" against him, CP at 1243. Similarly, before the special master filed his report, West also (4) filed a bar grievance alleging that the Port's counsel was inadequately supervised by a partner in her law firm; and (5) wrote to state and federal prosecutors, including the United States attorney general, requesting a criminal investigation of a conspiracy to deprive West of his civil rights and right to inspect the Port's records.

[2] During 2010 the Port continued to file "various administrative items" including a notice of attorney change of address and a notice of counsel's unavailability. CP at 998.

On December 8, 2010, the trial court mailed West and the Port a letter notifying them of a "status conference" on January 7, 2011. CP at 603. The letter advised, "If no one appears . . . the Court will dismiss this matter on its own motion." CP at 603.

On January 7, 2011, the date of the status conference, the Port filed a motion to dismiss, which it framed as a "reply" to the trial court's letter. This motion argued that CR 41(b) required the trial court to dismiss West's claims for want of prosecution because West had not filed anything in the case docket for the previous 16 months.[3] In response, West claimed that the parties had been awaiting the trial court's ruling based on the special master's report. Despite the Port's failure to give West notice of its CR 41(b) motion to dismiss, the trial court stated it would "grant [the Port's] order"; however, the Port did not have a proposed order ready. Verbatim Report of Proceedings (VRP) (Jan. 7, 2011) at 5.

West immediately began a flurry of filings, several of which seemed to duplicate one another. On January 7, West filed a note for a hearing on presentation of a written order of dismissal; the trial court set this hearing over to January 25. The trial court's January 25 order of dismissal relied solely on CR 41(b)(1) and (2).

Also on January 7, West filed a handwritten notice of appeal seeking our Supreme Court's direct review of the order of dismissal "and [ ] orders." CP at 606 (omitting two illegible words, possibly "24 interlocutory"). Our Supreme Court considered this notice of appeal along with a second notice that West subsequently filed. Although a notice of appeal is premature if filed before entry of the written decision, West apparently overcame this barrier by filing the trial

[3] The Port simultaneously filed an additional motion to dismiss, also captioned as a "reply," asserting that dismissal was warranted because the Port complied with the Public Records Act. The trial court did not consider the merits of this motion.

court's written order of dismissal after its entry. *See* Letter from Supreme Court Deputy Clerk Susan Carlson to the parties and Pierce County Superior Court Clerk Kevin Stock (Jan. 11, 2011), and Letter from Supreme Court Deputy Clerk Susan Carlson to the parties (Feb. 17, 2011), *West v. Port of Tacoma*, No. 85510-2 (Wash.).

On January 19, West filed in the superior court a "note for trial, declaration, and objection to CR 41 dismissal." CP at 610. Although West noted this objection to be heard on January 28, the trial court set it over to March 4.

On February 1, West filed a "motion to vacate improper dismissal issued without notice," citing CR 59. CP at 630. The Port and the trial court treated it as a motion to reconsider the order of dismissal. Although West noted this motion to be heard on February 25, the trial court set this hearing over to March 18.

When the trial court convened the March 4 hearing on West's objection to the CR 41 dismissal, West did not appear. The trial court then entered an order denying West's motion to reconsider.[4] The order denying reconsideration based dismissal of West's suit on CR 41, and, for the first time, also based dismissal on the ground that West's "refusal to obey [a court] order was willful or deliberate." CP at 660 (alteration in original). But the trial court did not specify

[4] The record does not explain why the trial court denied West's motion to reconsider on March 4 instead of on March 18, the date on which it was noted for a hearing. West later claimed that (1) he believed the March 4 hearing had been set over to March 18 and (2) the trial court "deliberately held an ex parte hearing." CP at 672. But the trial court informed both parties of the March 4 hearing by letter dated January 21. Further, on March 2, the Port's counsel filed a proposed order denying West's motion for reconsideration; the proposed order was prepared for the trial court's consideration at the March 4 hearing. Although the record does not include a declaration of service accompanying the proposed order, the Port's counsel represented that "Mr. West has been served with [it]." VRP (Mar. 4, 2011) at 2. It also appears from the record that no hearing occurred on March 18.

the order that West willfully or deliberately disobeyed. The trial court further characterized its conclusions of law as supporting a "ruling to dismiss for want of prosecution." CP at 661.

On March 18, West filed a second notice of appeal, again seeking direct review in our Supreme Court. The notice of appeal identified (1) the order of dismissal, (2) the order denying West's motion to reconsider, and (3) "all interlocutory orders." CP at 662. The Supreme Court's clerk later transferred the case to this court because both West and the Port agreed to it. Letter from Supreme Court Deputy Clerk Susan Carlson to the parties (Dec. 15, 2011), *West*, No. 85510-2.

ANALYSIS

I. ORDER OF DISMISSAL

West argues that the trial court erroneously dismissed his suit because (1) it failed to give proper notice under CR 41 (b)(1) or (2), and (2) the trial court's inherent power cannot support the order of dismissal. In an apparent concession, the Port's response does not contend that the trial court properly relied on CR 41(b)(1) or (2); instead, the Port claims that the order of dismissal was a proper exercise of the trial court's inherent power. We agree with West that the order of dismissal was not properly based on CR 41(b)(1), CR 41(b)(2), or the trial court's inherent power.

A trial court may dismiss a case pursuant to a court rule or by exercising its inherent power to dismiss cases. *See Snohomish County v. Thorp Meats*, 110 Wn.2d 163, 166-67, 750 P.2d 1251 (1988). But a trial court may exercise its inherent power to dismiss a case "only when no court rule or statute governs the circumstances presented." *Thorp Meats*, 110 Wn.2d at 167.

A. *Dismissal under CR 41(b)(1) and (2)*

West argues that the order of dismissal for want of prosecution was improper under CR 41(b)(1) and CR 41(b)(2) because he did not receive sufficient notice. We agree.

Whether a trial court properly dismissed an action for want of prosecution is a question of law. *State ex rel. Heyes v. Superior Court*, 12 Wn.2d 430, 433, 121 P.2d 960 (1942). Likewise, the application of a court rule to a particular set of facts is a question of law reviewed de novo. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

Each of CR 41(b)(1) and (2) provides an independent method of involuntary dismissal under distinct circumstances. *Wallace v. Evans*, 131 Wn.2d 572, 578, 934 P.2d 662 (1997). But under both provisions, involuntary dismissal is *mandatory* when the criteria for dismissal are met. *Thorp Meats*, 110 Wn.2d at 167; *Vaughn v. Chung*, 119 Wn.2d 273, 278, 830 P.2d 668 (1992).

1. *CR 41(b)(1)*

CR 41(b)(1) permits a trial court to dismiss a case on a *party's* motion when the plaintiff "neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined," unless the moving party caused the delay. "Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party." CR 41(b)(1).

Here, dismissal was clearly improper under CR 41(b)(1) because the Port did not give West 10 days' notice. Instead, the Port moved to dismiss the case on the same day that the motion was heard. Thus the order of dismissal was erroneous to the extent it was based on CR 41(b)(1).

2. *CR 41(b)(2)*

CR 41(b)(2) allows the trial court to dismiss dormant cases *on its own* motion. *Miller v. Patterson*, 45 Wn. App. 450, 455, 725 P.2d 1016 (1986). Dismissal under CR 41(b)(2) is appropriate when three elements are met: (1) the trial court's clerk mails the required notice to the parties, (2) there is no action of record in the case during the 12 months preceding the notice, and (3) within 30 days following the notice, there is no action of record and no showing of good cause for continuing the case. *Vaughn*, 119 Wn.2d at 278. In the required notice, "the clerk of the superior court shall notify the attorneys of record by mail that the court will dismiss the case for want of prosecution" unless action of record occurs or a showing of good cause is made within 30 days. CR 41(b)(2)(A).

As West asserts, the trial court's letter was a deficient notice for the purposes of CR 41(b)(2)(A). The letter required the parties to appear at a status conference and further advised that the trial court would dismiss the case on its own motion "[i]f no one appears." CP at 603. But unlike the required notice, the letter failed to inform the parties that the case would be dismissed after 30 days absent action of record or a showing of good cause.[5] CR 41(b)(2)(A). The letter did not meet the requirements of a notice under CR 41(b)(2)(A), and therefore CR 41(b)(2) also cannot support the order of dismissal.

[5] Because the notice's contents were insufficient, we do not address West's additional arguments that (1) the order of dismissal erroneously found that the trial court's letter provided *more than* 30 days notice to the parties of the status conference because *exactly* 30 days were provided and (2) West took action of record by appearing at the status conference and noting the matter for trial.

B. *Trial Court's Inherent Power To Dismiss Cases*

The Port proposed an additional order which it presented on March 4, when the trial court considered West's motion for reconsideration. The trial court's March 4 order contained all the findings of fact and conclusions of law stated in the January 25 order of dismissal, which was based solely on CR 41(b). In addition, the March 4 order contained one new finding of fact and seven new conclusions of law supporting dismissal as an exercise of the trial court's inherent power.[6]

The parties dispute whether the March 4 order *denying* West's motion for reconsideration could modify the rationale for dismissal by, for the first time, basing dismissal on the trial court's

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[6] The new finding of fact stated: "Petitioner West's failure to timely prosecute this PRA case was without justification or excuse." CP at 659. The new conclusions of law stated:

> 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* [*v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002)].
> 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.

CP at 660-61.

inherent power. We assume without deciding that the trial court properly changed its rationale.[7] Even so, the trial court erred by exercising its inherent power to dismiss.

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, based on untenable grounds, or made for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). This standard is also violated when a trial court bases its decision on an erroneous view of the law.[8] *Mayer*, 156 Wn.2d at 684.

The trial court gave two reasons for exercising its inherent power to dismiss: (1) West's willful or deliberate refusal to obey a court order and (2) want of prosecution. Neither reason supports the dismissal of West's suit.

First, the trial court ruled that West's refusal to obey a court order was willful. But the trial court failed to identify any order that West violated. The trial court did not order West to prosecute his case, and our review of the record found no violation of any order. Therefore, to

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[7] Neither party cites authority addressing this precise issue.

[8] Citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992), the Port argues that we should not consider whether the trial court abused its discretion because West originally sought de novo review and addressed the abuse of discretion standard for the first time in his reply brief. We disagree. Although RAP 10.3(a)(6) provides in part, "The court ordinarily encourages a concise statement of the standard of review as to each issue," the Port cites no case in which a party waived an argument by failing to address the correct standard of review in its original brief. *See* Br. of Resp't at 36-37. Because West's original brief argues that the trial court erred by dismissing his claim to the extent it relied on its inherent power, West did not raise this issue for the first time in reply.

the extent the dismissal rests on West's refusal to obey a court order, the trial court abused its discretion by dismissing West's suit for an untenable reason.

Second, the trial court exercised its inherent authority to dismiss the case for want of prosecution. But CR 41(b)(1) limits a trial court's inherent power to dismiss actions for want of prosecution. *Wallace*, 131 Wn.2d at 575, 577. A trial court may dismiss for want of prosecution on the basis of its inherent power *only* where CR 41(b)(1) does not address the circumstances, i.e., where the plaintiff has engaged in "'unacceptable litigation practices other than mere inaction.'" *Bus. Servs. of Am. II, Inc. v. WaferTech LLC*, 174 Wn.2d 304, 308, 274 P.3d 1025 (2012) (quoting *Wallace*, 131 Wn.2d at 577). Examples of such unacceptable practices include "failures to appear, filing late briefs, and similarly egregious sorts of dilatory behavior." *Bus. Servs.*, 174 Wn.2d at 311.

Here, the trial court found that West engaged in only one dilatory behavior: inaction. But mere inaction is insufficient to support dismissal of an action on the basis of the trial court's inherent power. *Bus. Servs.*, 174 Wn.2d at 308, 311; *Wallace*, 131 Wn.2d at 577. By basing the order of dismissal on untenable reasons, the trial court abused its discretion. *See Mayer*, 156 Wn.2d at 684.

Arguing to the contrary, the Port claims that the record would support dismissal as an exercise of inherent power on the grounds that West was dilatory in two other respects: (1) West failed to appear at the March 4, 2011 hearing on his motion to reconsider the order of dismissal and (2) West demonstrated "[i]nexcusable and unprofessional dilatoriness" through a host of filings in this case and related matters he filed in other fora. Br. of Resp't at 33. This claim fails

because the trial court did not base the order of dismissal on these actions.[9] Because the trial court abused its discretion by dismissing West's case, we vacate both the order of dismissal and the order denying West's motion for reconsideration. We remand for further proceedings consistent with this opinion.

II. SHOW CAUSE HEARINGS AND DETERMINATION OF PRA VIOLATIONS

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.

The only two methods for seeking review of a superior court's decision are appeal as a matter of right and discretionary review. RAP 2.1(a). RAP 2.2(a) lists the types of decisions that are appealable as a matter of right. *In re Dependency of Chubb*, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). But a decision on a party's motion seeking a show cause hearing to determine the merits of the party's claim is not appealable as a matter of right under RAP 2.2(a).[10] *Meadow Park Garden Assocs. v. Canley*, 54 Wn. App. 371, 372, 773 P.2d 875 (1989).

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[9] The trial court never exercised its discretion by determining whether West's other actions were dilatory and, if so, whether they were so egregious that dismissal of the action was warranted as a sanction.

[10] When a decision is not appealable, it is reviewable solely according to the method for seeking discretionary review. *Chubb*, 112 Wn.2d at 721; *see* RAP 2.3. But West did not seek discretionary review.

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. *Chubb*, 112 Wn.2d at 721; *Meadow Park*, 54 Wn. App. at 372.

In addition, West's challenge to the trial court's decisions on his show cause motions is outside the scope of his appeal from the order of dismissal.[11] Under RAP 2.4(b), the scope of our review of trial court decisions not designated in the notice of appeal includes decisions that (1) prejudicially affected the order designated in the notice of appeal and (2) occurred before we accepted review. A decision prejudicially affected an order if the order would not have happened but for the earlier decision. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). Because the order of dismissal would have happened *regardless of* the trial court's decisions on West's show cause motions, the decisions on the show cause motions did not prejudicially affect the order of dismissal.

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.

[11] The trial court's order of dismissal was appealable as a matter of right. RAP 2.2(a)(3); *Munden v. Hazelrigg*, 105 Wn.2d 39, 44, 711 P.2d 295 (1985).

III. Appointment of a Special Master

West further claims that the trial court erred by "appointing a special master to decide the ultimate issues in the case." Br. of Appellant at 47. We similarly decline to consider this claim because it also raises an issue that is not appealable.

Pursuant to CR 53.3, the trial court appointed the special master to review the records responsive to West's request and the Port's claimed exemptions from disclosure. CR 53.3 authorizes a trial court to appoint a special master "to adjudicate discovery disputes."

A pretrial discovery order is not appealable as a matter of right. *See* RAP 2.2(a). In addition, the trial court's order appointing a special master did not prejudicially affect the trial court's appealable order of dismissal for want of prosecution. *See* RAP 2.4; *Right-Price*, 146 Wn.2d at 380. Therefore we decline to consider West's claim that the trial court erred by appointing the special master.

ATTORNEY FEES ON APPEAL

Each party requests an award of attorney fees on appeal. A party may recover attorney fees on appeal if applicable law authorizes the award. RAP 18.1(a).

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 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.[12]

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.

Citing RCW 4.84.185 and RAP 18.9, the Port contends that it is entitled to reasonable attorney fees for defending a frivolous appeal. We disagree. Under RCW 4.84.185, 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). Under RAP 18.9, an appeal is frivolous if it is so devoid of merit that there exists no reasonable possibility of reversal. *In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114 (1983). Because this action clearly is *not* frivolous under either standard, the Port's request fails. We decline both parties' requests for attorney fees.

[12] In 2011, the legislature amended RCW 42.56.550(4) to eliminate a minimum penalty for each day that an agency denied a person the right to inspect or copy a public record. LAWS OF 2011, ch. 273, § 1. The amendment does not affect this analysis.

Because the trial court erred by dismissing West's case, we vacate the order of dismissal and the order denying reconsideration. We remand for further proceedings consistent with this opinion.

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.

Worswick, C.J.

We concur:

Hunt, J.

Penoyar, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST, Appellant, v. PORT OF TACOMA, Respondent.	No. 43004-5-II ORDER DENYING MOTION FOR RECONSIDERATION AND COMPELLING RESPONDENT'S COUNSEL TO ANSWER

Respondent, Port of Tacoma, has moved for reconsideration of the unpublished opinion in this case. Upon due consideration, we deny the motion.

In addition, respondent's motion contains a purported excerpt from the superior court's "Order Granting Port's Motion to Dismiss. CP 764-778." Resp't's Mot. for Reconsideration at 10. The excerpted material quoted in the Port's motion, however, does not appear at pages 764-778 of the Clerk's Papers or, so far as we can determine, elsewhere in the record on appeal. Accordingly, it is hereby

ORDERED that, within ten (10) days from the date of this order, counsel for the respondent Port must serve opposing counsel and submit to this court a written explanation for the presence of a purportedly quoted excerpt that is apparently not included in the record on appeal.

Respondent Port's failure to provide a timely and satisfactory explanation may result in the imposition of sanctions for failure to comply with the rules of appellate procedure, RAP 18.9(a), or other action as we deem appropriate.

IT IS SO ORDERED.

DATED this 2nd day of April, 2014.

Panel: Jj. Worswick, Hunt, Penoyar.

Worswick, C.J.

We Concur:

Hunt, J.

Penoyar, J.P.T.

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY

THE SUPREME COURT
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July 1, 2014

LETTER SENT BY E-MAIL ONLY

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Re: Supreme Court No. 90314-0 - Arthur West v. Port of Tacoma
Court of Appeals No. 43004-5-II

Counsel and Mr. West:

On June 30, 2014, this Court received the Court of Appeals case file for this matter. It appears from review of the Court of Appeals docket that the motion to publish has now been withdrawn.

In regards to the "RESPONDENT'S MOTION TO STRIKE" and "PETITIONER'S MOTION TO ACCEPT OVERLENGTH PETITION FOR REVIEW", the following ruling is entered:

> **After review of the petition and the Court of Appeals opinion in this matter, the motion to accept overlength petition for review is denied but the Petitioner shall be allowed to file a revised petition for review that does not exceed 30 pages in length, excluding appendices. The revised petition for review should be served and filed by not later than July 21, 2014. The Respondent's motion to strike is granted only to the extent that the 41-page petition for review has been rejected for filing and the Petitioner has been granted permission to file a 30-page**

petition. Any answer to the revised petition for review shall be due 30 days from service of the revised petition.

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

SLC:lm

THE SUPREME COURT OF THE STATE OF WASHINGTON

PORT OF TACOMA APPELLANT, V. ARTHUR WEST RESPONDENT.	NO. 90314-0 DECLARATION OF SERVICE (Court of Appeals, Div. II No. 43004-5-II)

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. REVISED PETITION FOR REVIEW BY THE SUPREME COURT

to be served on July 21, 2014 to be served on the following parties and in the manner indicated below:

Arthur West
120 State Avenue, N.E. #1497
Olympia, WA 98501
Email: awestaa@gmail.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[ ] by Personal Delivery
[X] 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 21st day of July 2014, at Tacoma, Washington.