No. 43876-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ARTHUR WEST, et al.,

Appellants,

vs.

PORT OF OLYMPIA, et al.

Respondents

APPELLANT ARTHUR WEST'S SECOND AMENDED OPENING BRIEF

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I. INTRODUCTION

This is a case that demonstrates how a public agency who favors a policy of concealment over disclosure, and a court administration who erroneously construes an order as having dismissed the entirety of a case when, in fact, claims remain, can entomb justice in procedure and red tape so as to render the administration of justice meaningless.

Appellant and Plaintiff Arthur West filed a public records request with Defendant and Respondent the Port of Olympia on March 17, 2007, that sought, among other records, records concerning the Port's lease to Defendant and Respondent Weyerhaeuser Company, and the Port's records concerning the then-proposed South Sound Logistics Center. On June 12, 2007, the Port informed Mr. West by mail that the Port had silently withheld records from inspection and intended to continue to exempt many of the records from disclosure.

Although the statute of limitations in effect at the time allowed two years for such actions, Mr. West filed suit on June 18, 2007, less than a week after the Port's letter, and obtained an Order to Show Cause the same day. In that same case, Mr. West also appealed, under the State Environmental Protection Act ("SEPA"), the Port's Mitigated Determination of Non-Significance ("MDNS") for the Weyerhaeuser lease.

Mr. West later discovered that the Port had purged, withheld, and failed to disclose many additional records responsive to his request. *See, e.g.*, CP 390; 307-310; 1968; 2070-2083. These withheld records included a crucial environmental report (dated July 12, 2005), prepared for the Port, that the Port had considered in issuing its MDNS that Mr. West had challenged. This record, although responsive to Mr. West's March 17, 2007, public records request, was silently withheld from him by the Port, and was only independently discovered by Mr. West and identified by him in a declaration to the Trial Court. CP 368-373. Significantly, the Port did not include this record in the administrative record it had prepared and filed with the Trial Court in responding to Mr. West's SEPA appeal.

The story of how the Port fought tooth and nail to delay a hearing and deny justice for over six years forms the basis of this appeal. The record will show that the Port worked to delay and deny any hearing on the PRA issues. Yet the Port blames Mr. West for the delays in the hearing of his PRA claims. These delays ultimately culminated in an involuntary dismissal of Mr. West's case, even though the Port successfully resisted and prevailed against Mr. West in his original action he filed in the Supreme Court in an attempt to compel a hearing by the Trial Court of his PRA claims, and even though the Port filed such a multitude of confusing pleadings that so complicated the case so as to

effectively prevent a hearing of Mr. West's claims in a timely fashion. The Port should be estopped from arguing that Mr. West's case should be dismissed for delay, when the Port itself was the architect of substantial delay and successfully prevailed in the Supreme Court on its arguments that Mr. West was not entitled to a prompt hearing on his PRA claims.

Further complicating the matter is the fact that a non-party to the case, the Olympians for Public Accountability (OPA) were allowed to file an affidavit of prejudice that caused the assigned judge to recuse herself from the case. Weyerhaeuser – a party to this appeal – itself delayed the case by obtaining an order of bifurcation that set the PRA claims on a separate track than the non-PRA claims. While Mr. West did not oppose this order, at the time he had no notion that this seemingly innocuous order of bifurcation would cause significant confusion within the Superior Court; a later judge thought that the bifurcation had stayed Mr. West's claims and that he would have to obtain an order lifting the stay, and the Superior Court clerk's office thought that the entire matter at one point had been dismissed, and refused to allow Mr. West to file pleadings in the case or to assign a new judge to hear Mr. West's PRA claims.

The record, including the many times Mr. West attempted to extricate himself from a procedural morass to set a hearing and conclude the case, demonstrates that justice delayed has been justice denied.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

1. The Trial Court erred in dismissing Mr. West's PRA claims under CR 41(b). *Did Mr. West disobey an order of the Trial Court? Did the Port of Olympia show prejudice? Did the Trial Court expressly consider whether lesser sanctions than dismissal would suffice? No. Did the Trial Court err in weighing evidence and credibility, with respect to Mr. West's evidence that the Superior Court Clerk's Office refused to accept filings or set the matter for hearing? Yes.*
2. The Trial Court did not dismiss the case pursuant to its own inherent powers, but it would have been error had it done so.
3. The Trial Court erred in not applying CR 41(b)(1) to the case. *Did the Trial Court's conclusion that Mr. West deliberately and willfully delayed the case amount to a conclusion that Mr. West had failed to note the matter for hearing, such that CR 41(b)(1) came into play? Yes.*
4. The Trial Court erred with regard to the order of bifurcation, construing it in such a fashion that the Thurston County Superior Court administration thought Mr. West's PRA claims had been stayed, or, alternatively, dismissed, effectively

barring Mr. West from proceeding. *Was it an error to conclude that the entire case had been dismissed and to refuse to allow Mr. West to file pleadings in the case, when in fact the order of bifurcation bifurcated the case and the orders of dismissal only dismissed Mr. West's non-PRA claims or any PRA claims as to Weyerhaeuser, not as to the Port? Yes.*

5. The Trial Court erred in making finding of fact 3 (CP 934), "On August 24, 2007, this Court, the Honorable Christine Pomeroy, granted Defendant Weyerhaeuser Company's motion to bifurcate, and segregated Plaintiffs' Public Records Act claims from the other causes of action in the case. Nothing in the bifurcation order prevented the PRA case from going forward." *When a motion to dismiss is decided on affidavits and declarations, is it decided as a motion for summary judgment? Is it error, on a motion for summary judgment, to determine disputed issues of fact? Do not the declaration at CP 369, "When plaintiff attempted to set a hearing he was informed by the Superior Court's private ex officio legal counsel that the case had been dismissed. Intervention by the Office of the prosecuting Attorney was required to have the case re-activated" and the fact that Mr. West, upon hearing*

Judge Thomas McPhee's statement that the "stay" in the case would have to be lifted before the case could proceed, filed a motion to lift the "stay" (CP 533-538), demonstrate that the practical effect of the bifurcation order was in fact to prevent the PRA case from going forward? Yes.

6. The Trial Court erred in making finding of fact number 10 (CP 935), "No action was taken by anyone in this case until October 16, 2009 when Mr. West filed a Declaration in Support of Motion for Show Cause Order, on the Public Records Act issue." *When a motion to dismiss is decided on affidavits and declarations, is it decided as a motion for summary judgment? Is it error, on a motion for summary judgment, to determine disputed issues of fact? Does the email at CP 517, "Upon further review by court administration and consultation with our staff attorney, it has been determined that this case was closed by Order of Dismissal signed by Judge Wickham on 4-25-08. Based on that, the court is not going to reassign this case to another judge. No further motions will be heard in this case," not demonstrate that the Superior Court administration thought the entire case had been dismissed, and the declaration at CP 833, "many of the Superior Court Staff*

were aware of my and Mr. West's efforts to set a hearing for the PRA issues during the about 1 ½ years of time when the Clerk's 'mistake' about the dismissal of this case prevented us from filing any pleadings or setting any hearings in this case," and Mr. West's declaration at CP 943-946 show that Mr. West had done everything short of being arrested to attempt to proceed, while the clerk's office considered the case dismissed and no judge was assigned to the case? Yes.

7. The Trial Court erred in making finding of fact number 13 (CP 936), "Those reasons [that Mr. West's show cause hearing for which he filed eight notices of issue was never heard] included Mr. West noting the hearing for a day he had previously been informed that counsel for the Port was not available; Mr. West noting the hearing for dates when the assigned judicial officer was not present and/or available; and Mr. West failing to confirm the hearing in advance. None of the delays were caused by the Port of Olympia and none of the reasons the show cause hearing was never held were caused by the Port of Olympia." *When a motion to dismiss is decided on affidavits and declarations, is it decided as a motion for summary judgment? Is it error, on a motion for summary judgment, to*

determine disputed issues of fact? Do not Mr. West's Declaration at CP 943-946, Mr. Dierker's Declaration at CP 833, and Mr. West's Declaration at CP 369-370 show that in fact the unavailability of the counsel for the Port of Olympia coincided with the only available dates for hearing before the assigned judge, Judge Wickham, then on Juvenile and Family Court rotation, and that this coincidence also led to the non-hearing of Mr. West's Show Cause, a circumstance not attributable to Mr. West? Yes.

8. The Trial Court erred in making finding of fact 27 (CP 937-938), "This Court finds that the delays in this case have severely prejudiced the Port of Olympia, since the Public Records Act requires a mandatory daily penalty in the event that a court finds an agency to have violated the act and does not vest a court with discretion to reduce the number of days for which a penalty may be imposed. Mr. West and Mr. Dierker should not be allowed to benefit from the delays that they themselves caused." *When a motion to dismiss is decided on affidavits and declarations, is it decided as a motion for summary judgment? Is it error, on a motion for summary judgment, to determine disputed issues of fact? Do not Mr.*

West's Declaration at CP 943-946, Mr. Dierker's Declaration at CP 833, and Mr. West's Declaration at CP 369-370 show that in fact the unavailability of the counsel for the Port of Olympia coincided with the only available dates for hearing before the assigned judge, Judge Wickham, then on Juvenile and Family Court rotation, and that this coincidence also led to the non-hearing of Mr. West's Show Cause, a circumstance not attributable to Mr. West? Yes. Is it not true that an increased number of days for which a penalty might be imposed is not, in fact, "prejudice?" Yes.

9. The Trial Court erred in dismissing Mr. West's PRA claims when the record in the case demonstrated that the Port had violated the Public Records Act in three ways and when the case had been delayed so long that the in camera records submitted by the Port for review had been lost by the Port. *When the record in the case demonstrated that the Port had violated the Public Records Act, was the case not ripe for a show cause hearing? When the Port silently withheld 15 responsive records until after suit was filed, when the Port failed to identify or produce responsive records that Mr. West later obtained from third parties, when the Port improperly*

withheld six records under claim of exemption when the records were not properly subject to such exemptions, was that not a violation of the Public Records Act?

10. The Trial Court erred in dismissing Mr. West's non-PRA claims for lack of standing. *Did Mr. West make sufficient factual allegations of injury to himself, according to the procedural posture of the case? Yes.*

III. STATEMENT OF THE CASE

On March 17, 2007, Mr. West submitted a public records request to the Port of Olympia. CP 1963; CP 1079. The request sought, among other records, records concerning the Port's lease with Weyerhaeuser and the Port's records concerning the South Sound Logistics Center ("SSLC"). The Port, shortly after receiving Mr. West's request, decided to silently withhold records from Mr. West.

> ....At the time Ms. Sevier initially drafted the Port response, several documents he [Mr. West] requested were still in "draft" form, and therefore exempt from public release.
>
> The Port provided the public documents and June 12 cover letter to Mr. West on Thursday June 14, 2007. The Port's Cover letter was initially drafted in mid-March, and included a list of draft and therefore exempt records. However the cover letter had not been updated to reflect documents which had been in draft form and therefore exempt when the letter was initially drafted in mid March, but in the intervening time had become final and thus subject to disclosure.

CP 1177-1178. On June 12, 2007, the Port disclosed to Mr. West that it had been silently withholding records in response to his request, and specified for the first time 15 records it was withholding. CP 543-544.

Meanwhile, on April 16, 2007, while continuing to withhold records silently from Mr. West, the Port of Olympia issued a SEPA determination of MDNS (mitigated determination of non-significance) for the Port of Olympia/Weyerhaeuser Company lease that is the subject of this appeal. CP 2380. On April 25, 2007, Mr. Arthur West (later joined by Mr. Jerry Dierker) filed a reconsideration request with the Port. CP 2380. The Port's "Responsible Official" issued his Decision on Reconsideration on June 7, 2007. CP 2381.

On June 14, 2007, Mr. West and Mr. Dierker filed a SEPA Determination Appeal Form with the Port of Olympia. CP 2358. The appeal was timely. CP 2381. They stated: "The Environmental review process violates SEPA and the project has a reasonably foreseeable significant impact. Appellants are subject to particular injury due to the impact of the project, noise, traffic, danger of spills and contamination due to increased marine traffic, degradation of the environment and air quality." CP 2358. They sought vacation of "The MDNS #07-2" and requested that the Port prepare an EIS [environmental impact statement].

CP 2358. They paid the appeal fee. CP 2360. On June 19, 2007, the Port informed them [CP 2362]:

> Please know that the Port Commissioners acted on Monday evening to decline to hold an administrative hearing on the appeal you filed of the above Project, and to adopt the Decision of the Responsible Official as the Port's Final Decision for SEPA 07-2. This decision was made by formal Commission vote at the June 18, 2007 Commission meeting. You may consider today's date of June 19, 2007 as the date this Decision was "entered," for purpose of any further appeal.

Pursuant to the Port Commission's adopted SEPA Policy Resolution 2006-3, Section 8(6), only "the parties to the appeal have standing to appeal to Court." CP 2351. Also pursuant to the Port's SEPA policy, appeal of such "Final Decision" is as follows [CP 2382]:

> (6) Appeal of Port Final Decisions. Port environmental Final Decisions shall be appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review or otherwise challenge the decision of the Port shall be commenced within 21 days of the entering of the decision by the Port unless otherwise provided by statute.

On June 18, 2007, Plaintiff and Appellant Arthur West filed this case against Defendants and Respondents the Port of Olympia and Weyerhaeuser Company, less than a week after the Port had informed Mr. West that it had been silently withholding and would continue to withhold responsive records to his Public Records Act request. Mr. West's

complaint made Public Records Act ("PRA") claims and also made a SEPA appeal of the Port's MDNS. CP 07-17. Mr. West's complaint also named individual Port employees as defendants, Edward Galligan, Bill McGregor, Robert Van Schoorl, and Paul Telford. On this same day, Mr. West moved for and obtained an Order to Show Cause. CP 1056-1061 Mr. West, joined by co-Plaintiff and co-Appellant Jerry L. Dierker, Jr., filed an amended complaint on July 6, 2007, and a second amended complaint on July 13, 2007. CP 18-54.

Mr. West had obtained an Order to Show Cause that was set for hearing on June 29, 2007. Unfortunately, the show cause hearing would have been set before the Honorable Gary Tabor (CP 1061), against whom Mr. West filed an affidavit of prejudice. CP 1062. The Port filed declarations and briefing in response to the show cause order. CP 1072-1211. Mr. West filed his reply on October 9, 2007. CP 1962-1980. The show cause hearing did not take place. Mr. West filed an additional declaration on December 19, 2007. CP 2070-2083.

While Mr. West knew that the Port had violated the PRA in silently withholding responsive records and in claiming exemptions for the records it continued to withhold that did not conform with law, he later learned of additional violations by the Port of Olympia. Mr. West discovered that the Port had purged (CP 390), withheld (CP 307-310), and

failed to disclose many additional responsive records (CP 1968; CP 2070-2083). As late as August 26, 2010, Mr. West independently discovered a crucial responsive record that the Port had been withholding from him: an environmental report dated July 12, 2005, prepared for the Port and that the Port had considered in issuing its MDNS for the Weyerhaeuser lease. Mr. West, upon discovering this environmental report, submitted the same to the Trial Court. CP 368-373. After Mr. West filed suit, the Port continued to withhold six responsive records. CP 1181-1182.

Early on, Weyerhaeuser moved to bifurcate the PRA claims from the rest of the case. CP 1389-1392. The Trial Court, the Honorable Christine Pomeroy, granted Weyerhaeuser's motion on August 24, 2007. CP 71-72. Another entity, the Olympians for Public Accountability ("OPA"), not a party to the case, filed an affidavit against Judge Pomeroy in this case. CP 1070. Because Mr. West's and Mr. Dierker's case – this present matter – had been linked with OPA's action in a separate matter, this case was reassigned to a new judge, ultimately to the Honorable Richard Hicks. CP 79-80. Weyerhaeuser and the Port had filed multiple dispositive motions in the case, and Mr. West and Mr. Dierker had also filed multiple motions (*See, e.g.*, CP 1951-1952). At the status conference on October 5, 2007, after having discussed all the non-PRA claims and motions pertaining thereto, the Trial Court asked about Mr. West's PRA

action. RP 10/05/07, p. 46, ll. 7-8. Counsel for the Port answered that the Port had brought a collateral estoppel motion that related to Mr. West's PRA case, and asked that it be heard before the PRA case went further. RP 10/05/07, p. 46-47, ll. 11-25, l.1. The Trial Court issued a letter directing all to appear for a second scheduling conference. CP 1949-1953.

Upset with the reassignment of the case from Judge Pomeroy by the affidavit of a non-party, and upset at what they believed was a failure of the Trial Court to decide their claims, Mr. West and Mr. Dierker filed an original petition with the Supreme Court. CP 78-88. The Port of Olympia and Weyerhaeuser appeared in the Supreme Court matter, strenuously opposed Mr. West's efforts, and succeeded. The Supreme Court dismissed the original petition and imposed sanctions. CP 88. Ironically, Mr. West's Supreme Court action centered upon the delays in hearing his PRA claims; Mr. West sought a prompt hearing of those claims prior to any hearing of the SEPA (the non-PRA) issues. The Port and prevailed in this action in the issue that Mr. West was not entitled to a prompt hearing on his PRA claims.

Meanwhile, the case was reassigned to the Honorable Chris Wickham after Judge Hicks recused himself. CP 2117. Weyerhaeuser and the Port filed a Joint Request for Status Conference and Proposed case schedule concerning the non-PRA issues in the case. CP 2084-2116. The

Trial Court held a status conference on March 21, 2008, where the Trial Court signed the case schedule order that the Port and Weyerhaeuser had submitted. CP 2125-2126. The order gave a dispositive motion deadline of April 25, 2008, as to the non-PRA issues. CP 2125.

Mr. West had not abandoned his PRA claims. On March 21, 2008, he filed a note of issue for a show cause hearing, setting the matter for April 4, 2008. CP 2123. The Port filed a "reply." CP 2232-2254; 2255-2286. Mr. Dierker, on April 3, 2008, also filed pleadings. The PRA show cause hearing did not take place on April 4.

Weyerhaeuser and the Port re-filed dispositive motions seeking dismissal of the non-PRA claims for, among other bases, lack of standing. CP 2135-2151; CP 2152-2174; CP 2175-2219. Mr. West had earlier filed a memorandum and declaration on the issue of standing. CP 1395-1408. In that earlier memorandum Mr. West argued:

> Both petitioner west and Dierker have resided in the Olympia area for over a decade. The allegations of residence in the vicinity of the project are undisputed. Dierker's declarations stating his particular susceptibility to toxic contaminants have not been controverted. Both petitioners have attested to employing the vicinity of the project area in the areas impacted by the project for recreation and leisure activities, and have identified their connections to the area and the animals and protected and threatened species that inhabit and pass through the project's vicinity- species which will be impacted by the effects of construction and the greater air [*sic*] traffic resulting from the project.

CP 1404. Mr. West also declared:

> I currently reside on Legion Street in Olympia, within a half mile of the project site. I regularly drive on the roads that will be impacted by the traffic projected to result from this project. I spend a great deal of time in downtown Olympia, and regularly walk, drive, bycicle [*sic*], and operate small marine craft in the vicinity of and/or upon the port of Olympia. I have an interest in preventing air, water, noise pollution that this project is certain to increase....
>
> I have a connection to the project site and to the animals and marine life that remains in the vicinity. As an individual whose federally protected bird watching activities have been recognized by the federal court, I also watch birds on or near the site. On infrequent occasions I observe seals and whales in the waters surrounding the project site. All of these activities, the species I observe, and the quality of my environment will be directly impacted by the increased traffic, noise, and increased traffic, noise, and increased discharge of water and air pollutants resulting from this project.
>
> As a person who spends time in the area surrounding the project site, and as one of the individuals who has repeatedly contacted Thurston County in an effort to have more explicit warning signs posted around the inlet, I am also concerned and specifically impacted by the contamination stemming from the Cascade Pole Containment Site, which is scheduled to be disturbed and used as a log yard, with a potential for further discharge of toxic waste.
>
> I was present at a recent meeting of the Commissioners of the Port of Olympia where a projection was displayed that 60 additional marine vessels would call at the Port every year if the project described in this case were to be implemented. 60 additional vessels and the truck and automobile traffic resulting from the cargo that they will load and discharge in Olympia will have direct effects that are not speculative by any stretch of the imagination.

CP 1406-1408. Mr. West and Mr. Dierker had also jointly filed an earlier Plaintiffs' hearing brief on the issue of standing. CP 1748-1762. Mr. West and Mr. Dierker also filed a response to the two pending motions from the Port and Weyerhaeuser. CP 2414-2421. Weyerhaeuser and the Port both filed replies. CP 2422-2430; CP 2431-2454. Mr. Dierker also filed an "Exhibit in Support of Standing of Petitioners." CP 2526-2531.

On April 25, 2008, the Trial Court dismissed the non-PRA claims for lack of standing. The Trial Court held:

> There are essentially two requirements for standing. One is that the plaintiffs be within the zone of interest protected by the statute. I think petitioners could arguably represent that they are within that zone of interest, but as to the second requirement, an injury in fact, I do not see any evidence of such injury in fact. There is some speculation that agency action might in the future provide injury to the plaintiffs, but I have seen nothing that is sufficiently specific or substantial to place plaintiffs in a situation different than any other members of the community.

RP 04/25/08, pp. 28-29, l. 25, ll. 1-11.

The Trial Court dismissed only the non-PRA claims for lack of standing, though the order erroneously stated that the entire case was dismissed. CP 2554; CP 90. Mr. West and Mr. Dierker filed Motions for Reconsideration of the dismissal for lack of standing. CP 2581-2586; CP 2587-2608. Mr. West argued that he had standing because he was particularly impacted by the Port/Weyerhaeuser project. CP 2582.

Weyerhaeuser moved specifically for dismissal of the PRA claims as to itself, and the Trial Court granted the motion. CP 2509-2513; CP 91. Mr. West opposed Weyerhaeuser's motion to dismiss the PRA claims by arguing that its motion was filed after the dispositive motion deadline – April 25, 2008 – established by the Trial Court in its scheduling order. CP 2125; 2563-2564. Weyerhaeuser persuasively argued, however:

> The scheduling order at issue specifically applied to the SEPA and Harbor Improvement claims which remained after the PRA cause of action was bifurcated and as the result of a status conference held on March 21, 2008. The Court will recall that Petitioner filed an original action in the Supreme Court seeking, among other things, relief against this Court arising out of one or more decisions entered in this case. After that original action was dismissed, the instant action resumed with the Notice of Reassignment and Status conference. It was during that status conference that the Court established a briefing schedule for the already pending and fully briefed motions to dismiss the SEPA review and HIA claims. No order was entered that impacted the bifurcated PRA claim.

CP 2565-2566. The Trial Court – who had itself signed the case scheduling order – agreed with Weyerhaeuser that the case schedule order and the dispositive motion deadline of April 25, 2008, did not apply to the bifurcated PRA claims, and granted Weyerhaeuser's motion to dismiss the PRA claims as to Weyerhaeuser alone. CP 2509-2513; CP 91.

Weyerhaeuser also observed that the Trial Court's order of dismissal of the non-PRA claims was incorrect. On May 30, 2008, the

Trial Court issued a corrected and superseding order dismissing only the non-PRA claims. CP 94-95.

On October 16, 2009, Mr. West filed a Declaration in Support of Motion for Show Cause Order, in which he put forth his evidence supporting a finding that the Port had violated the Public Records Act in its response to Mr. West's PRA requests. CP 96-298. Mr. West argued that the records he attached to his declaration were responsive to his request, that should have been maintained by the Port of Olympia, were not produced to him by the Port of Olympia, and that he had obtained from another source. CP 96. Mr. West filed a notice of issue setting the matter for hearing on January 15, 2010. CP 299. He filed a subsequent notice of issue setting the matter for hearing on January 29, 2010. CP 301. This hearing was cancelled after the parties had appeared in court, due to the recusal of the Honorable Paula Casey. Mr. West filed yet another notice of issue attempting to set the show cause hearing for August 20, 2010. CP 301; CP 304. The notice of issue for August 20, 2010, was stamped "Incorrect Set; Rejected by Court Admin." CP 304.

Mr. West attempted to file a Declaration of Prejudice for Cause against Judge Wickham. CP 306. However, Judge Wickham did not recuse himself and Mr. West had already used up his one judicial affidavit to which he was allotted. CP 79.

Mr. West filed another Declaration concerning the Port's withholding of public records. CP 307-310. He also filed a notice of issue setting the matter for hearing on September 2, 2010. CP 311. The Port's counsel, Ms. Carolyn Lake, filed a Notice of Unavailability on September 16, 2010. CP 313. Mr. West, on October 26, 2010, filed another notice of issue setting the matter for hearing on December 9, 2010. CP 315. This date was, unfortunately, one of Ms. Lake's unavailable dates. CP 313. Ms. Lake filed another notice of unavailability adding additional unavailable dates. CP 317. The Port also, on November 29, 2010, filed an objection to Mr. West's having noted the matter for hearing on December 9. CP 320-348. The Port filed a second declaration as well. CP 349-361.

Mr. West, attempting to renote the matter, filed another notice of issue. CP 362. He got it wrong again; he noted the matter for December 23, 2010, which was one of the new unavailable dates on Ms. Lake's second notice of unavailability. CP 362; CP 317. By coincidence, this date – December 23 – was one of the very few available dates on Judge Wickham's civil motion calendar (since Judge Wickham was on family and juvenile court rotation) and was also one of the unavailable dates for the Port's counsel. The Port filed a third declaration in support of its objection. CP 364. So Mr. West again attempted to renote the matter, this time to January 13, 2011. CP 367.

Mr. West then filed a reply declaration in support of the show cause hearing he was attempting to have heard. This reply declaration set forth additional facts relative to the delay in getting a show cause hearing heard:

> Although originally set for hearing before the Honorable Judge Pomeroy, an improper affidavit of prejudice by a non-party [OPA] somehow was allowed to delay the scheduled hearing, which was never re-set by the Court.
>
> When plaintiff attempted to set a hearing he was informed by the Superior Court's private ex officio legal counsel that the case had been dismissed. Intervention by the Office of the prosecuting Attorney was required to have the case re-activated.
>
> Since that time, plaintiff repeatedly attempted to set a hearing, and the Superior Court has refused to accept his notices of issue. Delays have also resulted of the circumstance that, despite having been transferred to the Juvenile Court, Judge Wickham continues to exercise jurisdiction over this matter.
>
> Due to the irregular and sporadic nature of the family and juvenile Court motion Calendar, and the difficulty of communicating with Juvenile Court, further delays have ensued, despite the constitutional guarantee that causes of action shall not fail for lack of an available judge.

CP 369. While this reply declaration betrays some of Mr. West's procedural confusion, it does set forth salient facts: to wit, the Clerk's office had rejected Mr. West's attempts to set a hearing, believing the entire case to have been dismissed; Mr. West had experienced difficulty in attempting to set a hearing; and since the judge assigned to the case, Judge

Wickham, was also assigned to the Family and Juvenile Court calendar, there were only a few available days on which Mr. West could attempt to set hearings. The paucity of hearing dates was exacerbated by the fact that the Port counsel's unavailability dates coincided with the very few motion calendars before Judge Wickham.

There is further evidence in the record corroborating Mr. West's reply declaration. In an email from Ms. Trina Wendel, judicial assistant, dated February 2, 2010, Ms. Wendel wrote: "Upon further review by court administration and consultation with our staff attorney, it has been determined that this case was closed by Order of Dismissal signed by Judge Wickham on 4-25-08. Based on that, the court is not going to reassign this case to another judge. No further motions will be heard in this case." CP 517. Later, on February 17, 2010, Ms. Wendel wrote that she had located the order of bifurcation and also the order dated May 30, 2008, that clarified that the PRA claims had not been dismissed. CP 516.

Mr. West's most recent attempt to set a hearing was for January 13, 2011, which appears to have been for a day on which Judge Wickham did not have a motion calendar. The Honorable Anne Hirsch struck the show cause hearing in court. CP 376. Mr. West tried again and filed a notice of issue for a show cause hearing on April 28, 2011. CP 377. The Port filed a Declaration concerning relevant pleadings on file. CP 379.

Unfortunately, Mr. West failed to confirm the hearing and it was stricken for non-appearance. CP 382.

The case was reassigned for judicial efficiency from Judge Wickham to the Honorable Thomas McPhee, and a status conference was scheduled for June 10, 2011. CP 383. Mr. West filed a request to have the matter set for trial. CP 384. At the status conference on June 10, 2011, the Trial Court notified the parties that the records the Port had submitted for in camera review were missing and directed the Port to resubmit the records (CP 385), and also notified the parties that the case had been stayed and that the stay would have to be lifted (CP 533; CP 537). The Trial Court set a second status conference for June 24, 2011. CP 385. Mr. Dierker filed a Declaration of Prejudice for Cause against Judge McPhee. CP 386. Mr. West filed a declaration in support of his PRA claims, attaching copies of records he received from the Port that were responsive to his records request. CP 387.

The individual Port employee defendants – Mr. Galligan, Mr. McGregor, Mr. Van Schoorl, and Mr. Telford – filed a CR 12(b)(6) motion to dismiss and for sanctions, supported by a declaration from counsel. CP 452-464; CP 465-482. In fact, since Mr. West's PRA claims were directed to the Port, and since Mr. West's non-PRA claims had already been dismissed (CP 94-95), claims against these individual Port

employee defendants had already been dismissed, meaning the motion was unnecessary. The Port also filed a Motion to Dismiss Mr. West's PRA claims against it. CP 487-503. Both motions were set for July 22, 2011.

Meanwhile, at the status conference on June 24, 2011, the Trial Court – Judge McPhee – reviewed the information on the record with regard to the affidavit of prejudice filed by Mr. Dierker. Mr. West also – the morning of the status conference – filed an affidavit of prejudice against Judge McPhee (CP 530); however, Mr. West had already filed the one affidavit of prejudice to which he was allotted (CP 79). At any rate, Judge McPhee recused himself. The Trial Court determined the case would be reassigned to another judge. CP 486.

The Port's Motion to Dismiss sought dismissal for failure to prosecute, under CR 41(b)(1), and also pursuant to the Trial Court's independent authority to manage a case. CP 492-493. The Port argued that Mr. West was a labeled vexatious litigant. CP 496. The Port's motion was supported by the Declaration of Counsel. CP 504-529.

Mr. West, acting pursuant to the remarks by the Trial Court on June 10, 2011, at the status conference, filed a motion to strike and lift the "stay." CP 533-546.

However, neither the Port's motions to dismiss nor Mr. West's motion to strike and lift stay were heard as noted, because Judge McPhee

had recused himself and no new judge had yet been assigned. During this time, Mr. West retained counsel, the undersigned. Mr. West's counsel contracted court administration and sought and obtained the assignment of a judge to hear the case, the Honorable Sam Meyer, *pro tempore* Superior Court judge. CP 567; 577. Mr. West's counsel also began pursuing discovery on Mr. West's behalf, sending a notice of CR 30(b)(6) deposition to the Port. CP 568-571. Mr. West filed a Motion for Trial Setting and Issuance of New Case Schedule Order. CP 557.

The Port then filed a Motion to Quash Discovery & Motion for Protective Order. CP 547-556. Mr. West responded. CP 558-563; 564-581. The Port replied. CP 582-615. Mr. West filed a surreply. CP 616-619; 620-624. The Port had refused to participate in a CR 26(i) conference with counsel for Mr. West, despite bringing a motion to quash under the discovery rules (CP 558-563; 564-581; 616-619; 620-624). At the hearing on June 1, 2012, the Trial Court invited the parties to conduct the CR 26(i) conference. RP 06/01/12, p. 8, ll. 1-7. Counsel for the Port finally agreed to confer. RP 06/01/12, p. 9, ll. 19-20. After the CR 26(i) conference, Mr. West's counsel informed the Trial Court that she was willing to continue the noted depositions until after the Trial Court had ruled on the Port's pending motion to dismiss, which was noted for June 29, 2012. RP 06/01/12, p. 10, ll. 19-21.

Mr. Dierker filed his response to the Port's Motion to Dismiss. CP 626-654. Mr. West filed his response to both the individual Port Defendants' motion to dismiss (arguing it was unnecessary, that they had already been dismissed from the case, but opposing the request for sanctions) and also the Port's motion to dismiss. CP 655-662. Mr. West argued that the "Port has failed to show that any basis exists for dismissal of Mr. West's case, whether under CR 41(b), CR 41(b)(1), or under any other rule or statute providing for involuntary dismissal of a case." The Port filed its reply as to Mr. Dierker (CP 663-674) and also as to Mr. West (CP 675-777). Mr. Dierker moved to strike the Port's briefs. CP 778-794. Mr. Dierker also moved for the setting of a trial date. CP 795. The Port filed a proposed order of dismissal. CP 802-818. The Port also opposed Mr. Dierker's motion to strike. CP 819-827. Mr. Dierker filed a reply. CP 829-832.

At the hearing on the Port's motion to dismiss, the Trial Court heard argument and reserved ruling, taking the matter under advisement. RP 06/29/12, p. 54, ll. 12-22. The Trial Court set the matter for July 13, 2012, at which it would announce its ruling. RP 06/29/12, p. 56, ll. 13-25.

Mr. Dierker filed a supplemental declaration on July 6, 2012, in which he stated:

> ...many of the Superior Court Staff were aware of my and Mr. West's efforts to set a hearing for the PRA issues during the about 1 ½ years of time when the Clerk's "mistake" about the dismissal of this case prevented us from filing any pleadings or setting any hearings in this case.

CP 833.

The Port had earlier filed copies of its proposed orders of dismissal. Mr. West filed his objections to the Port's proposed orders. CP 873-880.

At the hearing on July 13, 2012, the Trial Court announced its decision. The Trial court found that there was a period of approximately 17 months in which no action was taken on this case – from May 30, 2008, the date of the amended order excepting the PRA claims from dismissal (CP 94-95), through to October 16, 2009, when Mr. West filed his declaration in support of his PRA claims (CP 96-298) and attempted to note the matter for a show cause hearing (CP 299). RP 07/13/12, p. 4, ll. 4-11. The Trial Court found that the Port appeared ready to respond to a show cause hearing in April of 2008. RP 07/13/12, p. 4, ll. 19-20. The Trial Court observed that ordinarily, when a case languishes for a period of time and then starts up again, "while they're languishing, they're just a case sitting on two people's desks without any prejudice to any party or anyone else." RP 07/13/12, p. 6, ll. 12-14. The Trial Court distinguished

this present case, however. RP 07/13/12, p. 6, l. 15. The Trial Court held, in concluding that no lesser sanction than dismissal would suffice:

> As pointed out by Ms. Lake, and I think as everyone knows, on these public records cases, there's a daily penalty. There's nothing that can be done – there's no real discretion with regard to that daily penalty. There's no discretion with regard to the penalty, on a daily penalty, even if the delay was caused by the person who is getting the penalty.

RP 07/13/12, p. 8, ll. 4-9. The Trial Court dismissed the case. RP 07/13/12, p. 8, ll. 21-23.

Both Mr. West and the Port submitted proposed orders to the Trial Court. CP 882-893; CP 894-910. At the presentation of orders hearing on July 27, 2012, the Trial Court signed the order of dismissal. CP 932-940. In the order of dismissal, the Trial Court concluded:

> 5. The obligation of going forward in an action always belongs to the plaintiff and this Court concludes that Mr. West and Mr. Dierker have deliberately and willfully caused excessive delays in this case. And those delays have hindered the efficient administration of justice and prejudiced the defendant Port of Olympia.
> 6. This Court concludes that the delays caused by Mr. West and Mr. Dierker have prejudiced the Port of Olympia, since the Port of Olympia, if found to have violated the Public Records Act, will be subject to a daily penalty.
> 7. This Court concludes that lesser sanctions than dismissal will not suffice, since a court would have no discretion to reduce the number of days for which the Port of Olympia would be subject to a daily penalty.

CP 938.

After the Trial Court dismissed the case, Mr. West timely filed a motion for reconsideration. CP 948-949. Mr. West supported his motion for reconsideration with a declaration. CP 943-947. Mr. West declared:

> The representations that there ever was any failure to prosecute this case are false and untrue. For the entire time that the court administration has obstructed any progress in this case I have done everything possible, up to the point of being arrested and escorted out of the courthouse, to attempt to prosecute this case.
>
> The period during which there were no filings in 2007-2008 resulted from the circumstance that the Clerk would not assign a judge to hold hearings, accept pleadings or filings or allow motions to be heard.
>
> At one point, I became so frustrated that I attempted to appear before the judge nominally assigned to the case in open court to present a motion, and was escorted out of the courthouse by armed Thurston County Sheriff Deputies.
>
> *****
>
> During the periods when the Court refused to accept pleadings or hold hearings, I contacted judicial assistant Debbie Requa on a regular (and almost weekly basis at some times) to attempt to arrange for a judge to be assigned to hear the case. She told me that Thurston County Court Administrator Marti Maxwell was responsible for assigning judges.
>
> I also repeatedly attempted to contact Marti Maxwell, but she refused to respond to my many repeated requests to set a hearing....
>
> The fact that there are periods when no progress was made in this case resulted from the periodic refusal of the Court to accept filings and the continuing pattern of actions on the part of the court administration to refuse to assign a judge to hear the case.
>
> I do not believe there has been any lack of prosecution in this case. I tried repeatedly to attempt to get a judge assigned to the case, tried repeatedly to file pleadings and note hearings in the case, and tried to seek assistance from the court administration in getting a judge

> assigned and in allowing me to file pleadings and note hearings. This Court has already read the emails where at one point I was told that I could not file a pleading since the case has been dismissed. The docket does not reflect my efforts in this regard. If I am not allowed to file a pleading or note motion, that does not show up on the docket.

CP 943-946. In his motion for reconsideration, Mr. West argued that the Trial Court's dismissal rested on the conclusion that there was a lack of prosecution in the case that was not cured by subsequent activity. CP 948. Mr. West argued that the delays during the time period complained of were systemic rather than caused by Mr. West or Mr. Dierker. CP 949. Mr. West argued that concluding that lesser sanctions that dismissal would not suffice was error, in that it was based on the finding that if the Port were found in violation of the PRA it would be subject to a statutory daily penalty, when the Port itself, the responding agency, is in control of the timing and adequacy of its response to Mr. West's records request. CP 948-949. Finally, Mr. West argued that the Port's accusations and allegations amount to a complaint that there were delays in prosecution, meaning that CR 41(b)(1) applies. CP 949. Application of CR 41(b)(1) would result in a denial of the motion to dismiss, because Mr. West had cured any delays in prosecution. CP 949.

The Port responded to Mr. West's motion for reconsideration (CP 952-968) and also responded to a motion for reconsideration that had been

filed by Mr. Dierker (CP 969-991). The Trial Court denied the motions for reconsideration. CP 1004; CP 1017-1019.

This appeal followed.

IV. ARGUMENT

A. Standard of Review

There are multiple standards of review in this appeal. Mr. West's non-PRA claims were dismissed for lack of standing. This Court reviews standing determinations de novo. Wolstein v. Yorkshire Ins. Co., 97 Wn. App. 201, 206, 985 P.2d 400 (1999).

Mr. West's PRA claims were dismissed pursuant to the Trial Court's authority under CR 41(b). These orders of dismissal are reviewed for an abuse of discretion. Will v. Frontier Contractors, 121 Wn. App. 119, 128, 89 P.3d 242 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, 121 Wn. App. at 128.

The Trial Court also made findings of fact and conclusions of law. In the ordinary course, this Court would review findings for substantial evidence and would review conclusions of law *de novo*. But here, however, the Port made a motion to dismiss supported by affidavits, and the Trial Court conducted the hearing based solely on affidavits, meaning that the motion is treated as one for summary judgment. Access Rd.

Builders v. Christenson Elec. Contracting Eng'g Co., 19 Wn. App. 477, 481, 576 P.2d 71 (1978). Accordingly, the findings of fact and conclusions of law here were not only unnecessary; indeed, they are "merely superfluous and of no prejudice to the appellant." State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962).

Finally, while it does not appear that the Trial Court chose to sanction Mr. West pursuant to its inherent authority, had it done so, and imposed a sanction of dismissal, that decision would be reviewed for abuse of discretion. " '[D]ecisions either denying or granting sanctions ... are generally reviewed for abuse of discretion.' Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). But the 'choice of sanctions remains subject to review under the court's inherent authority applying the arbitrary, capricious, or contrary to law standard of review.' Butler v. Lamont Sch. Dist., 49 Wn. App. 709, 712, 745 P.2d 1308 (1987)." State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000).

"Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration or regard for facts or circumstances." Helland v. King Cnty. Civil Serv. Comm'n, 84 Wn.2d 858, 865-66, 529 P.2d 1058 (1975) (internal citations omitted).

B. The Trial Court Erred in Dismissing Mr. West's PRA Claims Under CR 41(b)

The Trial Court erred in dismissing Mr. West's PRA claims under CR 41(b). CR 41(b) allows a defendant to move for involuntary dismissal of an action based on the plaintiff's failure to comply with court rules or any order of the court. Will, 121 Wn. App. at 128. "Dismissal is an appropriate remedy where the record indicates that (1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction probably would have sufficed." Will, 121 Wn. App. at 129.

Here, the Trial Court concluded as a matter of law that Mr. West had "deliberately and willfully caused excessive delays in this case."[1] But

[1] Assuming for the moment that this Court is called upon to review the findings of fact for substantial evidence (even though the findings here are merely superfluous and of no prejudice to the appellant; Carroll, 61 Wn.2d at 149), the findings of fact that the Trial Court made supporting its conclusion that Mr. West willfully and deliberately caused excessive delay in the case were also erroneous. In a set of two findings of fact, the Trial Court found that no action by anyone was taken in this case between the time that the amended order of dismissal was entered and the time that Mr. West filed his PRA declaration, a period of 17 months. In doing so, the Trial Court weighed evidence and credibility, and found unpersuasive Mr. West's and Mr. Dierker's evidence that the Thurston County Superior Court Clerk's office had refused to accept filings or set the matter for hearing. "This is somewhat of a collateral point, but I will say I tend to agree with Ms. Lake with the fact that had there been a year and a half pattern of refusing to accept pleadings from Mr. West, we would have

this is not a conclusion that Mr. West had willfully or deliberately disobeyed a court order, or even that Mr. West had disobeyed a court order. This Court reviews conclusions of law de novo (even though the conclusions of law in this matter were merely superfluous, and of no prejudice to the appellant; Carroll, 61 Wn.2d at 149), and this Court should examine this conclusion carefully. There is no basis in case law or precedent that Mr. West has found for equating "delay" with "disobeying a court order." The two are entirely different and distinct.

The Trial Court did find as a matter of fact – a superfluous finding -- that the case scheduling order of March 21, 2008 provided for a deadline of April 25, 2008, for hearing dispositive motions. CP 935. The Trial Court also found as a matter of fact – a superfluous finding -- that no show cause hearing (that is, a dispositive hearing in the PRA context) had ever been held in this case. CP 935.

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heard about it." RP 06/29/12, p. 54, ll. 7-11. But here, the matter was decided completely on affidavits; no testimony was taken or reviewed, making it akin to a matter decided on summary judgment. And in ruling on motions for summary judgment, a trial court is not permitted to weigh evidence or to resolve any existing factual issues. Fleming v. Smith, 64 Wn.2d 181, 390 P.2d 990 (1964). Continuing the analogy, the Trial Court erred in not viewing facts and inferences therefrom in the light most favorable to the non-moving party. Gaines v. Northern Pacific R. Co., 62 Wn.2d 45, 380 P.2d 863 (1963).

But the Trial Court did not find that Mr. West had disobeyed the case scheduling order of March 21, 2008. And indeed, substantial evidence would not support such a hypothetical finding. Recall that when Mr. West opposed Weyerhaeuser's motion to dismiss the PRA claims as to Weyerhaeuser itself, that Mr. West argued that Weyerhaeuser hadn't filed the dispositive motion in accordance with the case schedule order. CP 2563-2564. And Weyerhaeuser persuasively argued to the Trial Court that the case schedule order in question only pertained to the non-PRA claims, since the PRA claims had been bifurcated in the case. CP 2565-2566. There is thus no evidence supporting even a hypothetical finding of fact that Mr. West disobeyed the case schedule order. The first prong for dismissal under CR 41(b) – that the party must have disobeyed a court order – is missing.

The Trial Court also found as a matter of fact – a superfluous finding -- that Mr. West prejudiced the Port, "since the Public Records Act requires a mandatory daily penalty in the event that a court finds an agency to have violated the act and does not vest a court with discretion to reduce the number of days for which a penalty may be imposed. Mr. West and Mr. Dierker should not be allowed to benefit from the delays that they themselves cause." CP 937-938. This superfluous finding is not supported by substantial evidence. While it is true that the PRA requires a

mandatory daily penalty, it does not follow as a matter of fact that this is prejudicial to the Port. Indeed, this superfluous Finding of Fact is actually a superfluous Conclusion of Law.

And it was error for the Trial Court to conclude that an increased number of penalty days for which a mandatory daily penalty must be imposed constitutes "prejudice." "'Prejudice means a damage or detriment to one's legal claims. Black's Law Dictionary 1299 (9th ed. 2009)." Nat'l Sur. Corp. v. Immunex Corp., ____ Wn.2d _____, 297 P.3d 688, 696 (2013). The risk of being forced to pay an increased penalty based on number of days is not damage or detriment to legal claims or defenses. This Court should conclude that the Trial Court erred in finding that Mr. West's delays caused substantial prejudice to the Port. Further, as Mr. West argued in his Motion for Reconsideration, the Port, as the responding agency, has control over its own response to Mr. West's public records requests. If the Port does not wish to risk a mandatory daily penalty, it is in complete control of the means by which to avoid such a penalty, by swiftly and fully responding to a public records request.

Finally, the Trial Court erred in concluding that no lesser sanction than dismissal would suffice. "This Court concludes that lesser sanctions than dismissal will not suffice, since a court would have no discretion to reduce the number of days for which the Port of Olympia would be subject

to a daily penalty." CP 938. Assume for a moment that the risk of being subject to a monetary daily penalty for an increased number of days is, indeed, prejudicial. It still does not follow that such hypothetical prejudice can only be cured by the severe sanction of dismissal. Indeed, the daily penalty under the PRA is a monetary one. If the "prejudice" can be measured in monetary terms, it could likewise be "cured" in monetary terms. The Trial Court did not consider, much less reject, a monetary sanction against Mr. West. RP 07/13/12, pp. 7-8, ll. 19-25, 1-10.

This Court should conclude that substantial evidence does not support any of the Trial Courts' superfluous findings or implied findings that Mr. West disobeyed a court order, prejudiced the Port, or that no lesser sanction would suffice. In the absence of substantial evidence supporting these superfluous findings, this Court should also conclude that the superfluous conclusions of law supporting the Trial Court's exercise of discretion in dismissing the case pursuant to CR 41(b) were in error. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, 121 Wn. App. at 128. In the absence of substantial evidence, where the conclusions of law are erroneous, the "reasons" supporting the Trial Court's exercise of discretion are untenable. This Court should conclude

that the Trial Court erred in dismissing the case pursuant to CR 41(b) and should reverse and remand.

C. Even If the Trial Court Had Dismissed the Case Pursuant to Its Own Inherent Authority, Such Dismissal Would Have Been In Error

> "Every court of justice has power... [t]o enforce order in the proceedings before it, ... [and][t]o provide for the orderly conduct of proceedings before it[.]" RCW 2.28.010(2)-(3). "When jurisdiction is ... conferred on a court or judicial officer all the means to carry it into effect are also given[.]" RCW 2.28.150. Where sanctions are not expressly authorized, "the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation." In re Firestorm 1991, 129 Wn.2d 130, 139 P.2d 411 (1996) (applying the principles embodied in CR 11, CR 26(g), and CR 37 to CR 26(b) violations).

State v. S.H., 102 Wn. App. at 473. Here, it does not appear that the Trial Court dismissed Mr. West's case under its own inherent authority to control litigation. But if it had, that would be error.

"Under RCW 2.28.010(3), a trial court has the power to provide for the orderly conduct of proceedings before it. Further, 'in Washington, trial courts have the authority to enjoin a party from engaging in litigation upon a "specific and detailed showing of a pattern of abusive and frivolous litigation." ' Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008) (*quoting* Whatcom County v. Kane, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981)). Proof of mere litigiousness is insufficient to warrant

limiting a party's access to the court. Yurtis, 143 Wn.App. at 693, 181 P.3d 849." Bay v. Jensen, 147 Wn. App. 641, 657, 196 P.3d 753 (2008).

Here, the Trial Court did expressly did not find a pattern of abusive and frivolous litigation. Though the Port argued that Mr. West had intentionally scheduled sham hearings, the Trial Court did not so find. All the Trial Court found was that while Mr. West had filed a notice of issue for a show cause hearing that never took place for one reason or another, that none of the delays were caused by the Port of Olympia. CP 936. That is, while it is possible to infer that the Trial Court found the delays were caused by Mr. West, the Trial Court did not find an improper motive or a pattern of abuse.

The Order of Dismissal reflects that the dismissal was granted pursuant to CR 41(b), not to the Trial Court's inherent powers to control and manage the cases before it. Nor did the Trial Court make any (superfluous) findings that would support such an order of dismissal. This Court should not affirm the dismissal on this hypothetical but erroneous basis, especially since the Port is judicially estopped from arguing that Mr. West had not acted to secure a prompt hearing by prevailing in the Supreme Court against Mr. West's efforts to try and compel a prompt hearing. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn.App. 222, 224, 108 P.3d 147 (2005).

D. **The Trial Court Erred in Not Applying CR 41(b)(1)**

The Trial Court erred in not applying CR 41(b)(1) to the case. This rule provides that "Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff...neglects 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." Here, the Trial Court's conclusion that Mr. West deliberately and willfully caused excessive delays amounts, essentially, to a conclusion that there was a want of prosecution. And indeed – Mr. West's failing to properly note the show cause matter for hearing resulted, simply, in the matter not being noted for hearing. Accordingly, CR 41(b)(1), a mandatory rule, applies.

> There is only one exception to the mandatory application of the italicized portion of the rule: "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." Snohomish County v. Thorp Meats, 110 Wn.2d, 163, 169, 750 P.2d 1251 (1988) (citing Gott v. Woody, 11 Wn. App. 504, 508, 524 P.2d 452 (1974)). Such dilatoriness "refers to unacceptable litigation practices other than mere inaction." Wallace v. Evans, 131 Wn.2d 572, 577, 934 P.2d 662 (1997).

Bus. Servs. of Am. II, Inc. v. WaferTech LLC, 174 Wn.2d 304, 308, 274 P.3d 1025 (2012). While a trial court has discretion to ignore the prohibition of dismissal under CR 41(b)(1) where delay was caused by

"unacceptable litigation practices other than mere inaction," the Trial Court did not find any such unacceptable litigation practices – like failure to appear at trial or failure to appear at a status conference combined with other dilatory behavior -- here. Bus. Servs., 174 Wn.2d at 310. Even the failure to properly note a show cause hearing amounts to nothing more than failing to note the matter for trial. Accordingly, the Trial Court should have applied CR 41(b)(1) and erred in not doing so. Since Mr. West noted the matter for trial before the hearing on the Port's Motion to Dismiss, the Trial Court lacked discretion, under CR 41(b)(1), to dismiss the case. *See, e.g.*, Caldwell v. Caldwell, 30 Wn.2d 430, 191 P.2d 708 (1948); State ex rel. Hayes v. Superior Court, 12 Wn.2d 430, 121 P.2d 960 (1942).

E. The Trial Court and the Entire Thurston County Superior Court Administration Erred in Construing the Order of Bifurcation

The Trial Court and the entire Thurston County Superior Court administration erred in construing the order of bifurcation. CP 71-72. First, the Trial Court entered an order of dismissal that appeared on its face to dismiss the entire case. CP 2554; CP 90. That was in disregard of the order of bifurcation that separated the PRA claims from the non-PRA claims, an error that was only partially rectified when Weyerhaeuser sought and obtained an amended order specifying that the PRA claims

were not dismissed. CP 94-95. Then, the Thurston County Superior Court administration, relying on the first, superseded order of dismissal, concluded that the entire case was dismissed (also disregarding the order of bifurcation), and refused to let Mr. West file pleadings in the case or set hearings in the case, and refused to assign a judge to hear the case. CP 369; CP 517; CP 833; CP 943-946. Finally, once the Thurston County Superior Court administration recognized that Mr. West's PRA claims had in fact not been dismissed, the Trial Court construed the order of bifurcation as having stayed the PRA claims and so informed Mr. West, upon which Mr. West filed a motion to lift the stay. CP 533-538. All this truly demonstrates that the practical effect of the seemingly innocuous Order of Bifurcation was, in fact, to prevent Mr. West's PRA claims from moving forward.

F. The Trial Court Erred in Dismissing Mr. West's PRA Claims When the Record Showed the Port's Violations

The Trial Court erred in dismissing Mr. West's PRA claims when the record showed the Port's violations of the public records act. CP 390; CP 307-310; CP 1968; CP 2070-2083; CP 368-373. The Port had violated the PRA in three ways: (1) it had silently withheld 15 separate records and failed to disclose them until after Mr. West filed this lawsuit on June 18, 2007 (CP 1963-1965); (2) it completely failed to identify or

produce responsive records known to exist, which records were identified and (in some cases) obtained from third parties and filed with the Trial Court by Mr. West (CP 390; 307-10; 1968; 2070-2083); and it had improperly withheld records 1-6 described in the privilege log at CP 1200-1206 under claim of attorney-client, deliberative process, and research date exemptions when the records were not properly subject to such exemptions.

By failing to disclose 15 separate records until after Mr. West filed suit, the Port violated the PRA. Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005) (an agency may not resist compliance with the PRA until after a suit is filed without facing a penalty). By silently withholding responsive records relating to the SSLC and the Weyerhaeuser lease, records that the Port maintained and that Mr. West only obtained later from third parties (*see* Mr. West's declarations at CP 307-10, CP 2070-83, and CP 1963-68; significantly, the Port even purged its administrative record of the Environmental Site Analysis, a record detrimental to the Port's arguments in Mr. West's SEPA case), the Port violated the PRA. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 270, 884 P.2d 592 (1994).

And as to the records that the Port originally withheld under claim of exemption (CP 1200-1206) (the Port has now released records 2-6), the

Port improperly withheld record 3 under a claim of attorney-client privilege when it is apparent from the Port's description of the record that to the extent any it contained any attorney-client privileged communication, that communication could be redacted and the remainder of the record produced.[2] The Port improperly withheld records 3-6 under the deliberative process exemption when the records were associated with a determination already made by the Port. West v. Port of Olympia, 146 Wn. App. 108, 116-118, 192 P.3d 926 (2008). Further, as to record 4, the Port claimed that the record involved the recommendations of a subordinate to a decision maker, and that disclosure would chill the free give and take necessary to the decision making process. But record 4 is an email from **Weyerhaeuser's** Brad Kitselman to the **Port's** Jim Amador; is is not a recommendation from a subordinate to a decision maker. Finally, the Port improperly withheld records 3-6 under the research data exemption when the Port did not show that private gain and public loss would result from the records' release. Spokane Research & Def. Fund v.

[2] Likewise, the Port improperly withheld records 1-2 under a claim of attorney-client privilege when they contained relevant evidence to Mr. West's SEPA claim and the question of Mr. West's standing under SEPA, evidence not readily available elsewhere, and when, to the extent any attorney-client privilege existed, the benefits to the administration of justice through disclosure outweighed the Port's interest in confidentiality. Dietz v. Doe, 131 Wn.2d 835, 842-43, 935 P.2d 611 (1997).

City of Spokane, 96 Wn. App. 568, 576-577, 983 P.2d 676 (1999), *rev. denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

The case was ripe for determination and could have been determined on the record that existed at the time, even though the Thurston County Superior Court administration had lost or misplaced the records that the Port submitted for in-camera review. In dismissing the case, the Trial Court erred in failing to broadly construe the PRA to effectuate its purposes. Dragonslayer, Inc. v. Wash. State Gambling Comm'n, 139 Wn. App. 433, 447, 161 P.3d 428 (2007).

G. The Trial Court Erred in Dismissing Mr. West's non-PRA Claims for Lack of Standing

The Trial Court dismissed all of Mr. West's non-PRA claims for lack of standing, applying standing case law in SEPA actions. The main thrust of Mr. West's non-PRA claims was, indeed, a SEPA appeal of the Port's MDNS on the joint Port-Weyerhaeuser project.

In SEPA actions, a challenger must meet a two-part standing test: (1) the alleged endangered interest must fall within the zone of interests protected by SEPA and (2) the party must allege an injury in fact. Kucera v. Dep't of Transp., 140 Wn.2d 200, 212, 995 P.2d 63 (2000) (citing Leavitt v. Jefferson County, 74 Wn. App. 668, 678-79, 875 P.2d 681 (1994). Here, the Trial Court found that Mr. West had not shown an

injury in fact. "The Plaintiffs have not alleged immediate, concrete, specific injury required to establish standing or injury particular to them beyond any other member of the public." CP 94.

The injury in fact element is satisfied when a plaintiff alleges the challenged action will cause "specific and perceptible harm." Leavitt, 74 Wn. App. at 679. A sufficient injury in fact is properly pleaded when a plaintiff alleges direct impacts to his or her property and/or interests, *even if* the alleged impacts are speculative and undocumented, *even if they* are possible, not necessary, impacts of the challenged action, as long as the allegations are of direct impacts. Leavitt, 74 Wn. App. at 678-79.

Allegations of injury in fact are "not mere pleading requirements but rather an indispensable part of the plaintiff's case." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." Lujan, 504 U.S. at 561. Here, Mr. West's non-PRA claims were dismissed at the pleading stage of the litigation, on Weyerhaeuser's and the Port's motions to dismiss. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace

those specific facts that are necessary to support the claim.'" Lujan, 504 U.S. at 561, quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

The Supreme Court further held:

> Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 734, 92 S.Ct. 1361 (1992). "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.' Sierra Club, 405 U.S. at 734-735. To survive [the moving party's] summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened [the challenged action], but also that [respondents] would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." Sierra Club, 405 U.S. at 735.

Lujan, 504 U.S. at 562-63.

The record shows that Mr. West declared the following:

> I currently reside on Legion Street in Olympia, within a half mile of the project site. I regularly drive on the roads that will be impacted by the traffic projected to result from this project. I spend a great deal of time in downtown Olympia, and regularly walk, drive, bycicle [*sic*], and operate small marine craft in the vicinity of and/or upon the port of Olympia. I have an interest in preventing air, water, noise pollution that this project is certain to increase....
>
> I have a connection to the project site and to the animals and marine life that remains in the vicinity. As an individual whose federally protected bird watching activities have been recognized by the federal court, I also watch birds on or near the site. On infrequent occasions I observe seals and whales in the waters surrounding the

> project site. All of these activities, the species I observe, and the quality of my environment will be directly impacted by the increased traffic, noise, and increased traffic, noise, and increased discharge of water and air pollutants resulting from this project.
>
> As a person who spends time in the area surrounding the project site, and as one of the individuals who has repeatedly contacted Thurston County in an effort to have more explicit warning signs posted around the inlet, I am also concerned and specifically impacted by the contamination stemming from the Cascade Pole Containment Site, which is scheduled to be disturbed and used as a log yard, with a potential for further discharge of toxic waste.
>
> I was present at a recent meeting of the Commissioners of the Port of Olympia where a projection was displayed that 60 additional marine vessels would call at the Port every year if the project described in this case were to be implemented. 60 additional vessels and the truck and automobile traffic resulting from the cargo that they will load and discharge in Olympia will have direct effects that are not speculative by any stretch of the imagination.
>
> CP 1406-1408.

These allegations of direct future harm to Mr. West individually, apart from allegations of future harm to the community at large, are sufficient under Lujan's application of Sierra Club. The record shows that the Trial Court did not consider that "speculation that agency action might in the future provide injury to the plaintiffs" to be sufficiently pled allegations of injury in fact, even though the motion to dismiss was made at the pleading stage, not at trial. This is error under Lujan, 504 U.S. at 561, and under Leavitt, 74 Wn. App. at 678-79.

Not only did Mr. West have standing under caselaw, he also had standing pursuant to the Port's own rules. Pursuant to the Port Commission's adopted SEPA Policy Resolution 2006-3, Section 8(6), only "the parties to the appeal have standing to appeal to Court." CP 2351. It is undisputed that Mr. West participated in the administrative proceeding and also appealed the decision to the Port itself. After the Port denied Mr. West's appeal without consideration, Mr. West timely appealed to the Superior Court. Mr. West thus falls within the meaning of the Port's rule on appellants with standing.

This Court should review *de novo* the dismissal of Mr. West's non-PRA claims for lack of standing, and should reverse and remand.

H. **Request for Award of Attorney Fees**

This, ultimately, is a public records act case. Mr. West requests an award of attorney fees and costs. RAP 18.1 and RCW 42.56.550.

V. CONCLUSION

For the foregoing reasons, this Court should reverse and remand.

Submitted this 7th day of June, 2013.

/s/ Stephanie M. R. Bird

Stephanie M. R. Bird, WSBA #36859

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On June 7, 2013, I caused the foregoing document to be filed with this Court and served on the undersigned in the manner indicated:

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SIGNED at Olympia, Washington this 7th day of June, 2013.

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June 07, 2013 - 2:58 PM

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(2nd) Amended Brief of Appellant

Sender Name: Rhonda Davidson - Email: **rdavidson@cushmanlaw.com**