

No. 73014-2-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ARTHUR WEST,

APPELLANT

VS.

SEATTLE PORT COMMISSION, TACOMA PORT  
COMMISSION, PORT OF TACOMA, PORT OF SEATTLE,  
CLARE PETRICH, DON JOHNSON, RICHARD MARZANO,  
DON MEYER, CONNIE BACON, TOM ALBRO, STEPHANIE  
BOWMAN, BILL BRYANT, JOHN CREIGHTON, COURTNEY  
GREGOIRE,

RESPONDENTS.

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RESPONSE BRIEF OF RESPONDENT PORT OF TACOMA

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COURT OF APPEALS  
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## **I. INTRODUCTION / SUMMARY**

At the Trial Court level and again here on appeal, Appellant brings a non-justiciable claim (request for Declaratory Judgment that the Ports of Tacoma and Seattle (collectively “Ports”) violated the Open Public Meeting Act). The Trial Court properly found that Appellant lacks standing to bring this Declaratory Judgment Action and suit alleging violations of Washington’s Open Public Meetings Act (OPMA) (Chapter 42.30 RCW), and found that that the Federal Shipping Act preempts application of the OPMA to the Ports’ meetings. The Port of Tacoma joins in the analysis of co-Respondent Port of Seattle Opening Brief as to preemption and all issues. The appeal should be dismissed in its entirety. The Ports should be awarded their costs pursuant to RAP 18.1, 18.9, and RCW 4.84.185

## **II. RESPONDENT PORTS’ RESTATEMENT OF FACTS**

Upon information and belief, Appellant West, acting pro se, filed the above-entitled action on or around September 29, 2014 in the King County Superior Court at Kent, Cause No. 14-2-26791-6 KNT.CP 1-6. On 30 September 2014, Appellant filed his Amended Complaint, in which he sought injunctive and declaratory relief and alleged violations of the Washington State Open Public Meetings

Act, RCW 42.30. CP 15-19.

As West referenced in his Complaint for Violation of the Open Public Meetings Act,<sup>1</sup> Respondent Ports had been meeting pursuant to their Discussions Agreement filed with and approved by the Federal Maritime Commission (FMC). The Federal Shipping Act governs the FMC and approved discussion agreements and occupies the entire field of marine terminal operators entering discussion agreements. 46 U.S.C. §§ 40101 - 41309.<sup>2</sup> Appellant also submitted to the Port of Tacoma an Amended Complaint on 30 September 2014, after the Removal pleadings were filed. CP 15-19.

Both Respondent Ports filed Motions to Dismiss on December 16, 2014. CP 156-170; CP 182-240. At hearing on the dismissal Motions, on January 16, 2015, the Trial Court granted the Ports' Motions to Dismiss. CP 273-4 and see Transcript of January 16, 2015 hearing on file. On January 26, 2015, Appellant filed a three page Motion to Reconsider. By Order dated February 15, 2015, the Trial Court denied Reconsideration. CP 370. Appellant appealed. CP 277.

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<sup>1</sup> See *West Complaint* 2-6, at page 3 at paragraph: "3.6. FMC Agreement No. 201222 contains the following language....."

<sup>2</sup> 46 U.S.C. §§ 40101 - 41309, Public Law 98-237, cited as the "Shipping Act of 1984," replaced portions of the Shipping Act of 1916, the 1961 Amendments to the 1916 Act, and certain other maritime laws that were passed in the intervening period.

### III. AUTHORITY & ANALYSIS

#### 1. Standard Of Review

The appellate court reviews de novo a dismissal for failure to state a claim upon which relief can be granted. *Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.* (2004) 123 Wash.App. 863, 99 P.3d 1256. The appellate court reviews de novo a trial court's order for judgment on the pleadings. *Pasado's Safe Haven v. State* (2011) 162 Wash.App. 746, 259 P.3d 280.

This case raises questions of law, which the court reviews de novo. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 813, 854 P.2d 1072 (1993).

#### 2. Dismissal Appropriate Pursuant to CR 12(b)(6).

The rule of Civil Procedure 12(b) provides:

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19.

A complaint can be dismissed under CR 12(b)(6) for “failure to state a claim upon which relief can be granted.” Whether a CR

12(b)(6) dismissal is appropriate is a question of law. *Tenore v. AT & T Wireless Servs.*, 136 Wash.2d 322, 329-30, 962 P.2d 104 (1998).

On a 12(b)(6) motion, the Court examines the pleadings to “determine whether claimant can prove any set of facts, to “determine whether claimant can prove any set of facts consistent with the complaint, which would entitle claimant to relief” *North Coast Enterprises Inc., v. Factoria Partnership*, 94 Wn App 855, 859, 974 P2d 1257 (1999).

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate when “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’ ” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) ( quoting *Bowman v. John Doe Two*, 104 Wash.2d 181, 183, 704 P.2d 140 (1985)).

One purpose of CR 12, which permits the inclusion of all defenses in a responsive pleading, is to eliminate unnecessary delay in the conduct of an action. *Kuhlman Equipment v. Tamermatic Inc.* (1981) 29 Wash.App. 419, 628 P.2d 851.

While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient. As this court stated in *Bravo*, a proffered hypothetical will “ ‘defeat a CR 12(b)(6) motion *if it is legally sufficient to support plaintiff's claim.*’ ” *Bravo*, 125 Wash.2d at 750, 888 P.2d 147 (quoting *Halvorson*, 89 Wash.2d at 674, 574 P.2d 1190) (emphasis added).

However, the complaint's legal conclusions are not required to be accepted on appeal. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wash.2d 107, 120, 744 P.2d 1032 (1987).

If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate. *Gorman v. Garlock, Inc.*, 155 Wash.2d 198, 215, 118 P.3d 311 (2005).

In general, when ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings. *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 297, 545 P.2d 13 (1975); *Jackson v. Quality Loan Service Corp.* (2015) 186 Wash.App. 838, 347 P.3d 487.

3. **The Trial Court Properly Dismissed Because Appellant Lacks Standing To Bring Declaratory Judgment Action.**

Mr. West's Complaint expressly sought Declaratory Judgment Relief.

**4.1. UNIFORM DECLARATORY JUDGMENTS ACT (RCW 7.24)**

By their acts and omissions defendants created an uncertainty in the conduct of public officers and compliance with the OPMA, and a cause of action for a declaratory judgment in regard to whether the OPMA is superseded by federal law. Such declaration will conclusively terminate the controversy giving rise to this proceeding.

*CP18*. Emphasis added.

**A. Appellant Omitted Any Briefing on the Declaratory Judgment Standing Issue Below & on Appeal – Dismissal Was Uncontested & Appeal Should be Denied.**

Appellant did not merely allege that the Ports of Tacoma and Seattle violated the Open Public Meetings Act and the Public Records Act, he also sought Declaratory Judgment and injunctive relief. CP 2. However, in his response to the Ports' Motion to Dismiss before the Trial Court and again on appeal, Appellant failed completely to address the Declaratory Judgment standing issue at all, responding (barely) only to the OPMA standing challenge. Accordingly, the Port's Motion to Dismiss Plaintiff's Declaratory

Judgment action was uncontested, properly granted by the Trial Court and appeal should be denied.

An appellant's brief must contain “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” RAP 10.3(a)(6). An appellate court will not consider a claim of error that a party fails to support with legal argument in her opening brief. *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wash.App. 476, 486, 334 P.3d 1120 (2014) (citing *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wash.2d 619, 624, 818 P.2d 1056 (1991); *Fosbre v. State*, 70 Wash.2d 578, 583, 424 P.2d 901 (1967); RAP 10.3.(a)(6)).

“While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised.” *Karlberg v. Otten*, 167 Wash.App. 522, 531, 280 P.3d 1123 (2012) (citing *Smith v. Shannon*, 100 Wash.2d 26, 38, 666 P.2d 351 (1983)). In an abundance of caution, the issue is addressed below.

**B. Declaratory Judgment Action Required Appellant to First Establish Standing, Which he Failed to do.**

A Plaintiff must establish personal standing in order to seek a

declaratory judgment, per the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW:

A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations there under.

RCW 7.24.020. Emphasis Added.

To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm **personal to the party** that are substantial, rather than speculative or abstract. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). This statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Id.* at 419.

The Washington Supreme Court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397

U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)).

The second part of the test considers whether the challenged action has caused " 'injury in fact,' " economic or otherwise, to the party seeking standing. *Id.* at 866. *Five Corners Family Farmers v. State*, 173 Wn.2d 296,302-03,268 P.3d 892 (2011) (quoting *Grant County Fire Prot. Dist. No.5 v. City o/Moses Lake*, 150 Wn.2d 791,802, 83 P.3d 419 (2004)). **Both** tests must be met by the party seeking standing.

Further, the Courts have required a specific injury in fact in order to invoke standing. For example, a taxpayer may not invoke Declaratory Judgments Act to test constitutionality of Port Districts Act, where he does not allege that he owns or is interested in any property within district or will be in any way affected by acts done pursuant to such act, and he shows no substantial interest therein. *Heisey v. Port of Tacoma* (1940) 4 Wash.2d76, 102 P. 2d 258.

**C. West alleges no Facts Establishing Specific Harm or Injury Personal to him.**

Here, Appellant failed to show that he is 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' Nor did he establish any 'injury in fact'. One may not, by declaratory judgment action, challenge constitutionality of statue **unless it appears that he**

**will be directly damaged in person** or in property by its enforcement. *De Grief v. Seattle* (1956) 49 Wash.2d 912, 297 P.2d 940. Accordingly, the Trial Court properly found and this Appeals Court should find that Appellant lacked standing to bring this Declaratory Judgment action.

In order to meet both prongs of the standing requirement, the plaintiff must allege specific facts. *See Five Corners Family Farmers*, 173 Wn.2d 296 at 302-03; *Am. Legion Post No. 149 v. Dep't o/Health*, 164 Wn.2d 570,594, 192 P.3d 306 (2008). Mr West established neither.

Because West fails to establish both prongs of the Uniform Declaratory Judgments Act standing test, this Appeals Court should find accordingly, that Appellant West lacks standing to seek a declaratory judgment.

**D. Declaratory Judgment Action Requires Establishing Appellant Is More Than Just “Any Person” To Confer Standing.**

The sole reference to standing raised by Appellant in his complaint was as follows:

Plaintiff West is “any person” as defined in RCW 42.30.130 with standing to seek relief.

*West Amended Complaint* CP 3. West thus failed to establish either

that (1) he is within the zone of interests to be protected or regulated by the Ports of Tacoma or Seattle or (2) he actually suffered an injury. *See Five Corners Family Farmers*, 173 Wn.2d at 302-03.

The UDJA unquestionably requires more than just being “any person” in order to pursue a declaratory judgment, as West seeks here. <sup>3</sup> Plaintiff West’s singular allegation is exceptionally vague and does not include any specific-facts. More is required.

Nor should the Court be persuaded by the additional allegations West embedded in his Reconsideration Motion CP 278-281 (and repeated in his Opening Brief on Appeal, at 33 & 34)<sup>4</sup> for several reasons.

First, in general, when ruling on a CR 12(b)(6) motion to

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<sup>3</sup> A person . . . **whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise**, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations there under. RCW 7.24.020.

<sup>4</sup> I am particularly and adversely impacted by the determination of the Ports to conduct joint meetings in that I was barred from attending... At the first joint meeting of the ports that was open to the public, I testified as to some of the interests I have in the alliance. I am a taxpayer and landowner in Thurston and Mason Counties and face the prospect of paying a larger port assessment if the new alliance adversely impacts the Port of Olympia. As a property owner and investor, I am also directly and adversely impacted by the broad impacts upon trade, the environment, and the economy caused by such an Alliance by the two largest ports in this State. I live within a block of Budd Inlet, and I am particularly impacted by environmental and other issues stemming from oceangoing trade, which has long been recognized to have widespread impacts. I am also still in litigation with the Port of Tacoma and their reactionary, litigious counsel over records concerning the port of Tacoma's previous maritime alliance with the Port of Olympia, even after seven years and 2 Orders of Remand from the Appellate Courts.

dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings. *Brown v. MacPherson's, Inc.*, 86 Wash.2d 293, 297, 545 P.2d 13 (1975); *Jackson v. Quality Loan Service Corp.* (2015) 186 Wash.App. 838, 347 P.3d 487. West's supplemental allegations were raised outside his complaint, in his Motion for Reconsideration, after the dismissal motion had been granted.

Second, if a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate. *Gorman v. Garlock, Inc.*, 155 Wash.2d 198, 215, 118 P.3d 311 (2005). This is the case here.

To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of **harm personal** to the party **that are substantial rather than speculative or abstract**. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).

West's eleventh hour allegation that he is a "taxpayer and landowner in Thurston and Mason Counties" remains legally insufficient; these contacts are insufficient to confer standing. If status as a citizen or consumer were sufficient to confer standing, the entire doctrine would be superfluous. See *Am. Legion Post No.*

*32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

Further, a plaintiff's status as a landowner will cause a litigant to have standing **only** if the lawsuit involves some harm to the land or the owner's property rights, thus fulfilling the "injury in fact" prong of the standing test. See, e.g., *Orion Corp. v. State*, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985) (a landowner has standing if his property rights were allegedly infringed). Nowhere does Plaintiff West demonstrate how the actions of either Port of Tacoma (Pierce County) or Port of Seattle (King County) implicate or harm his Thurston and Mason County property rights and, therefore, his alleged status as a landowner still does not confer standing.

Last, West's late allegation of being a taxpayer also fails to confer standing. Washington law requires more: "...to sue, "the taxpayer must show that he or she has a unique right or interest that is being violated, in a manner **special and different from the rights of other taxpayers.**" *Am. Legion Post No. 32*, 116 Wn.2d at 7. West has not done this.

#### **E. Absent Standing, Merits Are Not Reached.**

The Washington legislature crafted the UDJA in order "to settle and to afford relief from and insecurity with respect to rights, status and other legal relations." RCW 7.24.120. The UDJA thus allows a

trial court to issue a declaratory judgment if "a judgment or decree will terminate [a] controversy or remove an uncertainty." RCW 7.24.050; see also RCW 7.24.010. Where a plaintiff lacks standing, Washington Courts do not issue advisory opinions and do not consider the merits of a claim. *To-Ro*, 144 Wn.2d at 416.

Except under rare circumstances where a declaratory judgment action presents broad issues of great public importance, a court will not issue a declaratory judgment unless the plaintiff establishes that a justiciable controversy exists. *Am. Traffic Solutions, Inc.v. City of Bellingham*, 163 Wn. App. 427, 432, 260 P.3d 245 (2011), *review denied*, 173 Wn.2d 1029 (2012). And see *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-17, 27 P.3d 1149 (2001) (discussing justiciability under UDJA), *cert. denied*, 535 U.S. 931 (2002).

#### **F. Court Lacks Jurisdiction to Consider Non Justiciable Claim & Must Dismiss.**

Because West lacks standing to bring this claim, the trial court lacked jurisdiction to consider the issues and properly dismissed. A claim is not justiciable, meaning the court does not have jurisdiction to consider the case, unless the plaintiff has standing. *To-Ro*, 144 Wn.2d at 411; *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). As under all laws, courts lack

jurisdiction to consider an action if a party does not have standing to bring the lawsuit. *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing *Grove v. Mead Sch. Dist.* 354, 753 F.2d 1528 (9th Cir.), cert. denied, 474 U.S. 826 (1985)), *appeal dismissed* by 479 U.S. 1073 (1987).

#### **4. Plaintiff West Also Lacks Standing to Raise OPMA Alleged Violations.**

In interpreting the OPMA, Courts first must analyze its language. *West v. Wash. Ass 'n of County Officials*, 162 Wn. App. 120, 130, 252 P.3d 406 (2011) (*WACO*). If the OPMA's language is unambiguous, Courts are to apply its plain meaning. *WACO*, 162 Wn. App. at 130.

The OPMA states that "[a]ny *person* may commence an action either by mandamus or injunction for the purpose of stopping violations ... of [the OPMA] by members of a governing body." RCW 42.30.130 (emphasis added).

Despite the OPMA's broad language, the Washington Supreme Court has recognized that, similar to a party seeking declaratory judgment, a party must assert an injury in order to bring suit under the OPMA. *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 772, 630 P.2d 930 (1981). In *Kirk*, the Washington

Supreme Court held that a plaintiff who attended a public meeting was not entitled to sue under the OPMA alleging that a third party had been denied notice of the meeting. 95 Wn.2d at 770, 772. Only the third party who suffered the injury had standing to raise it. 95 Wn.2d at 772.

In *Kirk*, the Washington Supreme Court was asked to decide if a fire protection district violated the Open Public Meetings Act of 1971 (act), RCW 42.30, when it held a meeting to dismiss the fire chief. Two of the three fire commissioners held an "executive meeting" to consider the Fire Chief's dismissal from his position. The district, purporting to act through the two commissioners, terminated his employment. The Fire Chief brought an action for wrongful termination of his employment, seeking reinstatement and damages for lost salary and benefits. The trial court granted petitioner's motion for summary judgment, ruling that because the district had not complied with the notice requirements for a special meeting, the district's action in dismissing petitioner on May 6 was invalid under the Open Public Meetings.

The Court of Appeals reversed the trial court, and the Supreme Court affirmed, finding that the ***fire chief did not have standing*** to raise issue whether fire protection district violated

Open Public Meetings Act of 1971 by failing to give one of the district commissioners' notice of the special meeting at which the fire chief was dismissed:

In any event, even if the absent commissioner was not properly notified, petitioner has no standing to raise the matter of improper notice to a board member. Only the aggrieved member of the board could raise that issue, and he failed to raise it.

*Kirk*, quoting *State ex rel. Hays v. Wilson*, 17 Wash.2d 670, 673, 137 P.2d 105 (1943); *Casebere v. Clark County Civil Serv. Comm'n*, 21 Wash. App. 73, 76, 584 P.2d 416 (1978).

*Kirk* comports with well-settled principles of federal standing doctrine that a legislative grant of standing to the public as a whole is ineffective to confer standing on an individual. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992):

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized,<sup>5</sup> and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>6</sup> Second, there must be a causal connection between the injury and the conduct complained of—the injury has to

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<sup>5</sup> see *id.*, at 756, 104 S.Ct., at 3327; *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740–741, n. 16, 92 S.Ct. 1361, 1368–1369, n. 16, 31 L.Ed.2d 636 (1972); 1.

<sup>6</sup> *Whitmore, supra*, 495 U.S., at 155, 110 S.Ct., at 1723 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)).

be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.”<sup>7</sup> Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” *Id.*, at 38, 43, 96 S.Ct., at 1924, 1926.

*Lujan*, 504 U.S. at 560-61.

Even where Congress purports to confer standing on all members of the public, a plaintiff must demonstrate an injury in fact to his own person, rather than to the public, to show standing. *Lujan*, 504 U.S. at 577-78. (“This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does **not** state an Article III case or controversy. See, *e.g.* *Fairchild v. Hughes*, 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499.)”

It is an established principle,” we said, “that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is **immediately in danger of sustaining a direct injury** as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.

*Lujan* citing to *Ex parte Lévit*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), 302 U.S., at 634, 58 S.Ct., at 1. See also *Doremus v.*

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<sup>7</sup> *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976).

*Board of Ed. of Hawthorne*, 342 U.S. 429, 433–434, 72 S.Ct. 394, 396–397, 96 L.Ed. 475 (1952) (dismissing taxpayer action on the basis of *Mellon*).

“Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be converted into an individual right by a statute denominating it as such and permitting all citizens to sue, **regardless of whether they suffered any concrete injury**, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art.II, § 3.” *Id* at pp. 576-7.

Washington's standing doctrine is drawn from federal law. *See High Tide Seafoods*, 106 Wn.2d at 702 (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) and *Craig v. Boren*, 429 U.S. 190, 193-94, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)).

Rather than demonstrate an injury, in his Complaint, West vaguely asserts, only that he is “any person” as defined in RCW 42.30.130 with standing to seek relief. *CP 15-19*. Even when supplemented by his additional Reconsideration allegations, Mr West’s overly simplistic arguments are flawed in several ways. First, he fails to provide the Court with a citation supporting his

allegation.

Second, Mr West overlooks that, in addition to ample federal standing law, the Washington Supreme Court has ruled that standing under the Open Public Meeting Act is a ***threshold test prior*** to determining whether a violation occurred and or whether any alleged violation is actionable, re *Kirk*.

In *Kirk*, the Fire Chief Petitioner had a significantly stronger argument that Petitioner West does in this case to claim injury resulting from an alleged Open Public Meetings Act Violation. The Chief was directly impacted by the meeting's results (terminated). Here, West provided the Court no linkage at all to the Ports of Seattle and Tacoma as an organization, nor alleged how any action at the complained of meetings impacts Mr. West at all.

The *Kirk* case also tells us that West's inability to establish standing as a threshold matter eliminates any further discussion of whether a violation occurred and whether West would be entitled to damages. The Fire Chief in *Kirk* also contends that as a result of his wrongful dismissal he was entitled to damages. The Supreme Court disagreed, "...but he alleges no wrongdoing except violation of the act. Even assuming petitioner would have a private cause of action for such a violation, ***a question we need not decide***, we discern

***no basis for an award of damages in these circumstances where there is no violation of which petitioner can complain.*** *Kirk* at 773.

Interpreting the OPMA consistently with *Kirk* and with federal law, this Appeals Court should find that West's bare assertions are insufficient to show that he has standing under the OPMA. West's vague pleadings, standing alone, state no cause for which relief may be granted.

**5. No Justiciable Controversy Exists as Appellant Lacks Standing; Declaratory Judgment Action Fails.**

A Declaratory Judgment action may not be used for the purpose of obtaining a purely advisory opinions. *Seattle First National Bank v. Crosby*, 41 Wn2d 234, 254 P2d 732 (1953). Declaratory Judgment action must be adversarial in character, and involve present and actual, as opposed to possible or potential controversy between parties. *De Grief v. Seattle*, 50 Wa2d 1, 297 P.2d 940 (1956).

The controversy must be justiciable in order to support a proceeding for, or the award of, declaratory relief.<sup>8</sup> The

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<sup>8</sup> *Nostrand v. Little*, 58 Public Service Commission of Utah v. Wycoff Co., Inc., 344 U.S. 237, 73 S. Ct. 236, 97 L. Ed. 291 (1952); *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir. 1960). *Wash. 2d* 111, 361 P.2d 551 (1961).

requirements for a justiciable controversy are no less exacting in a case brought under the declaratory judgment statute than in any other type of suit. *Id.* <sup>9</sup> In order to be justiciable, the controversy must be within the jurisdiction of the court. *Id.*

“Justiciable controversy” requires parties having existing and genuine, as distinguished from theoretical, rights or interests; controversy must be one upon which judgment of court may effectively operate; <sup>10</sup> judicial determination of controversy must have force and effect of final judgment or decree upon relationships of one or more of parties in interest or be of such great public moment as to constitute legal equivalent of them; and proceedings must be genuinely adversary in character. RCWA 7.24.010.

Here, Appellant lacks standing and has not shown how the issues presents an injury personal to him. Appellant therefore, fails to assert any facts upon which relief may be granted.

What are the principal elements of a justiciable controversy as contemplated by the Uniform Declaratory Judgments Act, RCW 7.24? **First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests.** Second, the controversy must be one upon which the judgment of the court may effectively operate,

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<sup>9</sup> See also *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 210 U.S.P.Q. (BNA) 344 (9th Cir. 1981); *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992 (S.D.N.Y. 1973).

<sup>10</sup> *State ex rel. O'Connell v. Dubuque*, 68 Wash. 2d 553, 413 P.2d 972 (1966).

**as distinguished from a debate or argument evoking a purely political, administrative, philosophical** or academic conclusion. Third, it must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution. The decisions of this court, when considered seriatim, recognize and apply this definition. *Hubbard v. Medical Ser. Corp.*, 59 Wash.2d 449, 367 P.2d 1003 (1962); *State ex rel. Ruoff v. Rosellini*, 55 Wash.2d 554, 348 P.2d 971 (1960); *Huntamer v. Coe*, 40 Wash.2d 767, 246 P.2d 489 (1952); *Adams v. City of Walla Walla*, 196 Wash. 268, 82 P.2d 584 (1938); *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938); *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P.2d 341, 114 A.L.R. 1345 (1937).

*State ex rel. O'Connell v. Dubuque*, 68 Wash. 2d 553, 557, 413 P.2d 972 (1966).

**'It should be remembered that this court is not authorized to render advisory opinions or pronouncements upon abstract or speculative questions under the declaratory judgment act.**

The action still must be adversary in character between real parties and upon real issues, that is, between a plaintiff and defendant having opposing interests, and the interest must be direct and substantial and involve an actual as distinguished from a possible or potential dispute, to meet the requirements of justiciability.' See also *Kitsap County v. City of Bremerton* (1955), 46

*Wash.2d 362, 281 P.2d 841; Adams v. City of Walla Walla (1938), 196 Wash. 268, 82 P.2d 584.*

*Washington Beauty College, Inc. v. Huse (1938), 195 Wash. 160, 164, 80 P.2d 403, 405.*

#### **6. Prior Dismissed Cases In Accord Where West Lacked Standing.**

Mr West's dearth of factual standing allegations is especially telling, given the Court of Appeals previously on two occasions so clearly found against him on near identical grounds. *See West v. WPPA*, Thurston County Cause NO. 06-2-01972-2, where the Court granted Summary Judgment to WPPA based on West lack of standing issue (Honorable Gary R Tabor) and its subsequent Court of Appeals Division II ruling *West. v. Washington Pub. Ports Ass'n*, 146 Wash. App. 1003 (Div. 2, 2008), upholding the Dismissal; and a second Court of Appeals ruling, also affirming case dismissal based on West lack of standing issue, in *West. v. Marzano*, 171 Wn.App. 1004 (Div. 2, 2012), *review denied*, 176 Wn.2d 1023, (2013), CP 182-240 and copies attached as **Appendix 1, 2, and 3** hereto<sup>11</sup>. In the 2006 *West v. WPPA* Court of Appeals opinion, the Appeals Court found:

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<sup>11</sup> Both Court of Appeals decisions are unpublished. These are provided for background only and not as precedent.

West challenged the trial court's dismissal of his UDJA claims, in which he asked the trial court to declare that the WPPA is a public agency that is subject to the Public Records Act, the OPMA, and the State Environmental Policy Act. **Because West lacked standing to bring these claims, the trial court did not have jurisdiction to consider them and their dismissal was appropriate.**

**As under all laws, courts lack jurisdiction to consider an action if a party does not have standing to bring the lawsuit.** *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986 (citing *Grove v. Mead Sch. Dist.* 354, 753 F.2d 1528 (9th Cir.), cert. denied, 474 U.S. 826 (1985)), *appeal dismissed* by 479 U.S. 1073 (1987).

*Id.*, **Appendix 1, 2, and 3** attached hereto. In the present case, this Court should also find that West lacks standing to request the relief.

**7. No Continuance is Warranted for CR 12(b)(6) Motion.**

West on appeal claims err for the Court “denying a continuance under CR 56(f).” Opening Brief at 35. But the record on appeal fails to support that West filed any Motion for continuance. See Clerks’ Papers attached, as **Appendix 4**. Nor does the transcript at hearing reflect any West continuance request.

An appellant bears the burden of perfecting the record on appeal. An appellate court may decline to consider an issue if the appellate record is inadequate to permit effective review.

*Rhinevault v. Rhinevault*, 91 Wn. App. 688, at 689, (1988). Every

factual statement included in an appellant's brief must be supported by citation to the record. RAP 10.3(a)(4). Sanctions ordinarily adhere for failure to do so; see, e.g., *Hurlbert v. Gordon*, 64 Wn. App. 386, 400-01, 824 P.2d 1238 (1992) (imposing \$750 in sanctions for "laissez-faire" briefing, as errors "hampered the work of the court"); *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990) ("The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court.").

Moreover, whether a CR 12(b)(6) dismissal is appropriate is a question of law. *Tenore v. AT & T Wireless Servs.*, 136 Wash.2d 322, 329-30, 962 P.2d 104 (1998). West has not shown how a continuance, even if requested, which it was not, would bear on the disputed issues of law. No error has been shown.

### **8. The Ports Should Be Awarded Fees & Costs**

The Ports request attorney fees and costs based on this frivolous appeal. RAP 18.1;<sup>12</sup> RCW 4.84.185.13 and RAP 18.9.14 A lawsuit is

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<sup>12</sup> RAP 18.1. (a) **Generally.** If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court. (b) **Argument in Brief.** The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made

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

The Ports request that this Court order Appellant West to pay its attorney fees and costs for having to respond yet again to this frivolous issue of standing. RAP 18.1, 18.9 and or RCW 4.84.185.

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

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in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

<sup>13</sup> **4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense.** In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

<sup>14</sup> **RULE 18.9 VIOLATION OF RULES**

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

administrative agency. *State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985).

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

An appeal is frivolous if there are “no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility’ of success.” *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)).

This appeal is frivolous. West presents no debatable point of law, his appeal (yet again) lacks merit, and the chance for reversal is nonexistent. This was true in his pleadings before the Superior Court; it remains true now. Mr. West was given the several opportunities for a graceful exit, without a monetary penalty to him, but he chooses to persist. Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Eugster v. City of Spokane*, (2007) 139 Wash.App. 21, 156 P.3d 912.

#### IV. CONCLUSION

This Court should find that Plaintiff West presents no justiciable issue as he lacks standing to bring this Declaratory Judgment Action and to pursue allegation of violations of the OPMA by the Ports of Tacoma and Seattle. The appeal should be dismissed. In addition, the Ports should be awarded their fees and costs.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of November, 2015.

GOODSTEIN LAW GROUP PLLC

By: s/Carolyn A. Lake  
Carolyn A. Lake, WSBA #13980  
Seth Goodstein WSA# 45091  
Attorneys for Port of Tacoma

1  EXPEDITE

2  HEARING IS SET:

3 DATE:

4 TIME:

5 JUDGE: Honorable Judge Tabor

6 THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
7 IN THE COUNTY OF THURSTON

8 ARTHUR S. WEST,

9 Plaintiff,

10 v.

11 WASHINGTON PUBLIC PORT ASSOCIATION  
12 & ROBERT VAN SCHOORL

13 Defendants,

NO. 06-2-01972-2

ORDERGRANTING WPPA'S  
MOTION FOR SUMMARY  
JUDGEMENT & MOTION TO STRIKE

14 THIS MATTER coming on for hearing on the motion of Defendant Washington  
15 Public Port Association (WPPA) for summary judgment, said defendants appearing by  
16 and through their attorney of record, Carolyn Lake of the Goodstein Law Group PLLC,  
17 and plaintiff Arthur West appearing pro se. The Court having heard argument of the  
18 parties and considered the records and files herein, including:

	<b>Date Filed</b>	<b>Pleading</b>
19		
20	1 11-30-2006	WPPA's Motion To Dismiss
21	2 11-30-2006	Declaration Of Pat Jones
22	3 12-06-2006	Response Of Plaintiff
23	4 12-27-2006	Declaration Of A. West
24	5 01-05-2007	WPPA Memorandum In Support of Summary Judgment & Motion to Strike
25	6 01-22-2007	Plaintiff's Memorandum In Response
	7 01-25-2007	Response Of Defendant WPPA

ORDERGRANTING WPPA'S MOTION FOR  
SUMMARY JUDGEMENT & MOTION TO STRIKE

- 1 070131.pldg.Order Granting WPPA SJ .doc

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Tel: 253 779-4000

**APPENDIX 1**

1 Based on the foregoing, and the Court being fully advised; the Court finds:

- 2 1. To the extent that the Plaintiff seeks a Declaratory Judgment, the  
3 Plaintiff lacks standing to bring to bring this Declaratory Judgment  
4 action pursuant to RCW 7.24.020 under the facts presented to the Court.
- 5 2. Based on Plaintiff's failure to present facts or make an offer of proof in  
6 support of his claim of WPPA's alleged violation of the Open Public  
7 Meeting Act, i.e., no justiciable controversy exists and or Plaintiff has  
8 failed to state a claim upon which relief may be granted pursuant to CR  
9 12(b)(6).
- 10 3. Based on Plaintiff's failure to present facts or make an offer of proof in  
11 support of his claim of WPPA's alleged "Unconstitutional Expenditure of  
12 Public Funds", no justiciable controversy exists and or Plaintiff has failed  
13 to state a claim upon which relief may be granted pursuant to CR  
14 12(b)(6).
- 15 4. Based on Plaintiff's failure to present facts or make an offer of proof (a)  
16 in support of his claims of WPPA's alleged violation of the Public  
17 Records Act, (b) in Support of Plaintiff's requested Global Declaration  
18 that the WPPA is subject to the Public Records Act (PRA), (c) in support  
19 of his claims of WPPA's alleged violation of the State Environmental  
20 Policy Act, and (d) in support of his claims of Defendant Van Schoorl's  
21 alleged conflict of interest claim, no justiciable controversy exists and or  
22 Plaintiff has failed to state a claim upon which relief may be granted  
23 pursuant to CR 12(b)(6).
- 24  
25

1 Now, therefore, IT IS ORDERED, DECREED AND ADJUDGED that:

- 2 1. Defendant WPPA's Motion for Summary Judgment is GRANTED;
- 3 2. Defendant WPPA's Motion to Strike is GRANTED;
- 4 3. Counsel for WPPA shall cause to be filed a transcript of the
- 5 Court's verbal ruling in this matter.
- 6 3. Plaintiff's claims are hereby DISMISSED with out prejudice.

7  
8 DONE IN OPEN COURT THIS 9 day of February 2007.

9  
10 LSI  
11 Hon. Judge Tabor

12 Presented by:

13 GOODSTEIN LAW GROUP, P.L.L.C.

14 LSI  
15 Carolyn A. Lake WSBA #13980  
16 Attorneys for Defendant Port of Olympia

17 ~~Approved as to form,~~  
18 ~~notice of presentation waived:~~

19 ARTHUR S. WEST

20 *with objections as to findings*

21 LSI  
22 Arthur S. West, plaintiff pro se

23  
24  
25 ORDER GRANTING WPPA'S MOTION FOR  
SUMMARY JUDGEMENT & MOTION TO STRIKE  
- 3 070131.pldg.Order Granting WPPA SJ .doc

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COURT OF APPEALS

03 JUL 22 AM 8:04

STATE OF WASHINGTON

BY lp  
CLERK

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

ARTHUR S. WEST,

Appellant,

v.

WASHINGTON PUBLIC PORTS  
ASSOCIATION and ROBERT VAN  
SCHOORL,

Respondents.

No. 36112-4-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Arthur West appeals an order granting summary judgment to the Washington Public Ports Association (WPPA) and Robert Van Schoorl, WPPA's former president. West argues that the trial court erred when it (1) did not require WPPA to respond to his discovery requests that he made after the summary judgment hearing, (2) struck three documents he submitted as evidence, (3) held that West did not have standing under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, and (4) granted summary judgment to the WPPA. We affirm.

**FACTS**

West submitted a public records request to WPPA on September 25, 2006. Four days later, WPPA sought clarification. West clarified his request on October 6, and then, four days later, WPPA responded that it would make the requested records available to West by October

**APPENDIX 2**

No. 36112-4-II

West commenced a lawsuit against WPPA on October 20, 2006. He alleged generally that WPPA violated the Public Records Act, ch. 42.56 RCW, and sought a declaratory judgment stating that WPPA is a public agency subject to the Public Records Act and a host of other laws.

On January 5, 2007, WPPA moved for summary judgment and to strike three documents that West had attached to his pleadings. West responded to the motion on January 22. The trial court held a summary judgment motion hearing on January 26.<sup>1</sup> Then, on February 2, West filed a document entitled "MOTION TO COMPEL ADMISSIONS AND PRODUCTION AND MOTION FOR DEFAULT." Clerk's Papers (CP) at 292. WPPA responded with a brief in which it argued that the discovery request was untimely. The trial court held a motion hearing on February 9, apparently to resolve the continuance and discovery issue, but our record does not contain a ruling on this matter.

Also on February 9, 2007, the trial court entered a written order granting summary judgment to WPPA.<sup>2</sup> The trial court held that West lacked standing to request a declaratory judgment under RCW 7.24.020. It also dismissed West's claims that (1) the WPPA violated the Open Public Meetings Act of 1971 (OPMA), ch. 42.30 RCW, (2) the WPPA made an

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<sup>1</sup> The hearing is shown on the trial court's docket. WPPA contends that the trial court granted summary judgment in an oral ruling that day. West did not make the report of proceedings part of our appellate record to dispute this claim. RAP 9.2(a), 9.3, 9.5(a) (declaring appellant's duty to perfect record for appeal). We do not review matters outside our record. *Weems v. N. Franklin Sch. Dist.*, 109 Wn. App. 767, 779, 37 P.3d 354 (2002) (citing *State v. McFarland*, 127 Wn.2d 335, 899 P.2d 1251 (1995)).

<sup>2</sup> The trial court did not consider two declarations that West submitted on February 8, 2007, which was after the summary judgment hearing and one day before the trial court entered its written ruling granting summary judgment. The decision to reject declarations filed after a summary judgment hearing, but before the final written ruling, lies within the trial court's sound discretion. *Brown v. Peoples Mortgage Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). Although West refers to his declarations in his brief, he has not appealed the decision to reject them. A commissioner of our court issued a ruling striking the declarations. Accordingly, we do not rely on the declarations because they are not a part of the record at the trial court or on appeal.

No. 36112-4-II

“Unconstitutional Expenditure of Public Funds,” (3) the WPPA violated the Public Records Act, (4) the trial court should enter a “Global Declaration” that the WPPA is subject to the Public Records Act, (5) the WPPA violated the State Environmental Policy Act, ch. 43.21C RCW, and (6) Van Schoorl had a conflict of interest. The trial court reasoned that these six claims warranted dismissal because West failed to present facts showing a justiciable controversy existed and failed to state a claim upon which relief may be granted. Thus, the trial court granted WPPA’s motion for summary judgment, granted the WPPA’s motion to strike, and dismissed the claims without prejudice. The trial court denied West’s motion for reconsideration.

West appeals.<sup>3</sup>

#### ANALYSIS

##### CONTINUANCE

West argues that the trial court erred by not requiring WPPA to respond to his February 2 discovery requests. But the proper issue before us is whether the trial court erred when it declined to grant a continuance in order to allow West to conduct additional discovery. West made this request after the summary judgment hearing on January 26, which is not contained in our record, but before the February 9 written ruling, which is in our record. Such discovery may have proven relevant if the trial court had not yet made a final summary judgment ruling or if it heard a motion to reconsider an earlier ruling. The record before us is insufficient to address this issue.

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<sup>3</sup> A commissioner of our court ruled that this matter is appealable as a matter of right because the order effectively discontinued the action. *See Barnier v. Kent*, 44 Wn. App. 868, 872 n.1, 723 P.2d 1167 (1986).

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The party seeking review, West, has the burden to perfect the record so that, as the reviewing court, we have all relevant evidence before us. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (citing *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992)). An insufficient appellate record precludes review of the alleged errors. *Bulzomi*, 72 Wn. App. at 525 (citing *Allemeier v. Univ. of Wash.*, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985), *review denied*, 105 Wn.2d 1014 (1986)).

Here, West has not provided us with an adequate record. At a minimum, such record would include the written ruling denying his request for a continuance or the report of proceedings from the motion hearing containing the trial court's oral decision. Upon the record provided, we cannot determine whether West proved to the trial court good cause to conduct additional discovery nor can we evaluate the trial court's rationale for denying West's request. *See* CR 56(f); *Cogle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990) (outlining rules regarding requests for a continuance to conduct further discovery in order to oppose a summary judgment motion; determination is fact-based). Accordingly, we do not address West's discovery challenge on its merits.

#### EVIDENTIARY RULING

Next, West appeals the trial court's decision to strike three documents that he submitted. It appears that the trial court struck (1) the WPPA's 1960 Articles of Incorporation, (2) a check dated December 2006, and (3) a letter that West wrote to the Attorney General.<sup>4</sup>

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<sup>4</sup> On appeal, WPPA argues that the trial court properly struck nine of West's attachments. The trial court did not explain what documents it struck in its written ruling and the oral ruling is not part of our appellate record. But the trial court indicated that it granted WPPA's motion to strike and the written motion (the only relevant portion of our record) contends only that the trial court should strike these three attachments. Accordingly, we review whether the ruling was erroneous regarding the three contested documents and consider the remaining six documents in our review of summary judgment because they were apparently before the trial court.

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We review a trial court's ruling on a motion to strike for abuse of discretion. *King County Fire Prot. Dists. No. 16, et al. v. Housing Auth. of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994) (citing *Orion Corp. v. State*, 109 Wn.2d 621, 638, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988)). A trial court may base its summary judgment ruling only on "pleadings, depositions, answers to interrogatories, . . . admissions on file [and] affidavits, if any." CR 56(c). Further:

[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Sworn or certified copies* of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

CR 56(e) (emphasis added).

Here, the three attachments are admissible for summary judgment purposes only if they are "sworn or certified copies" of documents referred to in West's affidavits. CR 56(e). These three documents are neither sworn nor certified. Accordingly, the trial court did not abuse its discretion when it declined to consider them when ruling on summary judgment.

#### STANDING UNDER THE UDJA

West challenges the trial court's dismissal of his UDJA claims, in which he asked the trial court to declare that the WPPA is a public agency that is subject to the Public Records Act, the OPMA, and the State Environmental Policy Act. Because West lacked standing to bring these claims, the trial court did not have jurisdiction to consider them and their dismissal was appropriate.

Our legislature crafted the UDJA in order "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." RCW 7.24.120. The UDJA thus allows a trial court to issue a declaratory judgment if "a judgment or decree will

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terminate [a] controversy or remove an uncertainty.” RCW 7.24.050; *see also* RCW 7.24.010. The act does not, however, allow trial courts to issue advisory opinions except on exceptionally rare occasions where the public’s interest in the resolution of an issue is overwhelming and the issue is adequately briefed and argued. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-17, 27 P.3d 1149 (2001) (discussing justiciability under UDJA), *cert. denied*, 535 U.S. 931 (2002).

As under all laws, courts lack jurisdiction to consider an action if a party does not have standing to bring the lawsuit. *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (citing *Grove v. Mead Sch. Dist.* 354, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985)), *appeal dismissed by* 479 U.S. 1073 (1987). Standing is roughly defined as a personal stake in the challenge. *See High Tide Seafoods*, 106 Wn.2d at 701-02. We review a party’s standing de novo. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999).

We review whether a party has standing to bring a particular action by applying a two-part test:

First, we ask whether the interest asserted is arguably within the zone of interests to be protected by the statute or constitutional guaranty in question. Second, we consider whether the party seeking standing has suffered from an injury in fact, economic or otherwise. Both tests must be met by the party seeking standing.

*Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004) (citations omitted).

The only allegations relevant to standing are West’s assertions that (1) he is “a landowner and a citizen conducting business in Thurston County Washington and in the Cities of Tumwater and Olympia, with standing to maintain this action,” CP at 11; (2) he is “a property owner in a port district whose representative[, Tim Sheldon,] has requested an [Attorney General’s Opinion] on the issue of the status of the WPPA,” CP at 269; (3) the issue of whether WPPA is a public

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agency is “of statewide significance and of broad public import,” CP at 58; and (4) West “submitted the required standing letter under Reiter v. Walilgren, 28 Wn. 2d 872, 184 P.2d 571 (1947)” regarding the claim of unconstitutional expenditure of public funds, CP at 61. These assertions are insufficient to confer standing because they fail to show that West has “suffered from an injury in fact,” a basic requirement for invoking a court’s jurisdiction. *Branson*, 152 Wn.2d at 876.

We address the assertions of standing contained in West’s pleadings in turn. First, being a landowner and citizen is insufficient to confer on a person standing to commence a lawsuit over the question of whether an entity like WPPA is a public agency subject to a host of statutes. If status as a citizen or consumer were sufficient to confer standing, the entire doctrine would be superfluous. *See Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). And a plaintiff’s status as a landowner will cause a litigant to have standing only if the lawsuit involves some harm to the land or the owner’s property rights, thus fulfilling the “injury in fact” prong of the standing test. *See, e.g., Orion Corp. v. State*, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985) (a landowner has standing if his property rights were allegedly infringed). West does not demonstrate how WPPA’s actions implicate his property rights and, therefore, his status as a landowner does not confer standing.

Second, a state senator’s decision to ask for an Attorney General’s Opinion is irrelevant to the question of whether one of that senator’s constituents has standing to commence a lawsuit. Standing analysis focuses on litigants’, not politicians’, interests. *See Orion Corp.*, 103 Wn.2d at 455. Third, West suggests that he has presented a question of public interest for which standing requirements are relaxed. In *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wn.2d 175, 178, 492 P.2d 1012 (1972), our Supreme Court has held that appellate courts may decide a

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question of public interest that has been adequately briefed and argued if doing so would benefit the public and government officers. Assuming the questions posed are of public interest, West's briefing and the inadequate appellate record make it inappropriate for us to attempt to address West's claims on the merits.

Last, West's reliance on taxpayer standing and *Reiter* is misplaced. In *Reiter*, our Supreme Court held that, without statutory authorization, a taxpayer *does not* have standing to challenge the legality of public officers' acts unless he first requests that a proper public official sue on behalf of all taxpayers. 28 Wn.2d at 876-77. But *Reiter's* holding does not mean, conversely, that a taxpayer *has* standing simply because he wrote a letter demanding that the Attorney General's Office commence litigation. Rather, to sue, "the taxpayer must show that he or she has a unique right or interest that is being violated, in a manner special and different from the rights of other taxpayers." *Am. Legion Post No. 32*, 116 Wn.2d at 7. West has not done this. Moreover, to the extent that West seeks an advisory opinion regarding a matter for which he lacks standing, Washington courts may not issue such advisory opinions. *To-Ro Trade Shows*, 144 Wn.2d at 416 (holding that a court may not deliver an advisory opinion under the UDJA if standing and other justiciability factors are not satisfied, barring a substantial public interest that is adequately briefed). Accordingly, West does not have standing to seek a declaratory judgment and we may not address his alleged public interest claims in an advisory opinion.

#### SUMMARY JUDGMENT

Last, West appeals the trial court's grant of summary judgment to WPPA on his claims that (1) it violated the OPMA, (2) it made unconstitutional expenditures of public funds, and (3) its president had a conflict of interest. He has abandoned his public records request claim. And

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he does not dispute WPPA's evidence that it responded to his request with a timely letter asking for clarification, followed by the disclosures West sought.

As stated above, we do not issue advisory opinions. *Commonwealth Ins. Co. of Am. v. Grays Harbor County*, 120 Wn. App. 232, 245, 84 P.3d 304 (2004) (citing *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 164, 80 P.2d 403 (1938)). Thus, even if the record before us contained sufficient evidence, which it does not, we may not issue a ruling answering the merits of West's claims absent a real justiciable controversy. *Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 924, 91 P.3d 903 (2004) (citing *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000); *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490, 997 P.2d 960 (2000), *aff'd*, 144 Wn.2d 403, 27 P.3d 1149 (2001)), *review denied*, 153 Wn.2d 1015 (2005).

A. STANDARD OF REVIEW

We review an appeal from summary judgment de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)); *see also Berger v. Sonneland*, 144 Wn.2d 91, 102-03, 26 P.3d 257 (2001).

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). Here, West is the nonmoving party. After the moving party meets its initial burden to show an absence of material fact, the burden shifts to the party with the burden of proof at trial, here West. *Young v. Key*

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*Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). When that party responds to the summary judgment motion, he cannot rely on mere allegations contained in the pleadings. *Young*, 112 Wn.2d at 225. Instead, he must offer affidavits or other means provided in CR 56 to set forth specific facts showing that there is a genuine issue for trial. *Young*, 112 Wn.2d at 225-26.

B. OPEN PUBLIC MEETINGS

In his complaint, West (1) sought a declaratory judgment that WPPA is subject to the OPMA, ch. 42.30 RCW, (2) asserted that WPPA violated the OPMA without specifying how, and (3) requested an injunction to prevent future violations. Above, we held that West lacks standing to bring a declaratory judgment action. And we hold that summary judgment was appropriate for the remaining OPMA claims.

Unless an exception applies, “[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency.” RCW 42.30.030. “Any person may commence an action either by mandamus or injunction for the purpose of stopping violations or preventing threatened violations of [the OPMA] by members of a governing body.” RCW 42.30.130.

Here, West did not present a genuine issue of material fact regarding this open meetings claim because he did not support his claim of an OPMA violation. Instead, he asserted that the OPMA applies to the WPPA and requested an advisory opinion confirming his assertion. Courts are prohibited from issuing advisory opinions. *Commonwealth Ins. Co. of Am.*, 120 Wn. App. at 245. And the record contains no evidence of an OPMA violation. “[B]are assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence.” *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

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Evidence of an OPMA violation could include affidavits showing that a meeting was held on a particular day but that it was closed to the public or otherwise did not conform to the OPMA's requirements.<sup>5</sup> See, e.g., *Protect Peninsula's Future v. Clallam County*, 66 Wn. App. 671, 833 P.2d 406 (1992), review denied, 121 Wn.2d 1011 (1993). Assuming, without deciding, that WPPA is subject to the OPMA, West did not present a genuine issue of material fact regarding an OPMA violation and, therefore, the trial court did not err when it entered summary judgment on this claim.

C. UNCONSTITUTIONAL EXPENDITURE OF PUBLIC FUNDS

West also claimed that WPPA made an unconstitutional expenditure of public funds for lobbying activities. In support of this claim, he provided evidence of a WPPA disclosure that it spent money to hire lobbyists.

It is unclear what law West relies on in bringing this claim. Our constitution sets requirements for the expenditure of public funds, including (1) a prohibition on paying money out of the state treasury without an appropriation, (2) a requirement of timely payments and specific sums and objects of an appropriation, and (3) a prohibition on lending or giving public money or credit. *Wash. Ass'n of Neighborhood Stores v. State*, 149 Wn.2d 359, 365-66, 70 P.3d 920 (2003) (citing WASH. CONST. art. VIII, § 4); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 652, 62 P.3d 462 (2003) (quoting WASH. CONST. art. VIII, § 7). It is unclear how West's claim challenges WPPA's compliance with these, or other, constitutional requirements and his evidence does not raise a genuine issue of material fact regarding whether

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<sup>5</sup> West had an opportunity to obtain such evidence through the discovery process before WPPA moved for summary judgment but apparently declined to do so.

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WPPA violated any law when it hired lobbyists. The trial court did not err in entering summary judgment on this claim.<sup>6</sup>

D. CONFLICT OF INTEREST

Finally, West alleged that Van Schoorl had a conflict of interest because he was simultaneously WPPA's president, an Olympia port commissioner, and budget director for the Department of Natural Resources. Van Schoorl was defeated as port commissioner in the November 2007 general election and is no longer WPPA's president. We may decline review of an issue if it is moot because we are unable to provide effective relief. *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wn.2d 70, 73, 442 P.2d 967 (1968); *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981); *see also To-Ro Trade Shows*, 144 Wn.2d at 411 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Courts cannot provide effective relief regarding the alleged conflict of interest here because such a conflict no longer exists. Thus, the conflict issue is moot and we decline to review it.

ATTORNEY FEES AND COSTS

WPPA requests West pay its attorney fees and costs for having to respond to what it characterizes as a frivolous appeal. RAP 18.1; RCW 4.84.185. An appeal is frivolous if it raises no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Andrus v. Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), *review denied*, 157 Wn.2d 1005 (2006). Although West does not prevail, this appeal is not frivolous. He arguably has raised issues of public interest concerning alleged expenditures of public funds. Moreover,

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<sup>6</sup> West also argues that WPPA's lobbying activity exceeded the authority delegated to it under chs. 39.84 and 53.06 RCW. We decline to address this issue because it was not properly before the trial court. RAP 2.5(a).

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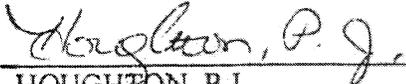
the conflicts issue is moot, not wholly devoid of merit. Accordingly, we decline to award fees and costs.

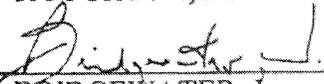
Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

  
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QUINN-BRINTNALL, J.

We concur:

  
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HOUGHTON, P.J.

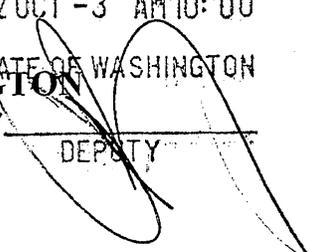
  
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BRIDGEWATER, J.

FILED  
COURT OF APPEALS  
DIVISION II

2012 OCT -3 AM 10:00

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

BY  DEPUTY

DIVISION II

ARTHUR WEST,

No. 41497-0-II

Plaintiff/Appellant,

v.

DICK MARZANO; PAT JONES;  
JOE MELROY; PAUL SCHNEIDMILLER;  
HERB BECK; AMBER HANSON;  
THE WASHINGTON PUBLIC PORTS  
ASSOCIATION,

UNPUBLISHED OPINION

Defendants/Respondents,

STATE OF WASHINGTON,

Defendant.

WORSWICK, C.J. — In this Public Records Act<sup>1</sup> (PRA) and Open Public Meetings Act<sup>2</sup> (OPMA) case, Arthur West brought suit against the Washington Public Ports Association. In his suit, he requested a declaratory judgment finding the Association is a public agency. West also sued for costs and statutory penalties alleging the Association violated the OPMA and the PRA. The trial court summarily dismissed West's lawsuit, finding that (1) West did not have standing

<sup>1</sup> Chapter 42.56 RCW.

<sup>2</sup> Chapter 42.30 RCW.

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to assert a cause of action under the Uniform Declaratory Judgments Act,<sup>3</sup> (2) West did not have standing to pursue a claim under the OPMA, and (3) West failed to allege facts to support his claim that the Association violated the PRA. We affirm.<sup>4</sup>

## FACTS

West made two PRA requests for documents from the Association, one in 2008 and another in 2009. Although West's present appeal is based on the Association's response to his 2009 PRA request, his 2009 request renewed and expanded his 2008 request. Accordingly, we discuss both West's 2008 and 2009 PRA requests for documents from the Association.

### A. *West's June 2008 PRA Request*

West requested records from the Association in June 2008.<sup>5</sup> Specifically, West sought communications between the Association and its legal counsel, Stoel Rives and Goodstein Law Group, dated between January 2005 and June 2008 on "the projects or activities" counsel performed for the Association, including invoices, policy statements, guides, and manuals. The Association timely responded to West's request and informed him that it anticipated having the requested records ready for his review by mid-July.

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<sup>3</sup> Chapter 7.24 RCW.

<sup>4</sup> In his reply brief, West argues that we should strike the Association's brief and impose CR 11 sanctions against the Association's counsel for misstating the record. We do not consider these arguments because the Association's brief supports its arguments with accurate citations to the record and we cannot award sanctions under CR 11. See *Kinney v. Cook*, 150 Wn. App. 187, 195, 208 P.3d 1 (2009); RAP 12.2.

<sup>5</sup> West's June 2008 request purports to clarify an earlier request, and one of the Association's written responses states that West's June 2008 request clarified his April 28, 2008 request. But West does not argue that the Association's response to his April 28 request was deficient.

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The Association notified West on July 14 and August 25 that the records he requested were available for his review by appointment during the Association's normal business hours. At that time, the Association did not claim that any of the records West requested were exempt from production under the PRA. West did not contact the Association to review the records, so on February 27, 2009, the Association sent West a letter informing him that it was closing his records request.

B. *West's April 2009 PRA Request*

In April 2009, more than a month after the Association closed his June 2008 request, West made another records request to the Association for eight types of records. West specifically requested the following records: (1) "ex parte communications" between the Association and the Washington Supreme Court or any of its justices from October 19, 2008 to present, including the text of any speeches given by any justice at an Association meeting; (2) a copy of a resolution; (3) "[a]ll E-mails sent by the [Association's] Executive Director from January of 2007 to present;" (4) any records related to the Association's record retention and destruction schedule; (5) indexes of all the public records the Association maintains; (6) all records related to the Association's internet server, including its backup and e-mail recovery practices; (7) all records on backup files of the Association's employees' e-mails; and (8) all records relating to the Association's e-mail archiving programs. Clerk's Papers (CP) at 67.

West's April 2009 request for "[a]ll E-mails sent by the [Association's] Executive Director from January of 2007 to present" necessarily included several of the same records he requested in his June 2008 request for communications between the Association and its legal

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counsel at Stoel Rives and Goodstein Law Group between January 2005 and June 2008. But West's April 2009 records request was much broader in scope than his June 2008 request.

The Association timely responded to West's request, stating that (1) it would re-collect and update the documents responding to his June 2008 request for communications with its legal counsel at Stoel Rives and Goodstein Law Group and have those records ready for his inspection by May 8, and (2) it would have the additional documents responding to the rest of his broader April 2009 request ready by June 8. On May 26, West inspected the records the Association produced in response to his renewed 2008 request.

Then, on May 29, the Association informed West that it did not have documents responding to his requests for records on its public records index, internet server, backup files for employee e-mail, or e-mail archival program. However, the Association informed West that he could schedule an appointment to inspect and copy the following records it compiled responding to his request:

- (1) [A] copy of a Washington Supreme Court justice's remarks delivered at the Association's November 19, 2008 luncheon;
- (2) a copy of the requested resolution;
- (3) many of its executive director's e-mails from February 2, 2009 to present; and
- (4) a copy of the Association's record retention and destruction policy.

However, regarding West's request for all e-mails sent by its executive director after January 2007, the Association's May 29 letter (1) stated it had only such e-mails dated February 2, 2009 and after and (2) claimed that some of the requested e-mails were exempt from production under the attorney-client privilege. Along with this letter, the Association provided West with a copy of its privilege log.

The Association's privilege log identified that the exempt e-mails were all between its current executive director and its legal counsel at Stoel Rives and Goodstein Law Group and dated between October 2005 and May 2009.<sup>6</sup> The Association further stated in its privilege log that because the listed records "consist of communication between port staff and [the Association]'s attorneys, these documents are exempt pursuant to the Attorney-Client Privilege. See [*Hangartner*] v. *City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004)." CP at 79. The privilege log also described the privileged documents as e-mails, identified the date of each privileged e-mail, and provided a brief explanation of the documents. In each explanation of how the attorney-client privilege applied to the listed e-mails, the Association identified the matter to which the e-mails pertained. The Association was a party or amicus in each of those cases.

C. *West's Suit*

After West received the Association's privilege log and copies of the produced documents, West filed suit against the Association. In his complaint, West requested a declaratory judgment finding that the Association is a public agency and political subdivision of the State and is therefore subject to the PRA and OPMA. West also claimed that the Association violated the OPMA by holding and taking action during private board meetings on November 19 to 21, 2008 without publication or the opportunity for public participation. Lastly, West alleged

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<sup>6</sup> We note that the Association first claimed certain e-mails between it and its legal counsel at Stoel Rives and Goodstein Law Group were exempt from production on May 29, 2009. However, we further note that West neither argues that (1) the Association improperly withheld documents from the set of records it produced on May 8, 2009, in response to his renewed June 2008 request for e-mails between the Association and its legal counsel or (2) the Association must have e-mails dated before February 2, 2009 because its privilege log includes e-mails sent as early as October 2005.

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that the Association violated the PRA by providing an inadequate privilege log identifying documents withheld from production and by not retaining e-mails from the Association's former executive director.

In his complaint, West alleged that he had standing to bring these claims because he "is a citizen and a 'person' as defined in [the OPMA] with standing to seek relief . . . [and he had] also been denied inspection of records." CP at 5. West further alleged that he "is beneficially interested in the acts of the [Association] which creates impacts which affect him personally." CP at 6. In its answer to West's complaint, the Association denied that it was a public agency and thus stated it was not subject to the OPMA or the PRA.

In response to West's interrogatories and requests for production regarding his OPMA claim, the Association produced evidence that its board of trustees met twice yearly and that

[the Association] publicizes these events with Mailings to [Association] Members, Associate Members, a list maintained by [the Association] of other officials, and to any person or entity that requests notice. [The Association] also publicizes meeting notices with a posting on the [Association's] website, and through invitations to speakers and presenters. [The Association] not only accepts but encourages registrations and attendance from any and all interested persons. No one from the general public is denied attendance.

CP at 95-96. The Association produced evidence that it held an annual meeting November 19 to 21, 2008. The Association also produced evidence that, apparently because of its notice, 245 members and associate members from at least 44 cities and counties across Washington as well as from various industries registered for its November 2008 meeting. The Association produced evidence that at least seven members of the general public were also present at its November 2008 meeting.

D. *Summary Judgment*

The Association moved for partial summary judgment dismissing West's declaratory judgment and OPMA claims; although West responded, he did not submit any evidence to counter the Association's motion. Accordingly, the trial court granted the Association's motion for summary judgment and dismissed West's declaratory judgment and OPMA claims, without ruling on whether the Association was a state agency or the functional equivalent of a state agency for purposes of the OPMA. Then the trial court set a briefing and hearing schedule for a show cause hearing on West's remaining PRA claim. Both West and the Association filed briefs, but West failed to appear at the scheduled show cause hearing. West did not take any action on the case for nine months, so the Association moved for summary judgment on West's PRA claim.

After argument on the Association's motion for summary judgment, the trial court entered a September 27, 2010 order granting summary judgment in favor of the Association and dismissing West's PRA claim.<sup>7</sup> West appeals.

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<sup>7</sup> The trial court's order granting summary judgment on West's PRA claim contains 35 findings of fact and 8 conclusions of law. Among these findings and conclusions, the trial court ruled that: (1) the Association was legislatively created, (2) ports are authorized to pay Association dues with public funds, (3) the Association's records are subject to audit, and (4) the Association's purpose is to support port business. Thus, the trial court concluded that, for purposes of the PRA in the context of this case, the Association was a state agency and subject to the PRA. However, these findings and conclusions are superfluous and we do not consider them on appeal. *Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 209, 263 P.3d 1251 (2011), review denied, 174 Wn.2d 1013 (2012). Moreover, although the Association states that the trial court disposed of West's PRA claim on a CR 12(b)(6) motion, that statement is inaccurate. The trial court actually disposed of West's PRA claim on summary judgment.

## ANALYSIS

### I. SUMMARY DISMISSAL OF DECLARATORY JUDGMENT, OPMA, AND PRA CLAIMS

West argues that the trial court erred when it found he did not have standing to assert claims under the Uniform Declaratory Judgments Act or the OPMA and that the trial court erred in dismissing his Uniform Declaratory Judgments Act, OPMA, and PRA claims on summary judgment. We hold that the trial court correctly dismissed West's claims.

#### A. *Standard of Review*

We review orders granting summary judgment de novo, performing the same inquiry as the trial court. *Gronquist v. Dep't of Corr.*, 159 Wn. App. 576, 582-83, 247 P.3d 436 (2011), *review denied*, 171 Wn.2d 1023 (2011). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Where the defendant moving for summary judgment meets its initial burden of showing the absence of a material question of fact, the plaintiff must respond by making a prima facie showing of the essential elements of its claims. *Building Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 735, 218 P.3d 196 (2009) (*BLAW*). The plaintiff cannot rely on his pleadings in making this showing; rather, the plaintiff must demonstrate the existence of a material factual dispute by affidavit or other competent evidence. *BLAW*, 152 Wn. App. at 735.

Although we generally limit review of summary judgment orders to the issues and evidence called to the trial court's attention, we may affirm summary judgment on any ground supported by the record below. RAP 9.12; *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990); *Kinney v. Cook*, 150 Wn. App. 187, 192, 208 P.3d 1 (2009). We also review challenged agency action under the PRA and interpretation of the OPMA de novo. *Gronquist*,

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159 Wn. App. at 582; *Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380 (2002).

Similarly, whether a party has standing to assert a claim is a question of law that we review de novo. *Sloan v. Horizon Credit Union*, 167 Wn. App. 514, 518, 274 P.3d 386 (2012), *review denied*, 174 Wn.2d 1019 (Aug. 7, 2012).

B. *Declaratory Judgment Claim*

West sought a declaratory judgment that the Association is a state agency or the functional equivalent of a state agency for purposes of the OPMA and the PRA. On appeal, West argues that the trial court erred in finding that he lacked standing to bring his claim for a declaratory judgment and in dismissing that claim on summary judgment. We disagree.<sup>8</sup>

Washington courts may issue declaratory judgments under the Uniform Declaratory Judgments Act to declare the rights of the parties if there is “an actual dispute between opposing parties with a genuine stake in the resolution.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). Except under rare circumstances where a declaratory judgment action presents broad issues of great public importance, a court will not issue a declaratory judgment unless the plaintiff establishes that a justiciable controversy exists. *To-Ro*, 144 Wn.2d at 411; *Am. Traffic Solutions, Inc. v. City of Bellingham*, 163 Wn. App. 427, 432, 260 P.3d 245 (2011), *review denied*, 173 Wn.2d 1029 (2012).

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<sup>8</sup> The Association argues that West is attempting to get a “second bite at [the] standing apple” in bringing this claim and appended to its brief our unpublished decision in *West v. Wash. Pub. Ports Ass’n*, noted at 146 Wn. App. 1003, 2008 WL 281146, at \*2-4, *review denied*, 165 Wn.2d 1039 (2009). But, because this is a different case in which West alleges different facts and because the Association did not argue that West was collaterally estopped from bringing this claim below, we do not consider this argument.

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A claim is not justiciable, meaning the court does not have jurisdiction to consider the case, unless the plaintiff has standing. *To-Ro*, 144 Wn.2d at 411; *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). A plaintiff cannot have standing to bring a claim under the Uniform Declaratory Judgments Act unless he or she demonstrates that (1) he or she is within the “zone of interests to be protected or regulated” and (2) he or she has actually suffered an injury in fact. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 302-03, 268 P.3d 892 (2011) (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004)). In order to meet both prongs of the standing requirement, the plaintiff must allege specific facts. See *Five Corners Family Farmers*, 173 Wn.2d 296 at 302-03; *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 594, 192 P.3d 306 (2008). Where a plaintiff lacks standing, our courts do not issue advisory opinions and do not consider the merits of a claim. *To-Ro*, 144 Wn.2d at 416.

Here, West alleged that he “is beneficially interested in the acts of the [Association] which creates impacts which affect him personally.” CP at 6. This allegation is exceptionally vague and does not include or receive support from any specific facts. Because West’s allegation is so vague, it fails to establish either that (1) West is within the zone of interests to be protected or regulated by the Association or (2) he actually suffered an injury. See *Five Corners Family Farmers*, 173 Wn.2d at 302-03. Because West fails to establish both prongs of the Uniform Declaratory Judgments Act standing test, the trial court did not err in finding that he lacked standing. Because West does not have standing to assert his Uniform Declaratory Judgments Act claim, we do not address whether the Association is a state agency or the functional equivalent of a state agency.

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C. *OPMA Claim*

As noted above, the trial court granted summary judgment on West's OPMA claim. West challenges this grant of summary judgment on appeal. We hold that there is no genuine issue of fact whether West lacks standing to sue under the OPMA and affirm summary judgment on this claim.

In interpreting the OPMA, we first analyze its language. *West v. Wash. Ass'n of County Officials*, 162 Wn. App. 120, 130, 252 P.3d 406 (2011) (*WACO*). If the OPMA's language is unambiguous, we apply its plain meaning. *WACO*, 162 Wn. App. at 130. The OPMA states that "[a]ny person may commence an action either by mandamus or injunction for the purpose of stopping violations . . . of [the OPMA] by members of a governing body." RCW 42.30.130 (emphasis added).

Despite the OPMA's broad language, our Supreme Court has recognized that, similar to a party seeking declaratory judgment, a party must assert an injury in order to bring suit under the OPMA. *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 772, 630 P.2d 930 (1981). In *Kirk*, the court held that a plaintiff who attended a public meeting was not entitled to sue under the OPMA alleging that a third party had been denied notice of the meeting. 95 Wn.2d at 770, 772. Only the third party who suffered the injury had standing to raise it. 95 Wn.2d at 772.

*Kirk* comports with well-settled principles of federal standing doctrine that a legislative grant of standing to the public as a whole is ineffective to confer standing on an individual. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Even where Congress purports to confer standing on all members of the public, a plaintiff must

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demonstrate an injury in fact to his own person, rather than to the public, to show standing. *Lujan*, 504 U.S. at 577-78. And Washington's standing doctrine is drawn from federal law. See *High Tide Seafoods*, 106 Wn.2d at 702 (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) and *Craig v. Boren*, 429 U.S. 190, 193-94, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)).

Rather than demonstrate an injury, West vaguely asserts that he "is beneficially interested in the acts of the [Association] which creates impacts which affect him personally." CP at 6. He submitted neither an affidavit nor any evidence in support of this assertion. CP at 80-83. As noted above, on summary judgment a plaintiff may not simply rest on the pleadings; the plaintiff must present evidence demonstrating a genuine issue of material fact on the issues on which the moving party is requesting summary judgment. *BIAW*, 152 Wn. App. at 735. Interpreting the OPMA consistently with *Kirk* and with federal law, we hold that West's bare assertion is insufficient to show that he has standing under the OPMA.

We emphasize that West's burden to show standing here was light. The injury needed for West to show standing to sue under the OPMA need not be a severe one—in other contexts, the burden to show injury has been characterized as the burden to show "an identifiable trifle." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). But West's showing did not even rise to the level of an identifiable trifle. West submitted no affidavit providing facts to support his allegation that he was "beneficially interested in the acts of the [Association] which creates impacts which affect him personally." CP at 6. West's vague pleadings, standing alone, create

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no genuine issue of material fact on this point. We affirm summary dismissal of West's OPMA claim on the grounds that there is no genuine issue of material fact that he had standing to sue under the OPMA.

D. *PRA Claim*

West next argues that the trial court erred in summarily dismissing his PRA claim. He argues that the trial court erroneously (1) found that the Association's privilege log and responses to West's requests were timely and adequate, (2) expanded the scope of the attorney-client privilege exemption under the PRA, and (3) allowed the Association to destroy e-mail records without a valid records retention and destruction policy in place. Assuming without deciding that the Association is a state agency or the functional equivalent of a state agency for purposes of the PRA, we disagree.

1. *Privilege Log*

The PRA favors broad disclosure of public records and requires state agencies to disclose and produce public records on request, unless an enumerated exception applies. *Sanders v. State*, 169 Wn.2d 827, 846, 240 P.3d 120 (2010); *West v. Wash. State Dep't of Natural Res.*, 163 Wn. App. 235, 242, 258 P.3d 78 (2011), *review denied*, 173 Wn.2d 1020 (2012) (*DNR*); *see* RCW 42.56.070(1). Where an agency seeks to withhold documents, it bears the burden of proving that a specific exemption applies. *DNR*, 163 Wn. App. at 242. In satisfying this burden, the agency must identify the records being withheld. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 271, 884 P.2d 592 (1994) (*PAWS*), *review denied*, 174 Wn.2d 1013 (2012).

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The identifying information need not be elaborate, but *should* include the type of record, its date and number of pages, and, *unless otherwise protected*, the author and recipient, or if protected, other means of sufficiently identifying particular records without disclosing protected content.

*PAWS*, 125 Wn.2d at 271 n.18 (emphasis added).

One method of sufficiently identifying the withheld documents is with a privilege log. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538-39, 199 P.3d 393 (2009); WAC 44-14-04004(4)(b)(ii). Such a privilege log should include the type of information required by *PAWS* (as described above) that would enable a records requester to make a threshold determination of whether the agency properly claimed the privilege. *Rental Housing Ass'n*, 165 Wn.2d at 539; WAC 44-14-04004(4)(b)(ii).

Here, the Association claimed that some of the documents West requested in his expanded April 2009 request were privileged and exempt from production under the PRA. The Association provided a privilege log along with its timely response to West's request. The Association's privilege log identified that each of these records were e-mails, the date of each e-mail, the author and recipient of each e-mail, the general topics of these e-mails, and cited to *Hangartner* as authority for its claimed attorney-client privilege. The Association's privilege log, therefore, contained each type of identifying information recommended in *PAWS* and made each record identifiable. Thus, the Association's privilege log was sufficient to allow West to make a threshold determination of whether the privilege applied and this argument fails.

West further argues that the trial court allowed the Association to silently withhold these privileged documents for over a year because the Association did not produce its privilege log until May 2009. Here, the records the Association actually produced in response to West's 2008 request are not included in the record on appeal. Thus, we cannot identify which records the

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Association produced responding to West's renewed June 2008 request for general "communications" between the Association and its legal counsel regarding legal services, including invoicing, manuals, opinions, and policy statements since January 2005. *See* CP at 57. Again, the Association did not claim that documents responding to West's June 2008 request were exempt from production.

However, in response to West's April 2009 expanded request for "[a]ll E-mails sent by the [Association's] Executive Director from January of 2007 to present," the Association claimed that several of those messages were exempt from production under the attorney-client privilege. Although the e-mails that the Association alleged were exempt from production are sealed, the trial court reviewed them in camera and they are included in the record on appeal. None of these e-mails include general information on legal services counsel provided the Association, like invoicing, manuals, opinions, or policy statements by legal counsel. Rather, they include specific legal analysis and recommendations for the Association in several cases in which it was involved. Thus, West's expanded April 2009 request for "[a]ll E-mails" asked for a much wider cadre of e-mails than his general June 2008 request for "communications" between the Association and its legal counsel or legal services counsel provided to the Association, including guides, manuals, or policy statements. Therefore, although West argues that the Association silently withheld records without producing a valid privilege log for a year, that argument fails based on the record before us.

## *2. Attorney-Client Privilege*

Under the PRA, records are exempt from production if they would not be available to other parties to a controversy under the civil rules for discovery. RCW 42.56.290. Thus, if a

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record is discoverable, it is subject to production under the PRA. *See* RCW 42.56.290; CR 26. But if a record is not discoverable, then it is exempt from production under the PRA. *See* RCW 42.56.290; CR 26.

The “mental impressions, conclusions, opinions, or legal theories of an attorney . . . of a party concerning . . . litigation” are not discoverable and, thus, not subject to production under the PRA. CR 26(b)(4); *DNR*, 163 Wn. App. at 247. Records also protected from discovery and production under the PRA include “any communication made by the client to his or her [attorney], or [the attorney’s] advice given thereon in the course of professional employment.” RCW 5.60.060(2)(a); *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004); *DNR*, 163 Wn. App. at 247. Therefore, this broad attorney-client privilege protects documents generated by an attorney in response to a client’s request for legal counsel and documents generated by clients communicating with their attorneys. *DNR*, 163 Wn. App. at 247.

Here, the Association withheld 65 pages of records from West’s April 2009 PRA request, claiming they were exempt from production under the attorney-client privilege. The trial court conducted an in camera review of these documents and agreed with the Association that the documents were exempt from production under the PRA under the attorney-client privilege. These withheld documents consist exclusively of e-mails between the Association and its legal counsel, generated between 2005 and 2009, and addressing active or pending litigation to which the Association was a party or an amicus.<sup>9</sup> In these e-mails, the Association requests legal

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<sup>9</sup> West argues that the Association must disclose the e-mails to and from its counsel for cases in which it appeared as an amicus, but he fails to cite meaningful authority for that proposition. Thus, we do not consider this issue. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

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advice and its counsel responds with careful analysis, recommendations, and strategies. Because these types of communications fit squarely within the attorney-client privilege, the trial court correctly concluded that they were exempt from production under the PRA. Thus, West's argument fails.

### 3. Deleted E-mails

Next, West argues that the Association violated the PRA by deleting the e-mail correspondence of its past executive director without a valid record retention and destruction policy in place.<sup>10</sup> West states that "his research has failed to uncover any WAC provisions adopted by the [Association] or any duly approved records and retention schedule appropriate for a State Agency." Br. of Appellant at 29. Without argument, analysis, or authority, West declares that the Association "cannot credibly deny that the provisions of [the preservation and destruction of public records statute, chapter 40.14 RCW] apply to it as a public entity." Br. of Appellant at 29. Because West does not support these arguments with authority or analysis, we do not consider them. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

## II. FINDINGS AND CONCLUSIONS

Lastly, West argues that the trial court erred by entering findings of fact that are not supported by substantial evidence and conclusions of law applying an incorrect standard of law. West, therefore, asks us to reverse these findings and conclusions. We decline to do so.

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<sup>10</sup> In another section of his brief, West appears to argue that the Association is liable for negligently deleting these e-mails under a *res ipsa loquitur* theory. But we need not analyze this argument because West fails to support it with meaningful analysis based on precedent. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

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Trial courts need not enter findings of fact and conclusions of law when granting summary judgment. CR 56; *Westberry v. Interstate Distrib. Co.*, 164 Wn. App. 196, 209, 263 P.3d 1251 (2011); *review denied*, 174 Wn.2d 1013, (2012). Where a trial court does enter findings of fact and conclusions of law in an order granting summary judgment, they are superfluous. *Westberry*, 164 Wn. App. at 209. Because we review orders granting summary judgment de novo, we do not consider a trial court's superfluous findings of fact and conclusions of law. *Westberry*, 164 Wn. App. at 204, 209.

Here, the trial court entered two orders granting summary judgment in favor of the Association. In its summary judgment order dismissing West's PRA claim, the trial court entered 35 findings of fact and eight conclusions of law. Because these findings of fact and conclusions of law are superfluous to the summary judgment orders, we do not consider them and we do not address West's argument that these findings are not supported by substantial evidence and that the conclusions applied an incorrect legal standard. Thus, West's argument fails.

#### ATTORNEY FEES

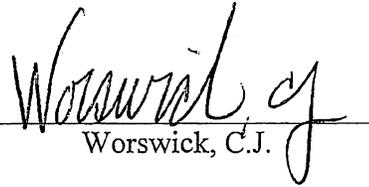
The Association argues that West's appeal is frivolous and requests attorney fees and costs in accordance with RAP 18.1, RAP 18.9, and RCW 4.84.185 for defending against a frivolous appeal. An appeal is frivolous if it presents no debatable issues and is so meritless that there is no reasonable possibility the appellate court will reverse. *In re Guardianship of Wells*, 150 Wn App. 491, 504, 208 P.3d 1126 (2009). Because West's appeal presented debatable

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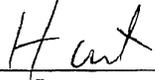
issues on which reasonable minds could differ we exercise our discretion and decline the Association's request for attorney fees on appeal.

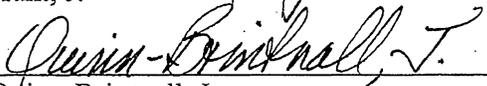
Affirmed.

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.

I concur:

  
Hunt, J.

  
Quinn-Brintnall, J.

**IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF KING  
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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Plaintiff,

v.

SEATTLE PORT COMMISSION,  
TACOMA PORT COMMISSION,  
PORT OF TACOMA, PORT OF  
SEATTLE, CLARE PETRICH, DON  
JOHNSON, RICHARD MARZANO,  
DON MEYER, CONNIE BACON,  
TOM ALBRO, STEPHANIE  
BOWMAN, BILL BRYANT, JOHN  
CREIGHTON, COURTNEY  
GREGOIRE,

Defendants.

NO. 73014-2-1

DECLARATION OF  
SERVICE

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

1. RESPONSE BRIEF OF RESPONDENT PORT OF TACOMA

to be served on November 18, 2015 served on the following parties and in the manner indicated below:

Arthur West  
120 State Ave. NE, #1497  
Olympia, WA 98501  
Email: awestaa@gmail.com

by United States First Class Mail  
 by Legal Messenger  
 by Electronic Mail

2015 NOV 18 PM 4:17  
COURT OF APPEALS  
STATE OF WASHINGTON

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Email: timl@calfoharrigan.com  
shanec@calfoharrigan.com

by United States First Class Mail  
 by Legal Messenger  
 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 18<sup>TH</sup> day of November 2015 at Tacoma, Washington.

s/ Carolyn A. Lake  
Carolyn A. Lake