

No. 49207-5-II

**IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION II**

**ARTHUR WEST,
appellant,**

Vs.

**PORT OF TACOMA, et al
respondents**

Review of decisions entered by
the Honorable Judge Edwards

**APPELLANT'S
OPENING BRIEF**

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SUMMARY OF ARGUMENT

This is the second appeal in a case filed by appellant West in 2009 under the Public Records Act challenging *the reasonableness of an estimate* (See CP 185 at line 17-18, section 3.12) and the withholding of records by the Port of Tacoma involving a proposed South Sound Logistics Center (SSLC).

Although this case was originally brought to compel the timely production of records, it is really not about records anymore. What it is really about is whether a public agency, through sharp practices and a

virtually unlimited expenditure of legal resources, can raise so many spurious technical objections to jurisdiction that the actual disclosure of records becomes irrelevant due to the sheer enormity of the delay, obstruction and difficulty interposed by counsel.

After over seven years of litigious hair-splitting, (which has resulted in not a single step forward in the production or review of records claimed exempt), the passage of time has rendered the withheld records virtually useless for the purpose for which they were originally requested.

By any reasonable measure, the port has been so overwhelmingly successful in delaying and obstructing the consideration of the actual records issues in this case for so long that the controversy to which the records pertain has vanished in the mists of ancient history. The Ports have abandoned their project long ago, and most people even have difficulty remembering there ever was a failed SSLC project that squandered over a quarter of a Billion dollars of public funds.

Under these circumstances it is obvious that the Port of Tacoma has attained their aim of making the process of seeking disclosure of public records so onerous, expensive and burdensome that no actual review or disclosure of records ever takes place, and all that can be achieved in the face of the Port's overzealous legal sallies is useless procedural wrangling.

The case was initially improperly dismissed in 2012. Following

appeal of this first dismissal, an Order of Remand issued to the Superior Court. As the decision of Justice Spearman of Division I of the Court of Appeals held... *“The merits of his (West’s) claims will be remanded for trial.”* (emphasis added)

Yet, somehow, despite these clear directions, another improper Order of Dismissal has now been entered, based upon what is, in effect, an unconstitutional judicial ex post facto re-writing of Statute Law to eliminate RCW 42.56.550(2) from the Public Records Act. This appeal follows.

There can be no dispute from the express language of the Complaint (See CP 185 at line 17-18, section 3.12) and the Motion for Order to Show Cause (See CP 190 at line 8) the that this case included claims for failure of the port to provide a reasonable estimate¹ for production.

The doctrine of Separation of Powers and Article I, sections 9 and 10 of the Constitution of the United States both limit the authority of the Judiciary to enact ex post facto amendments to duly enacted Legislative Acts such as RCW 42.56.550(2) of the Public Records Act, which expressly provides jurisdiction for a citizen to challenge the actions of an

¹ RCW 42.56.550(2) Provides...Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

agency in failing to provide a reasonable estimate for disclosure, as plaintiff did in Section 3.12 of his original complaint.

Thus, upon remand, instead of proceeding reasonably to allow the court to conduct an in camera review of the withheld records, the Port interposed a new set of specious jurisdictional pretexts to send the ponderous mass of this case tumbling down the slope again in an avalanche terminating, once more, at the feet of the Court of Appeals.

The most recent basis for the Port to attempt to evade accountability for their openly confessed, undeniable and deliberate frustration of the public's right to know was based not only upon a redaction of the claims asserted in the Complaint, but also upon what West believes to be obiter dicta in a new and undefined ruling in *Hobbs v. State Auditor*, 183 Wn. App. 925, (2014) a distinguishable case where the timeliness of the agencies' estimate under RCW 42.56.550(2) was not at issue, and, significantly, where the court reached the merits of Hobbs claims and found that all of the asserted defects in the response had been cured by the final disclosure of the records by the Auditor prior to trial.

The circumstances in this case differ from those in *Hobbs* in a number of significant respects: The Port was not in the process of producing records at the time of suit, West asserted a claim for failure to provide a reasonable estimate of a date certain, after the Port repeatedly failed to meet its self imposed deadlines, (See CP 190 lines 6-7) and most

importantly, perhaps, the defects in the Port's response were not cured by any final disclosure prior to a hearing in the Superior Court.

Even in the unlikely event that Hobbs or the Honorable Judge Edwards could re-write RCW 42.56.550(2) to eliminate a cause of action for failure to provide a reasonable estimate, it is undeniable that this Court, Division I, the Supreme Court, the Port, and West, all reasonably relied upon the jurisdiction of this case in taking many, many, affirmative acts over the course of the last 7 years.

It would be the height of inequity to ratify a second wrongful dismissal when an overwhelming degree of reasonable reliance has been vested in the jurisdiction of the Trial Court to conduct further proceedings in this case by both the Court of Appeals and the Supreme Court, and when the port equitably waived its right to argue these issues in its first jaundiced bite at the rotten apple of improper dismissal based upon abuse of discretion.

This most recent wrongful dismissal should also be vacated, and West should be afforded the opportunity to again resume his labors in attempting to push the ponderous burden of justice over the precipitous heights of the never-ending succession of obstructive and specious objections repeatedly raised by the Port in this case.

Perhaps, if it is the intent of this Court that the prosecution of this

matter is not to assume mythic² proportions of futility, instructions should issue to insure that this case is actually heard on the merits in the wake of this latest remand.

ASSIGNMENTS OF ERROR

I The Court erred in entering a second improper dismissal after remand for a trial on the merits when the issue of jurisdiction of the Trial Court was beyond reasonable dispute under the express terms of RCW 42.56.550(2) and the rulings of both the Court of Appeals and the Supreme Court.....

II The Court erred in entering a second improper dismissal after remand based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs when West and three Appellate Courts had reasonably and justifiably relied upon prior law and practice.....

III The Court erred in entering a second improper dismissal after remand for a trial on the merits when the Port's affirmative representations that the Costello Court did not have jurisdiction over the “duplicative” issues were binding under the doctrines of res judicata, collateral and equitable estoppel and waiver.....

IV The Court erred in entering a second improper dismissal after remand based upon a novel ex post facto misconstruction of the PRA alleged to exist in Hobbs when, unlike Hobbs, West had asserted a claim for an untimely response under RCW 42.56.550(2) due to the Port having repeatedly missed self-imposed deadlines.....

V The Court erred in entering a second improper dismissal after remand based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs when the agency was not in the process of producing records and did not subsequently cure the defects in its response prior to the hearing.....

²And I saw Sisyphus at his endless task, seeking to raise a monstrous stone with both his hands. With hands and feet he tried to roll it up to the top of the hill, but always, just before he could roll it over on to the other side, its weight would be too much for him, and then down again to the plain would come rolling the ruthless stone thundering again on to the plain. Then he would begin trying to push it up hill again...*The Odyssey*, Homer. Original Publication Date Unknown, Book 11, Trans. By Thomas Hobbes, 1675.

VI The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the Court in Hobbs reached the substantive claims of violation rendering its other extraneous language obiter dicta.....

VII The Court erred in failing to allow a reasonable amendment that would have cured any jurisdictional defects

VIII The Court erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment and in Refusing to Conduct a Show Cause Hearing to Determine that the Port Violated the PRA.....

IX The Court erred in exercising jurisdiction in Grays Harbor County as a non-visiting “visiting” Pierce County judge in violation of the provisions of RCW 2.08.150 and Article 4 Section 7 of the Constitution of the State of Washington, and in effecting a change of venue without following the procedure set forth in RCW 4.12.030.....

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I Did the Court err in entering a second improper dismissal after remand for a trial on the merits when the issue of jurisdiction of the Trial Court was beyond reasonable dispute under the express terms of RCW 42.56.550(2) and the rulings of both the Court of Appeals and the Supreme Court? Yes.....

II Did the Court err in entering a second improper dismissal after remand for a trial on the merits based on a novel ex post facto misconstruction of RCW 42.56.550(2) alleged to exist in Hobbs Hobbs when West and three Appellate Courts had reasonably and justifiably relied upon prior law and practice? Yes.....

III Did the Court err in entering a second improper dismissal after remand for a trial on the merits when the Port's affirmative representations that the Costello Court did not have jurisdiction over the “duplicative” issues were binding under the doctrines of res judicata, collateral and equitable estoppel and waiver? Yes.....

IV Did the Court err in entering a second improper dismissal after remand based upon a novel ex post facto misconstruction of the PRA alleged to exist in Hobbs when, unlike Hobbs, West had asserted a cause of action

for an untimely response under RCW 42.56.550(2) due to the Port having repeatedly missed self-imposed deadlines ? Yes.....

V Did the Court err in entering a second improper dismissal after remand based upon a novel ex post facto misconstruction of the PRA alleged to exist in Hobbs when the agency was not in the process of producing records and did not subsequently cure the defects in its response prior to the hearing ? Yes.....

VI Did the Court err in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the Court in Hobbs reached the substantive claims of violation rendering its other extraneous language obiter dicta? Yes.....

VII Did the Court err in failing to allow a reasonable amendment that would have cured any jurisdictional defects ? Yes.....

VIII Did the Court err in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment and in Refusing to Conduct a Show Cause Hearing to Determine if the Port Violated the PRA? Yes.....

IX Did the Court err in exercising jurisdiction in Grays Harbor County as a non-visiting “visiting” Pierce County judge in violation of the provisions of RCW 2.08.150 and Article 4 Section 7 of the Constitution of the State of Washington, and in effecting a change of venue without following the procedure set forth in RCW 4.12.030? Yes.....

STATEMENT OF THE CASE

This case involves a public records request made Seven and a half years ago, on August 14, 2009, to the Port of Tacoma, in which the plaintiff requested specific identifiable public records concerning the Port’s proposed South Sound Logistics Center project. (See CP 292, the Original Request, and CP 185 at lines 12-16)

In the original proceeding prior to remand, the following took place:

October 6, 2009 the Complaint was filed. (CP 182-187)

On October 9, an Order to Show Cause was signed, for November 23, but no hearing took place on that date. (CP at 191) This was just the first of a number of strange events related to the employment of a “visiting” judge from Grays Harbor County, who did not, as required by law, ever “visit” Pierce County.

On May 10, 2010, pursuant to the express direction of the Grays Harbor Court Administrator's office, RP 05-101-0, pp. 3-4, lines 12-25, and 1-3) a hearing was held on West's Second motion for an Order to Show cause and a Motion to Amend.

Although the Court signed the Order, the Pierce County Clerk refused to file it. West was reduced to the expediency of complaining to the Pierce County Sheriff about the refusal of the Clerk to file the Order at a May 16 legislative hearing before the House local Government Committee on the Public Records Act. Subsequently, a Pierce County Deputy Sheriff contacted the Clerk's office and filed the Order. (CP 209) This was just the second in a series of strange events stemming from the appointment of a non-visiting “visiting judge” from Grays Harbor County.

On June 18, 2010, The Court held a hearing on the port's motion to reconsider and dismiss West's complaint. At his hearing, the Court

attempted to excuse the Port's failure to file any form of timely response to his motion by accusing West of lying to the Court.

On July 26, 2010, the Court vacated the Order allowing amendment of the Complaint and dismissed allegedly “duplicative” portions of the complaint. This was improper as the Port had not filed an Answer to the Complaint and thus plaintiff was entitled to amend his complaint, possibly due to the fact that the Court was motivated just as much by invidious prejudice as it was by the Court Rules.

The Court held West in contempt for his attempting to make an objection to its ruling, and subsequently abused its discretion to dismiss the case, a dismissal that was reversed as an abuse of discretion by Division I of the Court of Appeals.

As the decision of Justice Spearman of Division I of the Court of Appeals held... *“The merits of his (West's) claims will be remanded for trial.”* (emphasis added)

Yet, rather than obeying the directions of the Court of Appeals on remand, on April 1, 2016, the Court held a hearing on the Port's motion to dismiss, and upon plaintiff's Motions where West, represented by Jon Cushman of the Cushman Law Group, continued the seemingly eternal uphill struggle against the implacable slope of the Honorable Judge Edwards' enmity to attempt to obtain a hearing on the merits. (See Transcript of April 1, 2016)

The Court subsequently entered the Order of 05/16/2016 denying West's Motions to 1. decline jurisdiction due to a defective appointment and improper venue, 2. vacate the June 18 Order denying amendment and granting a partial dismissal, 3. Staying the proceeding until the issue of which court had jurisdiction over the “duplicative” claims was resolved, since Lake had, in the intervening time period also obtained a dismissal of the allegedly duplicative claims. (See Brief in Cause No. 48110-3-I)

West filed a timely Notice of Appeal and this case was again in the Court of Appeals.

Standard of Review

Where the Trial Court has jurisdiction over the parties and the subject matter, a mistaken belief that an action should be dismissed would be an error of law. State ex rel. Heyes v. Superior Court, 12 Wn.2d 430, 433, 121 P.2d 960 (1942). This Court reviews questions of law and statutory construction de novo. Likewise, judicial review of all agency actions under the Public Records Act chapter is de novo, as is the question of construction and interpretation of statutes. RCW 42.56.550(3); State ex rel. Humiston v. Meyers, 61 Wn.2d 772, 777, 380 P.2d 735 (1963). This Court should review all issues de novo, except the amendment issue, which is reviewed for abuse of discretion.

ORDERS ON APPEAL

Appellant seeks review of the (second) Order of Dismissal of May 16, 2016 (CP 636-637) Appellant also seeks review of the Court's denial of plaintiff's Motion to decline to exercise jurisdiction improperly as a non-visiting "visiting" judge, and the refusal of the Court to allow Amendment of the Complaint in it's July 26 2010 Order (CP 275-279) as the Port had not filed an answer to the Complaint at that point, and as this amendment would have cured any jurisdictional defects, since the Port had concluded its response to the Records Request at that time.

ARGUMENT

I The Court erred in entering a second improper dismissal after remand for trial on the merits when the issue of jurisdiction of the Trial Court was beyond reasonable dispute due to the express terms of RCW 42.56.550(2) and the rulings of both the Court of Appeals and the Supreme Court

The Trial Court erred in entering the Order of May 16, 2016 (CP at 636-7) when the Order of Remand issued by Division I of the Court of Appeals directed that. "*The merits of his (West's) claims will be remanded for trial.*" (emphasis added) and when the undisputed record (CP 190 Lines 5-7) demonstrates that that the port was not producing records at the time the suit was filed, and, therefore West's claims under RCW 42.56.550(2) invoked the jurisdiction of the Court...

Stare Decisis is defined as...

"Literally, to stand by decided matters; . . . as implying the

doctrine or policy of following rules or principles laid down in previous judicial decisions unless they contravene the ordinary principles of justice. This principle had an important part in the development of the English common law." *Windust v. Department of Labor & Industries*, 52 Wn.2d 33, 323 P. 2d 241, (1958)

It was reversible error for the Trial Court to refuse to recognize the stare decisis and res judicata effects of the express language and holding of the Court of Appeals in holding that "*The merits of his (West's) claims will be remanded for trial.*" (emphasis added) .

It was further reversible error to apply the precedent of *Hobbs* retroactively and overbroadly in a manner that did not account for the differing fact situations between the two cases and the limitations upon the ambiguous holding of *Hobbs* regarding initiation of a suit when an agency has not yet begun to produce records and has repeatedly failed to meet its own estimates for production, which justifies a second remand with directions that this time the merits of the claims actually are subject to a trial. It is suggested that in order for this to actually take place, the directions should specify that a judge other than one from Grays Harbor County conduct further proceedings.

II The Court erred in entering a second improper dismissal after remand based on an alleged new principle of law established by *Hobbs* when West and three (3) Appellate Courts had reasonably and justifiably relied upon prior law and practice.....

To the extent that the Trial Court read what is best seen as obiter

dicta in Hobbs to eliminate the cause of action in the PRA for failure to provide a reasonable estimate, or barred any action until an agency decided in its own sweet time it was done providing records, the Court impermissibly misconstrued the remedial terms of the Public Records Act.

The Court's use of the obiter dictum of Hobbs to support a construction of the PRA to eliminate the language in RCW 42.56.550(2) violated the principle that...

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)

"When interpreting a statute, the court must first look to its language." *State v. Jones*, 168 Wn.2d 713, 722, 230 P.3d 576 (2010); *Cerrillo v. Esparza*, 158 Wn.2d 194,201,142 P.3d 155 (2006). If a statute is clear on its face, "its meaning is to be derived from the language of the statute alone." *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). Where "the plain language of a statute is unambiguous and legislative intent is apparent, [the courts] will not construe the statute otherwise." *Friends of Columbia Gorge, Inc. v. WA Forest Practices Appeals Bd.*, 129 Wn. App. 35, 47-48, 118 P.3d 354 (2005)

In this case the Trial Court violated all of these principles of statutory construction, and erred in disregarding the clear language of RCW 42.56.550(2) making it superfluous, and undermining the intent of

the people that public records be disclosed in a reasonable time and that a requestor should not have to wait for disclosure for years or decades until an agency like the Port of Tacoma decides that there is no longer any political reason to hide information and “concludes” its response to the request, no matter how long it might take.

Such a precedent would effectively eviscerate the PRA, and that is exactly what the respondents hope to achieve in this case.

Even in the highly unlikely event that the dicta in *Hobbs v. State Auditor's Office*, 183 Wn. App. 925 (2014) could be seen to establish a new standard, the Court also erred in applying the new standard of *Hobbs* (to the extent it was a new standard), retroactively when plaintiff, the Court of Appeals in its April 28, 2014 determination, as well as Division II in the companion case (and the Supreme Court in denying review in both cases) justifiably relied upon prior law (See, eg, *Violante v. King County Fire Dist. No. 20 571*, 114 Wn. App. 565, (1979)) *West v. Department of Natural Resources*, 163 Wn. App. 235 (Div. II, August 23, 2011), that allowed parties to bring PRA actions prior to completion of a request or, more importantly, where an agency had repeatedly failed to meet its own deadlines.

So, even to the extent the misconstrued dicta from *Hobbs* might be seen establish a new standard, the Court still erred in applying any such new standard retroactively, and when *West* and three appellate Courts had

previously and justifiably relied upon prior law and practice.

Such justifiable reliance on the part of West and Divisions I and II and the Supreme Court was appropriate under the precedent of Cascade Sec. Bank v. Butler, 88 Wn.2d 777, 567 P.2d 631 (1977); Haines v, Anaconda Aluminum Co., 87 Wn.2d 28, 549 P.2d 13 (1976); State Ex Rel State Finance Commission v. Martin, 62 Wn.2d 645, 384 P.2d 833, (1963).(See also, Prospective or Retroactive Operations of Overruling Decision, Annot., 10 A.L.R.3d 1371, 1386 (1964)).

Such manifest justifiable reliance on established precedent and the clear language of State Law in RCW 42.56.550(2) the manifestly justifies a second remand in this case so that ***“The merits of his (West’s) claims will (actually) be remanded for trial.”*** (emphasis added) .

III The Court erred in entering a second improper dismissal after remand for trial when the Port's affirmative representations that the Costello Court did not have jurisdiction over the “duplicative” issues were binding under the doctrines of res judicata, collateral and equitable estoppel and waiver.....

The Port's latest pretext for dismissal is based upon a jurisdictional shell game effected by port counsel having obtained dismissal of “duplicative” claims in this case and having prevailed and obtained terms of \$1,500 based upon that express representation, when it was also subsequently alleged that the first case lacked jurisdiction over the “duplicated” claims. (See Brief Cause No. 48110-3-I)

As Division I of the Court of Appeals explained in its April 20, 2014 ruling in This case, No. 71366-3...

On July 26, 2010, the trial court heard the Port's motion to dismiss West's claims, alleging they were duplicative of claims made in a previous lawsuit. The trial court granted the Port's motion as to one of the claims and sanctioned West in the amount of \$1500, payable to the Port.

Significantly, page Three of the Port's Response in support of its Motion to dismiss of July 23, 2010 demonstrates that the Port obtained a dismissal of “duplicative” claims in this case based upon an express representation that the “Costello” court had jurisdiction over West's PRA claims.

As Counsel Lake wrote in that pleading...

“However, despite his personal disagreement, Mr West cannot bypass *the jurisdiction* and judgments of the original litigation by inventing a new cause of action³....”
(**emphasis in original**)

Significantly, the “original litigation” which counsel Lake successfully asserted “**the Jurisdiction**” of *in boldface* is the companion case that was recently dismissed on the port's Motion for lack of jurisdiction by Judge Costello.

Yet, having prevailed on this argument in one Trial Court, (that of the Honorable Judge Costello) the port proceeded to play a jaundiced

³ See Port's Motion to dismiss of July 23, 2010, in Cause No. 09-2-14216-1, and the Order of August 23, 2010 awarding the Port affirmative relief in the form of terms of \$1,500 as a result of the finding that this Court had previous jurisdiction over the PRA claims. (CP 425-31)

form of jurisdictional shell game to assert just the opposite in this, the next Court, in the Trial Court case presided over by the Honorable Judge Edwards.

Counsel's "Edwards and Costello" Shell game resembles nothing so much as a jaundiced and litigious version of "Who's on first⁴?" It is hoped that the Court will not be offended if the plaintiff fails to see the humor in this penultimate performance of preternatural prevarication.

It is difficult to predict what court might ever actually have jurisdiction over claims against counsel's client, unless it would be the court counsel is not presently in. In this manner, counsel's effects on our system of justice are akin to that of a massive gravitational vortex disturbing the continuum of equity; creating a localized jurisdictional vacuum from which not even a dim flicker of justice can escape.

Perhaps, despite the best efforts of the Honorable Judges in this and the previous cases to rule correctly and in good faith, it is conceivable they were persuaded into error by the anomalous judicial "event horizon" and the disturbance in the jurisdictional continuum resulting from counsel anomalously having packed so much cunning and deception within the Schwarzschild radius of their practice.

Thus, for nearly a decade, the intense gravitational draw of the

⁴ Who's on First? Abbott and Costello, 1938
https://ia600201.us.archive.org/25/items/otr_abbottandcostello/Abbott_and_Costello_-_Whos_On_First_Original_30_Min_Live_Rad.mp3

port's (metaphoric) black hole of injustice has soaked up vast amounts of the parties' resources and time letting not the slightest glimmer of rectitude escape, despite the best efforts of a succession of honorable judges attempting to rule in good faith. Truly, something akin to “The Schwartz” appears to have been with the Port of Tacoma.

This ethereal downward pressure has resulted in a series of wrongful dismissals of port cases, of which the Orders of November 20, and December 15, 2015 might be seen to be merely the latest example.

Obviously, on a level playing field and without any fancy trickery, the successful assertion of the jurisdiction of this Court in a different case and the judgment the port sought and received therein would bar the diametrically opposite Order of Dismissal that the Court obtained in this present case under the doctrines of Res Judicata, Estoppel, and Waiver.

Further, as both cases have been subject to improper dismissals reversed as abuses of judicial discretion, Stare Decisis applies as well to demonstrate that this latest dismissal was also reversible error precipitated by the port.

Significantly, the true and correct copies of a portion of the Port's Reply in Support of its Motion to Dismiss of July 23, 2010 and the Order of the Superior Court of August 13, 2010 (and subsequent proceedings) demonstrate not only Equitable and Collateral Estoppel but Res Judicata (see *Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983) as well as

express waiver of the right to contest jurisdiction.

To paraphrase counsel's July 23 Brief (in Port of Tacoma II)...

However, despite (her) personal disagreement, (Ms. Lake) cannot bypass *the jurisdiction* and judgments of the original litigation...

The appellate Courts have repeatedly and consistently found defenses to be waived under similar circumstances...

Common law waiver can two ways. "It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior." Lybbert, 141 Wn.2d at 39 (citing Romjue v. Fairchild, 60 Wn. App. 278, 281, 803 P.2d 57, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991)). "It can also occur if the defendant's counsel has been dilatory in asserting the defense." Lybbert, 141 Wn.2d at 39 (citing Raymond, 24 Wn. App. at 115). As we explained in Lybbert, "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" Lybbert, 141 Wn.2d at 39 (quoting CR 1)... Haywood v. Aranda, 143 Wn.2d 231, (2001) (See also Miotke v. City of Spokane, 101 Wn.2d 307, 337, 678 P.2d 803 (1984), where the Supreme Court held a jurisdictional defense was waived because it was not raised until three years after the litigation began and after "substantial" litigation progress less than what has taen place in this case.)

Estoppel and waiver can also be premised upon seeking accessory relief in the manner that the Port did in Cause No. 09-2-14216-1. See In re Marriage of Parks, 48 Wn. App. 166, 170, 737 P.2d 1316 (1987), Kuhlman Equipment v. Tammermatic, Inc., 29 Wn. App. 419, 425, 628 P.2d 851 (1981), Livingston v. Livingston, 43 Wn. App. 669, 672, 719 P.2d 166 (1986)

Clearly, despite its best efforts, the most recent order of dismissal entered by the Honorable Court in this case was in error – (as were the previous 2 unjustified orders of dismissal obtained by counsel Lake from other honorable judges in Port of Tacoma I and II) – due to the circumstance that the issue of this Court's jurisdiction was expressly settled in the opinions of 3 other Courts and an award to counsel Lake of \$1,500 based upon the jurisdiction of this Court over the PRA issues: issues that have yet to be finally adjudicated in nearly Nine (9) years due to Ms. Lake's uncanny ability to persuade honorable and competent magistrates into making incorrect decisions in regard to the PRA claims brought by plaintiff West.

While it is evident that "the doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.' , it is equally evident from the nearly a decade of delay that counsel has unilaterally precipitated, that the progress of this case has been woefully at odds with any form of just, speedy, and inexpensive determination whatsoever.

Thus, this is just the type of case that the doctrines of waiver, collateral estoppel and res judicata were designed to address. Thus, under the circumstances of this case, it was be unfair and inequitable to enter yet another Order of Dismissal without reaching the merits of the plaintiff's

claims, as the Court of Appeals obviously intended when it remanded this case back for consideration in the first place on February 20, 2014.

IV The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when, unlike Hobbs, West had asserted a cause of action for an untimely response under RCW 42.56.550(2) due to the Port having repeatedly missed self-imposed deadlines.....

The Court erred in basing the latest dismissal on the untested scope of Hobbs when the circumstances were simply not comparable: In Hobbs' case, Hobbs failed to assert a cause of action under and the Auditor in Hobbs was producing records to Hobbs prior to his suit. By contrast in this case, (as this Court has previously recognized), West's complaint specifically asserted a cause of action under RCW 42.56.550(2)

This Court's Order in the Opinion of February 20, 2014, (In the previous appeal) expressly held that the port was not producing records at the time the suit was filed; and recognized West's claims under RCW 42.56.550(2)...

(... **“(T)he port repeatedly pushed back its expected release date.** On January 14, 2008, West filed a complaint alleging that the Port's Actions violated the Public Records Act.” (See Opinion of February 20, 2014, emphasis added)

This recognition was in accord with the express black letter law of RCW 42.56.550(2) which provides...

Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it

provided is reasonable.

As the honorable Rob McKenna arguing in the March 6, 2015 Brief on behalf of the Auditor opposing discretionary review of the decision of this Court in Hobbs in the Supreme Court observed...

In any event, the PRA provides requesters with a distinct cause of action to challenge an agency's estimate of time it will take to respond; a PRA claim that Hobbs did not pursue in this case. RCW 42.56.550(2). Any other requester who wishes to challenge an agency's estimate of time to respond would be able to argue that his case is distinguishable from the decision below.

These observations by the Attorney General as to the limited scope of the Hobbs case are correct and should be seen as an appropriate interpretation of the express letter of law which explicitly provided jurisdiction for the filing of this case.

V The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the agency was not in the process of producing records and did not subsequently cure the defects in its response prior to the hearing.....

Substantively, the Trial Court erred by failing to consider the limitations and factual basis for the holding of the Court of Appeals in Hobbs, and in failing to recognize that both the differing circumstances of this case and the Order of the Court of Appeals vacating the previous dismissal of this action foreclosed the port from obtaining yet another improper dismissal.

For the first part, it is unclear if Hobbs has established a new standard and what the parameters of such a standard might be. Under accepted practice

Significantly, the Hobbs court included a footnote that distinguishes the circumstances of this present case and other cases under RCW 42.56.550(2) challenging the reasonableness of an agency's estimate from the facts of Hobbs...

Here the Auditor was producing records in installments. We do not address the situation where an agency completely ignores a records request for an extended period.

Even if the port has not expressly or equitably waived its right to argue that this Court lacks jurisdiction, it seeks to rely upon is manifestly obiter dictum limited to a very specific fact situation, where the agency was not withholding records and had fully complied with the PRA at the time the case was heard. These are most evidently not the facts of this case.

The brief filed by the Attorney General of the State of Washington in the Supreme Court in the Hobbs Case that illustrates the nature of the operative portions of the Hobbs decision and the limitations that the chief law enforcement officer of the State viewed the actual precedent in the Hobbs decision to incorporate.

Hobbs' Petition does not claim that the Auditor's final, complete response to his records request denied non-

exempt information or inadequately explained exemptions from disclosure in violation of the PRA. Rather, he seeks a finding that the Auditor's first installment violated the PRA during the short period of the time it took the Auditor to consider Hobbs' concerns and address them.... These are not issues of substantial public interest which merit review under RAP 13.4(b)(4).

As the both Attorney General and the Court (at 940-41) concluded..."Under these circumstances, Hobbs was not "denied" an opportunity for inspection of the records." (emphasis added). Finally, the Attorney General in the March 6, 2015 Brief observed...

In any event, the PRA provides requesters with a distinct cause of action to challenge an agency's estimate of time it will take to respond; a PRA claim that Hobbs did not pursue in this case. RCW 42.56.550(2). Any other requester who wishes to challenge an agency's estimate of time to respond would be able to argue that his case is distinguishable from the decision below.

In the instant case, the presence of claims for failure to provide a reasonable estimate and the ultimate final withholding of records by the Port provide a sound basis for the jurisdiction of this court to determine, as the Court in Hobbs did, the merits of the PRA withholding claims.

The Port's lack of any compelling argument based upon law may be demonstrated by a close reading of the obiter dicta cited by counsel from Hobbs v. State. In Hobbs, the Court actually reached the merits of Hobbs' claims, and found no violation, making the portions of their ruling on the timing of Hobbs suit obiter dictum inapplicable to cases where an actual violation of the PRA is present. As the Court of Appeals ruled in Hobbs,

reaching the merits of the unreasonable withholding claims...

We hold that the Auditor's search for records to produce in response to Hobbs' public records request was reasonable, and Hobbs' PRA claim fails.

Significantly, under the unique facts in Hobbs, the Appellate Court found...

When an agency diligently makes every reasonable effort to comply with a requestor' s public records request, and **the agency has fully remedied any alleged violation of the PRA** at the time the requestor has a cause of action (i.e., **when the agency has taken final action and denied the requested records**), **there is no violation entitling the requester to penalties or fees.** (See Hobbs, (emphasis added))

Thus, it is evident that the dicta of Hobbs that counsel attempts to cite as precedent is limited to situations where an agency is still responding to a request or has cured all of its omissions prior to any hearing in the Superior Court, and the operative Ratio Decidendi of Hobbs is simply inapplicable to the facts of any case where the complaint seeks relief for failure to provide a reasonable estimate and where the agency is actually “finally” withholding records in violation of the PRA at the time the case is brought to trial.

VI The Court erred in entering a second improper dismissal after remand based upon the new and undefined scope of the ruling in Hobbs when the Court in Hobbs reached the substantive claims of violation rendering its other extraneous language obiter dicta.....

The Hobbs Court's finding of no violation of the PRA on the merits was irrespective of its dicta concerning the timing of filing suit and

thus, under the Wambaugh inversion test, or any other precedential analysis, the ratio decidendi of Hobbs is limited to the basis for the decision...

The bindingness of a series of holdings of a court of last resort under the rule of stare decisis is determined by the 'decision' rather than the opinion or rationale advanced for the decision. 21 C.J.S. Courts §§ 181, 186, pp. 289, 297. The controlling principle of a case is generally determined by the judgment rendered therein in the light of the facts which the deciding authority deems important. Goodhart, 'Determining the Ratio Decidendi of a Case,' Jurisprudence in Action, p. 191. (See also, A Computational Model of Ratio Decidendi, Karl Branting, University of Wyoming)

Where a statement in a judicial decision is offered as authority for a position or legal argument, a court must examine the statement in context and evaluate whether the statement is dicta; if it is, it has no precedential effect.

Where a statement in a judicial opinion relates to an issue that was not before the court, that statement does not constitute a holding of the court. Black's Law Dictionary defines a "holding" as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision. Cf. OBITER DICTUM." Black's Law Dictionary (8th ed. 2004).

Black's Law Dictionary sets forth the following definition for "obiter dictum":

[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). – Often shortened to dictum or, less commonly, obiter. Pl. obiter dicta. See DICTUM. Cf. HOLDING (1); RATIO

DECIDENDI. Black's Law Dictionary (8th ed. 2004⁵).

“In considering . . . statements made in the course of judicial reasoning, **one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved.**” Peterson v. Hagan, 56 Wn.2d 48, 53, 351 P.2d 127 (1960) (citations omitted); see also Waremart v. Progressive Campaigns, 139 Wash.2d 623, 647-48, 989 P.2d 524 (1999) (Madsen, J., concurring).(emphasis added)

Statements in a case that do not directly relate to the actual issue before the court and are unnecessary to decide the case constitute dicta. In D'Amico v. Conguista, 24 Wash.2d 674, 167 P.2d 157 (1946), the Supreme Court cautioned against reliance upon dicta:

Our attention has been called to the fact that in some of our cases, we have made statements which would indicate our adherence to a rule that an employee was in the course of his employment when he was eating lunch. **Those statements, however, were made in the course of our reasoning and did not, and could not, announce our adherence to such a rule** because the question was not present in any of those cases. D'Amico at 683. (emphasis added)

In State ex rel. Johnson v. Funkhouser, 52 Wn.2d 370, 325 P.2d 297 (1958), the Supreme Court applied the same rule in a similar situation, where the lower court had relied upon the court's statement in an earlier case, Luellen v. City of Aberdeen, 20 Wash.2d 594, 148 P.2d 849 (1944), that “it quite clearly appears from a reading of the pension act

⁵1 The Black's Law Dictionary definition of obiter dictum also includes the following explanation: “Strictly speaking an ‘obiter dictum’ is a remark made or opinion expressed by a judge, in his decision upon a cause, ‘by the way’... or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion. . . . In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as ‘dicta,’ or ‘obiter dicta,’ these two terms being used interchangeably.” William M. Lile et al., Brief Making and the Use of Law Books 304 (3d ed. 1914).

that one must have the status of a police officer before he can apply for retirement and a pension.” The court refused to accord any precedential effect to that statement:

The quoted statement, upon which the court relied in the instant case, was made in the course of this court’s reasoning. The issue to which the statement relates was not before the court and, therefore, the statement did not and could not announce our adherence to such a rule. [citing D’Amico] That the statement was not essential to the opinion is evidenced by the court’s conclusion The court’s conclusion in the Luellen case does not support respondent’s contention. *State ex rel. Johnson v. Funkhouser*, 52 Wash.2d at 373-74.

Thus, a court’s statement – no matter how clearly articulated, unambiguous, or definitive – is not a holding and has no precedential effect if it does not relate to an issue actually decided by the court. The briefs in *Hobbs* do not even tangentially deal with the issue of whether a suit may be filed before an agency has completed its response to a request, and the issue was not before the Court for resolution.

Nor was *Hobbs* decided on the basis that the Court lacked jurisdiction, rather the Court proceeded, after its brief analysis into the realm of dicta, to reach the merits of *Hobbs* claims, which due to their defects being remedied prior to the hearing, lacked vitality in their own right, as the Court expressly held. Absolutely nothing in this decision sets a precedent anywhere near what Ms. Lake would have the Court believe in the present case.

In addition to the cases cited above, Washington Courts have consistently upheld the principle that unnecessary surplusage such as the dicta in *Hobbs* is to be disregarded. See *City of Seattle v. Holifield*, 170 Wn.2d 230, 244 n. 13, 240 P.3d 1162 (2010) (court's comments in an opinion that are immaterial to the outcome are dicta); *State v. Halgren*,

137 Wn.2d 340, 346 n. 3, 971 P.2d 512 (1999) (court's comments that do not bear on the outcome of a case are dicta); *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 331, 166 P.3d 677 (2007) (declining to be influenced by dicta injudicial decision that encouraged the State's argument); see also *Noble Manor v. Pierce County*, 133 Wn. 2d 269, 289, 943 P.2d 1378 (1997) (Sanders, J. concurring) (dicta are not controlling precedent); *State v. Potter*, 68 Wn.App. 134, 150, 842 P.2d 481 (1992) (statements in a case that are unnecessary to decide the case constitute dicta and need not be followed). *State v. Stewart*, 125 Wn.2d 893, at 900, (Wash. 1995) (Johnson, concurring) "This dicta is unnecessary to the resolution of this case, confuses the analysis... and is not helpful to the trial courts."

In light of the actual precedential portion of the ruling of the Court of Appeals in *Hobbs*, such a mis-application of its dicta as is suggested by counsel in this case to re-write RCW 42.56.550(2) would not only violate the separation of powers, under *Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994) it would be in complete violation of the intent of the PRA, as it would encourage agencies to deny disclosure interminably until a requestor either expired of old age⁶ or the records became antiquated and useless.

A further problem for the "**Nasty, brutish and short**" "Hobbesian" analysis of counsel is that...

When a state court overrules established precedent with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678.

⁶ See, i.e. *The Facts in the Matter of the Great Beef Contract*, Mark Twain, *The Galaxy*, 1870

⁷ See Thomas Hobbes, *Leviathan*

Thus, to apply Hobbs to upset over 40 years of precedent under the PRA where jurisdiction has been found to exist under RCW 42.56.550(2) under which suits have been routinely and regularly filed prior to an agency dotting the last i and crossing the last t on their response to bar any PRA suit until an agency had fully responded to a request would also violate the prohibition on ex post facto law in U.S. Constitutional Art 1, § 9 and Art. 1 § 10. (see, e.g. Collins v. Youngblood, 497 US 37 (1990) and California Dep't of Corrections v. Morales, 514 US 499 (1995), and due process concerns, especially in the absence of the right to amend to cure any technical defect by amendment. This, again, was reversible error.

VII The Court erred in failing to allow a reasonable amendment that would have cured any jurisdictional defects

Another critical factor that distinguishes the circumstances of the case from Hobbs is the Court in Hobbs did not abuse its discretion in denying an amendment of the pleadings, and the claims in Hobbs were unable to be cured by an amended pleading.

In this case not only did Appellant move to Amend the Complaint after the response was complete, this was granted, properly, as the port had not yet filed an answer. This was granted on June 7, and then improperly vacated on July 26.

The Court erred and committed an abuse of discretion in denying this amendment in that both the Federal and State Court rules provide that the right to amend a complaint shall be freely given... The Supreme Court has stated that “this mandate is to be heeded.” Foman v. Davis,

371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

In addition, it is clearly established in the 9th Circuit that “a...court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” See *Doe*, 58 F.3d at 497.

In *Lopez v. Smith*, the 9th Circuit Court of Appeals held...

The dismissal without leave to amend was therefore contrary to our longstanding rule that “[l]eave to amend should be granted ‘if it appears at all possible that the plaintiff can correct the defect.’ ” *Balistreri*, 901 F.2d at 701 (quoting *Breier v. Northern California Bowling Proprietors' Ass'n*, 316 F.2d 787, 790 (9th Cir.1963)).

The district court's action was also inconsistent with our precedent because *Lopez* was a pro se plaintiff. We have noted frequently that the “rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel.” *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)

Because the district court failed to grant *Lopez* leave to amend, we reverse the dismissal and remand to the district court with instructions that *Lopez* be given an opportunity to amend his complaint. *Lopez v. Smith*, 173 F.3d 749 (9th Cir. 2000)

Under this precedent, the Trial Court abused its discretion in denying plaintiff West's request for leave to amend the original Complaint on July 26, 2010, and in failing to vacate its prior denial on May 16, 2016. This is particularly glaring in this case where the plaintiff's amendments were not to add any substantive claims that the Port had not been aware of and such an amendment would not prejudice the Port, and would certainly be in the interest of justice. This, again, was reversible error.

VIII The Court erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment and in Refusing to Conduct a Show Cause Hearing and Determine if the Port Violated the PRA.....

West obtained an Order for a show cause hearing multiple times. A show cause hearing is appropriate in the PRA context. RCW 42.56.550(1) and (2) provide for a show cause hearing on why a public agency has refused to allow inspection or copying of a specific public record or class of records, and whether the estimated time it provided for response was reasonable. RCW 42.56.550(3) allows for a hearing based solely on affidavits. But the Trial Court refused to consider whether the Port had violated the PRA, even though the Port’s violations were apparent at the times that Mr. West noted up the show cause hearings.

For example, the Port responded to Mr. West by giving him an expanding series of promised dates by which it would provide the first installment of the records, none of which promises it kept. Nor did the Port provide a complete exemption log until several months after Mr. West’s request.

The act sets forth strict standards for administrators to meet. “Responses to requests for public records shall be made promptly by agencies.[...] Denials of requests must be accompanied by a written statement of the specific reasons therefor.” [RCW 42.56.520]. This statement “shall include a statement of the specific exemption

authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld.” [RCW 42.56.210(3)]. If the agency fails to provide the required written statement by the end of the second business day following denial of inspection, review of the records in question can be submitted directly to the superior court. [RCW 42.56.520] and [RCW 42.56.550(2)]. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 139, 580 P.2d 246 (1978). “Strict enforcement of these provisions where warranted should discourage improper denial of access to public records and adherence to the goals and procedures dictated by the statute. Hearst Corp., 90 Wn.2d at 140.

The Port continually argued to the Trial Court that it had properly and completely responded to Mr. West’s request. The Port is wrong. It did not make a reasonable estimate, or produce the records in a timely fashion, nor did it timely disclose the privilege log of the withheld records. “[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether.” Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 727, 261 P.3d 119 (2011). Further, the Port’s own records, that it provided to Mr. West and that were quoted in newspaper articles in *The Olympian* and *The News Tribune* showed that the Port destroyed responsive records to Mr. West’s request. (See CP at 248-249)

The Port also continually argued to the Trial Court that Mr. West prematurely filed suit. This is not correct, either. “Whether suit is

reasonably regarded as necessary must be objectively determined, from the point of view of the requesting party. We agree with the [responding agency] that a history of prompt responses to previous requests may be relevant. But after four attempts to obtain the same information, the likelihood of inadvertent agency error was obviously low, the likelihood of a timely response was obviously nil, and there was nothing to indicate the [requestor's] request would ever be honored. Viewed objectively from the [requestor's] point of view, this lawsuit was reasonably regarded as necessary.” Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 571, 59 P.3d 109 (2002).

Here, the Port made three failed promises to produce records; the likelihood of a timely response was obviously nil and there was nothing to indicate that Mr. West's request would ever be honored.

Moreover, a record that the Port did produce to Mr. West showed that this failure to respond promptly to Mr. West was the result of a deliberate policy decision by the Port, to withhold public records from the public until the Port had its chance to put its own spin on the records when it released them at the January 31 study session. (See CP at 250-251)

Violante was partially abrogated by Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117 P.3d 1117 (2005); Spokane Research stands for the proposition that a requestor's lawsuit does not have to *cause* the release of the records in order for the requestor

to be the prevailing party, instead, “prevailing” relates to the legal question of whether the records should have been disclosed on request. 155 Wn.2d at 103. Here, of course, Mr. West’s lawsuit actually *did* cause the release of records, even though all he must show to prevail is whether the records should have been disclosed on request.

Not only can Mr. West show that the records should have been disclosed on request, but he can also show that the Port’s exemption log was lacking. “In order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency’s response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.” PAWS, 125 Wn.2d at 271. “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....” PAWS, 125 Wn.2d at 271, n. 18.

Finally, Mr. West can, and will, if this case ever gets to the trial on the merits ordered by Division I, show that the Port’s claimed exemptions were not supported by law.

The Trial Court could have, and should have, conducted a show cause hearing, as thrice noted by Mr. West, and could have and should have found that the Port was in violation of the PRA, both in the inadequacy and tardiness of its response, and in its overreaching claiming

of exemptions contrary to established precedent.

This Court should, again, remand the case back to the Superior Court for a long overdue show cause hearing on the merits of this case.

IX The Court erred in exercising jurisdiction in Grays Harbor County as a non-visiting “visiting” Pierce County judge in violation of the provisions of RCW 2.08.150 and Article 4 Section 7 of the Constitution of the State of Washington, and in effecting a change of venue without following the procedure set forth in RCW 4.12.030.....

The Grays Harbor Court erred in entering the Order of Masy 16, 2016 by exercising jurisdiction in Grays Harbor County as a Pierce County Court when there was no basis in the record for a change of venue or the appointment of a “visiting” judge who did not “visit” the appointing County. Such an exercise of judicial power violated RCW 2.08.150 and improperly circumvented the due process requirements of a change of venue, which is what a non-visiting “visiting” judge appointment actually effects.

Section 7 of Art. 4 of the Constitution provides, that "the judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so."

RCW 2.08.150 further provides...

Whenever a like request shall be addressed by the judge, or by a majority of the judges (if there be more than one) of the superior court of any county to

the superior judge of any other county, he is hereby empowered, if he deem it consistent with the state of judicial business in the county or counties whereof he is a superior judge (and in such case it shall be his duty to comply with such request), *to hold a session of the superior court of the county the judge or judges whereof shall have made such request, at the seat of judicial business of such county*, in such quarters as shall be provided for such session by the board of county commissioners...(emphasis added)

Significantly, the change of venue statute, RCW 4.12.030, requires conditions to be demonstrated that were not so demonstrated in the present case and a consideration of the impartiality of the forum and the convenience of the parties..

Grounds authorizing change of venue.

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

- (1) That the county designated in the complaint is not the proper county; or,
- (2) That there is reason to believe that an impartial trial cannot be had therein; or,
- (3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,
- (4) That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he or she is a party, or in which he or she is interested;

The unprecedented appointment of a non-visiting “visiting” judge in this case meets neither the requirements of a valid appointment under Statute or the Constitution or those of a change of venue which it most closely resembles in effect. Arguably, all of the factors that could be

considered in a motion for a change of venue militate for this case to be heard in Pierce County.

Significantly, the leading case in Washington on visiting judge appointments *State v. Holmes*, 12 Wn. 169, (1095) concerns a properly appointed visiting judge who actually “visited” unlike the honorable judge Edwards, a further reason to see such exercise improper;

Grays Harbor County is not the proper County for this case and the Grays Harbor Superior Court lacks jurisdiction over the parties and subject matter of this case.

Especially since the honorable (former) judge Fleming has long since retired, there is no reason to believe that an impartial hearing can be had in Pierce County, and plaintiff has an objectively reasonable belief that the impartiality of a magistrate that attempted to imprison him without due process in Grays Harbor might be suspect.

The transfer of this case to Grays Harbor was a hardship for both the plaintiff and the defendants and works a severe hardship upon plaintiff West due to Grays Harbor being a forum non conveniens and due to his justifiable fear of being subject to further threats of unlawful incarceration.

In addition, it is a notorious and open circumstance that the judges of the Grays Harbor Superior Court do not have adequate resources to manage their own caseload, let alone those from other better funded

counties, as is evidenced by the lawsuit filed by the Honorable Judge Edwards against Grays Harbor County arguing that the Court lacked adequate resources. (See news article quoting the Honorable judge Edwards) For the Court to exercise jurisdiction over this case under such circumstances is unreasonable and contrary to common sense.

Pierce County has over a dozen judges qualified to hear this case and it is adequately funded. To have this case transferred to an underfunded County with only 3 Judges, one of whom might be seen to be prejudiced against the plaintiff, is not in the interests of economy or justice.

Pierce County has no shortage of judges or resources to handle cases like this, and has many competent judges who have both acted impartially and reasonably in cases involving plaintiff West. There is absolutely no good reason why both parties in this case should be put to the unnecessary inconvenience of having to undergo the travails inherent in the underfunded forum non conveniens of the Grays Harbor Superior Court.

Request for Attorney Fees

Mr. West was representing himself pro se below. He properly did not request attorney fees and costs in his complaint. Mr. West requests attorney fees on appeal for work done by counsel in both appeals pursuant to RAP 18.1 and RCW 42.56.550(4), and upon remand to the Trial Court.

CONCLUSION

This is a case about delay, reasonable reliance and RCW 42.56.550(2). The Port deliberately delayed in its response to Mr. West's public records request and in its production of the exemption log to Mr. West and to the Trial Court. The first Trial Court delayed in its adjudication of the case and in its appointment of the special master, which in and of itself was another error. Then there were further delays due to the Trial Courts error in dismissing Mr. West's case for alleged "want of prosecution". Even after remand there were further delays and obstructions. During all of these actions and for nearly a decade, the Courts and parties concerned reasonably relied upon the underlying jurisdiction of the Superior Court.

This Court should again reverse the latest improper dismissal in this case and remand the case back to superior court for determination, by the Trial Court, of the ultimate issues in the case: whether the Port violated the Public Records Act and whether it properly claimed exemptions, and for determination of penalties and fees.

The decision of the Trial Court should be vacated, and this case remanded back, again, with directions for the Superior Court to conduct a trial on the merits of plaintiff's claims. This will give West the opportunity to renew his epic struggle to secure justice in the Pierce County Superior Court⁸, with instructions for the award of appropriate costs and penalties

⁸At the very end of his long effort measured by skyless space and time without depth, the purpose is achieved. Then Sisyphus watches the stone rush down in a few moments toward the lower world whence he will have to

for the unlawful withholding of records.

This case has already lasted a long time: longer than the War of Independence, longer than the indenture of Jabez Stone's immortal soul, twice as long as the Civil War, and longer than the participation of the United States in World War I and World War II combined.

In many ways, the burdens placed upon West in this matter are unprecedented in law or Myth⁹. to the extent that if this case is again remanded this Court should seriously consider issuing explicit orders on remand and assigning it to another Honorable Judge in order that these proceedings may comply with Article I, section 10 of the Constitution of the State of Washington, that *Justice in all cases shall be administered openly, and without unnecessary delay*.

Respectfully submitted this 2nd day of February, 2017.

s/Arthur West
ARTHUR WEST

push it up again toward the summit. He goes back down to the plain. *Le Mythe de Sisyphé*. Hamish Hamilton, 1955, Trans. By Justin O'Brien.

⁹ It should be noted that while Sisyphus had the luxury of enjoying the company of Hades, Thanatos and the sulphurous atmosphere of the infernal regions, West, in the course of his apparently futile and seemingly eternal quest for a hearing on the merits of this case, must make do with Ms. Lake, the Honorable Judge Edwards, and the somewhat less infernal region of the Grays Harbor Superior Court.

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I caused to be served a true and correct copy of the preceding document on the party listed below at their Tacoma Hilltop offices via:

Via Email

Attorneys for Respondent Port of Tacoma

Carolyn Lake
Goodstein Law Group, PLLC
501 South G Street
Tacoma, WA 98405

s/Arthur West
ARTHUR WEST

CUSHMAN LAW OFFICES PS

February 02, 2017 - 3:45 PM

Transmittal Letter

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