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STATE OF WASHINGTON

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NO. 49207-5-II

DIVISION II OF THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON

ARTHUR WEST,

APPELLANT

V.

PORT OF TACOMA,

RESPONDENT.

RESPONSE BRIEF OF PORT OF TACOMA

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I. RESPONDENT PORT OF TACOMA'S RESTATEMENT OF ISSUE.

Is dismissal of Public Record Act suit properly dismissed under CR 12(b), CR 56, and *Hobbs v. State*, 183 Wn.App. 925- 936,335 P.3d 1004 (2014), where Appellant filed his PRA suit prior to final agency action by the Port in response to his public records request? **YES.**

II. INTRODUCTION/RESTATEMENT OF FACTS

The case has a long history; the facts relative to this Motion are summarized below.

PORT'S RECORD PROCESSING MILESTONES

On August 4, 2009, Mr West submitted a Public Record request to the Port. He requested the following:

1. All physical copies of SSLC related or other records presently being withheld by the Port or its agents from any person or entity, including the allegedly "newly disclosed" October Surprise SSLC records which continue to be illegally withheld.
2. All billing statements, invoices, and communications 2006 to present involving or about Ramsey Ramerman, Foster Pepper, or other counsel providing advice or services in regard to Public Disclosure issues.
3. All billing statements, invoices, or communications 2004 to present with or concerning "Judge" Terry Lukens or Judge Flemming (sic)
4. All communications with friends of Rocky Prairie or their representatives 2007 to present, to include any denials of requests for disclosure and any "privilege" logs.

CP 28-35. **On August 19, 2009** within 5 days of Mr West's

request, the Port responded to him, advising that due to broad scope of his entire request and the large volume of potentially responsive records, the Port estimated that additional time through on or before August 31, 2009 was required to gather, review records and respond. CP 36.

Thereafter, on **September 3, 2009** the Port extended its estimated response date to be on or before September 25, 2009. On **September 24, 2009** the Port revised its estimated response date to be October 6, 2009, and finally on October 6, the Port updated its response date to be October 14, 2009. CP 36-38. **On 14 October 2009** the Port responded with an update of records status. The Port responded to each of the four categories of requested records (Items 1-4). CP 36-38.

1. Item 1 Records Portion of Record Request.

On 14 October 2009, the Port advised Mr. West that the records requested under Item 1 were the subject of Mr. West prior records request from 2008, and duplicated the records information request which West had made as part of his then existing litigation against the Port in Pierce County Superior Court No. 08-2-043121-1. CP37.

In October 2008, as part of that litigation, the Port advised Mr West that these records were available. **In March 2009**, Mr West requested and sent payment for a CD version

of these records. **On March 16, 2009**, the Port mailed the CD of these records to him. CP 37.

In June 2009, Plaintiff West requested a *paper* version of these same records. CP 37. **On July 2, 2009**, the Port advised that these same public records were available and since then awaited Mr. West's payment for copying. The Port sent West several follow up requests for payment, which was finally received on **October 8, 2009**, in the appropriate amount of \$29.70. The next day, on **October 9, 2009**, the Port through counsel transmitted a copy of records to Mr West, which are also responsive to Item 1 of his 14 August 2009 records request. CP 37.

2. Item 2 Portion of Records Request.

On **October 14, 2009**, the Port advised Mr West that the Port had gathered 46 records responsive to Item 2, "All billing statements, invoices, and communications 2006 to present involving or about Ramsey Ramerman, Foster Pepper". The Port did not redacted or deemed exempt any records in response to the Item 2 portion of the Request. CP 37.

3. Item 3 Portion of Records Request.

On **October 14, 2009**, the Port advised Mr West that the Port had gathered 217 records responsive to Item 3, "billing statements, invoices, or communications 2004 to present with or concerning "Judge" Terry Lukens or Judge Flemming". The records responsive to the Item 3 portion of the request included Goodstein Law Group invoices which also were responsive to Item 2 above. CP 37-38.

The Item 3 requested records include some correspondence

between Port Staff and Port attorneys or between Port attorneys. The Port advised Mr West that it redacted some entries pursuant to the attorney client privilege, *Hangartener v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004) and RCW 5.60.060(2). A Privilege Log describing the redactions and basis for the exemptions was enclosed with the Port's October 14, 2016 response. CP 37-38.

4. Item 4 Portion of Records Request.

On **October 14, 2009**, the Port advised Mr West that so far, the Port had gathered 324 records responsive to Item 4, "communications with friends of Rocky Prairie or their representatives 2007 to present". The Port did not redacted or deemed exempt any records gathered as of October 14, 2009 in response to Item 4. CP 38.

On **October 14, 2009**, the Port also advised Mr West that the Port required additional time to completely respond to Item 4, and estimate the Port could next respond to his request on or before November 3, 2009. CP 38.

In sum, on **October 14, 2009**, Mr West was notified that the total number of records currently response to Items 2-4 was 587, Mr West was were given a copy of the Port's privilege Log for the few records deemed exempt pursuant to attorney client privilege, and advised that the charge for paper copies is \$88.05 (at \$ 0.15 a

page). CP 36-38.

On November 3, 2009, the Port responded pursuant to its forecasted schedule and advised Mr. West that the Port gathered, reviewed and compiled an additional 1258 records responsive to his request. A Privilege Log was created for certain records deemed exempt pursuant to (1) Attorney client Privilege, *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004), and (2) records related to the on-going negotiations for the Port's sale of the Maytown Property, which were determined to be exempt under the PRA as pre-decisional recommendations / deliberative process records pursuant to RCW 42.56.280. CP 39-40.

On November 9, 2009, the Port supplied Mr West with a Privilege log, updated to include exempt documents within the Bate stamped range of 794-2051. CP 39-40, 42.¹

MR WEST'S MULTIPLE LITIGATION MILESTONES

Despite the Port's on-going actions to respond to Plaintiff West, on October 7, 2009, Plaintiff filed his Lawsuit with the Trial Court. CP28-35. Mr West alleges in his Complaint the following public

¹Mr West requested to review the records at the Port on Tuesday November 10, 2009, but re-scheduled to Thursday November 12 from 9-12. On November 12, 2009, Mr West canceled his appointment to review records, and next re-scheduled his records review for January 29, 2010. West completed his records review on that date and requested copies of various records. On February 11, 2010, the Port sent Mr West copies of his requested records. CP 39-40, 42.

Record Act alleged violations:

2.3 The Port of Tacoma is a Port District with a standard business practice of failing to comply with the Public Disclosure Act.

3.12 On August 14, 2009, plaintiff requested inspection and copying of the following records:

1. All physical copies of SSLC related or other records presently being withheld by the Port or its agents from any person or entity, including the allegedly "newly disclosed" October Surprise SSLC records which continue to be illegally withheld.

2. All billing statements, invoices, and communications 2006 to present involving or about Ramsey Ramerman, Foster Pepper, or other counsel providing advice or services in regard to Public Disclosure issues.

3. All billing statements, invoices, or communications 2004 to present with or concerning "Judge" Terry Lukens or Judge Flemming (sic)

4. All communications with friends of Rocky Prairie or their representatives 2007 to present, to include any denials of requests for disclosure and any "privilege" logs.

3.12 (sic) The Port has failed to comply with the PRA by failing to make a reasonable estimate of time for compliance, disclosing the records, asserting exemptions, or even following the various schedules of compliance that they have set. This is consistent with the port's regular business practice of evasion of the act in order to cover up their negligence and maladministration.

See CP 28-35. However, to place this litigation in context, a brief review of its elongated history is needed.

**First Port- West PRR Case
Pierce County Cause No. 08-2-043121-1.**

In 2008, Mr West submitted a massive public records request with the Port of Tacoma, seeking all records related to the Port's potential planned South Sound Logistic Center. The South Sound Logistics Center (SSLC), the centerpiece of the records request, refers to the joint planning process undertaken by the Ports of Tacoma & Olympia to evaluate an integrated cargo handling and transportation facility that facilitates the movement of freight from one mode of transport to another at a terminal specifically designed for that purpose. Mr West's public record request was broad, requesting "all records associated with the Project. The request generated a massive records search by the Port of Tacoma. CP 23.

The Port actively gathered, reviewed and released records responsive to his request, which generated **tens of thousands** of pages of possible responsive records. While the Port was responding to his request, Plaintiff West rushed to file suit against the Port, and moved prematurely for show cause. See Pleadings on file from Pierce County Cause No. 08-2-043121-1. The Port opposed. The Peirce County Court (Judge Fleming) set a records release schedule in keeping with the massive request, and the Port fully complied. CP 23.

Ultimately, Mr West's first PRR case was dismissed based Cr 41 and Trial Court's exercise of discretion. CP 43-46. Mr West appealed that dismissal in January, 2010 and ultimately the case was remanded back to the Trial Court in December 2014. CP 24. In October, 2015, the remanded (and new) Trial Court again dismissed Mr West's Complaint upon Motion of the Port, based on the same analysis of *Hobbs*, which case law supports this present Motion. CP 34 and 47. That matter is on appeal.

**Present West PRR Case
Pierce County Cause No. 09-2-14216-1**

While his first PRA litigation against the Port was "on hold", Mr. West filed this **present** suit on Oct. 6, 2009. CP 24 and 28-35.² Mr West's complaint again alleges (among other things) that the Port of Tacoma and various officials violated the Public Disclosure Act. *Id.*

Mr West describes in his Complaint that he takes issue with Superior Court Judge Frederick Flemings handing of Mr West's

3. 1.1 This is an action for a declaratory ruling in regard to a **pattern of secrecy and negligent administration at the Port of Tacoma that has cost the public over a Quarter of a Billion Dollars (250,000,000) in needless expenditures for mismanaged projects.**

1.1 Plaintiff will show that Defendant Port of Tacoma Commissioners (and Executive Director Tim Farrell) negligently failed to exercise due care in supervising their staff and contractors, **violated their fiduciary duties to administer the Port in the Public interest**, and **maintained a culture of secrecy and a pattern of obstruction** of the Public Disclosure Act to conceal and obscure their wrongful actions in wasting **hundreds of millions of dollars** on mismanaged boondoggles, including the SSLC and the Blair Hylebos NYK terminal project.

first & on-going Public records act complaint:

3.4 On or about April 15 of 2008, a Public Records case involving a regional Rail Logistics Center proposed by the Port of Tacoma was submitted to the then Honorable Judge Fleming for disposition, in Pierce County Cause No. 08-2-04312-1.

3.5 Despite the passage of well over a year, and despite the express terms of RCW 42.56.550 which require **the Court** to conduct an in camera review, respondent Fleming has willfully failed to decide the issue presented for his determination, and has deliberately obstructed and delayed judicial review. He has also, by his actions, entered an order that required a private contractor to conduct the in camera review. This was unlawful in such review is required to be conducted **by the Court** under the express terms of the aforementioned State Law.

3.6 By such actions, respondent Fleming has forfeited his office under the express terms of RCW 2.08.240, and Article 4, Section 20 of the Constitution of the State of Washington.

3.7. A Writ of Quo Warranto is the proper remedy to effect the ouster of an individual unlawfully exercising the franchise of Judge.

CP 28-35, at para 3.4- 3.7. The centerpiece issue of this suit is the Public Records Act allegations, which duplicates the requests made in his first PRR case. Id. On 10/30/2009, the Trial Court granted Pierce County's Motion and dismissed the County from the suit. CP 48-50. On November 2, 2009, Pierce County Superior Court recused itself, and the Case was assigned to visiting Grays Harbor Judge Edwards. The Clerk's Notice set forth procedures for scheduling hearings. CP 50.

In May 2010, despite Port counsel's Notice of Unavailability, lack of notice and objection, Mr West scheduled a Motion and Show Cause in her absence. CP 193-211. On July 26, 2010, Judge Dave Edwards (1) vacated the Motion and Show Cause Order, based upon West's failure to properly confirm his May 10 hearing and failure to give proper notice to Port Counsel and failure to bring to the Court's attention Port Counsels objection and opposition. CP 275-279, 53, and 63-64³, and (2) verbally granted the Port of Tacoma's Motion to Dismiss the Petitioner's Complaint in part (the **Item 1** portion of the August 14, 2009 Public Records Request based on duplicative claims), CP 329-332 and CP 51-66, Transcript of 26 July 2010 hearing. The Court also found Mr. West in contempt at that July 26, 2010 hearing CP 282-285, and awarded terms against Mr. West in the amount of \$1,500 payable to the Port of Tacoma because Mr

³ The Pierce County Administrator's January 27, 2010 letter assigning the visiting judge set forth protocols for the parties to follow. CP 50. On Saturday, May 8, 2010, while Port counsel was out of state, Port counsel was advised by email from Mr West that he intended to attempt a hearing on May 10, 2010, notwithstanding counsel's unavailability. The Port filed its written objection to any hearing on May 10, 2010 as the matter was not properly noted or confirmed. Further, Petitioner West was aware that the Port's legal Counsel was out of town and unavailable for any hearings from May 4-17 2010. CP 275-279. The Port also submitted its Response Brief Opposing Petitioners' Motion for Show Cause regarding Disclosure of Public Records in an abundance of caution. The Port objected to the timing and noting of the hearing. Mr West did not confirm the May 10, 2010 hearing per the instructions in the Pierce County Administrator's January 27, 2010 letter assigning the visiting judge, which set forth the required protocols. Notwithstanding the unavailability of Port counsel, Mr West proceeded with the hearing before the Court on or about May 10, 2010, and did not advise the Court of the Port's unavailability or the port's written response. CP 275-279.

West caused the Port to have to respond to the same issue a second time, in part. CP 64. The Court conditioned further proceedings in the case on Mr. West's payment of those terms and upon giving proper notice of hearings. Id. The Order was signed August 9, 2010 (and filed August 13, 2010 CP 329-332 due to transmittal from Grays Harbor to Pierce County).

Nearly two years later, on June 1, 2012, after Mr West finally paid his sanctions, CP 555, the Port moved and the Grays Harbor Court granted dismissal by Order dated June 12, 2012. CP 424-438 (order filed 8/24/12 and nunc pro tunc effective June 12, 2012). Mr West appealed that dismissal in July 2012 and ultimately the case was remanded back to the Trial Court in January 2015. CP 27.

After remand, the Port filed a Motion to Dismiss on February 5, 2016. CP 573-589. After briefing and argument, the Court issued its Order granting dismissal on May 13, 2016 .CP 636-643. Appellant appealed.

III. ARGUMENT AND AUTHORITY

This Court should uphold the Trial Court's Dismissal pursuant to CR 12(b) and or CR 56. This is a Public Records case, where Appellant prematurely filed his public records lawsuit prior to the Port completing its final agency response action. Under the holding

in *Hobbs v. State*, 183 Wn.App. 925- 936,335 P.3d 1004 (2014), Appellant failed to state a cause of action upon which relief can be granted. The Trial Court properly dismissed the Complaint. This appeal should be denied.

A. Dismissal Was 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 P.2d 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). 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. *Bravo*, 125 Wash.2d at 750, 888 P.2d 147.

A Court reviews a CR 12(b)(6) Motion under the standard of Review. A trial court's ruling on a motion to dismiss for failure to state a claim on which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

B. Dismissal Was Appropriate Pursuant to CR 56.

The rule of Civil Procedure 56(c) provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law.

The Motion for Summary Judgment below pursuant to CR 56(c) was therefore proper because the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986)); and *Wilson v. Steinbach*, 98 Wn.2d

434, 437, 656 P.2d 1030 (1982)). All the facts submitted and the reasonable inferences there from are considered in the light most favorable to the nonmoving party. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 383, 766 P.2d 1137, review denied, 112 Wn.2d 1020 (1989). The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985).

Issues of law are properly resolved on summary judgment. *See Harris v. Harris*, 60 Wn.App. 389, 392, 804 P.2d 1277, review denied, 116 Wn.2d 1025, 812 P.2d 103 (1991); *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975)).

A Court reviews a CR 56 Summary Judgement Motion under the de novo standard of review. “The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)).

C. Appellant Failed to State a Claim for

**Which Relief May Be Granted Because
Appellant Prematurely Filed His PRA Suit,
Prior to Final Agency Action as the Port's PRA
Responses Were Not Yet Complete**

Denial of a request to inspect to copy public records is a prerequisite for filing an action for judicial review of an agency decision under the PRA. *Hobbs v. State*, 183 Wn. App. 925- 936,335 P.3d 1004 (2014). Copy attached as **Appendix 1**.

The PRA requires a final agency action before a suit may be brought. *See Hobbs*, 183 Wn.App. at 936.... before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records. *Hobbs*, 183 Wn. App. at 936. Thus, requestor may not initiate a lawsuit before an agency has taken some form of a final action. *Hobbs*, 183 Wn. App. at 937, (“*Hobbs* takes the position that a requestor is permitted to initiate a lawsuit prior to an agency’s denial and closure of a public records request. **The PRA allows no such thing.** Under the PRA, a requestor may only initiate a lawsuit to compel compliance with the PRA after the agency has engaged in some final action denying access to a record”).

In the present matter, Appellant file suit on October 6, 2009, while the Port was actively gathering, and reviewing records, and in

no way had given any indication that its response to the records request was final. CP 36-42. The Port, while actively gathering and reviewing the tens of thousands of potentially responsive records and updating Appellant of that review status, did not complete its records request response until November 9, 2009. CP 36-42.

Appellant's and Port pleadings before the trial court establish that there is no genuine issue of these material facts. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995), cases cited.

First, West's Complaint admits the material fact that the Port's actions in response to the request were not yet complete at the time of filing: "3.2 Defendants have refused to comply with the disclosure act entirely, and refused to respond promptly with a date certain for disclosure" CP 38-39.

Next, pleadings by Appellant further concede that the Port's actions in response to the PRA request were active and ongoing at the time the Appellant filed this case:

Although the Port had set 3 successive deadlines for response to the first request, (August 31, September 25, and October 6) it has failed to comply with any of these estimates. **While some records have been produced and an exemption log provided, prior to the filing of this suit**, the Port of Tacoma failed to reasonable provide any records for inspection, assert exemptions, or make a reasonable estimate of the time required for compliance

with the act.⁴

Dismissal under *Hobbs* is proper pursuant to CR 12(b)(6). 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. *Bravo*, 125 Wash.2d at 750, 888 P.2d 147.

Before the Trial Court, and again here on appeal, Appellant fails to dispute the centerpiece material fact which underpins the Port's dismissal Motion - that the Port's responsive efforts were ongoing but not yet final at the time he filed suit.

In a CR 56 summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. See *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial", then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548

⁴ CP ___. The Port will file a supplemental designation of record concurrently with this Brief. RAP 9.6(a). (Plaintiff's Notice of Issue Filed May 3, 2010).

(1986); see also *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-32 (9th Cir. 1987). In *Celotex*, the United States Supreme Court explained this result: "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." 477 U.S. at 322-23.

In making a CR 56 responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." At that point, the evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989). Here, West presented no proof and no specific contrary facts on the material issue that the Port's responsive efforts were ongoing but not yet final at the time he filed suit. Pleadings filed by the Port amply establish the Port was actively responding to the records request. CP 36—42, and Port's Response to Show Cause dated May 10,

2010.⁵ Therefore, the Port properly met its burden to show that the undisputed facts on record entitle the Port to a summary dismissal under CR 12 and or CR 56 and *Hobbs*.⁶

Per *Hobbs*, “being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define “denial” of a public record, considering the PRA as a whole, we conclude that a **denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.**Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.” *Id.*

Hobbs, a published Division II case, requires this lawsuit be dismissed. The *Hobbs* Court expressly held: “Thus, based on the plain language of the PRA, **we hold** that before a requestor initiates a PRA lawsuit against an agency, there must be some

⁵ CP ___. The Port will file a supplemental designation of record concurrently with this Brief. RAP 9.6(a).

⁶ A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 383, 766 P.2d 1137, review denied, 112 Wn.2d 1020 (1989). The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985). The Port met that burden.

agency action, or inaction, indicating that the agency will not be providing responsive records.” *Hobbs*, 183 Wn.App. at 936. Emphasized.

Hobbs further establishes that when there is “no dispute that [an agency] was continuing to provide Hobbs with responsive records [at the time of the lawsuit filing]”, ***no justiciable event occurs***. 183 Wn. App at 936. Only after an agency closes a request, does a requestor have the ability to petition for judicial review. *Id.* “Thus, requestor **may not initiate a lawsuit before an agency has taken some form of a final action.**” *Hobbs*, 183 Wn.App. at 937. Emphasis provided.

Division I also affirmed the Port’s reading of *Hobbs*: “There, the agency advised Hobbs that it would produce the requested documents in installments. Hobbs filed suit immediately after the agency produced its first installment, while the request was still open and the agency was still gathering records... Division Two affirmed the dismissal of Hobbs's case....” *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wash. App. 695, 714, 354 P.3d 249, 257 (Div. 1, 2015). Thus the *Hobbs* holding unquestionably requires dismissal, when a PRA suit is prematurely filed before an agency takes final action, as was here.

The Trial Court's firm conclusion to dismiss was driven by the plain language of the PRA, RCW 42.56.550(1). As the *Hobbs* court explained:

Under RCW 42.56.550(1), the superior court may hear a motion to show cause when a person has "been denied an opportunity to inspect or copy a public record by an agency." Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.

.... The language in RCW 42.56.520 ^[11] itself refers to "final agency action or final action." Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn.App. at 936. Here, at the time that Appellant asserted his PRA cause of action in his complaint, there was no final agency action that constituted a denial of records and, thus, formed a basis for judicial review of the Port's response. Appellant did not have a cause of action when he asserted that he did have a cause of action. The Trial Court lacked jurisdiction and properly dismissed.

Dismissal with prejudice is the proper remedy for bringing a premature PRA Claim. *See Hobbs*, 183 Wn. App. at 935, 946. Here, both Appellant's pleadings and numerous Port pleadings on record,

establish that this case on all fours is indistinguishable from *Hobbs*, and accordingly was properly dismissed.

D. Appellants Arguments on Appeal Lack Merit

Appellant attempts to raise various issues to refute *Hobb's* clear application. None succeed. Each is addressed below.

1. Stare Decisis Does NOT Apply Here as Appellant Claims.

Although difficult to logically follow, Appellant apparently argues that prior rulings in this (and other cases) can rise to somehow confer jurisdiction on a Court, where otherwise it is lacking.⁷ Similarly Appellant repeats this argument, when he claims "West and three (3) Appellate Courts had reasonably and justifiably relied upon prior law and practice".⁸ Appellant is wrong. Stare decisis does not apply here as Appellant claims.

Stare decisis means, literally, "to stand by things decided." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004). This cornerstone of the common law assures that citizens can rely on the rule of law in decision making. By virtue of stare decisis, courts follow holdings laid down in previous judicial decisions unless they contravene principles of justice. *See Windust v. Dep't of Labor & Indus.*, 52

⁷ Section I & II, *App Opening Brief* at 18-22.

⁸ Section II, *App Opening Brief* at 19.

Wn.2d 33, 35-36, 323 P.2d 241 (1958).

Applicability of doctrine of stare decisis here turns on whether the Port's dismissal Motion presents any argument that touches and concerns determinations made by the appellate court previously in this case.⁹ The record shows it does not. The Trial Court previously dismissed the case, not based on PRA issues, but instead as an exercise of the Trial Court's inherent power to manage schedules and litigants before it¹⁰. In the first appeal, this Appellate Court expressly did **not** rule on any Chapter 42.56 Public Records Act (PRA) issues.

The Appellate Opinion, docketed in this case on April 28, 2014, contains a factual recitation, a section analyzing the applicability of CR 41, and a section analyzing the trial court's inherent power to dismiss a case. Copy attached as **Appendix 2**. Significantly, no portion of the Opinion touches in any way on review of any PRA issues. Therefore, stare decisis, to the extent it applies at all, can only apply to the very narrow issues of the applicability of CR 41 and also the scope of a trial court's inherent power to dismiss this case as a sanction for the Plaintiff's prior litigation practices. These

⁹ CP 553-564, this Appellate Court's prior April 28, 2014 appellate ruling.

¹⁰ The trial court, relying on CR 41(b) and its inherent authority to dismiss, granted the Port's motion. CP 555, 559.

issues are not present here.

At bar is appeal of the Port's Motion to Dismiss for lack of justiciable issues at the time Plaintiff filed his premature PRA case. The substantive PRA dismiss motion is outside the scope of the Appellate opinion in this case. The doctrine of stare decisis simply does not apply here, because there has been no appellate ruling on any PRA matter in this case.

2. The Port is Not Estopped from Dismissal Based on *Hobbs*.

Hobbs establishes with certainty that a PRA review filing is premature when the agency has not yet closed its request. The Port is not estopped under any legal standard from raising the defense under *Hobbs*, as Appellant argues.¹¹ Nor did the Port "expressly waive" the grounds articulated by *Hobbs* for dismissing the case, as Appellant claims.¹²

"Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wash. App. 222, 224-25, 108 P.3d 147 (Div. 1,

¹¹ *Appellant Opening Brief at Section III, 22-28.*

¹² *Id.*, at 27.

2005).

Appellant wrongly infers that Respondent's counsel has been dilatory in asserting the defense.¹³ But the record below belies this assertion. Here, the Port has maintained, from their very first pleadings in this case that the lawsuit was premature:

The Port is properly complied with disclosure requirements pursuant to the Public Records Act, Chapter RCW 42.56 RCW. The Court should find that Public Records Act allows reasonable time to comply, acknowledge the Ports efforts to date as reasonable, and strike the Show Cause matter with prejudice.

Port's Response to Show Cause dated May 10, 2010.¹⁴ Further in its Answer to Complaint, the Port preserved its Affirmative Defense of Plaintiff's Failure to State a Claim and lack of jurisdiction, among other defenses:

5. AFFIRMATIVE DEFENSES

5.4. Plaintiff fails to state a claim upon which relief can be granted.

5.5. Plaintiff has failed, in whole or in part, to satisfy the jurisdictional requirements of the asserted claims. ...

5.7. Plaintiff's claims are barred by lack of subject matter jurisdiction.

See CP 565-572. The Port has pointed out in the beginning, and

¹³ " ..nearly a decade of delay that counsel has unilaterally precipitated.."

Appellant Opening Brief at Section III, 27.

¹⁴ CP ___. The Port will file a supplemental designation of record concurrently with this Brief. RAP 9.6(a).

maintained throughout, that Appellant's lawsuit was premature; the Port is in no way estopped from re-asserting this same position in its dismissal motion. Further, *Hobbs* and its closely related case of *Cedar Grove Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wash. App. 695, 714, 354 P.3d 249, 257 (Div. 1, 2015) were decided in 2014 and 2015 respectively. The Port promptly filed its Motion to Dismiss in reliance on these ruling in early 2016. CO 573-589.

3. *Violante* doesn't Apply to Distinguish this Case From *Hobbs*.

Contrary to Appellant's arguments¹⁵, *Violante* doesn't apply to distinguish this case from *Hobbs*.

A. Port was actively Producing Records.

Appellant concedes that "*Hobbs*, that counsel attempts to cite as precedent, is limited to situations where an agency is still responding to a request..."¹⁶ Here, Appellant the Port was "still responding".¹⁷ Thus, according to *Hobbs*, dismissal is proper.

¹⁵ *Appellant Opening Brief, Section IV*, pp 28-29, *Section V*, pp 29-32, and *Section VIII*, 39-43.

¹⁶ *Appellant Opening Brief*, at 37.

¹⁷ *Appellant Opening Brief* at page 41, alleges without any citation or support in the record that, "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". References to the facts not supported by the record should be disregarded. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 225 P.3d 280 (2009). Further, Appellant is blatantly inserting, word for word, a factual finding made by the

In uncontested pleadings filed in this case as early as 2010, the Port points out that the records West requested in Part 1 of his 4-part records request had already, previously been made available to West by the Port in October 2008, with CD of those records mailed to him in March 2009, and paper copies mailed to him in July 2009 – all before he filed this October 2009 lawsuit, over these same records. CP 37.

In fact, the Superior Court issued an Order of Partial Dismissal on August 9, 2010, finding that “Mr West’s pending lawsuit in Pierce County matter No. 08-2-043121-1 was filed first, was filed by West against the Port of Tacoma, includes this same public records act issue, **including a request for the same documents as at issue in that first case**, and seeks the same relief”. CP 329-332. And the record shows the steps undertaken by the Port to actively keep West informed on the progress of the remaining records

Violante Court and cut and pasting it into a false description of the case below. In *Violante*, the Court based its holding on findings that: “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, Appellant admitted that “While some records have been produced and an exemption log provided, prior to the filing of this suit, the Port of Tacoma failed to reasonable provide any records for inspection, assert exemptions, or make a reasonable estimate of the time required for compliance with the act”. CP ___ (Supplemental Designation of Clerk’s Papers filed simultaneous hereto, May 10, 2010 Plaintiff Note of Issue Motion to show cause).

search –CP 36-40.

B. *Violante* doesn't apply to distinguish this case from *Hobbs*.

Appellant unpersuasively cites to the *Violante* case to argue that the facts of this case are distinguishable from *Hobbs*. There are several significant differences.

First, the 2002 *Violante* case predates 2014 *Hobbs* by a dozen years. Second, in *Violante*, the Court based its holding on findings that: “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 record below firmly establishes (1) the huge number of records potentially responsive to the request, (2) the Port's substantial and on-going actions undertaken in response to Appellant's mammoth records request, and (3) the Port's constant notifications to Appellant of the status of the Port's response. “Viewed objectively,” it is not flatly not true that “there was nothing to indicate the [requestor's] request would ever be honored,” as in *Violante*.

Appellant's reliance on *Violante* is further flawed in that the *Violante* court was concerned with an agency that tried to excuse its (complete) non-responsiveness on the basis that the requester had other means of access to the documents. *Violante* does not suggest that an agency's failure to meet its own estimated date of production automatically violates the Public Records Act.

A more useful precedent is *West v. Department of Licensing*, 182 Wn. App. 500, 331 P.3d 72, *review denied*, 181 Wn.2d 1027, 339 P.3d 634 (2014), where this same Appellant West alleged that the Department had violated the Public Records Act by failing to reasonably search for, identify, and produce records related to motor vehicle fuel tax payments to Indian tribes. The Department responded in installments and not always within its estimates of time needed. After nine months, the Department had delivered almost 50,000 pages and still had as many as 10,000 pages to review.¹⁸ The trial court entered summary judgment for the Department. The Appeals Court affirmed, recognizing that when a request for records is broad in scope and the number of responsive records is substantial, an agency must be allowed time to review the records "to determine whether they were responsive and whether

¹⁸ This compares precisely to the Port's production of tens of thousands of records responsive to Petitioner's request. CP 37:1-15.

they should be produced, disclosed, redacted, or withheld.” *West*, 182 WnApp. at 512. See also *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 334 P.3d 94, 2014, (“ The statute simply requires an agency to provide a “reasonable” estimate, not a precise or exact estimate, recognizing that agencies may need more time than initially anticipated to locate the requested records. RCW 42.56.520”).

Violante does not apply here. The facts in this case are on all fours and undistinguishable from *Hobbs*. The *Hobbs* holding unquestionably requires dismissal, when a PRA suit is prematurely filed before an agency takes final action, as was here.

4. Rule of Law & NOT DICTA in *Hobbs v. State*, 183 Wash. App. 925, 335 P.3d 1004 (Div. 2, 2014), Holds Dismissal Proper When PRA Suit is Prematurely Filed.

Contrary to Appellant’s claims¹⁹, the Port does not rely on dicta. The holding in *Hobbs* requires that this lawsuit be dismissed.

Appellant filed this case while the Port’s responsive efforts to his public records request were ongoing. The *Hobbs* Court expressly held: “Thus, based on the plain language of the PRA, **we hold** that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency

¹⁹ *Appellant Opening Brief*, at page 21 and 29-36.

will **not** be providing responsive records.” *Hobbs*, 183 Wn. App. at 936. *Emphasized*. This plain language of *Hobbs* disposes of the Plaintiff’s centerpiece assertions that *Hobbs*’ timing-of-suit requirements are “dicta”. *Id.* A statement is dicta when it is not necessary to the court’s decision in a case. *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 8-9, 977 P.2d 570 (1999).

Hobbs further establishes that when there is “no dispute” that an agency was continuing to respond to a public record, **no justiciable event occurs**. 183 Wn. App at 936. Only after an agency closes a request, does a requestor have the ability to petition for judicial review. *Id.* “Thus, requestor may not initiate a lawsuit before an agency has taken some form of a final action.” *Hobbs*, 183 Wn.App. at 937. (“*Hobbs* takes the position that a requestor is permitted to initiate a lawsuit prior to an agency’s denial and closure of a public records request. The PRA allows no such thing”).

Under the PRA, a requestor may only initiate a lawsuit to compel compliance with the PRA after the agency has engaged in some final action denying access to a record”). Emphasis provided.

...being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA. Although the statute does not specifically define “denial” of a public record, considering the PRA as a whole, we conclude that a denial of public records occurs when it reasonably appears

that an agency will not or will no longer provide responsive records.

.... The language in RCW 42.56.520 ^[11] itself refers to “final agency action or final action.” Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn.App. at 936.

If the *Hobb*’s ruling were not clear enough, Division I **also** affirmed the Port’s reading of *Hobbs*: “There, the agency advised Hobbs that it would produce the requested documents in installments. Hobbs filed suit immediately after the agency produced its first installment, while the request was still open and the agency was still gathering records... Division Two affirmed the dismissal of Hobbs's case....” *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wash. App. 695, 714, 354 P.3d 249, 257 (Div. 1, 2015).

Thus both the *Hobbs* and the *Cedar Grove*’s holdings unquestionably require dismissal, when a PRA suit is prematurely filed before an agency takes final action, as was here.

5. Dismissal based on *Hobbs* is not a Due Process Violation As Appellant Claims.

Hobbs relies upon the plain language of the PRA for the proposition that judicial review of an open PRA request is

“premature”. *Hobbs*, 183 Wn.App. 925, citing to RCW 42.56.520. Since the “plain language” of the statute at issue has not changed at any time relevant to this action²⁰, Appellant suffered no due process violation by the Court applying *Hobbs*, as Appellant claims.²¹

Appellant’s reliance²² upon *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930) (hereafter “*Hill*”) is grossly misplaced. Copy attached as **Appendix 3**. That out-of-state case found violation of the United States Constitution’s Due Process Clause on very different facts than those presented here. In summary, Missouri’s State Supreme Court violated taxpayer’s due process rights when that court totally abrogated a taxpayer’s remedy by requiring, in contravention of that Court’s clear precedent existing at the time of filing, the taxpayer engage in various administrative procedures prior to filing suit, which would have been untimely as of the ruling. *Hill*, 821 U.S. at 676. In 1922, the Missouri Supreme Court had denied in the strongest terms a mandamus petition by a similarly situated taxpayer who sought administrative relief that the Missouri Supreme Court later

²⁰The legislature re-codified RCW 42.17.320 to RCW 42.56.520. There have been no substantive changes to RCW 42.17.320/42.56.520. The Port relied upon 42.17.320, *supra*, at the time the Plaintiff filed this case. *Hobbs* cites to 42.56.520 as basis for its ruling. 183 Wn.App at 925.

²¹ *Appellant Opening Brief*, at 36-37.

²²*Appellant Opening Brief*, at 36.

required in *Hill*: “The [Missouri] Supreme Court denied the petition, saying that it was ‘preposterous’ and ‘unthinkable’ that the statute conferred such power on the commission.” *Hill*, 281 U.S. at 676; citing *Laclede Land & Improvement Co. v. State Tax Commission*, 295 Mo. 298, 243 S. W. 887 (1922). Then, in 1927, Missouri’s Supreme Court reversed course, and required, for the first time, the taxpayer to follow the previously “unthinkable” and “preposterous” procedures. This was found to be a due process violation because Missouri got to profit from its **reversed stance** and ruling by keeping the taxpayer’s money without providing any form of hearing. “The state court refused to hear the Plaintiff’s complaint and denied it relief, **not because of lack of power or because of any demerit in the complaint**, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it.” *Hill* at 454. That was a far different situation than here.

Here, from the outset, the Port correctly pointed out and preserved the proper interpretation of the plain language of the PRA, which has **stayed consistent throughout**, and which renders this premature lawsuit defective:

.... The language in RCW 42.56.520 ^[11] itself refers to “final agency action or final action.” Thus, based on the plain language of the PRA, we hold that before a requestor initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records.

Hobbs, 183 Wn.App. at 936.

Even assuming purely *arguendo* that Appellant had a “property interest” arising from the Port’s records response, this is not a case where any asserted Court rulings were reversed. Rather, it **is** a case where dismissal is based on a “**demerit in the complaint**” which element was missing in *Hill*. Here, Appellant misused and misapplied the available procedures, filing his law suit far too early and before a valid PRA cause of action had accrued. Therefore, *Hill* is totally distinguishable and does not support Appellant’s claimed due process violation in any way.

To the extent that Appellant argues that *Hill* prohibits application of *Hobbs* as after-adopted judicial interpretation of statute, *Hill* plainly forecloses West’s interpretation:

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court’s power to review decisions of state courts is limited to their decisions on federal questions; **and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise**

confer appellate jurisdiction on this court.

Hill, 281 U.S. at 680. Emphasized. Here, Appellant misapplied

Hill. The quotation provided by Appellant²³:

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."

concerns when a state court (1) reverses course and (2) denies a litigant a property right (in *Hill*, the State of Missouri's Supreme Court ruled that the State could retain tax monies paid under protest by enacting wholly new procedures in dereliction of the Court's own, recently, clearly established common law) and then totally abrogated all manner of judicial review.

Here, (1) no principle, nor doctrine, was reversed, because the PRA language requiring final agency action prior to seeking relief has remained consistent; the law never gave the Appellant the right to **prematurely** seek judicial review of an on-going records response, at any time, and (2) the Appellant was not deprived any property. Therefore, the Appellant's reliance on *Hill* to support a

²³ Appellant Opening Brief at 36.

due process claim is wholly misguided.²⁴

Appellant's premature filing action here is not unlike his hasty action which also resulted in dismissal in *West v. Washington State Association of District And Municipal, Court Judges, a state agency, and the State of Washington*, affirmed by Ruling dated November 2, 2015 in Appeals Court No. 72337-5-1:

“West did not timely give the prerequisite notices before commencing this action. He cannot avoid the obligation of giving the required notices by styling his action as one for declaratory judgment rather than as a citizen action under RCW 42.17A.765(4)... **Because West failed to comply with the statutory procedures, he lacked authority to sue for a judgment that the Association's activities violate the restrictions on agency lobbying.**”

6. Court Did Not Err in Failing to Amend Complaint²⁵

A.Appellant Failed to Support His Claim of Motion to Amend.

Appellant fails to support his claim of filing a Motion to Amend with a citation to the record in his Opening Brief.²⁶ The Court should disregard.²⁷ In fact, with the exception of a cite to CP 209, Appellant fails to cite any citation to the record to support his

²⁴ *Hill* expressly recognizes that even if *arguendo* the Plaintiff's arguments were correct and *Hobbs* departed from precedent, the dismissal of this case still satisfies the due process clause.

²⁵ *Appellant Opening Brief*, Section VII at 37-38.

²⁶ “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.” *Appellant Opening Brief*, at 37.

²⁷ Where party fails to cite to the record to support a contention, the court will not review matters for which the record was inadequate. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 225 P.3d 280 (2009).

“factual” assertions from the middle of page 15 (referencing a May 2010 hearing) to his next record citation to Transcript of an April 1, 2016 hearing on page 16, omitting nearly six years of his lawsuit. Thereafter, West’s remaining “facts” are unsupported but for a non – specific reference to “(See Brief in Cause No. 48110-3-1) at Opening Brief at page 17. Where party fails to cite to the record to support a contention, the court will not review matters for which the record was inadequate. *Mitchell v. Wash. State Inst. of Pub. Policy*, 153 Wn. App. 803, 225 P.3d 280 (2009).

B. West’s Omitted Facts Are Fatal to his Argument.

Even if the court considers West’s allegation unsupported by citations to the record, the full record supports that the Trial Court’s actions were proper. West fails to disclose to this Court facts which defeat any argument that vacation of any amendment Order was improper. In May 2010, West moved to Show Cause West was aware but failed to notify the Court that (1) Port Counsel was unavailable and out of state from the date West filed his Motion to Show Cause through the hearing date, (2) West failed to confirm his Motion as required by Pierce and Kitsap Local Court Rules, and (3) West failed to advise the Court that Port Legal counsel had filed a Response in Opposition to his Motions. CP 193-211. Upon her

return, Port Counsel timely filed a Motion to Reconsider & Vacate Orders entered in her absence. Mr West failed to file any response to the Port's Motions to reconsider & vacate. The Court vacated the May 10, 2010 Orders. CP 275-279, CP 63-64 and 53, By Order signed August 9, 2010 CP 329-332, the Court awarded terms against Mr. West in the amount of \$1,500 payable to the Port of Tacoma because Mr West caused the Port to have to respond to the same issue a second time, in part. CP 64. The Court conditioned further proceedings in the case on Mr. West's payment of those terms and upon giving proper notice of hearings. *Id.* West did not pay the sanction until 2012. CP 555. West alleges he moved to vacate again in May 2016. If true, by that time, his Motion was very untimely and the statute of limitation on this PRA cause of action had passed.

C. West Had No Valid Complaint to Amend.

Correctly applying *Hobbs*, Mr West at no time had a valid Complaint to amend. Because West's Complaint was prematurely filed, the Court lacked jurisdiction to take any action other than to dismiss, *Hobbs*, 183 Wn.App at 936. (Where agency is continuing to respond to a public records request, and compliant files suit, **no**

justiciable event occurs.) Here, Appellant could not append any new cause of action to his defective Complaint.

D. 2010 Court Action was Within Discretion of Trial Court & Proper.

Changes in pleadings designed to add facts occurring after the filing of the original complaint technically should be made pursuant to Wash. Super. Ct. Civ. R. 15(d), in a motion to serve a supplemental pleading, **not** pursuant to Wash. Super. Ct. Civ. R. 15(a), the rule for amended pleadings. *Caruso v. Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983).

The standard of review for denial of a motion to supplement pleadings, like that for denial of a motion to amend, is abuse of discretion. *Caruso v. Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983).

Significantly, contrary to a motion to amend, CR 15(d) contains no requirement imposed on the trial judge that leave to supplement be "freely given". *Herron v. Tribune Pub. Co.*, 108 Wn.2d 162 (1987). Under the facts here, the Trial Court properly issued its discretion to vacate any prior Order, given as the court found without proper notice and confirmation.

E. Court did not Abuse its Discretion.

A trial court's exercise of discretion is manifestly unreasonable if

no reasonable person would concur with the Court's view when the Court applies the correct legal standard to supported facts. *Mayer v. Sto Indu., Inc.*, 156 Wn.2d 677, 684 (2006); quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Here, in 2010, Judge Dave Edwards vacated the Motion and Show Cause Order, based upon West's failure to properly confirm his May 10 hearing and failure to give proper notice to Port Counsel and failure to bring to the Court's attention Port Counsels objection and opposition. CP 275-279, 53, and 63-64²⁸.

In determining whether prejudice would result from granting a motion to amend, Courts may consider potential delay, **unfair surprise**, and the probable merit or futility of the amendments requested. *Estate of Becker v. Forward Tech. Indus., Inc.*, 192 Wn. App. 65 (2015). *Emphasis provided*.

²⁸ The Pierce County Administrator's January 27, 2010 letter assigning the visiting judge set forth protocols for the parties to follow. CP 50. On Saturday, May 8, 2010, while Port counsel was out of state, Port counsel was advised by email from Mr West that he intended to attempt a hearing on May 10, 2010, notwithstanding counsel's unavailability. The Port filed its written objection to any hearing on May 10, 2010 as the matter was not properly noted or confirmed. Further, Petitioner West was aware that the Port's legal Counsel was out of town and unavailable for any hearings from May 4-17 2010. CP 275-279. The Port also submitted its Response Brief Opposing Petitioners' Motion for Show Cause regarding Disclosure of Public Records in an abundance of caution. The Port objected to the timing and noting of the hearing. Mr West did not confirm the May 10, 2010 hearing per the instructions in the Pierce County Administrator's January 27, 2010 letter assigning the visiting judge, which set forth the required protocols. Notwithstanding the unavailability of Port counsel, Mr West proceeded with the hearing before the Court on or about May 10, 2010, and did not advise the Court of the Port's unavailability or the port's written response. CP 275-279.

Washington Courts have “such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction.” *State v. Gilkinson*, 57 Wn.App. 861, 865, 790 P.2d 1247 (Div. 2, 1990). The courts derive authority to govern court procedures from Article IV, § 6 of the Washington Constitution. *City of Fircrest c. Jensen*, 158 Wn.2d 384, 395, 143 P.3d 776 (2006). Additionally, “inherent power is authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties.” *In re Mowery*, 141 Wn.App. 263, 281, 169 P.3d 835 (Div. 1, 2007); quoting *In re Salary of Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976).

“We do not reverse a discretionary decision absent a clear showing that the trial court’s exercise of its discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *City of Puyallup v. Hogan*, ___ Wn.App. ___, 277 P.3d 49 (Div. 2, 2012).

Appellate courts are loath to substitute their discretion for that of the trial court, which is what the Appellant actually requests. *A.G. v. Corporation of Catholic Archbishop of Seattle*, 162 Wn.App.

16, 25, 271 P.3d 249 (Div. 1, 2011), and cases cited therein. (“An appellate court does not substitute its own judgment for that of the trial court, but rather, looks to whether the court’s exercise of discretion was manifestly unreasonable, or made for untenable reasons.”)

An appellate court does not substitute its own judgment for that of the trial court, but rather, looks to whether the court’s exercise of discretion was manifestly unreasonable, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), *Overruled on other grounds by RCW 71.05.390*, explained by *Seattle Times Co. v. Benton County*, 99 Wn.2d 251, 263 661 P.2d 964 (1983). The Supreme Court of Washington has held such substitution to be reversible error. *Teter v. Deck*, ___Wn.2d___, 274 P.3d 336, 346, 274 P.3d 336 (2012) (“We will not substitute our own judgment in evaluating the scope and effect of that misconduct”).

Here, even if Mr West would have supported his allegations regarding Motion to amend in the record, by appealing the vacation of a “motion to amend,” he asks that this Court engage in exactly the judgment substitution that the Supreme Court expressly prohibits. Appellant’s invitation to substitute judgment and this

appeal should be summarily rejected on the grounds that Appellant requests relief that the Court cannot and should not grant under *Hogan*, 277 P.3d 49 and its long line of prior cases in accord.

F. West's 2016 Motion Also Fails As One Year Statute of Limitation Has Passed

West arguably could have thereafter timely renewed any Motion to Amend, with proper scheduling, confirmation and notice, but he did not.²⁹ And, by the time West cured his 2010 imposed sanction in 2012, the statute of limitations for his PRA cause of action has long ago expired. Thus his alleged, requested action in 2016³⁰ actually would have been an improper attempt to revive a claim that is no longer justiciable because the statute of limitations has passed.

In 2005, (pre-dating Appellant's suit), the Washington Legislature amended the Public Records Act to shorten the statute of limitations from five years to one year. See Laws of 2005, ch.

²⁹ The Port does not waive its position that no motion to amend could ever properly be brought based on Mr West having filed a premature lawsuit.

³⁰ Mr West claims that "The Trial Court abused its discretion ... in failing to vacate it prior denial on **May 16, 2016.**" *Appellant's Opening Brief* at 38. Again, he gives no citation to the record in support of this claim. A review of the May 16, 2016 Order reveals that West did not file a Motion to vacate any denial of amendment to the Complaint. See CP 636-643. That is the only Order issued on that date. Nonetheless the Port responds. In addition, if West later claims that his unclear arguments were meant to apply to the Court's 16, 2016 Order denying Motion to Vacant the Court's Prior August 13, 2010 Order Granting Partial Dismissal CP 636-643, then the Port incorporates by reference its analysis presented to the Trail Court in the Port's Response in Opposition to Plaintiffs Motions to Delay CP 159-176. Appellant's failure to cite to the record below, accurately or at all, hinders the Port's ability to track and respond to his vague arguments as precisely as the Port wishes.

483, § 5; former RCW 42.17.410. Actions for judicial review under RCW 42.56.550 now “must be filed within one year of the agency’s claim of exemption or the last production of a record on a partial or installment basis.” RCW 42.56.550(6). See also *Johnson v. State Department of Corrections*, 164 Wn.App. 769 (2011) and *Bartz v. State Department of Corrections Public Disclosure Unit*, 173 Wn.App. 522 (2013), *review denied*, 177 Wn.2d 1024 (2013).

Here, the Port completed its response to Appellant on November 9, 2009. The one year statute of limitations from the Port’s last production of a record on a partial or installment basis thus passed on November 10, 2010. In 2016, Appellant no longer had a cause of action because the limitation time period had passed.

A finding that any Appellant motion to “amend” in 2016, if it existed and the record does not support that it does, is barred by the passage the limitation time period is no hardship on Appellant, because it was self -created. It must be remembered that, after August 2010 when West failed to appear at hearing to determine Court sanctions, “West took no further action until Spring 2012”. CP 554. By that time and certainly in 2016, the time to properly initiate the claim he sought (PRR violation allegedly based on Port’s November 9, 2009 last incremental release) had long passed its one

year limitation date.

G. Any alleged 2016 Amendment is Futile, As Limitation Deadline Has Passed.

Here, in addition to the above basis, any Appellant motion to amend/for supplemental pleadings was/would have been properly denied because the act would have been futile, because the Court lacked jurisdiction over the prematurely file action and or when the statute of limitation has passed. Factors which a trial court may be consider in determining whether to permit amendment is whether the amendment would be **futile**. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154, 943 P.2d 1358 (1997). In determining whether prejudice would result, Courts may consider potential delay, unfair surprise, and **the probable merit or futility of the amendments requested**. *Estate of Becker v. Forward Tech. Indus., Inc.*, 192 Wn. App. 65 (2015). *Emphasis provided*.

In *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 304 P3rd 914 (2013) the Appeals Court upheld denial of an amendment to Complaint where Plaintiff sought the trial court's leave to amend the complaint by adding a request that the trial court declare that the Cities' fluorides are drugs. The trial

court denied the motion on the grounds that it would be futile, given that fluorides in public drinking water were held not to be drugs in *Kaul v. City of Chehalis*, 45 Wn.2d 616, 625, 277 P.2d 352 (1954). The same reasoning applies here. Any Appellant motion to amend his complaint to add new facts and a new PRA cause of action, was made when the Court lacked jurisdiction and or long after the time limitation to do so has passed. Any such amendment would have been futile. "Where the legal basis for a cause of action is **tenuous, futility supports the refusal to grant leave to amend.**" *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). Emphasis provided.

7. Appellant Argument Not Supported by Analysis or Authority should be Wholly Disregarded.

Appellant makes no showing or provides any support for his claim that "The Court erred in failing to afford West an objectively impartial process in accord with the Appearance of Fairness and the 5th Amendment".³¹ Accordingly, that assignment of error is waived. RAP 10.3(a)(6); *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 188 Wn. App. 949, 959 n. 9, 355 P.3d 1199 (2015), *review denied*, 184 Wn.2d 1039 (2016).

³¹ *Appellant Opening Brief*, Section VIII at 39.

8. Appellant's Attempts to Litigate Issues outside the Appeal Should be Ignored.

Appellant next improperly strays far afield from proper issues on appeal. The Court should refuse to consider those issues.³²

West argues that "the Trial Court refused to consider whether the Port had violated the [Public Records Act], even though the Port's violations were apparent at the times that Mr. West noted up the show cause hearings." Opening Brief at 39. By making this argument, West is attempting to advance his argument on the merits of his claim. This Court should decline to consider such issues because it challenges decisions that are neither (1) appealable as a matter of right nor (2) within the scope of West's appeal from the order of dismissal.

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

³² Appellant Opening Brief, Section VIII at 39

372, 773 P. 2d 875 (1989). Here, West's notice of appeal sought review of the order of dismissal and "all interlocutory orders," apparently including the decisions on West's show cause motions. CP at 402-423. But a notice of appeal is not a proper method of seeking review of these decisions because they are not appealable as a matter of right. *Chubb*, 112 Wn.2d at 721; *Meadow Park*, 54 Wn. App. at 372.

In addition, West's challenge to the trial court's decisions on his show cause motions is outside the scope of his appeal from the order of dismissal. Under RAP 2.4(b), the scope of review of trial court decisions not designated in the notice of appeal includes decisions that (1) prejudicially affected the order designated in the notice of appeal and (2) occurred before we accepted review. A decision prejudicially affected an order if the order would not have happened but for the earlier decision. *Right -Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P. 3d 789 (2002). Because the order of dismissal would have happened regardless of the trial court's decisions on West's show cause motions, the decisions on the show cause motions did not prejudicially affect the order of dismissal. Thus the trial court's orders on West's show cause motions are neither appealable as a

matter of right nor within the scope of West's appeal from the order of dismissal. See *RAP* 2. 2, 2.4. Therefore, the Court should decline to consider West's argument.

9. This is not a defacto change in Venue, as West Claims

West argues that this case is a defacto change of venue, and then builds upon that inaccurate claim to argue that the RCW 4.12.030 criteria for change of venue is not met. *Opening Brief* at 43-46. When West's absurd premise is rightfully discounted, the argument collapses.

In truth, the Grays Harbor Trial Court was correctly appointed to serve as a visiting Judge for the Pierce County bench. The authority for appointment of visiting judges has existed under Washington law since at least 1890. See RCW 2.08.150-170. The authority of this Court to act as a visiting judge for Pierce County cannot reasonably be questioned.

Judgments, decrees, orders and proceedings of any session of the superior court held by one or more of the judges of said court, or by any judge of the superior court of another county pursuant to the provisions of RCW 2.08.140 through 2.08.170, shall be equally effectual as if all the judges of such court presided at such session. RCW 2.08.160.

E. Port Should Be Awarded Fees & Costs

The Port requests attorney fees and costs based on this frivolous appeal. RAP 18.1;³³ RCW 4.84.185.³⁴ and RAP 18.9.³⁵ A lawsuit is 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).

Appellant's pursuit of this appeal requires scarce Port taxpayer

³³ 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 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.

³⁴ **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.

³⁵ **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.

dollars to be spent once again defending against off topic and baseless claims. The Port requests this Court order Appellant to pay its attorney fees and costs for having to respond yet again to these frivolous matters. RAP 18.1, RAP18.9 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 administrative agency. *State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985). Although any one prong under *Rolax* will suffice to entitle the Port to a fee award, this appeal meets all three prongs:

- (1) *Hobbs* is well-settled law which defeats this appeal,
- (2) the facts of the Port's on-going response to Appellant's PRA request, the futility of Appellant's Motion to Amend and Appellant's repeat of seeking improper review of Court's Show Cause rulings and straying from issue on appeal are factual and supported by the record, and
- (3) any Appellant Motion to Amend was a discretionary decision which the Trial Court properly denied.

The record here clearly demonstrates that the prerequisites for a attorney fee award is met. Further, 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. The Appellant 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

Hobbs Controls & Requires Dismissal. Per *Hobbs*, 183 Wn. App at 936, at the time that Appellant asserted his cause of action in his complaint, there was no final Port action that constituted a denial of records and, thus, there was no basis for judicial review of the Port's response at the time Appellant filed this

case. Appellant did not have a cause of action when he asserted that he did have a cause of action. **Pursuant to CR 12(b)(6)**, and *Hobbs*, Appellant's concession in his Show Cause Motion that the Port was actively responding to his records request properly triggered dismissal. **Alternatively the Trial Court properly dismissed pursuant to CR 56**. In his response to the Port's Motion and here on appeal, Appellant failed to dispute the centerpiece material fact which underpins the Port's dismissal Motion - that the Port's responsive efforts were ongoing and not yet final. Therefore, the Port has met its burden to show that the undisputed facts on record entitled the Port to a summary dismissal under *Hobbs*. **The Hill case relied on by Appellant is totally distinguishable** and does not support Appellant's claimed due process violation in any way. Rather, Appellant misused and misapplied the procedures available to him, filing his law suit far too early and before a valid PRA cause of action had accrued. Because the Port pointed out in the beginning, and maintained throughout, that West's lawsuit was premature, **the Port was in no way estopped from re-asserting this same position in its dismissal motion**. Last, Mr West claims he sought to amend his complaint to add new facts and a new PRA cause of action. But

any such **amendment would have been futile**, and if made, was properly denied because the Court lacked jurisdiction and or occurred after the time limitation to do so has passed. The Port respectfully requests that this Court deny the appeal and award the Port and its taxpayers their fees and costs.

RESPECTFULLY SUBMITTED this 4th day of April 2016.

GOODSTEIN LAW GROUP PLLC

By: /s/Carolyn A. Lake
Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port

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Job Number: 40543703

Document (1)

1. *Hobbs v. Wash. State Auditor's Office, 183 Wn App 925*

Client/Matter: Port of tacoma PRR

Search Terms: Hobbs v. State, 183 Wash. App. 925, 335 P.3d 1004 (Div. 2, 2014)

Search Type: Natural Language

Narrowed by:

Content Type
Cases

Narrowed by
-None-

APPENDIX 1

APPENDIX 1

Hobbs v. Wash. State Auditor's Office

Court of Appeals of Washington, Division Two

October 7, 2014, Filed

No. 44284-1-II

Reporter

183 Wn. App. 925 *; 335 P.3d 1004 **; 2014 Wash. App. LEXIS 2434 ***

MIKE HOBBS, *Appellant*, v. THE WASHINGTON STATE AUDITOR'S OFFICE, *Respondent*.

Subsequent History: Motion denied by *Hobbs v. Wash. State Auditor's Office*, 2015 Wash. LEXIS 376 (Wash., Apr. 1, 2015)

Prior History: [***1] Appeal from Thurston Superior Court. Docket No: 11-2-02725-0. Judge signing: Honorable Lisa L Sutton. Judgment or order under review. Date filed: 11/09/2012.

Core Terms

records, public records request, documents, requester, installment, e-mail, redactions, superior court, agency's, responsive, violations, whistle-blower, cured, first installment, public record, investigator, responding, penalties, cause of action, electronic, estimated, metadata, lawsuit, copies, issues, final action, updated, alleged violation, initial response, agency's action

Case Summary

Overview

HOLDINGS: [1]-Plaintiff did not have standing to initiate an enforcement lawsuit under *Wash. Rev. Code § 42.56.550* because the agency had not yet taken some form of final action by denying production of requested records or by not providing responsive documents as required by *Wash. Rev. Code § 42.56.520*; [2]-Plaintiff was not entitled to an award of penalties for alleged violations by the agency because the agency was still responding to the request and was not foreclosed from voluntarily curing the violations while the request remained open; [3]-The agency did not violate statutory response requirements by indicating in a timely response letter that the requested records would be

produced on an installment basis and estimating the date the first installment would be completed.

Outcome

Judgment for the agency was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN1 An appellate court reviews agency actions challenged under the Public Records Act, *Wash. Rev. Code §§ 42.56.030-.520*, de novo.

Governments > Legislation > Interpretation

HN2 When interpreting a statute, a court must determine and enforce the legislature's intent. Where the meaning of statutory language is plain on its face, a court will give effect to that plain meaning as an expression of legislative intent.

Governments > Legislation > Interpretation

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Enforcement > General Overview

HN3 When interpreting provisions of the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, a court considers the PRA in its entirety to effectuate the PRA's overall purpose.

Administrative Law > ... > Judicial Review > Reviewability > Standing

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN4 Under the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, a requestor may initiate a lawsuit to compel compliance with the PRA only after an agency has engaged in some final action denying access to a record.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Judicial Review > Reviewability > Standing

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN5 Under *Wash. Rev. Code § 42.56.550(1)*, a superior court may hear a motion to show cause when a person has been denied an opportunity to inspect or copy a public record by an agency. Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the Public Records Act (PRA), Wash. Rev. Code ch. 42.56. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN6 See *Wash. Rev. Code § 42.56.520*.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > ... > Judicial Review > Reviewability > Standing

HN7 Before a requestor initiates a Public Records Act, Wash. Rev. Code ch. 42.56, lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records. The plain language of the statute does not support the claim that a requester is permitted to initiate a lawsuit before an agency has taken some form of final action in denying the request by not providing responsive documents.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN8 Even when an agency actually violates the Public Records Act, Wash. Rev. Code ch. 42.56, the agency is not foreclosed from later curing that violation by offering a satisfactory explanation for the redaction or withholding of documents.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN9 Agencies can cure Public Records Act, Wash. Rev. Code ch. 42.56, violations by voluntarily remedying the alleged problem while a records request is open and the agency is actively working to respond to it

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Judicial Review > Reviewability > Standing

Administrative Law > Judicial Review > Reviewability > Standing

Administrative Law > ... > Freedom of

Information > Sanctions Against Agencies > General Overview

HN10 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 Public Records Act, Wash. Rev. Code ch. 42.56, 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.

Administrative Law > . . . > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > . . . > Freedom of Information > Enforcement > General Overview

Administrative Law > . . . > Freedom of Information > Methods of Disclosure > General Overview

HN11 The purpose of the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, is to encourage open and transparent government by ensuring public access to government records. Wash. Rev. Code § 42.56.030. As a policy matter, the purpose of the PRA is best served by communication between agencies and requestors, not by playing "gotcha" with litigation. In cases where an agency is making every effort to cooperate with a requestor to provide requested records, there certainly cannot be any legitimate purpose served by initiating a lawsuit prior to the agency making a final decision regarding what documents it will and will not produce.

Administrative Law > . . . > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > . . . > Freedom of Information > Enforcement > General Overview

Administrative Law > . . . > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN12 Wash. Rev. Code § 42.56.520 governs an agency's initial response to a Public Records Act, Wash. Rev. Code ch. 42.56, request.

Administrative Law > . . . > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > . . . > Freedom of Information > Methods of Disclosure > General Overview

HN13 See Wash. Rev. Code § 42.56.520.

Administrative Law > . . . > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > . . . > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN14 Wash. Rev. Code § 42.56.080 allows an agency to produce records on a partial or installment basis.

Administrative Law > . . . > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > . . . > Freedom of Information > Methods of Disclosure > General Overview

HN15 Under the Public Records Act, Wash. Rev. Code ch. 42.56, there are two ways for an agency to respond to a public records request. An agency can (1) make the records available for inspection or copying or (2) respond by including an explanation of the exemption authorizing the agency to withhold the record. Wash. Rev. Code § 42.56.210(1) and (3). The plain language of Wash. Rev. Code § 42.56.520 requires that an agency provide a reasonable estimate of the time required to respond to a request. An agency can make records available on an installment basis. Wash. Rev. Code § 42.56.080.

Governments > Legislation > Interpretation

HN16 When interpreting a statute, a court must not add words where the legislature has chosen not to include them.

Administrative Law > . . . > Freedom of Information > Methods of Disclosure > General Overview

Administrative Law > . . . > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN17 Wash. Rev. Code § 42.56.520 does not require an agency to provide an estimate of when it will fully respond to a public records request when the legislature has declined to include such language in the statute.

Administrative Law > . . . > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > . . . > Freedom of Information > Methods of Disclosure > General Overview

HN18 The adequacy of an agency's records search is judged by a standard of reasonableness, that is, the

search must be reasonably calculated to uncover all relevant documents. Washington courts have adopted the federal courts' reasonableness standard as articulated by the Tenth Circuit Court of Appeals. The focal point of the judicial inquiry is the agency's search process, not the outcome of its search. The issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate, which is determined under a standard of reasonableness, depending on the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.

Administrative Law > > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

HN19 At a minimum, a person seeking documents under the Public Records Act, Wash. Rev. Code ch. 42.56, must identify the documents with sufficient clarity to allow the agency to locate them. Agencies are not required to be mind readers.

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > General Overview

HN20 A court inquires into the scope of an agency's search as a whole and whether the search was reasonable, not whether the requestor has presented alternatives that are believed would have more accurately produced the records requested.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Appeals > Costs & Attorney Fees

HN21 *Wash. R. App. P. 18.1* allows an appellate court to grant attorney fees if authorized by statute.

Civil Procedure > Appeals > Costs & Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Administrative Law > Judicial Review > Remedies > General Overview

Administrative Law > > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

HN22 *Wash. Rev. Code § 42.56.550(4)* allows a person who prevails against an agency to be awarded costs and attorney fees.

Headnotes/Syllabus

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Action to enforce a request for the production of public records by the state auditor's office under the Public Records Act. The action was filed while the auditor's office was still responding to the request on an installment basis.

Superior Court: The Superior Court for Thurston County, No. 11-2-02725-0, Lisa L. Sutton, J., on November 9, 2012, dismissed the action with prejudice, ruling that the initial response by the auditor's office complied with the statutory requirement to provide a response within five days and that, after the initial response, the auditor's office had continued to communicate with the plaintiff regarding the dates additional responses would be provided; that the auditor's office did not deny the plaintiff access to electronic records or metadata because providing records in updated installments while the public records request was still pending was not a "denial" of records for purposes of the Public Records Act; and that the scope of the auditor's office search was adequate and that the auditor's office reasonably interpreted the plaintiff's public records requests.

Court of Appeals: Holding that the plaintiff did not have standing to initiate an enforcement action at the time he filed suit because the auditor's office had not yet taken some form of final action by denying production of requested records or by not providing responsive documents, that the plaintiff was not entitled to an award of penalties for alleged violations by the auditor's office because the office was still responding to the request and was not foreclosed from voluntarily curing the violations while the request remained open, and that the auditor's office did not violate statutory response requirements by indicating in a timely response letter that the requested records would be produced on an installment basis and estimating the date the first installment would be completed, the court *affirms* the

dismissal order.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1] [1]

Open Government > Public Disclosure > Judicial Review > Appellate Review > De Novo Review.

An appellate court reviews de novo agency actions challenged under RCW 42.56.030 through RCW 42.56.520 of the Public Records Act.

WA[1] [2]

Statutes > Construction > Legislative Intent > In General.

A court interprets a statute to determine and enforce the legislature's intent.

WA[3] [3]

Statutes > Construction > Statutory Language > Plain Meaning > Unambiguous Language

When the meaning of statutory language is plain on its face, a court will give effect to that plain meaning as an expression of the legislature's intent

WA[4] [4]

Open Government > Public Disclosure > Statutory Provisions > Construction > Considered as a Whole > Statutory Purpose

The Public Records Act (ch. 42.56 RCW) is construed as a whole to effectuate the act's overall purpose.

WA[5] [5]

Open Government > Public Disclosure > Judicial Review > Right to Review > Final Agency Action > Necessity

A person who requests an agency to produce public records under the Public Records Act (ch. 42.56 RCW) may not initiate an enforcement action against the agency unless and until the agency takes some form of final action on the request or there is inaction by the agency indicating that the agency will not be providing responsive records. Under RCW 42.56.550(1), an agency's denial of a public records request is a prerequisite to filing an action for judicial review of the

agency's actions under the act. An agency may be deemed to have denied a public records request when it reasonably appears that the agency will not or will no longer provide responsive records.

WA[6] [6]

Open Government > Public Disclosure > Response by Agency > Failure To Properly Respond > Opportunity To Cure > Right of Action Not Yet Accrued.

At any time before an agency takes final action on a public records request under the Public Records Act (ch. 42.56 RCW), at which time the requester may seek judicial enforcement of the request, the agency may voluntarily cure any violations of the act committed in responding to the request. An agency may voluntarily cure an alleged violation of the act while a request for public records remains open and the agency is actively engaged in efforts to fully respond to the request. If the agency diligently makes every effort to comply with a records request and remedies any alleged violations of the act before the requester's cause of action accrues, there is no violation entitling the requester to penalties; the requester cannot obtain judicial relief for alleged violations of the act before the requester has a cause of action under the act.

WA[7] [7]

Open Government > Public Disclosure > Response by Agency > Partial or Installment Basis > Estimate of Date for Completing First Installment > Sufficiency

An agency may timely and adequately respond to a request for public records under RCW 42.56.520 by sending a response letter to the requester within five days of the request stating that the records will be produced in installments and providing an estimated date for completion of the first installment. RCW 42.56.520 does not require an agency providing records in installments to provide an estimated date for producing all of the records in the agency's initial response letter.

WA[8] [8]

Statutes > Construction > Omitted Language > In General

When interpreting a statute, a court must not add words where the legislature has chosen not to include them.

WA[9] [9]

Open Government > Public Disclosure > Response by Agency > Search for Records > Adequacy > Test > Reasonableness > Determination > Analysis > Factors.

The adequacy of an agency's search for records requested under the Public Records Act (ch. 42.56 RCW) is judged by a standard of reasonableness. The search must be reasonably calculated to uncover all relevant documents. The focus of a court's inquiry is the agency's search process, not the outcome of the search. The issue is not whether any further documents might conceivably exist but, rather, whether the agency's search for responsive documents was adequate, which is determined under a standard of reasonableness and depends on the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives.

WA[10] [10]

Open Government > Public Disclosure > Public Records > Request > Specificity.

A person requesting an agency to produce public records under the Public Records Act (ch. 42.56 RCW) must identify the sought-after documents with sufficient clarity to allow the agency to locate them. An agency is not required to be a mind reader.

WA[11] [11]

Open Government > Public Disclosure > Response by Agency > Search for Records > Adequacy > Test > Reasonableness > Determination > Search Viewed as a Whole.

In determining the adequacy of an agency's search for records requested under the Public Records Act (ch. 42.56 RCW), a court inquires into the scope of the agency's search as a whole and whether the search was reasonable, not whether the requester has presented alternatives that the requester believes would have more accurately produced the records requested.

WA[12] [12]

Open Government > Public Disclosure > Response by Agency > Search for Records > Adequacy > Scope of Search.

An agency's search for records requested under the Public Records Act (ch. 42.56 RCW) may satisfy the standard of reasonableness where the agency assigns several people to conduct the search; numerous search terms are identified that would reveal responsive records; such terms are used to search numerous places where electronic documents are stored, including shared file systems, e-mail files, and paper files; and thousands of pages of documents are identified, including prior and backup versions of documents, e-mails, and other responsive documents. A requester's later identification of additional documents the requester believes fall within the scope of the request does not mean that the agency's search was unreasonable if the record shows that the agency performed a comprehensive search of its paper and electronic files using numerous terms meant to comprehensively identify records responsive to the request.

WA[13] [13]

Open Government > Public Disclosure > Attorney Fees > On Appeal > Prevailing Party > Necessity.

RCW 42.56 550(4) does not authorize an award of appellate attorney fees to a nonprevailing party.

LEE, J., delivered the opinion for a unanimous court.

Counsel: *Christopher W. Bawn*, for appellant.

Robert W. Ferguson, Attorney General, and *Jean M. Wilkinson* and *Linda Anne Dalton*, Managing Assistants, for respondent.

Judges: Authored by Linda CJ Lee. Concurring: J. Robin Hunt, Bradley A. Maxa.

Opinion by: Linda CJ Lee

Opinion

[*928] [1005]**

¶1 LEE, J. — Mike Hobbs appeals the superior court's order dismissing his Public Records Act (PRA)¹ claim against the State Auditor's Office (Auditor). Hobbs argues that the superior court erred in concluding that the Auditor cannot be liable for potential errors while a PRA request is [*929] still pending, the Auditor's initial response letter was adequate, and the scope of the

¹ Ch. 42.56 RCW

Auditor's search was reasonable. Because we hold the superior court did not err, we affirm.

FACTS

¶2 On November 28, 2011, attorney Christopher W. Bawn filed a PRA request to the Auditor on behalf of his client Mike Hobbs. The request was for public records related to the Auditor's investigation of a whistle-blower complaint regarding the Department of Social and Health Services [***2] (DSHS) and the use of "SSI[2]¹ Dedicated Accounts" for foster children. Clerk's Papers (CP) at 105. The request included a large amount of technical information related to the records and record retention. Mary Leider, the Auditor's public records officer, received the request.

A. AUDITOR'S RESPONSE TO HOBBS' REQUEST

¶3 On December 2, 2011, Leider sent Hobbs a response letter stating, "As we understand the subject matter of your request, you are requesting all records related to investigations of DSHS that pertain specifically to SSI Dedicated Accounts." CP at 108. The letter informed Hobbs that the records would be provided in installments and that the Auditor expected the first installment to be available for inspection, by [**1006] appointment, anytime after December 16. The letter also stated that DSHS client records would be sent first to DSHS to ensure all the appropriate redactions were made to protect the foster children's privacy. [***3]

¶4 Leider was unable to contact Hobbs' attorney by phone or e-mail to arrange for the inspection of documents; so on December 21, the Auditor made the first installment [**930] of records available to Hobbs electronically. As discussed in more detail below, Hobbs responded to this first installment by filing suit against the Auditor for alleged PRA violations.³

¶5 On December 30, the Auditor provided Hobbs with a new copy of the documents, using code numbers the Auditor created to correspond to explanations of the

¹"SSI" is the acronym for Supplemental Security Income and is a federal income supplement program designed to help aged, blind, and disabled people who have little or no income. *Supplemental Security Income Home Page—2014 Edition*, U.S. SOC. SECURITY ADMIN., <http://www.ssa.gov/ssi/> (last visited Sept 26, 2014).

³Hobbs filed a lawsuit against the Auditor on December 23, two days after Leider made the December 21 installment available.

redactions. Leider also informed Hobbs that the next installment of records would be ready on January 13, 2012.

¶6 On January 6, 2012, the Auditor's counsel sent Hobbs a letter confirming his requested prioritization of his three pending records requests (two of which are not the subject of this appeal) and stating,

In our conversation, I requested that you contact me if you believe the Auditor has made a mistake in processing your public records requests. The Auditor wants to hear from you if you think there are problems, so the Auditor may address your concerns promptly if [***4] it is possible to do so. This request for cooperation from you pertains to any concerns you may have about redactions, validity or explanation of claimed exemptions, or other concerns. For example, you mentioned that the Auditor's public records officer provided you with an updated version of the first installment of its response to your November 28, 2011 request, and that this update was provided promptly. This approach avoids unnecessary use of the court's time and resources.

CP at 121-22. Also on January 6, Leider sent Hobbs an e-mail informing him that the final installment of records would be ready on February 13.

¶7 On January 19, Leider contacted Hobbs to inform him of some technical issues that had arisen in providing e-mails containing metadata. After consulting with Pete Donnell, audit manager for the statewide technology audit team, the Auditor developed a method to provide the [**931] documents in the format that Hobbs had requested. Leider informed Hobbs that she would prepare five e-mails, send them to Hobbs to confirm they were in an acceptable format, and then process the remaining 88 e-mails. After confirming the e-mails were in a format acceptable to Hobbs, Leider told Hobbs the remaining [***5] 88 e-mails would be ready on March 1.

¶8 On February 13, Leider sent Hobbs the first 1,010 pages of the foster child records redacted by DSHS. On February 14, Leider provided Hobbs with another updated copy of the December 30, 2011 production addressing additional concerns Hobbs' attorney had raised. On February 16, Leider provided the remaining 1,010 pages of foster child records redacted by DSHS. On February 17, Leider sent Hobbs an e-mail stating that she had identified technical issues with some of the files and sent Hobbs another copy of the DSHS records

with corrections to resolve the technical issues

¶9 On February 27, Leider sent Hobbs another e-mail stating that she had reviewed a declaration he had submitted to the court complaining about technical issues involving the metadata of the 17 different versions of the Auditor's whistle-blower investigation closure letter. Leider stated that she had consulted with Donnell, corrected the problem, and was providing new versions of the letter with the metadata issues resolved.

¶10 On March 1, Leider provided Hobbs with the additional e-mails that Leider had contacted Hobbs about on January 19. She also sent Hobbs an e-mail stating that the Auditor [***6] believed it had provided all the responsive documents to Hobbs' public records request, and that Hobbs should contact her with any concerns he may have.

[**1007]

¶11 On March 29, Leider sent Hobbs an e-mail in which she noted that Hobbs had not downloaded the final installment of the records from March 1 and that the link to the "Secure File Transfer System" had expired. CP at 302. She [*932] notified Hobbs that she was reposting a new transfer link so that he would be able to access the installment.

B. HOBBS' LITIGATION AGAINST THE AUDITOR

¶12 Meanwhile, on December 23, 2011, almost immediately after the Auditor had provided the first installment of documents in response to Hobbs' public records request, Hobbs filed suit against the Auditor for alleged PRA violations, primarily complaining about redactions to the records produced in the December 21, 2011 first installment. On January 20, 2012, Hobbs filed a motion requesting in camera review of the Auditor's December 21 and December 30⁴ installments of produced records. The superior court heard the motion on February 14 and reviewed both the December 21 and December 30 productions in camera. On February 15, the superior court ruled that exemption codes the Auditor had [***7] used complied with the PRA requirements.

¶13 On February 17, based on the superior court's ruling after the in camera review, the Auditor filed a motion seeking a ruling that (1) "the redactions contained in the Auditor's December 30, 2011

production, as supplemented by the 5 pages of updated redactions provided to the requester on February 14, 2012, [were] proper" and (2) Hobbs had no cause of action with respect to the December 21, December 30, and February 14 installments because the Auditor was still in the process of responding to Hobbs' public records request and, thus, had not denied Hobbs any records. CP at 143. On March 30, the superior court ruled that the redactions made in the December 30 installment, as updated in the February 14 installment, complied with the PRA. And, the superior court ruled that Hobbs did not have a cause of action as to the December 21, December 30, and February 14 installments.

[*933]

¶14 A final hearing on Hobbs' suit against the Auditor was held on August 17, 2012, after the Auditor's final installment [***8] of Hobbs' public records request. Hobbs raised numerous issues, including that (1) the Auditor's response letter on December 2, 2011 violated the PRA because it did not contain a date for when the response to his request would be completed; (2) the initial copies of the letter closing the whistle-blower investigation (the December 21 installment) were disclosed with improper metadata; (3) the investigator originally assigned to the case did not properly search her electronic case file, and thus, certain records were not disclosed; (4) the Auditor improperly interpreted Hobbs' public records request and did not include documents such as file folder tabs and documents recovered from disaster recovery tapes; and (5) the first installment of records was improperly redacted.⁵

¶15 The Auditor submitted numerous declarations from employees who had worked on compiling the responses to Hobbs' public records request. Leider submitted an affidavit comprehensively explaining the entire process of responding to Hobbs' public records request. Kim Hurley, the special investigations manager, declared [***9] that she had compiled numerous search terms and used those terms to search "the Auditor's Sharepoint program for documents related to Whistleblower case 10-005, my individual Outlook mailboxes, Teammate, and my Auditor network folder." CP at 246. She had also searched the Auditor's "evault," which stores all Auditor employee e-mails in a place where employees cannot delete them. CP at 246.

¶16 Julie Cooper, the special investigations coordinator,

⁴The December 30 response included the same documents provided in the December 21 installment, but with code numbers that corresponded to explanations for the redactions.

⁵Hobbs also stated he would not "waive" this issue, despite the superior court's earlier adverse rulings. CP at 653.

declared that she had searched her own e-mail box and two other employees' e-mail boxes for responsive e-mails and documents. She had also searched the "evault" to ensure all responsive e-mails were disclosed to Leider. CP at 243. Jan Jutte, the director of legal affairs, declared **[**1008]** that she had **[*934]** worked with Leider on compiling the response to Hobbs' public records request, which work had included numerous discussions and meetings to plan and coordinate the interpretation, search, collection, and redaction of responsive records.

¶17 Cheri Elliott was the original investigator assigned to the whistle-blower complaint. She stated that she maintained a paper file of the investigation after closing the complaint and that the electronic documents were deleted after the investigation was closed **[***10]** and the paper file was compiled. After being notified of the public records request, she had scanned the final paper file into an electronic document for disclosure. She had also searched her e-mail boxes and her "Word program folder on the Auditor network." CP at 252. And, statewide technology audit team manager Donnell submitted an affidavit explaining how he had performed the e-mail redactions while maintaining the metadata. He also explained how he had corrected Hobbs' alleged problem with the metadata in the 17 different versions of the Auditor's letter closing the whistle-blower investigation.

¶18 On November 9, 2012, the superior court issued its final order, ruling that the Auditor's initial response complied with the PRA requirement to provide a response within five days and that, after the initial response, the Auditor had continued to communicate with Hobbs regarding the dates additional responses would be provided. The superior court concluded that the Auditor did not deny Hobbs access to the electronic records or metadata because providing records in updated installments while his public records requests were still pending was not a "denial" of records for PRA purposes. CP at 1373. The superior **[***11]** court also concluded that the scope of the Auditor's search was adequate and that the Auditor reasonably interpreted Hobbs' public records requests. Finally, the superior court declined to reconsider issues it had resolved in its previous rulings. The superior court dismissed Hobbs' PRA action with prejudice. Hobbs appeals.

[*935] ANALYSIS

¶19 Hobbs argues that the superior court erred by concluding that he had no cause of action based on the

Auditor's December 21 first installment in response to his public records request. He also argues that the superior court erred by concluding that the Auditor's response letter was adequate, that the scope of the Auditor's search was reasonable, and that the Auditor reasonably interpreted Hobbs' public records request such that it had disclosed all requested documents. We disagree and affirm the superior court's dismissal of Hobbs' PRA claim.

WA[1-4] [1-4] ¶20 **HN1** We review agency actions challenged under *RCW 42.56 030 through RCW 42.56 520* de novo. *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). **HN2** When interpreting a statute, we must determine and enforce the legislature's intent. *Rental Hous. Ass'n*, 165 Wn.2d at 536. Where the meaning of statutory language is plain on its face, we give effect to that plain meaning as an expression of legislative intent. *Rental Hous. Ass'n*, 165 Wn.2d at 536. **HN3** When interpreting provisions **[***12]** of the PRA, we consider the PRA in its entirety to effectuate the PRA's overall purpose. *Rental Hous. Ass'n*, 165 Wn.2d at 536.

A. PREMATURE LITIGATION

[5] [5] ¶21 Hobbs contends that the superior court erred by allowing the Auditor to supplement its responses after he had filed suit to correct alleged violations of the PRA. Specifically, Hobbs argues that any violations in the original installment were violations at the time they occurred and that he was entitled to penalties regardless of whether the violations were later corrected. Thus, Hobbs takes the position that a requester is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request. The PRA allows no such thing. **HN4** Under the PRA, a **[*936]** requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record.

[1009]** 1. No PRA Cause of Action Until after Agency Denies the Public Records Requested

¶22 **HN5** Under *RCW 42.56 550(1)*, the superior court may hear a motion to show cause when a person has "been denied an opportunity to inspect or copy a public record by an agency." Therefore, being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under **[***13]** the PRA. Although the statute does not specifically define "denial" of a public record, considering the PRA as a whole, we conclude that a denial of public records

occurs when it reasonably appears that an agency will not or will no longer provide responsive records

¶23 RCW 42.56 520 states, in relevant part,

HN6 Denials of requests must be accompanied by a written statement of the specific reasons therefor. Agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall establish mechanisms for the most prompt possible review of decisions denying inspection, and such review shall be deemed completed at the end of the second business day following the denial of inspection and shall constitute *final agency action or final action* by the office of the secretary of the senate or the office of the chief clerk of the house of representatives for the purposes of judicial review.

(Emphasis added.) The language in RCW 42.56 520 itself refers to “final agency action or final action.” Thus, based on the plain language of the PRA, we hold that HN7 before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the [***14] agency will not be providing responsive records.

¶24 Here, there is no dispute that the Auditor was continuing to provide Hobbs with responsive records until March 1, 2012, when the Auditor determined it had provided all responsive documents to Hobbs' public records [*937] request. Therefore, there could be no “denial” of records forming a basis for judicial review until March 1, 2012. The plain language of the statute does not support Hobbs' claim that a requester is permitted to initiate a lawsuit before an agency has taken some form of final action in denying the request by not providing responsive documents.⁶

2 Initial PRA Violations

[6] [6] ¶25 Hobbs also argues that once an agency has allegedly violated the PRA, that PRA violation exists as a basis for penalties and costs from the time of alleged violation until it is cured, even if it is cured before the requester would have a cause of action against the agency (i.e., when the agency takes final action in denying public records). In other words, if there were violations in the December 21 installment [***15] of

records, he should be entitled to penalties and costs based on those violations from December 21 until the time the violations are cured. We disagree.

¶26 Hobbs cites four specific cases to support his contention that the superior court provided the Auditor with improper “do-overs” while litigation was pending, rather than ruling that he was entitled to penalties and fees because the Auditor had violated the PRA with its December 21 installment production. Br. of Appellant at 33. Specifically, Hobbs relies on *City of Lakewood v. Koenig*,⁷ *Sanders v. State*,⁸ *Gronquist v. Department of Licensing*,⁹ and *Resident Action Council v. Seattle Housing Authority*.¹⁰ Hobbs' reliance on these cases is misplaced.

[*938]

¶27 First, this court's recent decision in *Koenig* is inapplicable to this case. There was a single issue presented in *Koenig*—whether [***1010] a requester is entitled to penalties based solely on an agency's violation of the “brief explanation” requirement. *Koenig*, 176 Wn. App. at 399. Neither party disputed whether the records were properly redacted, and the City did not argue that it subsequently cured the violation by later explaining the redactions. See *Koenig*, 176 Wn. App. at 399-400. Accordingly, *Koenig* does not address the issue of whether [***16] a requester is entitled to penalties and fees for alleged violations of the PRA prior to the requester having a cause of action under the PRA based on an agency's final action in denying requested records.

¶28 Second, like *Koenig*, *Sanders* does not address the issue of whether a requester is entitled to penalties and fees for alleged PRA violations before the requester has a cause of action. However, *Sanders* does seem to suggest that agencies may have the opportunity for “do-overs.” Br. of Appellant at 33. In *Sanders*, our Supreme Court held that, if an agency violates the “brief explanation” requirement in RCW 42.56 210(3), the agency is not precluded from subsequently offering an

⁷ *City of Lakewood v. Koenig*, 176 Wn. App. 397, 309 P.3d 610 (2013), review granted, 179 Wn.2d 1022 (2014).

⁸ *Sanders v. State*, 169 Wn 2d 827 240 P 3d 120 (2010).

⁹ *Gronquist v. Dep't of Licensing*, 175 Wn. App. 729, 309 P.3d 538 (2013).

¹⁰ *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn 2d 417, 327 P 3d 600 (2013).

⁶ 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.

explanation regarding how the claimed exemption applies. 169 Wn 2d at 847-48. Moreover, an agency is not precluded from arguing a different exemption applies to justify the redaction or withholding of a record after a lawsuit is initiated. Sanders, 169 Wn 2d at 847; Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn 2d 243, 253, 884 P.2d 592 (1994). The agency's violation of the "brief explanation" requirement is only relevant insofar as it may increase the penalties imposed if documents are improperly redacted or withheld. Sanders, 169 Wn.2d at 848. Therefore, while *Sanders* fails to support Hobbs' assertion, *Sanders* does suggest that **HN8** even when the agency actually violates the **[***17]** PRA, the agency is not foreclosed from later curing that violation by offering a satisfactory explanation for the redaction or withholding of documents.

[*939]

¶29 Finally, neither *Gronquist* nor *Resident Action Council* addresses the issue of whether an agency can voluntarily cure an alleged violation of the PRA while the request remains open and the agency is actively engaging in efforts to fully respond to the request. In these two cases, the agencies maintained, in both the trial court and the appellate courts, that the documents at issue were either properly withheld or redacted. Gronquist, 175 Wn App at 746-54; Resident Action Council, 177 Wn.2d at 439-40. That is not the circumstance here. And *Gronquist* did not completely foreclose the possibility that an agency may voluntarily cure a PRA violation after litigation has commenced. Rather, *Gronquist* held that the agency's continued attempts to cure the violation during litigation were inadequate. 175 Wn. App. at 754.

¶30 Hobbs fails to cite to any authority to support his contention that an agency is categorically precluded from voluntarily curing alleged PRA violations while they are actively making reasonable efforts to fully respond to the public records request. However, **Division Three** of this court recently addressed a similar issue and **[***18]** its decision supports the assertion that **HN9** agencies can cure PRA violations by voluntarily remedying the alleged problem while the records request is open and the agency is actively working to respond to it.

¶31 In *Andrews v. Washington State Patrol*,¹¹ the Washington State Patrol (WSP) responded to a public

records request by providing an estimated response date of May 1, 2012. 183 Wn. App. at 647. However, the WSP inadvertently forgot to send the requester an extension letter explaining that there would be additional delays caused by the complexity of the request. Andrews, 183 Wn. App. at 647. On May 3, the requester filed a lawsuit alleging that the WSP violated the PRA by failing to respond to the request by their estimated response date. Andrews, 183 Wn App at [*940] 647-48. On May 9, the WSP responded to the requester explaining the complexity of the request and provided a new estimated time for responding to the request. **[**1011]** Andrews, 183 Wn. App. at 648. On May 25, the WSP fully responded to the requester's public records request. Andrews, 183 Wn. App. at 649 The requester continued to argue that he was entitled to penalties for the entire period of time between the WSP's estimated response date and the date the WSP ultimately responded to the request Andrews, 183 Wn. App. at 649-50

¶32 The court disagreed and declined to impose a "mechanically **[***19]** strict finding of a PRA violation whenever timelines are missed." Andrews, 183 Wn. App. at 653. Instead, the court held that the PRA did not require an agency to comply with its own self-imposed deadlines as long as the agency was acting diligently in responding to the request in a reasonable and thorough manner. Andrews, 183 Wn. App. at 653-54. Because the WSP acted diligently in its attempts to respond to the PRA request, and the WSP's "thoroughness of response [was] not an issue," the court affirmed the trial court's order granting summary judgment in favor of the WSP. Andrews, 183 Wn App at 653-54.

¶33 Here, the Auditor consistently made every effort to fully comply with Hobbs' public records request and voluntarily cured each of Hobbs' alleged violations. The Auditor produced new exemption codes and explanations, produced updated copies of certain redacted pages, re-produced 17 copies of the letter closing the whistle-blower investigation in order to address Hobbs' concern regarding the metadata, and consulted with the statewide technology audit team manager to develop a method of providing the documents in a format that Hobbs had requested. And Hobbs does not dispute that by the time of the final hearing, all of the issues he raised regarding the Auditor's response **[***20]** had been cured. **HN10** When an agency diligently makes every reasonable effort to comply with a requester's public records request, **[*941]** and the agency has fully remedied any alleged violation of the PRA at the time the requester has a cause of

¹¹ 183 Wn. App. 644, 334 P.3d 94 (2014).

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.¹²

B. INITIAL RESPONSE LETTER

WA[7.8] [7, 8] ¶34 Hobbs asserts that the Auditor violated [***21] the PRA by failing to properly provide a prompt response to his public records request. Although the Auditor sent Hobbs a response letter within the statutory five-day response period and included an estimated date for completion of the first installment in response to Hobbs' public records request, Hobbs contends that this response was insufficient because it did not provide him with an estimated date for completing the Auditor's entire response to his public records request. Hobbs is incorrect. The Auditor's response complied with the statutory five-day response period; thus, the Auditor did not violate the PRA.

¶35 HN12 RCW 42.56.520 governs an agency's initial response to a PRA request and states, in relevant part:

HN13 Within five business days of receiving a public record request, an agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested, except that if the requester notifies the agency that he or she cannot access the records through the internet, then the agency must provide copies of the record [***22] or allow the [*942] requester to view copies using an agency [**1012] computer; (3) *acknowledging that the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives has received the request and providing a reasonable estimate of the time the*

agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives will require to respond to the request; or (4) denying the public record request.

(Emphasis added.) In addition, HN14 RCW 42.56.080 allows an agency to produce records on a "partial or installment basis." Here, the Auditor informed Hobbs that it would be producing the records in installments. We must, therefore, determine whether RCW 42.56.520 requires an agency to respond to a public records request by providing a reasonable estimate of when the agency will be able to provide the *completed* response to the request, or whether it is sufficient for the initial response to include only a reasonable estimate of the time it will take the agency to produce the first installment of responsive records.

¶36 HN15 Under the PRA, there are two ways for an agency to "respond" to a public records request. The agency can (1) make the records available [***23] for inspection or copying or (2) respond by including an explanation of the exemption authorizing the agency to withhold the record. See Rental Hous. Ass'n, 165 Wn.2d at 535 (quoting RCW 42.56.210(1) and (3)). The plain language of RCW 42.56.520 requires that the agency provide a reasonable estimate of the time required to respond to the request. Here, the Auditor provided a reasonable estimate of the time required to respond to Hobbs' public records request; the Auditor stated it would provide the first installment of records by December 16. As noted, an agency can make the records available on an installment basis. RCW 42.56.080. Because the Auditor complied with the plain language of RCW 42.56.520, we hold that the superior court did not err in finding that the Auditor complied with the prompt response requirement of the PRA. [*943]

¶37 However, Hobbs asks us to read additional language into RCW 42.56.520. Specifically, he asks us to interpret RCW 42.56.520 as requiring the agency to provide an estimate of the reasonable amount of time needed to fully or completely respond to the request. HN16 When interpreting a statute, "we 'must not add words where the legislature has chosen not to include them.'" Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting Rest. Dev., Inc v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Accordingly, we will not interpret HN17 RCW 42.56.520 to require agencies to provide an estimate of when it will fully [***24] respond to a public records request when the legislature has declined to

¹²We stress that this opinion should not be read to encourage requesters to remain silent and wait until final agency action to voice concerns regarding agency actions or inaction. HN11 The purpose of the PRA is to encourage open and transparent government by ensuring public access to government records. RCW 42.56.030. As a policy matter, the purpose of the PRA is best served by communication between agencies and requesters, not by playing "gotcha" with litigation. In cases such as this, where an agency is making every effort to cooperate with a requester to provide the requested records, there certainly cannot be any legitimate purpose served by initiating a lawsuit prior to the agency making a final decision regarding what documents it will and will not produce.

include such language in the statute.

C. SCOPE OF RECORDS SEARCH

¶38 Finally, Hobbs argues that the scope of the Auditor's records search was unreasonable because (1) the investigator assigned to investigate the whistleblower complaint did not search all of her electronic records and provided the employees responsible for responding to the request with paper copies of the files she kept; (2) it did not include "Outlook appointment records, the investigator's diary of the time she spent on the investigation, and the invoices that were sent to the DSHS on the basis of the diary entries"; and (3) the Auditor failed to search its disaster backup tapes. Br. of Appellant at 46. We disagree.

WA[9,10] [9, 10] ¶39 HN18 "The adequacy of a [records] search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents." Forbes v. City of Gold Bar, 171 Wn. App. 857, 866, 288 P.3d 384 (2012) (quoting Neighborhood All. of Spokane County v. Spokane County, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)), review denied, 177 Wn.2d 1002 (2013). Washington courts have adopted the federal courts' reasonableness standard as articulated by the Tenth Circuit Court of Appeals:

[*944] "[T]he focal point of the judicial inquiry is the agency's search process, not the outcome of its search. The issue is not [***25] whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate[,] .. [which is determined under] [**1013] a standard of reasonableness, and is dependent upon the circumstances of the case. The reasonableness of an agency's search turns on the likelihood that it will yield the sought-after information, the existence of readily available alternatives, and the burden of employing those alternatives."

Forbes, 171 Wn. App. at 866 (alterations in original) (internal quotation marks omitted) (quoting Trentadue v. Fed. Bureau of Investigation, 572 F.3d 794, 797-98 (10th Cir. 2009)). HN19 At a minimum, a person seeking documents under the PRA must identify the documents with sufficient clarity to allow the agency to locate them Hangartner v. City of Seattle, 151 Wn.2d 439, 447, 90 P.3d 26 (2004). Agencies are not required to be mind readers. Bonamy v. City of Seattle, 92 Wn. App. 403, 409, 960 P.2d 447 (1998)

[11] [11] ¶40 As an initial matter, Hobbs presents an incorrect characterization of the issue for our review. He points to specific pieces of the Auditor's records search (i.e., the search by one specific person) or to particular words in his request that he believes the Auditor did not adequately interpret. But HN20 we inquire into the scope of the agency's search as a whole and whether that search was reasonable, not whether the requester has presented alternatives that he believes would [***26] have more accurately produced the records he requested.

[12] [12] ¶41 Here, the Auditor assigned numerous people to conduct the search for relevant records in response to Hobbs' public records request, not just the investigator who had investigated the original whistleblower complaint. The people assigned to respond to Hobbs' public records request identified numerous search terms that would reveal records related to the whistleblower complaint. They used these terms to search numerous places where electronic [**945] documents were stored. The areas they searched included the Auditor's shared file system, e-mail files, and paper files. Over the course of responding to Hobbs' public records request, the Auditor identified thousands of pages of documents, including prior versions of documents, backup versions of documents, Outlook e-mails, documentation regarding meetings and appointments related to the investigation, and numerous other documents.

¶42 Hobbs complains that this search was not reasonable because the Auditor did not (1) search the backup tapes kept off-site specifically for disaster recovery; (2) uncover particular "documents," such as tabs from file folders; and (3) require the original whistleblower [***27] case investigator to read Hobbs' entire public records request before copying her files for the employees gathering documents to compile a response. These alleged "failings" do not render the Auditor's records search unreasonable. Rather, the record shows that the Auditor performed a comprehensive search of its paper and electronic files using numerous terms meant to comprehensively identify records related to the whistleblower complaint and investigation that was the subject of Hobbs' public records request. Simply because Hobbs later identified additional documents he believed fell within the scope of his request does not mean that the Auditor's search was unreasonable. 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.

D ATTORNEY FEES

[13] [13] ¶43 Hobbs also requests attorney fees. HN21 RAP 18.1 allows us to grant attorney fees if authorized by statute. HN22 RCW 42.56.550(4) allows a person who prevails against an agency to be awarded costs and attorney fees. Here, Hobbs is not the prevailing party. Accordingly, he is not entitled to an award of attorney fees
[*946]

¶44 We affirm the superior court's dismissal of Hobbs' PRA action with prejudice. [***28]

MAXA, J., and HUNT, J. PRO TEM., concur.

References

Washington Administrative Law Practice Manual

Annotated Revised Code of Washington by LexisNexis

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 28 PM 12:45

ARTHUR WEST,)	
)	No. 71366-3-1
Appellant,)	
)	DIVISION ONE
v.)	
)	
CONNIE BACON, CLARE PETRICH)	
DON JOHNSON, TED BOTTINGER)	UNPUBLISHED OPINION
TIM FARKELL, RICHARD NARZANO,)	
MARK LINDQUIST, PIERCE COUNTY)	
PROSECUTING ATTORNEY, and)	
PORT OF TACOMA,)	
)	
Respondents.)	FILED: <u>April 28, 2014</u>

SPEARMAN, C.J. — A trial court may dismiss a case for want of prosecution under CR 41(b)(1) unless the case is noted for trial before the hearing on the motion to dismiss. Because the appellant in this case noted the matter for trial before the trial court heard the motion to dismiss, it was error to dismiss the case on this ground. We further hold that, while trial courts have inherent authority to dismiss a case for dilatoriness of a type not described in CR 41(b)(1), in this case, because the grounds relied on by the trial court are not supported by the record, dismissal was an abuse of discretion. We reverse and remand for further proceedings.

FACTS

On October 6, 2009, Arthur West filed this case against the Port of Tacoma (the Port) in Pierce County Superior Court. He alleged, among other things, that various Port officials had violated the Public Records Act (PRA). 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.¹ 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. The order did not set a date by which payment was to be made. In addition, during the course of the hearing, West repeatedly interrupted the proceedings and the court held him in contempt for being "disorderly, insolent to the Court and disrupt[ing] the hearing." Clerk's Papers (CP) at 357. A hearing to determine sanctions for the contempt finding was set for August 2, 2010. West failed to appear. He also failed to appear at a subsequent hearing on August 9, 2010. Verbatim Report of Proceedings (VRP) (08/09/10) at 18. It is unclear from the record whether sanctions were ordered for West's contempt or for his failures to appear. West took no further action in this case until the spring of 2012.

¹ West had filed a separate PRA claim against the Port in 2008. That claim arose from a request for documents that involved tens of thousands of pages of possible responsive records. The lawsuit was initially dismissed based on West's failure to prosecute the suit (citing the lapse of 18 months with no plaintiff action, willful disregard of court orders, and failure to abide by the case schedule). West appealed the dismissal, and Division II of this court reversed the trial court's order and remanded for further proceedings. West v. Port of Tacoma, No. 43004-5-II, 2014 WL 689739.

During the intervening twenty-months, West filed two related cases in other forums, seeking, among other things, relief from the contempt order in the present matter. First, in July 2010, he filed a personal restraint petition (PRP) in the Washington Supreme Court, in which he claimed that the Port's counsel in the present case had illegally acted as a "special prosecutor" when, at the direction of the court, she prepared the orders of contempt. He also claimed the trial judge's imposition of sanctions based on the finding of contempt was a violation of his due process rights.² Less than two weeks later, he filed a suit in the Western District of Washington, which named as defendants three Pierce County judges—including the trial judge in the present matter—several Port Commissioners, and the Port's attorney.³

On March 19, 2012, the trial court case set a status conference for April 6, 2012. In response, West retained counsel, who filed a notice of appearance on March 26, 2012. He also paid the \$1500 sanction on April 16, 2012. The Port responded on April 5 with a notice of intent to file a motion to dismiss. On May 11, 2012, West served the Port with a notice of deposition of Port officials, which he re-noted once due to opposing counsel's unavailability, and again after the Port filed an unsuccessful Motion to Quash pursuant to CR 26(i). On May 30,

² West also filed a motion for injunction and requested an emergency stay of proceedings in the current case. The Supreme Court dismissed West's PRP and denied his motion for reconsideration, issuing a Certificate of Finality on April 5, 2011.

³ West again claimed that counsel for the Port acted as illegal "Special Prosecutor" in the present matter. He also claimed, among other things, that the judges and Port officials had conspired to deny him rights under the PRA and retaliated against him for asserting his rights under the PRA. The federal court granted a defense motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted on June 15, 2011

2012, West filed a Note for Trial Setting with a trial date of November 14, 2012, and moved the court for issuance of a case schedule order.

On June 1, 2012, the Port filed a motion to dismiss with a hearing set for June 12. CP at 673-74. The trial court, relying on CR 41(b) and its inherent authority to dismiss, granted the Port's motion.⁴ West appeals.

DISCUSSION⁵

CR 41(b) provides in relevant part:

Involuntary Dismissal Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

(1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

⁴ Although the order cites CR 41(b)(2) as one basis for the dismissal, this appears to be a scrivener's error. That subsection provides for dismissal on motion of the court clerk and requires the clerk to accomplish a number of procedural steps before so moving. Here, it is apparent that the clerk did not make the motion and the record does not reflect that the required procedural were steps taken. In addition, neither party makes reference to subsection (b)(2) in their briefing.

⁵ The Port requests that we take judicial notice of documents from three other cases filed by West, which it appends as exhibits to its brief. Brief of Respondent at 48-49, ex. 1-4. Two of the documents are taken from West v. Port of Tacoma, No. 43004-5-II, 2014 WL 689739 (*supra*, n.1). The third document is a copy of the docket reflecting dismissal of West's appeal of the federal court bar order. The fourth document is a page of transcript of an oral argument in West v. Wash. Assoc. of Cities, et al., Division Two Cause No. 40865-I-II. We grant the Port's motion as to the first two exhibits because the parties, claims and issues in that case are nearly identical to those in this case and are thus, properly subject to judicial notice. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

The request is denied as to the third and fourth documents.

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(Emphasis added). Whether a trial court properly dismissed an action for want of prosecution under CR 41(b)(1) is a question of law, reviewed de novo. State ex rel. Heyes v. Superior Court for Whatcom Cy., 12 Wn.2d 430, 433, 121 P.2d 960 (1942). Likewise, the application of a court rule to a particular set of facts is a question of law reviewed de novo. Wiley v. Rehak, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

West argues that the trial court had no authority to dismiss the case for failure to prosecute under CR 41(b)(1) because he noted the case for trial before the hearing on the Port's motion to dismiss. We agree. When a trial court rules on a motion for dismissal based on inaction in bringing the case to trial, it is bound by the explicit language of CR 41(b)(1). Snohomish Cy. v. Thorp Meats, 110 Wn.2d at 163,169-70, 750 P.2d 1251 (1988). "The final sentence of CR 41(b)(1) means precisely what it says, a case shall not be dismissed for want of prosecution if it is noted before the hearing on the motion to dismiss." Thorp, 110 Wn.2d at 169-70; see also Walker v. Bonney-Watson Co., 64 Wn. App. 27, 37, 823 P.2d 518 (1992). Here, because it is undisputed that West noted the case for trial before the hearing on the Port's motion to dismiss, the trial court erred when it relied on CR 41(b)(1) as a ground for granting the Port's motion.

Next, we consider whether the trial court had inherent authority to dismiss West's case based on dilatoriness of a type not described in CR 41(b)(1). "When the Court's inherent power to dismiss for want of prosecution is at issue the trial court's decision is reviewed under the abuse of discretion standard." Stickney v. Port of Olympia, 35 Wn.2d 239, 241, 212 P. 2d 821 (1950); see also, Bus. Serv.

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of Am. II v. WafterTech, LLC, 174 Wn.2d 304, 316, 274 P.3d 1025, (2012). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) 443.

Where, as here, the trial court also makes findings of fact and conclusions of law, we review the trial court's conclusions of law to determine if they are supported by the findings of fact and if, in turn, those findings are supported by substantial evidence. Nelson Const. Co. of Ferndale, Inc. v. Port of Bremerton, 20 Wn. App. 321, 326-27, 582 P.2d 511 (1978). Undisputed findings are verities on appeal. Keever & Assoc., Inc. v. Randall, 129 Wn. App. 733, 741, 119 P.3d 926 (2005).

CR 41(b) states in relevant part:

[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

The rule has been interpreted as a codification of the trial court's inherent discretionary power to manage its affairs. Thorp Meats, 110 Wn.2d at 170; Gott, 11 Wn. App. at 507. Thus, "[w]here dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains." Thorp Meats, 110 Wn.2d at 169; see also, Will v. Frontier Contractors, Inc., 121 Wn. App. 119, 128, 89 P.3d 242 (2004); Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 131, 896 P.2d 66 (1995); Jewell v. Kirkland, 50 Wn. App. 813, 822, 750 P.2d 1307 (1988).

In this case, the trial court relied on its inherent power to dismiss because West: (1) failed to timely comply with the trial court's sanction orders and (2) engaged in an abuse of process—specifically, his pursuit of “extended and unfounded litigation actions in various courts, all to avoid complying with the sanctions issued by [the trial] [c]ourt. . . .”⁶ CP at 776. West contends that the trial court abused its discretion when it granted the motion to dismiss on these grounds because neither reason finds support in the record. We agree.

Dismissal for failure to comply with a court order is an appropriate sanction only where the record demonstrates that:

- (1) the party's refusal to obey a [court] order was willful or deliberate,
- (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and
- (3) no lesser sanction would have sufficed.

Will, 121 Wn. App. at 128 (citing Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002)). In Will, the plaintiff, Will, moved for leave to amend his complaint. He served the defendant, Frontier, with the motion and the proposed amended complaint. The court granted the motion on May 31, 2002. Subsequently, on four separate occasions Frontier requested a copy of the amended complaint. Will did not respond until the fourth request, nearly seven months later, in December 2002. Frontier was

⁶ The Port argues that the trial court also had inherent authority to dismiss West's case (1) for allegedly misleading the court by noting motions on dates he knew the Port's attorney was unavailable, and (2) for failure to appear at hearings on August 2, 2010, and August 9, 2010. Because neither basis is cited as justification for dismissal in the trial court's order, we do not address these arguments.

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dissatisfied with the response because the amended complaint still named defendants and asserted claims that had been dismissed on summary judgment. When Will did not respond to Frontier's further complaints, Frontier moved to dismiss. The trial court granted the motion.

On appeal, we reversed, in part, because "[t]he order granting ... leave to amend contained no time deadlines or requirement by the court that Will proceed in a particular way." Will, 121 Wn. App. at 130. We distinguished this circumstance from those in Jewell v. City of Kirkland, 50 Wn. App. 813, 750 P.2d 1307 (1988)). In that case, Jewell appealed the trial court's dismissal of a petition for a writ of certiorari in a land use matter to the superior court. The superior court ordered that Jewell provide funds to the City for the preparation of the record within thirty days of the date of the order, but the funds were not provided until nearly three weeks beyond the due date. We affirmed the superior court's dismissal of the case under CR 41(b) on grounds that Jewell had willfully failed to abide by the time limits specified in the court order. Id. at 822.

Here, as in Will, the trial court's order required that \$1500 be paid, but did not establish a date by which it was to be paid. Because West complied with the order as written, albeit nearly two years later, the evidence is insufficient to conclude that he willfully or deliberately failed to abide by the court's order. Thus, the trial court abused its discretion when it relied on this ground to dismiss the case.

We also conclude that the trial court abused its discretion when it relied on West's "abuse of process" to dismiss this case. The trial court cited Woodhead,

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78 Wn. App. at 132, in support of its decision, however, the case is distinguishable. In Woodhead, we considered whether an appellant's failure to comply with court orders or court rules "together with" other egregious acts—there, deliberate attempts to mislead the court by making false statements—constituted an abuse of process that warranted dismissal. Id. at 131. But, because, as discussed above, West's delay in paying the sanctions was not a willful or deliberate violation of the trial court's sanction order, the fact that he filed baseless claims in other courts, was insufficient, by itself, to find an abuse of process in this case. Thus, dismissal on this basis was an abuse of discretion.

We also conclude that the third prong of Will, which requires a showing that no lesser sanction than dismissal will suffice, is not satisfied here. The trial court noted that West had been fined \$1500 and found in contempt in the present matter. It also noted that bar orders were issued by other courts. After the imposition of these sanctions, the trial court made no finding that West engaged in any other misconduct. By contrast, the record shows that after the sanctions, West retained counsel, paid the terms ordered to the Port, noted up a discovery deposition, and requested a trial setting. The Port objected to the discovery deposition, arguing that there could be no purpose other than harassment, but there is nothing in the record to support this allegation and the trial court did not enter any finding to that effect. Because the sanctions imposed by the trial court and by the other courts had the desired effect, the severe sanction of dismissal in this case was unwarranted.

Attorney Fees and Costs

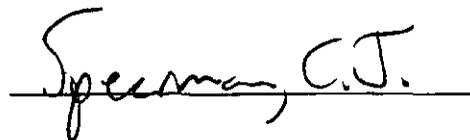
West requests an award of attorney fees and costs pursuant to RAP 18.1 and RCW 42.56.550. RAP 18.1 provides in relevant part:

(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.

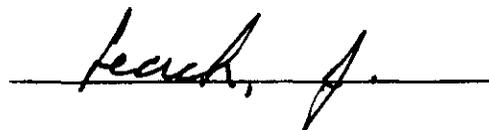
RCW 42.56.550(4) provides for an award of attorney fees and costs to any "person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time. . . ." Because success on appeal does not make West the prevailing party, but rather, the merits of his claim will be remanded for trial, we deny West's request for fees and costs.

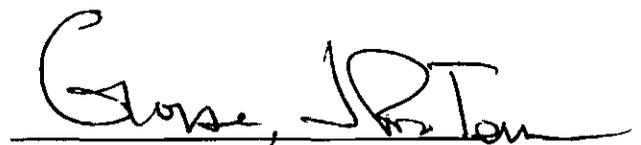
The Port also requests an award of attorney's fees as a sanction against West for filing a frivolous appeal, pursuant to RAP 18.1, RAP 18.9, and RCW 4.84.185. Given our resolution of this case, we deny the Port's request.

We reverse and remand.



WE CONCUR:





KeyCite Yellow Flag - Negative Treatment

Distinguished by Bond v. Dentzer, 2nd Cir (N.Y.), March 13, 1974

50 S.Ct. 451

Supreme Court of the United States

BRINKERHOFF-FARIS TRUST & SAVINGS CO.

v.

HILL, County Treasurer.

No. 464. | Argued May 1,
1930. | Decided June 2, 1930.

On Certiorari to the Supreme Court of State of Missouri

Suit by the Brinkerhoff-Faris Trust & Savings Company against Walter O. Hill, Treasurer of Henry County, Mo. Judgment for defendant was affirmed (19 S.W. (2d) 746), and plaintiff brings certiorari

Reversed and remanded.

West Headnotes (11)

[1] **Federal Courts**

↔ Review of state courts

Federal claim invoking jurisdiction of Supreme Court was timely made, though in state Supreme Court, where raised at first opportunity (Const. U. S. Amend 14).

5 Cases that cite this headnote

[2] **Taxation**

↔ Conditions precedent in general

Plaintiff suing to enjoin county treasurer from collecting part of taxes claimed to be excessive did not omit to comply with any existing condition precedent, where state did not provide administrative remedy. V.A.M.S. §§ 138.010–138.080.

21 Cases that cite this headnote

[3] **Constitutional Law**

↔ Judicial review

Judgment denying relief in equity from discrimination in tax for failure to first seek administrative remedy deprives plaintiff of property without due process, where administrative remedy was never available. U.S.C.A.Const. Amend. 14.

24 Cases that cite this headnote

[4] **Constitutional Law**

↔ Applicability to Governmental or Private Conduct; State Action

Federal guaranty of due process extends to state action through judicial as well as through legislative, executive, or administrative branch of government. U.S.C.A.Const. Amend. 14.

26 Cases that cite this headnote

[5] **Federal Courts**

↔ Validity of state constitution or statutes

State courts have supreme power to interpret written and unwritten laws of state.

2 Cases that cite this headnote

[6] **Federal Courts**

↔ Review of state courts

United States Supreme Court's power to review decisions of state courts is limited to decisions on federal questions

3 Cases that cite this headnote

[7] **Federal Courts**

↔ Particular Cases, Contexts, and Questions

That state court rendered erroneous decision on question of state law, or overruled principles established by previous decisions on which party relied, does not confer appellate jurisdiction on federal Supreme Court (Const. U. S. Amend. 14)

7 Cases that cite this headnote

[8] **Federal Courts**

↔ Particular Cases, Contexts, and Questions

State court's opinion is not final on claim arising under federal Constitution.

5 Cases that cite this headnote

[9] **Federal Courts**

↔ Validity of state constitution or statutes

State court held to have power to construe statute dealing with state tax commission and to re-examine and overrule former case construing such statute (Rev. St. Mo. 1919, ss 12828-12852)

8 Cases that cite this headnote

[10] **Constitutional Law**

↔ Course and conduct of proceedings in general

State courts must accord parties due process in determining adjective and substantive law of state.

27 Cases that cite this headnote

[11] **Taxation**

↔ Conditions precedent in general

Taxpayer's laches in seeking relief from discrimination based on failure to apply to state tax commission held insufficient alone to support judgment dismissing bill for injunction. Mo.St. Ann. §§ 9819-9859, pp. 7916-7936 (Repealed Laws 1945, p. 1805).

18 Cases that cite this headnote

Attorneys and Law Firms

**452 *674 Mr. Roy W. Rucker, of Sedalia, Mo., for petitioner.

Mr. Lieutellus Cunningham, of Jefferson City, Mo., for respondent.

Opinion

Mr Justice BRANDEIS delivered the opinion of the Court.

In 1928, the Brinkerhoff-Faris Trust & Savings Company, acting as trustee for its shareholders, brought this suit in a Missouri court against the treasurer of Henry county, Mo., to enjoin him from collecting or attempting to collect a certain part of the taxes assessed against them for the year 1927 on the shares of its stock; and, pending decision in this suit, to restrain the prosecution of an action already brought by him against the plaintiff for that purpose.

The bill alleged that the township assessor had intentionally and systematically discriminated against the shareholders by assessing bank stock at full value, while intentionally and systematically omitting to assess certain classes of property and assessing all other classes of property at 75 per cent. or less of their value. It asserted that, to the extent of 25 per cent., the assessments were void because such discrimination violated the equal protection clause of the Fourteenth Amendment. And it recited that the plaintiff had tendered, and was continuing to tender, payment of the 75 per cent. of the taxes assessed, which amount it conceded was due. As grounds for equity jurisdiction, the bill charged that relief could not be had at law, either by way of defense in the pending action brought by the treasurer or by paying the tax in full under protest and suing for a refund of 25 per cent. thereof; and that no administrative remedy for the relief *675 sought was, or ever had been, provided by law either by appeal or otherwise to or from the county board of equalization or the state board of equalization.

The defendant's answer denied all the allegations of discrimination and further opposed relief in equity on the grounds that the plaintiff had not pursued remedies before the county or state board of equalization pursuant to articles 3 and 5 of chapter 119 of the Missouri Revised Statutes of 1919 (sections 12820-12827, 12853-12857), and that the plaintiff was guilty of laches in not so doing. The trial court refused the injunction and dismissed the bill, without opinion or findings of fact.

The Supreme Court of Missouri held, on appeal, that relief from the alleged discriminatory assessment could not be had in any suit at law; that his bill in equity was the appropriate and only remedy, unless relief could have been had by timely application to some administrative board; and that neither of the boards of equalization was charged with the power and duty to grant such relief. But, without passing definitely upon the question of discrimination, it concluded that if the plaintiff had 'at any time before the tax books were delivered to the collector, filed complaint with the

state tax commission, that body, in the proper exercise of its jurisdiction, would have granted a hearing, and would have heard evidence with respect to the valuations complained of, and, if the charges contained in the complaint had been found to be true, the valuations placed on its property would have been lowered, or that on other property raised, the property omitted from the assessment roll would have been placed thereon, and the discrimination complained of thereby removed. The remedy provided by statute is adequate, certain, and complete.' Compare *First National Bank of Greeley v. Weld County*, 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784. The court held, therefore, that, because plaintiff had this adequate *676 legal remedy, it was not entitled to equitable relief, and because plaintiff had not complained to the tax commission, 'it was clearly guilty of laches in not so doing.' On these grounds, the Supreme Court affirmed the judgment of the trial court. 19 S.W.(2d) 746.

The powers and duties of the state tax commission are prescribed by article 4 of chapter 119 of the Revised Statutes of 1919 (sections 12828-12852). Six years before this suit was begun, those provisions had been construed by the Supreme Court of Missouri in *Laclede Land & Improvement Co. v. State Tax Commission*, 295 Mo. 298, 243 S. W. 887. There, the court had been required to determine whether the commission had power to grant relief of the character here sought. The commission had refused, on the ground of lack of power, an application for relief from discrimination similar to that here alleged. The Laclede Company petitioned for a mandamus to compel the commission to hear its complaint. The Supreme Court denied the petition, saying that it was 'preposterous' and 'unthinkable' that the statute conferred such power on the commission; and that if the statute were thus construed, it would violate section 10 of article 10 of the Constitution of Missouri. That decision was thereafter consistently acted upon by the commission; and it was followed by the Supreme Court itself in later cases.¹

**453 *677 No one doubted the authority of the Laclede Case until it was expressly overruled in the case at bar.² While the defendant's answer asserted that the plaintiff had not availed itself of the administrative remedies under articles 3 and 5 of chapter 119 by application to the boards of equalization and was guilty of laches in not so doing (contentions which the state court held to be unsound), the answer significantly omitted any contention that there had been a remedy by application to the state tax commission, whose powers are dealt with in the intervening article 4. The possibility of relief before the tax commission was not

suggested by any one in the entire litigation until the Supreme Court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the tax commission could not be made after the tax books were delivered to the collector; and this had been done about October 1, 1927.

[1] The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due *678 process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 50 S. Ct. 326, 74 L. Ed. —. The petition was denied without opinion. This court granted certiorari. 280 U. S. 550, 50 S. Ct. 152, 74 L. Ed. —. We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff 'due process of law'-using that term in its primary sense of an opportunity to be heard and to defend its substantive right.

[2] [3] First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the federal Constitution to equality of treatment. *Greene v. Louisville & Interurban R. R. Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979. If the allegations of the complaint could be established, the federal Constitution conferred upon the plaintiff the right to have the assessments abated by 25 per cent. In order to protect its property from being seized in payment of the part of the tax alleged to be unlawful, the plaintiff invoked the appropriate judicial remedy provided by the state. *Second Employers' Liability Cases*, 223 U. S. 1, 55-57, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44

Under the settled law of the state, that remedy was the only one available. That a bill in equity is appropriate and that the court has power to grant relief, even under the new construction of the statute dealing with the tax commission, is not questioned.³ And it is held by the state court in this case that no other judicial remedy is open to the plaintiff and that no administrative *679 remedy, other than that before

the state tax commission, has been provided. But, after the decision in the Laclede Case, it would have been entirely futile for the plaintiff to apply to the commission. That body had persistently refused to entertain such applications, and the Supreme Court of the state had supported it in its refusal. Thus, until June 29, 1929, when the opinion in the case at bar was delivered, the tax commission could not, because of the rule of the Laclede Case, grant the relief to which the plaintiff was entitled on the facts alleged. After June 29, 1929, the commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the commission could act had long expired. Obviously, therefore, at no time did the state provide to the plaintiff an administrative remedy against the alleged illegal tax; and in invoking the appropriate judicial remedy, the plaintiff did not omit to comply with any existing condition precedent. *Montana National Bank v. Yellowstone County*, 276 U. S. 499, 505, 48 S. Ct. 331, 72 L. Ed. 673.

If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack **454 of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.

[4] [5] [6] [7] [8] [9] [10] Second. If the above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment *680 would be obvious. *Ettor v. Tacoma*, 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773.⁴ The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (*First National Bank of Greeley v. Weld County*, 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.⁵

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions;⁶ and that the mere fact that a state court has rendered an erroneous

decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court.⁷

*681 But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the Laclede Case. Neither of these matters raises a federal question: neither is subject to our review.⁸ But, *682 while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real **455 opportunity to protect it.⁹ Compare *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 475, 476, 38 S. Ct. 566, 62 L. Ed. 1215.

[11] Third. The court's finding of laches was predicated entirely on the plaintiff's failure to apply to the state tax commission. In view of what we have said, this ground is not sufficient independently to support the judgment. And, as the Supreme Court of Missouri did not decide whether the allegations of the plaintiff's bill were sustained by the proof, we do not inquire into the merits of the plaintiff's claim under the equal protection clause. The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice McREYNOLDS did not hear the argument and took no part in the decision of this case.

All Citations

281 U.S. 673, 50 S.Ct. 451 (Mem), 74 L.Ed. 1107

Footnotes

- 1 In *Boonville National Bank v. Schlotzhauer*, 317 Mo. 1298, 298 S. W. 732, 55 A. L. R. 489, where the taxpayer was represented by the same counsel who represent the plaintiff here, relief was sought by bill in equity from like discrimination, without prior application to the state tax commission. The Supreme Court of Missouri was required to decide whether the taxpayer had invoked the appropriate remedy; and it held, in an elaborate opinion which did not mention the tax commission, that the remedy pursued was the appropriate one and that the taxpayer was entitled to relief thereby, if the facts alleged were proved. See also *Jefferson City Bridge & Transit Co v Blaser*, 318 Mo. 373, 300 S. W 778; *Columbia Terminals Co. v Koeln*, 319 Mo. 445, 3 S.W.(2d) 1021, *State v. Baker*, 320 Mo. 1146, 9 S.W.(2d) 589, 592, 593; *State v. Dirckx* (Mo. Sup.) 11 S.W (2d) 38.
- 2 The reason which prompted the Supreme Court to re-examine and overrule the *Laclede Case* is thus stated in its opinion: It is doubtful whether the evidence in this case warrants a finding that the local assessor intentionally and systematically undervalued real estate and personal property listed with him, other than bank stock; but there can be no question but that his failure to assess sucking animals and poultry was both intentional and pursuant to system. * * * If the owners of bank stock are entitled to an abatement of a portion of their taxes because other property was undervalued, it would appear on principle that all taxpayers of the state should be entirely relieved. so far as the taxes for 1927 are concerned, because the owners of poultry were not taxed at all. It seems necessary that we rechart our course ' 19 S.W.(2d) 746, 749.
- 3 Equitable relief was denied solely on the equitable doctrines that the plaintiff had an adequate legal remedy by application to the Commission and was guilty of laches in not pursuing it
- 4 Compare *Turner v. New York*, 168 U. S. 90, 94, 18 S. Ct 38, 42 L. Ed. 392, *Saranac Land & Timber Co. v. Comptroller*, 177 U. S. 318, 325, 20 S. Ct. 642, 44 L. Ed 786; *Crane v. Hahlo*, 258 U. S. 142, 147, 42 S. Ct. 214, 66 L. Ed. 514, *Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 258 U. S. 190, 197, 42 S. Ct. 284, 66 L. Ed. 559.
- 5 *Ownbey v. Morgan*, 256 U. S. 94, 111, 41 S. Ct. 433, 65 L. Ed. 837, 17 A. L. R. 873. Compare *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Standard Oil Co. v. Missouri*, 224 U. S. 270, 281, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936; *Frank v. Mangum*, 237 U. S. 309, 326, 335, 35 S. Ct. 582, 59 L. Ed 969; *Moore v. Dempsey*, 261 U. S. 86, 43 S. Ct 265, 67 L. Ed. 543
- 6 *Kryger v. Wilson*, 242 U. S. 171, 176, 37 S. Ct. 34, 61 L. Ed. 229; *Mount St. Mary's Cemetery Ass'n v. Mullins*, 248 U. S. 501, 503, 39 S. Ct 173, 63 L. Ed. 383; *Quong Ham Wah Co. v. Industrial Accident Comm*, 255 U. S. 445, 448, 41 S. Ct. 373, 65 L. Ed. 723, *Fox River Paper Co v. Railroad Comm.*, 274 U. S. 651, 655, 47 S. Ct. 669, 71 L. Ed. 1279.
- 7 *Central Land Co. v. Laidley*, 159 U. S. 103, 112, 16 S. Ct. 80, 40 L. Ed. 91, *Patterson v. Colorado*, 205 U. S. 454, 461, 27 S. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689; *Willoughby v. Chicago*, 235 U. S. 45, 50, 35 S. Ct. 23, 59 L. Ed. 123; *O'Neil v. Northern Colorado Irrigation Co.*, 242 U. S. 20, 26, 27, 37 S. Ct. 7, 61 L. Ed. 123; *Dunbar v. City of New York*, 251 U. S. 516, 519, 40 S. Ct. 250, 64 L. Ed. 384; *Rooker v. Fidelity Trust Co*, 261 U. S. 114, 118, 43 S. Ct 288, 67 L. Ed. 556; *Tidal Oil Co v. Flanagan*, 263 U. S. 444, 450, 44 S. Ct. 197, 68 L. Ed. 382, *American Railway Express Co. v. Kentucky*, 273 U. S. 269, 273, 47 S. Ct 353, 71 L. Ed. 639. For 'a long line of decisions' holding 'that the provision of section 10, article 1, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts,' see *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451, note 1, 44 S. Ct. 197, 68 L. Ed 382. Likewise, with reference to *ex post facto laws* *Kring v. Missouri*, 107 U. S. 221, 227, 2 S. Ct. 443, 27 L. Ed. 506; *Ross v. Oregon*, 227 U. S. 150, 161, 33 S. Ct. 220, 57 L. Ed. 457; *Frank v. Mangum*, 237 U. S. 309, 344, 35 S. Ct 582, 59 L. Ed. 969.
- 8 The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions. The doctrine of *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed 520, and *Butz v. Muscatine*, 8 Wall 575, 19 L. Ed 490, like that of *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, is, if applied at all, confined strictly to cases arising in the federal courts. *Fleming v. Fleming*, 264 U. S. 29, 31, 44 S. Ct. 246, 68 L. Ed. 547, *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 451, 44 S. Ct. 197, 68 L. Ed. 382; *Moore-Mansfield Const. Co. v. Electrical*

Installation Co., 234 U. S. 619, 624-626, 34 S. Ct. 941, 58 L. Ed. 1503; Bacon v. Texas, 163 U. S. 207, 220-224, 16 S Ct. 1023, 41 L. Ed. 132; Central Land Co. v. Laidley, 159 U. S. 103, 111, 112, 16 S. Ct 80, 40 L. Ed. 91

- 9 Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own. Likewise, if the administrative remedy were still available to the plaintiff, there would be no denial of due process in that regard.

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COURT OF APPEALS
DIVISION II

2017 APR -5 AM 10:10

STATE OF WASHINGTON

WASHINGTON STATE COURT OF APPEALS

DIVISION II BY DEPUTY

ARTHUR WEST, Appellant, v. CONNIE BACON, PORT OF TACOMA, et al., Respondents.	NO. 49207-5-II DECLARATION OF SERVICE
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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. RESPONDENTS' MOTION TO FILE OVERLENGTH RESPONSE BRIEF
2. RESPONSE BRIEF OF PORT OF TACOMA
3. RESPONDENTS' MOTION TO ACCEPT RESPONSE BRIEF

to be served on April 5, 2017 to the parties and in the manner indicated below:

Arthur West, Pro Se
120 State Avenue, N.E. #1497
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Email: awestaa@gmail.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 5th day of April 2017 at Tacoma, Washington.

/s/ Carolyn A. Lake
Carolyn A. Lake

ORIGINAL