

**No. 49207-5-II**

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

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**ARTHUR WEST,  
appellant,**

**Vs.**

**PORT OF TACOMA,  
respondent**

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Review of decisions entered by  
the Honorable Judge Edwards

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**APPELLANT'S  
REPLY BRIEF**

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Arthur West  
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## ARGUMENT

I. Retroactive and overly broad “universal” application of the non-operative provisions of Hobbs to the differing circumstances of this case would lead to strained, absurd and manifestly inequitable results, and, as an Oregon Appellate Court recently recognized in *ILWU v. Port of Portland*, would be contrary to the statutory scheme favoring disclosure of public records.

Karl Llewellyn, one of the foremost proponents of American legal realism observed...

One does not progress far into legal life without learning that there is no single right and accurate way of reading one case, or of reading a bunch of cases<sup>1</sup>.

In this case we are presented with the question of what is the “right and accurate” way of harmonizing the terms of a recent decision of this Court in *Hobbs* with several decades of prior practice that appellant and the Courts reasonably relied upon, and of how *Hobbs* might apply retroactively to the circumstances of this case where plaintiff West had expressly asserted a cause of action under RCW 42.56.550(2), where the port was not engaged in producing records, but had repeatedly and deliberately delayed disclosure for PR purposes, and where records eventually disclosed demonstrated that far from diligently and thoroughly complying with the PRA, the port's primary concern was how to

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<sup>1</sup> *Remarks on the Theory of Appellate Decisions and the Rules or Canons about how Statutes are to be Construed*, 1950 *Vanderbilt Law Review*, v. 3, p. 395, Karl N. Llewellyn. See also Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harvard Law Review* 457 (1897) “The fallacy to which I refer is the notion that the only force at work in the development of the law is logic.”...“Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.”

“diligently and thoroughly” **evade** the terms of the PRA and **conceal records for political purposes** to advance a controversial project without disclosing the potential adverse impacts and undesirable consequences of the project to concerned citizens until it was too late for them to effectively oppose it.

Certainly, counsel for the port has their view of how this novel legal question might be resolved, but it is by no means the only possible “right and accurate” means of resolving the uncertainty of retroactive application of whatever portions of Hobbs are ultimately determined to be of binding precedential value.

One possible and compelling resolution of a very similar issue involving finality, public disclosure, and a port district is evidenced in a recent (May 3<sup>rd</sup>, 2017) ruling of the Oregon Court of Appeals.

The case, *ILWU v. Port of Portland*, 285 Or. App. 222, 231, P.3d. \_\_ (2017), though involving the laws of our sister State, provides useful guidance as to how Hobbs and the actual intent of the Washington State Public Records Act may best be harmonized.

This May 3<sup>rd</sup>, 2017 ruling of the Oregon Appellate Court, by coincidence also involving public disclosure, a port district, and an Order of Dismissal based on the asserted non-final nature of the port's response, provides a compelling rationale that should be followed by the Courts in Washington State.

In overturning the improper dismissal, the Oregon Court noted that...

On appeal, the ILWU raises two assignments of error. In the first, the ILWU argues that the trial court erred in relying on disputed evidence to find that the port had not denied (or de facto denied) the ILWU's records requests, which was the sole basis given for the court's dismissal of the ILWU's complaint. In the second, the ILWU argues that the court erred in dismissing its complaint based on the court's legally erroneous conclusion that a public body must issue a "denial" of a records request for a circuit court to have jurisdiction of a case under the Public Records Law. As explained below, we conclude that the circuit court did have subject matter jurisdiction to consider all of the claims in the ILWU's complaint, and, thus, the court erred in granting the port's motion to dismiss...(ILWU Slip Op. Page 4)

Third, the port's argument that there must be a "denial" of a records request before a court can enjoin a public body ignores the plain statutory text of ORS 192.490(1)<sup>2</sup>. Under ORS 192.490(1) , a circuit court "has jurisdiction to enjoin the public body from withholding records and to order the production of any records improperly withheld from the person seeking disclosure." Nothing in that grant of jurisdiction requires that the public body formally "deny" a records request before a court can exercise its statutory injunctive authority. Moreover, it is self-evident that an improper withholding of a public record could occur in any number of ways short of some formal "denial" of a records request, such as by stonewalling or other obstructive conduct on the part of the public body. We decline to read into the statute a jurisdictional requirement that is not in the text of the statute and that would be contrary to the statutory scheme favoring the disclosure of public records. See, e.g. , *Guard Publishing Co.*, 310 Or. at 39, 791 P.2d

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<sup>2</sup> (Appellant's Note) See, by way of comparison in Washington Law, RCW 42.56.550(2), specifically cited to in West's Original Complaint in section 3.12, "Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable."

854 (“A public body may not exempt itself from its responsibilities under the Inspection of Public Records law by adopting a policy that seeks to deprive citizens of their right under the law to inspect public records. Disclosure is the norm; exclusion is the exception that must be justified by the public body.”)... (ILWU Slip Opp. Page 5)

Unlike counsel, and in accord with the Oregon Court, appellant believes that, as a remedial statute enacted by the people to insure that agencies like the port of Tacoma actually produce records, the PRA should be liberally interpreted to effectuate the intent of the People in enacting the law, and, therefore, an overly broad across the board “universal” and retroactive application of the non-determinative (obiter dicta) portions of Hobbs would be manifestly contrary to this remedial intent.

Further, even if the alleged “new rule” in Hobbs is seen to have ratio decidendi effect, retroactive application of such a radical departure from previous practice that appellant and the Courts have reasonably relied upon (especially in the Order of Remand in this very case) would seriously implicate the type of concerns expressed by the Supreme Court in Lynce...

The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption “is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994). This doctrine finds expression in several provisions of our Constitution. *The specific prohibition on ex post facto laws is only one*

aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, United States v. Winstar Corp., 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), but also the indigent... Lynce v. Mathis, 519 U.S. 433 (1997) See also Doe v. Gregoire, 960 F.Supp. 1478, Western District of Washington (1997) (emphasis added) (USCA 5, Art. 1 § 10)

It should come as no surprise that the port, is its standard tactics of the best defense is an outrageous offense, and in its quest to make the chaoskampf it imposes on its opponents as difficult as possible, again attempts to subvert these constitutional protections on the part of its “rich and... powerful” clients and economically browbeat the appellant by seeking money from him for having the temerity to challenge what is very likely just the latest in a series of unlawful dismissals obtained by Ms. Lake in her endless pattern of chaotic litigation.

In 2014 Ms. Lake lost 4 appeals in a row and she had shamelessly asked for sanctions in each of those too, regardless of the fact that the requests were, as they are in this 5<sup>th</sup> case, completely meritless.

Such knee jerk requests for sanctions by counsel are all the more objectionable in that Ms. Lake is well aware of the actual boundaries of acceptable legal practice under CR 11, in large part due to her well

documented history of flagrantly flaunting them<sup>3</sup>.

Simple common sense and sound precedent (See PPG Industries, Inc. v. NLRB, 671 F.2d 817 (4th Cir. 1982); 820-821 n. 5-6,) recognize the “conclusive” and “compelling force” of the shoe on the other foot argument, and this principle should operate in the present case to compel the denial of what is just the latest in a series of improper requests for sanctions by the barefooted and baldfaced counsel for the port.

While counsel is wondrously facile in cobbling together one-size-fits-all requests for CR11 sanctions, it is instructive to note that when the shoe is on the other foot counsel is the first to stridently complain of any imagined pinches. As Ms. Lake herself recently wrote to this Court...

“This Court can only find a CR 11 violation if it finds that Petitioners' pleadings...were " baseless" and " not well grounded in fact or warranted by law." Lee v. Kennard, 176 Wn. App. 678, 691, 310 P.3d 845 (2013). For purposes of CR 11, a filing is baseless if not grounded in fact, or nor (sic) warranted by existing law or a good faith basis alter existing law. Id. CR 11 sanctions are warranted only " when it is patently clear that a claim has absolutely no chance of success." In re Cooke, 93 Wn App. 526, 529, 969 P.2d 127 (1999). **That is far from the situation here.**” Appellant's Brief, Spice v. Pierce County, COA 45476-9, Page 54, Carolyn Lake, Goodstein Law Group, 2016

In contrast to the conduct of the long-deceased and dear departed plaintiff's counsel in the Spice case, in the present case debatable issues

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<sup>3</sup> See, as but one example, Spice v. Pierce County & the City of Puyallup, Pierce County Cause No. 07-2-11635-0, COA No. 45476-9-II.

are clearly present, for while counsel can, perhaps, make a barely arguable case that Hobbs justifies dismissal, the principles of Hobbs have simply not yet been applied to specific fact circumstance where an agency has provided cause for a plaintiff to challenge its estimate for production in court under RCW 42.56.550(2), (See Plaintiff's Original Complaint at Section 3.12) when there is a clear and undeniable record of the agency deliberately evading disclosure, and when the agency has subsequently failed to cure its violations of the PRA prior to taking final action.

As Division I recently recognized in *Hikel v. City of Lynnwood*, in recognizing a cause of action under the PRA (as is alleged in this present case) for failure to provide a reasonable estimate, citing to *City of Lakewood v. Koenig*, 182 Wn.2d 87, 97, 343 P.3d 335 (2014), it would “contravene the PRA's purpose” to adopt an interpretation of the law that “forces requestors to resort to litigation, while allowing the agency to escape sanction of any kind.”

Yet that very type of inequitable and absurd result is exactly what the port is attempting to attain here. The port is attempting to assert that an agency can deliberately delay disclosure, based upon public relations considerations, fail to provide a specific estimate, instead informing appellant that records would be produced “shortly”, (which is not a reasonable estimate) then belatedly produce records for in camera review, then drag its feet and obtain an improper dismissal based upon an abuse of

judicial discretion, fight all the way up to the Supreme Court and lose, and then waste further immense amounts of time and resources attempting to deny justice in the Superior Court for many months and with literally reams of paper pleadings before finally seeking and obtaining a dismissal based upon the ridiculous claim that the courts it has been litigating in for nearly a decade never had jurisdiction in the first place!

Indeed, it would take a thorough review of history to find appropriate words<sup>4</sup> to adequately describe counsel's legal modus operandi.

As Counsel for the City of Puyallup observed in the (also decade old) Spice case before this Court on June 2<sup>nd</sup>, 2017, quoting Eugster v. State Bar Association, (such) “Endless litigation leads to chaos”: perhaps a more classical reference is more appropriate<sup>5</sup>...

Meanwhile, in this current case, during the near geologic era through which the port has been actively evading the PRA and obstructing review the statute of limitations has long passed and new dicta of uncertain application has arisen that appears to be contrary to RCW 42.56.550(2) and previous practice in not only each division of the Court of Appeals but also the Supreme Court, which new dicta the Port seeks to employ to veil itself from accountability from the unlawful delays in disclosure and withholding of records it now admits it improperly delayed

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<sup>4</sup>But we can not expect that you should be concerned at your own failings, that you should fear the penalties of the laws, or that you should yield to the necessities of the republic, for you are not, O Ca(ro)line, one whom either shame can recall from infamy, or fear from danger, or reason from madness. *Oratio in Catalinium Prima in Senatu Habita*, Marcus Tullius Cicero, 63 B.C.

<sup>5</sup>Quo usque tandem abutere, Catalina, potentia nostra? id.

disclosure of and withheld to begin with.

In effect, the port seeks to have this court reward it for suborning an improper dismissal based upon a judicial abuse of discretion by ratifying a second improper dismissal based upon circumstances that did not exist and would not have been applicable had it not acted improperly in obtaining an improper dismissal in 2010 in the first place.

This is exactly the type of chaos the Eugster Court addressed, a “chaos” that appears to occur frequently in the practice of counsel for the respondent in this case regardless of the parties, circumstances or cause of action.

Since the only reason that the port is able to even argue Hobbs is a result of the port's misconduct in securing a wrongful dismissal based upon an abuse of judicial discretion, the relief sought by counsel should be barred under the clean hands doctrine. See *Everett v. Williams*, (1725), 2 Pothier on Obligations 3.

Such an inequitable and absurd result as the port seeks would seriously subvert and undermine the intent of the people in enacting the Public Disclosure Act and, as the Oregon Court so aptly recognized, would be contrary to the established principle that the language of a statute should be construed to carry out, rather than defeat, the statute's purpose. See *Miller v. Paul Revere Life Ins. Co.*, 81 Wn.2d 302, 310, 501 P.2d 1063 (1972).

As the Supreme Court has repeatedly held...

We construe statutes to effect their purpose and avoid unlikely or absurd results. *Thompson v. Hanson*, 167 Wn.2d 414, 426, 168 Wn.2d 738, 219 P.3d 659, 664 (2009) (rejecting party's interpretation of the Uniform Fraudulent Transfer Act, chapter 19.40 RCW, because it would lead to strained results). See also *City of Seattle v. Dep't of Labor Indus.*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998), *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989).

To apply Hobbs retroactively to bar relief when the port was not diligently producing records, but instead was admittedly (See CP 149, 150, 151, 152, and CP 149-185, generally) concealing records in a deliberate strategy to evade the PRA, and when, unlike the circumstances in Hobbs, the port had taken final action to improperly withhold records and those records had been delivered into the custody of the Court for in camera review would not only be inequitable and strained, it would implicate the interests identified in both *Lynce* and *Gregoire*: the “broader constitutional protection against arbitrary changes in the law” which is applicable “(i)n both the civil and the criminal context”. (See USCA 5, 14)

For this court to conclude that now, after nearly a decade of litigation and 3 appellate actions, that there never was any jurisdiction to begin with, that the port should get off scot-free for an undeniable pattern of deliberate suppression of public records and admitted violations of the PRA and that plaintiff should be sanctioned<sup>6</sup> for pursuing a case that this

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<sup>6</sup> Perhaps this court will not agree with the appellant's arguments, but there can be no reasonable dispute that arguing that the Trial Court had jurisdiction over the claims that the Court of Appeals court remanded back to it for trial on the merits in a manner completely consistent with established practice appellant (and the appellate

very court ordered remanded would be a strained, patently absurd and inequitable result. This is not what the people who voted for the Public Disclosure Act intended.

Even if plaintiff's arguments may be less than compelling in some minor respects, this court should let him off with the penalty of time served<sup>7</sup> over the last decade in attempting to secure review of the records (that, when recently disclosed, demonstrated a deliberate campaign to suppress information) and responding to similar meritless requests by counsel, rather than subjecting him to further penalties and imposts for his efforts in attempting to comply with the order of Remand issued by this very Court.

Not only did the Port, by its own admissions, deliberately conceal information from the public and destroy records, it issued a series of public apologies, one published in the Tacoma News Tribune (CP 363-64), a second to the Port of Olympia<sup>8</sup> (CP 361), a third to the Port of Tacoma Employees (CP 362), and a fourth to the Friends of Rocky Prairie (CP 359), for (among other things) “withholding information from the public

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court) reasonably relied upon is a good faith argument for the extension or modification (if not the only reasonable non-absurd interpretation) of existing public records law as it **may** have been altered by Hobbs.

<sup>7</sup> There were three thousand six hundred and fifty-three days like that in his stretch. From the first clang of the rail to the last clang of the rail. Three thousand six hundred and fifty-three days. The three extra days were for leap years. *One Day in the Life of Ivan Denisovich*, Aleksandr Solzhenitsyn Signet Classic 1962

<sup>8</sup>...(T)his project has attracted attention...It was through this increased scrutiny one of the many public records requests we have received related to this project-- that we discovered unprofessional behavior among some of our staff members working on this project. The...documents we gathered to meet the records request included e-mails that fell within the following categories of inappropriate behavior. Taking procedural shortcuts, **withholding information from the public** and otherwise undermining trust in our public process. Inappropriate comments about communities, partners, colleagues and consultants...

and otherwise undermining trust in our public process.”

These statements are inconsistent with the port's denials, and equitably estopp the port from alleging it complied with the PRA. In light of this undisputed record, the long history of previous practice that West and this court itself relied upon, the remedial intent of the Public Records Act, and in particular, RCW 42.56.550(2), this Court should find that the trial court had jurisdiction over the parties and subject matter.

**II.** The Port's redacted “restatement” misrepresents the allegations in the complaint and completely fails to address the rulings in Hikel and Cedar Grove or RCW 42.56.550(2), the express provision of law that allows for a cause of action for failure to produce a reasonable estimate, especially when the estimate is, as it was in this case, that the records would be produced “shortly”

Perhaps the most critical omission from the port's “restatement” of the issues is that it is more of a redaction than a restatement, and deliberately edits and misstates the allegations in the Complaint and omits the critical facts of the port's repeated delays set forth as law of the case in the Opinion of Division I remanding this case “for trial”.

In contrast to the port's “redacted” version of the facts that omits critical allegations and circumstances, plaintiff alleged (at section 3.12 of his Original Complaint) a failure to promptly provide a reasonable estimate for disclosure in response to the port's less than diligent productions and repeated delays.

Section 3.12 of the Complaint, which the port predictably omits

from their redacted “restatement”, explicitly states

...The Port has failed to comply with the PRA by failing to make a reasonable estimate of the time for compliance, disclosing the records, asserting exemptions,...

Therefore, this case should be clearly seen to be within the scope of the recent ruling of Division I in *Hikel v. City of Lynnwood*, 197 Wn. App. 366, (2016), which found grounds for jurisdiction when the plaintiff argued the City of Lakewood had failed to provide a reasonable estimate. As the Court in *Hikel* held...

“The plain language of the PRA provides that costs and reasonable attorney fees shall be awarded to a requester for vindicating ‘the right to receive a response.’” *City of Lakewood v. Koenig*, 182 Wn.2d 87, 97, 343 P.3d 335 (2014) (quoting RCW 42.56.550(4))

**In Hobbs, the court held that a requester could not recover any penalty or fees for PRA violations if the agency cured the violation before taking final action to deny the requested records.** *Hobbs*, 183 Wn. App. At 940-41.(empahsis added)

We disapprove of this view to the extent that it denies fees for procedural violations. The Supreme Court has observed that an interpretation where the only remedy for the State's insufficient withholding index was to compel an explanation of the exemptions would contravene the PRA's purpose because an agency would have “no incentive to explain its exemptions at the outset” and “[t]his forces requestors to resort to litigation, while allowing the agency to escape sanction of any kind.”*Koenig*, 182 Wn.2d at 97-98 (second alteration in original) (quoting *Sanders*, 169 Wn.2d at 847)

The same principle applies here: if the only remedy for failing to provide a reasonable estimate is to treat the violation as an aggravating factor in calculating a penalty, where the agency does not withhold the records, and is therefore subject to no penalty, it has no incentive to provide a reasonable estimate. For these reasons, we

conclude that the legislature intended always to provide for an award of fees and costs when an agency fails to comply with RCW 42.56.520. Hikel, Slip Opp, at p. 17

This Court should agree with Division I in Hikel that a cause of action exists under RCW 42.56.550 section (2) as well as section (1) and that the ratio decidendi of Hobbs is limited to the holding that **a requester can not recover any penalty or fees for PRA violations if the agency cures the violation before taking final action to deny the requested records.** (emphasis added)

Similarly, the decision in the Cedar Grove case does not support the port's position either in that the Cedar Grove Court held...

At oral argument, Marysville cited a recent case from Division Two of this court, Hobbs v. Washington State Auditor's Office, for the rule that an agency's denial of records is a "necessary predicate" of a cause of action under RCW 42.56.550. Thus, Cedar Grove had no cause of action as to the 15 records. But the facts in Hobbs differ... Hobbs filed suit immediately after the agency produced its first installment,... He complained mainly about redactions, all of which the superior court later found to comply with the PRA. Division Two affirmed the dismissal of Hobbs's case:

When an agency diligently makes every reasonable effort to comply with a requester's public records request, and the agency has fully remedied any alleged violation of the PRA at the time the requester 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. Hobbs, supra.

More significantly, and fatal to the port's case in the present circumstances is that the Cedar Grove Court held...

Here, although the process the City's public records officer used complied with the PRA, **the record as a whole does not show that the City responded with "reasonable thoroughness and diligence to public records requests."** **Rather, the record demonstrates that certain members of city government and Strategies intentionally withheld responsive records and pursued a policy of evading the requirements of the PRA.** The PRA makes clear that it is not up to an agency to decide which records are consequential or inconsequential. And Marysville's position ignores the fact that a court assesses penalties on the basis of what documents the government withheld, not what it produced. Cedar Grove Composting v. City of Marysville, 188. Wn. App. 695, 354 P.3d 249 (Div. 1 2015) (emphasis added)

As in Cedar Grove, in this present case “the record as a whole does not show that the “Port” responded with "reasonable thoroughness and diligence to public records requests." In light of the clear evidence that the port deliberately suppressed disclosure of the SSLC records, this Court should rule in a manner consistent with Division I in Cedar Grove, the case the port itself cites as controlling.

**III.** The Port's redacted restatement completely fails to address RCW 42.56.550(2) and West's reasonable reliance upon Violante, West v. DNR, COGS, Double H v. Department of Ecology, Hangartner, and orders of remand from this Court and a judgment of the Superior Court that held that the trial court had jurisdiction

In its zeal to assert a knee-jerk request for fees, The port also neglects to even attempt to address the appellant's arguments as to reasonable reliance, stare decisis, ex post facto laws or estoppel.

Even should Hobbs be seen to radically alter the Public Records Law in the manner claimed by counsel, the circumstances of this case

where appellants rights to review vested under the previously accepted rules of practice, where the records were produced for in camera review and reviewed, and where both the Court of Appeals and the Supreme Court found there to be jurisdiction sufficient to justify an order of remand back to the Superior Court.

Significantly, *in State ex rel. Washington State Finance Committee v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963) *the court held:*

If rights have vested under a faulty rule, or a constitution misinterpreted, or a statute mis-construed, or where, as here, subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected. . . . The courts can act to do that which ought to be done, free from the fear that the law itself is being undone.

In the present case, it is apparent that prior to Hobbs all three divisions of the Court of Appeals and the Supreme Court have found jurisdiction for suits brought under the PRA for suits brought prior to an agency completing its response under the PRA, as did both Divisions I and II implicitly in remanding this and a companion case, and as such reasonable reliance was justified.

In *West v. Department of Natural Resources*, 163 Wn. App. 235 (*Div. II, August 23, 2011*) this Court found jurisdiction under the PRA even when the DNR had not completed its response. Similarly, in *Double H, LP v. Dep't of Ecology*, 166 Wash.App. 707, 271 P.3d 322, (2012)

review denied, 174 Wash.2d 1014, (2012) Division III of the Court of Appeals also found jurisdiction even when the agency had not completed its response.

In the case of *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004), both the Court of Appeals and Supreme Court found jurisdiction even when the agency had not completed its response until 2 days after the suit was filed. In *Violante v. King County*, Division I found that..."A plaintiff is a prevailing party if "prosecution of the action could reasonably be regarded as necessary to obtain the information," and "the existence of the lawsuit had a causative effect on the release of the information." *Coalition on Gov't Spying v. Dept. of Public Safety*, 59 Wn. App. 856, 863, 801 P.2d 1009 (1990) (quoting *Miller v. United States Dep't of State*, 779 F.2d 1378, 1389 (8th Cir. 1985)) also found that if the existence of a lawsuit was objectively reasonable or had a causal effect on disclosure that a requestor was entitled to penalties and fees. According to the ports' jaundiced view, all of this precedent was somehow overturned, sub silencio, by the dicta in *Hobbs*. This is an unpersuasive and untenable argument.

Clearly, both the existence of all of this sound and well reasoned precedent as well as the reasonable reliance upon it by both plaintiff and the Courts for the many decades the PRA has been interpreted in this manner militate strongly against a retroactive repeal of this entire body of

precedent sub silencio, by obscure dicta in a manner that unfairly burdens a citizen such as the appellant and thus violates the 5<sup>th</sup> Amendment in a case where jurisdiction has previously been found to exist, and where the port had waived its right to object to jurisdiction by having sought and obtained affirmative relief in the form of a \$1500 sanction.

In a case over a century old that is relevant today in light of recent executive Orders, *Chew Heong v. United States*, 112 U. S. 536 (1884), the Supreme Court considered

a provision of the "Chinese Restriction Act" of 1882 barring Chinese laborers from reentering the United States without a certificate prepared when they exited this country. We held that the statute did not bar the reentry of a laborer who had left the United States before the certification requirement was promulgated. Justice Harlan's opinion for the Court observed that the law in effect before the 1882 enactment had accorded laborers a right to reenter without a certificate, and invoked the "uniformly" accepted rule against "giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.*, at 559.

As the Supreme Court recognized in the landmark civil rights case *Bouie v. City of Columbia*, albeit in a criminal context...

The Due Process Clause compels this same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively...*Bouie v. City of Columbia*, 378 U.S. 347 (1964)

This Court should similarly reject a retroactive application of

Hobbs that alters decades of accepted legal practice to the detriment of the appellant.

**IV** The Port's redacted restatement completely fails to address the issue of the port's duplicity in obtaining the \$1,500 sanction the port obtained by means of its "Edwards and Costello" jurisdictional Shell game in first asserting the jurisdiction of another Court, then denying the jurisdiction of that Court in a successful attempt to deny due process of law and effect an unlawful taking.

The Port, as always, no matter how unwarranted the request is, seeks sanctions and fees for the alleged lack of jurisdiction of the trial court. Yet, in addition to the circumstance that the port, appellant, and 3 appellate courts recognized the jurisdiction of the trial court in this case, there are 1500 very good reasons why this is a frivolous argument, in that the port has already obtained \$1500 on the basis that the trial court in this case did have jurisdiction<sup>9</sup>.

The Trial Court erred in dismissing plaintiff's claims and denying and failing to vacate its previous denial of the plaintiff's motion to Amend when the undisputed record (CP 190 Lines 5-7) demonstrates that that the port was not producing records at the time the suit was filed, and when, as Division I of the Court of Appeals explained in its April 20, 2014 ruling...

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

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<sup>9</sup> As an aside, the port also obtained a further 500 sanction from Judge Costello in an ex parte hearing due to plaintiff having a conflicting hearing in Division I of the Court of Appeals.

This ruling that Division I of the Court of Appeals discussed was based upon the jurisdiction of the court that the port has since denied and obtained a dismissal of .

The alleged untimely payment of these terms were then employed by counsel as a means to secure yet another wrongful and unlawful dismissal of PRA claims.

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

As Counsel Lake wrote in this case...

“However, despite his personal disagreement, Mr West cannot bypass *the jurisdiction* and judgments of the original litigation by inventing a new cause of action<sup>10</sup> . . . .”  
**(emphasis in original)**

This was the basis for the \$1500 sanction, yet after obtaining it, counsel proceeded to recant and renounce the very jurisdiction the sanction was based upon.

Stare Decisis is defined as...

"Literally, to stand by decided matters; . . . as implying the doctrine or policy of following rules or principles laid

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<sup>10</sup> See Port's Motion to dismiss of July 23, 2010, and the Order of August 23, 2010 awarding the Port affirmative relief in the form of terms of \$1,500 as a result of the finding that the other Court had previous jurisdiction over the PRA claims.

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

It was reversible error for the Trial Court to refuse to recognize the stare decisis and res judicata effects of the express language and holding of the Court of Appeals in remanding this case for further proceedings and the effect of the port's recanting of its claims that were successfully employed to obtain sanctions judgment obtained by the port.

All of this brings us back to Oliver Wendell Holmes' most important and influential "realist" argument, the "bad-man" theory of law:

"[I]f we take the view of our friend the bad man we shall find that he does not care two straws" about either the morality or the logic of the law. For the bad man, "legal duty" signifies only "a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment".

Like Holmes' theoretical "bad man" it is apparent that counsel for the Port of Tacoma cares nothing for ethics, morality, compliance with the PRA or legal theorizing and concerns itself only with practical consequences of how it can evade the requirement of disclosure and escape scot-free from any form of responsibility or accountability for evident and admitted violations of the law while financially burdening its opponents for having the temerity to attempt to seek justice.

Appellant hopes that the Court is "realistic" enough to agree that

the fundamental intent of the PRA is to require disclosure of the records of the people's business and that the PRA's remedial penalty provisions must be construed liberally to hold even the archetypical type of actors such as those described by Justice Holmes accountable in the only manner that such entities concern themselves with.

In this case that would require vacation of the rulings of the Trial Court and a second Order of Remand with a second instruction that trial be held on the merits.

V. The continuing denial of a hearing on the merits which persisted after remand for trial on the merits and which has persisted for nearly a decade along with counsel's duplicitous jurisdictional "Who's on First" shell game denied due process and a timely and meaningful opportunity to be heard on the merits of the case.

Due process under the 5<sup>th</sup> and 14<sup>th</sup> Amendments requires that...

...the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law;...*Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884). Further, The right to trial by an impartial judge 'is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955))

In this case, for over a decade, the Superior Court has refused to follow the judicial review procedures in the PRA in a meaningful time frame or a meaningful manner. The process followed has consistently diverged from the ordinary forms of or mode prescribed by the law, and

was inappropriate to the case and unjust to the parties affected.

Not only did the honorable judge Edwards sanction West and improperly attempt to incarcerate him, he subsequently, after remand completely refused to act upon the order of remand **for hearing on the merits**, the Honorable Judge Edwards evidenced a disposition adverse to the plaintiff incompatible with Caperton or USCA 5.

By exercising jurisdiction improperly without “visiting” in compliance with the State Constitution and the visiting judge statute sanctioning West in a manner the Court of Appeal could not precisely understand and failing to recuse itself after it had attempted to rule in the port's favor so overtly that West was forced to file a personal restraint petition and so improperly that , subsequently, its original order of dismissal had to be vacated by a ruling from Division I of the Court of Appeals, based upon an abuse of discretion, and then finding yet another (the third) improper pretext for ruling in the port's favor, the honorable Trial Court violated the objective requirements of the 5<sup>th</sup> and 14<sup>th</sup> Amendments articulated in Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009).

Additionally, in this case, based on counsel's illusory and now repudiated claim that jurisdiction lied in the companion case, counsel's Edwards and Costello “who's on first?” jurisdictional shell game allowed counsel to obtain an improper \$1,500 sanction from the honorable judge

Edwards based upon the jurisdiction of the other case, and then subsequently obtain a dismissal of that case from the honorable Judge Costello for lack of jurisdiction!

Yet, under the precedent that Ms. Lake seeks to assert in the Spice case, when the CR shoe was on the other foot, such a sanction would be a manifest error as it lacked any clear basis for the Court of Appeals to identify. See *Stiles v. Kearney*, 168 Wn. App. 250, at 262, 277 P. 3d 9, (2012), “The court must make findings specifying the actionable conduct.”

As the Court of Appeals held, over 3 years ago, on April 28, 2014,

It is unclear from the record whether sanctions were ordered for West's contempt or for his failures to appear. (See April 28, 2014 ruling, COA Cause No 71366-3)

Although, as with the famous Abbott and Costello comedy routine, it is very confusing to determine just what took place when, or who's on first, somewhere in the process of counsel's jaundiced and duplicitous sanctioning and jurisdictional shell game, appellant was denied due process for over 9 years and sanctioned as a result of the port's representations as to the jurisdiction of the trial court in the “Costello” case, a court that the port now denies ever had jurisdiction to begin with.

Like the traditional 3 Card Monte or shell game, this was an inequitable and deliberately abusive charade, and by any reasonable definition, a violation of due process, with the resulting sanction an

improper 5<sup>th</sup> Amendment “taking” without due process.

Like a thimblerrigger, a sidewalk huckster playing the old shell game, or a card shark running the Three Card Monte con, counsel has developed an unbeatable jurisdictional racket where whichever case is presently before the court lacks jurisdiction and the crooked house always prevails to make the honest citizen pay.

For counsel to assert that her jurisdictional Edwards and Costello “Who's on first” shell game routine and the nearly a decade of futile proceedings in this case comport with due process is just as unreasonable as a Three Card Monte<sup>11</sup> operator or a thimblerrigger asserting that their games are similarly on the level.

## **VI. CONCLUSION**

The circumstances in this case differ from those in *Hobbs* in a number of significant respects: The Port was not in the process of producing records at the time of suit, West asserted a claim for failure to provide a reasonable estimate, and only filed suit after the Port repeatedly failed to meet its self-imposed deadlines.

Most importantly, perhaps, the defects in the Port's response were

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<sup>11</sup> See, e.g. Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78, *UMKC Law Review* 875 (2010), *In re Antar*, 71 F.3d 97, 101 (3d Cir. 1995), ... “we're not playing three-card Monte on Broad Street or Broadway, New York. This is not a three-card Monte game. This is not a shell game. This is the law. This is a legal proceeding.”

not cured by any final disclosure prior to a hearing in the Superior Court, as evidenced by the exemption logs on file in this case.

Even in the unlikely event that Hobbs or the Honorable Judge Costello could re-write RCW 42.56.550(2) to eliminate a cause of action for failure to provide a reasonable estimate, it is undeniable that this Court, Division I, the Supreme Court, the Port, West all reasonably relied upon the jurisdiction of this case in taking many, many, affirmative acts over the course of the last 9 years.

It would be the height of inequity to allow an agency that has manifestly violated the Public Records Act to evade any form of accountability after so much reasonable reliance has been placed upon prior precedent and an explicit Order of Remand for trial on the merits, merits, it must be mentioned, that are, for the most part, no longer subject to dispute by the “bad actors” at the Port due to their internal memos cited in this case, their public apologies and the records revealed in their most recent disclosures.

Respectfully submitted this day of June 5<sup>th</sup>, 2017.

*s/Arthur West*  
ARTHUR WEST

**CERTIFICATE OF SERVICE**

I hereby certify that on 5<sup>th</sup> day of June, 2017, I caused to be served a true and correct copy of the preceding document on the party listed below at their Tacoma Hilltop offices via:

Via Email at [Clake@Goodsteinlaw.com](mailto:Clake@Goodsteinlaw.com)  
**Attorneys for Respondent Port of Tacoma**

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*s/Arthur West*  
ARTHUR WEST

**CUSHMAN LAW OFFICES, P.S.**

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