

NO. 49617-8-II

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

MARC LANDRY,

APPELLANT

V.

PORT OF PORT TOWNSEND et al.,

RESPONDENTS.

RESPONDENT PORT OF PORT TOWNSEND'S OPENING BRIEF

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I. INTRODUCTION

In 2016, the Port of Port Townsend summarily evicted Mr. Landry's project boat from a monthly, commercial tenancy. Also in 2016, Mr. Landry filed three *pro se* lawsuits seeking, in one way or another, relief from the eviction Order. This appeal arises from a Jefferson County Superior Court order dismissing the last in the series of three *pro se* lawsuits and other *pro se* legal maneuvers that Mr. Landry filed against the Port of Port Townsend, the Port's now-retired executive director Larry Crockett, and the Port's then-deputy Director Jim Pivarnik (collectively "Port" or "the Port", unless context clearly indicates otherwise). The Trial Court gave Mr. Landry extraordinary latitude so that Mr. Landry could fully air his grievances. Then the Trial Court ruled Mr. Landry's claims meritless, dismissed all his cases, and imposed thousands of dollars in terms against Mr. Landry.

The reason for eviction was simple. Mr. Landry rented space to work on his boat at the Port's boatyard. Mr. Landry became a property management problem by not paying his rent on time, tracking Port staff down at their houses, and moving onto his boat in the Port industrial area after apparently becoming homeless. Mr. Landry also did not substantially complete his project, despite Mr.

Landry ostensibly working on his boat at the Port for five years. The Port summarily evicted Mr. Landry, who, at the time of his eviction hearing, was represented by an attorney. The Eviction Court restored the boatyard space Mr. Landry rented from the Port, and ordered Mr. Landry's eviction judgment set off against the security deposit on file. Mr. Landry unsuccessfully attempted to vacate the eviction judgment, twice. Mr. Landry did not further appeal the eviction judgment and order, and it is too late do so.

Mr. Landry then chose to bring even more hardship upon himself. Given the impractical nature of Mr. Landry's personal property (disassembled, old, fifty-five foot wooden boat), the eviction court ordered that the Port give Mr. Landry several months past the date the sheriff forcibly evicted Mr. Landry to remove his boat. In hopes of helping Mr. Landry avoid demolition of the boat, Port even offered to apply Mr. Landry's security deposit on file to hiring a transportation company to move the boat somewhere that authorized the boat. Instead of complying with the Court's order or assigning due consideration to the Port's gracious offer, Mr. Landry chose to file a series of *pro se* lawsuits and motions, seeking, in essence, that the Jefferson County Superior Court declare the eviction case to be invalid. Per Court order, the Port eventually

disposed of Mr. Landry's personal property and unfortunately demolished Mr. Landry's boat.

The Port is not liable to Mr. Landry, because the Port acted pursuant to court orders and plainly worded statutes. Filing later lawsuits seeking to declare prior trial court judgments void is not a cognizable means of seeking further review of a trial court judgment. The doctrine of collateral estoppel prevents second, third, and fourth bites at the apple. Mr. Landry's contention that adverse court decisions stem from fraud and judicial misconduct do not warrant response. The Court properly dismissed this case for failure to state a claim. The Port request judgment for its reasonable attorney's fees under RAP 18.1 and RAP 18.9 because the Port is entitled to attorney's fees under Port policy, and this appeal fails to present debatable issues.

II. RESTATEMENT OF ISSUES

- A. Whether the port district is authorized to condition lease of a boatyard space to a private party upon payment of a security deposit.
- B. Whether the doctrine of collateral estoppel bars second and third lawsuits concerning the same subject matter and among the same parties.

- C. Whether a dissatisfied litigant is entitled to file a second lawsuit to declare a trial court judgment void.
- D. Whether Mr. Landry exhausted his administrative remedies before filing suit.
- E. Whether the Port Should be Awarded Fees under RAP 18.9.

III. RESTATEMENT OF FACTS

Mr. Landry arrived at the Port of Port Townsend in 2011 to seek haul out of his large, hundred-year-old, wooden, motor vessel *Patrol No. 1*. *Compl.* 1. 3. CP 1, 3. Mr. Landry originally represented that he would need just a few months to repair the boat. Instead, years went on without completion. *Id.* In 2012, Mr. Landry Mr. Landry moved his boat from the Port-controlled boatyard to Gold Star Marine, a private facility existing on leased space within the Port's boatyard. *Compl.* 9. CP 9. Mr. Landry wore out his welcome at Gold Star Marine, and, apparently Gold Star Marine conditioned some further stay upon Mr. Landry signing a confession of unlawful detainer judgment.

In 2015, the Port negotiated a revised lease with Mr. Landry. The new agreement allowed Mr. Landry to move his boat out of the unwelcoming Gold Star Marine facility and back into the Port-controlled boatyard. *Compl.* 9:7-11. Cp. 9.

As a condition of the renewal, Port Staff required approximately seventeen thousand dollar (\$17,000) security deposit from Mr. Landry, called a derelict vessel fee, per port policy § 5.05 and to protect the taxpayers in the event the Port needed to dispose of the vessel. *Derelict Vessel Agreement & Deposit Form Ex. 2 to Compl. CP 27*. The deposit is a “port charge” per the agreement that Mr. Landry signed. *Id.*

To impose the deposit, the Port considers, among other things, the history of the project in choosing to assess the fee. *Port Policy 5.05.020(B)(2)*¹. Mr. Landry’s own Complaint informs the Court of Mr. Landry’s poor rental and project history. CP 23-24 (Confession of Unlawful Detainer Judgment concerning Gold Star Marine Tenancy), CO 29 (Port of Port Townsend Environmental Citation to Mr. Landry).

¹ In conducting the inspection in order to make the determination of whether the vessel is derelict, the Harbormaster or Yard Manager shall consider the following nonexclusive criteria in making his evaluation:

1. General seaworthiness;
2. Recent history of use of the vessel;
3. Whether the vessel is equipped with a working generator, holding tank, engine, and electrical system;
4. The extent of the repairs necessary to make the vessel seaworthy and to bring the vessel in compliance with current Coast Guard Regulations governing such vessel; and
5. Other factors bearing on the value of the vessel in comparison with the cost of demolition, transportation and disposal. [Reissued by Exec. Dir. 10/15/13; formerly Appendix “E”, #100.3]

Mr. Landry's own Complaint also speaks to the unseaworthiness of his vessel at the time Mr. Landry returned to the Port's yard in January, 2015: "Throughout the 2012 to the middle of the first month of 2015, Landry was doing extensive work on his subject personal property boat in the shelter at Gold Star Marine". *Compl.* 8:16-18. CP 8.

Mr. Landry could have appealed the decision to impose a deposit. *Port Policy* 5.05.050. Mr. Landry's complaint in this matter does not assert or allege that Mr. Landry availed himself of administrative remedies concerning the deposit. *Accord, Dec'l Pivarnik*. In fact, instead of appealing the imposition of the security deposit, as allowed under Port rules, Mr. Landry allowed a third party, Mr. Stan Goddard, to pay the deposit on Mr. Landry's behalf and without protest. *Compl.*, 16. CP 16.

Mr. Landry's deposit became finalized not later than January 15, 2015, when Mr. Landry moved onto the Port premises and began paying rent under his revised agreement. *Compl.* 11, 13. CP 11 & 13.

Mr. Landry paid rent between the payment of the deposit and the end of Landry's tenancy. Mr. Landry's Complaint expressly

confirms that Mr. Landry paid rent to the Port. *Compl.* 11:1-2 & 14:3. CP 11 & 14. FF 11. CP 83.

Mr. Landry also agreed to Port Policies. *Lease Addendum*, Ex. 1 to *Dec'l Pivarnik*. CP_.² FF 6. CP 82.

The Port Policy includes a severability clause. *Port Policy* 1.01.040³. FF 7. CP 82.

On February 4, 2016 the Port filed an eviction lawsuit against Mr. Landry (*Landry I*). *Port of Port Townsend v. Landry*, 16-2-00020-6 (Jefferson County Super Ct.). FF 13 CP 83. As Mr. Landry explains, the Port promptly secured a writ of restitution on February 22, 2016, and, then, on April 22, 2016, the Port also obtained an order that ultimately authorized the port to destroy the boat should Mr. Landry not remove the boat after several months. *Landry Br.* & FF. 13. CP 83-4. After dissociating from his attorney, Mr. Landry chose to file a motion to vacate the eviction judgment that accused Port deputy director Jim Pivarnik of fraud, and accused the Port of mis-applying RCW 79.100 (Washington public lands law concerning derelict vessels) to Mr. Landry's situation.

² The Port shall promptly file a supplemental designation of Clerk's papers to include this document on review. A copy is attached as Appendix 1 hereto.

³ If any section, subsection, sentence, clause or phrase of these Rules, Regulations and Procedures is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions hereof.

This was the first time that Mr. Landry requested the Jefferson County Superior Court examine the security deposit that Mr. Landry paid the Port. The Jefferson County Superior Court responded to Mr. Landry's argument by sanctioning Mr. Landry for filing the motion, even despite Mr. Landry's *pro se* status. FF 13. CP 83.

Mr. Landry later filed *Landry II, Landry v. Port Townsend*, 16-2-00040-1, again asserting that the Port committed fraud, that the Port somehow misapplied RCW 79.100 to Mr. Landry's security deposit situation, and also seeking a declaration that the eviction in *Landry I* should be voided. FF 14. CP 85. The trial court in this case reviewed *Landry II* and found that the *Landry II* Complaint sought a declaration concerning whether or not the Port should have found Landry's boat to be "derelict". *Id.* The Court dismissed that claim, finding for a second time that no fraud had been committed and that it lacked jurisdiction to declare a prior order in another case to be void. The trial Court also awarded \$4,000 in sanctions against Mr. Landry for filing *Landry II*. *Id.*

On May 4, 2016, Mr. Landry handed copies of a third lawsuit, *Landry III*, about his tenancy out at a Port Commission session. Mr. Landry then tried to file *Landry III in forma pauperis*,

but the Court denied Mr. Landry's fee waiver. *Port Motion for Vexatious Litigant Order*. CP __.⁴

On May 24, 2016, Mr. Landry filed this case, *Landry IV*. *Compl.* CP 1-28.

Mr. Landry's Complaint argues that the security deposit was completely unauthorized, and or that the Port had to follow Washington Public Lands law relating to derelict vessels, RCW 79.100, to charge the fee. *Summ. J.* CP 38-54. This *Landry IV* complaint was "different" because it also named Gold Star Marine, and alleged that the Port and Gold Star Marine engaged in a conspiracy to "set Landry up for a fall". *Compl.* 4. CP 4. All parties moved for Summary Judgment. It appears that Mr. Landry's Motion argued that Mr. Landry's security deposit was illegal, that illegal contracts are void "an initio" and or unenforceable as against public policy, and that therefore the Port never assumed the role of Mr. Landry's landlord, that because the Port was not Mr. Landry's landlord eviction was unavailable to the Port, and Landry should be refunded money and his boat.

Mr. Landry's DATE Motion for Summary Judgment argued only that the Port misapplied RCW 79.100 the deposit, despite at

⁴ The Port shall promptly file a supplemental designation of Clerk's papers to include this document on review. A copy is attached as Appendix 2 hereto.

least two prior court rulings that RCW 79.100 had nothing to do with Mr. Landry's situation at the Port. Mr. Landry posited that since the Port "misapplied" the (inapplicable) law, then his entire rental contract with the Port was void, and the eviction court lacked unlawful detainer jurisdiction.

Just prior, on July 18, 2016, Mr. Landry raised a substantially identical RCW 79.100-"*void ab initio*" argument under cover of his second Motion to Vacate *Landry I. Ex. FF to Motion for Vexatious Litigant*. CP __.⁵ Responsive to Mr. Landry's *Landry I* motion, the Port pointed out to Mr. Landry that RCW 53.08.085 authorizes the deposit, and the Port's policies not only authorize the deposit, but provide the deposit agreement as an appendix.

At a July 29, 2016, at a hearing on whether to declare Mr. Landry a vexatious litigant, and having been instructed by the Port concerning relevant laws, Mr. Landry "revised" his argument in open Court. Mr. Landry decided to orally go off-script from his Motion for Summary Judgment. Mr. Landry abandoned his Motion for Summary Judgment, and, instead, argued, for the first time, that the Port misapplied its security deposit policy. The Port

⁵ The Port shall promptly file a supplemental designation of Clerk's papers to include this document on review. A copy is attached as Appendix 2 hereto.

objected to the tardily-raised arguments, but addressed the arguments in an abundance of caution. The Court considered the arguments, and still ruled to dismiss this case.

On Appeal, Mr. Landry allowed the Port's alleged conspirator, Gold Star Marine, to be dismissed from the appeal. What is left behind is Mr. Landry's third lawsuit concerning the propriety of the Port's security deposit. The Port submits that Mr. Landry's precise argument on appeal – that the Port misapplied its own policy, is not properly preserved in the first place, and, if it were, the argument should be dismissed for the many reasons stated below.

IV. STANDARD OF REVIEW

The standard of review in this case is *de novo*, because this Court reviews trial court orders on summary judgment and trial court legal rulings *de novo*.

"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." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003); quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The purpose of summary judgment is to avoid unnecessary trial when there is not a dispute as to the facts before the court. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d

1152 (1977). Under CR 56, a party is entitled to summary judgment where the evidence produced by the parties permits only one conclusion. *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77, 81 (1985).

The moving party has the initial burden to prove that no genuine issue of material fact exists; once this burden is satisfied the opponent “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 863, 991 P.2d 1182 (Div. 3, 2000), *as amended on reconsideration* (Feb. 29, 2000) (*citing Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986)). The party opposing the summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

V. ARGUMENT

The Port will establish the laws that apply to Mr. Landry’s situation at the Port, and then respond to Mr. Landry’s Opening Brief point-for-point, before asking in conclusion that the Court affirm the trial court and award the Port its reasonable fees and costs on appeal.

1. **Mr. Landry’s Situation at the Port is wholly authorized.**

A. Port districts, generally

In 1911, the Washington State Legislature authorized port districts in the various counties of the state for purposes of acquisition, construction, maintenance, operation, development and regulation within the district of harbor improvements, and various other commercial facilities and industrial improvements. RCW §53.08.010(1). *See also Servais v. Port of Bellingham*, 127 Wn.2d 820, 827, 904 P.2d 1124, 1128 (1995) (“The Port is a public agency crated under RCW 53.04.010”). For the reasons immediately below, it is beyond reproach that port districts can lease port property to individuals, and condition the leases on such terms and security deposit as the Port district, acting through its commission or managing official, deems fit. Because Port’s are government agencies, parties seeking to challenge port district administrative determinations must exhaust their administrative remedies prior to filing any declaration lawsuit.

i. **Port Districts Established Pursuant to Washington State Constitution**

Under Article XV of the Washington Constitution, State of Washington owns the lands under the navigable waters of the State of Washington. § 1. The State shall never give, sell or lease such

lands to private persons. *Id.* The Legislature must provide general laws of the leasing of the rights to maintain wharves, docks and other structures inside the harbor area. *Id.* at § 2. In 1911, the legislature established port districts in part to administer the harbor areas. “The legislature has created port districts expressly as “municipal corporations,” thereby classifying them in the same fashion as cities and towns, public utility districts, and similar public agencies. *State ex rel. O’Connell v. Port of Seattle*, 65 Wn.2d 801, 803, 399 P.2d 623 (1965). Citing Art. 11, § 10, Wn. Const.

ii. Port districts are Municipal Corporations

“Municipal corporations, as creatures of the state, derive their authority and powers from the state's legislative body”. *Campbell v. Saunders*, 86 Wn.2d 572, 574-75, 546 P.2d 922 (1976), citing cases & P. Trautman, Legislative Control of Municipal Corporations in Washington, 38 Wash. L. Rev. 743, 744 (1963). Port powers are provided in RCW Ch. 59.08, entitled “Powers”.

Chapter 53.08 RCW addresses specific grants of Port powers. RCW 53.08.020 recites the general list of operations and specific powers granted to Ports. The basic purpose of a port district is ‘the acquirement, construction, maintenance, operation, development and regulation of a system of harbor improvements and rail and

water transfer and terminal facilities'. Ports are given incidental powers to carry out those purposes. *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 166 P. 780; *State ex rel. Hill v. Bridges*, 87 Wash. 260, 151 P. 490. And, some of the functions of the port district are proprietary in nature, relating to the Port's charge of promoting economic development.

Additional and incidental powers are set forth in numerous statutes, mainly in Title 53 of the Revised Code of Washington, and particularly in RCW Chapter 53.08. Some significant powers have been added by the legislature by constitutional amendments, mainly to facilitate trade promotion and industrial development. Some port district powers resembling county and city governmental powers are eminent domain, the power to levy taxes and special local improvement assessments, to create incidental park and recreation facilities, to adopt and enforce regulations relating to moorage and toll facilities, and to cooperate with counties and cities in applying general police and traffic regulations to port properties and operations.

iii. Ports Exercise their Powers through the Port Commission

The powers of the port district shall be exercised through a port commission consisting of three or five members. RCW

53.12.010(1). *Accord State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767-68, 575 P.2d 713, 715 (1978) (“The purposes for which a port district may be formed are set forth in RCW 53.04.010. That statute limits activities for which port commissions are organized to those carried on “within the district.” The powers of a port district are set out in RCW 53.08.”). The commission is a “legislative body”. *Auto. Drivers & Demonstrators Union v. Dep't of Ret. Sys.*, 92 Wn.2d 415, 421, 598 P.2d 379, 383 (1979)

In acknowledgement that three or five port district commissioners cannot possibly make all decisions, large and small, that a port district encounters, the legislature authorizes broad delegation of commission powers to managing official of the port district by resolution. RCW 59.12.270. Such delegation is limited to ministerial acts. Such a delegation of authority is a living document, subject to change at any time. However, certain dollar thresholds must beyond which the port manager must seek commission approval are set forth in RCW 59.08.090(1), and those thresholds must be adopted and or updated on an annual basis. *Id.*

iv. The Legislature Expressly Allows Port Districts to Lease property

Relevant here, the Legislature expressly allows port districts to lease property. “A district may lease all lands, wharves, docks

and real and personal property owned and controlled by it, for such purposes and upon such terms as the port commission deems proper: PROVIDED, That no lease shall be for a period longer than fifty years with option for extensions for up to an additional thirty years....”) RCW 59.08.080. Port districts have land leasing power distinct and difference from land use regulations and zoning rules. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 99, 392 P.3d 1025 (2017). Ports are empowered to lease public lands to private parties. *In re Port of Seattle*, 80 Wn.2d 392, 396, 495 P.2d 327 (1972). “The legislature empowered the Port to determine whether, and under what terms, to lease public property under its control.” *Riverkeeper*, 188 Wn.2d at 97. “This statutory authority grants the Port de facto approval and veto power over any proposal to be sited on the Port’s land.” *Id.* The Port is unaware of any case limiting the terms that can imposed on a lease by a port district.

v. Port are Generally Required to charge security deposits

Port districts are expressly authorized, and, generally required to charge security deposits. RCW 53.08.085. This statute speaks for itself:

53.08.085

Lease of property—Security for rent.

Every lease of all lands, wharves, docks, and real and personal property of a port district for a term of more than one year shall have the rent secured by rental insurance, bond, or other security satisfactory to the port commission, in an amount equal to one-sixth the total rent, but in no case shall such security be less than an amount equal to one year's rent or more than an amount equal to three years' rent. Evidence of the existence of such insurance, bonds, or security shall be on file with the commission at all times during the term of the lease: PROVIDED, That nothing in this section shall prevent the port commission from requiring additional security on leases or provisions thereof, or on other agreements to use port facilities: PROVIDED FURTHER, That any security agreement may provide for termination on the anniversary date of such agreement on not less than one year's written notice to the port if said lease is not in default at the time of said notice: PROVIDED FURTHER, That if the security as required herein is not maintained throughout the full term of the lease, said lease shall be considered in default: PROVIDED, HOWEVER, That the port commission may in its discretion waive the rent security requirement or lower the amount of such requirement on the lease of real and/or personal port property.

The Port is unaware of any case that interprets RCW 59.08.085 to mean anything other than its plain terms. In fact, only one unpublished case has ever cited to RCW 53.08.085 (in footnote), for the unremarkable proposition of RCW 59.08.085 “requiring security for property leased but port commission may waive: *Teamsters Union Local 117 v. Port of Seattle*, No. 36366-2-I, 1996 Wash. App. LEXIS 403, at *9 n.11 (Div. 1, 1996) (unpublished).

Therefore, it is beyond reproach that Ports can lease port property to individuals, and condition the leases on such terms and security deposit as the Port district deems fit.

B. RCW Ch. 79.100, the Derelict Vessel Act

In addition to creating port districts, Washington State's legislature vested some management of the waters of the State of Washington in the Department of Natural Resources. These statutes exist at Title 79 RCW, "Public Lands". Within the public lands law, the Legislature addresses "derelict and abandoned vessels that are either grounded or anchored upon publicly or privately owned submerged lands. These vessels are public nuisances and safety hazards as they often pose hazards to navigation, detract from the aesthetics of Washington's waterways, and threaten the environment with the potential release of hazardous materials". RCW § 79.100.005. RCW Ch. 79.100 is entitled "derelict vessels". This chapter is a valid exercise of the State of Washington's police power. *Matheson v. City of Hoquiam*, 170 Wn. App. 811, 822-823, 287 P.3d 619 (Div. 2, 2012)

"RCW 79.100.060(1) makes the owner of an abandoned or derelict vessel responsible for reimbursing the government for "auditable costs" of the nuisance abatement, including

administrative costs, removal and disposal costs, and costs associated with environmental damages directly or indirectly caused by the vessel.”. *Matheson*, 170 Wn.App. at 8230. Governments to which a party becomes potentially liable are defined as "Authorized public entity", and “includes any of the following: The department of natural resources; the department of fish and wildlife; the parks and recreation commission; a metropolitan park district; a port district; and any city, town, or county with ownership, management, or jurisdiction over the aquatic lands where an abandoned or derelict vessel is located.” RCW 79.100.010(3). In order for a vessel owner to become liable to the government under RCW 79.100.060, the vessel must first be declared “derelict”⁶ or “abandoned”⁷. Then, after some time, an

⁶ "Derelict vessel" means the vessel's owner is known and can be located, and exerts control of a vessel that:

- (a) Has been moored, anchored, or otherwise left in the waters of the state or on public property contrary to RCW 79.02.300 or rules adopted by an authorized public entity;
- (b) Has been left on private property without authorization of the owner; or
- (c) Has been left for a period of seven consecutive days, and:
 - (i) Is sunk or in danger of sinking;
 - (ii) Is obstructing a waterway; or
 - (iii) Is endangering life or property.

⁷ "Abandoned vessel" means a vessel that has been left, moored, or anchored in the same area without the express consent, or contrary to the rules of, the owner, manager, or lessee of the aquatic lands below or on which the vessel is located for either a period of more than thirty consecutive days or for more than a total of ninety days in any three hundred sixty-five-day period, and the vessel's owner is: (a) Not known or cannot be located; or (b) known and located but is unwilling to take control of the vessel. For the purposes of this subsection (1) only, "in the same area" means within a radius of five miles of any location where the vessel was previously moored or anchored on aquatic lands.

authorized government agency can take custody of the vessel, dispose of the vessel, and seek restitution from the liable party. RCW 79.100.040. The procedures in RCW 79.100 are permissive, not mandatory, and not an exclusive remedy available to authorized entities. RCW 79.100.020.

C. Port of Port Townsend

The Port of Port Townsend is a Washington State port district serving all of Jefferson County, Washington.

i. Boat haven

The Port operates several marinas, a boatyard, and a shipyard. The Port can and does serve hundreds of boat owners, at once. The boatyard and shipyard, alone, called “Boat Haven”, has capacity for up to two hundred boats on land.

ii. The Scale of the Port Operation Requires significant administrative oversight.

Given the scale of the Port operation, the Port Commission makes use of the provisions of RCW 53.12.270, which, as described above, allows the Port Commission to delegate its authority to a managing official. The Port commission passed a resolution that empowers the Port’s executive director to make effective port rules, regulations and procedures. *Port rules* § 1.01.010(a). The rules

include detailed terms by which parties may rent haul-out space in Boat Haven, or moorage space elsewhere at the Port. Title 4 & 5, *Port Rules*. The commission deems such leases administrative, and does not require the port's staff to seek commission approval as to these relatively minor, walk-in sorts leases in the ordinary course of the Port's business.

iii. Derelict vessel fee

The Port also operates the last "tailgater" boat yard in Puget Sound. This operation allows boat owners to request port staff to haul boat owners' boats out of the water with a traveling gantry crane and place the boats on blocks on dry land. Then, the boat owners can work on their own vessels, subject to Port best management practices to protect the environment. *Port rules* Ch. 5.01.030. The boat owners can also hire their own labor to help with projects, or commission professionals shipwrights form the co-op on site.

Port rules comprehend that some projects are quite lengthy and involved. Owners must meet with port staff to explain their intentions and prepare the vessels. *Port rules* 5.01.040. In the event that Port staff determines a boat is worth less than the cost of disposing the boat then port staff considering non-exclusive factors:

1. General seaworthiness; 2. Recent history of use of the vessel; 3. Whether the vessel is equipped with a working generator, holding tank, engine, and electrical system; 4. The extent of the repairs necessary to make the vessel seaworthy and to bring the vessel in compliance with current Coast Guard Regulations governing such vessel; and 5. Other factors bearing on the value of the vessel in comparison with the cost of demolition, transportation and disposal.

Port rule 5.05.020.

If after completing the above described inspection, at the sole discretion of the Harbormaster or Yard Manager, as applicable, a vessel is determined to be a derelict vessel, the owner of such vessels shall deposit with the Port of Port Townsend a deposit in the amount of the number of tons of the boat, multiplied by the current “Tipping Fee” per ton as charged by the Jefferson County Land Fill for disposal, plus the sum of Five Hundred Dollars (\$500.00) for a derelict vessel weighing up to 100 tons. Vessels weighing between 100 and 200 tons shall pay One Thousand Dollars (\$1,000.00), and vessels over 200 hundred tons shall pay One Thousand Five Hundred Dollars (\$1,500.00) which shall be considered the estimated expense of demolition and transportation to the Jefferson County Land Fill for disposal. Refer to Appendix “H” for the Derelict Vessel Agreement and Deposit Form.

Port rule 5.05.030. Emphasis added. The Port keeps the deposit if the owner fails to remove the vessel from Port property. *Id.*

Therefore, the Port policy establishes a means of calculating a security deposit, called a “derelict vessel fee”. The Port rules are authorized by RCW 53.08. *Port rule 1.01.010(a).* As the Jefferson County Superior Court told Mr. Landry *before* Mr. Landry filed this

case, the Port's derelict vessel fee is distinct and different than any procedures under RCW Ch. 79.100.

Port district administrative determinations, such as the determination to impose a security deposit, may are not subject to judicial review under RCW Ch. 7.24 unless and until parties have exhausted administrative remedies. "The doctrine of exhaustion of administrative remedies is well established in Washington. The rule provides that "[i]n general an agency action cannot be challenged on review until all rights of administrative appeal have been exhausted." *S. Hollywood Hills Citizens Ass'n v. King Cty.*, 101 Wn.2d 68, 73, 677 P.2d 114, 117 (1984).

The Port is an agency to which the doctrine of exhaustion of administrative remedies applies. Even if Mr. Landry's claim was not barred for the reasons described below, Mr. Landry's claim was also never properly before *any* court because Mr. Landry was aware of the determination that Mr. Landry needed to pay a security deposit, and Mr. Landry signed a statement that Mr. Landry was familiar with Port policy. "[A]dministrative remedies must be exhausted before the courts will intervene: (1) 'when a claim is cognizable in the first instance by an agency alone'; (2) when the agency's authority 'establishes clearly defined machinery for the

submission, evaluation and resolution of complaints by aggrieved parties'; and (3) when the 'relief sought . . . can be obtained by resort to an exclusive or adequate administrative remedy'. *Id.* Here, the Port's security deposit is a cognizable port district procedure, the Port's policy 5.05 establishes the criteria supplemental to the Port's general authority to impose deposits, the Port policy provides for an administrative appeal of the deposit. Therefore, the Port's security deposit determinations are subject to the doctrine of exhaustion of administrative remedies.

2. Contrary to Appellant Landry's position, Port actions were wholly authorized by laws and policies

Given the above authorities, Mr. Landry's lawsuit is flatly meritless.

In 2015, the Port negotiated a lease with Mr. Landry to allow Mr. Landry to bring his boat out of the unwelcoming Gold Star facility, and back onto Port land. *Compl.* 9:7-11. CP 9. As a condition of the renewal, Port Staff required approximately seventeen thousand dollar (\$17,000) security deposit from Mr. Landry, called a derelict vessel fee, per port policy and to protect the taxpayers in the event the Port needed to dispose of the vessel. *Derelict Vessel Agreement & Deposit Form Ex. 2 to Compl.* CP 27.

The Port also required Mr. Landry pay advance rentals in an amount of approximately six thousand dollars. *Id.* The deposit is a “port charge” per the agreement that Mr. Landry signed, and, again, has no conceivable connection to RCW 79.100. *Id.*

To impose the deposit, the Port considered, among other things, the history of the project in choosing to assess the fee. *Port rule 5.05.020(B)(2)*. Mr. Landry’s own Complaint informs the Court of Mr. Landry’s rental and project history

Mr. Landry curiously attached to his complaint evidence that prior to moving onto Port real estate in 2015, Mr. Landry overstayed his agreement at PT Marine/Gold Star Marine (“Gold Star”), a boat repair business that exists on property leased from the Port of Port Townsend. Gold Star Marine required Mr. Landry to sign a confession of unlawful detainer judgment, apparently in lieu of immediate eviction. *Email & Confession, Ex. 1 to Compl.*

Mr. Landry’s own Complaint also speaks to the unseaworthiness of his vessel: “Throughout the 2012 to the middle of the first month of 2015, Landry was doing extensive work on his subject personal property boat in the shelter at Gold Star Marine”. *Compl. 8:16-18.*

After due consideration of the factors set forth in the Port rules, port staff determined that it was necessary to charge Mr. Landry a derelict vessel fee and advance monthly rentals. Mr. Landry's own evidence, attached to his Complaint, establishes the basis for this action. The Port's fee is authorized by RCW 53.08.080-.085. The Court should reject any notion that Mr. Landry's fee is "illegal", and similarly deny the outlandish reliefs that Mr. Landry wishes to flow from his faulty premise. The Port notes that later events vindicated imposition of the deposit – the Port took six months to work through Mr. Landry's left-behind property and obtained an eviction judgment in excess of the all security deposits.

A. Landry collaterally estopped from filing this case, at all, because he filed two other lawsuits about his situation at the port in the weeks prior to this case, and, the eviction court also rejected some of the same arguments he makes here.

Collateral estoppel⁸ applies where the following elements exist: "(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3)

⁸ Collateral estoppel differs from the related doctrine of *res judicata* because

the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of [the] doctrine must not work an injustice.” *State v. Mullin-Coston*, 152 Wn.2d 107, 114, 95 P.3d 321 (2004). Landry’s claims meet this test on all fours.

"The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit. We have held that summary judgment can be a final judgment on the merits with the same preclusive effect as a full trial and is therefore a valid basis for application of res judicata" . *Ensley*, 152 Wn.App 900. Internal citations omitted. The entry of summary judgment in favor of the Port and dismissal with prejudice of Landry's claims in *Landry II* is a final judgment on the merits, allowing the application of res judicata. *See Order in Landry II*. *Landry II* involved the same personal and parties, the same request for \$10,000,000 emotional damages and a declaration that *Landry I* is void, the same subject matter of Landry's situation at the Port, and the same quality of persons against whom Mr. Landry made claims. Therefore, the Court should dismiss this case because the doctrine of res judicata bars Landry's claims here.

(1) Identity of Issues. *Landry I, II, III and IV* all concern Mr. Landry's tenancy at the Port. The Port filed *Landry I* in February, 2016. Mr. Landry filed *Landry II* on March 24, 2016. FF 14. CP 83. *Landry II* sought a declaration of whether or not Mr. Landry's vessel should have been deemed to be derelict. *Id.* The Complaint also alleged that Mr. Landry was denied process under RCW 79.100 and that the Port committed fraud. In other words, *Landry II*, like this case, asked for a court to examine the Port's requirements imposed when the Port offered Mr. Landry a lease in 2015. This instant case sought judicial examination of events alleged to have occurred in 2014 and 2015, relating to Mr. Landry's tenancy. *Compl.* 1-28. The issues in this case are the same as *Landry II*, which the court dismissed on summary judgment, and Mr. Landry has not appealed. FF 14. CP 83.

(2) Prior Adjudication was had on the merits. In *Landry II*, the Landry actually litigated the issue of whether the Port, properly assessed Mr. Landry's security deposit. The Port filed for summary judgment dismissal of *Landry II*. The Court granted a summary dismissal, and also awarded the Port approximately \$4,000 in sanctions against Mr. Landry, pursuant to CR 11 and or RCW 4.84.185. FF 14. CP 83. "[A] grant of summary judgment

constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue”. *Brownfield v. City of Yakima*, 178 Wn. App. 850, 870, 316 P.3d 520 (Div. 3, 2013); quoting *Nat'l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn. App. 226, 233, 983 P.2d 1144 (1999). Therefore, there has been a prior adjudication on the merits of Landry’s claim that the Port’s terms and conditions of lease were somehow unauthorized.

(3) Landry and the Port were parties to *Landry I - IV*. The third criterion of collateral estoppel is met, as the parties are identical. FF 14, 16. CP 83. *Motion for Vexatious Litigant Order*. CP __. Appendix 2 hererto.

(4) Application of the doctrine will not work an injustice. The fourth and last criterion is met. Washington Courts disfavor finding that application of the doctrine will work an injustice, so long as the parties had a full and fair hearing on the issue. *Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 795-96, 982 P.2d 601 (1999). (“Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question.”). Establishing injustice is no small burden. “However, ‘injustice’ means more than that the prior decision was wrong. When faced with a choice between achieving finality and correcting

an erroneous result, we generally opt for finality”. *In re Marriage of Brown*, 98 Wn.2d 46, 49, 653 P.2d 602 (1982).

Further, the Port asserted “defensive” collateral estoppel. The Port has found some instances where Washington Courts may find injustice when litigants use the doctrine for “offensive” purposes, which occurs when a Plaintiff seeks to apply collateral estoppel in order to bar a defendant from defending itself. *Ward v. Torjussen*, 52 Wn.App. 280, 283, 758 P.2d 1012 (Div.1 1988) (“agency has been found to provide the requisite privity only when the principal or agent is attempting to benefit from collateral estoppel, not when collateral estoppel is used against the principal or agent”); *Everett v. Perez*, 78 F.Supp.2d 1134 (E.D.Wash 1999) (“Furthermore, Washington forbids the offensive use of collateral estoppel against an agent when the action serving as the basis for the estoppel involved the principal but not the agent.”).

To the extent that Mr. Landry may argue that this case is somehow different than the prior cases, the Court should still affirm dismissal. “Filing two separate lawsuits based on the same event – claim splitting – is precluded in Washington. *Ensley v. Pitcher*, 152 Wn.App 891, 898, 222 P.3d 99 (Div. 1, 2009); citing *Landry v. Lushcer*, 95 Wn.App. 779, 780, 976 P.2d 1274 (Div. 3, 1999). “The

doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Ensley*, 152 Wn.App at 899,10 quoting *Marino Prop. Co. v. Port Comm'rs of Port of Seattle* , 97 Wn.2d 307, 312, 644 P.2d 1181 (1982). "Res judicata bars such claim splitting if the claims are based upon the same cause of action". *Ensley*; citing 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.33, at 479 (1st ed. 2007) ("issues that could have been litigated and resolved are barred").

Here, as described above, Landry already at least one full and fair hearing on the on the issues relating to his situation at the Port during at least one prior case. The Court should affirm dismissal under the doctrine of collateral estoppel, pursuant to CR 56 or CR 12.

B. Filing a lawsuit seeking a trial court to declare a prior judgment void, weeks after the trial court entered that judgment, is not a claim upon which relief can be granted.

Washington Court Rules provide dissatisfied litigants procedures to seek relief from a trial court ruling. For example, Landry unsuccessfully attempted to vacate his judgment pursuant to CR 60. Landry could also have appealed the judgments in the eviction case and *Landry II*, but did not.

Filing a second or third case in the same court seeking to declare a recent judgment invalid is not one of those tools allowed under the rules. Before Mr. Landry filed this case, the Jefferson County Superior Court already ruled on Landry's status at the Port, and whether the Port's actions connected to Landry's lease renewal were authorized, and rendered judgment on the same. No statute or Court Rule supports a second lawsuit where the relief is to declare prior Court Orders, rulings or judgements "void". In reality, Landry's *Landry II* lawsuit and this lawsuit is requested actually is a defective and untimely way to ask for the relief of CR 59 reconsideration and or a CR 60 request for relief from the Court's previous Orders in the Eviction Case. *See Compl.* (Landry seeks a declaration effectively reinstating his tenancy and ameliorating the April 22 Eviction Court order authorizing disposal of Landry's boat). CP 16. Landry's flawed second lawsuit fails the criteria of each Civil Rule as described below, and must be dismissed.

A. CR 59 Motion is Untimely. Although Landry fails to cite to CR 59, that rule governs disposition of Landry's present suit. Cr 59 applies for motions for "New Trial, Reconsideration, And Amendment Of Judgments". ⁹ CR 59 (9)(b) governs the time for

⁹ CR 59 - NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making the application; or

(9) That substantial justice has not been done.

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgment as a matter of law,

is made and heard before the entry of the judgment, no further motion may be made without leave of the court

first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections

filing Motion for Reconsideration, and CR 59 (g)(h) governs the time for filing a Motion To Alter or Amend Judgment.¹⁰ Both Rules unequivocally require the Motions shall be filed not later than 10 days after the entry of the judgment, order, or other decision.

Landry II and this suit, which sought to alter or amend this Court's previous rulings is clearly time barred because the Court ordered eviction in February of 2016, and Mr. Landry filed the later cases on March 24, 2016 and April 24, 2016, respectively.

Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

CR 59 (g)(b).

(g), (h), and (i) of this rule,
or (3) under rule 52(b).

¹⁰ CR 59 (b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.

CR 59 (9)(h).

A motion for reconsideration of a judgment filed after the period specified by former CR 59(b) is untimely and need not be considered. *Griffin v. Draper* 32 Wash.App. 611, 649 P.2d 123 (1982).

Trial court has no discretionary authority to extend the time period for filing a motion for reconsideration. *Metz v. Sarandos* (1998) 91 Wash.App. 357, 957 P.2d 795. A Motion for new trial filed was nine days and served upon opposing counsel 38 days after court signed its findings of fact, conclusions of law, and judgment, with full knowledge of moving counsel, was not timely filed and, therefore, could have no effect upon commencement of time within which appeal can be taken. *Canzler v. Mammoliti* 40 Wash.2d 631, 245 P.2d 215 (1952).

Even appeals will not extend the ten day deadline. Thirty-day time limit for filing notice of appeal under RAP 5.2(a) is not extended upon filing of motion for reconsideration with trial court if moving party has failed to both file and serve motion within ten days after entry of judgment, as required by CR 59(b). *Schaefco*,

Inc. v. Columbia River Gorge Com'n (1993) 121 Wash.2d 366, 849 P.2d 1225.

Here Landry's present lawsuit clearly seeks to amend the Court's Order and Judgement on Unlawful Detainer entered on February 22, 2016, and property disposal order entered on April 22, 2016. This Court should deny the relief that Mr. Landry actually seeks as simply unauthorized by any rules.

C. Landry also clearly seeks CR 60 relief.

CR 60 applies for motions for "Relief From Judgement of Orders". The Trial Court should dismiss this suit because (1) Landry has not and cannot meet his burden under CR 60 and (2) the criterion of CR 60(a) is not met.

1. Landry cannot meet his burden to justify relief from Judgement.

The party seeking relief through a motion to vacate bears the burden of establishing that relief is warranted. *Washington Mill Co. v. Marks*, 27 Wash. 170, 174, 67 P. 565 (1902); see CR 60(e)(1). Landry cannot meet his burden as described below.

2. Landry CR 60 (a) Motion is legally defective.

CR 60 (a) provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative

or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

A party can move under CR 60(a) at any time **within the same** case where the Order issued. CR 60(a). Emphasized. But CR 60(a) allows a trial court to grant relief from judgments only for clerical mistakes, such as mathematical miscalculations or unintentional mistakes in a property description.

A clerical error is a technical mistake or omission that is apparent from the record, does not involve a legal decision or judgment, and prevents the judgment from embodying the court's intention. *In re Stern*, 68 Wash. App. 922, 927, 846 P.2d 1387 (1993); *Marchel v. Bungler*, 13 Wash. App. 81, 84, 533 P.2d 406, review denied, 85 Wash. 2d 1012 (1975).

A mathematical miscalculation is an example of a clerical error. *In re King*, 66 Wash. App. 134, 138, 831 P.2d 1094 (1992). In *King*, the arbitrator who determined the amount of child support failed to complete the child support worksheet and, consequently, miscalculated the monthly support payments. The trial court relied on the arbitrator's figures and entered judgment accordingly. When the mistake came to light, the father sought a CR 60 (a) vacation of the judgment. He accompanied his motion with an affidavit from

the arbitrator acknowledging the miscalculation. The trial court denied the father's motion, but the appellate court reversed, finding the trial court's error was clerical and could be remedied through CR 60(a). *King*, 66 Wash. App. at 138-39.

In contrast, CR 60(a) cannot be used to effect substantive changes or correct judicial errors. *See Presidential Estates*, 129 Wn.2d at 326; 15 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE, §39.4, at 68 (2003). This rule allows a trial court to correct an error that renders a judgment inconsistent with the trial court's intention, as expressed in the trial court record. *Presidential Estates*, 129 Wn.2d at 326. The test for distinguishing between "judicial" and "clerical" errors is whether, based on the record, the judgment embodies the trial court's original intention. *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wash. 2d 320, 326, 917 P.2d 100 (1996).

The trial court under CR 60(a) can "correct[]language that did not correctly convey the intention of the court, or suppl[y] language that was inadvertently omitted from the original judgment." *Presidential Estates*, 129 Wn.2d at 326. A trial court also can use CR 60(a) to clarify an ambiguity in a judgment. *Presidential Estates*, 129 Wn.2d at 328-29.

But CR 60(a) does not allow correction of a “judicial” error. *Presidential Estates*, 129 Wn.2d at 326. CR 60(a) does not allow a trial court to “go back [and] rethink the case”, which, in this instance, the Court expressly decided not to do. *Presidential Estates*, 129 Wn.2d at 326.

The Court’s Orders in the Eviction Case precisely carried out the Court’s intention. Landry’s fourth, present lawsuit does not correct a “clerical mistake,” but instead involves voiding a prior legal decision or judgment, which is not allowed. *Compl.* 60. Landry in this second suit seeks relief that is not legally permissible and should be dismissed.

It is axiomatic that litigants only get a single bite at the apple. Landry cannot leverage RCW 7.24, Washington State’s Uniform Declaratory Judgment Act, to use this case to seek relief from independent eviction and other trial court orders entered in a different cause by the same trial court. Washington’s Court Rules and Rules of Appellate Procedure provide limited procedures to dissatisfied parties. This lawsuit is not one of them. The Port asks the Court to affirm the dismissal of this case.

3. Port's Response to Landry's Arguments

Now that the Port recited the reasons that the Court should affirm, the Port will response to Mr. Landry's brief, point-by-point.

A. This Case is Properly Before the Court

Washington State's Rules of Appellate Procedure do not require a jurisdictional statement. The Port does not dispute this Court's jurisdiction nor offer a response to Mr. Landry's superfluous jurisdictional statement.

B. Standard of Review

Mr. Landry adequately reproduced the familiar standards of review for a dismissal under CR 56 and CR 12. The Port adds that in Washington State the law is well settled that *pro se* litigants are held to the same standards under the rules, substantive laws, and administrative laws as attorneys. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (Div. 2, 1997).

C. The Trial Court Properly Dismissed this Case

Mr. Landry has offered the Court just one sentence of analysis concerning the ultimate issue of his appeal:

No genuine issue as to material fact capable of dispute has been presented in regard to the illegality of the subject contract in renewal of Landry's month to month tenancy at the Respondent PORT, thus summary judgment was

appropriate and warranted in favor of moving party Landry, who was thereby entitled as a matter of law.

Landry Br.; citing *Dept of Labor Indus. V. Frankheuser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993). *Frankenhueser* concerned appeals from the Board of Industrial Insurance Appeals consolidated for direct review by the Washington State Supreme Court, and lacks any remote, tenuous, or conceivable nexus to this case. *Id.* at 306. Therefore, Mr. Landry's single sentence, conclusory, and wholly unsupported opinion that the Court should reverse the superior court merely because Mr. Landry says so does not warrant judicial consideration or further response.

D. The Trial Court Findings of Fact are Supported by Substantial Evidence on the Record in this Case.

Port districts are by the Legislature empowered to lease port district property.

Lease of property—Authorized—Duration.

A district may lease all lands, wharves, docks and real and personal property owned and controlled by it, for such purposes and upon such terms as the port commission deems proper

Port districts are empowered to charge security deposits, and are even generally required to do so.

Lease of property—Security for rent.

Every lease of all lands, wharves, docks, and real and personal property of a port district for a term of more than one year shall have the rent secured by rental insurance, bond, or other security satisfactory to the port commission, in an amount equal to one-sixth the total rent, but in no case shall such security be less than an amount equal to one year's rent or more than an amount equal to three years' rent. Evidence of the existence of such insurance, bonds, or security shall be on file with the commission at all times during the term of the lease: PROVIDED, That nothing in this section shall prevent the port commission from requiring additional security on leases or provisions thereof, or on other agreements to use port facilities:

Here, the Port let Mr. Landry a written lease for an allotted space in the Port's boat yard, and charged Mr. Landry a security deposit. *CP* 27. Mr. Landry makes much of the fact that the Port's security deposit is called a "Derelict Vessel Fee", which, coincidentally, mirrors a term used in RCW 79.100, Washington State's Derelict Vessel Act, RCW 79.100. *Compl.* 11. *CP* 11.

Mr. Landry's initial confusion between the similar terms located in Port Policy and RCW 79.100 may have been understandable. What is not understandable or excusable, is that Mr. Landry persists with his meritless claims after the Jefferson County Court ruled that 79.100 RCW obviously has nothing to do with Mr. Landry's situation. *FF* 13-14. *CP* 82-3. In the eviction case, Mr. Landry attempted to vacate the judgment and order for writ of restitution on the basis he had been wronged under RCW

79.100. FF 13 CP 82.3. & Ex. FF to *Motion for Vexatious Litigant Order*. The Court in the prior case expressly ruled that RCW 79.100 did not apply to Mr. Landry's situation. *Id.* Next, Mr. Landry filed his first lawsuit (*Landry II*) against the Port and Port Staff, alleging, among other things, that because the Port did not follow RCW 79.100, the Jefferson County Superior Court should find the Port liable to Mr. Landry for millions of dollars in "emotional damages". The Jefferson County Superior Court dismissed *Landry II* on summary judgment. Mr. Landry did not appeal the outcome of *Landry II*, and it is too late to do so. As the trial Court ruled in this case and other Landry cases, the Port-policy derived security deposit is just that, a security deposit authorized by RCW 53.08.

Because Ports are unquestionably authorized to collect security deposits, there was nothing illegal about the Port's security deposit imposed here. Mr. Landry's arguments that the deposit was "illicitly charged" are simply wrong. Mr. Landry's incorrect premises cannot be the basis for further arguments that port district security deposits are void as against public policy. *See Appellant's Br. 22.*

The trial court's reluctance to second guess the Port staff's discretion to impose a security deposit in the amount imposed

should be upheld. Several factors waived any challenge Mr. Landry may have had to the imposition of the deposit, no matter how feeble the merits of such a challenge.

Due process can be waived. “A party may waive the due process right to a meaningful hearing by failing to timely raise it.” *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 959, 320 P.3d 163 (Div. 2, 2014) Mr. Landry’s own complaint shows that Mr. Landry signed that he was familiar with the Port policy, and chose to pay the deposit without protest in 2015, and paid the rentals for months. The course of performance in a lease, paying or accepting rent, results in waiver of alleged breaches. *Wilson v. Daniels*, 31 Wn.2d 633, 634, 198 P.2d 496, 498 (1948). Here, Mr. Landry alleges he paid the rent under the lease for twelve consecutive months in 2015 and 2016. FF 11 CP 83. Therefore, Mr. Landry waived any administrative challenge to the deposit.

Finally, Mr. Landry dips into extreme absurdity in this segment by arguing that he Port is not a governmental agency. *Appellant Br.25*. That is not true, see above. Landry needed to exhaust administrative remedies as a precondition to suing the Port under RCW 7.24 over the imposition of the derelict vessel fee. In order to seek a declaration, a plaintiff must first exhaust available

administrative remedies. *Lechelt v. Seattle*, 32 Wn. App. 831, 836, 650 P.2d 240, 243 (1982); citing; *Ackerley Communications, Inc. v. Seattle*, 92 Wn.2d 905, 602 P.2d 1177 (1979). (“The owners thus lack standing to maintain an action for declaratory and injunctive relief since they have failed to pursue and exhaust their administrative remedies”). “Although a remedy is not the precise relief sought, or will not give the litigant ‘complete relief,’ the remedy may be adequate for purposes of requiring exhaustion”. *Smoke v. City of Seattle*, 132 Wn.2d 214, 225, 937 P.2d 186, 191 (1997). Here, the Port provided the exact administrative remedy Mr. Landry sought – rescission of the security deposit. *Port Rule* 5.05. Because Mr. Landry paid his security deposit instead of contesting it, Mr. Landry did not exhaust administrative remedies and has not standing to seek a declaration.

Mr. Landry’s complaint does not meet Mr. Landry’s burden to allege that he exhausted the remedy. In Fact, Mr. Landry’s complaint and the attached declaration alleges the exact opposite – Mr. Landry had a benefactor pay the deposit, and that Mr. Landry moved onto the Port and paid rent.

Moreover, Mr. Landry did not actually sue the Port for a declaration under RCW 7.24 that the Port improperly imposed a

security deposit. *Compl.* 14-15. Mr. Landry apparently sued to Port for a declaration that his boat is not a derelict vessel under RCW 79.100 and that the Port “conspired” with now-dismissed defendants. As explained above, Mr. Landry crafted that “argument” that the Port did not follow its own valid policies, whole cloth, in a Summary Judgment reply.

Although the Port has provided the many reasons that the Mr. Landry’s arguments about the security deposit are not property before the Court, severability clause also protects the Port from the relief that Mr. Landry seeks. Mr. Landry also agreed to Port Policies. The Port Policy includes a severability clause. *Port rule* 1.01.040. Even if Mr. Landry’s outlandish arguments that the Port cannot collect security deposits were true, then the rest of the lease would continue in force.

E. Request for Attorney’s Fees

The Port’s policies authorize an award of attorney’s fees. “In the event that any party commences legal action to enforce or interpret any provision of these terms and conditions, the prevailing party in such legal action shall be entitled to an award of attorney’s fees and all litigation expenses, in amounts determined by the court”. *Port rule* 5.06.080. The trial court awarded the Port

its reasonable attorney's fees and costs under this Rule. Pursuant to RAP 18.1, the Port requests an award of its fees on appeal.

The Port also requests that the Court award fees under RAP 18.9, as Mr. Landry's appeal is devoid of merit, does not present a debatable point of law, and chances of reversal are virtually nonexistent.

VI. CONCLUSION

For the above reasons, the Court should affirm the dismissal and allow the Port to submit a cost bill for further fees incurred on appeal.

RESPECTFULLY SUBMITTED this 7th day of August 2017.

GOODSTEIN LAW GROUP PLLC
By: s/Seth S. Goodstein
Seth Goodstein, WBSA # 45091
501 S. G Street
Tacoma, WA 98405
(253) 779-4000
Attorneys for Port of Port
Townsend

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Marc Landry General Delivery Port Townsend, WA 98368 E-mail: patrolnumber1@gmail.com	<input checked="" type="checkbox"/> U.S. First Class Mail <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email
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DATED this 7th day of August 2017, at Tacoma, Washington.

s/Seth S. Goodstein
Seth S. Goodstein

APPENDIX 1

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SUPERIOR COURT OF WASHINGTON FOR JEFFERSON COUNTY

MARC LANDRY,

Plaintiff,

v.

PORT OF PORT TOWNSEND, a
Washington municipal corporation, et al.

Defendants.

NO. 16-2-00076-1

DECLARATION OF JIM PIVARNIK

Comes now Jim Pivarnik, being over eighteen years of age and competent to testify herein, and declares:

1. I am the former deputy director of the Port of Port Townsend, and have been named Defendant in the above-referenced case.
2. I imposed a derelict vessel deposit on Mr. Landry when Mr. Landry sought to move back onto the Port of Port Townsend boatyard.
3. The derelict fee was needed given Mr. Landry's poor performance as a tenant at the Port, the dismantled condition of his vessel, and lack of fitment of the vessel.
4. Mr. Landry never asked for any review of his derelict vessel deposit, formally or informally.
5. In fact, the first time I learned that Mr. Landry took issue with his deposit was when I read a newspaper article about Mr. Landry's situation at the Port, that was published after the eviction of Landry commenced in the spring of 2016 and more than one year after Mr. Landry's benefactor paid Mr. Landry's deposit.
6. Therefore, Mr. Landry did not exercise or exhaust any administrative remedies available to Mr. Landry, nor attempt to do so.

I certify the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated this 15th day of August, 2016 at Kingston, WA.



Jim Pivarnik

DECLARATION OF JIM PIVARNIK

- 1 -

**GOODSTEIN
LAW GROUP** PLLC
501 South G Street
Tacoma, WA 98405
Fax: (253) 779-4411
Tel: (253) 779-4000

APPENDIX 2

1 EXPEDITE

2 Hearing is set: July 29, 2016

3 Time: 1:00 p.m.

4 Judge Harper

5
6
7 SUPERIOR COURT OF WASHINGTON FOR JEFFERSON COUNTY

8 MARC LANDRY,

9 Plaintiff,

10 v.

11 PORT OF PORT TOWNSEND, a Washington
12 municipal corporation; LARRY CROCKETT,
13 both as an individual and as an agent and/or
14 Executive Director of PORT OF PORT
15 TOWNSEND; JIM PIVARNIK, both as an
16 individual and as an agent/Deputy Director of
17 PORT OF PORT TOWNSEND; PT MARINE
18 ENTERPRISES LLC dba GOLD STAR
19 MARINE and its co-owner/officer/agenda at all
20 relevant times, JIM HECKMANN; and DOES 6
21 through 15, Inclusive,

22 Defendants.

NO. 16-2-00076-1

MOTION FOR ORDER DECLARING
MARC LANDRY A VEXATIOUS
LITIGANT, AND BARRING MARC
LANDRY FROM FURTHER FILINGS
& AWARDING SANCTIONS

23 **MOVING PARTY**

24 Comes now the Port of Port Townsend, Larry Crockett, Jim Pivarnik (collectively "the
25 Port", unless context clearly indicates otherwise), and through undersigned counsel Seth
Goodstein and Goodstein Law Group, respectfully requests the relief designated below.

REQUESTED RELIEF

The Port respectfully requests that the Court enter an Order declaring Marc Landry a
vexatious litigant and barring Landry from further filings in the Courts of this State that invite

1 any sort of response by the Port and or the Port of Port Townsend's officers, employees,
2 agents, instrumentalities, successors in title, assigns, and contractors relating in any way to
3 Landry's tenancy and or situation at the Port of Port Townsend from 2011 to 2016. While
4 undersigned counsel does not represent Gold Star Marine, nor Jim Heckmann, the same
5 arguments and principles probably apply to all Defendants to this lawsuit. Those non-Port
6 defendants may or may not choose to join this motion at a later time.

7 The Port also requests that the Court accept this over length Motion as necessary to
8 build the required record to support the requested relief, and also accept hard copies of
9 voluminous exhibits on shortened time, so that they may arrive in the mail. Because the Port
10 counsel learned Landry hauled the Port before Court's July 29, 2016 calendar for a show cause
11 hearing with one day to write this Motion, the Port will submit a proposed Order as soon as
12 possible, under separate cover.

13 INTRODUCTION

14 Mr. Landry now owes the Port tens of thousands of dollars in principal judgment, court
15 sanctions, and attorney's fees. Mr. Landry's vexatious litigation continues unabated despite (1)
16 a prevailing party attorney's fee provision in the Contract between the Port and Landry, (2)
17 RCW 59.12.090 provision for a mandatory award of double damages to the Port, and (3) the
18 Court having already awarded to the Port \$5,475 in sanctions against Landry.

19 On July 20, 2016, Mr. Landry has filed paperwork asking the Court to rule on the same
20 issues he has already unsuccessfully brought before the Court two, three, and four times.

21 The Port requests a narrowly-tailored bar order to protect the Port's precious taxpayer
22 dollars, to put an expiration date on Mr. Landry's situation at the Port, and to serve the ends of
23 judicial economy.

24 The Port is also frankly concerned that Mr. Landry fails to grasp the hole into which he
25 continues to dig himself. Mr. Landry is a pro se litigant. Mr. Landry fired his attorney. Mr.
Landry was on the losing end of the most straightforward superior court legal proceedings: A

1 no-cause eviction for overstaying a twenty day notice to vacate real property held on a monthly
2 lease. No amount of machinations change that Landry, attorney or no attorney, inevitably lost
3 the underlying eviction case. Nothing about Landry's situation that warrants additional
4 litigation chapters. The Court may wish to consider stepping in to prevent Mr. Landry from
5 further self-destruction and snowballing debts.

6 FACTS¹

7 1. January 8-March 17, 2016: *Port of Port Townsend v. Landry*, 16-200020-6 (Landry

8 D

9 In 2011, Mr. Landry entered into a lease for an allotted space in the Port's boat yard.
10 *Dec'l Pivarnik, Ex. A:1*. Pursuant to letting of the lease, Mr. Landry hauled his fifty five foot
11 (55') wooden boat onto the yard. Eventually, Mr. Landry moved his boat into a metal building
12 on land that Gold Star Marine leases from the Port. By 2014, Mr. Landry wore out his
13 welcome at Gold Star Marine, as evidenced by the unlawful detainer confession of judgment
14 that Gold Star Marine required Landry to sign. *Confession of Judgment, Ex. 3 to Compl. in*
15 *Cause No. 16-2-00076-1. Ex. B:6-7.*

16 In January of 2015, Mr. Landry entered into an agreement to return to open space in the
17 Port's yard. *Addendum, Ex. A:3*. Due to Mr. Landry's boat's state of disrepair, Mr. Landry's
18 poor payment record, and Mr. Landry's slow progress, Port staff required that Landry post a
19 \$17,030 fee pursuant to Port Policy Ch. 5.05. *Derelict Fee Agreement, Ex. to Compl in Cause*
20 *No. 16-2-00076-1. Ex. C:8*. The policy exists so that "the vessel owner shall be responsible
21 for all costs incurred by the Port in excess of the monies on deposit". *Port of Port Townsend*
22 *Rules & Regulations*. In Landry's case, the Fee covers \$6,278.40 dump fees, \$3,000.00
23 demolition fees, \$586.59 hoist fee, \$6,350.40 for six months' storage, and \$815.39 leasehold

24 _____
25 ¹ The Port has compiled exhibits and assigned them exhibit letters. For clarity, the exhibits are bates stamped.
Citations shall be referred to by letter and bates number, for example **Ex. A:100**.

1 tax. **Ex. C:8.** Landry found a benefactor, Mr. Stan Goddard, to post his entire fee so that
2 Landry could remain at the Port. *Dec'l Landry dated July 19, 2016.* **Ex. D:10.**

3 At some point in 2015, Landry built a “cocoon” of plastic sheeting and scrap lumber
4 around and over his vessel. This photo of the cocoon reflects Landry’s situation at the time of
5 Landry’s eviction:



18 Landry also took up residence in the cocoon, despite not complying with Port policy 5.02.080²,
19 which requires permission and a displayed license to live aboard a boat in the yard. *Dec'l*

20
21 ² 5.02.080 Upland live-aboard permits – Requirements – Limitations.

22 A. Persons wishing to live aboard their vessel while in the upland work yard areas of the Port shall first apply for a
“Live-Aboard Permit” on forms available at the Yard Office.

23 B. The owner of the subject vessel or his/her authorized representative shall apply for the Live-Aboard Permit.
Renting of vessels to persons seeking live-aboard status is prohibited.

24 C. All live-aboard vessels within upland yard areas shall be registered with the Port and have a current Live-
Aboard Permit conspicuously displayed upon the vessel.

25 D. Upland Live-Aboard Permits shall be valid for a period of up to three (3) months, and shall be valid only while
work is being actively performed on the vessel.

1 *Pivarnik. Ex. A:2.* Landry's cocoon lacked basic facilities, such as toilet, running water,
2 insulation, and heat. Landry also amassed an inappropriate amount of personal property and
3 flammable liquids within his cocoon. *BMP Letter, Ex. to Compl* in Cause No. 16-2-00076-1.

4 **Ex. E:12.**

5 On January 8, 2016, the Port staffer Terry Khile and Port of Port Townsend Police
6 Sargent Garin Williams served Landry a three day pay-or-vacate notice requiring Landry to
7 pay rent in arrears for the months of December 2015 and January 2016, and also served a
8 twenty day notice to terminate tenancy on February 1, 2016. *Dec'l Khile & Notices. Ex. F:16.*

9 On January 8, 2016, Landry, or someone acting on behalf of Landry, paid the rent in
10 arrears. On February 2, 2016, Landry remained on the premises and did not appear to make
11 any progress on leaving. *Eviction Compl., Ex. G:21.*

12 On February 4, 2016, the Port filed an unlawful detainer lawsuit against Landry for
13 violating the 20 day notice to terminate tenancy. **Ex. G:20-22.** On February 9, 2016, the Port
14 also obtained a show-cause hearing date of February 19, 2016. *Order to Show Cause. Ex.*
15 **H:23-24.**

16 On February 12, 2016, attorney Samuel Feinson appeared on behalf of Mr. Landry.
17 *Notice of Appearance. Ex. I:25-26.*

18 E. Upland Live-Aboard Permits may be renewed on a monthly basis for up to three (3) additional months (i.e., for
19 a maximum duration of six (6) months within a 12 month period), provided that the Yard Manager has reviewed
20 the request and has concluded that the criteria set forth below have been satisfied:

- 21 1. Unforeseen circumstances during the repairs to the vessel necessitate an extension of the Live-Aboard Permit;
- 22 2. Termination of the Live-Aboard Permit would result in an unreasonable hardship to the vessel owner, and the
23 vessel owner is not responsible for the delay in completing repairs;
- 24 3. The vessel owner has demonstrated reasonable diligence in attempting to complete the repairs during the initial
25 three (3) month period or any one (1) month extension period thereafter, as applicable; and
- 26 4. That the vessel owner's accounts with the Port have been paid up to current status throughout his/her stay
27 within the yard.

28 F. Live-Aboard permittees shall be charged a monthly fee, as well as an established monthly fee for electricity.

29 G. A Port Townsend Boat Haven Live-Aboard permittee that has moved his/her vessel into an upland work yard
30 area of the Port, and who is eligible for the Port's credit
31 programs, will be charged the standard moorage and Marina live-aboard fees, in addition to the established
32 monthly fee for electricity.

33 H. Live-Aboard permittees shall comply with all Port Rules, Regulations and Procedures. [Reissued by Exec. Dir.
34 10/15/13; formerly #90.9, #90.23-29]

1 The Parties attended Court on February 19, 2016. Landry's attorney Mr. Fienson
2 moved to continue the hearing a week. *Motion for Continuance. Ex. J:27-28.* The Port
3 objected to the continuance. *Port Response and Br. in Support of Show Cause. Ex. K:29-40.*
4 The Court verbally ordered that the Parties return to Court on Feb 22, 2016 for a continued
5 hearing on show cause.

6 On February 22, 2016 the Court found Mr. Landry in unlawful detainer and ordered the
7 Clerk of Court to issue a writ of restitution. *Order on UD, Ex. L:41-44.* On March 1, 2016,
8 the Court ordered an amended writ of restitution in order to fix some issues that the Jefferson
9 County Sheriff raised with the form of the writ.

10 Around March 17, 2016, The Jefferson County Sheriff forcibly ejected Mr. Landry
11 from the Port. Landry had made no effort to remove his personal property, and left the Port to
12 deal with this gather of possessions:



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21 2. March 2017-April 22, 2016 *Landry v. Port of Port Townsend* 16-2-00040-1. (Landry
22 II), Denial of Motion to Vacate *Landry I*, and Entry of Plan of Personal Property Disposition -
23 **\$1,365 Sanctions Against Landry.**
24
25

1 On or Around March 17, 2016, Mr. Landry filed a lawsuit, pro se, against the Port of
2 Port Townsend, Jim Pivarnik, the Port's former³ Deputy Director. On March 24, 2016, Landry
3 Amended his Complaint. *Compl* in Cause No. 16-2-0040-1. **Ex. M:45-60.** The Complaint,
4 *inter alia*, sought that the Court declare its judgment in *Landry I* to be invalid and also sought
5 at least \$5,000,000 in emotion distress damages. *Compl. M:59.* Landry cited to allegedly
6 fraudulent statements that Pivarnik made connected to Landry's situation at the Port as the
7 basis for Landry's requested relief. **M:57, 59.** Landry alleged that he had performed his duties
8 under the lease agreement with the Port. **M:49.** Landry alleged that he had not mistreated Port
9 staff. *Id.*

10 On March 25, 2016, the Port filed a notice of appearance in *Landry II*. *Notice of*
11 *Appearance.* **Ex. N:61-62.**

12 The Port had the foresight to realize that disposing of Landry's possessions would not
13 go smoothly. On March 31, 2016, the Port moved the Court for an Order approving a plan to
14 dispose of the personal property that Landry left behind at the Port, which included Landry's
15 boat and a large assortment of materials and other property. **Ex. O:63-72.** The Port noted its
16 Motion for April 8, 2016, and served this Motion and Notice of Issue upon Attorney Fienson.

17 On April 1, 2016, attorney Fienson filed a notice of withdrawal from representing Mr.
18 Landry in *Landry I*, effective April 11, 2016. **Ex. P:73**

19 On April 7, 2016, Landry served the Port a Motion to Vacate the judgement in *Landry*
20 *I*. Landry chiefly argued and declared that (1) the Port procured the *Landry I* eviction
21 judgment by Pivarnik submitting fraudulent testimony about Landry's situation at the Port,
22 thereby voiding the judgment and (2) the Port did not follow certain procedures laid out in
23 RCW Ch. 79.100, Washington State's public lands statute that relates to derelict vessels.
24 *Motion to Vacate.* **Ex. Q:74-95.**

25 ³ Mr. Pivarnik is now the executive director of another Port district.

1 On April 8, 2016 Port Counsel and Landry *pro se* attended the Jefferson County Court
2 hearing on the Port's Motion to approve a plan for personal property disposition. Landry
3 successfully sought a continuance pursuant to local court rule, citing as grounds that Landry
4 fired his attorney Fienson who had received service of the Port's Motion and needed time to
5 prepare. The Court orally ordered the *Landry I* hearings on the Order approving property
6 disposition and the motion to vacate to Friday, April 22, 2016. Landry never filed a response
7 to the Personal Property Disposition Plan.

8 On April 20, 2016 the Port served a Response opposing the Motion to Vacate, and
9 requested terms pursuant to CR 11, and a bar order that would prevent Landry from filing
10 further pleadings related to Landry's situation at the Port, until such time that Landry paid his
11 sanction to the Port. **Ex. R:96-112.**

12 On April 22, 2016, the Port Counsel and Landry *pro se* again attended the Jefferson
13 County Court hearing on the personal property disposition and the Motion to Vacate. Landry
14 and the Port made oral arguments. The Court denied Mr. Landry's Motion to Vacate. *Order*
15 *denying Motion to Vacate & Imposing Sanctions*, on file. The Court approved a plan for the
16 Port to dispose of the personal property. *Plan*, **Ex. S:113-116**. The Court entered \$1,365
17 sanctions against Landry. The Court denied, without prejudice, the Port's Motion for a Bar
18 Order. The Court also warned Landry something similar to: "Mr. Landry, you'll have a chance
19 to get your things, but what we're not going to have here is for this to go on and on".

20 3. April 23-May 23, 2016: The Port works through the Personal Property Disposition
21 Plan, Landry's unsuccessful Motion for Default in *Landry II*, Landry's unsuccessful *in forma*
22 *pauperis* Complaint against the Port and Gold Star Marine (*Landry III*), Port's Motion for
23 Summary Judgment Dismissal of *Landry II*. - \$400 new sanctions against Landry; total
24 \$1765.00 sanctions.

25 On April 25, 2016, pursuant to the Court-endorsed plan of personal property
disposition, the Port sent Landry a notice of intent to advertise Landry's Boat. **Ex. T:117-119.**

1 On April 27, 2016, Mr. Landry moved for an order and judgment of default against the
2 Port in *Landry II*. **Ex. U:120-130.**

3 The Port promptly filed an Answer in *Landry II*. **Ex. V:131-136.**

4 On May, 2 Port Counsel wrote Mr. Landry an email asking that Landry strike the
5 Motion for default. **Ex. W:137-139.** On May 4, 2016, Landry wrote the Port Counsel that he
6 would not strike the hearing on default. **Ex. W:139.**

7 On May 4, Port counsel filed a response opposing default, which pointed out, among
8 other things, the common practice in Washington State that parties who do not want to waste a
9 lot of time on lawsuits will file a notice of appearance, and then answer to avoid a default. **Ex.**
10 **X:140-141.**

11 On May 6, 2016, Landry filed a new complaint against the Port of Port Townsend.
12 This Complaint also named Larry Crockett, the Port's now-retired executive director, Gold Star
13 Marine, and Gold Star Marine's owner Jim Heckman. This lawsuit also alleged that Pivarnik
14 committed a fraud in connection with Landry's situation at the Port, and had also conspired
15 with Heckman. *Compl. Ex. Y:142-165.* The Complaint also sought \$10,000,000 for
16 emotional distress damages. Landry filed this Complaint *in forma pauperis*. The Court
17 apparently denied Landry's request for a fee waiver at some point shortly after the filing. It is
18 unclear whether this *Landry III* Complaint ever received a cause number.

19 Also on May 6, 2016, the Port Counsel and Landry *pro se* attended the hearing on
20 Landry's Motion for Default in *Landry II*. The Court denied the Motion for default, and
21 explained to Mr. Landry that it is, in fact, common practice in Washington State that parties
22 who do not want to waste a lot of time on lawsuits will file a notice of appearance, and then
23 answer to avoid a default, which the Port did in *Landry II*. The Port awarded \$400 sanctions
24 against Landry. *On file.* Port Counsel made known on the record that the Port intended to
25 renew its Motion for a Bar Order at some future date, due to Landry filing a third lawsuit
related to the same subject matter.

1 On May 17, 2016, the Port counsel send Mr. Landry a CR 11 notice imploring Mr.
2 Landry to dismiss *Landry II* on the grounds that the Court already ruled on the issues
3 underpinning *Landry II* in denying Landry's motion to vacate the Order and Judgment in
4 *Landry I*. **Ex. Z:166.**

5 On May 19 & 23, 2016, Landry responded and declined to withdraw *Landry II*. **Ex.**
6 **AA:167-172**

7 4. May 24-June 24, 2016: The Port continues to work through the Personal Property
8 Disposition Plan, *Summary Judgment and Dismissal of Landry II*, Landry's files a new
9 Complaint against the Port and Gold Star Marine (Landry IV), Port's Motion for Summary
10 Judgment Dismissal of *Landry II*. - **\$3,710 new sanctions against Landry; total sanction**
11 **\$5,475.**

12 On May 24, 2016, Mr. Landry paid a \$240 filing fee and filed suit against the Port of
13 Port Townsend, Crockett, Pivarnik, Gold Star Marine, and Heckman. The allegations were
14 similar to those in *Landry III* and *Landry II* – that a fraud had been perpetuated, and that the
15 Court should therefore declare the Court's prior ruling in *Landry I* void. **Ex. BB:172-200.**

16 On May 25, 2016, the Port moved for dismissal of *Landry II*, on grounds that Landry
17 did not file a claim for damages against the Port, that the Court lacked subject matter
18 jurisdiction to declare its prior order in a different case to be void, and failure to meet legal
19 standards imposed by CR 12(b)(6) and CR 56. The Port also moved for an award of its fees
20 pursuant to CR 11 and RCW 4.84.185. Port Counsel was not yet award of *Landry IV* at the
21 time of the motion filing. **Ex. CC:201-234.**

22 On May 31, 2016, Mr. Landry sent a letter to the Port's new executive director who
23 replaced the retired Mr. Crockett. This letter implored Port Staff to watch a "video" Landry
24 had made. This email is on file with Port counsel and intentionally withheld due to ER 408.

25 On June 7, 2016, undersigned counsel located a two hour long video that Mr. Landry
posted to Facebook. The video contained Mr. Landry's admission that he had been late on the
rent more than thirty times, and clarification that because other tenants were even more late,

1 that Landry was always in “good standing”. This admission was contrary to the grounds for
2 “fraud” that Landry alleged throughout his lawsuits – which were that Pivarnik declared that
3 Landry was late on the rent. *Port’s Reply*. **Ex. DD:239**.

4 Landry missed his responsive deadline to the Motion to Dismiss. On June 20, 2016
5 Port Counsel filed a Reply in support of summary judgment and declaration of no objection.
6 The Port counsel pointed out that CR 56 mandated the dismissal of *Landry II*, due to Landry’s
7 non-response. **DD:235-239**.

8 On June 24, 2016, the Port Counsel and Landry *pro se* attended the hearing on
9 Summary Judgment. The Court granted the Motion for Summary Judgment, and sanctioned
10 Landry \$3,710 for filing and maintaining the frivolous *Landry II* lawsuit. *Order*. **Ex. EE:240-**
11 **248**.

12 5. June 25, 2016 – July 29, 2016: Landry’s personal property disposition Plan expires,
13 the Port makes one final offer to Landry, Landry moves to vacate the Judgement in *Landry I*
again. Sanctions pending July 29 hearing.

14 Landry’s deadline to remove his personal property came and went on June 30, 2016.
15 Landry did not remove the property.

16 On July 5, 2016, the Port dropped a thirty (30) cubic yard dumpster next to Landry’s
17 site. Port staff spent 110.5 hours by July 8, 2016 demolishing the cocoon, segregating
18 hazardous and flammable materials, recycling, filling up the dumpster, a dump truck, and a
19 large flatbed trailer with Landry’s abandoned property, and also having increased presence at
20 Landry’s former site.

21 On July 8, 2016, Port Staff picked up Landry’s boat with a traveling lift and moved it to
22 long-term storage.⁴

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24
25 ⁴ If Landry wishes to challenge these collateral factual assertions, then the Port will secure declaration testimony to support the same.

1 On July 13, 2016, Port Counsel offered Landry a last chance to save his former boat
2 from destruction by signing a release of interest in the Boat, and agreeing to hold the Port
3 harmless and defend the Port's title to Landry's former boat. With a release signed, the Port
4 would then make a defined effort⁵ to sell the vessel. Without such a release, the Port has
5 serious reservations about trying to market the vessel, due to concerns that Landry will cause
6 problems in the future.

7 Landry did not timely respond to the Port's offer.

8 Instead, on July 18, 2016, Mr. Landry moved the Court *again* to vacate the Judgment in
9 *Landry I*, again on the basis that the judgment had been fraudulently procured, that Landry was
10 entitled to some process under RCW 79.100, and that the eviction was generally not justified
11 under RCW 59.12 and or the state and federal constitutions. By the Port's count, Landry now
12 invites the Court to rule for a fourth time that he should be evicted, rule for a third time that
13 RCW 79.100 does not apply to Landry's situation, rule for a third time that no frauds were
14 perpetuated on Landry, and rule for a second time that Washington's eviction statutes are
15 constitutional. *Second Motion to Vacate. Ex. FF:249-288.*

16 On July 20, 2016, Port Counsel again emailed and mailed Landry a CR 11 correction
17 notice. *Ex. GG:289-290.*

18 STANDARD OF REVIEW

19 Trial courts have broad discretion to manage their courtrooms and conduct trials in
20 order to achieve the orderly and expeditious disposition of cases. *In re Marriage of Zigler and*
21 *Sidwell*, 154 Wn.App. 803, 815, 226 P.3d 202 (Div. 3, 2010); *citing State v. Johnson*, 77
22 Wn.2d 423, 426, 462 P.2d 933 (1969). When reviewing a discretionary action taken pursuant
23 to the inherent powers that sanction unacceptable litigation practices, the standard of review is
24 abuse of discretion: "When the Court's inherent power to dismiss for want of prosecution is at

25 ⁵ This effort was to include posting the vessel for sale in two newspapers and also on the Port's website.

1 issue the trial court's decision is reviewed under the abuse of discretion standard." *Stickney v.*
2 *Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950); *see also Business Services of*
3 *America II v. Waftertech, LLC*, 174Wn.2d 304, 274 P.3d 1025 (2012, C.J. Madsen, dissenting).
4 The sole dispositive issue in this appeal is whether the trial court abused its discretion in
5 dismissing the case due Appellant's lack of Prosecution beyond that described by CR 41(b)(1).

6 **AUTHORITY**

This Court has inherent authority to manage the parties and cases before it.

7 Washington Courts have "such powers as are essential to the existence of the court and
8 necessary to the orderly and efficient exercise of its jurisdiction." *State v. Gilkinson*, 57
9 Wn.App. 861, 865, 790 P.2d 1247 (Div. 2, 1990). The courts derive authority to govern court
10 procedures from Article IV s. 6 of the Washington Constitution. *City of Fircrest v. Jensen*, 158
11 Wn.2d 384, 395, 143 P.3d 776 (2006). Additionally, "inherent power is authority not expressly
12 provided for in the constitution but which is derived from the creation of a separate branch of
13 government and which may be exercised by the branch to protect itself in the performance of its
14 constitutional duties." *In re Mowery*, 141 Wn.App. 263, 281, 169 P.3d 835 (Div. 1, 2007);
15 quoting *In re Salary of Juvenile Director*, 87 Wn.2d 232, 552 P.2d 163 (1976).
16

17
18 An individual does not have an unlimited or absolute constitutional right of access to
19 the court system, and the court may limit access to those who would abuse the right. *Yurtis v.*
20 *Phipps*, 143 Wn. App. 680, 694, 181 P.3d 849 (Div. 3, 2008) (permanently enjoining pro se
21 litigant from filing future litigation regarding real estate transaction); *citing In the Matter of the*
22 *Marriage of Giordano*, 57 Wn. App. 74, 15 77, 787 P.2d (1990)). This inherent authority
23 includes the power to enjoin a party from litigation upon a "specific and detailed showing of a
24 pattern of abusive and frivolous litigation." *Id.* (citing *Whatcom County v. Kane*, 31 Wash.
25 App. 250,253, P.2d 1075 (1981)). Those limitations can include perpetually enjoining

1 prosecution of a civil suit. See *Burdick v. Burdick*, 148 Wn. 15,267 P. 767 (1928) (holding that
2 courts have the power to enjoin vexatious suits); *Yurtis*, 2008 WL 852595 at *7 (same).
3 Limitations must be reasonable under the circumstances. See *In the Matter of the Marriage of*
4 *Giordano*, 57 Wn. App. 74, 77, 787 P.2d (1990) (moratorium on any motions practice by pro
5 se litigant who abused the process). Like the courts of this state, federal courts impose pre-
6 screening requirements on vexatious pro se litigants. See *Moy v. US*, 906 F 2d 467, 471 (9th
7 Cir. 1990) (forbidding pro se from filing further complaints against listed defendants without
8 prior approval of the court).

9 The vexatious litigant order implicates the subject's due process rights to access the
10 Court. "The Ninth Circuit has outlined four factors for district courts to examine before
11 entering pre-filing orders. First, a litigant must be provided with an opportunity to oppose the
12 order before it is entered. Second, the district court must create an adequate record for review.
13 Third, the district court must make substantive findings as to the frivolousness or harassing
14 nature of the litigant's actions. Lastly, the order must be narrowly tailored to closely fit the
15 specific vice encountered. *Robinson v. Tacoma Cmty. Coll.*, No. C11-5151BHS, 2011 U.S.
16 Dist. LEXIS 140641, at *6-7 (W.D. Wash. Dec. 7, 2011); *Molski v. Evergreen Dynasty Corp.*,
17 500 F.3d 1047, 1059 (9th Cir. 2007).

18
19 A litigant may still be vexatious even where some of the cases filed have merit. As the
20 Ninth Circuit explains:

21 Frivolous litigation is not limited to cases in which a legal claim is
22 entirely without merit. It is also frivolous for a claimant who has
23 some measure of a legitimate claim to make false factual
24 assertions. Just as bringing a completely baseless claim is
25 frivolous, so too a person with a measured legitimate claim may
 cross the line into frivolous litigation by asserting facts that are
 grossly exaggerated or totally false.

1 can be upheld on appeal and does not violated due process. *In re Marriage of Lilly*, 75 Wn.
2 App. 715, 719, 880 P.2d 40 (1994).

3 The Port requests that the Court condition stay all Landry Motions and Lawsuits in this
4 Court and all other Washington State Courts pending Landry paying his sanctions imposed.
5 Landry likely lacks the ability to legally work and earn any money to pay his judgment.
6 Something more is needed to prevent further baseless filings. Mr. Landry's public actions and
7 representations indicate that Landry has no money, at all.

- 8 • Landry's internet donation site urgently seeks a modest sum of money - \$600. **Ex. R:107-110.**
- 9 • Despite Being Domiciled in the United States of America, Landry May Lack the
10 Ability to Legally Work in the United States of America, due to Canadian
11 Citizenship. *See Internet posting, Ex. R:107-110 and 2015 Lease, Ex 2 to Dec'l*
12 *Pivarnik. EX.A:5.*

13 For those reasons, the Port requests that the Court stay all Landry proceedings in this Court
14 involving the Port of Port Townsend and its agents until such time as Landry pays his sanction,
15 and bar any future filings in this Court and the Court of Washington State.

16 **2. Landry's extraordinary outstanding CR 11 Sanctions of \$5,475 have not curtailed**
17 **the Frivolousness and Harassing Nature of the Litigant's Actions.**

18 As noted above, the Court imposed a total of \$5,475 sanction against Landry on three
19 separate and unrelated occasions, in two different cases. These sanctions are independent of,
20 and additional to the contractual prevailing party fees that Landry owes the Port in his multiple
21 cases. It is likely that Landry owes the Port tens of thousands of dollars at this writing.

22 But the specter of a \$20,000-\$40,000 judgment has not deterred Landry from more
23 filings. The Court will notice that Landry's April, 2016 and July, 2016 Motions to vacate his
24 eviction judgment, **Ex. Q:74-95 & FF:249-288** are essentially identical. Both tardily request
25

1 to raise arguments that are not well grounded in law or fact. The Court already sanctioned
2 Landry \$1,365 due to the content of the April, 2016 Motion to Vacate. Yet, Landry has done
3 the same thing again, apparently expecting a different result.

4 **3. The Court May Wish to Step in to Prevent Landry's Further Self-Destructive**
5 **Filings.**

6 Mr. Landry's repetitive litigation actions with expectation of differing results indicate
7 irrational behavior. Mr. Landry's situation is similar to that described in Division 3's
8 unpublished *Chiofar Gummo Bear v. State*, No. 32127-4-III, 2015 Wash. App. LEXIS 1069, at
9 *12 (Div. 3, 2015). In that case, a the Court upheld a bar order, and a psychological
10 professional evaluated a vexatious litigant as follows:

11 But she described him as "pathologically litigious," with many adverse
12 consequences for himself:

13 [H]e has incurred legal sanctions, spent money that he cannot afford, has caused
14 himself additional stress, feels himself to be out of control and to be, at times,
15 suicidal. It also prevents him from getting the help that he needs because
16 professionals are concerned about being sued by him. ... In reality he is not
17 resolving any of his emotional issues with these lawsuits, which is what he
18 hopes to do with them, but is actually adding to the burden of his mental illness.

19 The Port does not comment on Mr. Landry's mental health or feelings, but notes that Mr.
20 Landry self-describes as homeless since being kicked out of his cocoon on the boat yard. Mr.
21 Landry's attempted *in forma pauperis* petition in *Landry III* and internet begging activity **Ex.**
22 **R:107-110**, combined with non-payment of court sanctions, all indicate that Landry is
23 spending resources he cannot afford to sustain ill-conceived lawsuits that are not going to bring
24 his boat back or any other positive result for Landry.

25 **REQUEST FOR TERMS**

The Port counsel has spent 16 hours responding to reviewing Landry's July 19, 2016
Motion to Vacate, writing and researching this Motion, and gathering exhibits, exclusive of

1 travel time, and at the reduced hourly rate of \$210 per hour. Landry and not the Port's
2 taxpayers should this \$3,360 cost. The Court should impose sanctions under RCW 4.84.185⁶,
3 because this Motion is necessary to the Port's defense strategy against Mr. Landry's onslaught
4 on frivolous litigation.

5 CONCLUSION

6 For the above reasons, the Court should deny Landry's Motion to vacate the judgment.
7 The Court should impose a sanction of \$3,360, and stay all Landry proceedings involving the
8 Port of Port Townsend and its agents until Landry pays the Port the sanction.

9 DATED this 21st day of July, 2016.

10 GOODSTEIN LAW GROUP, PLLC

11 
12 _____
13 Seth Goodstein, WSBA #45091
14 Attorneys for Port of Port Townsend

15 DECLARATION OF COUNSEL

16 Comes now Seth Goodstein and declares:

- 17 1. I am the Port's attorney in this matter.
- 18 2. I have spent 16 hours on the instant motion.
- 19 3. This time was reasonably necessary to research and craft a response to Landry's
20 situation at the Port, and actually billed to the Port. These hours do not include
21 travel time to and from Court.

22 ⁶ In any civil action, the court having jurisdiction may, upon written findings by the judge that the action,
23 counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause,
24 require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys,
25 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.

The provisions of this section apply unless otherwise specifically provided by statute.

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- 4. I have been a licensed attorney in the State of Washington since August of 2012.
- 5. I charge the Port a reduced hourly rate of \$210 per hour to work on this case which is reasonable given my experience and the prevailing rates for legal service in the Western Washington.

I certify the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

DATED this 21st day of July, 2016 at Tacoma, WA


Seth Goodstein, WSBA #45091
Attorneys for Port of Port Townsend

GOODSTEIN LAW GROUP PLLC

August 07, 2017 - 10:19 AM

Transmittal Information

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Appellate Court Case Title: Marc Landry, Appellant v Port of Port Townsend, et al, Respondents
Superior Court Case Number: 16-2-00076-1

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