

No. 73014-2-1

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION I

ARTHUR WEST,
Appellants,
v.

SEATTLE PORT
COMMISSION, et al
Respondents

APPELLANT WEST'S
REPLY BRIEF

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APPELLANT WEST'S
REPLY BRIEF
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I. SUMMARY OF ARGUMENT - THE COURT ISSUED A DECLARATORY RULING AS TO PREEMPTION AND THE ISSUE OF STANDING UNDER THE OPMA IS NOT CLEARLY ESTABLISHED IN ANY PUBLISHED PRECEDENT

This is an action under the Washington State Open Public Meetings Act concerning a series of “confidential” meetings attended by all of the Commissioners of both the Port of Seattle and the Port of Tacoma, purportedly under color of authority of an agreement for discussions under the federal Shipping Act of 1984.

The issues in this case are complicated by the unique circumstance that although the Trial Court *technically* stated that plaintiff lacked standing to seek a ruling as to the preemption of the State open Public Meetings Act by the federal Shipping Act of 1984, it then proceeded to enter an express ruling declaring that...

The Court further finds that the Shipping Act preempts the OPMA under these circumstances. The OPMA does not apply to these meetings between the Ports. (See Order dismissing Port of Tacoma of January 16, 2015)

Now, to complicate the issues even further, the ports seek costs and fees under various inapplicable court rules and statutes to retaliate against plaintiff for his attempt to exercise his basic due process right to appeal the substantive terms of this order and obtain a binding resolution of these issues of first impression.

Despite counsel's strident and vehement arguments, the basic reality is that the Superior Court did issue a substantive ruling on the issue of federal preemption of the OPMA, which is an issue of first impression.

Further, the ruling in Kirk v. Fire Protection Dist. 95 Wn.2d 769. (1981) was based upon a claim brought not by a citizen but by a member of the Fire Protection District Board that was arguably decided on a basis other than standing.

Such a ruling could be viewed as obiter dicta, and in any event falls far short of clearly establishing in settled law that the express terms of the OPMA statute that provide that "any person" may maintain an action do not include "any person" who is a citizen within the liberal and remedial ambit of the Open Public Meetings Act.

In addition, there is also the added consideration that Ms. Lake is judicially estopped from denying **the Trial Court did enter a declaratory ruling** in favor of the ports and that **counsel has represented to another Court that the January 16, 2015 decision of the honorable Judge Garratt in this case is a declaratory ruling with collateral estoppel effect that adversely impacts appellant West.**

It should also be noted that both the OPMA preemption and citizen standing issues are issues of first impression having not been squarely determined in any previous published decision.

Under these circumstances, and in light of the complete absence of any published authority squarely disposing of the OPMA preemption or

OPMA standing issues, it is apparent that the rather high requirements of the frivolous action standard--that a judge must find the "action ... as a whole" to be frivolous and advanced without reasonable cause before attorneys' fees may be awarded to the prevailing party—(See *Biggs v. Vail*, 119 Wn.2d 129, P.2d 350, (1992)) are met in respect to the fee awards the ports are seeking under both their statutory and RAP 18.9 claims.

Thus, the ports' requests for fees and costs from West under their various frivolous action and frivolous appeal claims should be seen for what they are, red herrings to cloud the issues, prejudice the honorable Court, and obscure the basic and largely undetermined important public issues in this case in regard to federal preemption and citizen standing under the Washington State Open Public Meetings Act.

II. LIKE THE NOTORIOUS AND ILL-FITTING GAUNTLETS OF ORENTHAL JAMES SIMPSON, THE PREEMPTION DOCTRINE DOES NOT CONFORM TO THE FACTUAL AND LEGAL CONTOURS OF THIS CASE

The ports make a number of shotgun type alternative arguments attempting to justify, under any number of theories, a preemption claim that is not well grounded in existing law. Unfortunately, like the notorious and infamous glove immortalized by Johnny Cochran, the doctrine of preemption, however it is asserted, simply does not fit the legal contours of facts and issues of this case.

The ports' profound confusion as to preemption analysis can be illustrated by their unfounded reliance on *Locke* to deny the existence of a presumption against preemption without accounting for the clarification of *Locke* in *Wyeth v. Levine*, 555 U.S. 555, (2009) and *Pacific Merchant Shipping Association v. Goldstene*, 639 F.3d 1154 (9th Cir. 2011)

Significantly, in *Goldstene*, the Ninth Circuit began its analysis by acknowledging the existence of a general presumption against preemption. Although PMSA argued (as the port respondents do in the present case) that a presumption against preemption was not applicable because the Supreme Court's decision in *United States v. Locke*, the Ninth Circuit countered that a more recent Supreme Court decision, *Wyeth v. Levine*, 129 S.Ct. 1187 (2009) dismissed a similar argument as a misunderstanding of the basic "governing principle" of respect for states as "independent sovereigns in our federal system."

Significantly, in *Goldstene*, the Ninth Circuit determined that the objectionable substantive State Vessel Fuel Rules were ultimately concerned with the prevention and control of air pollution—an area of state concern (See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (noting that legislation designed to address air pollution "clearly falls within the exercise of even the most traditional concept of ... the police power").—rather than with maritime commerce, conduct at sea, or the definition of state boundaries—fields occupied by the federal

government, and subsequently concluded that California's substantive regulation of international commerce was not preempted.

Similarly in the present case it is indisputable that the OPMA is ultimately concerned not with substantive regulation of shipping to any degree whatsoever, but with the traditional State law and police power related concerns that officers of subdivisions of the State operate in a transparent and accountable manner on behalf of the public that they serve.

It is also apparent that despite the ports' "Chicken Little" style arguments that they will be denied the ability to compete effectively or that the sky will fall on the metaphoric heads of implementation and uniform enforcement of the discussion agreement provisions of Shipping Act if the OPMA is not preempted, there is no credible evidence or reasonable inference to suggest that the discussion provisions of the Shipping Act could not be effectuated by meetings between less than a quorum of the governing bodies of the ports.

III. THE BASIC PREMISE OF THE PORTS' PREEMPTION ARGUMENT IS DEFECTIVE AS THE SHIPPING ACT DOES NOT REQUIRE OR IMPLY THAT THE ENTIRE GOVERNING BODY OF A PORT DISTRICT PARTICIPATE IN DISCUSSIONS

The ports' preemption arguments fail to address the basic fact that nothing in the Shipping Act requires or even suggests that a quorum of the governing bodies of port districts must meet secretly to effectuate its provisions. This basic and fatal flaw in the ports arguments misrepresents

the Shipping Act to read into it a requirement that a quorum of both port commissions must meet secretly in order to effectuate the intent of congress. Nothing could be further from the truth. The discussions contemplated under the Act can, and often do, take place between directors or executive officers, and if less than a majority of a governing body is directly involved, there would be no conflict with the OPMA.

To allow the ports to bootstrap a preemption issue that does not exist on the basis of their deliberate refusal to reasonably follow the requirement that a majority of their governing boards not meet secretly to transact the public's business would be a manifest error when they could just as easily have authorized their executive directors or other designated agents to conduct discussions without any conflict with State law.

In this context it is apparent that the only real “law” that the ports argument is based on is the GIGO principle first enunciated by George Fuechsel¹. Any reasonable analysis of the actual terms of the federal and State laws at issue in this case reveals that the Shipping Act is concerned with substantive shipping issues and has no express or implied legislative intent to preempt the content neutral procedural requirements of the provisions of the unrelated State Open Public Meetings Act as they apply to the exclusively State concern with the time place and manner of meetings of a quorum of a governing body.

¹ See Butler, Jill; Lidwell, William; Holden, Kritina (2010). *Universal Principles of Design* (2nd ed.). Gloucester, MA: Rockport Publishers. p. 112. ISBN 1-59253-587-9

IV. THE STATE OPMA HAS NO SUBSTANTIVE IMPACT ON SHIPPING REGULATION, AND IS A REASONABLE EXERCISE OF STATE POLICE POWERS IN A TRADITIONAL AREA OF STATE CONCERN NOT SUBJECT TO CASUAL FEDERAL PREEMPTION

The Ports' preemption arguments are based upon a profound misunderstanding of the Shipping Act, the State OPMA and the “governing principle” set forth in Wyeth and Goldstene of “respect for the States” as 'independent sovereigns in our federal system.

Contrary to the ports specious claims, the OPMA does not regulate maritime commerce and provides no substantive obstacle to the ports entering into agreements and conducting discussions under federal Shipping Act whatsoever, it merely reflects the reasonable and traditional state police power based interest that when a quorum or more of the members of a public body in the State of Washington meet to transact business they do so in accord with the OPMA.

V. THE JANUARY 16 DECLARATORY ORDER OF THE TRIAL COURT HAS BEEN CITED BY COUNSEL AS HAVING RES JUDICATA AND COLLATERAL ESTOPPEL EFFECT

In Cause No. 15-2-06420-2 Counsel Lake has filed the Order of the Trial Court on appeal in this case and the transcript of the January 16, 2015 hearing, and argued that they have collateral estoppel and res judicata effect on the issue of federal preemption of the Washington Sunshine laws.

Judicial estoppel precludes a party from asserting one position in a court proceeding and then later, in a different court, seeking an advantage by taking a clearly inconsistent position" .. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn.App. 222, 224-25, 108 P.3d 147 (2005).

As the Court of Appeals explained in a 2014 case, Harris v. Fortin...

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Arkison v. Ethan Allen. Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartlev-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). **One of the purposes of the doctrine is to protect the integrity of the judicial process.** New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). **It also "seeks . . . "to avoid inconsistency, duplicity, and . . . waste of time."** Arkison, 160 Wn.2d at 538 (quoting Cunningham v. Reliable Concrete Pumping. Inc.. 126 Wn. App. 222, 225,108 P.3d 145 (2005) (second alteration in original) (quoting Johnson v. Si-Cor. Inc.. 107 Wn. App. 902, 906, 28 P.3d 832 (2001)) Harris v. Fortin, 183 Wn. App. 522, 526-27, 333 P.3d 556 (2014) (emphasis added)

The doctrine of judicial estoppel in this case should be applied to prevent counsel from seeking advantage by taking clearly inconsistent positions, avoid counsel Lake's inconsistency, duplicity and waste of time and, incidentally, to protect the integrity of the judicial process.

VI. THE RATIO DECIDENDI OF KIRK IS LIMITED TO A SPECIFIC FACT SET AND DOES NOT CLEARLY ESTABLISH ANYTHING

The profoundly mistaken nature of counsel's claims as to the phantasmagorical "settled and clearly established" state of the law may be demonstrated by a close reading of the obiter dicta cited by counsel from *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 630 P.2d 930 (1981)

In *Kirk*, the issue was a claim of a violation of the OPMA brought by a Board Member, not a citizen, and the Court actually reached the merits of Kirks' claims, and found no violation, making the portions of their ruling on standing the obiter dictum inapplicable to cases where a citizen alleges an actual violation of the PRA is present. As the Court ruled in *Kirk*...

In this case, one commissioner was neither present nor notified in writing in advance of the "executive meeting", but the trial court found he ratified the actions of his fellow board members at the regular meeting held May 11, 1976. Moreover, the record reveals an uncontested sworn statement by the board secretary that the absent commissioner knew that the other two would be considering the matter of petitioner's dismissal and had indicated in advance he would concur in their decision. In any event, even if the absent commissioner was not properly notified, petitioner has no standing to raise the matter of improper notice to a board member. Only the aggrieved member of the board could raise that issue, and he failed to raise it...It is apparent that the May 6 meeting would have complied with all requirements for a valid special meeting had all three commissioners received proper notice. Since petitioner has no standing to complain that a

commissioner was not properly notified, however, he cannot challenge any actions taken by those present at the meeting.

A compelling argument can be made that the Kirk Court's standing determination was independent of its finding that the OPMA was not violated on the merits, and/or limited to the facts of that case.

Thus, under the Wambaugh inversion test or any other precedential analysis, the ratio decidendi of Kirk would be limited to the fact situation that formed the basis for the Court's decision;

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

Thus, it is evident that the dicta of Kirk that counsel attempts to cite as precedent is, at the very least, arguably inapplicable to the facts of a disparate case where a citizen brings an action based upon competent evidence that the agency is actually in violation of the OPMA, particularly in a case such as the present case where plaintiff West had demonstrated an "identifiable scintilla" of interest sufficient to establish standing under SCRAP.

VII. WEST DEMONSTRATED AN “IDENTIFIABLE SCINTILLA” OF INTEREST EVEN IN THE ABSENCE OF COUNSEL'S DECLARATION AS TO THE EFFECT OF JUDGE GARRATT'S RULING ON APPELLANT'S RIGHTS

The ports' arguments also fail to address the fact that West had demonstrated an “identifiable scintilla” of interest for the purpose of standing.

Significantly, West had shown particularized injury, including the acknowledged circumstance that he had been excluded from the joint “secret” meetings of the ports' Commission meetings, giving him a particular injury under the central intent of the OPMA that citizens be able to observe every step of the decisionmaking process of public agencies, as well as his showing of discrete impacts upon his interests reasonably (and potentially) resulting from the secretly negotiated terms of the Maritime Alliance.

West is particularly and adversely impacted by the determination of the Ports to conduct joint meetings in that he was barred from attending the confidential meetings of the Ports, including those on September 10 and September 30, 2014. (See CP 278-280) The exclusion from these public meetings was not a harm that all citizens of this State were even aware of prior to the media coverage of the confidential nature of the meetings.

At the first joint meeting of the ports that was open to the public, West testified as to some of the interests he had in the formation and

operation of the alliance. West is a taxpayer and landowner in Thurston and Mason Counties and faces the prospect of paying a larger port assessment if the new alliance adversely impacts the Port of Olympia. (CP 278-280)

As a property owner and investor, West also directly and adversely impacted by the broad impacts upon trade, the environment, and the economy caused by such an Alliance by the two largest ports in this State. West lives within a block of Budd Inlet, and is particularly impacted by environmental and other issues stemming from oceangoing trade, which has long been recognized to have widespread impacts.

Indeed the last “Maritime Alliance” that the Port of Tacoma entered into ultimately resulted in the quarter Billion Dollar SSLC boondoggle, and a Twelve (12) Million dollar award against Thurston County, (See Port of Tacoma v. Thurston County, Lewis County Superior Court No. 11-2-00395-5) This verdict, resulting from the Port's previous “Maritime Alliance”, will have significant impact on government in Thurston County, where West resides, also impacting his ability to participate in the sound governance of a free society.

As this Court is aware from the last improper dismissal obtained by counsel Lake that it vacated, West also has a longstanding relationship with the Port of Tacoma and the multi-million dollar boondoggles associated with the port's previous attempt to form a “Maritime Alliance” with the Port of Olympia.

West is also, after many years of tooth and nail delaying tactics by the port, still in litigation with the Port of Tacoma and their overly zealous, litigious counsel over records concerning the port of Tacoma's previous "Maritime Alliance" with the Port of Olympia, even after over seven years of litigation and 2 Orders of Remand from the Appellate Courts.

As the Supreme Court held in *United States v. SCRAP*, 412 U.S. 669 (1973)....

(a) Standing is not confined to those who show economic harm, as "[a]esthetic and environmental wellbeing, like economic wellbeing, are important ingredients of the quality of life in our society." *Sierra Club, supra*, at 405 U. S. 734. P. 412 U. S. 686.

(b) Here, the appellees claimed that the specific and allegedly illegal action of the ICC would directly harm them in their use of the natural resources of the Washington area. Pp. 412 U. S. 686-687.

(c) Standing is not to be denied because many people suffer the same injury. Pp. 412 U. S. 687-688.

The issue of standing is at least arguable in this case, and even if the Court does not agree with appellant's arguments, there is no equitable basis for an award of fees or penalties to the respondents in this case, particularly in light of their long and tortured history of improperly seeking similar sanctions improperly in four (4) previous actions in the appellate courts.

VIII. COUNSEL LAKE'S LONG HISTORY OF SUCCESSIVE AND UNSUCCESSFUL FEE REQUESTS MILITATE STRONGLY AGAINST ANY AWARD IN THIS CASE

In their response brief counsel for the port seeks fees and penalties under a laundry list of statutes and Court Rules, obviously boilerplate copies almost verbatim from the unsuccessful applications for identical awards in the last four (4) appellate actions that Ms. Lake lost for her port clients in 2014.

This Court should find, as the appellate courts have in the case of the many, many, recent similar frivolous applications by Ms. Lake, that her boilerplate shotgun application for fees and costs are similarly groundless in this case. This conclusion is especially appropriate because it is Ms. Lake's legal arguments that are not well grounded in fact or law and which are advanced, as were her four (4) unsuccessful previous attempts to litigiously cry wolf for the improper purpose of needlessly increasing the burdens of this litigation.

IX. CONCLUSION- THE TRIAL COURT'S RULINGS SHOULD BE VACATED AND THIS CASE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS

Washington State's Open Public Meetings Act is a content neutral, broadly applicable State law essential to the People of the State of Washington's fundamental rights to knowledge of, and control over, the instruments they have created, including the Ports of Tacoma and Seattle.

In contrast to the procedural provisions of the Washington State Open Public Meetings Act, the federal Shipping Act of 1984 concerns

substantive maritime issues having no direct bearing on whether a quorum of a governing body meets secretly to conduct the people's business.

Washington State's Open Public Meetings Act is is the quintessential example of a State statute concerning interests “deeply rooted in local feeling and responsibility” of the type that the courts have consistently refused to allow discrete federal statutes like the Shipping Act of 1984 to preempt.

There is simply no reasonable or legal basis for any principled finding of express, implied, super, extratextual freewheeling, or dormant commerce clause preemption, and, as their reliance on off-point substantive maritime regulation based cases like *Ray v. Atlantic Richfield Co.* 435 U.S. 151, 177, (1998) demonstrates, the respondent ports are simply “Whistling Dixie” when they attempt to suggest otherwise for the purpose of undermining the transparency and accountability that forms the foundation of the sound governance of a free society in the United States of America and the State of Washington.

Requiring public boards in the State of Washington to abide by reasonable time, place and manner restrictions when they meet as a quorum of a governing body implicates no interests legitimately within the purview of the Federal Maritime Commission, or the Shipping Act, and the compelling open and accountable government interests protected by this State's Open Public Meetings Statute cannot reasonably be seen to frustrate the discreet and exclusively maritime goals of 46 USC 40101,

which can easily be effectuated, as the original agreement was, without any secret meetings of quorums of public bodies.

A judicially legislated amendment to statute in the form of a standing limitation in OPMA cases such as the one envisioned by the Superior Court in this case would not only violate the doctrine of separation of powers recognized in *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P. 3d 1252 (2013), but it would also eviscerate and render the OPMA toothless and lead to absurd results, as no citizen could possibly know whether they had or reasonably be expected to demonstrate such particularized standing as a prerequisite to contesting the (most often unknown) secret deliberations of their government.

In any event, the issues of standing and preemption in this case are novel and far from being clearly established one way or the other in any unambiguous precedent.

This Court should reject counsel's application for attorney fees, vacate the rulings of the Trial Court, issue an Order establishing that the Shipping Act of 1984 does not preempt the Washington Sunshine Laws, and remand this case back to the Trial Court for further proceedings in accord with those determinations.

Respectfully submitted this 19th day of January, 2016.


s/ Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Brief of Respondent, **by Email** with backup **by regular U.S. Mail** on the 19th day of January, 2016, to counsel of record:

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Dated this 19th day of January, 2016.


~~s/ Arthur West~~
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