No. 43704-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Pierce County Superior Court Cause No. 09-2-14216-1)

ARTHUR WEST,

Appellant,

v.

CONNIE BACON, et al., and
PORT OF TACOMA,

Respondents

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

As this Court knows, Plaintiff and Appellant Mr. Arthur West is a frequent pro se litigant whose efforts have resulted in precedent setting cases. *See* West v. Port of Olympia, 146 Wn. App. 108, 192 P.3d 926 (2008) (limitations on applications of deliberative process exemption to PRA); West v. Thurston County, 144 Wn. App. 573, 183 P.3d 46 (2008) (retroactive application of amendment to PRA concerning attorney billing invoices for legal services provided to public entities); West v. Washington Association of County Officials, 162 Wn. App. 120, 252 P.3d 406 (2011) (WACO was a public agency for purposes of the Open Public Meetings Act); and West v. Secretary of Transportation, 206 F.3d 920 (9th Cir. 2000). But as this Court also knows, Mr. West's litigation has angered and alienated the bar and bench. His conduct has, at times, crossed the line, and he has been subject to sanctions and to bar orders, and has been named a vexatious litigant.

In other words, Mr. West is a gadfly – a "person who stimulates or annoys esp. by persistent criticism." Merriam-Webster's Collegiate Dictionary (10th ed. 2000). At his best, Mr. West "stimulates," by making meritorious claims that, by dint of Mr. West's persistence and intelligence, result in the establishment of precedent. At his worst, Mr. West "annoys" by bringing lawsuits where he fails to state a claim for which relief can be

granted, in the wrong forum, at the wrong time, and against the wrong people.

The question that faces the courts where Mr. West litigates can be paraphrased from a famous Broadway musical: "How do you solve a problem like [Mr. West]?" *The Sound of Music*, R. Rodgers & O. Hammerstein (1959). The answer, of course, is to apply the law to him. Where Mr. West makes a meritorious claim, let him exercise his constitutional right of access to the courts. Where Mr. West does not, dismiss his case. Where a court finds it necessary to **limit** Mr. West's constitutional right of access, it must do so in a manner that still **preserves** that right of access.

Here, in this case, Mr. West made several meritorious Public Record Act claims against Defendant and Respondent the Port of Tacoma. Mr. West also undertook objectionable actions, for which he was sanctioned. The Port moved for dismissal and the Trial Court dismissed Mr. West's case. The problem is that the Trial Court erred in applying the law to Mr. West and dismissing his case. This Court should reverse and remand.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

1. The Trial Court erred in making Finding of Fact 13: "Mr. West also included a Public Records Act complaint in this present suit, which duplicates the requests made in his first PRR case. See West Complaint at para 4.12." *Where both parties agreed at oral argument on July 26, 2010, on the Port of Tacoma's motion to dismiss heard on that date that only "prong one" of Mr. West's public records request at issue in this present suit was duplicative, while prongs two, three, and four were not, and where the Trial Court dismissed only the public records act claims arising out of prong one of Mr. West's public record request, was it error to find that the public records act complaint in this present suit duplicates the requests made in the previous suit? Yes.*
2. The Trial Court erred in making Finding of Fact 19: "The Court also found Mr. West in contempt at that hearing, and ultimately awarded terms against Mr. West in the amount of $1,500 payable to the Port of Tacoma. The Court conditioned further proceedings in the case on Mr. West's payment of those terms." *Where the terms were awarded not because the Trial Court found Mr. West in contempt, but because the Trial Court dismissed claims arising out*

of prong one of Mr. West's public records request as being duplicative of a request at issue in a previous lawsuit, was it error to find that the imposition of terms was a sanction for contempt? Yes.

3. The Trial Court erred in making finding of fact 40. "As a consequence of these 'detours' Plaintiff pursued related to this case, i.e., filing three separate lawsuits in federal and state legal forums, the Port through its taxpayers was required to spend money to defend against each. The price the Port paid for Mr. West's forays into the various courts as he unsuccessfully attempted to avoid this Court's Order is no small sum:

Arthur West v. Port of Tacoma, Case No. 0-2-042312-1 (Pierce County Super. Ct.): 555.5 hrs. Attorney fees: $146,984.50 and Costs: $17,160.40.

Arthur West v. Brian Chushcoff, David Edwards, Fredrick Flemming [sic], 'Special Prosecutor Lake, Connie Bacon, Richard Marzano, Don Johnson, Clare Petrich, Don Meyer, Terry Willis, Mark Wilson, Al Carter, Grays Harbor County, Pierce County, Maytown Sand and Gravel, LLC, Sam Reed, Port of Tacoma, Case No. C10-5547-RBL (W.D. Wash.): 46.3 hrs. Attorney fees: $12,119.00. Costs: $240.27.

In re Personal Restrain [sic] of Arthur West by Port of Tacoma and Grays Harbor, Case No. 84837-8 (Wash. 2011): 52.9 hrs. Attorney fees: $10,979.50 Costs: $131.28.

Where West v. Port of Tacoma, Pierce County Cause No. 08-2-042312-1 was filed, prosecuted, and then put on hold by Mr. West all before this present suit was filed, was it error to conclude that the attorney fees and costs in that case should be counted as part of the "price the Port paid for Mr. West's forays into the various courts as he unsuccessfully attempted to avoid this Court's Order"? Yes.

4. The Trial Court erred in making finding of fact 41: "The combined totals paid by the Port of Tacoma for these West matter [sic] came to: **Attorney fees: $170,083.00 Costs: $17,531.95.** See Decl. of Lake, subjoined to Port's Reply in Support of Dismissal filed June 11, 2012. *Where the fees and costs incurred in West v. Port of Tacoma, Pierce County Cause No. 08-2-042312-1 should not be counted as part of the "price the Port paid for Mr. West's forays into the various courts as he unsuccessfully attempted to avoid this Court's Order", is not the actual sum $23,098.50 in attorney fees and $371.55 in costs?*

5. The Trial Court erred in concluding as a matter of law that the case should be dismissed pursuant to CR 41(b)(1) for want of prosecution. *Where Mr. West had moved for a trial setting date before the Port of Tacoma filed its motion to dismiss, did Mr. West cure any failure to prosecute? Yes.*

6. The Trial Court erred in finding that Mr. West had disobeyed the order imposing terms of $1,500 on Mr. West, payable to the Port of Tacoma, when Mr. West paid the terms to the Port of Tacoma. *Where an order imposing terms and conditioning further participation in the lawsuit upon payment of those terms contains no time frame within which to pay the terms, is not payment of the terms compliance with the order; does it not purge the sanction? Yes.*

7. The Trial Court erred in concluding that Mr. West's pursuit of closely-related litigation in Federal Court and in the Supreme Court was a basis for dismissal in this case. *Where Mr. West's pursuit of closely-related litigation in Federal Court and in the Supreme Court already resulted in stringent and harsh sanctions against him – the imposition of a bar order against him – does not the conclusion that the pursuit of closely-related litigation is a basis for dismissal in this case actually operate as an*

impermissible limitation on Mr. West's constitutional right of access to the courts? Yes..

8. The Trial Court erred in concluding that Mr. West's actions substantially prejudiced the Port of Tacoma. *Where a public agency responding to a public records request controls its own response, does any delay by the requestor that might result in an additional number of penalty days operate as prejudice against the public agency? No. Does the accrual of attorney fees and costs constitute prejudice? No.*

9. The Trial Court erred in concluding that lesser sanctions would not have sufficed. *Where Mr. West already was sanctioned for objectionable conduct and undertook no new objectionable conduct thereafter, was the conclusion that lesser sanctions would not have sufficed not in error? Yes.*

10. The Trial Court erred in dismissing Mr. West's case pursuant to its own inherent powers and for failing to obey a court order under CR 41(b). *Where there is no disobedience of a court order and no prejudice, is there a basis for dismissal? No. Where the sanction of dismissal is made without regard for the facts or circumstances of the case, and where Mr. West had not undertaken any additional*

objectionable conduct beyond that for which he was already sanctioned, is dismissal an abuse of discretion? Yes.

III. STATEMENT OF THE CASE

This is a case where the Plaintiff and Appellant, Arthur West, brought multiple Public Record Act claims against the Defendant and Respondent the Port of Tacoma. CP 1-6.[1]

Early on in the case, Mr. West obtained a show cause order directing the Port to appear and show cause why it should not be found in violation of Chapter 42.56 RCW. This hearing did not take place. Thereafter, Mr. West noted up a motion for leave to amend his complaint (even though such a motion was unnecessary under CR 15(a); the Port had filed no answer to Mr. West's complaint (CP 26) and Mr. West might file an amended complaint as a matter of right) and also to obtain another

[1] Mr. West's complaint also sought a writ of mandamus directed at the Pierce County Prosecuting Attorney Mark Lindquist, concerning another Pierce County Superior Court judge, the Honorable Frederick Fleming. This claim was correctly dismissed by the Trial Court early on in the case and is not at issue here. CP 434-435.

show cause order. CP 13, CP 14-17. Unfortunately, Mr. West noted this hearing for a date (May 10, 2010) when the Port's counsel, Ms. Carolyn Lake, was unavailable. CP 19-21. Ms. Lake was also counsel of record for the Port of Olympia (not a party to this case), and in her capacity as counsel for the Port of Olympia, she had served Mr. West with a notice of unavailability (in a different case) that covered the date in question, May 10, 2010. CP 19; CP 23-24.

In opposing Mr. West's motion for a show cause order and for leave to amend his complaint, the Port argued that Mr. West's "records request and the Port's response is all subsumed within the Public Records Act litigation Mr. West filed in Pierce County Cause No. 08-2-043121-1, which is on-going. Because all public record act issues raised by West within this new litigation are already included within his existing records act suit, this Court lacks jurisdiction to hear these issues....The Port will file a Motion to dismiss the matter entirely shortly." CP 35-36.

At the hearing on May 10 on Mr. West's motion for a show cause order and leave to amend his complaint, the record reflects the following:

> THE COURT: Is anyone here from the Port of Tacoma? Did you – did you give notice to anyone?
> MR. WEST: Yes, Your Honor. There's a declaration of service right there. I personally placed into the Port counsel's hands a notice of issue and motion on April 30th.

> Furthermore, your own court administrator [from Grays Harbor Superior Court; the Honorable David Edwards of Grays Harbor Superior Court was serving as visiting judge in this Pierce County action] sent a letter to all parties on May 5th indicating that this hearing was taking place and giving them direction to appear. It says, please be present at that time –
>
> THE COURT: Just a second. Just a second. Okay, just a second.
>
> (Brief pause in proceedings.)
>
> THE COURT: All right. I signed the order of show cause scheduling a hearing for June 7 at 3:00 p.m. in this.

RP 05-10-10, pp. 3-4, ll. 12-25, ll. 1-3. The order of show cause also allowed Mr. West to amend his complaint. CP 237. Of course, Mr. West's motion for leave to amend his complaint and the order allowing the amendment were both unnecessary pursuant to CR 15(a), since the Port had not filed an answer. CP 26.

The Port filed a Motion for Reconsideration of the Trial Court's order allowing amendment of the complaint (not the order of show cause) combined with a Motion to Dismiss. CP 238-256. The Port argued that "[t]he records request and the Port's response is all subsumed within the Public Records Act litigation Mr. West filed in Pierce County Cause No. 08-2-04312101, which is on-going. Because all public record act issues raised by West within this new litigation are already included within his existing records act suit, this Court ***lacks jurisdiction*** to hear these issues.

Accordingly, the Port urges this Court to deny the show cause and any motion to amend." CP 244.

The Port also filed a Brief in Response to the Show Cause Order. CP 257- 265. The Port's argument was that it had complied with the requirements of the public records act. CP 265. Mr. West filed a hearing brief where he argued that "In regard to at least four separate groups of records, defendant Port of Tacoma has failed to make reasonable estimates of the time required for disclosure, has failed to reasonably disclose public records in accord with its own estimates, has asserted overbroad and inapplicable exemptions, and has unreasonably delayed disclosure…". CP 289-292, *quote from* CP 289-290.

At the next hearing, on June 18, 2010, the Trial Court first asked Mr. West about the May 10 hearing:

> THE COURT:….it appeared that [Mr. West] had been informed by counsel for the Port that she was unavailable to attend hearing that day. You didn't bring that to my attention. Not that that prevents you from scheduling motions, but I think in the spirit of being forthright with the Court you had an obligation to let me know that you had communicated with counsel for the defendants and counsel indicated an unavailability to you….
>
> MR. WEST: Yes, Your Honor. Briefly, I apologize if the Court was – believes it was misled. I had thought that the Port's communications with the court administrator had been communicated to the Court, which there were extensive communications about that. I responded correctly that there had been no response and I

> would believe that was correct. I wasn't intending to mislead anyone.
>
> The hearing was set by the court administrator by a letter that was delivered to myself and the Port, as I noted at the hearing. ....

RP 06-18-2010, pp. 6-7, ll. 1-8, 17-25, 1. The Trial Court vacated the order entered on May 10, 2010, and "all the relief granted in that order." RP 06-18-2010, p. 7, l. 14; CP 288.

Meanwhile, the Port's pending Motion to Dismiss was re-set for July 26, 2010. Mr. West filed a response (which he called a "reply"), where he argued that the records sought in this present action were different than the ones sought in the previous action: "Since the records that plaintiff seeks disclosure of in this matter are different from those at issue in the case that Judge Fleming refuses to enter a final order in, there is no identity of subject matter or relief, and absolutely no possibility of any res judicata effect of a ruling in the previous case." CP 304-308, *quote from* CP 306. In Mr. West's response, he also argued that he had had significant procedural difficulties in prosecuting the case, including the fact that the "Pierce County clerk refused to file the Show Cause Order signed by this Court." CP 305. Mr. West also re-filed his hearing brief. CP 309-312. The Port filed its reply (which it called a "response") in support of its motion to dismiss. CP 317-338.

At the hearing on July 26, 2010, the first matter that the Trial Court considered was the proposed order, filed by the Port, striking the May 10 order. The record shows that Mr. West initially did not understand the Trial Court's query about any objections to the proposed order:

> THE COURT: Mr. West, stop. You either are refusing to listen to what I am saying or you are not understanding what I am saying.
>
> The order that has been presented by counsel for the port.
>
> MR. WEST: Yes, Your Honor.
>
> THE COURT: Reflects the court's ruling on May 10th, which set aside or vacated an order to show cause. It doesn't dismiss your complaint, it sets aside the show cause order that was entered for the reasons that proper notice was not given to counsel for the Port.
>
> MR. WEST: But – thank you, Your Honor.
>
> THE COURT: So, either address your specific issues regarding the form of this order, or I am going to sign it.
>
> MR. WEST: Thank you. If I could have a minute.
>
> *****
>
> THE COURT: Mr. West, what are your objections, if any?
>
> MR. WEST: Um, I object to number 14. I object to –
>
> THE COURT: Basis for your objection.
>
> MR. WEST: Um, that I did file an objection and that, oh – so, yeah, I am sorry. This order doesn't appear to have the rest of the stuff in there. So most of these I agree with them, Your Honor, I don't have any objection. This accurately reflects your rulings on the show cause order. Sorry about that.

RP 07-26-2010, pp. 2-4, ll. 17-26, 1-7, 17-25, 1-2. The Trial Court signed the order vacating the May 10, 2010 order. RP 07-26-2010, p. 4, ll. 3-4. CP 340-344.

Next, the Trial Court considered the Port's motion to dismiss, where the Port argued that Mr. West's public records requests were duplicative of the ones at issue in the previous lawsuit. At oral argument, both Mr. West and the Port agreed that while "prong one" of his public records request was duplicative, prongs two, three, and four were not. RP 07-26-2010, p. 10, ll. 12-18; RP 07-26-2010, p. 12, ll. 2-6. In concluding his argument, Mr. West asked the Trial Court to set a hearing date on a pending motion for reconsideration. RP 07-26-2010, pp. 13-14, ll. 24-25, 1-3. The Trial Court explained that this was procedurally incorrect, and was interrupted by Mr. West:

> THE COURT: Mr. West, the court does not schedule hearings on motions filed by parties, parties schedule hearings on motions they file. So, if you wish to have a hearing on any motions you have filed, you need to file an appropriate notice of hearing and provide appropriate notice to opposing counsel –
>
> MR. WEST: There is another thing, Your Honor.
>
> THE COURT: Do not interrupt me again; do you understand?

RP 07-26-2010, p. 14, ll. 4-12.

The Trial Court announced its decision:

> THE COURT: ....Here is what we are going to do today. I am going to grant, in part, the Port's motion to dismiss. Any portion of the litigation relating to the Public Records Act, that relies upon the failure to disclose records that are the subject of the previously filed lawsuit in Pierce County under cause number 08-2-4312-1, will be dismissed.
>
> Because Mr. West has caused the Port to have to respond to the same litigation a second time, in part, the Port is entitled to terms, and I am going to impose monetary terms of $1,500, which must be paid before Mr. West can proceed further in this litigation –
>
> MR. WEST: I would like to object and state that this is a violation of my civil rights.
>
> THE COURT: Mr. West, you are now in contempt of court. So now we are going to have a hearing next Monday at 8:30 a.m., to determine sanctions for your contempt, and if there are further hearings which need to be held in this case, they may only be held if they are on the plaintiff's motion after terms are paid, and upon proper notice of hearing.

RP 07-26-2010, pp. 14-15, ll. 22-25, 1-17. To be clear, the Trial Court set the $1500 terms against Mr. West because he "caused the Port to have to respond to the same litigation a second time." RP 07-26-2010, p. 15, ll. 4-5. The Trial Court found Mr. West in contempt of court because he interrupted the Trial Court for the second time. RP 07-26-2010, p. 15, ll. 7-12.

Mr. West did not attend the hearing "next Monday at 8:30 a.m.", August 2, 2010. RP 08-2-2010, p. 16. The Trial Court signed the "proposed finding of contempt, the findings of fact and conclusions of law." RP 08-2-2010, p. 17, ll. 2-3; CP 356-358. The Trial Court made

findings of fact that Mr. West was in attendance at the 26 July hearing, that he apparently disagreed with the rulings of the Trial Court, that he interrupted the Trial Court during the court's rulings, that the Trial Court warned Mr. West not to interrupt at least once, that Mr. West became agitated and continued to interrupt the Trial Court and speak over the Trial Court while the court was ruling, and that Mr. West's behavior was disorderly, insolent to the Trial Court, and disrupted the hearing. CP 357. The Trial Court made conclusions of law that concluded that punitive, not remedial, sanctions were warranted against Mr. West. CP 359. The Trial Court also set the matter on the docket "for next Monday at 8:30 for presentation of orders regarding the motion to dismiss." RP 08-02-2010, p. 17, ll. 6-8.

At the hearing "next Monday," that is, on August 9, 2010, the Trial Court signed the proposed order partially dismissing Mr. West's complaint. CP 402; CP 403-406. The order dismissed the portion of Mr. West's complaint concerning "prong one" of his public records request. CP 406. The order also imposed terms of $1500 against Mr. West, payable to the Port, and conditioned further proceedings in this case by Mr. West upon payment of the terms imposed. CP 406. The Trial Court did not impose sanctions of contempt against Mr. West.

Thereafter, Mr. West filed a personal restraint petition directly in the Supreme Court, challenging the contempt ruling and the order imposing terms. *See* CP 480-481. The Supreme Court issued a ruling dismissing Mr. West's personal restraint petition, because the order imposing terms "does not so limit Mr. West's freedom as to constitute restraint under RAP 16.4(b)." CP 481.

Mr. West also filed a lawsuit in the U.S. District Court for the Western District of Washington, naming among other defendants Judge Edwards, the Trial Court judge hearing the case (visiting judge from Grays Harbor County Superior Court) and Ms. Lake, the Port of Tacoma's counsel, and making claims arising out of the contempt ruling and the order imposing terms. CP 483-502. Mr. West's federal court lawsuit was dismissed with prejudice because the federal court lacked "subject matter jurisdiction over Plaintiff's claims, and Plaintiff fails to state a claim upon which relief can be granted." CP 503; CP 506. Thereafter, the U.S. District Court, the Honorable Ronald B. Leighton, issued a show cause order requiring Mr. West to show cause why a standing bar order should not be imposed against him. CP 511.

Ultimately, the U.S. District Court did impose a bar order against Mr. West. CP 513-517. The U.S. District Court held:

> Courts may bar vexatious litigants from filing frivolous and harassing lawsuits. "District courts have the inherent power to file restrictive pre-filing orders against vexatious litigants with abusive and lengthy histories of litigation." *Weissma v. Quail Lodge, Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999). These bar orders "may enjoin the litigant from filing further actions or papers unless he or she first meets certain requirements, such as obtaining leave of court or filing declarations that support the merits of the case." *Id.*

CP 517. The U.S. District Court concluded that Mr. West was a "vexatious litigant." CP 516. It imposed a bar order against Mr. West, limiting but not restricting his constitutional access to the courts:

> In the event West seeks to commence a new action, he shall make a pre-filing affirmative showing to this Court that: (1) any proposed cause of action is within the jurisdiction of this Court; (2) the claim asserted meets the requirements of the Federal Rules of Civil Procedure, particularly Rule 8, and is not subject to immediate dismissal under the Rules, particularly Rule 12(b)(6); and (3) West has alleged a cognizable injury and otherwise has standing to bring his action in federal court. ....

CP 516. Upon Mr. West's pre-filing affirmative showing to the U.S. District Court, if Mr. West's claims were properly within the court's jurisdiction, met the requirements of the federal rules, and if Mr. West had alleged a cognizable injury and otherwise had standing, the U.S. District Court would, presumably, allow Mr. West to file his action. CP 516.

Meanwhile, in this case, time had lapsed. Mr. West had not yet paid the $1500 terms against him, and had not yet made any further filings

in this case. On March 19, 2012, the Trial Court – the Honorable Vicki Hogan, the Presiding Judge over the Pierce County Department to which the case was assigned – scheduled a review of the case for April 6, 2012. CP 407. Mr. West, who had previously appeared pro se, promptly retained counsel, the undersigned, who appeared. CP 409. Mr. West paid the $1500 terms to the Port. CP 568-570.

Mr. West's counsel immediately began prosecuting the case, including noting up a discovery deposition. CP 539-540; CP 541-542. Recall that Mr. West was challenging the Port's response to his public records request on the following basis: "In regard to at least four separate groups of records, defendant Port of Tacoma has failed to make reasonable estimates of the time required for disclosure, has failed to reasonably disclose public records in accord with its own estimates, has asserted overbroad and inapplicable exemptions, and has unreasonably delayed disclosure…". CP 289-292, *quote from* CP 289-290. Mr. West's notice of deposition informed the Port that he would seek testimony on, among other matters, the review procedure employed to review and determine which records were exempt or non-existent. CP 540.

After receiving Judge Hogan's notice for review of the case on April 6, 2012, the Port filed a Declaration of Case Status. CP 410-419. The Port filed as exhibits to its counsel's declaration, among other

exhibits, the Supreme Court and U.S. District Court orders quoted above. CP 420-523. The Port wrote: "40. The above history evidences that Mr. West has expended his efforts in every direction to diffuse, contest, and obfuscate, rather than to comply with the long outstanding August 2010 Court Order in **this** case, and thus timely prosecute this Public Records Act claim. 41. Accordingly, the Port will shortly file its Motion to Dismiss the matter with prejudice." CP 418-419.

The Port filed a motion to quash Mr. West's discovery, and sought a protective order. CP 524-528. The Port, in its motion, again referred to a motion to dismiss for failure to prosecute. CP 528. The Port had not yet filed a motion to dismiss. The Port argued in its motion to quash that Mr. West "should not be permitted to manufacture an argument of seemingly diligent prosecution by noting this stale deposition after **years** [that is, 19 months] of failing to prosecute this matter." The Port also made a factual error in its motion:

> Significant to the Port's instant Motion to Quash Deposition, the Court will recall that it found Mr. West in contempt at hearing held on **July 26, 2010.** The Court ultimately imposed terms against Mr. West in the amount of $1,500 payable to the Port.

CP 525. Actually, the terms of $1,500 imposed on Mr. West were because he "caused the Port to have to respond to the same litigation a second

time." RP 07-26-2010, p. 15, ll. 4-5. The Trial Court had not imposed punitive contempt sanctions on Mr. West.

The Port made its motion to quash under CR 26. CP 526. Prior to making its motion to quash, however, the Port's counsel failed to conduct a CR 26(i) conference with Mr. West's counsel concerning the substance of the motion. CP 552-555. After the Port filed and served its motion to quash, Mr. West's counsel called and left messages for the Port's counsel, but the Port's counsel did not return the messages. CP 554. When Mr. West's counsel and the Port's counsel met at oral argument on another matter, the Port's counsel asked for a continuance of the motion to quash, but did not attempt to discuss the substance of the motion to quash or attempt in any way to discuss the issue of Mr. West's pending discovery. CP 554.

Even though the Port had not yet filed its motion to dismiss for want of prosecution, it had announced its intentions of doing so. Mr. West filed a motion for trial setting and issuance of new case schedule order, and requested November 14, 2012, for assignment of trial date. CP 543-544; CP 545. Mr. West also filed a response to the Port's motion to quash. CP 547-551.

The Port filed a reply in support of its motion to quash. CP 573-579. In the Port's reply, it cited Division I authority for the proposition

that a trial court has discretion to decide whether or not to hear a discovery dispute when the moving party has failed to comply with the conference requirement of CR 26(i). CP 574. Mr. West filed a "surreply" where he argued that there was a division split, and that Division II – this Court!, and the division into which Pierce County and Grays Harbor County both fall – has a line of published cases that firmly hold that absent counsel's certification of a CR 26(i) conference, a trial court lacks authority to entertain a discovery motion. Rudolph v. Empirical Research Systems, Inc., 107 Wn. App. 861, 23 P.3d 813 (2001). CP 592. Mr. West's counsel also put before the Trial Court a declaration detailing further communication where the Port's counsel conditioned any CR 26(i) conference on Mr. West's counsel agreeing in advance to postpone the discovery deposition until after a hearing on the as-yet-unwritten and unfiled motion to dismiss. CP 593-596. The Port moved to strike the surreply. CP 597-600. The Port's counsel also filed a declaration. CP 601-605.

Ultimately, the Port's refusal to participate in a CR 26(i) discussion was overcome when a different judge in a different case invited the Port's counsel to participate in a CR 26(i) conference with Mr. West's counsel. The day of the hearing on the Port's Motion to Quash, June 1, was also the date of the hearing on a similar motion to quash in Thurston

County filed by the Port of Olympia, also represented by Ms. Lake, against Mr. West.

> MS. BIRD: .... Now, I set forth in my declarations the various opportunities I gave to the Port to try to attempt to discuss this with me. My position here is that this hearing is unnecessary. I called the Port of Tacoma's counsel; they didn't call me back. The Port of Tacoma's counsel and I were just present in Thurston County on another matter where the same issues were presented, and the judge in that case invited the Port of Tacoma to have the 26(i) conference with me. And the Port of Tacoma – excuse me, Counsel agreed, and we had that 26(i) conference just an hour ago, which I believe is completely untimely given the motion to quash, but it was the first opportunity where the [Port] had agreed to speak with me about the substance of the motion. And at that conference, I believe that we came to some sort of resolution. I said, I am not going to agree to strike the deposition pending hearing on a motion that you have not yet filed. I said, given the circumstances you have told me about your uncle's death, I am willing to accommodate you, and I am willing to continue the deposition until June 18th. I understood from Counsel's response that she was not opposed to that, and I said, so, are we still driving to Montesano? And she said, yes, I have got to make my motion.

RP 06-01-2012, pp. 22-23, ll. 7-25, ll. 1-6.

The Trial Court enquired whether the Port was ready to file its motion to dismiss:

> THE COURT: Counsel, when do you expect to file the motion to dismiss?
>
> MS. LAKE: We have it today, Your Honor. We will be filing it after this hearing.

RP 06-01-2012, p. 23, ll. 20-23. The Trial Court asked if the Port would be prepared to argue its motion to dismiss on June 12, 2012:

> THE COURT: Could you be prepared to argue it a week from Monday at 1:30?
> MS. LAKE: I can, Your Honor.

RP 06-01-2012, p. 24, ll. 3-5. The Trial Court also reset Mr. West's hearing where he requested a trial setting for the same June 12 date. RP 06-01-2012, p. 24, ll. 7-23. As to Port's motion to quash, the Trial Court recognized the Port's untimely acquiescence to participate in the requisite CR 26(i) conference:

> THE COURT: ....But it's my understanding that, by agreement now, the depositions at issue are being postponed to June 18th?
> MS. BIRD: Yes, Your Honor.
> THE COURT: So that takes care of the need for protective order.
> MS. LAKE: It does, Your Honor.

RP 06-01-2012, p. 26, ll. 9-15.

The Port filed its motion to dismiss. CP 606-670. The Port's motion to dismiss made two arguments: (1) that the Trial Court should dismiss the action under CR 41(b) for want of prosecution (CP 610-612); and (2) that the Trial Court should dismiss the case for Mr. West's "unacceptable litigation practices" pursuant to its own inherent powers and authority (CP 613-622).

In support of its arguments that Mr. West engaged in unacceptable litigation practices, the Port recited the following: (1) that the Port had filed a declaration of counsel regarding the status of the case (CP 607); (2) that "Mr. West initiated this cause on the exact same underlying facts as Pierce County Cause 08-2-043121-1" (CP 607); (3) that Judge Edwards was the visiting judge assigned to the case; (4) that "In May of 2010, West scheduled a Motion and Show Cause Hearing despite Port Counsel's duly-noticed unavailability" (CP 607); (5) that "At a July 26, 2010 hearing... West was found in contempt, and further proceedings in this case were conditioned upon West's payment of...$1,500" (CP 607-608); (6) that Mr. West had filed the personal restraint petition with the Supreme Court (CP 608); (7) that Mr. West had filed a motion for injunction incident to his personal restraint petition (CP 608); (8) that Mr. West filed a request for emergency stay, also incident to the personal restraint petition (CP 608); (9), that the pleadings filed by Mr. West impugned the judiciary and Port Counsel (CP 608); (10) that the Supreme Court dismissed the personal restraint petition (CP 608); (11) that "On August 13, 2010, the Court filed the order dismissing West's claims in this case that were duplicative of Cause No. 08-2-043121-1 and imposing $1,500 terms against West" (CP 608); (12) that Mr. West filed a federal lawsuit naming, among other defendants, Judge Edwards and Ms. Lake (CP 608-609); (13) that the U.S.

District Court dismissed Mr. West's claims with prejudice (CP 609); (14) that "West's various frolics at the Federal District court level repulsed that forum to the point that Mr. West was barred from partaking in any further federal litigation by Court Order of October 6, 2011" (CP 609); and (15) that Mr. West appealed the federal orders to the Ninth Circuit and his appeals were dismissed.

Certain of the Port's recitations were inaccurate. As to recitation (2), that Mr. West "initiated this cause on the exact same underlying facts as Pierce County Cause No. 08-2-043121-1," the fact is that Mr. West had made a new four-pronged public records request to the Port, and that the Port's response thereto had formed the basis for the public records act portion of this complaint (the only portion that remained in this case after the Trial Court correctly dismissed the claim for a writ of mandamus; CP 434-435). At the hearing on the Port's motion to dismiss, both the Port and Mr. West agreed that while "prong one" of his new public records request to the Port was duplicative, prongs two, three, and four were not. RP 07-26-2010, p. 10, ll. 12-18; RP 07-26-2010, p. 12, ll. 2-6. It was therefore inaccurate for the Port to say that the claims here were identical to the claims in the previous lawsuit.

As to recitation (5), the Port's language: "West was found in contempt, and further proceedings in this case were conditioned upon

West's payment of...$1,500" is inaccurate because it gives the incorrect impression that the terms of $1,500 were sanctions for Mr. West being found in contempt of court. In fact, the terms of $1,500 were imposed because Mr. West "caused the Port to have to respond to the same litigation a second time." RP 07-26-2010, p. 15, ll. 4-5.

As to recitation (14), the Port makes an important factual error. The Port recited that "West's frolics at the Federal District Court level repulsed that forum to the point that Mr. West was barred from partaking in any further federal litigation." CP 609. In fact, the bar order against Mr. West preserved his constitutional right of access to the courts even while limiting it; the bar order required Mr. West to make a pre-filing affirmative showing to the U.S. District Court, that his claims were properly within the court's jurisdiction, met the requirements of the federal rules, that he had alleged a cognizable injury and otherwise had standing. CP 516.

The Port argued that Mr. West had disobeyed a court order, but could cite to no court order that Mr. West had disobeyed, save for arguing that a delay in paying the $1,500 terms was in fact disobeying a court order. CP 616-617. The Port argued that it had been prejudiced by Mr. West's delay in that it added to the risk of the Port incurring a daily penalty under the public records act. The Port argued that it had been

prejudiced by its "obligation to defend against West's dilatory and voluminous frivolities." The Port argued that Mr. West's dilatoriness exceeds mere inaction; that "Mr. West failed to take any action for over one year because he (1) disregarded the court order to pay terms to the Port; and (2) occupied himself with outrageous legal filing designed to escape the thrust of the Court's ruling in this case on August 13, 2010. Mr. West also attempted to sneak multiple sham hearings on the Port." CP 618. This last allegation is unsupported by the record.

The Port further argued that Mr. West's case should be dismissed because Mr. West was a "***thrice-over*** labeled vexatious litigant." CP 619. The Port attached copies of the orders labeling Mr. West a vexatious litigant at CP 626-631 (U.S. District Court for Western District of Washington, requiring Mr. West to make a pre-filing affirmative showing before filing any action with that Court; CP 629); CP 632-651 (U.S. District Court for Western District of Washington, requiring Mr. West to make a pre-filing petition seeking leave before filing legal actions against the Patterson Buchanan law firm, state or federal judges, Thurston County, and King County; CP 650-651); and CP 652-655 (Thurston County Superior Court, requiring Mr. West to make a pre-filing petition seeking leave before filing legal actions against the Washington Public Ports Association; CP 654-655).

Mr. West filed his response. CP 672-679. He argued that "any 'failure to prosecute' was cured before the Port even filed its motion, and the Port can show no basis for dismissal pursuant to this Court's inherent authority." CP 672. As to the CR 41(b) motion to dismiss for failure to prosecute, Mr. West argued: "Under CR 41(b)(1), 'If the case is noted for trial before the hearing on the motion [to dismiss], the action shall not be dismissed.' Here, on May 30, Mr. West noted the case for trial on November 14, 2012, and also moved this Court for the issuance of a new case schedule order. This was two full days before the Port filed its motion to dismiss. This Court should deny the motion to dismiss under CR 41(b)(1)." CP 677.

And as to the motion for dismissal pursuant to this Court's inherent authority, Mr. West argued that the Port had not shown noncompliance with a court order or court rules, and that the Port had not shown prejudice. CP 675-677. Mr. West argued that although it took him a while to pay the $1,500 terms (on which further proceedings by Mr. West were conditioned), he did pay them and cured the terms; that is, Mr. West complied with the court order. CP 675. He argued that a finding by other courts that Mr. West was a vexatious litigant – and the imposition of restrictions on his filing *new* cases without the express permission of the court and a showing that his claim would pass a 12(b)(6) motion is no

basis for dismissal of an existing case that has already withstood a motion to dismiss by the Port. CP 676-677. Mr. West also argued that the Port did not show any prejudice. CP 677.

The Port filed its reply. CP 680-692. The Port argued that "Plaintiff's willful and protracted failure to pay contempt sanctions Order [sic] by this Court required the Port to litigate West's other lawsuits and filings, while continuing to invest attorney time in the instant matter. Mr. West's denial of Port prejudice wholly ignores again the consequences of the fanciful (and expensive) "detours" Plaintiff pursued related to this case, i.e., filing three separate lawsuits in federal and state legal forums which required the Port taxpayers to defend each. The price tag paid to Mr. West's antics is no small sum." CP 684. But then the Port cited to attorney fees and costs it incurred in the earlier lawsuit, Pierce County Superior Court No. 08-2-043412-1 – which preceded this lawsuit and which Mr. West did not file or pursue as a result of this lawsuit. CP 684. It was an error of fact for the Port to argue that *this* lawsuit and Mr. West's attempts to challenge the imposition of terms and the ruling of contempt resulted in the Port's incurring fees and costs in the earlier matter.

The hearing on the Port's motion to dismiss was held on June 12, 2012. The Trial Court heard the Port's motion to dismiss first, and did not reach the merits of Mr. West's motion for trial setting date. RP 06-12-

2012, p. 28, ll. 12-20. The Port made its argument first: the Port argued again that this present case was duplicative of the former lawsuit, Pierce County Superior Court No. 08-2-0432412-1 (RP 06-12-2012, p. 30, ll. 22-23). The Port argued that Mr. West had untimely and improperly filed a motion for an order to show cause set for a hearing when the Port counsel was unavailable, and that Mr. West did not bring the Port counsel's absence to the attention of the Trial Court, and that the Trial Court later vacated the order to show cause. RP 06-12-2012, pp. 31-32, ll. 20-25, l. 1-3. The Port also argued that in response to its motion to dismiss the claims as being duplicative of the earlier suit, that the Trial Court dismissed claims arising out of prong one of Mr. West's record request. PR 06-12-2012, p. 32, ll. 4-9.

Next, the Port argued:

> MS. LAKE: ....On July 26th, 2010, the Port presented an order to vacate. Mr. West's behavior in this courtroom prompted Your Honor issuing a sanction and reserving a finding of contempt. The amount of the sanctions was $1,500, which the court conditioned further action in the case upon payment by Mr. West of the sanctions to the Port.

RP 06-12-2012, p. 32. ll. 14-19. Again, this was a factual error by the Port. The terms of $1,500 were imposed because Mr. West "caused the Port to have to respond to the same litigation a second time." RP 07-26-2010, p. 15, ll. 4-5.

The Port further argued that after the Trial Court issued its order of partial dismissal, imposing terms, and issuing its order of sanctions, Mr. West filed his petitions in the Supreme Court and in the U.S. District Court, none of which were successful and ultimately culminated in the bar order against Mr. West in the U.S. District Court. RP 06-12-2012, pp. 32-34. Next, the Port argued "In the mean time, the Port was required to spend over one – excuse me, over $170,000 in attorney's fees. Over $17,000 in costs were incurred by the Port of Tacoma, based just on Mr. West's forays into the detours in other courts." RP 06-12-2012. This figure, however, included $146,984.50 in attorney fees spent in the previous lawsuit that actually preceded this one, and $17,160.40 in costs spent in that previous lawsuit. *Cf.* CP 682. It was factually incorrect for the Port to say that $170,000 in fees and $17,000 in costs were spent on "detours." The actual figure is closer to $24,000 total.

Mr. West's counsel responded. As to the Port's argument that the case should be dismissed for willful and deliberate disregard of reasonable and necessary court orders, and a showing of prejudice, Mr. West argued that the terms of $1,500 had been paid. "Before Mr. West paid that sanction, the Port of Tacoma did not bring a motion to dismiss; that is cured [purged]. There was no time limit in this Court's order for the payment of that sanction, and indeed, that sanction has been paid." RP 06-

12-2012, p. 40, ll. 5-9. Mr. West also argued that filing other lawsuits, including one that preceded this action, were no instances of disobedience of the Trial Court's order. RP 06-12-2012, p. 40, ll. 10-18. And Mr. West argued that the mere fact that he had been found to be a vexatious litigant in other cases is not a basis for dismissing this case here. RP 06-12-2012, p. 41.

The Trial Court granted the motion to dismiss, on the basis that there was a period of over a year and a half when Mr. West refused to comply with the terms ordered by the Trial Court, during which time he pursued closely related litigation in other courts, resulting in the bar order. RP 06-12-2012, p. 43, ll. 4-24. The Trial Court also granted the motion finding that the Port of Tacoma was clearly prejudiced by Mr. West's conduct in multiple ways, not the least of which is that Port has expended almost $200,000 in defending these various lawsuits brought by Mr. West, all arising out of a single public records request. RP 06-12-2012, pp. 43-44, l. 25, ll. 1-4. The Trial Court signed the proposed order of dismissal submitted by the Port, specifically adopting the findings of fact and conclusions of law. RP 06-12-2012, p. 44, ll. 14-18; CP 710-724. Mr. West timely appealed.

The parties later stipulated to the entry of a revised order of dismissal applying to all remaining parties in the case – not just the Port of

Tacoma – and being effective nunc pro tunc. CP 764-778. Mr. West timely appealed.

IV. ARGUMENT

A. Standard of Review

There are multiple standards of review here. The Trial Court dismissed Mr. West's case on two bases: failure to prosecute under CR 41(b)(1), and pursuant to the inherent authority of the court, or for failure to comply with court rules or any order of the court under CR 41(b). As to the dismissal for failure to prosecute, this Court reviews such dismissals de novo. Where the Trial Court has jurisdiction over the parties and the subject matter, a mistaken belief that an action should be dismissed for want of prosecution would be an error of law. State ex rel. Heyes v. Superior Court, 12 Wn.2d 430, 433, 121 P.2d 960 (1942). This Court reviews questions of law de novo.

And as to the dismissal under the Court's inherent authority under CR 41(b), these orders of dismissal are reviewed for an abuse of discretion. Will v. Frontier Contractors, 121 Wn. App. 119, 128, 89 P.3d 242 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, 121 Wn. App. at 128.

The Trial Court also made findings of fact and conclusions of law. "An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings. In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. Bering v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986)." Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). "This court reviews questions of law and conclusions of law de novo." Weyerhaeuser Co. v. Calloway Ross, Inc., 133 Wn. App. 621, 624, 137 P.3d 879 (2006).

" '[D]ecisions either denying or granting sanctions ... are generally reviewed for abuse of discretion.' Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). But the 'choice of sanctions remains subject to review under the court's inherent authority applying the arbitrary, capricious, or contrary to law standard of review.' Butler v. Lamont Sch. Dist., 49 Wn. App. 709, 712, 745 P.2d 1308 (1987)." State v. S.H., 102 Wn. App. 468, 473, 8 P.3d 1058 (2000).

"Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration or regard for facts or circumstances. A finding of fact made without evidence to support it and a conclusion based upon such a finding is arbitrary. But where there is

evidence to support a finding and where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Helland v. King Cnty. Civil Serv. Comm'n, 84 Wn.2d 858, 865-66, 529 P.2d 1058 (1975) (internal citations omitted).

B. The Trial Court Erred in Dismissing the Case for Want of Prosecution Under CR 41(b)(1)

The order of dismissal indicates that one basis for the dismissal was want of prosecution under CR 41(b)(1). CP 774-775. This was error. CR 41(b)(1), while allowing a party to move for dismissal for want of prosecution, provides that "If the case is noted for trial before the hearing on the motion, the action shall not be dismissed." Here, Mr. West noted his case for trial even before the Port filed its motion to dismiss. CP 543-544; CP 545. It was error for the Trial Court to dismiss for want of prosecution pursuant to CR 41(b)(1) and this Court should reverse and remand.

C. The Trial Court Erred in Dismissing the Case Pursuant to Its Own Inherent Authority or for Failure to Obey a Court Order Under CR 41(b)

The Trial Court erred in dismissing the case pursuant to its own inherent authority or for failure to obey a court order under CR 41(b).

1. The Trial Court Erred in Dismissing the Case for Failure to Obey a Court Order under CR 41(b)

CR 41(b) allows a defendant to move for involuntary dismissal of an action based on the plaintiff's failure to comply with court rules or any order of the court. Will, 121 Wn. App. at 128. "Dismissal is an appropriate remedy where the record indicates that (1) the party's refusal to obey [a court] order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction probably would have sufficed." Will, 121 Wn. App. at 129.

Here, the Trial Court found as a matter of fact that Mr. West disobeyed the court order imposing terms and conditioning further participation by Mr. West upon payment of the terms. This finding is not supported by substantial evidence. It is undisputed that Mr. West paid the terms. CP 568-570. The Trial Court found that it was the long period of time in which Mr. West did not pay the terms that constituted disobedience. RP 06-12-2012, p. 43, ll. 4-19. Yet the order itself did not impose any time limits by which Mr. West had to pay the order. CP 406. "Frontier cites Jewell v. City of Kirkland, 50 Wn. App. 813, 750 P.2d 1307 (1988), to show that Will's actions were willful and deliberate. In Jewell, a court order specifically required the plaintiff to provide funds for the preparation of the record within 30 days of the order. 50 Wn. App. at

815, 750 P.2d 1307. Will's situation is distinguishable. The order granting Will leave to amend contained no time deadlines or requirement by the court that Will proceed in a particular way." Will, 121 Wn. App. at 130. Mr. West's situation is the same as Will's. Substantial evidence does not support the Trial Court's finding that Mr. West disobeyed the order by not paying the terms before he did. This Court should find that there was no disobedience.

The Trial Court also found as a matter of fact that Mr. West prejudiced the Port by causing it to incur over $170,000 in attorney fees and $17,000 in costs in pursuing closely-related litigation in an attempt to avoid the order imposing terms and the order of sanctions. This finding is not supported by substantial evidence. It is clear that the bulk of the attorney fees and costs were incurred in the previous case, Pierce County Cause No. 08-2-042312-1, which preceded this case. CP 773. These fees and costs were therefore not incurred by Mr. West's pursuing closely-related litigation in an attempt to avoid the two orders here.

Further, even if it were true that Mr. West's pursuit of closely-related litigation cost the Port over $170,000 in attorney fees and $17,000 in costs, as a matter of law that does not constitute "prejudice." "'Prejudice means a damage or detriment to one's legal claims. Black's Law Dictionary 1299 (9th ed. 2009)." Nat'l Sur. Corp. v. Immunex

Corp., ____ Wn.2d _____, 297 P.3d 688, 696 (2013). Likewise, the conclusion that Mr. West's delays put the Port at risk of incurring an increased number of days for which a daily penalty must be imposed under the public records act is also erroneous. Again, the risk of being forced to pay an increased penalty based on number of days is not damage or detriment to legal claims or defenses. This Court should conclude that the Trial Court erred in finding that Mr. West's delays caused substantial prejudice to the Port.

Finally, the Trial Court erred in concluding that no lesser sanction than dismissal would suffice. "25. The Court also finds no lesser sanction will do . 26. The Court also notes that Mr. West has been previously found in contempt and fined in this matter ($1500), and bar orders were issued against Mr. West, all by Courts in litigation directly related to this matter. 27. These previous sanctions have not cured Mr. West's abuses of process." CP 777.

Mr. West was found in contempt for interrupting the Trial Court. An order of contempt was entered against him. Mr. West filed a public records act lawsuit – this one – in which one prong of his public records act request was duplicative. The Trial Court dismissed the claims arising out of that one prong and ordered terms of $1500 against Mr. West for forcing the Port to defend against a duplicative action. Then Mr. West

filed other litigation related to this matter, which cases were dismissed and in which perhaps the most stringent sanction of all – a bar order – was entered against him.

After the imposition of these sanctions, Mr. West did not resume any "abuses of process." The Trial Court made no finding that any action undertaken by Mr. West after the imposition of these sanctions constituted abuse of process. Instead, the record shows that Mr. West retained counsel to represent him, paid the sanctions, noted up a discovery deposition, and requested a trial setting. The Port objected to the discovery deposition, arguing that there could be no purpose other than harassment, but that is not so. Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 715-19, 261 P.3d 119 (2011), stands for the proposition that the civil rules, including the rules concerning discovery, apply in a Public Records Act case. Mr. West noted up the discovery deposition in order to prosecute his case. This Court should conclude that the Trial Court erred in concluding that no lesser sanction would suffice.

This Court should conclude that substantial evidence does not support any of the Trial Courts findings that Mr. West disobeyed a court order, prejudiced the Port, or that no lesser sanction would suffice. In the absence of substantial evidence supporting these findings, this Court

should conclude that the conclusions of law supporting the Trial Court's exercise of discretion in dismissing the case pursuant to CR 41(b) were in error. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. Will, 121 Wn. App. at 128. In the absence of substantial evidence, where the conclusions of law are erroneous, the "reasons" supporting the Trial Court's exercise of discretion are untenable. This Court should conclude that the Trial Court erred in dismissing the case pursuant to CR 41(b) and should reverse and remand.

2. The Trial Court Erred in Dismissing Mr. West's Case Pursuant to Its Own Inherent Authority

> "Every court of justice has power... [t]o enforce order in the proceedings before it, ... [and][t]o provide for the orderly conduct of proceedings before it[.]" RCW 2.28.010(2)-(3). "When jurisdiction is ... conferred on a court or judicial officer all the means to carry it into effect are also given[.]" RCW 2.28.150. Where sanctions are not expressly authorized, "the trial court is not powerless to fashion and impose appropriate sanctions under its inherent authority to control litigation." In re Firestorm 1991, 129 Wn.2d 130, 139 P.2d 411 (1996) (applying the principles embodied in CR 11, CR 26(g), and CR 37 to CR 26(b) violations).

State v. S.H., 102 Wn. App. at 473. Here, it also appears that the Trial Court dismissed Mr. West's case under its own inherent authority to control litigation. This was error.

"Under RCW 2.28.010(3), a trial court has the power to provide for the orderly conduct of proceedings before it. Further, 'in Washington, trial courts have the authority to enjoin a party from engaging in litigation upon a "specific and detailed showing of a pattern of abusive and frivolous litigation." ' Yurtis v. Phipps, 143 Wn. App. 680, 693, 181 P.3d 849 (2008) (*quoting* Whatcom County v. Kane, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981)). Proof of mere litigiousness is insufficient to warrant limiting a party's access to the court. Yurtis, 143 Wn.App. at 693, 181 P.3d 849." Bay v. Jensen, 147 Wn. App. 641, 657, 196 P.3d 753 (2008). Here, there is no question but that the Trial Court concluded the Port had made a detailed showing of a pattern of abusive and frivolous litigation – outside of the confines of this case, but closely related.

But the problem is not only with the decision to impose a sanction here but also with the Trial Court's choice of sanction: dismissal (while the decision to impose a sanction is reviewed for abuse of discretion, the choice of sanction itself is reviewed by applying the arbitrary, capricious, or contrary to law standard of review; State v. S.H., 102 Wn. App. at 473). Recall that the U.S. District Court had already imposed a stringent and severe sanction on Mr. West: it entered a bar order against him that required him to make a pre-filing showing that he had meritorious claims, had standing, and had claims that were within the subject matter

jurisdiction of the court. That is, the U.S. District Court entered an order that was narrowly tailored to limit but not restrict Mr. West's constitutional right of access to the courts. "This rule [allowing a court to limit a party's access to the court] is not absolute. A trial court may place reasonable restrictions on a party who abuses the court process so long as the party can still access the court to present a new and independent matter." Bay, 147 Wn. App. at 657. That is what the U.S. District Court did.

But what the Trial Court did here went beyond what the U.S. District Court did, dismissing a case with prejudice for failure to state a claim and that was outside the court's subject matter jurisdiction, and entering a bar order that would prevent any such future meritless cases. Recall that the Port had already made the argument, in its first motion for dismissal, that Mr. West's case was duplicative of the earlier West v. Port of Tacoma case, Pierce County Cause No. 08-2-043121-1. At oral argument, both the Port and Mr. West agreed that only prong one of the public records request at issue was duplicative, and that prongs two, three, and four were not. That is – Mr. West and the Port both agreed that this instant case was "a new and independent matter." The Trial Court agreed and Mr. West's claims concerning prongs two, three, and four of his public records request survived the Port's motion to dismiss.

But the Trial Court dismissed the whole case – a case with meritorious claims -- on the Port's second motion to dismiss, *after* it had imposed terms on Mr. West for the duplicative prong one, *after* it had found Mr. West in contempt of court for interrupting, *and after* the U.S. District Court had already imposed the severe and stringent sanction of a bar order on Mr. West as a preventative (and punitive) matter. There was no "bad conduct" by Mr. West **before this Trial Court** after the U.S. District Court imposed its bar order on Mr. West, nothing to bring this case outside, quite frankly, the purview of CR 41(b)(1) (the rule that allows a party to move to dismiss a case for failure to prosecute, since Mr. West had indeed failed to prosecute this case while pursuing closely-related litigation, though he cured that failure).

In other words, by sanctioning Mr. West with dismissal in a case with meritorious claims that had already survived one motion to dismiss – sanctioning him for conduct before the U.S. District Court when the U.S. District Court **had already sanctioned him** – the Trial Court abused its discretion by limiting Mr. West's access to the courts in a way that did not allow him to present this meritorious matter.

The record shows that the Trial Court did not consider this case to be an independent matter; at the hearing on the Port's second motion to dismiss on June 12, 2012, the Trial Court observed, "the Port has

expended almost $200,000 in defending these various lawsuit brought by Mr. West, all arising out of a single public records request." RP 06-12-2012, p. 44, ll. 2-5. The problem is that this conclusion of the Trial Court's is based on a finding that is not supported by substantial evidence. Mr. West and the Port both agreed that the public records request at issue here was a new one, with only one prong out of four that arguably duplicated the public records request at issue in the last lawsuit.

And here Mr. West is distinguishable from the plaintiff in Yurtis and other vexatious litigant cases in a way that makes the Trial Court's sanction of dismissal here arbitrary and capricious – that is, without regard for facts or circumstances. In Yurtis, the plaintiff had filed multiple lawsuits all arising out of a single 1991 land transaction; when they were not barred by the statue of limitations, they were barred by res judicata, collateral estoppel, or failure to state a claim for which relief could be granted. Yurtis, 143 Wn.App. at 696. Here, in contrast, Mr. West makes new and independent public record act requests. This instant lawsuit, even though it concerned the Port of Tacoma's unsuccessful Maytown project that had also been the subject of the last litigation, arose out of a separate and discrete public records act request. The Trial Court, in basing its sanction of dismissal upon a finding that all this litigation arose out of a

single public record act request, did so without regard for the facts and circumstances of the separate and discrete public record act requests.

For these reasons, this Court should conclude that The Trial Court abused its discretion in imposing a sanction on Mr. West pursuant to its own inherent authority, and that the Trial Court's choice of sanction, dismissal, was an arbitrary and capricious one. This Court should reverse and remand.

D. **Request for Award of Attorney Fees**

This, ultimately, is a public records act case. Mr. West requests an award of attorney fees and costs pursuant to RAP 18.1 and RCW 42.56.550.

V. CONCLUSION

For the foregoing reasons, this Court should reverse the Trial Court's order of dismissal and remand for further proceedings.

Respectfully submitted this 1st day of May, 2013.

CUSHMAN LAW OFFICES, P.S.

/s/ Stephanie M. R. Bird

Stephanie M. R. Bird, WSBA #36859
Attorneys for Mr. West

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On May 1, 2013, I caused a copy of the foregoing document to be electronically filed with the Court of Appeals, Division II and to be sent electronically and a hard copy delivered to the party as listed below:

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DATED this 1st day of May, 2013.

/s/ Rhonda Davidson
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