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 REPLY BRIEF

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I. INTRODUCTION

This case is a case of "want of prosecution," which Mr. West cured. The Trial Court improperly exercised its discretion, a discretion that is limited by the civil rule that applies. Further, even if the Trial Court could properly exercise its discretion here, it did so based on untenable grounds and for untenable reasons. This Court should reverse and remand.

II. "FLAILING AROUND" AND "GRASPED AT STRAWS"

The Respondent, the Port of Tacoma, argues that this case and this appeal are meritless, pointing to Mr. West's characterization ("flailing around" and "grasped at straws") of certain claims in this case that he made that were dismissed by the Trial Court long ago, the dismissal of which Mr. West did not and does not appeal.

By motion to this Court, Mr. West sought to strike this particular argument, on the grounds that it was based on an exhibit attached to the Port's brief that was not considered by the Trial Court, not properly reviewable by this Court under RAP 9.11, nor subject to judicial notice under ER 201. Mr. West repeats this argument below. However, in the event that this Court does not exclude from consideration the Port's

exhibits, quotations, citations, and arguments pertaining thereto, Mr. West needs to at least explain and put into context his characterization.

The Port quoted from Mr. West's opening brief in West v. Port of Tacoma, No. 430004-5-II, where Mr. West stated to this Court:

> What happened next is hard to understand. The undersigned has tremendous respect for Mr. West's public records act activism and his abilities as a pro se litigant, but Mr. West engaged in what can be described as "flailing around." It appears that Mr. West – frustrated by lengthy delays in this – a public records case – grasped at straws and filed multiple attempts in multiple fora to try to compel some kind of a final, appealable order in this case, or, alternatively, a ruling on Mr. West's public record acts claims.

Response Brief at 5, *quoting* Appellant's Opening Brief in West v. Port of Tacoma, No. 43004-5-II, at 24.

Mr. West used the phrases "flailing around" and "grasped at straws," to describe his procedurally incorrect efforts to "try to compel some kind of a final, appealable order in the case, or, alternatively, a ruling on Mr. West's public record acts claims." These procedurally incorrect efforts included certain claims that he made in this case, claims that were dismissed early on. Mr. West acknowledged these long-dismissed claims in his opening brief: "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." Opening Brief at 8, n. 1.

Mr. West **did not** use the phrases "flailing around" and "grasped at straws" to describe his Public Record Act claims in this case, good claims that have already once survived a motion to dismiss made by the Port and which were ultimately dismissed by the Trial Court in the ruling that Mr. West appeals here.

In making the distinction between the procedurally incorrect claims directed at Prosecuting Attorney Mark Lindquist and the meritorious Public Records Act claims directed at the Port of Tacoma, Mr. West is neither being hypocritical nor excessively nice. Rather, he is simply being honest. The claims against Mr. Lindquist were, indeed, "flailing around" and grasping at straws. The claims that the Port of Tacoma violated the Public Records Act in its response to Mr. West's PRA requests at issue in this lawsuit are not. Mr. West appeals the dismissal of the latter, not the former.

III. Mr. West Moves this Court to Strike the Exhibits Attached to the Port's Response Brief and Quotations, Citations, and Arguments Pertaining Thereto

By motion to this Court, Mr. West asked this Court to strike the exhibits attached to the Port's response brief and the quotations, citations,

and arguments pertaining thereto. This Court denied the motion, but allowed Mr. West to make his arguments in his reply brief.

The Port, on pages 48-49 of its brief, includes a Declaration of Counsel. The Port's counsel states, at paragraph 3, "Below is a true and correct copy of pleadings on file with this Court or the below named courts for which this Appeals Court may take judicial notice:...." Response at 49. The Port then appends a set of four exhibits of which it requests this Court take judicial notice. None of these exhibits were considered by the Trial Court and should be stricken and not considered by this Court. The Port cites to, quotes from, and makes argument concerning the exhibits in its brief. This Court should strike these exhibits, citations, quotations, and arguments.

First, "judicial notice" is an evidentiary doctrine codified at ER 201. But simply because a fact might be susceptible to judicial notice does not mean that this Court should consider the "fact" here, on appeal, when the Trial Court below did not. "RAP 9.11 applies in addition to the normal judicial notice standard." Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005). The four exhibits that the Port seeks to introduce into "evidence" here on appeal were not considered by the Trial Court below and are not part of the record on appeal. Because the Port did

not properly supplement the record on appeal, Mr. West requests that this Court strike the Port's proffered exhibits, whether they would be admissible under the doctrine of "judicial notice" or not. Indeed, the proffered exhibits would likely *not* be admissible before this Court under ER 201, even if the Port had properly supplemented the record on appeal:

> Judicial notice may be taken on appeal if the following standard is met: We may take judicial notice of the record in the case presently before us or "in proceedings engrafted, ancillary, or supplementary to it." However, we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.

Spokane Research, 155 Wn.2d at 98, *citing* In re Adoption of B.T., 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (citations omitted). Here, the exhibits that the Port wants this Court to consider are records of other independent and separate judicial proceedings; they are not engrafted, ancillary, or supplementary to this matter. .

RAP 9.11 provides means and perimeters by which the Port could have properly supplemented the record. But the Port did not avail itself of this rule, nor would RAP 9.11 have allowed the Port to supplement the record with these four exhibits.

RAP 9.11 allows, under certain circumstances, a party to supplement the record with material not considered by the Trial Court. It is a very limited remedy. Harbison v. Garden Valley Outifitters, Inc., 69 Wn. App. 590, 593-594, 849 P.2d 669 (1993). RAP 9.11 only applies when a party can show that **all six** of its criteria are met:

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a); State v. Ziegler, 114 Wn.2d 533, 541, 789 P.2d 79 (1990); Harbison, 69 Wn. App. at 593-94. Here, the Port did not move to supplement the record under RAP 9.11 and did not attempt to show that any of the six requisite criteria were present when asking this Court to take judicial notice of the four exhibits here.

Moreover, even if the Port had made a motion to this Court under RAP 9.11, it is unlikely that the Port would have succeeded. RAP 9.11(a)(2) requires that the Port show that the new evidence would probably change the decision being reviewed. Here, the Port is the Respondent on appeal. It is asking this Court to sustain the Trial Court's

dismissal of Mr. West's case. It is offering these four exhibits in support of its request that this Court sustain the Trial Court's decision; that is, there is no possible argument that the Port can make that would show that these four exhibits would change the decision on review.

The Port would also likely not succeed had it moved this Court pursuant to RAP 9.11 because the general rule is that this Court considers on appeal only that which was before the Trial Court. "We do not accept evidence on appeal that was not before the trial court. RAP 9.11." State v. Curtiss, 161 Wn. App. 673, 703, 250 P.3d 496 *review denied,* 172 Wn.2d 1012, 259 P.3d 1109 (2011). This Court should strike the four exhibits as well as the citations to, quotations from, and argument concerning these four exhibits within the Port's brief because the Port did not show that the requisite six criteria are present under RAP 9.11.[1]

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[1] Mr. West also moved this Court to strike footnote 15 on page 18 of the Port's Brief. This Court denied the motion to strike, but allowed Mr. West to address footnote 15 in his reply brief.

In moving this Court to strike footnote 15, Mr. West demonstrated to this Court that the allegations in footnote 15 were false. The Port alleged that Mr. West failed to pay the court reporters in a timely fashion, which resulted in the court reporters filing their transcripts late and delaying this appeal. Instead, the record that Mr. West put before this Court in his motion to strike shows that Mr. West's counsel's office communicated with the court reporters both before and after the transcripts were due, gently reminding them of their due date. The record shows that the court reporters, when responding, made no mention of any payment due or overdue. The record also shows that the first invoice from either court reporter was

IV. ARGUMENT

Truly, this case is a "want of prosecution" case. At the July 26, 2010 hearing, the Trial Court dismissed one of Mr. West's claims that it found duplicative, and assessed sanctions of $1500 against Mr. West for causing the Port to have to respond to the same claim twice. At that same hearing, Mr. West made a verbal outburst and was held in contempt of court. Thereafter, Mr. West took no new action **in this case**. He took actions in other cases, surely, filing more misguided and procedurally incorrect cases in various fora in an effort to avoid the order of contempt. And Mr. West was soundly punished for these other cases: he is now subject to bar orders that require him to make an affirmative showing that

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dated January 3, 2013, after the transcripts were due. It is therefore demonstrably **false** that Mr. West made late payment or caused the transcripts to be filed late, delaying the appeal.

Counsel for the Port put forth a declaration that Mr. Seth Goodstein called and spoke to Ms. Carman Prante, one of the court reporters, and Mr. Goodstein declares that Ms. Prante told him on January 2 that she would file the transcripts after Mr. West paid. Yet Ms. Prante did not send an invoice to Mr. West until January 3, and made no mention of any payment due when Mr. West's counsel's office contacted her. Mr. West could not have paid an invoice that the court reporters had not yet sent. It is not clear what happened when Ms. Prante and Mr. Goodstein spoke; very likely she confused Mr. West's case with another case. At any rate, the allegation that Mr. West delayed the appeal by failing to pay the court reporters is false. Mr. West and his counsel did not cause the late filing of the transcripts by any late payment. In fact, Mr. West's counsel's office worked diligently to secure the transcripts, including calling and emailing the court reporters and even this Court's case manager, and paid the invoices promptly when the court reporters sent them.

those various courts would have subject matter jurisdiction over his claims and that his prospective complaint would state claims upon which relief can be granted, before he can even file any new matter in those courts.

Again, Mr. West took no new action **in this case** – no new action, that is, until he paid the terms against him (subject to an order that mandated no date by which he must pay the terms), retained counsel, noted up discovery depositions, and noted the matter for trial setting. And that is why this case is a "want of prosecution" case.

Instead, the Port argues that this is a case where the Trial Court properly dismissed Mr. West's claims for dilatory conduct – unacceptable litigation practices – falling outside the purview of "want of prosecution." But all the acts that the Port complains of – Mr. West's noting the matter for hearing once when the Port's counsel was unavailable (and where Port's counsel had filed no notice of unavailability in this case but had given Mr. West a notice of unavailability in another case where she represented another party, not the Port of Tacoma); Mr. West's filing the complaint in this case that contained a duplicative claim; Mr. West's verbal outburst at the hearing on July 26; and Mr. West's attempts to avoid the contempt order by filing his misguided cases that resulted in his being punished by bar orders – either preceded the delay in this case that happened when Mr. West waited to pay the terms against him, or occurred

outside of this case. CR 41(b)(1) applies here, and since this rule governs this case, the Trial Court erred in dismissing the case, whether pursuant to CR 41(b)(1) or any other grounds.

But more importantly, even if the Port is right and this case is about the Trial Court's discretion to manage its calendar and dismiss Mr. West's case for "unacceptable litigation practices," Mr. West is not asking this Court to substitute its judgment for the Trial Court's. Instead, Mr. West is asking this Court to review the Trial Court's exercise of discretion and find that it was based on untenable grounds or untenable reasons. And Mr. West is asking this Court to reverse and remand.

A. The Port Ignored Mr. West's Argument that 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. Mr. West so argued in his opening brief at page 36, and the Port ignored his argument. 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).

But even more significantly, because the delay in this case amounted to nothing more than a want of prosecution (the order imposing $1500 terms on Mr. West conditioned further action in this case on his paying the terms, but did not give a date by which Mr. West must pay the terms), this case falls within the purview of CR 41(b)(1) and the discretion that the Trial Court would otherwise wield is limited.

> It is our view that when in 1967 the Supreme Court revised the rules adding to CR 41(b)(1) mandatory language of nondismissal under certain circumstances, that change assumes significance in light of this long-standing construction. The predecessors to CR 41(b)(1)...did not contain the mandatory language of nondismissal later added to the rule. In our opinion, the 1967 revision contemplates a limitation upon the otherwise inherent discretionary power of the court to dismiss, upon the motion of a party, for failure to bring a case on for trial in a timely fashion.

Gott v. Woody, 11 Wn. App. 504, 507, 524 P.2d 452 (1974). Because CR 41(b)(1) applies, the Trial Court's inherent discretionary power is limited. Because Mr. West filed his note for trial before the Port even filed its motion to dismiss, the Trial Court erred in dismissing the case.

B. Washington Trial Courts' Vested Inherent Authority to Dismiss Cases is Limited

All the cases that the Port cites for the argument that trial courts in Washington have unlimited vested inherent authority to dismiss case actually stand for the proposition that this inherent authority is limited.

Consider: State v. Gilkinson, 57 Wn. App. 861, 865, 790 P.2d 1247 (1990) (a trial court's powers are limited to those essential to the existence of the court and necessary to the exercise of its jurisdiction; trial court lacked power to expunge record); City of Fircrest v. Jensen, 158 Wn.2d 384, 395, 143 P.3d 776 (2006) (the constitution gives the Supreme Court authority to adopt rules of procedure); In re Mowery, 141 Wn. App. 263, 281, 169 P.3d 835 (2007) (court lacked inherent power to impose criminal contempt sanction in excess of that provided for by law); Bus. Servs. of Am. II, Inc. v. WaferTech LLC, 174 Wn.2d 304, 312, 274 P.3d 1025 (2012) (where CR 41(b)(1) applies, a trial court has no discretion to dismiss a case where the plaintiff has noted the case for trial before the motion to dismiss is heard); Snohomish County v. Thorpe Meats, 110 Wn.2d 163, 166, 750 P.2d 1252 (1988) (dismissal for lack of prosecution was precluded due to fact that case was noted for trial before motion to dismiss for lack of prosecution was heard); and Wallace v. Evans, 131 Wn.2d 572, 577-78, 934 P.2d 662 (1997) (where CR 41(b)(1) applies, the rule **prevents dismissal pursuant to the trial court's inherent authority**).

C. The Trial Court Erred in Finding that the Criteria for Discretionary Dismissal Were Met

The Port simply argues that the Trial Court found that the criteria for discretionary dismissal were met, ignoring Mr. West's argument that substantial evidence did not support the Trial Court's findings. For example, the Port states that the Trial Court found that Mr. West deliberately disobeyed a court order. But the Port fails to address Mr. West's argument that the order imposing terms did not contain a date by which Mr. West pay the terms, and that, in fact, Mr. West did pay the terms. Nor did the Port address the case of Will v. Frontier Contractors, 121 Wn. App. 119, 128, 89 P.3d 242 (2004), where the Court found that where an order does not contain a date for compliance, and that indeed, where a litigant complies with the order, that there is no disobedience.

Likewise, the Port ignores Mr. West's arguments that substantial evidence did not support the Trial Court's finding that Mr. West's delay prejudiced the Port. "On Appeal, the Appellant flatly failed to address the Court's findings regarding prejudice." Response at 22. Actually, Mr. West did address the findings regarding prejudice. *See* Opening Brief at 38-39.[2]

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[2] Instead of addressing Mr. West's arguments regarding prejudice, the Port argues that a trial court may sanction a litigant with dismissal for actions taken in other forums, *citing* to McNeil v. Powers, 123 Wn. App. 577, 97 P.3d 760 (2004). But in McNeil, the matter was dismissed on summary judgment, and the *plaintiff* had attempted to defend against the summary judgment motion by arguing that the motion violated an automatic

Finally, the Port argued that the Trial Court considered and imposed lesser sanctions – meaning the $1500 terms against Mr. West for his one duplicative claim – before imposing the most stringent sanction of dismissal. But Port, while elsewhere arguing that the Trial Court properly considered Mr. West's misguided forays into other fora, failed to address Mr. West's argument that *other fora* had already punished Mr. West by entering bar orders against him, and that after the imposition of the bar orders and Mr. West's payment of the $1500 sanctions against him, that Mr. West had undertaken no new objectionable conduct.

D. The Sanction of Dismissal Is not Warranted

In arguing that the sanction of dismissal was warranted, the Port cites to a list of cases involving a court's inherent authority to dismiss cases for want of prosecution, most of which precede the 1967 amendment of CR 41(b)(1) that severely limited this inherent authority. These cases range in dates from 1892 to 1950: McDaniel v. Pressler, 3 Wash. 636, 29 P. 209 (1892); Plummer v. Weill, 15 Wash. 427, 46 P. 648 (1896); State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956); State ex rel. Washington Water and Power Co. v. Superior Court for Chelan County, 41 Wn.2d 484, 250 P.2d 536 (1953); National City Bank of Seattle v.

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bankruptcy stay; the trial court concluded that no bankruptcy stay applied and granted summary judgment on the merits.

International Trading Co. of America, 167 Wash. 311, 9 P.2d 81 (1932); and Stickney v. Port of Olympia, 35 Wn.2d 239, 212 P.2d 821 (1950). This is no longer the law. In construing the post-1967 CR 41(b)(1), the Supreme Court held:

> it would be anomalous if we were to now hold that a trial court may exercise discretion when faced with circumstances *requiring* that an action under CR 41(b)(1) *not* be dismissed. Before 1967, the only way to avoid dismissal for want of prosecution under the predecessor of CR 41(b)(1) was to note the action for trial within 1 year after issues were joined. In 1967, CR 41(b)(1) was adopted, however, and this critical sentence was added to the rule: *If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.* (Italics ours.)

Thorpe Meats, 110 Wn.2d at 167-68.

In fact, the Port can point to no instance of dilatory behavior on the part of Mr. West that would take the case out of the purview of CR 41(b)(1), save for one example: the Port argues, "the Appellant **admits** that he failed to show up at his own contempt hearing in this case." Response at 26. But failure to show up at a single contempt hearing[3] is

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[33] Further, it is important to recognize that even though Mr. West's attempts to avoid the contempt order were improper, inartful, and offensive to counsel for the Port and to the Trial Court, they at least had a shred of a basis in law. "It is well established that a criminal contempt sanction should not be imposed unless it is sought by a disinterested public prosecutor in an action separate from the underlying civil dispute. Washington's criminal contempt statute incorporates these principles of procedural fairness. Because the court did not refer the matter for a

different than failing to show up at trial. That is not sufficient to support discretionary dismissal pursuant to the Trial Court's own inherent authority.

E. The Trial Court Abused its Discretion in Dismissing Mr. West's Case

The Port correctly states the legal standard for reviewing discretionary decisions: "A trial court's exercise of discretion is manifestly unreasonably if no reasonable person would concur with the Court's view when the Court applies the correct legal standard to supported facts." Response at 28. But the problem with the Port's argument is that the Port failed – as argued above – to address Mr. West's argument that substantial evidence did not support the findings of fact on which the Trial Court based its decision. Further, the Port argues that the "no reasonable person" prong is overcome by the fact that Mr. West's misguided and procedurally incorrect attempts to avoid the contempt order were dismissed by the various fora in which he made them. But the record shows that these cases were dismissed not for want of prosecution or for dilatory conduct not within the purview of CR 41(b)(1), but for lack of

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statutory prosecution or explain why the statute is inadequate for the purpose of punishing criminal contempt, the sentence must be reversed as an unwarranted use of inherent authority." In re Mowery, 141 Wn. App. 263, 268, 169 P.3d 835, 837 (2007).

subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *See, e.g.*, CP 504-506. That is, the dismissals in these other cases is fundamentally different.

F. The Record Does Not Support Affirming Dismissal

The record does not support affirming dismissal. As argued above, this is fundamentally a "failure to prosecute" case. Mr. West cured his failure to prosecute by noting the matter for trial. As for Mr. West's other misdeeds, he has been already punished. For making a duplicative claim, he was sanctioned $1500. Mr. West has paid that amount. For making a verbal outburst in court, Mr. West was held in contempt of court. For noting a hearing on a date when counsel for the Port was unavailable, the Trial Court vacated the relief granted at that hearing. For making misguided and procedurally improper attempts in other courts to vacate the contempt order, Mr. West was sanctioned with bar orders.

Because Mr. West has already been punished for his other misdeeds, and because this case is within the purview of CR 41(b)(1), the Trial Court erred in dismissing his case. The case that the Port cites for the proposition that the record supports dismissal is not on point. In Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962), there was no such rule as CR 41(b)(1). Mr. West is not asking that this Court substitute its judgment for the Trial Court's. Mr. West is asking this

Court to look at the facts and the law and conclude that the Trial Court lacked discretion because CR 41(b)(1) applied and Mr. West had cured his want of prosecution, or, alternatively, that even if CR 41(b)(1) did not apply, that the Trial Court erred in dismissing the case because substantial evidence did not support the findings on which the dismissal was based.

G. **Public Policy Supports Reversing and Remanding**

Public policy supports reversing the Trial Court's dismissal of Mr. West's case. "The dismissal of an action for want of prosecution, in the absence of statute or rule of court creating the power and guiding its action, is in the discretion of the court." Gott, 11 Wn. App. at 506. Here, there is no "absence" of statute or rule of court. CR 41(b)(1) exists and it applies. The Trial Court improperly exercised discretion when CR 41(b)(1) mandated that the Trial Court deny the Port's motion to dismiss. As a matter of public policy, it is important that courts apply the rules consistently to all parties, even those that are most reviled.

H. **Mr. West's Arguments Are Proper and Persuasive**

Mr. West is arguing that this Court should apply CR 41(b)(1) and or conclude that the Trial Court abused its discretion. These are not improper arguments.

1. **Mr. West's Arguments are Neither Untimely Nor Waived**

The Port argues that Mr. West is barred from assigning error to the findings of fact in the Court's order of dismissal, because Mr. West did not take exception to the order. However, the record shows that the order that was signed by the Trial Court was a true and accurate reflection of the Trial Court's ruling from the bench: "The motion to dismiss is granted. I have reviewed the Port's proposed order which contains findings of fact and conclusions of law. I specifically adopt those findings and conclusions, and I am going to sign the order." RP 06/12/12, p. 44, ll. 14-18. Since the findings of fact and conclusions of law were specifically adopted by the Trial Court, there was no possible exception on the basis that the order did not accurately reflect the ruling.

The Port argues that Mr. West waived the argument that he paid the $1500 sanction and so complied with the order, and purged any sanction. . But Mr. West made these arguments to the trial court. RP 06/12/12/, p. 40, ll. 5-9. The Port argues that Mr. West waived any arguments that the fees and costs incurred in a previous case were not connected to this case. But what the Port is arguing is not that the fees and costs were not connected, but that they actually arose out of Mr. West's attempts to avoid the sanction of contempt, which is inaccurate on its face, since the bulk of those fees and costs were incurred before the sanction of contempt was even incurred.

The Port argues that Mr. West dishonestly ignores his own conduct that occurred between July 26, 2010, and dismissal of the case on June 12, 2012. This is not accurate. Mr. West has attempted to paint a true and complete picture to this Court. *See* Opening Brief at p. 44.

I. This Court Should Refuse to Award the Port its Fees and Costs

The Port argues that this appeal is frivolous, and seeks an award of fees and costs. Mr. West believes this appeal is meritorious, and respectfully requests that this Court reverse and remand his case back to the Trial Court. But even in the event that this Court affirms the dismissal, an award of fees and costs are not warranted. The Port argues that an appeal is without merit if the issues on review (1) are clearly controlled by settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court. State v. Rolax, 104 Wn.2d 129, 132, 70 P.2d 1185 (1985). The Port argues that only one prong will suffice. But this is not so. In order to award fees and costs, this Court must find that the appeal is frivolous. Kearney v. Kearney, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). And an appeal is frivolous if it is both without merit, *and* if there are no debatable issues upon which reasonable minds might differ." In re Recall of Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

In Kearney, the Court found that there were no debatable issues upon which reasonable minds might differ, noting that the appellant had presented the exact same arguments twice before in petitions for discretionary review to the Court of Appeals and the Supreme Court, and then again to the Court of Appeals when the underlying action became final and he appealed directly. Here, there is no such history. And reasonable minds might well differ, at a minimum, as to whether CR 41(b)(1) applied in this case to preclude the Trial Court's exercise of discretion.

J. Request for Fees and Costs

Mr. West repeats his request for fees and costs that he made in his opening brief.

V. CONCLUSION

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

Respectfully submitted this Second Day of August, 2012.

CUSHMAN LAW OFFICES, P.S.

/s/ Stephanie M. R. Bird

Stephanie M. R. Bird, WSBA #36859

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On August 2, 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:

Attorney for Respondent Port of Tacoma:

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DATED this 2nd day of August, 2013.

/s/ Rhonda Davidson
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