90480-4

NO. 71366-3-I

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

PORT OF TACOMA, a municipal corporation

Petitioner

v.

ARTHUR WEST

Respondent.

PETITION FOR REVIEW BY THE SUPREME COURT

Carolyn A. Lake, WSBA No. 13980
Seth S. Goodstein, WSBA No. 45091
Goodstein Law Group PLLC
501 South G Street
Tacoma, WA 98405
(253) 779-4000
Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. IDENTITY OF PETITIONER

Petitioner Port of Tacoma (Port) asks for the relief designated in Part II. The Port is represented by the Goodstein Law Group PLLC.

II. RELIF REQUESTED.

The Port requests that the Supreme Court accept review of this case, in which the Port seeks to reinstate the Trial Court's exercise of discretion in dismissing Respondent Mr West's (West or Mr West) complaint as a sanction for his unacceptable litigation practices.

III. COURT OF APPEALS DECISION

A copy of the Court of Appeals Decision and Order on Reconsideration below is attached. RAP 13.4(c)(4). The unpublished Opinion will be cited to as "Slip Op."

IV. SUMMARY & WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following grounds for review of appellate decisions:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision by another division of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case should be considered under prongs one, two and four of this rule. The primary issue of this Petition is singular and narrow: whether the Trial Court abused its discretion to exercise its inherent authority to manage proceedings and parties before it. Review should be accepted because the Appeals court ruling conflicts with the Supreme Court rulings in *Gott*[1], *Thorp Meat*[2], and *Wallace,*[3] and or because the Opinion runs afoul of CR 41, which the Appeals Court below incorrectly found to be an absolute bar for a Trial Court's exercise of inherent authority. Review should also be accepted because the Appeal Court's reversal of the dismissal seriously erodes a Trial Court's inherent discretion to manage its calendar and the efficiency of the Court, and is an issue of substantial public interest that the Supreme Court should decide.

V. ISSUES PRESENTED FOR REVIEW

A. The Limits of Trial Court's Discretion Where Unacceptable Litigation Practices Exist Is An Issue Of Substantial Public Interest, and Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1) (2) and (4).

B. Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1) and (2).

C. Appeals Court Ruling Also Conflicts With Prior Supreme Court Cases Holding That Appellate Substitution Of Discretion In Areas Reserved For Trial Court Discretion Constitute Reversible Error. RAP 13.4(b)(1) and (2).

---

[1] *Gott v. Woody,* 11 Wash.App. 504, 507, 524 P.2d 452 (1974).
[2] *Thorp Meats,* 110 Wash.2d at 166-67, 750 P.2d 1251 (1988).
[3] *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997).

VI. STATEMENT OF THE CASE

Mr. West filed this case second in a line of five related *pro se* litigations[4] involving the Port. All four of the Mr. West-initiated cases were, for one reason or another, dismissed. The Federal Court, Western District of Washington, Judge Ronald Leighton *sua sponte* filed the fifth case – a federal court bar order against Mr. West that the Ninth Circuit summarily upheld. **All the facts of these related lawsuits** were **in the record** before the Trial Court in this instant matter and show Mr. West's extensive pattern of dilatory action of a type not described by CR 41(b)(1), all of which support the Trial Court's exercise of its inherent authority to dismiss.

Mr West filed this case on October 6, 2009. *Complaint*, CP 1-7. No substantive ruling ever issued on the PRA merits. Instead, and directly because of the improper procedural actions of West, the Court was prompted at various times to sanction him[5], rule him in contempt[6], and ultimately dismiss his case[7]. Mr. West's unacceptable litigation practices included:

- West's failure to appear at his own contempt proceeding (*August 2, 2010 Clerks Minute Entry* CP 926);

---

[4] *West v. Port of Tacoma*, Cause Nos. 08-2-043121-1 (Pierce County Super Ct.), 43004-5 (Division II), 902046 (Supreme Court of Washington) ; Second, the instant case; Third, *In re West*, Supreme Court of Washington Cause No. 84837-8; Fourth, *West v. Chushkoff*, C10-5547-RJB (W. Dist. Wash.), *aff'd* 11-35603 (9th Cir.); *In re Arthur West*, Cause No. MC11-5022-RBL (W. Dist. Wash.), *aff'd* 11-35918 (9th Cir.).

[5] CP 403-406 *Order of Partial Dismissal.*

[6] CP 356-359 *Order of Contempt.*

[7] CP 764-778 *Order of Dismissal.*

- West's failure to appear at his own dismissal presentment hearing (*August 9, 2010 Clerks Minute Entry*. CP 927);
- West's misrepresentations to the Court (Tr. of July 26, 2010 Hearing, 13:11-13:21, CP 450-451);
- West's filing a Personal Restraint Petition with this Court to protest being found in contempt in this case) (CP 359-363);
- West's frivolously suing the presiding trial court judge in Federal Court (CP 383-502); and
- West's joining-suing Port counsel in both this Court and Federal Court lawsuits involving Judge Edwards (CP 359-363, 383-502).
- West's willful refusal to pay $1,500 sanctions upon which further proceedings were conditioned for eighteen months. CP 774.

The Trial Court's awareness and the Trial record consists not just of the present matter but also the inter-related parallel cases, which are relevant and therefore briefly described below.

A. First West Lawsuit – *West v. Port of Tacoma*, No. 08-2-043121-1 (Pierce County Super Ct.)

In the mid-2000s, the Ports of Tacoma and Olympia planned a "South Sound Logistics Center" in Thurston County, where cargoes could be transferred between modes of transit. On December 4, 2007, Mr. West requested "all records related to the SSLC from January 1, 2005 to present." CP 411. Mr. West first sued the Port on January 14, 2008. *Order Dismissing,* CP 420.

Mr. West received the Port's records but failed in his demands to for Public Records Act substantive relief in his 2008 lawsuit. *Id.* at CP 423. Instead, the Court was prompted to deny his Motions for Orders to Show Cause, and affirm the Port's record release schedule as reasonable,

appointed a Special Master to marshal the voluminous record, and then ultimately dismissed the case as an exercise of the Court's discretion to sanction Mr West. CP 420-423. Division II reversed the dismissal. This case is presently pending discretionary review before the Supreme Court of Washington as Cause No. 902046.

B. Facts Related to Respondent's Unacceptable Litigation Practice Before the Trial Court, Pierce County Superior Court No. 09-2-14216-1. West's self-described "flailing around.[8]"

On **October 6, 2009**, Mr West again sued the Port, its commissioners and its executive director, in this present case repeating the same PRA allegations as in his 2008 lawsuit. *Complaint*, CP 1-7. Mr West also sought "a declaratory ruling in regard to a pattern of secrecy and negligent administration of the Port of Tacoma that has cost the public over a Quarter of a Billion Dollars ($250,000,000) in needless expenditures for mismanages projects." *Id.* West also sued Pierce County Prosecuting Attorney Mark Lindquist, Hons. Fleming and Lukens from the 2008 lawsuit. *Id.* West contended that Hon. Fleming was "unlawfully exercising" and had "forfeited" his office due to actions in this 2008 case subject of this instant appeal. West sought prosecution of Hon. Fleming by Prosecutor Lindquist. *Id.* West also argued that Prosecutor Lindquist and Judge Fleming "violated their oaths of office and duties under law." *Id.* West also sought to frustrate the work of Special Master Hon. Lukens'

[8] Description of West Action taken from Fourth Opening Br. Appellant, 24.

review of the responsive records in the first case: "Terry Lukens is an independent contractor who has been improperly hired by the Port, with the Collusion of Citizen Fleming and in violation of the Public Records Act to act to obstruct disclosure of public records and to cover up the actions of other private contractors in wasting public funds on Port of Tacoma boondoogles." CP 2-3.

On **October 30, 2009,** the Pierce County Superior Court (Judge Hogan) granted Pierce County's Motion to Dismiss Pierce County from the suit. CP 434-435. Judge Hogan recused herself, with the Case to be assigned to a visiting Judge. CP 436. On **January 26, 2010**, the case was assigned to Visiting Grays Harbor Judge Edwards. CP 930. Shortly thereafter, Mr West began his litigation misconduct. Mr West first deceitfully sought a show cause hearing, and did so in a manner that violated of the scheduling order in the case.

Mr West noted a significant hearing in this matter on two days' notice, in violation of the Court's scheduling order, and when the Respondent knew the Port's legal counsel was out of state. On **May 8, 2010**, despite his knowledge of Port's counsel's unavailability[9], and while the Port Counsel was out of state, Mr West noted a motion hearing on May 10, 2010. CP 341. This notation violated the Court's Order on

[9] Later, the Trial Court expressly found that the Respondent had knowledge of Port Counsel's unavailability: "And you failed to disclose to me, communications you had with opposing counsel wherein you knew, one, that they were unavailable, and secondly, that they had responded, and you failed to inform me of that." Tr. of July 26, 2010 Hearing, 13:11-13:21, CP 450-451.

procedure CP 930[10] (requiring five days' notice). Over Port Counsel's protest, West pursued his Motion and Show Cause in Port Counsel's absence, but failed to confirm the hearing, violating PCLR 7(a)**(8)** [11], and failed to advise the Court that Port Counsel had made her unavailability known. CP 908-923, and CP 35-236 (Both pleadings explain West's awareness of counsel unavailability and West's deficient noting procedure). Despite being out of state and the short notice, Port counsel filed and served on West objection to the hearing and reply to the show cause. *Id.*

Mr West proceeded, anyways. Mr West proceeded with the improper May 10th hearing and did not advise the Court of Port Counsel's absence, objection and/or response to the show cause hearing. *Tr. of July 26, 2010 Hrg*, 13:11-13:21, CP 450-451. The Court signed the Show Cause Order setting return hearing for June 7, 2010. *Order*, CP 237. The Court's May 10, 2010 Order was not filed in Pierce County Superior Court until May 18, 2010. *Id.* It was not until eleven days post hearing

---

[10] "When scheduling any motions hearings, please notify me directly at the number listed at least five (5) working days in advance to allow the court file to be delivered to Judge Edwards in a timely manner." CP 930.

[11] [11] PCLR 7(a)**(8) Confirmation of Motions.** All motions shall be confirmed by the moving party during the week of the hearing, but no later than 12:00 noon two court days prior to the hearing. Attorneys and any self-represented party shall confirm motions by contacting the judicial assistant of the assigned judicial department or electronically, through the internet by those with LINX accounts and PIN (Personal Identification Numbers), in accordance with the procedures adopted by the Pierce County Superior Court Clerk's Office. Motions filed by those persons physically confined under a court order shall be deemed confirmed at filing. The court may strike motions that are not timely confirmed.

on May 21, 2010 that West provided oblique notice to Port counsel via email that a Show Cause Order had issued, CP 254. ("Apparently my new law clerk from the Pierce County Sheriff's Office has succeeded in running the blockade and filing the show cause order for June 7, 2010 with the Pierce County Clerk"). Port Counsel immediately moved to reconsider and to vacate the Show Cause Order, and filed Motion to Dismiss the action. CP 236-256. On June 18, 2010 the Trial Court verbally vacated the May 10 Show Cause Order. CP 288[12].

The Trial Court finds West in contempt, and also to have misled the Court. On July 26, 2010,Judge Edwards verbally granted the Port's Motion to dismiss in part (based on claims duplicative of the first, 2008 lawsuit against the Port described above), and signed a written Order vacating the May 10 Show Cause Order. CP 340-344. The Court also found West in contempt "due to a verbal outburst" at hearing, and, independently awarded terms against Mr. West in the amount of $1,500 payable to the Port as a sanction for Mr West filing claims identical to the first, 2008 lawsuit in this case:

The Court grants a partial dismissal and finds the Port to be entitled to terms.
Judge Edwards finds Mr. West to be in contempt, due to a verbal outburst. A contempt hearing is scheduled for Monday, August 2nd, 2010 at 8:30 a.m.

[12] "Cause comes on for hearing at 1:10 PM....Court vacates the May 10 Order to Show Cause."

> THE COURT: Do not interrupt me again, do you [the Respondent] understand? If you wish to have these Motions that you have previously filed heard by this court, you need to properly note them for hearing. The reason the order to show cause that was entered on May 10th was vacated, was because you did not properly note that motion for hearing. **And you failed to disclose to me, communications you had with opposing counsel wherein you knew, one, that they were unavailable, and secondly, that they had responded, and you failed to inform me of that.**

Tr. of July 26, 2010 Hearing, 13:11-13:21, CP 450-451. Emphasis added.

The Appeals Court below expressly chose to ignore this part of the record:

> The Port argues that the trial court also had inherent authority to dismiss West's case (1) for allegedly misleading the court by noting motions on dates he knew the Port's attorney was unavailable, and (2) for failure to appear at hearings on August 2, 2010 and August 9, 2010. Because neither basis is cited as justification for dismissal in the trial court's order, we do not address these arguments.

Slip Op. Page 6, note 7.

Mr West skips his own contempt hearing. Visiting Judge Edwards set a contempt hearing for August 2, 2010 and asked Port Counsel to draw up a proposed Order memorializing the rulings. Mr West failed to appear at the August 2, 2010 hearing. CP 926. The Court signed the Order of Contempt, and set over presentment of the Order of Partial Dismissal to August 9. *Id.*

Mr West skips another, different, hearing, one week after his own contempt hearing. On August 9, 2010, West again failed to appear. CP 927. The Court signed the Order of Partial Dismissal and Awarding Terms. CP 403-406.

Instead of attending his own hearings on terms and contempt, Mr West instead:

(1) Sued Judge Edwards and Port Counsel in this Supreme Court, on the theory that Port Counsel was an "illegal special prosecutor" by virtue of Port Counsel presenting proposed contempt orders, at the Trial Court's invitation, and that Port counsel and Judge Edwards had "conspired" to deny the Respondents rights. *Personal Restraint Petition Cause No. 84837-8* (Supreme Ct. Wash.). CP 359-363, and

(2) Also filed a federal lawsuit against Port Counsel, Trial Judge Edwards, and also Judges Fleming (presiding over 2008 lawsuit, above), Chushcoff presiding Pierce County Superior Court Judge Division I, Lukens (special master in 2008, lawsuit above), the Port, the Port's commissioners, and others. CP 483-502. This federal lawsuit directly lead to Mr West's permanent bar order from the Western District of Washington. CP 513-518.

C. Facts Related to Personal Restraint Petition, Supreme Court of Washington, Cause No. 84837-8.

The same day as the Judge Edward ruled the Respondent in contempt, awarded terms, and dismissed West Respondent, Mr. West filed a "Personal Restraint Petition and Writ of Habeus Corpus" citing to the Trial Court (Judge Edwards) and also naming Port of Tacoma Legal counsel claiming Counsel acted as "illegal Special Prosecutor". 26 July 2010 *Petition in Washington Supreme Court Cause No. 84837-8,* CP 449-453. In Mr. West's "Declaration Re Filing of Criminal Citation by 'Special' Prosecutor Lake and Request for Emergency Stay," of Aug. 2,

2010, West hyperbolically asserted that Port Counsel "assumed the duties" of law enforcement by filing "a citation commencing a criminal proceeding" on July 30, 2010. CP 473. In fact, Port Counsel did nothing more than file two alternate proposed Orders to memorialize the Judge Edwards' July 26, 2010 rulings. CP 438-458. The Supreme Court ultimately determined that Port Counsel and Judge Edwards had not presumed or conspired to assume law enforcement duties, and dismissed Respondent's Personal Restraint Petition.[13] See *Ruling Dismissing Personal Restraint Petition*, CP 480-481. Nonetheless, West appealed the dismissal (denied), with the Supreme Court issuing a Certificate Order of Finality on 5 April 2011. CP 482.

D. Facts Related to West District Court Action – No. C10-5547 RJB.

On **August 5, 2010,** between the two hearings at which West failed to appear in this case, Mr West sued the Port of Tacoma, Pierce County, the Port's Legal Counsel [hyperbolically-labeled] "Illegal Special Prosecutor Lake," the Hon. Fleming, Hon. Edwards, Pierce County Presiding Judge Hon. Chushkoff, Secretary of Washington State Sam Reed, and others, again directly related to this instant case. CP 483-502. Here, West sought habeus corpus relief from Judge Edward's Order finding him in civil contempt finding, and West also argued that the

[13] Nor did she or the other Defendants conceivably "restrain" Mr. West in any manner. Judge Edwards signed one of the proposed Orders presented by Ms. Lake, and Mr. West apparently sought appellate review of that Order via the Personal Restraint Petition.

defendants had engaged in a conspiracy to deprive the Respondent of civil rights and caused "economic and personal assaults." West also complained that the Port Public Records Response was actually a prior restraint on his free speech. *Id.* This lawsuit resulted in an involuntary dismissal of West's complaint, and a standing bar order against him. West appealed to the Ninth Circuit, which summarily affirmed the Order.

E. Two years after contempt and sanction in this case - Involuntary Dismissal of this Case for unacceptable litigation practices.

Mr West's extracurricular attempts to confront unfavorable rulings in this case eventually were exhausted.[14] **On March 19, 2012**, the Trial Court below set a status conference for April 6, 2012. CP 407-408. Legal Counsel for Mr West appeared. CP409. The Port's response to the Court's Status Conference Notice included notice of intent to file a Motion to Dismiss based on Mr West's extended lapse in his pursuit of this case, and based on the Court's inherent authority to dismiss for abuse of process. CP 410-523. Thereafter West served a deposition notice. CP 524-542. The Port filed a Motion to Quash the deposition, with hearing noted for June 1. CP 606-670. At the June 1 hearing, the Port stated its intention to file the Dismissal Motion that day, where upon the Court set a June 12 hearing for the Port's Dismissal Motion, West's Motion to reschedule Hearing dates and ruling on attorneys fees. CP 671. On June 12, 2012,

[14] On April 15, 2011, this Court finalized dismissal of West's "Personal Restraint Petition". On June 15, 2011, the Western District of Washington *sua sponte* dismissed the federal claims as to the Port, all Port agents, and Port legal counsel. On July 7, 2011, the Federal Court Bar Order citing to the merits of this case issued against West.

Judge Edwards granted full dismissal to the Port. CP 764-778 & CP 709.

On October 18, 2012, West filed a "4th Amended Notice of Appeal" of the Dismissal in Division II. Division II transferred this case to Division I for oral argument. On April 28, 2014, Division I issued an unpublished, Slip Opinion reversing the Trial Court's Dismissal On June 6, 2014, Division I denied the Port's Motion to Reconsider. This Petition for review follows.

VII. ANALYSIS IN SUPPORT OF PETITION FOR REVIEW

The above record evidences that Mr West wasted the port and the Court' time and money with his unsuccessful 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 properly prosecute his Public Records Act claim. Despite the above record, Division I chose expressly to ignore record events and reverse the Trial Court's discretionary dismissal. This Court should accept review under RAP 13.4(b)(1), (2) and (4) and reinstate the dismissal for the following reasons.

A. The Limits of Trial Court's Discretion Where Unacceptable Litigation Practices Exist Is An Issue Of Substantial Public Interest, and Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1), (2) and (4).

This issue of a Trial Court's inherent discretion to manage it calendar and the efficiency of the Court is an issue of significant public interest. Every Court of justice has inherent power to control the conduct

of litigants who impede the orderly conduct of proceedings, and accordingly, a Court may, in its discretion, place reasonable restrictions on any litigant who abuses the judicial process. *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997). The Supreme Court should accept review either because the Appeals Court ruling below conflicts with this Court's rulings in *Gott*[15], *Thorp Meat*[16], and *Wallace,*[17] and or to more clearly clarify that CR 41(b)[18] is not an absolute bar to exercise the Court's exercise of inherent authority.

CR 41 was adopted in 1967. The provision barring dismissal when an action has been noted for trial was added to the rule in 1967. *Thorp Meats,* at 167-68. CR 41 is repeatedly cites as a limitation on a court's exercise of inherent authority when dismissal is sought for untimely prosecution. "..[a] court of general jurisdiction has the inherent power to dismiss actions for lack of prosecution, *but only when no court rule or statute governs the circumstances presented.*" *Thorp Meats,* 110 Wash.2d at 166-67, 750 P.2d 1251 (emphasis added) (footnote omitted) (citing

---

[15] *Gott v. Woody*, 11 Wash.App. 504, 507, 524 P.2d 452 (1974)).
[16] *Thorp Meats,* 110 Wash.2d at 166-67, 750 P.2d 1251 (1988)
[17] *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997).
[18] (b) Involuntary Dismissal; Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her. (1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

State ex rel. Dawson v. Superior Court, 16 Wash.2d 300, 304, 133 P.2d 285 (1943)).

"Where the provisions of CR 41 (b)(1) and its predecessors apply, dismissal of an action is mandatory; there is no room for the exercise of a trial court's discretion." *Thorp Meats,* 110 Wash.2d at 167,750 P.2d 1251.

> ...the 1967 [version of CR 41(b)(1)] 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 Wash.App. 504, 507, 524 P.2d 452 (1974)).

However, by express terms, CR 41 is **not** a limitation of the Court's independent authority to manage a case, including dismissal where so warranted. (CR 41 (b)(2((D) *Other Grounds for Dismissal and Reinstatement:* "This rule is ***not a limitation*** upon any other power that the court may have to dismiss or reinstate any action upon motion or otherwise".) While the *Gott, Wallace* and *Thorp Meat* cases all speak to the limitations which CR 41 places on a trial court's authority, each case of these post-1967 adoption of CR 41 also makes clear that Court's discretion is **not limited** by CR 41 where other types of unacceptable litigation practices also exist:

- *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997), quoting *Gott*: ("[T]he trial court's inherent discretion [to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings which are made] is not questioned by our interpretation.").

- *Gott v. Woody*, 11 Wash.App. 504 (1974) 524 P.2d 452, ("We do not believe, as defendants contend, that this interpretation will seriously invade the discretionary power of the superior court to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings which are made. In these areas the trial court's inherent discretion is not questioned by our interpretation.")

- In *Snohomish County v. Thorp Meats* 110 Wn.2d 163, 750 P.2d 1251 (1988) ,this Supreme Court observed that "[t]his interpretation [of CR 41(b)(1)] does not destroy a trial court's inherent authority to manage its calendar. Where dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains." *Thorp Meats,* 110 Wn.2d at 169.

See also Wagner v. McDonald, 10 Wn.App. 213, 516 P.2d 1051 (1973) (dismissal for want of prosecution where plaintiff failed to appear at trial). *See also Woodhead v. Discount Waterbeds, Inc.,* 78 Wn.App. 125, 896 P.2d 66, where failure to effect service on any of the defendants during the 4 months after he filed the complaint and for his failure to file a confirmation of service as required by King County Local Rule ("KCLR") 4.2.

Gott, Thorp Meats & Wallace v. Evans all expressly allow for dismissal based on "Dilatoriness of a type not described by CR 41(b)". Where dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains. "Dilatoriness of a type not described by CR 41(b)(1)" refers to unacceptable litigation practices other than mere inaction, whatever the duration. *Thorp Meats,* 110 Wash.2d at 169, 750 P.2d 1251.

Mr West's pattern of abusive litigation tactics and court rule violations noted herein is exactly the dilatory behavior of a type not described by CR 41(b), upon which the Trial Court properly exercised discretion to dismiss. The record before the Trial Court includes all of the extracurricular related lawsuits and at least the following egregious actions, in violation of statute, Court rule or Order, by Mr West which together form a pattern of dilatoriness of a type not described by CR 41(b)(1), and upon which the Trial Court properly exercised its inherent authority to dismiss this case:

CP 450-451 CP 341 CP 930	West improper notes a Motion on two days' notice, and, at a time when he knew Port Counsel unavailable and concealment from the Court, that Port Counsel was out of town& failure to confirm the hearing- Violation of PCLR 7(a)(8) Confirmation of Motions & Court's Scheduling Order. Violation of PCLR 7 (six court days of notice required and service required upon all parties), CR 11 (Motions and Memoranda must be well-grounded in fact and not interposed for any improper purpose).
CP 926	West's failure to appear at his own contempt proceeding - Violation of RCW 7.21.020 (A judge may initiate a proceeding impose a contempt sanction), CR 77 (Every court of justice has power to compel the attendance of persons to testify in a proceeding therein),
CP 927	West's failure to appear at his own dismissal presentment hearing) -Violation of CR 77 (Every court of justice has power to compel obedience to its judgments and decrees),
CP 450-451	West's misrepresentations to the Court - Violation of CR 11 (Motions and Memoranda must be well-grounded in fact and not interposed for any improper purpose).
CP 359-363 CP 464-474	West's filing an improper Personal Restraint Petition as a way to protest being found in civil contempt for the "verbal outburst" in the Trial Court. West further wasted this Court's time by filing an "emergency stay" and for an injunction. - Violation of RAP 18.9 (Use of RAP for

	frivolity and purpose of delay sanctionable), CR 11 (Pleadings must be well-grounded in fact), PCLR 7 & CR 59 (Providing for reconsideration of adverse court decisions)
CP 483-502	West's suing in federal court the Port of Tacoma, Pierce County, the Port's Legal Counsel [hyperbolically-labeled] "Illegal Special Prosecutor Lake," the Hon. Fleming, Hon. Edwards, Pierce County Presiding Judge Hon. Chushkoff, Secretary of Washington State Sam Reed, and others, again directly related to this instant case. Case No. C10-5547-RJB; Here, West sought habeus corpus relief from Judge Edward's Order finding West in civil contempt finding, and also the Respondent argued that the defendants had engaged in a conspiracy to deprive the Respondent of civil rights and caused "economic and personal assaults." - Violation of PCLR 7 & CR 59 (Providing for reconsideration of adverse court decisions), FRCP 11 (Claims must be warranted by existing law, grounded in fact, and not presented for any improper purpose, such as to harass).
CP 595-363 CP 483-502	West joining-suing Port counsel in both this Court and Federal Court lawsuits involving Judge Edwards (CP 359-363, 383-502).- Violation of FRCP 11 (Claims must be warranted by existing law, grounded in fact, and not presented for any improper purpose, such as to harass).
CP 774	West refusing to pay $1,500 sanctions upon which further proceedings were conditioned for eighteen months - Violation of PCLR 3 (case schedule), CR 11 (authorizes sanctions for improper pleadings and claims).

Other post 1967 adoption of CR 41 cases also have allowed discretionary dismissal for **failures to appear, filing late briefs, and similarly egregious sorts of dilatory behavior**. *E.g., Apostolis v. City of Seattle,* 101 Wash.App. 300, 305, 3 P.3d 198 (2000). Here, the Slip Opinion indicates that the Court of Appeals expressly ignored two failures to appear, and also the West's intentional misleading of the Court. In so doing the Slip Opinion conflicts with numerous prior Court decisions, which supports accepting this petition.

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

The Trial Court's power to discretionarily dismiss a case for unacceptable litigation practices is "inherent." *Snohomish County v. Thorpe Meats*, 110 Wn.2d 163, 166, 750 P.2d 1251 (1988) ("A court of general jurisdiction has inherent power to dismiss actions for lack of prosecution..."); *Wallace v. Evans*, 131 Wn.2d 572, 577-578, 934 P.2d 662 (1997) ("[T]he trial court's inherent discretion [to manage its affairs, so as to achieve the orderly and expeditious disposition of cases, to assure compliance with the court's rulings and observance of hearing and trial settings which are made] is not questioned by our interpretation."). Here, the decision below improperly limits the Trial Court's well-established discretionary power to dismiss extremely vexatious litigants. This Court

should accept and review the decision below as a matter of substantial public interest.

B. Appeals Court Ruling Below Conflicts with Supreme and Court of Appeals Rulings. RAP 13.4(b)(1) and (2).

Selected patterns of misconduct from the Washington Court of Appeals and Supreme Court resulting in undisturbed, discretionary dismissal includes:

- Division 1 Court of Appeals: The King County Superior Court dismissed the petition for review with prejudice on two separate grounds: first, as a sanction for deliberate failure to follow the case schedule and court orders....*Apostolis v. City of Seattle*, 101 Wn.App. 300, 301, 3 P.3d 198 (Div. 1, 2000).
- Division 1 Court of Appeals: "[W]illful and deliberate failure to effect service and to comply with the case scheduling order and the requirements of KCLR 4.2, **together with the deliberate attempts to mislead the court by false claims**, justifies the trial court's conclusion that the actions in this case amounted to an abuse of judicial process. *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn.App. 125, 131, 896 P.2d 66 (Div. 1, 1995).
- Supreme Court of Washington: Parties to the action are entitled to have the trial court consider and determine whether the action should be dismissed for want of prosecution independent of [CR 41 predecessor Rule] because plaintiff failed to continue making filings in the case for a protracted period, then noted a trial to escape operation of CR 41-predecessor. *Stickney v. Port of Olympia*, 35 Wn.2d 239, 241, 212 P.2d 821 (1950).

Here, Mr West's behavior activated the Court's discretion to involuntarily dismiss him. West's unacceptable litigation behavior in this case eclipses the fact patterns above. The Appeal Court's reversal of the Superior Court's exercise of discretion is contrary to the Supreme Court and

Appellate Court decisions listed above. Therefore, this Court's acceptance of review is supported by RAP 13.4(b)(1) and (2): (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.

C. Appeals Court Ruling Also Conflicts With Prior Supreme Court Cases Holding That Appellate Substitution Of Discretion In Areas Reserved For Trial Court Discretion Constitute Reversible Error. RAP 13.4(b)(1) and (2).

"A court of general jurisdiction has the inherent power to dismiss pending actions if not diligently prosecuted the exercise of such power, in the absence of statute or rule of court, being in the discretion of the court." *Stickney v. Port of Olympia*, 35 Wash. 2d 239, 241, 212 P.2d 821, 822 (1949). A discretionary dismissal will be reviewed for an abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). Appellate courts are loath to substitute their discretion for that of the trial court, which is what actually occurred here.

An appellate court should not substitute its own judgment for that of the trial court, but rather, look to whether the court's exercise of discretion was manifestly unreasonable, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *overruled* on other grounds by RCW 71.05.390, *explained by Seattle Times Co. v. Benton Cnty*, 99 Wn.2d 251, 263 661 P.2d 964 (1983).

A trial court abuses its discretion only if its decision is manifestly unreasonable or rests upon untenable grounds or reasons. *In re Marriage of Littlefield,* 133 Wash.2d 39, 46–47, 940 P.2d 1362 (1997). "An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court." *Holaday v. Merceri,* 49 Wash.App. 321, 324, 742 P.2d 127 (1987). A discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Rivers v. Washington State Conference of Mason Contractors,* 145 Wn.2d 674, 41 P.3d 1175 (2002). *And see In re Marriage of Littlefield,* 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997). The Trial Court Dismissal would be unreasonable ONLY if it was "outside the range of acceptable choices, given the facts and the applicable legal standard." *Id.* at 47. A trial court's decision "is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). When reviewing for abuse of discretion, the Appellate engages in "careful" review of record. *State v. Noble*, 74 Wn.2d 963, 442 P.2d 1000 (1968). Here, the Court of Appeals Slip Opinion acknowledges record events (failure to appear and misleading the Court) that directly sustain the Trial Court's decision under controlling precedent.

> The Port argues that the trial court also had inherent authority to dismiss West's case (1) for allegedly

> misleading the court by noting motions on dates he knew the Port's attorney was unavailable, and (2) for failure to appear at hearings on August 2, 2010 and August 9, 2010. Because neither basis is cited as justification for dismissal in the trial court's order, we do not address these arguments.

Slip. Op. 6, n. 7. Yet, the Court of Appeals expressly chose to *ignore* those record events, and reverse the Trial Court. This Supreme Court of Washington recently held such substitution to be reversible error. *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) ("In reaching this conclusion, the Court of Appeals appears to have substituted its own judgment for that of the trial court...We will not substitute our own judgment in evaluating the scope and effect of that misconduct"). This Court should accept review because the Appeals Court decision contravenes prior Appeals Court and Supreme Court decisions prohibiting such substitutions of judgment.

Further, here, the record below supports that the trial court's dismissal was reasonable, and thus not an abuse of discretion, for at least the following rationales upon which exercise of its inherent power to dismiss was based:

(1) West' s willful or deliberate refusal to obey a court order or rule, and
(2) want of prosecution combined with Mr West's abuse of process.

BOTH reasons support the dismissal of West's suit.

i. Courts Have Inherent Authority Dismissal For Willful Violation Of Court Order Or Rule.

When a trial court imposes dismissal or default in a proceeding as a sanction, it must be apparent from the record that (1) the party's refusal 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 would probably have sufficed. *Burnet v. Spokane Ambulance,* 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) *citing Snedigar v. Hodderson,* 53 Wn.App. 476, 487,768 P.2d 1 (1989), *aff'd. in part, rev'd in part,* 114 Wn.2d 153, 786 P.2d 781 (1990).

Here, the record below amply supports West's repeated non-compliance with court rules, and accordingly the Trial Court's exercise of inherent authority to dismiss was **not** an abuse of discretion and the Appeals Court erred in so finding. "Dismissal is an appropriate remedy where the record indicates that '(1) the party's refusal to obey 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 would probably have sufficed.'" *Will v. Frontier Contractors, Inc.*, 121 Wn.App. 119, 129, 89 P.3d 242 (Div. 2, 2004); *quoting Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). A party's disregard of a court order or rule without reasonable excuse or justification is deemed willful. *Woodhead,* 78 Wn. App. at 130.

ii. The record amply shows West's refusal to comply with court rules was willful or deliberate, the first element is

met.[19]

The Trial Court's Order Granting the Port's Motion to Dismiss, CP 764-778, expressly concluded that West willfully and or deliberately disobeyed a court order:

13. 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 and
(3) the trial court explicitly considered whether a lesser sanction would probably have sufficed." *See Rivers,* 145 Wash.2d at 686, 41 P.3d 1175.
14. A party's disregard of a court order without reasonable excuse or justification is deemed willful.

Mr. West's Abuse of Process

15. Petitioner West's failure to timely prosecute this PRA case and failure to timely abide by the Court's Sanction Order was without justification or excuse, and was therefore willful.
16. In addition, Plaintiff choose to pursue extended and unfounded litigation actions in various courts, all to avoid complying with the sanctions issued by this Court, failed to timely pay costs imposed against him by this Court and failed to timely pursue the issues in this cause with a lapse of nearly two years (July 2010 through March 2012).
17. Plaintiff's actions provide this Court with ample grounds to support discretionary dismissal for abuse of process.

Order Granting Port Motion to Dismiss 13 ¶¶ 15-16. CP 776.

Further, the Division I Slip Opinion acknowledges:

> The Port argues that the trial court also had inherent authority to dismiss West's case (1) for allegedly misleading the court by noting motions on dates he knew the Port's attorney was unavailable, and (2) for failure to appear at hearings on August 2, 2010 and August 9, 2010. Because neither basis is cited as justification for dismissal

[19] An appellate court may affirm trial court on any correct ground. *See Nast v. Michels,* 107 Wash.2d 300, 308, 730 P.2d 54 (1986).

> in the trial court's order, we do not address these arguments.

The Order entered on July 26, 2010 is included in the Clerk's Record at 340-344. That Order finds both that Mr. West was aware of Port Counsel's unavailability and nevertheless decided to schedule and conduct show cause hearing.

In addition to al the above, the Transcript of the Court's ruling provides the additional findings which amply supports the Trial Court's exercise of discretion:

> There was a period of almost two years, over a year and a half, where Mr. West refused to comply with the sanctions ordered issued by this Court.
>
> And during that same period of time, pursued closely-related litigation in Federal Court, which resulted not only in the dismissal of that related litigation, but in a bar order being entered by Judge Leighton, who found that Mr. West was a vexatious litigant who had abused his privilege to request judicial relief.
>
> It is clear to this Court that Mr. West has willfully and deliberately disregarded the order of this Court/ did so from the date that the order was made, until 18 months later when he apparently decided that he didn't have any other avenues available to him to continue his litigious conduct directed at the Port.
>
> I believe that his conduct has substantially interfered with the efficient administration of justice. I think that he has intentionally interfered with the administration of justice in this court.

Transcript June 12, 2012, TR 43: 4-24. Emphasis added. Therefore, the record, (which is all that is required to support the exercise of discretion) in addition to and independently of the Order dismissing, satisfies the first

element of a discretionary dismissal – willful disregard of a court rule or order[20].

iii. The Record & Court's Order amply shows Mr West's actions substantially prejudiced the Port, the second element is met.

In its Order Granting the Port's Motion to Dismiss, 764-778, at subheading **"Substantial Prejudice to the Port,"** emphasis original, the Trial Court concluded that Mr West substantially prejudiced the Port.

18. This is a Public Records Act case, in which potentially, a "per day" penalty is at issue.
19. Imposition of a "per day" penalty is mandatory.
20. Each day of the Petitioner's delay adds to the risk of the Port incurring a per day penalty.
21. Public Records cases are by nature fact dependent. Witness memories are affected and lessened by the extended lapse of time.
22. The extended lapse of time in this case substantially prejudices the Port and is directly attributable to Plaintiff West's own actions.
23. Thus West's pattern of delay represents real potential for substantial prejudice against the Port in this case.
24. In addition, the Port is substantially prejudiced due to the Port's willful and protracted failure to pay contempt sanctions Order by this Court and Plaintiff's pursuit of frivolous related litigation in other Courts rather than to prosecute his matter in this Court, which required the Port to litigate West's other lawsuits and filings, while continuing to invest attorney time in the instant matter, at a substantial cost to the Port taxpayers.

The Trial Court properly found that the taxpayer-funded Port had been prejudiced by the Respondent's refusal to respect or obey legal processes and orders. Further, the Trial Court expressly and correctly found that Respondent-caused extensive delay and costs to the Port in this case

[20] An Appellate Court "may affirm the trial court on any correct ground, even though the trial court did not consider that particular ground." *Wallace v. Lewis Cnty.*, 134 Wn.App. 1, 12, 137 P.3d 101 (Div. 2, 2006); *citing Nast v. Michels,* 107 Wn.2d 300, 308, 730 P.2d 54 (1986).

hinders the Port's ability to defend. The Court's verbal ruling granting the Dismissal ***amplifies*** the Court's finding of prejudice, not only to the Port – but also to the Court:

> The Port of Tacoma has clearly been prejudiced by his conduct in multiple ways, not the least of which is that the Port has expended almost $200,000 in defending these various lawsuits brought by Mr. West, all arising out of a single public records request.
>
> And, we have a judicial need in the Superior Court of this county of almost four judges, and we have three. We have two court reporters. We have one third of the staff that is recommended by the administrative office of the courts.

Transcript June 12, 2012, TR 43:25 – 44:1-9. Emphasis added. Therefore, the second element of prejudice to the Port is met.

iv. The Trial Court expressly considered – and previously imposed - a lesser sanction, the third and final element is met.

The Trial Court' expressly considered lesser sanctions, and concluded that a lesser sanction would not do:

> 18. The Court also finds no lesser sanction will do.
> 19. 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.
> 20. These previous sanction shave not cured Mr. West's abuses of process.
> 21. The sanction of dismissal for want of prosecution and abuse or process recognizes and cures the substantial prejudice caused to the Port, and no lesser sanction will do.

Order Granting Port Motion to Dismiss. CP 764-778. The Court's verbally Ruling further makes clear the Court's thoughtful exercise of its discretion:

> Our resources are valuable, and our recourses are scarce. And, when litigants waste the resources of this Court through the type of conduct exhibited by Mr. West in this case, dismissal becomes the only reasonable sanction to address the conduct.
>
> The motion to dismiss is granted.

Transcript June 12, 2012, 44:9-14. Emphasis added. The third and final element is satisfied; the Court expressly considered (and imposed) lesser sanctions.

The record establishes all three elements for proper exercise of a court's discretion to sanction, as established in Washington's common law. The Appeals Court ruling overturning the Trial Court's dismissal improperly substitutes its own judgment for that of the Trial Court and the dismissal conflicts with prior decisions of both this Court and the Court of Appeals. Review should be accepted and the dismissal re-instated.

VIII. CONCLUSION

The record below amply supports that West routinely violated court rules and orders, and engaged in dilatory behavior not anticipated by CR 41, all sufficient to support the Trial Court's exercise of inherent authority to dismiss. The issue of a Trial Court's inherent discretion to manage its calendar and the efficiency of the Court is an issue of substantial public interest that should be determined by the Supreme Court. The Supreme Court should accept review either because the Appeals Court ruling below conflicts with this Court's rulings and or to more clearly clarify that CR 41 is not an absolute bar to exercise the Court's exercise of inherent

authority.

RESPECTFULLY SUBMITTED this 7th day of July, 2014.

GOODSTEIN LAW GROUP PLLC

By: _____

Carolyn A. Lake, WSBA #13980
Seth S. Goodstein, WSBA No. 45091
Attorneys for Petitioner Port of Tacoma
501 South G Street Tacoma, WA 98405
(253) 779-4000 Fax: (253) 779-4411

UNPUBLISHED OPINION

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ARTHUR WEST, Appellant, v. CONNIE BACON, CLARE PETRICH DON JOHNSON, TED BOTTINGER TIM FARKELL, RICHARD NARZANO, MARK LINDQUIST, PIERCE COUNTY PROSECUTING ATTORNEY, and PORT OF TACOMA, Respondents.	)	No. 71366-3-I DIVISION ONE UNPUBLISHED OPINION FILED: April 28, 2014

SPEARMAN, C.J. — A trial court may dismiss a case for want of prosecution under CR 41(b)(1) unless the case is noted for trial before the hearing on the motion to dismiss. Because the appellant in this case noted the matter for trial before the trial court heard the motion to dismiss, it was error to dismiss the case on this ground. We further hold that, while trial courts have inherent authority to dismiss a case for dilatoriness of a type not described in CR 41(b)(1), in this case, because the grounds relied on by the trial court are not supported by the record, dismissal was an abuse of discretion. We reverse and remand for further proceedings.

FACTS

On October 6, 2009, Arthur West filed this case against the Port of Tacoma (the Port) in Pierce County Superior Court. He alleged, among other things, that various Port officials had violated the Public Records Act (PRA). On July 26, 2010, the trial court heard the Port's motion to dismiss West's claims, alleging they were duplicative of claims made in a previous lawsuit.[1] The trial court granted the Port's motion as to one of the claims and sanctioned West in the amount of $1500, payable to the Port. The order did not set a date by which payment was to be made. In addition, during the course of the hearing, West repeatedly interrupted the proceedings and the court held him in contempt for being "disorderly, insolent to the Court and disrupt[ing] the hearing." Clerk's Papers (CP) at 357. A hearing to determine sanctions for the contempt finding was set for August 2, 2010. West failed to appear. He also failed to appear at a subsequent hearing on August 9, 2010. Verbatim Report of Proceedings (VRP) (08/09/10) at 18. It is unclear from the record whether sanctions were ordered for West's contempt or for his failures to appear. West took no further action in this case until the spring of 2012.

[1] West had filed a separate PRA claim against the Port in 2008. That claim arose from a request for documents that involved tens of thousands of pages of possible responsive records. The lawsuit was initially dismissed based on West's failure to prosecute the suit (citing the lapse of 18 months with no plaintiff action, willful disregard of court orders, and failure to abide by the case schedule). West appealed the dismissal, and Division II of this court reversed the trial court's order and remanded for further proceedings. West v. Port of Tacoma, No. 43004-5-II, 2014 WL 689739.

During the intervening twenty-months, West filed two related cases in other forums, seeking, among other things, relief from the contempt order in the present matter. First, in July 2010, he filed a personal restraint petition (PRP) in the Washington Supreme Court, in which he claimed that the Port's counsel in the present case had illegally acted as a "special prosecutor" when, at the direction of the court, she prepared the orders of contempt. He also claimed the trial judge's imposition of sanctions based on the finding of contempt was a violation of his due process rights.[2] Less than two weeks later, he filed a suit in the Western District of Washington, which named as defendants three Pierce County judges—including the trial judge in the present matter—several Port Commissioners, and the Port's attorney.[3]

On March 19, 2012, the trial court case set a status conference for April 6, 2012. In response, West retained counsel, who filed a notice of appearance on March 26, 2012. He also paid the $1500 sanction on April 16, 2012. The Port responded on April 5 with a notice of intent to file a motion to dismiss. On May 11, 2012, West served the Port with a notice of deposition of Port officials, which he re-noted once due to opposing counsel's unavailability, and again after the Port filed an unsuccessful Motion to Quash pursuant to CR 26(i). On May 30,

---

[2] West also filed a motion for injunction and requested an emergency stay of proceedings in the current case. The Supreme Court dismissed West's PRP and denied his motion for reconsideration, issuing a Certificate of Finality on April 5, 2011.

[3] West again claimed that counsel for the Port acted as illegal "Special Prosecutor" in the present matter. He also claimed, among other things, that the judges and Port officials had conspired to deny him rights under the PRA and retaliated against him for asserting his rights under the PRA. The federal court granted a defense motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted on June 15, 2011.

2012, West filed a Note for Trial Setting with a trial date of November 14, 2012, and moved the court for issuance of a case schedule order.

On June 1, 2012, the Port filed a motion to dismiss with a hearing set for June 12. CP at 673-74. The trial court, relying on CR 41(b) and its inherent authority to dismiss, granted the Port's motion.[4] West appeals.

DISCUSSION[5]

CR 41(b) provides in relevant part:

> Involuntary Dismissal Effect. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.
>
> (1) Want of Prosecution on Motion of Party. Any civil action shall be dismissed, without prejudice, for want of prosecution whenever the plaintiff, counterclaimant, cross claimant, or third party plaintiff neglects to note the action for trial or hearing within 1 year after any issue of law or fact has been joined, unless the failure to bring the same on for trial or hearing was caused by the party who makes the motion to dismiss. Such motion to dismiss shall come on for hearing only after 10 days' notice to the adverse party. If the case is noted for trial before the hearing on the motion, the action shall not be dismissed.

---

[4] Although the order cites CR 41(b)(2) as one basis for the dismissal, this appears to be a scrivener's error. That subsection provides for dismissal on motion of the court clerk and requires the clerk to accomplish a number of procedural steps before so moving. Here, it is apparent that the clerk did not make the motion and the record does not reflect that the required procedural were steps taken. In addition, neither party makes reference to subsection (b)(2) in their briefing.

[5] The Port requests that we take judicial notice of documents from three other cases filed by West, which it appends as exhibits to its brief. Brief of Respondent at 48-49, ex. 1-4. Two of the documents are taken from West v. Port of Tacoma, No. 43004-5-II, 2014 WL 689739 (supra, n.1). The third document is a copy of the docket reflecting dismissal of West's appeal of the federal court bar order. The fourth document is a page of transcript of an oral argument in West v. Wash. Assoc. of Cities, et al., Division Two Cause No. 40865-I-II. We grant the Port's motion as to the first two exhibits because the parties, claims and issues in that case are nearly identical to those in this case and are thus, properly subject to judicial notice. Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).
The request is denied as to the third and fourth documents.

(Emphasis added). Whether a trial court properly dismissed an action for want of prosecution under CR 41(b)(1) is a question of law, reviewed de novo. State ex rel. Heyes v. Superior Court for Whatcom Cy., 12 Wn.2d 430, 433, 121 P.2d 960 (1942). Likewise, the application of a court rule to a particular set of facts is a question of law reviewed de novo. Wiley v. Rehak, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

West argues that the trial court had no authority to dismiss the case for failure to prosecute under CR 41(b)(1) because he noted the case for trial before the hearing on the Port's motion to dismiss. We agree. When a trial court rules on a motion for dismissal based on inaction in bringing the case to trial, it is bound by the explicit language of CR 41(b)(1). Snohomish Cy. v. Thorp Meats, 110 Wn.2d at 163,169-70, 750 P.2d 1251 (1988). "The final sentence of CR 41(b)(1) means precisely what it says, a case shall not be dismissed for want of prosecution if it is noted before the hearing on the motion to dismiss." Thorp, 110 Wn.2d at 169-70; see also Walker v. Bonney-Watson Co., 64 Wn. App. 27, 37, 823 P.2d 518 (1992). Here, because it is undisputed that West noted the case for trial before the hearing on the Port's motion to dismiss, the trial court erred when it relied on CR 41(b)(1) as a ground for granting the Port's motion.

Next, we consider whether the trial court had inherent authority to dismiss West's case based on dilatoriness of a type not described in CR 41(b)(1). "When the Court's inherent power to dismiss for want of prosecution is at issue the trial court's decision is reviewed under the abuse of discretion standard." Stickney v. Port of Olympia, 35 Wn.2d 239, 241, 212 P. 2d 821 (1950); see also, Bus. Serv.

of Am. II v. WafterTech, LLC, 174 Wn.2d 304, 316, 274 P.3d 1025, (2012). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) 443.

Where, as here, the trial court also makes findings of fact and conclusions of law, we review the trial court's conclusions of law to determine if they are supported by the findings of fact and if, in turn, those findings are supported by substantial evidence. Nelson Const. Co. of Ferndale, Inc. v. Port of Bremerton, 20 Wn. App. 321, 326-27, 582 P.2d 511 (1978). Undisputed findings are verities on appeal. Keever & Assoc., Inc. v. Randall, 129 Wn. App. 733, 741, 119 P.3d 926 (2005).

CR 41(b) states in relevant part:

> [f]or failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him or her.

The rule has been interpreted as a codification of the trial court's inherent discretionary power to manage its affairs. Thorp Meats, 110 Wn.2d at 170; Gott, 11 Wn. App. at 507. Thus, "'[w]here dilatoriness of a type not described by CR 41(b)(1) is involved, a trial court's inherent discretion to dismiss an action for want of prosecution remains.'" Thorp Meats, 110 Wn.2d at 169; see also, Will v. Frontier Contractors, Inc., 121 Wn. App. 119, 128, 89 P.3d 242 (2004); Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 131, 896 P.2d 66 (1995); Jewell v. Kirkland, 50 Wn. App. 813, 822, 750 P.2d 1307 (1988).

In this case, the trial court relied on its inherent power to dismiss because West: (1) failed to timely comply with the trial court's sanction orders and (2) engaged in an abuse of process—specifically, his pursuit of "extended and unfounded litigation actions in various courts, all to avoid complying with the sanctions issued by [the trial] [c]ourt. . . ."[6] CP at 776. West contends that the trial court abused its discretion when it granted the motion to dismiss on these grounds because neither reason finds support in the record. We agree.

Dismissal for failure to comply with a court order is an appropriate sanction only where the record demonstrates 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) no lesser sanction would have sufficed.

Will, 121 Wn. App. at 128 (citing Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002)). In Will, the plaintiff, Will, moved for leave to amend his complaint. He served the defendant, Frontier, with the motion and the proposed amended complaint. The court granted the motion on May 31, 2002. Subsequently, on four separate occasions Frontier requested a copy of the amended complaint. Will did not respond until the fourth request, nearly seven months later, in December 2002. Frontier was

---

[6] The Port argues that the trial court also had inherent authority to dismiss West's case (1) for allegedly misleading the court by noting motions on dates he knew the Port's attorney was unavailable, and (2) for failure to appear at hearings on August 2, 2010, and August 9, 2010. Because neither basis is cited as justification for dismissal in the trial court's order, we do not address these arguments.

dissatisfied with the response because the amended complaint still named defendants and asserted claims that had been dismissed on summary judgment. When Will did not respond to Frontier's further complaints, Frontier moved to dismiss. The trial court granted the motion.

On appeal, we reversed, in part, because "[t]he order granting ... 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. We distinguished this circumstance from those in Jewell v. City of Kirkland, 50 Wn. App. 813, 750 P.2d 1307 (1988)). In that case, Jewell appealed the trial court's dismissal of a petition for a writ of certiorari in a land use matter to the superior court. The superior court ordered that Jewell provide funds to the City for the preparation of the record within thirty days of the date of the order, but the funds were not provided until nearly three weeks beyond the due date. We affirmed the superior court's dismissal of the case under CR 41(b) on grounds that Jewell had willfully failed to abide by the time limits specified in the court order. Id. at 822.

Here, as in Will, the trial court's order required that $1500 be paid, but did not establish a date by which it was to be paid. Because West complied with the order as written, albeit nearly two years later, the evidence is insufficient to conclude that he willfully or deliberately failed to abide by the court's order. Thus, the trial court abused its discretion when it relied on this ground to dismiss the case.

We also conclude that the trial court abused its discretion when it relied on West's "abuse of process" to dismiss this case. The trial court cited Woodhead,

78 Wn. App. at 132, in support of its decision, however, the case is distinguishable. In Woodhead, we considered whether an appellant's failure to comply with court orders or court rules "together with" other egregious acts—there, deliberate attempts to mislead the court by making false statements—constituted an abuse of process that warranted dismissal. Id. at 131. But, because, as discussed above, West's delay in paying the sanctions was not a willful or deliberate violation of the trial court's sanction order, the fact that he filed baseless claims in other courts, was insufficient, by itself, to find an abuse of process in this case. Thus, dismissal on this basis was an abuse of discretion.

We also conclude that the third prong of Will, which requires a showing that no lesser sanction than dismissal will suffice, is not satisfied here. The trial court noted that West had been fined $1500 and found in contempt in the present matter. It also noted that bar orders were issued by other courts. After the imposition of these sanctions, the trial court made no finding that West engaged in any other misconduct. By contrast, the record shows that after the sanctions, West retained counsel, paid the terms ordered to the Port, 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 there is nothing in the record to support this allegation and the trial court did not enter any finding to that effect. Because the sanctions imposed by the trial court and by the other courts had the desired effect, the severe sanction of dismissal in this case was unwarranted.

Attorney Fees and Costs

West requests an award of attorney fees and costs pursuant to RAP 18.1 and RCW 42.56.550. RAP 18.1 provides in relevant part:

> (a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RCW 42.56.550(4) provides for an award of attorney fees and costs to any "person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time. . . ." Because success on appeal does not make West the prevailing party, but rather, the merits of his claim will be remanded for trial, we deny West's request for fees and costs.

The Port also requests an award of attorney's fees as a sanction against West for filing a frivolous appeal, pursuant to RAP 18.1, RAP 18.9, and RCW 4.84.185. Given our resolution of this case, we deny the Port's request.

We reverse and remand.

Spearman, C.J.

WE CONCUR:

Leach, J.

Grosse, J. Pro Tem

ORDER DENYING RECONSIDERATION

RICHARD D. JOHNSON,

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA

June 6, 2014

Carolyn A. Lake
Goodstein Law Group PLLC
501 S G St
Tacoma, WA, 98405-4715
clake@goodsteinlaw.com

Arthur West
120 State Ave NE #1497
Olympia, WA, 98501

CASE #: 71366-3-I
Arthur West, Appellant v. Port of Tacoma, et al., Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion For Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson

Court Administrator/Clerk

LAM

Enclosure

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ARTHUR WEST, Appellant, v. CONNIE BACON, et al., and PORT OF TACOMA, Respondent.	)	No. 71366-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent Port of Tacoma filed a motion for reconsideration of this Court's opinion dated April 28, 2014. A majority of the panel has determined this motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 6th day of June 2014.

Presiding Judge

THE SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST APPELLANT, V. PORT OF TACOMA RESPONDENT.	NO. DECLARATION OF SERVICE (Court of Appeals, Div. I No. 71366-3)

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and the following documents:

1. PETITION FOR REVIEW BY THE SUPREME COURT

to be served on July 7, 2014 to be served on the following parties and in the manner indicated below:

Arthur West
120 State Avenue, N.E. #1497
Olympia, WA 98501
Email: awestaa@gmail.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[ ] by Facsimile
[X] by Electronic Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of June 2014 at Tacoma, Washington.

Carolyn A. Lake

ORIGINAL