COA No. 49207-5-II

In the Supreme Court
of the State of Washington

Arthur West,

Appellant,

v.

Bacon, Port of Tacoma, **et al**

Respondents.

Petition for Review

Arthur West
120 State Avenue NE #1497
Olympia, WA 98501
360-593 4588

A. IDENTITY OF PETITIONER

Comes now Appellant West and respectfully moves for relief designated in Part B of this petition.

B. RELIEF REQUESTED

West requests review of the decision of the Washington State Court of Appeals for Division II in Case No. 49207-5-II filed Deeember 19, 2017, along with the final Order Denying Modification of February 21, 2018. (See Appendices I and II)

This case is virtually identical to Court of Appeals No. 48110-3-II, which was also determined in an unpublished Opinion, and for which a previous Petition for Review has been filed, concerning virtually identical issues. Appellant will move to consolidate the two virtually identical Petitions for Review for determination in the most efficient manner.

In both these rulings the Court of Appeals upheld an Order of Dismissal under the authority of Hobbs v. State Auditor, despite the fact that evidence in the record demonstrated that the port had a deliberate strategy of obstructing disclosure of project records until after a public relations presentation could be orchestrated and conducted, and despite the circumstance that, as in the Cedar Grove case, Hobbs was distinguishable.

In addition, the Court of Appeals in both cases awarded the Port Attorney fees for opposing a frivolous appeal despite the circumstance that the application of the new “Hobbs Rule” beyond the specific facts in

Hobbs was so uncertain that the Court of Appeals refused to publish its June 20, 2017 opinion.

The award of fees was also improper in that the decisions were contrary to over 40 years of previous practice under the PRA where the Courts routinely allowed cases to be filed prior to an agency completing its response, and determined PRA plaintiffs to be prevailing parties if the case was reasonably necessary to prompt an agency to disclose records.

It was also manifestly unfair for the Court to award the port fees when West had, in 2014, prevailed in the Court of Appeals in reversing two previous improper dismissals in the mirror image companion cases.

In addition, by allowing counsel for the port to maintain diametrically opposed positions as to the jurisdiction of the court in the two separate actions the court sanctioned a pattern of duplicity and misrepresentation that effected a deprivation of due process. The Court further, in the present action, arbitrarilly denied West the ability to bring a motion on spurious technical grounds, effecting a further denial od due process of law.

The decision meets the criteria for RAP 13.4 (b), and the Washington State Supreme Court should accept review, reverse and remand with instructions to the Trial Court to finally, after over a decade, address the actual issue of the ports' undisputed withholding of public records.

The June 20 2014 decision of the Court of Appeals is appended as Appendix A, and a Copy of the November 16 decision denying modification is attached as Exhibit B.

C. WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth (in pertinent portions) 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 published decision 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.

The issue of whether the Courts should adopt Hobbs as the new standard to bar the filing of cases prior to an agency completing its review, even those where the agency has been shown to deliberately delay disclosure and the agency subsequently withholds records presents issues that could radically undermine agency compliance with the PRA, in that under the new Hobbs Rule, agencies would be encouraged to delay disclosure as long as possible, rather than providing records.

The issue of whether the Court of Appeals properly awarded fees for a frivolous appeal based upon the new "Hobbs Rule" when it itself lacked enough confidence to publish its rulings to confirm the precedent it alleged to be so clearly established to begin with also presents an issue of substantial public importance

The public interest in clear unambiguous *published* precedent as to how the Hobbs Rule is to be applied, and the other serious issued posed by this case are properly subject to review under sections one, two, three and four of this rule.

RAP 13.4(b) Section 1 - The ruling conflicts with over 4 decades of Supreme Court precedent.

Review should be accepted because the proposed draconian application of the new "Hobbs Rule" conflicts with 4 decades of precedent interpreting the judicial review section of the PRA to allow actions to be filed prior to an agency's final response and definig the plaintiff as a prevailing party when the action could be reasonably seen to have caused disclosure.

A lawsuit under existing precedent need only to have been reasonably necessary to compel disclosure for a plaintiff to be a prevailing party in a PRA action. *Spokane Research*, 155 Wn.2d at 103. In *Spokane Research*, the Supreme Court explained,

> Rather, the "prevailing" relates to the legal question of whether the records should have been disclosed *on request*. Subsequent events do not affect the wrongfulness of the

> agency's initial action to withhold the records if the records were wrongfully withheld at that time. Penalties may be properly assessed for the time between the request and the disclosure, even if the disclosure occurs for reasons unrelated to the lawsuit. *Spokane Research*, 1 155 Wn.2d at 103-04 (emphasis added).

RAP 13.4(b) Section 2 - The ruling in Hobbs conflicts with decisions of Divisions I and III of the Court of Appeals

The pre-*Hobbs* precedent on which West reasonably relied upon (particularly considering that this suit was filed six years before this Court's decision in *Hobbs*) shows that PRA cases have been routinely accepted by this Court even without the "final agency action" required by the Court of Appeas' interpretation of *Hobbs*. *E.g., Hanggarner, West v. Department of Natural Resources*, 163 Wn. App. 235, 258 P.3d 78 (2011); *West v. Port of Olympia*, 146 Wn. App. 108, 92 P.3d 926 (2008).

As the Court of Appeals expressly acknowledged in both the June 20 and december 19 unpublished opinions, the new application of the "Hobbs Rule" also materially conflicts with Division I and III precedent as to what a "prevailing party" is under the PRA.

> Finally, to the extent West's citations to Violante v. King County Fire Dist. No. 20, 114 Wn. App. 565, 59 P.3d 109 (2002), are intended to support an assertion that his complaint was necessary to get the Port to respond, this argument is not persuasive. Violante is older than Hobbs and was decided by Division One of this court. Therefore, even if the holdings Violante and Hobbs were in conflict, which we do not consider, the precedent set by Violante does not bind this court.

Additionally, Division I of this Court has interpreted *Hobbs* in a manner that supports West's position. *E.g., Hikel*, 197 Wn. App. At 380; *Cedar Grove*, 188 Wn. App. at 714-15. The result is uncertainty and conflict in the true application of *Hobbs*.

The December 19, 2017 Decision of Division II is in conflict with the interpretation and application of *Hobbs* by Division I. To the extent it offers a different application, this Opinion modifies or clarifies the established principles from *Hobbs*. Because the decision affects and substantially alters prior practice as to when and how a requester of public records may bring an action for disclosure and penalties against an agency that violates the Public Records Act, this Petition presents an issue of general public interest or importance.

RAP 13.4(b) Section 3 - The violation of due process resulting from the port's duplicity in obtaining a disissal by denying the jurisdiction of the court in this second action based upon the jurisdiction of the court in the first and then subsequently also denying jurisdiction in the first action presents a significant question of law under the Constitution of the State of Washington the United States, as does the arbitrary ex post facto denial of the due process right to bring a motion.

The Court of Appeals improperly blamed West for not noting the May 10, 2008 Motion in the Trial Court, and refuses to address it by the pretext of ignoring that *the Motion Hearing was set by the Administrator for the Court*. The failure of the Court to allow West to reasonably rely upon the express Orders of the Court Administration denied due process of law under the 5th and 14th Amendments..

The Court also allowed the Port to duplicitously take the extra step —inconsistent with the later-asserted *Hobbs* defense—of obtaining dismissal of West's claims against the Port in *Port II* (this present case) by arguing that *Port I* (the prior companion case) was actually the proper venue for those claims.

The Port cannot have it both ways. West's claims in *Port II*, (this present case) having been brought **after** the Port completed its response to West's record requests, would have passed this Court's *Hobbs* analysis. By dismissing those claims as "duplicative" in favor of retaining West's claims in *Port I*, the Port necessarily accepted the *Port I* claims as equal to the *Port II* claims in every way—including in their timeliness. The position taken by the Port in *this present case* was entirely inconsistent with the Port's later assertion of the *Hobbs* defense in *Port I*. Under *Haywood* and *Lybbert* (cited by West in support of this argument in Br. of App. at 31), the Port waived the *Hobbs* defense through both delay and inconsistent actions.

It was a gross violation of due process of law to allow the port, by duplicitous pleading, to evade the jurisdiction of the court in both cases. It was an abuse of discretion and anunlawful taking in violation of the 5th Amendment and due process of law for the court to sanction West nearly $40,000 for attempting to address this duplicitous conduct and the uncertain application of Hobbes in the Court of Appeals.

West also cited *In re Marriage of Parks*, 48 Wn. App. 166, 170, 737 P.2d 1316 (1987) (a party waives the defense of lack of jurisdiction by affirmatively invoking the jurisdiction of the court). This supports West's argument that the Port waived its argument that the trial court lacked jurisdiction under *Hobbs* because the Port had already argued in *Port II* that the trial court **did have jurisdiction** here in *Port I*. In other words, if

the trial court lacked jurisdiction here under *Hobbs*, the Port must have misled the court in *Port II* to improperly obtain dismissal in that case. The trial court here should have remedied the Port's misconduct by applying the doctrines of waiver or judicial estoppel to deny the motion to dismiss.

West's arguments related directly to the central issue before this Court: the *Hobbs* defense. West argued that the Port had waived the defense through delay and inconsistent actions, and that Hobbs did not apply to the "duplicative" claims because the Port had completed its response prior to the filing of this second PRA suit, and therefore the trial court erred in dismissing West's claims. West supported his arguments with authority relating to the doctrine of waiver. Under that authority, the Port should have been barred from raising the *Hobbs* defense.

In addition, it was undisputed that the port had completed its response to the plaintiff's 1st (2007) request in regard to the duplicative claims prior to the filing of the lawsuit in this case.

Thus it is only by multiple misrepresentations and denials of basic due process that the port was able, by deliberately duplicitous and internally inconsistant jurisdictional claims, to obtain dismissals in both companion cases.

The Order of December 20, 2017 incorrectly asserts that West failed to argue the Port's duplicity. West repeatedly and thoroughly argued that Port counsel asserted inconsistent positions as to the jurisdiction of the two trial courts, referring to their actions as a jurisdictional shell game, and comparing counsels Edwards and Costello's routine to Abbott and Costello's "Who's on First?" routine. Appellant referred to counsel as a jurisdictional black hole and went to great length to assert counsel's duplicity and inconsistent positions. For the Court to amend the record in this manner also denies due process. Further, West could not have raised

this issue more than he did in the previous appeal, where the arguments were similarly disregarded by the jaundiced eye of the reviewing court. Additionally, West had moved to consolidate as the only way to properly address the duplicitous representations of the Port, and this Motion was denied by the Court, undermining the Court's duplicitous claim that West should have addressed the duplicitous issues in the first appeal-which he did in any event!

This Court erred in failing to afford West the due process required for the May 10 hearing which was set by order of the Court Administrator. This refusal to allow West a reasonable hearing violated due process under the 5th and 14th Amendments to the Constitution of the United States.

The claims that the trial court barred by its failure to vacate its ruling and allow amendment were not barred by *Hobbs* as the Port had completed its response to West's first PRA request prior to the filing of the second suit asserting "duplicative" claims. For this Court to deny West a forum to assert claims based upon a combination of *Hobbs* and the duplicitous actions of counsel, and to assess fees without publishing the opinion, effected an unconstitutional taking in violation of the 5th Amendment.

This Court also stated that West did not assert a cause of action under RCW 42.56.550(2). This statement overlooks the clear text of West's Complaint. RCW 42.56.550(2) provides a cause of action for "any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request." when West's Complaint clearly stated such a claim.

The Court of Appeals stated that West did not seek the relief that this cause of action would provide. But this statement misunderstands the

applicable law. Statutory penalties and costs are a proper form of relief for a claim under RCW 42.56.550(2) for no reasonable estimate.

The trial courts and the Court of Appeals panel erred in both of the companion cases. This Court should accept review of both and reverse.

RAP 13.4(b) Section 4 – Application of the "Hobbs Rule" to bar PRA suits even when an agebncy deliberately withholds records, and to penalize a plaintiff for maintaining a PRA action implicates substantial public interests

There is substantial public interest in the issue of whether an agency withholding records can deliberately delay disclosure, and then, not only evade liability for their withholding, but be rewarded for it, from the citizen who for over 10 years had attempted to compel disclosure, even obtaining a previous reversal of a wrongful dismissal.

The wholesale revisions of the Public Records Act effected by a technical and unwavering application of the new Hobbs Rule to bar suits where an agency deliberately withholds records and does not cure their errors prior to review implicate serious public interests and have the potential to seriously undermine the remedial intent of the Public Records Act.

The substantial public interest in clear, uniform, published precedent to establish how and on what basis a PRA action may be maintained compels review by the Supreme Court.

D. ISSUES PRESENTED FOR REVIEW

1 . Should the final agency response requirement in Hobbs be applied to technically bar causes of action where agencies have withheld public records and the filing of the suit was reasonably necessary to compel disclosure

2. Did the Court of Appeals improperly find the appeal was without any reasonable basis when the precise application of the decision in Hobbs is a matter of legitimate dispute, and when the Court fail to consider West's evidence and argument?

E. STATEMENT OF THE CASE

This case arose from records requests including West's December 4, 2007, and august 14, 2009 requests for public records related to the Port of Tacoma's South Sound Logistics Center.

However, by the date of the filing of this present action, in 2009, the port had completed its response sto West's 2007 request. See *West v. Port of Tacoma*, No. 43004-5-II (Wash. Ct. App., Div. II, Feb. 20, 2014) (unpublished, cited here for procedural history).

West filed this second lawsuit that included, among other things, claims against the Port identical to those made in the prior case. *See West v. Bacon*, No. 71366-3-I (Wash. Ct. App., Div I, Apr. 28, 2014) (unpublished, cited here for procedural history).

In the original proceeding prior to remand, the following took place: October 6, 2009 the Complaint was filed. (CP 182-187)

On October 9, an Order to Show Cause was signed, for November 23, but no hearing took place on that date. (CP at 191) This was just the first of a number of strange events related to the employment of a "visiting" judge from Grays Harbor County, who did not, as required by law, ever "visit" Pierce County.

On May 10, 2010, pursuant to the express direction of the Grays Harbor Court Administrator's office, RP 05-101-0, pp. 3-4, lines 12-25, and 1-3) a hearing was held on West's Second motion for an Order to Show cause and a Motion to Amend.

Although the Court signed the Order, the Pierce County Clerk refused to file it. West was reduced to the expediency of complaining to the Pierce County Sheriff about the refusal of the Clerk to file the Order at a May 16 legislative hearing before the House local Government Committee on the Public Records Act. Subsequently, a Pierce County Deputy Sheriff contacted the Clerk's office and filed the Order. (CP 209) This was just the second in a series of strange events stemming from the appointment of a non-visiting "visiting judge" from Grays Harbor County.

On June 18, 2010, The Court held a hearing on the port's motion to reconsider and dismiss West's complaint. At his hearing, the Court attempted to excuse the Port's failure to file any form of timely response to his motion by falsely accusing West of lying to the Court.

In this, the second case (*"Port II"*), the Port argued that West's claims against the Port should be dismissed as duplicative of West's claims in *Port I*. The Port argued, among other things, that the trial court already had jurisdiction over those claims in *Port I*. The trial court agreed with the Port and dismissed the claims.

On July 26, 2010, the Court vacated the Order allowing amendment of the Complaint and dismissed allegedly "duplicative" portions of the complaint. This was improper as the Port had not filed an Answer to the Complaint and thus plaintiff was entitled to amend his complaint, possibly due to the fact that the Court was motivated just as much by invidious prejudice as it was by the Court Rules.

The Court held West in contempt for his attempting to make an objection to its ruling, and subsequently abused its discretion to dismiss the case, a dismissal that was revered as an abuse of discretion by Division I of the Court of Appeals.

As the decision of Justice Spearman of Division I of the Court of Appeals held... ***"The merits of his (West's) claims will be remanded for trial.***" (emphasis added)

Yet, rather than obeying the directions of the Court of Appeals on remand, on April 1, 2016, the Court held a hearing on the Port's motion to dismiss, and upon plaintiff's Motions where West, represented by Jon Cushman of the Cushman Law Group, continued the seemingly eternal

uphill struggle to attempt to obtain a hearing on the merits. (See Transcript of April 1, 2016)

The Court subsequently entered the Order of 05/16/2016 denying West's Motions to 1. decline jurisdiction due to a defective appointment and improper venue, 2. vacate the June 18 Order denying amendment and granting a partial dismissal, 3. Staying the proceeding until the issue of which court had jurisdiction over the "duplicative" claims was resolved, since Lake had, in the intervening time period also obtained a dismissal of the allegedly duplicative claims. (See Brief in Cause No. 48110-3-I)

West appealed. He argued, under principles of waiver, res judicata, and judicial estoppel, that the Port could not argue that *Port II* was premature under *Hobbs* after having already obtained dismissal of the "duplicative" claims in *Port I* by arguing that the court already had jurisdiction of those claims through *Port II*. *See* Br. of App. at 23-25, 28-33. West argued that *Hobbs*, as applied by the trial court, silently and improperly overruled significant precedent of the Washington Supreme Court, under which PRA claims filed before any "final agency action" were permitted to proceed to determination on the merits. *See* Br. of App. at 25-27, 41-42.

West, citing to the fact that the port had belatedly released many of the disputed records in late 2016, after nearly a decade of litigation, also argued that *Hobbs* overruled, sub silencio, the decisions of the Court of

Appeals in *Violante* and *Coalition on Gov't Spying v. Dept. of Public Safety*, 59 Wn. App. 856, 863, 801 P.2d 1009 (1990).

West argued that *Hobbs* was distinguishable on its facts because in *Hobbs*, the auditor was producing records at the time Hobbs brought suit, whereas at the time West brought suit against the Port, the Port had failed to provide reasonable estimates for production, missed its own deadlines, and had not produced a single record or exemption log. *See* Br. of App. at 33-37. As to the 2007 request, the port had completed its response as of 2009 when this suit was filed. West argued that even if his claims in regard to the 2009 request were premature under *Hobbs*, the trial court was obligated to allow West to amend his complaint to cure the defect. *See* Br. of App. at 42-43.

On December 19, 2017 the Court of Appeals affirmed dismissal, holding that *Hobbs* controlled and West's suit was premature. The Court did not address West's reasonable reliance, RCW 42.56.550(2), or waiver or estoppel arguments. The Court did not address the issue of the completed response to the "duplicative" claims or acknowledge the legitimacy of West's motion to amend. The Court awarded attorney's fees to the Port under RAP 18.9.

On February 21, 2018, the Court of Appeals denied a Motion to Modify.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Without a clear ruling by this Court as to exactly how the new "Hobbs Rule" should apply, citizens seeking records will not know for certain when they can maintain a suit, even after years of agency recalcitrance, and judges in different divisions will differ on what standards to apply in PRA cases.

Proceedings within the jurisdictional boundaries of Divisions I and III in particular will be conducted in a no man's land of uncertainty. PRA plaintiffs and defendants will be faced with multiple and conflicting determinations at the various locations and levels of the courts and judges adjudicating PRA cases will lack clear standards to ensure **uniform** and impartial results in the application of the law.

West produced material evidence that, viewed in a light favorable to West as the nonmoving party, should have precluded summary judgment on the *Hobbs* defense. In holding that this case is not distinguishable from *Hobbs*, this Court appears to have overlooked key, material facts submitted by West as to whether the 2007 request was complete and as to whether the agency had delayed responding to the 2009 request.

Hobbs does not apply to bar West's claims because, as the Court of Appeals explicitly ruled in Bacon I, the Port was not acting diligently to respond to the request. In fact, West submitted evidence that the Port was acting diligently to **avoid** West's request. Also, the port's response to the 2007 request was complete by 2009.

The Court noted that "the PRA '[does] not require an agency to comply with its own self-imposed deadlines **as long as the agency was acting diligently in responding to the request in a reasonable and thorough manner.**" Slip op. at 15 (quoting *Hobbs*, 183 Wn. App. at 940) (emphasis added). The Court then stated, "West does not contend, nor does he provide any evidence to support an inference, that the Port was not diligent in its efforts to fulfill the request." *Id.* It appears the Court has overlooked West's evidence.

West provided clear evidence of the Port's recalcitrance in responding to both the 2007 and 2009 requests, and strenuously contended that the Port was not diligent in responding to his requests. *E.g.,* Br. of App. at 7-8. At the time West filed suit, the Port had already missed three of its own self-imposed deadlines (including one "estimate" with no more detail than "shortly"). After West filed, the Port missed its fourth deadline and did not produce its first installment of records until two weeks later.

This, in itself, supports an inference that the Port was not acting diligently to fulfill the request.

In regard to the 2007 request, the agency had clearly and undeniably completed its response by 2009, when this case was filed.

Even more significant are the "smoking gun" and "mea culpa" documents submitted to the court by West. The "smoking gun," CP 149, reveals that the Port had a deliberate policy to delay disclosure of records related to the controversial Logistics Center project until late January

2008, during the time West's request was pending. Then in the "mea culpa" documents, CP 359, 361-64, the Port admits to—and apologizes to the public for—deliberately "withholding information from the public" in relation to the project.

This evidence is at least sufficient to create a reasonable inference —if not an actual estoppel—that, far from "acting diligently in responding to the request in a reasonable and thorough manner," the Port was actually "acting diligently" to avoid, delay, or deny the request.

> An agency may not "pursue[] a policy of evading the requirements of the PRA" without subjecting itself to statutory penalties and fees. *Cedar Grove Composting v. City of Marysville*, 188 Wn. App. 695, 727-28, 354 P.3d 249 (2015).

The *Hobbs* defense, by its own terms, applies only if the agency is diligently responding to the request. Because the Port was doing the opposite—actively obstructing disclosure—*Hobbs* does not apply. At the very least, there was a genuine issue of fact that should have precluded dismissal of West's claims. The trial court erred. This Court should reverse.

This Court also stated that "West did not assert a cause of action under RCW 42.56.550(2)." Slip op. at 16. This statement overlooks West's RCW 42.56.550 Motion (CP 37) and the clear text of West's Complaint. RCW 42.56.550(2) provides a cause of action for "any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request." West's Complaint, at Section 3.2, stated such a claim:

> ...Defendants have refused to comply with the disclosure act entirely, and **refused to respond promptly with a date certain for disclosure.** CP 4-5 (emphasis added).

In addition to the complaint, West filed a motion as specified in RCW 42.56.550(2). CP 37. The trial court granted the motion.

The Court of Appeals stated that West did not seek the relief that this cause of action would provide. But this statement misunderstands the applicable law. Statutory penalties and costs are a proper form of relief for a claim under RCW 42.56.550(2) for no reasonable estimate:

> If the only remedy for failing to provide a reasonable estimate is to treat the violation as an aggravating factor in calculating a penalty, where the agency does not withhold the records, and is therefore subject to no penalty, it has no incentive to provide a reasonable estimate. For these reasons, we conclude that the legislature intended always to provide for an award of fees and costs when an agency fails to comply with RCW 42.56.520 [which sets forth the requirement of a reasonable estimate]. *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 380, 389 P.3d 677 (2016) (cited by West in Reply Br. of App. at 16-17.

Thus, West sought precisely the relief he was entitled to under his claim that the Port failed to provide a reasonable estimate of time to respond to the request. This claim could not be barred as untimely under *Hobbs* because the Port had, in fact, provided various estimates—all of which proved unreasonable—before West filed suit. .

Under *Hikel*, and *Violante*, West was entitled to seek penalties for the Port's adjudicated failure. This claim should not have been dismissed.

Further, West was a substantially prevailing party under Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 103-04, 117

P.3d 1117 (2005), because in 2017, after 10 years of litigation, the port released the records he sought.

Division II of the Court of Appeals erred in both this and the companion appeal. This Court should accept review and reverse.

G. CONCLUSION

The Court of Appeals appears to have overlooked or misapprehended key facts or law in reaching its unpublished opinion. The Port should have been barred from arguing that this action was untimely when it had already obtained dismissal of West's timely claims in *Port I*. The Port's undisputed obstruction of West's records request also rendered *Hobbs* inapplicable. The Court should have considered West's motion to amend, which prejudicially affected the trial court's decision to dismiss West's claims. West's appeal was not frivolous because his arguments are supported by 4 decades of established precedent as well Division I's interpretation and application of *Hobbs*.

The decision of this court stands the intent of the PRA on its head by punishing West for seeking a remedy for the Port's undisputed violations of the Act.

The decision conflicts with Division I's interpretation and application of *Hobbs*, as well as 4 decades of prior precedent and practice allowing the filing of PRA actions prior to the technical completion of an agency's response. These are matters of public importance subject to review under RAP 14.4, and this Court should accept review.

Done this 23rd Day of March, 2018.

`

s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on March 23, 2018, I caused the foregoing document to be served on Carolyn Lake, counsel of record for the Port of Tacoms, by email at their email address of record:

`

s/Arthur West
ARTHUR WEST

Filed
Washington State
Court of Appeals
Division Two

December 19, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ARTHUR WEST, Appellant, v. CONNIE BACON, CLARE PETRICH, DON JOHNSON, TED BOTTIGER, TIM FARRELL, RICHARD MARZANO, MARK LINDQUIST, PIERCE COUNTY PROSECUTING ATTORNEY; PORT OF TACOMA, Respondent.	No. 49207-5-II UNPUBLISHED OPINION

LEE, J. — Arthur West appeals the superior court's dismissal of his October 2009 lawsuit against the Port of Tacoma for alleged Public Records Act (PRA) violations from an August 2009 PRA request. The superior court dismissed the suit pursuant to our holding in *Hobbs v. State*, 183 Wn. App. 925, 335 P.3d 1004 (2014). West argues that the superior court erred in (1) dismissing his suit against the Port of Tacoma, (2) vacating its order granting West's motion for a show cause order and allowing amendment of his complaint, and (3) changing the venue to Grays Harbor County Superior Court.

We hold that the superior court did not err in dismissing West's suit because West filed his suit prematurely pursuant to *Hobbs*. We also hold that West's other claims fail and that the Port is entitled to an award of fees and costs on appeal. Accordingly, we affirm.

FACTS

On August 14, 2009, West filed a public records request with the Port seeking:

> 1. All physical copies of [South Sound Logistics Center (SSLC)] related or other records presently being withheld by the Port or its agents from any person or entity, including the allegedly "newly disclosed" October Surprise SSLC records which continue to be illegally withheld.
>
> 2. All billing statements, invoices, and communications 2006 to present involving or about Ramsey Ramerman, Foster Pepper, or other counsel providing advice or services in regard to Public Disclosure issues.
>
> 3. All billing statements, invoices, or communications 2004 to present with or concerning "Judge" Terry Lukens or Judge Flemming [sic].
>
> 4. All communications with friends of Rocky Prairie or their representatives 2007 to present, to include any denials of requests for disclosure and any "privilege" logs.

Resp't Clerk's Papers (CP) at 36.

On August 19, the Port responded to West's request and advised him that because of "the broad scope of [his] entire request and the large volume of potentially responsive records, the Port estimated that additional time was required to gather, review records and respond. [The Port] estimated [it] could respond to [West's] request on or before August 31, 2009." Resp't CP at 36.

On September 3, "the Port extended its estimated response date to on or before September 25, 2009." Resp't CP at 36. Before that deadline, the Port revised its estimate to October 6, 2009.

On October 6, the Port updated its response date to October 14, 2009. Also on October 6, West filed suit against the Port alleging a violation of the PRA. West included in his suit a cause of action alleged in a different suit he filed against the Port for violating the PRA. On October 14,

the Port sent a letter to West detailing its response to each of his requests and a privilege log for records it deemed exempt.[1]

On November 2, the Pierce County Superior Court judge assigned to the case recused herself. On January 27, 2010, the Pierce County Superior Court Administrator assigned the case to a visiting judge from Grays Harbor County Superior Court (hereinafter superior court).

On May 8, West sent an e-mail to the Port advising that he intended to note a hearing for May 10 on his motion for a show cause order and for leave to amend his complaint. The motion requested that the Port appear and show cause why it should not be found in violation of the PRA. West was aware that the Port's counsel was unavailable from May 4 to May 17.

On May 10, the Port filed a response objecting to a hearing on that day because the motion was not properly noted or confirmed. The Port also submitted a response brief opposing West's motion for a show cause order.

That same day, unaware that the Port had filed a response, the superior court held a hearing on West's motion to show cause. The Port did not attend the hearing and West did not advise the superior court of the Port's unavailability or response. On May 18, the superior court entered an order granting West's motion for a show cause order and allowing West leave to amend his complaint.

[1] On November 3, the Port informed West of 1,258 additional records that were responsive to his request, and on November 9, provided him with an updated privilege log for records the Port deemed exempt.

On May 21, the Port received notice about the superior court's order entered on May 18. The Port then filed a timely motion to reconsider and vacate the order. The Port also filed a motion to dismiss. West did not file any responsive pleadings to the Port's motions.

On June 18, the superior court held a hearing on the Port's motion to reconsider the show cause order entered on May 18. The superior court vacated the order to show cause and allow West to amend his complaint because West did not properly note or confirm his motion for the hearing for May 10,[2] knew but did not alert the court that the Port was unavailable on May 10, and the documents in the file were not file stamped until two days before the hearing.

On July 26, the superior court held a hearing on presentation of the order vacating the May 18 show cause order and on the Port's motion to dismiss. The Port argued that a portion of West's complaint was duplicative of another claim in a different public records lawsuit by West against the Port that was being litigated in the Pierce County Superior Court. West agreed that the first part of his complaint was duplicative and that the records sought in the other suit had largely been disclosed.

The superior court dismissed the first part of West's complaint. The superior court also imposed sanctions on West of $1,500, to be paid to the Port, for causing the Port to respond to the same litigation for a second time.

[2] The order assigning the case to the Grays Harbor visiting judge required that Pierce County Local Rules (PCLR) be followed for noting motions. PCLR 7(a)(3)(A) requires that all motions be noted, and the motion and supporting documents be filed and served, no later than the close of business six court days before the date set for the hearing. PCLR 7(a)(9) requires that all motions be confirmed by contacting the judicial assistant of the assigned judicial department no later than noon two court days prior to the hearing.

West interrupted the superior court during its ruling and continued to do so after being warned by the court. As a result, the superior court found West in contempt of court. The superior court then set a date for the parties to present an order in conformance with its rulings.

On August 2, the superior court held a hearing on the presentation of orders dismissing the first part of West's complaint, imposing sanctions on West, and finding West in contempt of court. West did not appear or respond. The superior court signed only the order of contempt, and set over the date for presentment of an order dismissing the first part of West's complaint and imposing sanctions to August 9. West did not appear at that hearing, and the superior court signed an order dismissing the first part of West's complaint, imposing $1,500 in sanctions payable to the Port, and conditioning further action by West in the case on payment of those sanctions.

From August 2010 to April 2012, West took no further action in this case. On April 16, 2012, West sent his sanctions payment to the Port.

On May 30, West filed a motion for a trial date and a new case scheduling order. Two days later, the Port filed a motion to dismiss.

On June 12, the superior court held a hearing on the Port's motion to dismiss for failure to prosecute and abuse of process. The superior court, relying on CR 41(b) and its inherent authority to dismiss, granted the Port's motion to dismiss because West disregarded the contempt order from the court and West's conduct had "substantially interfered with the efficient administration of justice." Verbatim Report of Proceedings (VRP) (June 12, 2012) at 43.

West appealed the dismissal, challenging the superior court's authority to dismiss based on CR 41(b)(1). On April 28, 2014, Division One of this court reversed and ordered that the merits of West's claim be remanded for trial.

On February 5, 2016, the Port filed a motion to dismiss based on CR 12(b) and CR 56. The Port argued that West "prematurely filed his public records lawsuit prior to the Port completing its final agency response action" and that under *Hobbs*,[3] West failed to state a claim upon which relief could be granted. Appellant CP at 573. West responded by arguing that because the appellate court ordered that the merits of his claim be remanded for trial, stare decisis applied, and the Port's motion was barred. West also argued that *Hobbs* did not apply and that the Port's motion was also barred by res judicata and collateral estoppel.

On April 1, the superior court held a hearing on the Port's motion to dismiss. The superior court found that *Hobbs* applied, that the PRA did not require an agency to comply with its own self-imposed deadlines as long as it was diligently responding to the request, and that no evidence was presented to show the Port was not diligent in responding to West's request. The superior court granted the Port's motion to dismiss.[4]

West appeals.

ANALYSIS

A. MOTION TO DISMISS

West argues that the superior court erred when it dismissed his suit against the Port of Tacoma on May 16, 2016. We disagree.

1. Legal Principles

We review PRA cases de novo. *Nissen v. Pierce County*, 183 Wn.2d 863, 872, 357 P.3d 45 (2015). We also review dismissals under CR 12(b)(6) de novo. *Worthington v. Westnet*, 182

[3] *Hobbs*, 183 Wn. App. 925.
[4] The superior court's order of dismissal was filed on May 16, 2016.

Wn.2d 500, 506, 341 P.3d 995 (2015). Dismissals under CR 12(b)(6) are proper "only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim." *Id.* at 505.

If a party brings a motion to dismiss under CR 12(b)(6), but "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [CR] 56." CR 12(b). Affidavits submitted in a CR 12(b)(6) motion are "matters outside the pleadings" that convert the CR 12(b)(6) motion into a CR 56 summary judgment motion. *Lobak Partitions, Inc. v. Atlas Constr. Co.*, 50 Wn. App. 493, 503, 749 P.2d 716, *review denied*, 110 Wn.2d 1025 (1988).

We review a superior court's decision on summary judgment de novo. *Didlake v. State*, 186 Wn. App. 417, 422, 345 P.3d 43, *review denied*, 184 Wn.2d 1009 (2015). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Here, the superior court considered facts beyond those stated in West's complaint. Therefore, because a motion to dismiss for failure to state a claim is treated as a motion for summary judgment when matters outside the pleadings are considered, we treat the superior court's dismissal of West's suit as a decision on a motion for summary judgment. *Kelley v. Pierce County*, 179 Wn. App. 566, 573, 319 P.3d 74, *review denied*, 180 Wn.2d 1019 (2014).

2. *Hobbs v. State*

In *Hobbs*, we addressed the issue of whether a public records requester is allowed to initiate a lawsuit before an agency denies or closes the request. 183 Wn. App. at 935. Hobbs argued that

"a requester is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request." *Id*. We rejected Hobbs's argument and held, "Under the PRA, a requester may only initiate a lawsuit to compel compliance with the PRA *after* the agency has engaged in some final action denying access to a record," and, though not specifically defined, "a denial of public records occurs when it reasonably appears that an agency will not or will no longer provide responsive records." *Id*. at 935-36. We concluded that the plain language of the PRA dictated that "being denied a requested record is a prerequisite for filing an action for judicial review of an agency decision under the PRA." *Id*. at 936. Accordingly, we held that the superior court did not err in dismissing Hobbs's PRA suit. *Id*. at 946.

3. Application of *Hobbs*

Here, West made his public records request on August 14, 2009. Like in *Hobbs*, the Port replied to West's request within the five-day statutory period and provided West with an anticipated response date of the end of the month. However, the Port was unable to meet that deadline due to "the broad scope of [his] entire request and the large volume of potentially responsive records" and had to extend the estimated date of production. Resp't CP at 36. And like in *Hobbs*, the Port maintained active communication with West about his request. The Port sent a letter to West on October 14 detailing its response to each of West's requests. But West had already filed his suit on October 6.

We reach the same conclusion we reached in *Hobbs*—that West's suit against the Port was premature under the plain language of the PRA because the Port had not "engaged in some final action denying access to a record" at the time West filed the suit, and "being denied a requested

record is a prerequisite for filing an action for judicial review of an agency decision under the PRA." *Id.* at 935-36.

4. West's Arguments

a. Distinguishing *Hobbs*

West argues that the facts in *Hobbs* are distinguishable from the facts of this case. We disagree.

West argues that, unlike *Hobbs*, the Port was not in the process of producing records when he filed suit. However, while the record shows that the Port had not produced a first installment as the Auditor did when Hobbs filed suit, the record does show that the Port was not ignoring West's request.

On August 19, within five days of receiving the request, the Port advised West that because the scope of his request was "broad" and that there were a "large volume of potentially responsive records" that required "additional time . . . to gather, review records and respond," the Port needed until August 31 to respond. Resp't CP at 36. Although the Port could not meet the August 31 self-imposed deadline, the Port provided West with constant updates, including its last update on October 6, which stated that it estimated a response by October 14.[5] The Port provided a detailed response to West's request on October 14. West does not provide any evidence to support an inference that the Port was not diligent in its efforts to fulfill his request and that the postponement of the response date was not in good faith.

[5] "An agency does not violate the PRA merely by failing to meet its own self-imposed deadlines as long as it was acting diligently in its attempts to respond to the PRA request." *Hikel v. City of Lynnwood*, 197 Wn. App. 366, 377, 389 P.3d 677 (2016).

West notes that the *Hobbs* court included a footnote stating that it did "not address the situation where an agency completely ignores a records request for an extended period." *Id*. at 937 n.6. However, the record fails to support the claim that the Port "completely ignored" West's request for an extended period of time. Therefore, the fact that the Port did not produce records before West filed suit does not render the legal principles in *Hobbs* inapplicable.

Second, West attempts to distinguish *Hobbs* by arguing that he asserted his cause of action under RCW 42.56.550(2).[6] But West fails to provide any citation to the record or to legal authority for his argument. RAP 10.3(a)(6). West only cites to a brief filed by the attorney general for support. Briefs are not legal authority. *See* RAP 10.3(a)(6).

Regardless, West did not assert a cause of action under RCW 42.56.550(2) or seek the relief provided by that statute. RCW 42.56.550(2) states:

> Upon the motion of any person who believes that an agency has not made a reasonable estimate of the time that the agency requires to respond to a public record request, . . . the superior court in the county in which a record is maintained may require the responsible agency to show that the estimate it provided is reasonable. The burden of proof shall be on the agency to show that the estimate it provided is reasonable.

West's complaint did not identify RCW 42.56.550(2) as the basis for his cause of action, nor did it seek to have the superior court "require the responsible agency to show that the estimate it provided [wa]s reasonable." RCW 42.56.550(2). Instead, West's asserted cause of action under the PRA was, "By their acts and omissions, the Port of Tacoma and its agents violated the Public

[6] West's argument that this court previously recognized his claim was under RCW 42.56.550(2) is misleading and factually meritless. West cites a passage from a case in this court that involved a different request for records that he previously submitted in 2007. *See West v. Port of Tacoma*, noted at 179 Wn. App. 1034 (2014).

Records Act, RCW 42.56." Appellant CP at 186. The relief West requested was "[t]hat plaintiff be awarded per diem penalties for each day each public record has been unlawfully withheld in regard to his August 14, 2009 request, and for each day of the Port's pattern of unreasonably delaying disclosure, and that plaintiff recover his costs and fees." Appellant CP at 187. This is not relief provided under RCW 42.56.550(2), but is instead relief provided under RCW 42.56.550(4). Therefore, West's argument that he asserted a cause of action under RCW 42.56.550(2) fails.

Even if we view West's request for relief as a request under RCW 42.56.550(2), West's claim fails. Nothing in the record shows that the Port provided an unreasonable estimate of time for responding to West's request. West made his records request on August 14. The Port initially estimated that it would be able to respond to West's request by the end of August. The Port then extended its estimated response date three times and ultimately provided a final estimated response date of October 14. But RCW 42.56.520 "does not limit the number of extensions an agency may require to respond to a request." *Andrews v. Wash. State Patrol*, 183 Wn. App. 644, 652, 334 P.3d 94 (2014), *review denied*, 182 Wn.2d 1011 (2015). The two-month time frame was reasonable as the record shows that the Port viewed the request as broad in scope and potentially involved a large number of responsive documents. The record also shows that there was a large volume of potentially responsive records to go through, the request included records subject to the attorney-client privilege, the Port initially found 587 responsive records, the Port subsequently informed West of an additional 1,258 records that were responsive to the request, and the Port provided him with privilege logs for records deemed exempt.

b. *Hobbs* Holding is Dicta

West next argues, "In [*Hobbs*], the Court actually reached the merits of Hobbs'[s] claims, and found no violation, making the portions of their ruling on the timing of Hobbs suit obiter dictum inapplicable to cases where an actual violation of the PRA is present." Br. of Appellant at 31. We disagree.

"Obiter dictum" is "'[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).'" *Pierce County v. State*, 150 Wn.2d 422, 435 n.8, 78 P.3d 640 (2003) (quoting BLACK'S LAW DICTIONARY 1100 (7th ed. 1999)). "Obiter dictum" is generally abbreviated to "dicta." *State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 89, 273 P.2d 464 (1954). Alternative holdings are not dicta, but are instead binding precedent. *See e.g.*, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255-56 (11th Cir. 2017) (citing, among others, *Hitchcock v. Sec'y, Florida Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014) for the proposition that "[A]n alternative holding is not dicta but instead is binding precedent.").

Here, the first issue considered in *Hobbs* was whether "a requester is permitted to initiate a lawsuit *prior* to an agency's denial and closure of a public records request." 183 Wn. App. at 935. On that issue, *Hobbs* held that "before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id.* at 936. Thus, the requirement that, "there must be some agency action, or inaction, indicating that the agency will not be providing responsive records" before a PRA suit could be filed, was the primary issue decided in *Hobbs*. *Id.* And to the extent *Hobbs* provided

further holdings for why the superior court did not err, they would be alternative holdings and binding precedent.

c. Retroactive application of *Hobbs*

West also argues that *Hobbs* should not be applied retroactively. However, the superior court did not retroactively apply *Hobbs*. *Hobbs* was decided before the superior court considered the Port's motion to dismiss on remand. Furthermore, when "a case is appealed after being remanded by the appellate court, the court may apply the law in effect at the time of the second appeal in reaching its decision." *Roberson v. Perez*, 119 Wn. App. 928, 933, 83 P.3d 1026 (2004), *aff'd*, 156 Wn.2d 33, 123 P.3d 844 (2005). Thus, we may nonetheless apply the legal principles set forth in *Hobbs* in this appeal. Therefore, West's argument fails.

d. Prior appellate court order and stare decisis

West next argues that the superior court was required to reach the merits of his claim because Division One of this court ordered a remand of the case for trial on the merits on a prior appeal.[7] We disagree.

[7] West also makes an argument based on stare decisis and res judicata. But West does not provide any legal authority for his argument on res judicata, and thus, we do not consider it. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Also, West's argument based on stare decisis is misplaced. Stare decisis means that "'the rule laid down in any particular case is applicable only to the facts in that particular case or to another case involving identical or substantially similar facts.'" *Kittitas County v. E. Wash. Growth Mgmt. Hr'gs Bd.*, 172 Wn.2d 144, 173, 256 P.3d 1193 (2011) (quoting *Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 565, 269 P.2d 563 (1954)). The prior appellate court order is not an established rule to be applied here. Therefore, this argument fails.

West's argument is not persuasive because Division One's opinion considered only whether dismissal was proper under CR 41(b) and not CR 12(b)(6) or CR 56(c). *See West v. Bacon*, No. 71366-3-I, slip op. at 4-5 (Wash. Ct. App. Apr. 28, 2014) (unpublished), http:/www.courts.wa.gov/opinions/pdf/713363.pdf. The superior court had previously dismissed West's suit relying on CR 41(b) and its inherent authority to dismiss because West disregarded the contempt order from the court and West's conduct had "substantially interfered with the efficient administration of justice." VRP (June 12, 2012) at 43. On appeal, Division One reversed and ordered the merits of West's claim to be remanded for trial. *Id.* at 10.

Division One's remand in 2014 does not change the necessary conclusion dictated by *Hobbs* because Division One only considered whether the superior court abused its discretion in granting a dismissal under CR 41(b). Thus, Division One's decision in the previous appeal has no bearing on the issues before this court in the current appeal, which concerns whether West prematurely filed suit.

e. Citation to other cases

West argues that *Violante v. King County Fire District No. 20*, 114 Wn. App. 565, 59 P.3d 109 (2002); *West v. Department of Natural Resources*, 163 Wn. App. 235, 258 P.3d 78 (2011), *review denied*, 173 Wn.2d 1020 (2012); and *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004), allowed him to bring a PRA action before his request was completed, in part because it was necessary to get the Port to respond. However, the cases West relies on are not persuasive. *West* and *Hangartner* did not address the issue of whether suit was prematurely filed. And *Violante* only addressed whether the suit was necessary when the public agency failed to respond to four PRA requests for the same information. 114 Wn. App. at 570-71.

West also argues that we should follow *International Longshore & Warehouse Union v. Port of Portland*, 285 Or. App. 222, 396 P.3d 235, *review denied*, 362 Or. 39 (2017), and hold that the superior court improperly dismissed the case because a "denial" of a records request is not necessary for a court to have jurisdiction over a case under public records law. However, the court in *International Longshore* interpreted an Oregon public records statute that allowed the court to enjoin a public body from withholding records, which is distinct from the Washington statute at issue here, which allows a requester to motion the court to require a public agency to show why it failed to disclose records or why its estimated disclosure time was reasonable. *See* ORS 192.490(1); *see also* RCW 42.56.550. Furthermore, precedent from other jurisdictions does not control our decisions. *Casterline v. Roberts*, 168 Wn. App. 376, 385, 284 P.3d 743 (2012); *Charlton v. Toys "R" Us—Delaware, Inc.*, 158 Wn. App. 906, 916 n.1, 246 P.3d 199 (2010). Therefore, we do not follow *International Longshore*.[8]

f. Constitutional arguments

West argues that applying the legal principle from *Hobbs* would violate the separation of powers, intent of the PRA, prohibition on ex post facto laws, and due process. However, we do

[8] To the extent West cites to *Hikel*, 197 Wn. App. 366, and *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015), to support his assertion that he had a cause of action under RCW 42.56.550, this argument is not persuasive. The court in *Hikel* only addressed whether the city provided a reasonable estimate for completion of a records request, whether notification of a completed request was necessary, whether the city acted diligently and reasonably, and what remedy was available for a violation. *See* 197 Wn. App. at 372-79. And the court in *Cedar Grove* only addressed whether a non-requesting party had standing to sue under the PRA, prelitigation production by the city negated penalties, certain documents were subject to the PRA, and the court abused its discretion in assessing penalties and fees. *See* 188 Wn. App. at 710-24. These cases did not address whether a party prematurely filed suit under the PRA.

not consider these claims as West merely claims such violations exist and cites to cases for the rules, but does not provide further argument.[9] Therefore, we do not consider these arguments further. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding that where arguments are not supported by authority, this court does not consider them).

g. Jurisdictional arguments

West makes several arguments regarding the superior court's jurisdiction over this case based on res judicata, collateral estoppel, equitable estoppel, and waiver. Regarding his claim under res judicata, West does not provide any applicable legal authority for support, and thus, we decline to address this claim. RAP 10.3(a)(6); *Cowiche Canyon*, 118 Wn.2d at 809. And for his claims under estoppel and waiver, West asserts that the Port waived the defense of jurisdiction and estopped itself from claiming otherwise because it sought affirmative relief. However, the Port did not seek any such relief. Therefore, these claims fail.[10]

[9] The cases cited by West are also inapplicable. The cases deal with the constitutionality of a coroner's inquest statute (*Carrick v. Locke*, 125 Wn.2d 129, 882 P.2d 173 (1994)), retroactive application of a verdict reformation statute (*Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)), application of an amended parole statute (*Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)), application of an amended statute on the certificate requirements for re-entry into the country (*Chew Heong v. U.S.*, 112 U.S. 536, 5 S. Ct. 255, 28 L. Ed. 770 (1884)), and retroactive expansion of statutory language in a criminal trespass case (*Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)).

[10] West apparently argues against the imposition of sanctions in this case under CR 11 and that the clean hands doctrine bars the relief sought by the Port. However, the Port does not request any sanctions under CR 11. West also raises this claim for the first time in his reply brief and fails to present any applicable legal authority for his clean hands argument. Therefore, we do not address these claims. RAP 10.3(a)(6); *Cowiche Canyon*, 118 Wn.2d at 809.

B. VACATING ORDER

West argues that the superior court erred when it vacated its order for a show cause hearing and allowing amendment.[11] We disagree.

Under CR 59(a), on the motion of the aggrieved party, a decision or order of the superior court may be vacated and reconsideration granted. Such relief may be granted based on an irregularity in the court proceeding or order, misconduct of the prevailing party, accident or surprise that ordinary prudence could not have guarded against, and when substantial justice has not been done. CR 59(a)(1), (2), (3), (9).

Under Pierce County Local Rule (PCLR) 7(a)(3)(A), motions are scheduled for hearing by filing a note for motion docket. The note must be "filed with the motion and supporting documents and served upon the opposing party at the same time." PCLR 7(a)(3)(A). The note, motion, and supporting documents must be filed with the court clerk, and served on the other party "no later than the close of business on the sixth court day before the day set for hearing." PCLR 7(a)(3)(A). Also, all motions must be confirmed by contacting the judicial assistant of the assigned judicial department by noon two court days before the hearing. PCLR 7(a)(9).

We review a superior court's ruling on a motion to reconsider and motion to vacate under CR 59 for an abuse of discretion. *Landon v. Home Depot*, 191 Wn. App. 635, 639, 365 P.3d 752

[11] West also argues that the superior court violated the appearance of fairness and the Fifth Amendment by refusing to conduct a show cause hearing. However, this claim is factually meritless. The superior court did not refuse to conduct a show cause hearing, but merely vacated its order for a show cause hearing after considering the Port's motions for reconsideration and to vacate. West did not make a subsequent motion for a show cause hearing. Furthermore, West does not provide any legal argument or authority based on the appearance of fairness or the Fifth Amendment. Therefore, we do not consider these arguments. RAP 10.3(a)(6); *Cowiche Canyon*, 118 Wn.2d at 809.

(2015), *review denied*, 185 Wn.2d 1030 (2016); *Meridian Minerals Co. v. King County*, 61 Wn. App. 195, 203, 810 P.2d 31, *review denied*, 117 Wn.2d 1017 (1991). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Landon*, 191 Wn. App. at 640.

Here, the superior court vacated its previous order to show cause and to allow West to amend his complaint because West did not properly note or confirm the hearing for May 10, knew and did not alert the court that the Port was unavailable on May 10, and the documents in the file were not file stamped until two days before the hearing.[12] The superior court concluded that the Port presented good cause to support its motion to vacate and West did not respond to the Port's motion.

While West was not required to alert the superior court that the Port was unavailable, PCLR 7 specifically requires that the note, motion, and supporting documents must also be filed with the court clerk, and served on the other party "no later than the close of business on the sixth court day before the day set for hearing." PCLR 7(a)(3)(A). However, West did not note the hearing for May 10 and did not file the note and supporting documents until two days before the hearing. And the record does not show that West had confirmed the hearing. West's failure to properly follow the rules prevented the Port from receiving proper notice of the hearing and provided a basis for

[12] West does not challenge the superior court's findings, and thus, they are verities on appeal. *PacifiCorp v. Wash. Utils. & Transp. Comm'n*, 194 Wn. App. 571, 587, 376 P.3d 389 (2016).

the superior court to vacate its previous order. Thus, we hold that the superior court did not abuse its discretion when it vacated its order for a show cause hearing and allowing amendment.[13]

D. CHANGE OF VENUE

West next argues that the superior court erred by changing the venue and appointing a visiting judge. This claim is factually meritless.

Under RCW 4.12.030, a court may change the venue for trial when motioned on several bases, including improper county designation, lack of impartiality, convenience, and judge disqualification. And under RCW 2.08.150, judges from one county may request that a visiting judge from another county be appointed. There is no requirement that this request must be on the record, and "[a] superior court, as a court of general jurisdiction, is presumed to act within its authority absent an affirmative showing to the contrary." *State v. Hawkins*, 164 Wn. App. 705, 712, 265 P.3d 185 (2011), *review denied*, 173 Wn.2d 1025 (2012).

West argues that this case should not have been transferred to Grays Harbor County because it was not the proper county for this case, and thus, the superior court lacked jurisdiction. However, the venue of this case was not transferred to Grays Harbor County Superior Court. A visiting judge from Grays Harbor County was merely appointed and trial was still set to be held in Pierce County Superior Court. While West also argues that the court lacked a basis to appoint a

[13] West also asserts that the superior court abused its discretion when it failed to "vacate its prior denial [of a show cause hearing and leave to amend his complaint] on May 16, 2016." Br. of Appellant at 38. However, West does not cite to any part of the record to show that he made a motion for such relief and a review of the record does not show that West requested a show cause hearing or leave to amend his complaint after the superior court vacated its initial order granting such relief. Therefore, we do not address this claim. RAP 10.3(a)(6); *Cowiche Canyon*, 118 Wn.2d at 809.

visiting judge, West fails to show that the superior court acted beyond its authority under RCW 2.08.150. Thus, we hold that this claim fails.[14]

Furthermore, "[i]t is also the rule that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause." *Adamson v. Traylor*, 66 Wn.2d 338, 339, 402 P.2d 499 (1965). West could have presented this issue in his prior appeal, but failed to do so. Therefore, we decline to address this issue.

ATTORNEY FEES

Both parties request attorney fees and costs on appeal.[15] We award fees and costs to the Port and decline such an award to West.

West requests fees and costs under RAP 18.1 and RCW 42.56.550(4). Under RCW 42.56.550(4), a party prevailing against an agency in a PRA suit is entitled to an award of fees and costs. Because West does not prevail here, he is not entitled to fees and costs.

The Port also requests fees and costs under RAP 18.1, RAP 18.9, and RCW 4.84.185 for defending a frivolous appeal. Under RCW 4.84.185, an action is frivolous if, "considering the action in its entirety, it cannot be supported by any rational argument based in fact or law." *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 785, 275 P.3d 339, *review denied*, 175 Wn.2d

[14] West also argues that the superior court denied him an opportunity to be heard and improperly sanctioned him for $1,500, which violated the Fifth and Fourteenth Amendments. However, West failed to raise these arguments in his opening brief, so we decline to address them. *Cowiche Canyon*, 118 Wn.2d at 809.

[15] West also raises an additional argument in his reply brief on the duplicity of awarding fees in this case. However, we do not address arguments raised for the first time in a reply. *Cowiche Canyon*, 118 Wn.2d at 809.

1008 (2012). Under RAP 18.9, an appeal is frivolous if it is so devoid of merit that there exists no reasonable possibility of reversal. *In re Marriage of Healy*, 35 Wn. App. 402, 406, 667 P.2d 114, *review denied*, 100 Wn.2d 1023 (1983). Because West's appeal did not present debatable issues on which there was a reasonable possibility of reversal, we exercise our discretion and award attorney fees and costs to the Port.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, A.C.J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

February 21, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

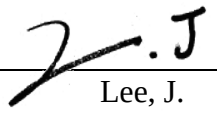
DIVISION II

ARTHUR WEST, Appellant, v. CONNIE BACON, CLARE PETRICH, DON JOHNSON, TED BOTTIGER, TIM FARRELL, RICHARD MARZANO, MARK LINDQUIST, PIERCE COUNTY PROSECUTING ATTORNEY; PORT OF TACOMA, Respondent.	No. 49207-5-II ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTION TO PUBLISH

Appellant, Arthur West, moves this court to reconsider its unpublished opinion issued on December 19, 2017. Appellant also moves this court to publish the opinion. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied. The motion to publish also is denied.

For the Court: Jj. Johanson, Lee, Melnick



Lee, J.

CUSHMAN LAW OFFICES, P.S.

March 23, 2018 - 8:57 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Arthur West, Appellant v Port of Tacoma, Respondent (492075)

The following documents have been uploaded:

- PRV_Petition_for_Review_20180323085158SC907844_5539.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- awestaa@gmail.com
- clake@goodsteinlaw.com
- dpinckney@goodsteinlaw.com

Comments:

Sender Name: Rhonda Davidson - Email: rdavidson@cushmanlaw.com
Filing on Behalf of: Jon Emmett Cushman - Email: joncushman@cushmanlaw.com (Alternate Email:)

Address:
924 Capitol Way S.
Olympia, WA, 98501
Phone: (360) 534-9183 EXT 360

Note: The Filing Id is 20180323085158SC907844