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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON
No. 40865-1-II

ca

ARTHUR WEST
APPELLANT

VS.
THURSTON COUNTY; PORT OF OLYMPIA,
RESPONDENTS

RESPONSE BRIEF OF RESPONDENT PORT OF OLYMPIA,

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I. INTRODUCTION / SUMMARY

Before the Trial Court and again here on appeal, Appellant brings this mixed bag of jumbled issues and unrelated parties and argues this is a Public Records Act case as to the Port of Olympia, but also purports to mix in vague allegations of unconstitutional expenditure of public funds, fraud, negligence and declaratory relief. Despite the complaints, Appellant fails to state a cause of action upon which relief can be granted. Appellant misuses the resources of both the Trial and Appeals Court by complaining of a Public Record Act (PRA) violation which simply did not occur. Appellant then bootstraps four other non-justiciable claims onto the frivolous PRA case. The Trial Court properly dismissed the Complaint against the Port of Olympia in its entirety, and that ruling should not be disturbed on appeal.

Appellant's Complaint set forth the following causes of action:

PUBLIC RECORDS ACT CLAIM

4.1 By their acts and omissions, defendants illegally and unconstitutionally violated RCW 42.56 , damaging plaintiff, and the State, for which relief should issue as requested below.

UNCONSTITUTIONAL EXPENDITURE OF FUNDS.

4.3 Defendants have created a cause of action for unconstitutional expenditure of public funds, for which relief should issue as requested below.

Plaintiff has, previous to filing this suit, filed a request for investigation and/or action with the County Prosecutor and Attorney General regarding such expenditures, which request has, to date, been refused.

FRAUD

4.4 Defendants false representations, that were reasonably relied upon, damaged plaintiff have created a cause of action for fraud, for which relief should issue as requested below.

NEGLIGENCE

4.5 Defendants and each of them violated standard and elevated levels of care damaging plaintiff, for which relief should issue as requested below.

V. REQUEST FOR RELIEF

Plaintiff respectfully requests the following relief:

- 5.1 That an order issue under the seal of this Court declaring that defendants Port of Olympia, Washington Association of Cities, Washington DNR, and Thurston County violated the Public Records Act, compelling disclosure of all requested records, and assessing penalties and costs.
- 5.3 That declaratory relief issue declaring that defendants Lott, HOCM, John doe Environmental consultants and the Port have conspired to obstruct the democratic system of government by obstructing access to records of the SSLC and the EBRP, and fraudulently conspired to misrepresent the public availability of records related to such projects.
- 5.4 Such other monetary relief as may be awarded by a jury.

The Trial Court properly and summarily dismissed

Appellant's various claims against the Port as follows:

(5.3) Appellant's lack of standing to bring this Declaratory Judgment action pursuant to RCW 7.24.020;

(4.1 and 5.1) Appellant's failure to plead any actual violation of the **Public Records Act**, i.e., no justiciable controversy exists, for which the Port is entitled to Summary Judgment pursuant to CR 56 and RCW 7.24.010, and Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6);

(4.3) Appellant's Lack of Facts in Support of Appellant's Claim of "**Unconstitutional Expenditure of Public Funds**", and thus Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6);

(4.4) **Fraud**; based on Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6); and

(4.5) **Negligence**, based on Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6).

The appeal should be dismissed in its entirety. The Port should be awarded its cost pursuant to RAP 18.1, 18.9, and RCW 4.84.185.

II. PROCEDURAL FACTS

Appellant West filed his complaint against the numerous and various parties on November 16, 2007. CP 4-10. The defendants at varying times filed Motions to Dismiss, most of which the Trial Court granted. CP 163-64, CP 1092-1097. On or about April 23, 2010, the Defendant Port filed its dispositive motions as to each of

Appellant's claim. CP ____.¹ Trial Court Judge Heller, previously assigned to this case, set June 4, 2010 for the Summary Judgment date. CP 65-67. Appellant failed to file any response to the dispositive Motions, which pursuant to CR 56 would have been due May 24, 2010.

After the Port's dispositive motions were filed, Judge Heller recused himself, and the case was reassigned to Judge Hilyer. CP 22-3, CP 21. At the May 19, 2010 case status conference Judge Hilyer verbally granted the Port's motion to bifurcate its issues from those against the only other remaining Defendant Association of Washington Cities, and set a deadline of June 1, 2010 for Appellant to file and serve his response to the Port's dispositive motions. The Court also responded to Mr West's claimed need for accommodation, by noting that west presented no request for continuance or any adequately specific GR 33 filing for accommodations. The Court set a May 26 2011 deadline for West to make such filing. West failed to timely do so. The Court's Order memorializing the Status conference rulings issued 26 May 2010. CP 1408-1410.

¹ The Port has filed a Supplemental Designation of Clerks Papers and will supplement this citation when CP number is established.

As of June 2, 2010, Appellant had failed to respond in any way to the Port's motions. On September 3, 2010, as part of the Court's Decision and Analysis, Findings Of Fact, And Conclusions Of Law (CP 93-103, filed 9/10/200) which issued after trial between AWC and West, the Trial Court granted the Port's Motion to Dismiss:

6.7 Judgment shall be entered for the Appellant consistent with this opinion, except the Port of Olympia, whose prior Motion for Summary Judgment was pending and unopposed at the time of trial, is dismissed with prejudice.

On September 20, 2010, Appellant filed Reconsideration of the Court's Order granting the Port's dismissal. CP 1425-1474. The Port responded October 5, 2010 and pointed out that most if not all of Appellant's arguments were untimely, founded in hearsay, and lacked admissible support. CP __². By ruling dated January 21, the Court of Appeals included Appellant's appeal of the Port's dismissal within Appellant's existing appeal of Association of Washington cities (that appeal now moot).

III. AUTHORITY & ARGUMENT

A. Standard Of Review

In reviewing a trial court's decision to grant summary judgment, the appellate court considers all facts and reasonable

² The Port has filed a Supplemental Designation of Clerks Papers and will supplement this citation when CP number is established.

inferences in the light most favorable to the nonmoving party. *Mason v. Kenyon Zero Storage*, 71 Wash.App. 5, 8-9, 856 P.2d 410 (1993). Absent a genuine issue of any material fact, the moving party is entitled to summary judgment as a matter of law. *Condor Enters., Inc. v. Boise Cascade Corp.*, 71 Wash.App. 48, 54, 856 P.2d 713 (1993) (citing CR 56), *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990)). This case raises questions of law, which the appeals court reviews de novo. *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 813, 854 P.2d 1072 (1993).

B. TRIAL COURT PROPERLY DISMISSED: DISMISSAL APPROPRIATE PURSUANT TO CR 12(B)(6).

A complaint can be dismissed under CR 12(b)(6) for “failure to state a claim upon which relief can be granted.” Whether a CR 12(b)(6) dismissal is appropriate is a question of law. *Tenore v. AT & T Wireless Servs.*, 136 Wash.2d 322, 329-30, 962 P.2d 104 (1998).

On a 12(b)(6) motion, the Court examines the pleadings to “determine whether claimant can prove any set of facts, to “determine whether claimant can prove any set of facts consistent with the complaint, which would entitle claimant to relief” *North*

Coast Enterprises Inc., v. Factoria Partnership, 94 Wn App 855, 859, 974 P.2d 1257 (1999).

A dismissal for failure to state a claim under CR 12(b)(6) is appropriate when “ ‘it appears beyond doubt that the Appellant can prove no set of facts, consistent with the complaint, which would entitle the Appellant to relief.’ ” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987) (quoting *Bowman v. John Doe Two*, 104 Wash.2d 181, 183, 704 P.2d 140 (1985)).

One purpose of CR 12, which permits the inclusion of all defenses in a responsive pleading, is to eliminate unnecessary delay in the conduct of an action. *Kuhlman Equipment v. Tamermatic Inc.* (1981) 29 Wash.App. 419, 628 P.2d 851.

While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient. As this court stated in *Bravo*, a proffered hypothetical will “ ‘defeat a CR 12(b)(6) motion *if it is legally sufficient to support plaintiff's claim.*’ ” *Bravo*, 125 Wash.2d at 750, 888 P.2d 147 (quoting *Halvorson*, 89 Wash.2d at 674, 574 P.2d 1190) (emphasis added). If a plaintiff's claim remains legally

insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate.

C. TRIAL COURT PROPERLY DISMISSED: CR 56 SUMMARY JUDGMENT IS APPROPRIATE TO DETERMINE QUESTIONS OF LAW

Dismissal was also proper pursuant to CR 56, Summary Judgment. The rules of Civil Procedure 56(c) provide:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Port's Motion for Summary Judgment pursuant to CR 56(c) was therefore proper if the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). All the facts submitted and the reasonable inferences there from are considered in the light most favorable to the nonmoving party. *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn. App. 381, 383, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989). The burden is on the moving party to prove there is no genuine issue of fact which could influence the trial. *Hartley v. State*, 102 Wn.2d 768, 774, 698 P.2d 77 (1985).

Issues of law are properly resolved on summary judgment. *See Harris v. Harris*, 60 Wn.App. 389, 392, 804 P.2d 1277, *review denied*, 116 Wn.2d 1025, 812 P.2d 103 (1991); *Maltman v. Sauer*, 84 Wn.2d 975, 530 P.2d 254 (1975).

**D. TRIAL COURT PROPERLY DISMISSED CAUSE OF ACTION 5.3
& ALL CLAIMS BECAUSE APPELLANT LACKS
STANDING TO BRING DECLARATORY JUDGMENT
ACTION³**

To find that a party has personal standing in order to seek a declaratory judgment, the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, states:

A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance,

³ Plaintiff's Complaint at 5. 3: "That declaratory relief issue declaring that defendants Lott, HOCM, John doe Environmental consultants and the Port have conspired to obstruct the democratic system of government by obstructing access to records of the SSLC and the EBRP, and fraudulently conspired to misrepresent the public availability of records related to such projects".

contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020.

To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm **personal to the party** that are substantial rather than speculative or abstract. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994). This statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Id.* at 419.

The Washington Supreme Court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is " 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' " *Save a Valuable Env't v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970)).

The second part of the test considers whether the challenged action has caused " 'injury in fact,' " economic or otherwise, to the

party seeking standing. *Id.* at 866. Both tests must be met by the party seeking standing.

The Courts have required a specific injury in fact in order to invoke standing. For example, a taxpayer may not invoke Declaratory Judgments Act to test constitutionality of Port Districts Act, where he does not allege that he owns or is interested in any property within district or will be in any way affected by acts done pursuant to such act, and he shows no substantial interest therein. *Heisey v. Port of Tacoma* (1940) 4 Wash.2d76, 102 P. 2d 258.

Here, Appellant's only complaint allegation relevant to standing is his assertion that he "is a citizen abiding and conducting business in The City of Olympia, Thurston County in the State of Washington. He has standing to maintain this action in all his particulars." Complaint at ¶2.1. If status as a citizen or consumer were sufficient to confer standing, the entire UDJA would be superfluous. *See Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991). And a plaintiff's status as a landowner will cause a litigant to have standing only if the lawsuit involves some harm to the land or the owner's property rights, thus fulfilling the "injury in fact" prong of the standing test. *See e.g. Orion Corp. v. State*, 103 Wn.2d 441, 455, P.2d 1369 (1985) (a

landowner has standing if his property rights were allegedly infringed).

Here, Appellant has **not** that he is 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' Nor has he established any 'injury in fact'. One may not, by declaratory judgment action, challenge constitutionality of statute **unless it appears that he will be directly damaged in person** or in property by its enforcement. *De Grief v. Seattle* (1956) 49 Wash.2d 912, 297 P.2d 940. Accordingly, the Trial Court properly dismissed and this Appeals Court should find the Appellant lacks standing to bring this Declaratory Judgment action.

E. CAUSE OF ACTION 4.1 -THE COURT'S DISMISSAL OF THIS CLAIM PROPER BECAUSE NO JUSTICIABLE CONTROVERSY EXISTS AS APPELLANT HAS NOT ALLEGED A PUBLIC RECORDS ACT VIOLATION.

Appellant's cause of action alleging Public Disclosure Act violation was properly dismissed pursuant to CR 12 or CR 56 because it is not supported by either fact or law. CR 56 provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Dismissal of the alleged public record violation pursuant to CR 56(c) is therefore proper because the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

A controversy must be justiciable in order to support a proceeding for, or the award of, declaratory relief. RCW 7.24.010. Here, Appellant alleges no actual violation of the Public Records Act by the Port of Olympia.⁴ Instead, Appellant merely seeks an advisory opinion from the Court, which is not permissible. Declaratory Judgment Action may not be used for the purpose of obtaining a purely advisory opinions. *Seattle First National Bank v. Crosby*, 41 Wn2d 234, 254 P2d 732 (1953). Declaratory Judgment action must be adversarial in character, and involve present and actual, as opposed to possible or potential controversy between parties. *De Grief v. Seattle*, 50 Wa2d 1, 297 P.2d 940 (1956).

⁴ See *Plaintiff's Complaint* at 4.1. "By their acts and omissions, defendants illegally and unconstitutionally violated RCW 42.56, damaging plaintiff, and the State, for which relief should issue as requested below".

The controversy must be justiciable in order to support a proceeding for, or the award of, declaratory relief.⁵ The requirements for a justiciable controversy are no less exacting in a case brought under the declaratory judgment statute than in any other type of suit. *Id.* ⁶ In order to be justiciable, the controversy must be within the jurisdiction of the court. *Id.*

“Justiciable controversy” requires parties having existing and genuine, as distinguished from theoretical, rights or interests; controversy must be one upon which judgment of court may effectively operate;⁷ judicial determination of controversy must have force and effect of final judgment or decree upon relationships of one or more of parties in interest or be of such great public moment as to constitute legal equivalent of them; and proceedings must be genuinely adversary in character. RCW 7.24.010.

Here, Appellant **failed to allege any actual violation** of the Public Records Act by the Port of Olympia, and therefore, failed to assert any facts upon which relief may be granted.

⁵ *Nostrand v. Little*, 58 *Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 73 S. Ct. 236, 97 L. Ed. 291 (1952); *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir. 1960). *Wash. 2d* 111, 361 P.2d 551 (1961).

⁶ See also *Societe de Conditionnement en Aluminium v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 210 U.S.P.Q. (BNA) 344 (9th Cir. 1981); *Landau v. Chase Manhattan Bank, N.A.*, 367 F. Supp. 992 (S.D.N.Y. 1973).

⁷ *State ex rel. O'Connell v. Dubuque*, 68 *Wash. 2d* 553, 413 P.2d 972 (1966).

What are the principal elements of a justiciable controversy as contemplated by the Uniform Declaratory Judgments Act, RCW 7.24? **First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests.** Second, the controversy must be one upon which the judgment of the court may effectively operate, **as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion.** Third, it must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of **one or more of the real parties in interest,** or, wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues. Any controversy lacking these elements becomes an exercise in academics and is not properly before the courts for solution. The decisions of this court, when considered seriatim, recognize and apply this definition. *Hubbard v. Medical Ser. Corp.*, 59 Wash.2d 449, 367 P.2d 1003 (1962); *State ex rel. Ruoff v. Rosellini*, 55 Wash.2d 554, 348 P.2d 971 (1960); *Huntamer v. Coe*, 40 Wash.2d 767, 246 P.2d 489 (1952); *Adams v. City of Walla Walla*, 196 Wash. 268, 82 P.2d 584 (1938); *Washington Beauty College, Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938); *Acme Finance Co. v. Huse*, 192 Wash. 96, 73 P.2d 341, 114 A.L.R. 1345 (1937).

State ex rel. O'Connell v. Dubuque, 68 Wash. 2d 553, 557, 413 P.2d 972 (1966).

'It should be remembered that this court is not authorized to render advisory opinions or pronouncements upon abstract or speculative

questions under the declaratory judgment act. The action still must be adversary in character between real parties and upon real issues, that is, between a plaintiff and defendant having opposing interests, and the interest must be direct and substantial and involve an actual as distinguished from a possible or potential dispute, to meet the requirements of justiciability.’ See also *Kitsap County v. City of Bremerton* (1955), 46 Wash.2d 362, 281 P.2d 841; *Adams v. City of Walla Walla* (1938), 196 Wash. 268, 82 P.2d 584.

Washington Beauty College, Inc. v. Huse (1938), 195 Wash. 160, 164, 80 P.2d 403, 405.

F. CAUSE OF ACTION 4.3 -THE TRIAL COURT PROPERLY DISMISSED THIS CLAIM BECAUSE NO JUSTICIABLE CONTROVERSY EXISTS AS APPELLANT HAS NOT ALLEGED ANY ACTUAL UNCONSTITUTIONAL EXPENDITURE OF PUBLIC FUNDS.

As part of his relief, Appellant claimed that, “By their acts and omissions, defendants unconstitutionally expended public funds, and unconstitutional application of [unnamed] statute for which Appellant is entitled to the relief requested in section 5 below” See Appellant’s complaint at 4.3. Yet no where does the Appellant provide the Defendant Port of Olympia (***or the Trial Court or the Appeals Court***) with any specific information supporting such a claim, or identify any activity claimed to be constitutional, or provide any supporting legal analysis as to why or how the undisclosed activity is unconstitutional.

Thus, Appellant's this cause of action, like his others, does not present any specific facts nor any actual justiciable controversy for the Court to decide, and was properly dismissed.

The action still must be adversary in character between real parties and **upon real issues**, that is, between a plaintiff and defendant having opposing interests, and **the interest must be direct and substantial and involve an actual as distinguished from a possible or potential dispute**, to meet the requirements of justiciability.' See also *Kitsap County v. City of Bremerton* (1955), 46 Wash.2d 362, 281 P.2d 841; *Adams v. City of Walla Walla* (1938), 196 Wash. 268, 82 P.2d 584.

Washington Beauty College, Inc. v. Huse (1938), 195 Wash. 160, 164, 80 P.2d 403, 405. Any controversy lacking these elements becomes an exercise in academics and **is not properly before the courts for solution**. *State ex rel. O'Connell v. Dubuque*, 68 Wash. 2d 553, 557, 413 P.2d 972 (1966).

G. DISMISSAL OF ALLEGATIONS OF FRAUD AND NEGLIGENCE IS APPROPRIATE PURSUANT TO SUMMARY JUDGMENT CR 56 AND CR 12(B)(6).

The Trial Court properly dismissed because Appellant's Complaint alleges general, unsupported allegation of fraud and negligence which are wholly without merit.

Appellant's complaint does not allege any facts to support either a negligence or fraud claim against the Port. At most, these claims are redundant or intended to be included within Appellant's

PRA and “illegal representation” claims, which have been or will be separately adjudicated by this court. Appellant’s fraud and negligence claims were appropriately dismissed with prejudice and the appeal should be denied for the reasons discussed below.

1. Appellant has not alleged facts sufficient to establish a claim of civil fraud.

To establish a claim for fraud, each element of fraud must be established by clear, cogent, and convincing evidence. *Stiley v. Block*, 13 Wn.2d 486, 505, 925 P.2d 194 (1996). The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s acknowledge of its falsity; (5) intent of the speaker that it should be acted upon by the Appellant; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely on it; and (9) damages suffered by the plaintiff. *Id* at 505.

Appellant had not alleged any facts whatsoever to support an actionable fraud claim against the Port. With regard to fraud, his complaint alleges merely alleges “[d]efendants false representations, that were reasonably relied upon, damaged plaintiff have created a cause of action for fraud, for which relief should issue as requested below.” Complaint at ¶ 4.4. He further states without support the “seven” elements of fraud have been met.

Id at ¶ 3.15. Appellant's fraud claim is baseless and appears solely intended to harass the Port. The Trial Court properly dismissed this claim.

2. Alternatively, Appellant's fraud claim was not properly pled, and should be dismissed on that basis.

While Washington is generally a notice pleading state, CR 9 requires certain causes of action be pled with particularity. CR 9(b) requires dismissal when a complaint fails to plead fraud with particularity. CR 9(b); *see also Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 165, 744 P.2d 1032 (1987).

CR 9(b) states in its entirety:

(b) Fraud, Mistake, Condition of Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

CR 9(b). CR 9(b), like its federal counterpart, Fed. R. Civ. P. 9(b), ensures that Appellants seek redress for a wrong rather than use lawsuits as pretexts to discover unknown wrongs, protects defendants from unnecessary harm to their reputation, and gives defendants sufficient notice to enable them to prepare a defense. *Haberman*, 109 Wn.2d at 165 (citing *D & G Enters v. Continental Ill. Nat'l Bank & Trust Co.*, 574 F.Supp. 263, 266067 (N.D. Ill.

1983); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The complaining party must plead both the elements and circumstances of fraudulent conduct. *Id.* (citing 3 A L. Orland, Wash. Prac. 129 (3d ed. 1980)).

The clear weight of authority is that CR and Fed. R. Civ. P 9(b) requires specification of the time, place and content of an alleged false representation. *McGinty v. Beranger Volkswagon, Inc.* 633 F.2d 226, 228 (C.A. Mass. 1980); *see also* 3A Wash. Prac., K. Tegland, Rules of Practice CR 9 (5th ed). To determine whether allegations of fraud satisfy CR 9(b), the court will consider only the complaint, and not additional allegations made in the briefs. *Id.* (citing *Beck v. Cantor, Fitzgerald & Co.*, 621 F.Supp. 1547, 1552 (N.D. Ill.)).

Here, Appellant fails to plead fraud with particularity. He merely alleges that the Port and other defendants acted fraudulently. He does not specify the time, place, content, or even any facts support a fraud claim. Thus, in addition to above, Appellant's fraud claim was properly dismissed with prejudice and on appeal the Court should confirm dismissal as the allegation was insufficiently pled.

3. **Appellant has failed to state a prima facie claim for negligence.**

Negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 927 P.2d (1996). In a negligence case, the plaintiff is required to prove four elements; (1) the defendant had a duty or obligation to conform to a certain standard of conduct for the protection of others against unreasonable risks; (2) the defendant breached that duty; (3) the breach was a proximate cause of the plaintiff's injury; and (4) the plaintiff suffered legally compensable damages. *Id.*

To make a prima facie case of negligence, the plaintiff must show duty, breach, causation, and damages. *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). Plaintiff must show an issue of material fact as to each element for him to support a challenge to his negligence claim. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). Negligence may be decided as a matter of law when reasonable minds could not differ in their interpretation of the facts. *Young v. Caravan Corp.*, 99 Wn.2d 655, 661, 663 P.2d 1267 (1983).

Like Appellant's purported fraud claim, Appellant fails to plead any facts to support any negligence claim against the Port.

Appellant has failed to identify any duty owed to him,⁸ how any such duty was breached, that he suffered any injury thereby, or that he has suffered any recoverable damages. In addition, negligence actions are for personal injury—unreasonable risk of physical or financial harm. Appellant has not alleged, nor has he suffered any loss as a result of any Port action. Under the facts alleged by Appellant, negligence is not an actionable claim. Appellant’s negligence claim was appropriately dismissed.

H. RELIEF OF DISMISSAL PROPERLY GRANTED BASED ON APPELLANT’S FAILURE TO RESPOND & LACK OF TIMELY REQUEST FOR ACCOMMODATION.

Appellant failed to respond or rebut any dispositive motions pursued by the Port. Thus, the Port was entitled to its requested relief. “The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56 (c).

West on appeal argues little of substance and mainly about a claimed lack of accommodation. However in its Order on Case

⁸ If a plaintiff cannot establish that a defendant owes a duty of care, the court need not determine the remaining elements of a negligence claim. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 985, P.2d 301 (1998). Plaintiff’s negligence claim immediately fails for lack of establishment of any duty of care owed.

status, the Trial Court responded to Mr West's claimed need for accommodation, by noting that West failed to present any request for continuance or any adequately specific GR 33 filing for accommodations. The Court set a May 26 2011 deadline for West to make such filing. West failed to timely do so. CP 1408-1410. He cannot now claim harm from his own inaction.

This Court also should not excuse Appellant's omissions based on his pro se status. "[P]ro se litigants are bound by the same rules of procedure and substantive law as attorneys." *Westberg v. All-Purpose Structures*, 86 Wash.App. 405, 411, 936 P.2d 1175 (1997) (citing *Patterson v. Superintendent of Public Instruction*, 76 Wash.App. 666, 671, 887 P.2d 411 (1994), *review denied*, 126 Wash.2d 1018, 894 P.2d 564 (1995)).

I. Port Should Be Awarded Fees & Costs

The Port requests attorney fees and costs based on this frivolous appeal. RAP 18.1;⁹ RCW 4.84.185.¹⁰ and RAP 18.9.¹¹ A

⁹ RAP 18.1. **(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.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts. *Tiger Oil Corp. v. Department of Licensing*, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997).

Appellant Mr West failed completely via his meritless pleadings before the trial Court but still presses on, requiring scarce Port taxpayer dollars to be spent once again defending against baseless claims; this Court should not allow him the same clemency in this round of similarly vacuous pleadings. The Port requests this Court order Appellant West to pay its attorney fees and costs for having to respond yet again to these frivolous matters. RAP 18.1, RAP18.9 and or RCW 4.84.185.

¹⁰ **4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense.** In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

¹¹ **RULE 18.9 VIOLATION OF RULES**

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules **to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply** or to pay sanctions to the court.

An appeal is clearly without merit if the issues on review: (1) are clearly controlled by settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency. *State v. Rolax*, 104 Wn.2d 129, 132, 702 P.2d 1185 (1985).

Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award. RAP 18.9 authorizes the Court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022 (1999).

An appeal is frivolous if there are “no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility’ of success.” *In re Recall of Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003) (quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wn.2d 9, 15, 665 P.2d 887 (1983)).

This appeal is frivolous. West presents no debatable point of law, his appeal (yet again) lacks merit, and the chance for reversal is nonexistent. This was true in his pleadings before the Superior Court; it remains true now. Mr West was given the several

opportunities for a graceful exit, without a monetary penalty to him, but he chooses to persist. Pursuing a frivolous appeal justifies the imposition of terms and compensatory damages. *Eugster v. City of Spokane* (2007) 139 Wash.App. 21, 156 P.3d 912.

IV. CONCLUSION

Appellant's appeal should be denied as to all issues.

- **(5.3)** based on Appellant's lack of standing to bring this Declaratory Judgment action pursuant to RCW 7.24.020,
- **(4.1)** based on Appellant's failure to pled any actual violation of the Public Records Act, i.e., no justiciable controversy exists, such that the Port is entitled to Summary Judgment pursuant to CR 56 and RCW 7.24.010, and Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6),
- **(4. 3)** based on Appellant's Lack of Facts in Support of Appellant's Claim of "Unconstitutional Expenditure of Public Funds", and thus Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6),
- **(4.4) Fraud;** based on Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6); and
- **(4.5) Negligence,** based on Appellant's failure to state a claim upon which relief may be granted pursuant to CR 12(b)(6).

In addition, WPPA should be awarded its fees and costs.

RESPECTFULLY SUBMITTED this 26th day of September 2011.

GOODSTEIN LAW GROUP PLLC

By: _____

Carolyn A. Lake, WSBA #13980
Attorneys for Respondent Port of
Olympia.

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

<p>ARTHUR WEST, Respondent/Cross-Appellant, v. WASHINGTON ASSOCIATION OF CITIES, Appellant/Cross-Respondent THURSTON COUNTY; PORT OF OLYMPIA, Respondents, WASHINGTON STATE DNR; WASHINGTON STATE; HANDS ON CHILDREN'S MUSEUM LOTT; JOHN DOE ENVIRONMENTAL CONSULTANTS, Defendants.</p>	<p>NO. 40865-1-II DECLARATION OF SERVICE</p> <p>FILED BY [unclear] CLERK OF COURT SEP 26 2011 OLYMPIA, WA</p>
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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. RESPONSE BRIEF OF RESPONDENT PORT OF OLYMPIA
2. RESPONDENT PORT OF OLYMPIA'S MOTION FOR EXTENSION & FOR COURT TO ACCEPT RESPONDENT'S BRIEF

to be served on September 26, 2011, on the following parties and in the manner indicated below:

Arthur West
120 State St. NE #1497
Olympia, WA 98501

ORIGINAL

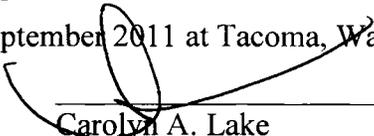
by United States First Class Mail
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 by Facsimile
 by Electronic Mail

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

Dated this 26 day of September 2011 at Tacoma, Washington.



Carolyn A. Lake