

No. 43876-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ARTHUR WEST, et al.,

Appellants,

vs.

PORT OF OLYMPIA, et al.

Respondents

APPELLANT ARTHUR WEST'S REPLY BRIEF

Stephanie M.R. Bird
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

206-902-6787

Attorneys for Appellant Arthur West

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I. INTRODUCTION

This case, so far as Plaintiff and Appellant Mr. Arthur West's Public Records Act ("PRA") claims are concerned, is one of "want of prosecution," which Mr. West cured. The Trial Court improperly exercised its discretion in dismissing Mr. West's PRA claims, a discretion that is limited by the civil rule, CR 41(b)(1), that applies. Further, even if the Trial Court could properly exercise its discretion here, it did so based on untenable grounds and for untenable reason. This Court should reverse and remand.

And as far as Mr. West's non-PRA claims go, these claims were dismissed by the Trial Court for lack of standing at a stage in the proceeding when Mr. West's yoke was easy and his burden was light. All that Mr. West had to do was to plead general factual allegations of injury. Mr. West did so, and the Trial Court improperly dismissed the claims. This Court should reverse and remand.

Defendant and Respondent the Port of Olympia has requested sanctions of attorney fees in its response brief. This Court, even if it denies Mr. West's appeal, should deny the request for sanctions. Reasonable minds might well differ as to whether CR 41(b)(1) applied in this case to preclude the Trial Court's exercise of discretion in dismissing Mr. West's PRA claims, and as to whether Mr. West met his standing

burden in pleading factual allegations of injury. Defendant and Respondent the Weyerhaeuser Company has requested no sanctions, nor is there any basis therefor. This Court should impose no sanctions.

II. STATEMENT OF FACT

The Port, in its statement of fact, makes an error. The Port alleges: “On September 7, 2013 [presumably 2012], this Court *sua sponte* filed a motion to dismiss the case because the Appellants did not pay a filing fee for this appeal. Appellants later paid.” This is not true. On September 7, 2013, Mr. West’s counsel received a letter from this Court saying that the notice of appeal appeared to be filed prematurely, not that appellants had not paid. *See* September 7, 2012 letter from Mr. David C. Ponzoha, *on file*. Next, on September 12, 2012, this Court wrote to Mr. West and returned the appellate filing fee that *he* had paid because Mr. West’s counsel – the undersigned – had already paid it when she filed the appeal on August 31, 2012. *See* September 12, 2012 letter from Mr. David C. Ponzoha, *on file*. Counsel for the Port was sent both letters.

Mr. West’s counsel denies the allegations of strategic delay in prosecuting this appeal. The Port complains that Mr. West’s counsel improperly sought to bifurcate the appeal, improperly sought to consolidate the appeal with other similar cases, improperly designated on appeal the administrative record, and improperly filed two revised opening

briefs without seeking leave of this Court. For good or for ill, the undersigned was simply trying to represent her client to the best of her ability, whether through trying to simplify and streamline the appeal (either through bifurcation or consolidation), make certain that this Court had a complete record to review (by designating the administrative record for review; indeed, Mr. West's counsel ended up citing to the administrative record – *see* West's Opening Brief at pp. 11-12; p. 50), or by filing revised versions of the opening brief.

Further, the Port is incorrect in alleging that Mr. West did not seek leave to file revised versions of the brief. The record shows that Mr. West twice moved this Court for leave to file revised versions of the opening brief, once on May 20 and once on June 7, and that twice this Court granted leave. The Port was served with the motions for leave to file. In any event, Mr. West's revisions did not delay the case, since Plaintiff and Appellant Jerry Lee Dierker was still working on his brief when Mr. West moved this Court for leave to file his revisions.

III. LEGAL ARGUMENT

A. This Court Should Reverse and Remand the Trial Court's Dismissal of Mr. West's PRA Claims

This Court should reverse and remand the Trial Court's dismissal of Mr. West's PRA claims. At heart, this is a failure to prosecute case, and Mr. West cured any failure to prosecute.

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

The Port argues that Washington trial courts have inherent authority to dismiss cases. That is so. But this authority is limited, not limitless. Consider: State v. Gilkinson, 57 Wn. App. 861, 865, 790 P.2d 1247 (1990) (a trial court's powers are limited to those essential to the existence of the court and necessary to the exercise of its jurisdiction; trial court lacked power to expunge record); City of Fircrest v. Jensen, 158 Wn.2d 384, 395, 143 P.3d 776 (2006) (the constitution gives the Supreme Court authority to adopt rules of procedure); In re Mowery, 141 Wn. App. 263, 281, 169 P.3d 835 (2007) (court lacked inherent power to impose criminal contempt sanction in excess of that provided for by law); Bus. Servs. of Am. II, Inc. v. WaferTech LLC, 174 Wn.2d 304, 312, 274 P.3d 1025 (2012) (where CR 41(b)(1) applies, a trial court has no discretion to dismiss a case where the plaintiff has noted the case for trial before the motion to dismiss is heard); Snohomish County v. Thorpe Meats, 110

Wn.2d 163, 166, 750 P.2d 1252 (1988) (dismissal for lack of prosecution was precluded due to fact that case was noted for trial before motion to dismiss for lack of prosecution was heard); and Wallace v. Evans, 131 Wn.2d 572, 577-78, 934 P.2d 662 (1997) (where CR 41(b)(1) applies, the rule **prevents dismissal pursuant to the trial court's inherent authority**). Here, because this case is at its heart a “failure to prosecute case,” CR 41(b)(1) applies and this rule prevents dismissal pursuant to the Trial Court’s inherent authority.

The Port also cites two cases that are not on point. Hiller Corp. v. Port of Port Angeles, 96 Wn. App. 918, 928, 982 P.2d 131 (1999) (*cited* by the Port as “Rogerson Hiller Corp.”) concerned a trial court’s imposition of a sanction of attorney fees, not dismissal. Dismissal is a more stringent sanction than an award of fees. And Johnson v. Horizon Fisheries, LLC, 148 Wn. App. 628, 639, 201 P.3d 346 (2009) concerned an appellant who disobeyed the scheduling order in the case. Here, Mr. West disobeyed no order.

2. Substantial Evidence Does Not Support the Superfluous Findings that the Criteria for Dismissal Were Met

Even if CR 41(b)(1) did not apply, precluding dismissal pursuant to the Trial Court's inherent authority, substantial evidence does not support the superfluous findings¹ that the criteria for dismissal were met.

a. Mr. West Did Not Disobey A Court Order

The Port argues that Mr. West disobeyed the order of bifurcation, alleging that in the order, "Appellants/Plaintiffs were instructed to pursue the records issues on a separate track." Port's Response at 19. But the Bifurcation Order itself did not instruct or order Mr. West to do anything.

IT IS HEREBY ORDERED that Weyerhaeuser's Motion to Bifurcate Plaintiffs' Cause of Action for Alleged Violations of the Public Records Act is GRANTED.

IT IS HEREBY FURTHER ORDERED that Plaintiffs' "Public Records Act" cause of action shall be segregated from Plaintiffs' remaining causes of action in this case.

CP 71. Mr. West did not disobey the order of bifurcation.

Further, Mr. West did not disobey the case schedule order.

Weyerhaeuser persuasively argued to the Trial Court, and the Trial Court agreed, that the case schedule order only concerned the non-PRA claims, not the PRA claims. CP 2565-2566; CP 2509-2513; CP 91.

¹ The Port argues that Will v. Frontier Contractors, Inc., 121 Wn. App. 119, 129, 89 P.3d 242 (2004) "requires explicit findings regarding the abusive plaintiff." Port's Response at 19, n. 17. Mr. West cannot see that Will requires such findings, only that the record show that the trial court explicitly considered whether lesser sanctions would have sufficed. Will, 121 Wn. App. at 129.

Substantial evidence does not support the superfluous finding that Mr. West disobeyed any court order. The record does not show that Mr. West disobeyed any court order. The Port argues that this Court must review the entire spectrum of Mr. West's conduct, *citing to* Anderson v. Mohundro, 24 Wn. App. 569, 575, 604 P.2d 181 (1979) and Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1995). But in Anderson and Woodhead, the plaintiffs disobeyed court orders and the courts dismissed the cases for disobedience of the court orders, even while they reviewed the entire spectrum of plaintiffs' conduct. Here, Mr. West has disobeyed no court order. The law explicitly requires that the party have willfully and deliberately refused to obey a court order. Will, 121 Wn. App. at 129. This prong fails.

b. The Delays Did not Prejudice the Port

The Port argues that Mr. West disobeyed a court order and that the delays he caused prejudiced the Port, causing the Port to spend money defending the lawsuits, subjecting the Port to more days for which a per diem penalty under the PRA could be awarded (were Mr. West to prevail), and that the passage of time impacts the Port's witnesses. As to the costs of defending the lawsuit and the risk of more days for which a per diem penalty could be awarded, these are not prejudicial. " 'Prejudice' means a damage or detriment to one's legal claims. Black's Law Dictionary 1299

(9th ed. 2009).” Nat’l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 890, 297 P.3d 688 (2013). Further, the Port is in control of its own response to Mr. West’s PRA request. If it does not wish to incur a monetary per diem penalty, it can fully and completely respond to the request.

And as to the allegation that the passage of time will have impacted the memories of the Port’s witnesses, thereby being a damage or detriment to the Port’s legal defenses, this allegation is belied by the Port’s own statements. “On April 2, 2008, the Port filed a Response to the Public Records Order of Show Cause. CP 2270-2286 and 2255-2264.” Port’s Response at 5. Indeed, the Trial Court found (in a superfluous finding) that the Port appeared ready to respond to a show cause hearing in April of 2008. RP 07/13/12, p. 4, ll. 19-20. If the Port had completed its response, interviewed all its witnesses and filed all the declarations it deemed necessary, the passage of time and impacts on the witnesses’ memories would not be detrimental or damaging. Substantial evidence does not support the Trial Court’s superfluous finding that Mr. West’s delays caused prejudice to the Port.

c. The Trial Court Did Not Explicitly Consider Lesser Sanctions

The Port argues that because it pointed out to the Trial Court that other courts had imposed monetary sanctions on Mr. West and that these monetary sanctions had not curbed Mr. West's *and* Mr. Dierker's "disruption and delay" (Port Response at 28), that it follows that the Trial Court explicitly considered whether lesser sanctions would suffice.

But the record does not support this argument. The Order of Dismissal states: "This Court concludes that lesser sanctions than dismissal will not suffice, since a court would have no discretion to reduce the number of days for which the Port of Olympia would be subject to a daily penalty." CP 938. That is, the record does not show that the Trial Court considered and found persuasive the Port's argument that monetary sanction imposed on Mr. West in another case did nothing to curb Mr. West's *and* Mr. Dierker's delays.

Further, the record does not show that the Trial Court considered any sanction other than dismissal. And again, it does not make sense that simply because the Port is at risk of a higher total monetary penalty, that dismissal is the only sanction that would suffice. If the harm can be measured in dollars and cents, it only follows that an appropriate sanction

could be as well. Substantial evidence does not support the Trial Court's superfluous finding that no lesser sanction than dismissal would suffice.

3. The Sanction of Dismissal is Not Warranted

In arguing that the sanction of dismissal was warranted, the Port cites to a list of cases involving a court's inherent authority to dismiss cases for want of prosecution, most of which precede the 1967 amendment of CR 41(b)(1) that severely limited this inherent authority. These cases range in dates from 1892 to 1950: McDaniel v. Pressler, 3 Wash. 636, 29 P. 209 (1892); Plummer v. Weill, 15 Wash. 427, 46 P. 648 (1896); State ex rel. Clark v. Hogan, 49 Wn.2d 457, 303 P.2d 290 (1956); State ex rel. Washington Water and Power Co. v. Superior Court for Chelan County, 41 Wn.2d 484, 250 P.2d 536 (1953); National City Bank of Seattle v. International Trading Co. of America, 167 Wash. 311, 9 P.2d 81 (1932); and Stickney v. Port of Olympia, 35 Wn.2d 239, 212 P.2d 821 (1950). This is no longer the law. In construing the post-1967 CR 41(b)(1), the Supreme Court held:

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

*the case is noted for trial before the hearing on the motion,
the action shall not be dismissed. (Italics ours.)*

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

The same argument holds true for the Supreme Court authority cited by the Port. The Port relies on Link v. Wabash R. Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L.Ed. 2d 734 (1962). In that case, there was no such rule as CR 41(b)(1). Mr. West is not asking that this Court substitute its judgment for the Trial Court's. Mr. West is asking this Court to look at the facts and the law and conclude that the Trial Court lacked discretion to dismiss the case because CR 41(b)(1) applied and Mr. West had cured his want of prosecution, or, alternatively, that even if CR 41(b)(1) did not apply, that the Trial Court erred in dismissing the case because substantial evidence did not support the findings on which the dismissal was based.

The Port did not respond to Mr. West's arguments that the Trial Court erred in not applying CR 41(b)(1) to the case. All of the delays that the Port complains of ultimately add up to a failure to prosecute, implicating CR 41(b)(1). Because this case falls within the purview of CR 41(b)(1), the discretion that the Trial Court would otherwise wield is limited.

It is our view that when in 1967 the Supreme Court revised the rules adding to CR 41(b)(1) mandatory language of nondismissal under certain circumstances, that change assumes significance in light of this long-standing

construction. The predecessors to CR 41(b)(1)...did not contain the mandatory language of nondismissal later added to the rule. In our opinion, the 1967 revision contemplates a limitation upon the otherwise inherent discretionary power of the court to dismiss, upon the motion of a party, for failure to bring a case on for trial in a timely fashion.

Gott v. Woody, 11 Wn. App. 504, 507, 524 P.2d 452 (1974). Because CR 41(b)(1) applies, the Trial Court's inherent discretionary power is limited. "The dismissal of an action for want of prosecution, in the absence of statute or rule of court creating the power and guiding its action, is in the discretion of the court." Gott, 11 Wn. App. at 506. Here, there is no "absence" of statute or rule of court, as there is in all the pre-1967 case law cited by the Port. CR 41(b)(1) exists and it applies. The Trial Court improperly exercised discretion when CR 41(b)(1) mandated that the Trial Court deny the Port's motion to dismiss.

Mr. West agrees with the Port that the case of Bus. Servs., 174 Wn.2d at 311, is on point:

The behavior engaged in by [Mr. West] here does not rise to the level of "unacceptable litigation practices other than mere inaction." Wallace, 131 Wn.2d at 577. [Failure to get a matter heard on show cause, despite eight attempts to do so, or filing multiple ineffective affidavits of prejudice] is not equivalent to a failure to appear at a court proceeding or noncompliance with a court order or ruling.

Bus. Servs., 174 Wn.2d at 311-12. Mr. West's behavior simply does not rise to the level of "an unacceptable litigation practice that is a basis for an exception to CR 41(b)(1)." Bus. Servs., 174 Wn.2d at 312.

This Court should reverse and remand the Trial Court's dismissal of Mr. West's PRA claims against the Port of Olympia.²

B. This Court Should Reverse and Remand the Trial Court's Dismissal of Mr. West's Non-PRA Claims

This Court should reverse and remand the Trial Court's dismissal of Mr. West's non-PRA claims for lack of standing. Mr. West made the required showing sufficient to withstand a CR 12(b) motion to dismiss. In his complaint and in his declarations, Mr. West made sufficient allegations of injury in fact. Each element of these allegations of injury in fact "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L. Ed. 2d 351 (1992).

Here, Mr. West's non-PRA claims were dismissed at the pleading stage of the litigation, on Weyerhaeuser's and the Port's motions to

²Mr. West did not and does not assign error to the Trial Court's dismissal of any possible PRA claims against Weyerhaeuser.

dismiss. “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’” Lujan, 504 U.S. at 561, *quoting Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L. Ed. 2d 695 (1990).

In responding to Mr. West’s arguments, the Port only looked at the allegations in Mr. West’s complaint, and failed to consider Mr. West’s declaration. *See* Opening Brief at pp. 48-49, *c.f.* Port’s Response at pp. 39-40. And Weyerhaeuser argued that Mr. West’s factual allegations were insufficient, without addressing Mr. West’s argument that they were sufficient for that stage of the litigation; i.e., at the pleading stage. *See* Weyerhaeuser Response at pp. 20-21.

Weyerhaeuser also argues that this Court should affirm the Trial Court’s dismissal of Mr. West’s non-PRA claims on grounds other than standing, stating that other bases for dismissal were already sufficiently briefed before the Trial Court. While this Court may affirm the Trial Court on any basis supported by the record and the law (State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992)), the problem here is that the other grounds Weyerhaeuser urges were simply not fully developed before the Trial Court. For example, Weyerhaeuser argues that Mr. West’s non-

PRA claims were barred by collateral estoppel. But in Weyerhaeuser's own argument to the Trial Court, Weyerhaeuser simply incorporated by reference the Port's arguments on collateral estoppel. *See* CP 2135-3150. And the Port argued that Mr. West and Mr. Dierker were collaterally estopped in making SEPA challenges in only two respects: whether or not the Port was compelled by law to provide a verbatim transcript where no hearing occurred, and as to the validity of the Port's reconsideration process. CP 2152-2175. The SEPA and other non-PRA claims in Mr. West's and Mr. Dierker's Second Amended Complaint were far more numerous than those few issues argued by the Port. CP 33-48. This Court should not affirm the Trial Court on the grounds urged by Weyerhaeuser because the record is insufficiently developed.

This Court should reverse and remand the dismissal of Mr. West's non-PRA claims on the basis of standing.

C. This Court Should Deny the Port's Request for Sanctions

The Port argues that this appeal is frivolous, and seeks an award of fees and costs. Mr. West believes this appeal is meritorious, and respectfully requests that this Court reverse and remand his case back to the Trial Court. But even in the event that this Court affirms the dismissal, an award of fees and costs are not warranted. The Port argues that an appeal is without merit if the issues on review (1) are clearly controlled by

settled law; (2) are factual and supported by the evidence; or (3) are matters of judicial discretion and the decision was clearly within the discretion of the trial court. State v. Rolax, 104 Wn.2d 129, 132, 70 P.2d 1185 (1985). Here, the Trial Court improperly exercised its discretion in dismissing the case pursuant to its inherent authority when CR 41(b)(1) applied and when Mr. West had cured the failure to prosecute.

Alternatively, even if CR 41(b)(1) did not apply, substantial evidence did not support the Trial Court's findings upon which it based the dismissal.

In order to award fees and costs, this Court must find that the appeal is frivolous. Kearney v. Kearney, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). And an appeal is frivolous if it is both without merit, *and* if there are no debatable issues upon which reasonable minds might differ." In re Recall of Feetham, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

In Kearney, the Court found that there were no debatable issues upon which reasonable minds might differ, noting that the appellant had presented the exact same arguments twice before in petitions for discretionary review to the Court of Appeals and the Supreme Court, and then again to the Court of Appeals when the underlying action became final and he appealed directly. Mr. West has made similar arguments to this Court in other cases, but this Court has not yet ruled on these arguments. There is no such history, therefore, as in Kearney. And

reasonable minds might well differ, at a minimum, as to whether CR 41(b)(1) applied in this case to preclude the Trial Court's exercise of discretion, or whether Mr. West met his light burden in opposing the CR 12(b) motion to dismiss Mr. West's non-PRA claims on the pleadings.

D. Request for Fees and Costs

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

IV. CONCLUSION

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

Respectfully submitted this Fifth Day of September, 2013.

CUSHMAN LAW OFFICES, P.S.

/s/ Stephanie M. R. Bird

Stephanie M. R. Bird, #36859

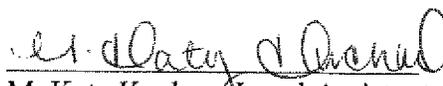
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury as follows:

On September 5, 2013, I caused the foregoing document to be filed with this Court and served on the undersigned in the manner indicated:

Carolyn Lake Seth Goodstein Goodstein Law Group, PLLC 501 South G Street Tacoma, WA 98405 clake@goodsteinlaw.com sgoodstein@goodsteinlaw.com	<input checked="" type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Facsimile/Electronic Mail <input type="checkbox"/> Hand Delivery
Kimberly Hughes Weyerhaeuser Law Department P.O. Box 9777 Federal Way, WA 98063-9777 kim.hughes@weyerhaeuser.com	<input checked="" type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Facsimile/Electronic Mail <input type="checkbox"/> Hand Delivery
Jerry Dierker 2826 Cooper Point Road NW Olympia, WA 98502-3876	<input checked="" type="checkbox"/> U. S. Mail <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile/Electronic Mail <input type="checkbox"/> Hand Delivery

SIGNED at Olympia, Washington this 5th day of September, 2013.


M. Katy Kuchno, Legal Assistant
Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
360-534-9183
Kkuchno@cushmanlaw.com

CUSHMAN LAW OFFICES PS

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