Supreme Court No. 89507-4

Court of Appeals Cause No. 68979-7-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

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JOHN WORTHINGTON,

Plaintiff /Appellant,

vs.

STATE OF WASHINGTON, et al.

Defendants/Appellees

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# ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

This case involved the application of a three-year statute of limitations to a five-year old event. The issue in the lower courts was whether Plaintiff John Worthington could qualify under the "discovery rule" exception for extending the limitations period. The Court of Appeals affirmed the trial court's dismissal on the grounds the "discovery rule" exception did not apply. The appellate court based its affirmance on Plaintiff's failure to plead or produce evidence supporting a fraud claim. The decision was consistent with uncontroversial discovery rule jurisprudence and the legislature's timing statutes. This case lacks precedential value. Defendants respectfully request the Court deny Plaintiff's request for discretionary review.

## II. STATEMENT OF FACTS

Plaintiff has litigated these facts before five courts since 2007.

### A. The Search Occurred Almost Seven Years Ago

On January 12, 2007, the Kitsap County Superior Court issued a search warrant for Plaintiff's home for drugs and drug paraphernalia. CP 320-29. Pursuant to that warrant, law enforcement officers searched Plaintiff's residence for drugs and drug-making equipment. CP 339. Plaintiff was present and watched the search occur from his backyard. CP

90-91. The two groups conducting the search were drug enforcement task forces known as WestNET and TNET:

- WestNET: WestNET stands for the West Sound Narcotics Enforcement Team. It is a regional task force designed to combat drug trafficking. WestNET members include Kitsap County, the Washington State Patrol ("WSP"), Poulsbo, Port Orchard, and Bremerton. Detective Roy Alloway worked for the Bremerton Police Department and served on WestNET. CP 283-303.
- TNET: TNET stands for the Tahoma Narcotics Enforcement Team. TNET members include Pierce County, Tacoma and Auburn, the Drug Enforcement Agency ("DEA), and the WSP. Agent Fred Bjornberg was a WSP trooper cross-deputized as a DEA agent. CP 54.

The task forces found six marijuana plants at Plaintiff's home. CP 87-135. The plants were placed into evidence at the Kitsap County Sheriff's Office. CP 331-33. Plaintiff was not charged criminally.

### B. Plaintiff Had All the Information He Needed to File Suit in 2007

Following the statute of limitations' expiration in early 2010,[1] much of Plaintiff's litigation has focused on why he waited too long to file

[1] RCW 4.16.080.

this lawsuit (his second lawsuit arising out of the search). One of the major problems with Plaintiff's ability to force his case into the discovery rule exception is that Plaintiff was physically present during the search of his home. CP 143-77. He knew the names of the law enforcement officers and their respective agencies on the day of the search. When the search was over, Agent Bjornberg handed Plaintiff a business card with his name, agency and contact information. CP 90-91. Plaintiff knew Detective Alloway was a city police officer. Plaintiff had all the information he needed to file a lawsuit that day. Plaintiff's pleadings from his first lawsuit about the drug search (hereinafter, "*Worthington I*") reveal Plaintiff had all the requisite information to timely file his lawsuit:

> Worthington denied the task forces entry [into his house] and asked them to get a search warrant. A few hours later the task forces returned with a warrant, and found 6 medical marijuana plants with a valid Washington State medical marijuana authorization from a Doctor Tom Orvald posted at the grow site.

CP 90-91. He continued:

> The Task forces gathered information from Worthington's computer, and took medical files from the grow site, and from Worthington's bedroom. Detective Alloway stated that Worthington was a legal medical marijuana patient, and that he was leaving the plants. ***Fred Bjornberg identified himself as a DEA agent, presented a DEA identification card with no photo, and confiscated the 6 plants***. Worthington is under the impression he was raided and turned over to a federal entity, and had no legal recourse to pursue state medical marijuana rights in the federal courts.

> Worthington, suspicious of the intent of the raid, pursued the issue thru public disclosure requests investigating the raid, and finds that ***Fred Bjornberg was a WSP officer cross designated as a DEA agent assigned to the IAD division of the WSP to supervise TNET.*** Worthington becomes even more suspicious of the raid and does a thorough investigation of the circumstances surrounding the raid. Through the Washington State Public Records Act and the internet, Worthington obtains numerous documents in his two and a half year investigation to support the allegations brought against all the Defendants in this action.

CP 91-92 (emphasis supplied). Plaintiff wrote these pleadings before the statute of limitations posed a problem. These statements show Plaintiff's "newly discovered" facts, which he presented at both the trial and appellate court levels—and now to this Court—were actually known to him on December 21, 2009. Plaintiff's own words were fatal to his last-ditch efforts to fit within the discovery rule fraud exception.

Plaintiff indicates he was initially confused about the roles each agency performed in the search, despite being physically present. Even assuming it made any difference as to which agency took the plants (it does not) Plaintiff was making *that* claim years before he filed the lawsuit at bar (hereinafter, "*Worthington II*"). On March 18, 2010, Plaintiff made exactly the same fraud allegation in *Worthington I* he claimed represented new information in *Worthington II* – that a city task force officer seized the marijuana. Roughly four years ago, he signed a declaration stating:

> I recently discovered a West Net Property seizure report showing West Net seized my medical marijuana.

CP 390. Plaintiff's representation that it took him until January 2012 to come to this realization is thus belied by the record he created in *Worthington I.*

## III. PROCEDURAL HISTORY

After filing repeated Public Records Act requests,[2] Plaintiff filed his first lawsuit against 27 governmental defendants. CP 87-135. The next four years show a tortured procedural history hallmarked by the state and federal judiciary's substantial efforts to give Plaintiff his day in court. Plaintiff has been fully heard. Every court to consider Plaintiff's frivolous claims has rejected them. Further consideration of his claims is unwarranted.

### A. Plaintiff Filed His First Lawsuit based on the January 2007 Search in December 2009

Plaintiff filed *Worthington I* just weeks before the three-year limitations period expired. CP 87-135. The defendants removed the case to the United States District Court for the Western District of Washington because it asserted many federal causes of action including claims under

[2] Defendants will not discuss at length Plaintiff's federal lawsuit over whether Plaintiff may obtain flight records of government airplanes flying over his property. *Worthington v. Panetta*, CLL-5916 BHS, 2012 WL 2952101 (W.D. Wash. July 19, 2012).

42 U.S.C. § 1983. CP. 138-41. The Honorable Judge James L. Robart presided.

1. U.S. District Court: Plaintiff Argued Newly Found Evidence Should Keep His Case Alive. *Rejected.*

Once removed, Plaintiff filed an amended 70-page complaint. Defendants[3] moved for a more definite statement, and the District Court ordered the Plaintiff to file a short and plain statement showing he was entitled to relief and that the Court had jurisdiction. CP 227. On March 3, 2010, Plaintiff filed his Fifth Amended Complaint. CP 143-177.

The defendants moved to dismiss the Fifth Amended Complaint for failure to state a claim under Federal Rule 12(b)(6). CP 179-202. Plaintiff argued he should be permitted to file a sixth amended complaint because, like here, he wanted to incorporate "newly found evidence," which consisted of the allegation Agent Bjornberg was not a "case agent" for the DEA and "West Net seized my medical marijuana." CP 390-91. The District Court reasoned Federal Rule 8 did not require an evidence proffer for an amendment, and, in any event, Plaintiff did not offer sufficient evidence to show a sixth amendment would cure the defect. CP 227-35.

[3] Most of the defendants were the same individuals and entities as are involved in this lawsuit, with the exception of the City of Auburn. The trial court ruled the City of Auburn is in privity with the other defendants, and Plaintiff did not appeal that determination. *See,* CP 54.

The District Court dismissed *Worthington I* without leave to amend in April 2010. *Id.* The District Court found "Mr. Worthington's allegations frivolous, baseless, and bordering on harassing." CP 404.

The decision was not published in the Federal Reporter. *Worthington v. Washington State Attorney Gen.'s Office*, C10-0118JLR, 2010 WL 1576717 (W.D. Wash. Apr. 20, 2010). Reconsideration was subsequently denied. CP 239-40. Plaintiff appealed the dismissal to the Ninth Circuit Court of Appeals.

2. Ninth Circuit Court of Appeals: Plaintiff Argued Newly Found Evidence Should Keep His Case Alive. *Rejected.*

Plaintiff argued the District Court erred when it failed to consider his "newly found evidence." The Ninth Circuit affirmed the District Court's dismissal without leave to amend on June 27, 2011. CP 242. The Ninth Circuit was to the point:

> A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard). Specifically, the district court did not err when it concluded that the plaintiff lacks standing to pursue his alleged claims as he did not show that there is a real or immediate threat of future injury and he did not seek redress of any past harm. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).
>
> Accordingly, we summarily affirm the district court's judgment.

All pending motions are denied as moot.

**AFFIRMED.**

The opinion was, unsurprisingly, not selected for publication. *Worthington v. Washington State Attorney Gen.'s Office, et al,* No. 10-35515 (June 27, 2011) (CP 242). The Ninth Circuit denied Plaintiff's motion for reconsideration. CP 244. The United States Supreme Court denied Plaintiff's petition for writ of certiorari in February 2012. CP 246.

Plaintiff recently engaged in another round of *Worthington I* briefing before the Ninth Circuit. On February 21, 2014, the Ninth Circuit once again rejected Plaintiff's claims of newly discovered evidence and summarily affirmed the district court's order without further argument. *Worthington v. Washington State Attorney Gen.'s Office, et al,* No. 13-35801 (February 21, 2014).

### B. Plaintiff Filed His Second Lawsuit based on the January 2007 Search in January 2012

On January 17, 2012, Plaintiff filed another lawsuit in King County Superior Court against the State of Washington and the cities of Bremerton, Poulsbo, Port Orchard and Auburn, as well as several elected state officials and law enforcement officers (*Worthington II*). CP 71-72.

1. King County Superior Court: Plaintiff Argued Newly Found Evidence Should Keep His Case Alive. *Rejected.*

*Worthington II* again focused on the 2007 drug search. CP 411. Plaintiff sought money damages under various state law tort and statutory claims. Plaintiff and defendants made cross-motions for summary judgment. *Id.* The Superior Court denied Plaintiff's motion and granted summary judgment in favor of the government defendants. CP 253. The dismissal was based on collateral estoppel, res judicata, and failure to comply with the statute of limitations. *Id.* Plaintiff appealed to Division One of the Washington Court of Appeals.

2. Washington Court of Appeals: Plaintiff Argued Newly Found Evidence Should Keep His Case Alive. *Rejected.*

The Washington Court of Appeals affirmance was based on the statute of limitations expiration. *See,* Appendix A of Plaintiff's Petition for Review; *Worthington v. City of Bremerton*, 68979-7-I, 2013 WL 5430537 (Div. I Sept. 23, 2013) (unpublished). The parties agreed the applicable statute of limitations for all of Plaintiff's claims was three years pursuant to RCW 4.16.080. Because Plaintiff filed the state lawsuit more than five years after the 2007 search, it was time barred. *Id.*

Plaintiff argued his case fit within discovery rule protections. Plaintiff once again claimed he originally believed his marijuana had been seized by the federal government because Agent Bjornberg misrepresented

himself as a DEA agent. Therefore, Plaintiff mistakenly believed he could not pursue recovery in state court.[4] The Court of Appeals, assuming without deciding that the discovery rule even applied, ruled he could not meet his burden of production regarding fraud and could not show defendants breached an affirmative duty to disclose a material fact. *Id.*

Additionally, Plaintiff claimed defendants were perpetrating a hoax to keep Plaintiff from filing a lawsuit within the statute of limitations.[5] The appellate court rejected that argument: "But Worthington's bald accusations that Agent Bjornberg misrepresented himself as a federal agent are not supported by the record, and are consequently insufficient to satisfy the requirements of equitable estoppel." *Id.*

The Court of Appeals chose not to publish its opinion. *Id.* Plaintiff moved to have the opinion published on the mistaken belief the opinion had some implication regarding the status of marijuana laws in Washington. *Id.* The Court of Appeals denied Plaintiff's motion to publish and a motion for reconsideration.

Plaintiff has unsuccessfully tried to keep *Worthington I* and *II* alive for years by rehashing the same assertions of "newly discovered evidence." Further review by this Court will not serve any public benefit.

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[4] Never mind the fact Plaintiff did file a lawsuit in King County in 2009 and asked the U.S. District Court for remand after it was removed.

[5] Again, Plaintiff did file his *first* lawsuit in a timely manner.

## IV. STANDARD FOR DISCRETIONARY REVIEW

Plaintiff's discretionary review request is largely devoid of argument and authority. This failure alone warrants denial of Plaintiff's review request. The Court can fairly end its inquiry with that determination. *See In re Detention of A.S.*, 138 Wn.2d 898, 982 P.2d 1156 (1999) (Supreme Court would not consider petition for review issue where Plaintiffs made no argument to support the issue). Plaintiff carries the burden of establishing at least one of the following criteria:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; 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.

RAP 13.4(b). Because Plaintiff failed to establish any of these considerations, his request should be denied.

## V. ARGUMENT AGAINST DISCRETIONARY REVIEW

Plaintiff essentially argues his case meets all four RAP 13.4(b) considerations for discretionary review because marijuana's state law status is (almost, but-for Colorado) unique. Plaintiff confuses a private

passion with the actual issue before the trial and appellate court. This case was dismissed because Plaintiff filed a 2012 lawsuit over an event that occurred in 2007. That would be the issue before the Supreme Court. Division One applied the law in accordance with the other courts of appeal, the Supreme Court, and the state and federal constitutions. None of the statutory considerations for review are implicated.

### A. RAP 13.4(b)(1) & (2): Plaintiff's "Conflict" Cases Are Inapposite; The Appellate Court Applied Uncontroversial Case Law to the Facts

Without any analysis or argument, Plaintiff argues Supreme Court review is warranted because Division One's decision conflicts with *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521-525, 886 P.2d 1121, 1122 (1994). In that case, a lender brought suit against developers seeking reformation of a master lease based on a discrepancy between the master lease and a commitment letter. *Id.* *Hedreen* involved contract fraud, whereby the property developer had a duty to inform the commercial tenant of the discrepancy and breached the duty. *Id.* at 525. This case has no application here because this case involved an allegation of fraud in the statute of limitations discovery rule context, which was not at issue in *Hedreen*. Additionally, defendants did not owe Plaintiff a duty to inform him about who did what in the search, nor is there a shred of evidence suggesting defendants made any representations to Plaintiff

about that information. That is particularly true given Plaintiff was physically present during the search. *Hedreen* is not in conflict with the appellate court's affirmance.

Plaintiff further contends the decision below is inconsistent with *State v. Kurtz*, _Wn.2d_, 309 P.3d 472, 473 (Wash. 2013). *Kurtz* focused on the availability of the medical necessity defense to marijuana prosecution under the Washington State Medical Use of Marijuana Act. *Id.* That case had nothing to do with the discovery rule or the application of a statute of limitations for that matter. *Kurtz* is not in conflict with the decision below.

Plaintiff also argues the Court of Appeals' decision conflicts with *Snohomish Reg'l Drug Task Force v. Real Prop. Known as 20803 Poplar Way*, 150 Wn. App. 387, 389, 208 P.3d 1189, 1190 (2009). That case answered the question as to whether the notices of appearances served on the Task Force were sufficient notices under the Seizure and Forfeiture Statute. *Id.* Again, the case had nothing to do with the application of a statute of limitations and is not in conflict with the decision below.

Plaintiff's remaining arguments are general assignments of error (*e.g.*, "Worthington also respectfully argues the discovery rule and fraud statute...should have been invoked..."). It is not entirely clear whether these assignments of error require a response because they do not address

the RAP 13.4 considerations. However, out of an abundance of caution, these arguments are addressed in sections 1-3 below.

1. The Discovery Exception Generally Does Not Apply When There is No Delay Between the Incident and the Injury.

The Court of Appeals' affirmance was consistent with Washington case law and statute regarding the discovery rule. *See,* RAP 13.4(b)(1) & (2). The three-year statute of limitations barred this lawsuit, which was based on an event five years old at the time the lawsuit was filed. *See,* RCW 4.16.080.[6] Plaintiff's limitation period started on January 12, 2007 and ended on January 13, 2010. He filed this lawsuit on January 17, 2012, which was over two years too late. *Malnar v. Carlson,* 128 Wn.2d 521, 529, 910 P.2d 455 (1996); *In re Estates of Hibbard,* 118 Wn.2d 737, 744, 826 P.2d 690 (1992); RCW 4.16.080.

The issue in the Court of Appeals was whether the trial court properly applied the statute of limitations. The trial court dismissed the case because Plaintiff could not avail himself of the discovery rule exception. The appellate court agreed, determining Plaintiff failed to carry his burden of production showing the defendants fraudulently induced him to delay filing suit. The record did not support a valid *accusation* of fraud, much less actual evidence. The factual crux of Plaintiff's claims is that defendants conspired to deprive him of important information. However,

[6] The parties agreed the three-year statute of limitations applied.

he offered not a shred of evidence to the lower courts to support that allegation.

Plaintiff makes exactly the same argument here as he made to four other courts: Roy Alloway actually seized his drugs, not Agent Bjornberg. CP 250.[7] Plaintiff thus argues his case fit in the narrow category of actions where there is a delay between the injury and the claimant's discovery of the injury. *Allen v. State,* 118 Wn.2d 753, 758, 826 P.2d 200 (1992) ("In some instances...there is a delay between the injury and the plaintiff's discovery of it."). The discovery exception tolls the date of accrual until the claimant knows or, through the exercise of due diligence, should have known the facts necessary to establish a legal claim. *Id.* at 758.

Plaintiff contends his case fell into a category[8] of discovery rule cases where the defendant fraudulently conceals a material fact to keep the plaintiff from knowing he or she had a cause of action. *Interlake Porsche & Audi, Inc. v. Bucholz,* 45 Wn. App. 502, 516-17, 728 P.2d 597 (1986), *review denied,* 107 Wn.2d 1022 (1987). Absent an affirmative duty to disclose material facts, a defendant's silence does not constitute fraudulent concealment or misrepresentation. *Favors v. Matzke,* 53 Wn. App. 789,

[7] These "facts" are a red herring but shed light on the theory Plaintiff has pursued through the course of this litigation.

[8] The other category of discovery rule cases involves injuries that make it difficult, if not impossible, for the plaintiff to learn about during the limitations period.

796, 770 P.2d 686, *review denied,* 113 Wn.2d 1033, 784 P.2d 531 (1989). The case law does not support the application of the discovery rule fraud exception under the facts of this case. Plaintiff did not plead or prove the elements of fraud and cannot establish an affirmative duty by the defendants to correct whatever beliefs he had about the drug search and seizure.[9]

2. The Discovery Exception Does Not Apply When the Claimant Knows the Facts.

The undisputed facts show Plaintiff had personal knowledge of every fact relevant to commencing the case on January 12, 2007. Plaintiff was present and watched the search of his residence occur. He knew the names of the agents and law enforcement agencies that day. CP 90-92. He named Agent Bjornberg and Detective Alloway in his first lawsuit filed in 2009. CP 87-135. His personal observations of the search show he knew Agent Bjornberg was a cross-designated DEA agent. CP 90-91. Plaintiff had every opportunity to file a complaint and conduct civil discovery to learn additional information and amend his complaint if necessary. He slept on those rights instead and thus cannot avail himself of the discovery rule. *See, Crisman v. Crisman*, 85 Wn. App. 15, 20, 931

[9] Within the "fraud" discovery rule category, there are two ways to establish concealment of a material fact: (1) the plaintiff may affirmatively plead and prove the nine elements of fraud, or (2) the plaintiff may show the defendant breached an affirmative duty to disclose a material fact. *Stiley v. Block,* 130 Wn.2d 486, 515-16, 925 P.2d 194 (1996) (Talmadge, J., concurring). Plaintiff could not establish fraud by either method.

P.2d 163, 165-66 (1997). The protections of the discovery rule exception do not apply.

3. With Due Diligence, Plaintiff Could Have Discovered the Basis of His Claim.

The lower courts' decisions are also consistent with case law regarding a claimant's duty of due diligence to discover the factual basis for any potential claims:

> The general rule in Washington is that when a plaintiff is placed on notice by ***some appreciable harm*** occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged with what a reasonable inquiry would have discovered. "[O]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of all acts which reasonable inquiry would disclose."

*Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998) (citing *Hawkes v. Hoffman*, 56 Wash. 120, 126, 105 P. 156 (1909) (other citations omitted) (emphasis supplied). *See also Allen,* 118 Wn.2d at 758; and, *Hibbard,* 118 Wn.2d at 746. "The plaintiff bears the burden of proving that the facts constituting the claim were not and *could not* have been discovered by due diligence within the applicable limitations period." *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 603-04, 123 P.3d 465 (2005) (emphasis supplied). Plaintiff did not observe due diligence in discovering the basis for his claim.

### B. RAP 13.4(b)(3): The State and Federal Constitutions are Not Implicated

The appellate court's decision was not in conflict with the Washington and United States constitutions. Plaintiff argues the opinion below conflicts with Washington State's Due Process Clause. However, the opinion had nothing whatsoever to do with whether Plaintiff had: (a) a protected property interest, (b) adequate notice of the property deprivation, or (c) an opportunity to be heard. This is because Plaintiff filed his lawsuit too late to get to the merits of his claims. The appellate court addressed the sole question of whether Plaintiff qualified for the discovery rule exception. Any constitutional discussion under these circumstances would rely on the validity of the Legislature's statutes of limitation. Plaintiff did not raise that as an issue in his Petition for Review or his underlying Court of Appeals briefing. Therefore, Division One's decision did not conflict with any constitutional provision.

### C. RAP 13.4(b)(4): I-502 Had Nothing to Do With the Discovery Rule

Plaintiff argues I-502 and Washington's legalization of marijuana is a basis for discretionary review. However, nothing about the lower courts' decisions had anything to do with Washington's marijuana laws. The trial court was affirmed because the Court of Appeals agreed the

statute of limitations had run. As such, this case does not involve an issue of substantial public interest.

## VII. CONCLUSION

For the reasons stated above, defendants respectfully request the Court deny Plaintiff's request for discretionary review.

Respectfully submitted this 5TH day of March, 2014.

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## DECLARATION OF SERVICE

I declare that on March 5, 2014, a true and correct copy of the foregoing document was sent to the following parties as indicated:

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DATED this 5th day of March, 2014.

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