68979-7

68979-7

NO. 68979-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN WORTHINGTON,
Appellant

v.

WASHINGTON STATE ATTORNEY
GENERAL ET AL,
Respondents

APPELLANT'S OPENING BRIEF

JOHN WORTHINGTON
4500 SE 2ND PL
RENTON, WA.98059
425-917-2235

ORIGINAL

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B. CASE STATEMENT

In August of 2006, after receiving an email from U.S. Attorney Janet Freeman requesting "dirt" on John Worthington and Steve Sarich, (CP 532 534) Bremerton police Detective Roy Alloway began an investigation on suspicion of a Violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.401.

On January 12, 2007, after the Kitsap County Superior court issued a warrant to search Sarichs' residence at 1604 Cedar Street, Everett. Detective

Alloway, along with his WEST NET (West Sound Narcotics Enforcement Team) colleagues, executed the search warrant on Sarich's residence and located nearly one thousand growing marijuana plants, and allegedly contacted the United States Drug Enforcement Administration ("DEA") to assist in the investigation. Public disclosure documents reveal that the "DEA" was actually another Washington State multi-jurisdictional drug task force called TNET (Tahoma Narcotics Enforcement Team).(CP 492) WEST NET detectives interviewed occupants of the house including a Zach Joy who was asked if he knew John Worthington. Mr. Joy said he did not know John Worthington but he knew someone named "Big John" as a partner of Mr. Sarich. (CP552-560)

Detective Alloway then applied for a telephonic search warrant for Worthington's residence, without honestly informing Judge Spearman that TNET had already decided to conduct a simultaneous knock and talk at Worthington's residence at a safety meeting prior to the raid on Sarich. (CP492) Using this fraud and deception Alloway was able obtain a search warrant, for "a guy named John", which enabled TNET to seize six marijuana plants from the premises , before the copy of the warrant for a "guy named John" arrived with Roy Alloway. (CP 320-325, 502)

After the initial warrantless raid, by the state law enforcement participating agencies of TNET, wearing DEA hats and windbreakers, Alloway arrived and

stated he was leaving the plants because Worthington was a legal medical marijuana patient under RCW 69.51A. (CP 501) Fred Bjornberg (Washington State Patrol) stepped forward and stated that he was a DEA agent and that the DEA was taking the plants. (CP 490)

In June of 2008, Worthington filed a public disclosure request with the Washington State Patrol, and was told the investigation was done by the DEA, and was informed that the DEA had all the documents of the raid. In this public records case, the WSP provided documents alleging that WSP members assigned to TNET, were a federal entity under the command and control of the DEA. After more public disclosure investigation, Worthington discovered the federal government and state drug control agencies met in 1996 to discuss the medical marijuana initiatives. During this meeting it was determined that the DOJ would federally cross designate state, county and city law enforcement officers, in order to utilize state resources to seize medical marijuana for the DEA. These meetings in 1996 led to a federal policy to use HIDTA grants to leverage state resources to seize medical marijuana for the DEA. (CP 628-640) This federal policy was signed by the president and entered into the federal registry on February 11, 1997. (CP 641-643)

In 1998, the Tahoma Narcotics Enforcement Team (TNET) Multi-jurisdictional drug task force was created. In that same year, the HIDTA grant to

cross designate state and local law enforcement to seize medical marijuana for the DEA, was offered to the TNET participating members by the U.S. Department of Justice. (CP 589-591) The TNET participating members signed and agreed to the terms of statement of assurances for the HIDTA grants, (CP 587-588) and also signed agreements to concede state authority to the DEA.(CP 578-586) TNET, admitted to enforcing the federal HIDTA grant policy to use state and local law enforcement to seize medical marijuana for the DEA, on Worthington in their February 14, 2007 TNET Executive Board meeting, (CP 626) which is confirmed by the January 19, 2007 WEST NET policy board meeting. (CP 568- 569)

In December 2009, Worthington filed a lawsuit in King County Superior Court challenging a what was effectively a state funded federal preemption of the Washington State medical marijuana law and the seizing of his medical marijuana plants by Fred Bjornberg, a federally cross designated member of TNET. The 2009 case was dismissed ,after the federal Judge in the case ruled Worthington did not meet the constitutional requirements for the federal court to take jurisdiction of the case. (CP 516)

In August, October, and November of 2011, Worthington received public disclosure documents from the City of Bonney Lake showing that the DEA did not conduct the raid and confiscate his property as he was told. (CP 494-495) Worthington was also sent documents from WEST NET showing the Naval

Criminal Investigative Service (NCIS), the City of Auburn, and the Washington State Department of Corrections also participated in the raid. (CP 39)

In January of 2012, Worthington filed a new complaint with the King County Superior court alleging new facts, against new parties and was based on allegations of fraud. Worthington alleged that WEST NET and Roy Alloway actually seized his property instead of Fred Bjornberg of the DEA/TNET. The defendants have admitted Roy Alloway seized the medical marijuana instead of Fred Bjornberg, and have not disputed Worthington's allegations of fraud. (CP 489)

Worthington and the defendants filed motions for summary judgment and had a hearing on April 13, 2012. On June 22, 2012, the trial court granted the defendants motion for summary judgment for collateral estoppel, res judicata, and statute of limitations.

Worthington brings this timely appeal challenging the trail court's orders in the defendants' motion for summary judgment, Worthington's motion for summary judgment and Worthington's motion to reconsider.

C. ARGUMENT

1. If a case is decided on jurisdictional defects, is that decision "on the merits" for res judicata or collateral estoppel purposes?

"Whether the trial court appropriately granted summary judgment is a question of law that the Appellate courts will review de novo." Troxell v. Rainier

Pub. Sch. Dist. No. 307, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). The Appellate courts consider the same evidence that the trial court considered on summary judgment. (See Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "We read the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party". *Id.*

On page 7 of the federal judge's order, the Judge clearly examined the U.S. District Court's jurisdiction of the previous federal case in question and described jurisdictional deficiencies that prevented Worthington's claims from meeting the Article III constitutional requirement. (CP 516) After clearly refusing to accept federal jurisdiction of Worthington's "claims on behalf of others", the federal judge would then only have had hypothetical jurisdiction, in violation of the hypothetical jurisdiction doctrine. "The federal Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning". (See Steel Co. v. Citizens for a better Environment *523 U.S. 83 (1998), quoting* Muskrat v. United States,219 U.S. 346, 362 (1911); Hayburn's Case,2 Dall.U.S. 409 (1792). "Much more than legal niceties are at stake here. "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects". (See

United States v Richardson,418 U.S. 166, 179 (1974); Schlesinger v. Reservists Comm. to Stop the War,418 U.S. 208, 227 (1974). "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction, to do so is, by very definition, for a court to act ultra vires". "'assuming' jurisdiction for the purpose of deciding the merits —the `doctrine of hypothetical jurisdiction.'" *Steel Co.*, 523 U.S. at 94 (citing United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996)). "The Supreme Court "declined to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.*; *see also id.* at 95.

On page 7 of the federal judge's order, the federal judge clearly ruled Worthington's complaint did not meet the Article III Constitutional requirements and refused jurisdiction of the case. Since the federal court ruled that Worthington's claims did not meet the constitutional jurisdictional requirements, and took hypothetical jurisdiction of the case to render an advisory ultra vires ruling there could not be a final ruling on the merits. "The application of either doctrine is dependent upon there being a final determination regarding the claim or issue". (See State v. Vasquez. 148 Wn.2d 303. 308. 59 P.3d 648 (2002) (collateral estoppel requires final judgment).

Assuming arguendo that the federal court had taken full jurisdiction of

Worthington's previous claims, which they did not, the court ruled Worthington himself made no claims and only made claims on behalf of others. (CP 234) This can only mean, "The merits" of Worthington's individual claims were never acknowledged, and that there was never a final determination on Worthington's individual remaining 2009 state law claims.

The controlling Washington State case law arguments for defenses of res judicata and collateral estoppel, when previous cases are dismissed for lack of standing due to procedural defects, are found in a published opinion by the Washington State Court of Appeals of Division III, Ullery v. Fulleton 162 Wn. App. 596 256 P.3d 406 (2011)."In some courts—those, such as the federal courts, whose authority is limited to deciding cases and controversies—a plaintiff's lack of standing deprives a court of subject matter jurisdiction, making it impossible to enter a judgment on the merits". Fleck & Assocs., Inc. v. City of Phoenix, 471 F.3d 1100, 1102 (9th Cir.2006) (recognizing that when a plaintiff lacks standing, the district court lacked subject matter jurisdiction to address the merits of the claim and should have dismissed it without prejudice on that ground alone); *cf.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998) ("`Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the

cause,'" (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)). "Regardless of the trial court's construction of its 2005 order and judgment of dismissal, prudential considerations of justiciability prevent a judgment of dismissal based on lack of standing from constituting a judgment on the merits". The Restatement (Second) of Judgments § 20(1) (a) (1982) provides that "a personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim ... [w]hen the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties."" Courts considering the issue have treated a lack of standing as the same sort of threshold justiciability issue, preventing the judgment as operating as a bar". (*See, e.g.,* Cayer Enters., Inc. v. DiMasi, 84 Conn.App. 190, 852 A.2d 758, 760-61 (2004) (holding that judgments based on want of jurisdiction, want of maturity, failure to prosecute, unavailable or inappropriate relief or remedy, or lack of standing are not rendered on the merits; collecting cases); Batterman v. Wells Fargo Ag Credit Corp., 802 P.2d 1112, 1118 (Colo.App.1990) (collecting cases); *cf.* Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wash.2d 542, 958 P.2d 962 (1998) (Talmadge, J., dissenting) (treating standing issue as tantamount to jurisdictional issue); Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 42, 978 P.2d 481 (1999) (Talmadge, J., dissenting) (discussing principles of justiciability as including

whether the litigants have real interests in the outcome).

The cases the defendants initially cited in both their reply to Worthington's preliminary injunction and their motion for summary judgment were:

(Kuhlman v. Thomas 78 Wn. App. 115, 120, 897 P.2d 365 (1995), Shoemaker v. City of Bremerton 109 Wash.2d 504, 745 P.2d 858 (1987), Landry v. Luscher 95 Wn .App. 779, 783, 976 P.2d 1274 (1999).Kelly-Hansen v. Kelly-Hansen 87 Wn. App. 320, 328-29, 941 P.2d 1108 (1997), Golden v. McGill 3 Wash.2d 708, 720, 102 P.2d 219 (1940), Bordeax v. Ingersoll Rand Co. 71 Wn.2d 392 (1967) 429 P.2d 207, Malland v. State Department of Revenue Systems 103 Wn.2d 484,489,694 P.2d 16 (1985).(CP 59-61)

These cases dealt mostly with claims which did not have jurisdictional or standing defects, and did not contain the necessary controlling legal principles for cases dismissed for lack of standing for those jurisdictional defects. The defendants decided to change that legal argument altogether in their 5 page reply brief and presented it orally at the Summary Judgment hearing. (RP 5-12). The centerpiece of the argument was the case law in Hisle v. Todd Pacific Shipyard, 151 Wn.2d 853, 93 P.3d 108 (2004) shown below:

> "The *Hisle* Court makes it clear that dismissal of a lawsuit with prejudice is a final judgment on the merits: Although the Court of Appeals did not expressly address whether the *Adams* dismissal was a final adjudication on the merits, *Hisle,* 113 Wash.App. [401,] 410–14, 54 P.3d 687 [2002], this threshold res judicata requirement is satisfied

> because *Adams* was dismissed with prejudice. *Maib v. Md. Cas. Co.*, 17 Wash.2d 47, 52, 135 P.2d 71 (1943) (a dismissal with prejudice constitutes a final judgment on the merits)."

As shown below in their En Banc ruling, the Washington State Supreme Court affirms that the *Hisle* case was in the summary judgment phase and not the 12 (b) (1) phase, where a court was able to determine the merits without taking hypothetical jurisdiction of the case to do so.

> "Both parties moved for summary judgment. The trial court rejected Hisle's motions for class certification and summary judgment and granted Todd's motion for summary judgment. It also dismissed Hisle's lawsuit with prejudice, finding that it was preempted by section 301 of the LMRA, and barred by res judicata and the Adams settlement agreement."

Similarly, the defendants rely on federal case *Nordyke v. King*, 644 F.3d 776, 788 -789 (9th Cir. 2011) to explain standing issues. Again as was the case in *Hisle* the federal court ruled on a summary judgment as shown below:

[644 F.3d 782]

> "The district court allowed the addition of all claims except for the Second Amendment claim, which the district court deemed futile because *Nordyke III* had already held that a Second Amendment claim was precluded by binding circuit precedent. After two motions to dismiss, only the First Amendment and equal protection claims survived. The district court then granted summary judgment to the County on those remaining claims. The Nordykes timely appealed."

As shown above the cited case which the defendant's relied upon was able to get past the 12 (b) (1) phase and did not present a situation where a court denied jurisdiction and took hypothetical jurisdiction to rule on the merits.

Another case the defendants relied upon was a federal U.S. Ninth Circuit Court of Appeals ruling in Lake Washington School District No. 414 v. Office of Superintendent of Public Instruction, 634 F.3d 1065, 1066 (9th Cir. 2011), which was dealing with statutory standing as shown below:

> "We must also consider "whether a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *Id.* In this case, we must determine whether the IDEA confers upon a school district the right to sue a state agency for its alleged noncompliance with IDEA procedures."
>
> "the school district lacks statutory standing to challenge the State of Washington's compliance with the IDEA's procedural protections. The district court correctly dismissed its complaint with prejudice."

Judge Robart did not rule that Worthington did not have statutory standing, he ruled Worthington made no claims for himself and only made them on behalf of others. (Without naming the persons Worthington allegedly made claims for) (CP 234) Nor did Judge Robart rule that Worthington could never, allege a cognizable injury. Judge Robart only indicated that he could not "Discern" Worthington's claims or interfere in what was a legislative matter. In fact Judge Robart avoided statutory interpretation altogether.

Judge Robart never offered the specific scrutiny of Worthington's claims as

offered by the court in the case the defendants cited, Schmier v. U.S. Court of Appeals, Ninth Circuit,136 F.Supp.2d 1048 (2001), Perhaps due to the fact that Worthington's complaint was littered with damages claims for himself, and specific injury claims for interfering with Worthington's medical treatment causing emergency room visits and outpatient care, and contained no request for damages for other parties. (CP 363,364,380,385,387) (These claims are now moot since they were based on a fraud and may have been barred for ripeness)

Worthington overcame the defendant's case law in the hearing for summary judgment with the hypothetical jurisdiction case law arguments, which relied on U.S. Supreme Court rulings and U.S. Ninth Circuit rulings, which essentially removed any possibility of a final determination on the merits (RP 12-19) Worthington also briefed the hypothetical jurisdiction arguments in his motion to reconsider. (CP 506-511)

The defendants' old and new legal theory did not provide the applicable controlling case law principles for Worthington's first federal claims, because those remaining 2009 state law claims were denied for jurisdictional deficiencies and never made it to a final determination on the merits. In addition, the plausibility issue in the previous federal case would have been Worthington's claims and issues on behalf of others and not Worthington's individual claims and issues, since the federal judge claimed Worthington himself made no claim for damages. (CP479) Worthington could have cured those plausibility claims by simply making claims and issues for himself. (Worthington argued he made state

law claims to no avail) The "deficiencies" that could not have been cured were the federal jurisdictional issues because there was no federal actor, and then Worthington dropped all of the federal causes of action and only left state law claims in the complaint. (CP 473) The defendants ultimately failed to meet the final adjudication on the merits test, because the federal judge was unable to "discern" Worthington's individual claims and issues, and did not take jurisdiction of the claims to be able to adjudicate them on the merits. (CP 473) Any other ruling made by Judge Robart, other than to dismiss without prejudice was under hypothetical jurisdiction and ultra vires according to U.S. Supreme Court case law. The defendant's did not offer any U.S. Supreme court case law showing the practice of taking hypothetical jurisdiction of cases for the purposes of making a ruling on the merits was accepted by the high court.

As shown above the federal court judge did not take federal jurisdiction of the previous federal case in 2009 nor could he "discern" Worthington's claims to be able to rule on the merits of them. The previous federal court ruling dismissing Worthington's case for lack of Article III Constitutional standing, did not have preclusive effect on his claim under either the doctrines of res judicata or collateral estoppel.

With Worthington having shown there was no final ruling on the merits in the previous federal case, the Appellate court need not consider the other elements

of res judicata or collateral estoppel, since both require a final determination on the merits. (See Clark v. Baines, 150 Wn.2d 905, 913, 84 P.3d 245 (2004). (See also State v. Vasquez. 148 Wn.2d 303. 308. 59 P.3d 648 (2002)

2. Were all the other legal tests required to establish collateral estoppel or res judicata met?

Collateral estoppel or issue preclusion also requires that (1) the identical issue was decided in the prior adjudication, (2) collateral estoppel is asserted against the same party or a party in privity with the same party to the prior adjudication, and (4) "precluding relitigation of the issue will not work an injustice". Clark v. Baines, 150 Wn.2d 905, 913, 84 P.3d 245 (2004). "A court may apply issue preclusion only if all four elements are met". Clark v. Baines, 150 Wn.2d 905, 913, 84 P.3d 245 (2004).The defendants have failed to meet all four elements of collateral estoppel.

Worthington also opposes the trial courts orders granting defendant's joint motion for summary judgment due to the fact that Worthington's complaint and motion for summary judgment were not barred by collateral estoppel for the following reasons: (1) dismissing the case after Worthington was finally able to get the truth would work an injustice; and (2) the issues in the federal case were not identical to this case; and (3) The City of Auburn and the Washington State Department of Corrections were not the same parties in the federal case.

Worthington also opposes the trial court's orders granting defendant's joint

motion for summary judgment due to the fact that Worthington's complaint and motion for summary judgment were not barred by res judicata for the following reasons: (1) the subject matter in the federal case is not the same as this case; and (2) the causes of action in the federal case are not all the same as this case; and (3) the persons and parties in the federal case are not all the same as this case. The doctrine of res judicata requires a concurrence of identity in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 858, 726 P.2d 1 (1986.

a. **Would precluding Worthington's claims work an injustice?**

If collateral estoppel and res judicata are granted, the defendants would be rewarded for; (1) fudging and withholding facts to the Kitsap County Superior court to get a search warrant, (CP 494 ,552-560) ; and (2) raiding Worthington before the search warrant arrived (CP 502) ; and (3) using Washington State law enforcement personnel pretending to be the DEA to get around the Washington State medical marijuana law (CP 568-569,589-591,626,628-643); and (4) intentionally misleading the Thurston County Superior Court and the Washington State Court of Appeals of Division II, to hide public records under that phony DEA raid. (See Worthington v. Washington State Patrol); and (5) continuing to hide the remaining records of the phony DEA raid on Worthington and Sarich. (See

Worthington v. West Net, and Worthington v. Washington State Military Department.) Dismissing this case, would be severe injustice to Worthington, especially since the facts now show that he was robbed of his property at gunpoint in a warrantless raid by rogue state law enforcement personnel, under a declared federal sovereignty, using the guise of a federal raid, organized by a law enforcement officer serving time in federal prison. (Roy Alloway) These rogue members of law enforcement then conspired to hide all records of the event until Worthington gave up his pursuit of justice or the statute of limitations expired. Also, the lead agency involved (WEST NET) was exposed in the Tacoma News Tribune as a nuisance to the medical marijuana patients and the community at large. (CP 593-624)

b. **Were there new causes of action?**

Worthington also opposes the order granting defendant's joint motion for summary judgment due to the fact that his new state claim is based on new causes of action that were not known to him during the previous federal claim. "Whether causes of action are identical " 'cannot be determined precisely by mechanistic application of a simple test.' " Rains v. State, 100 Wash.2d 660, 663–64, 674 P.2d 165 (1983) (quoting Abramson v. Univ. of Hawaii, 594 F.2d 202, 206 (9th Cir.1979)). "To determine whether causes of action are identical, courts consider whether (1) prosecuting the second action would destroy rights or interests

established in the first judgment, (2) the evidence presented in the two actions is substantially the same, (3) the two actions involve infringement of the same right, and (4) the two actions arise out of the same transactional nucleus of facts. *Rains,* 100 Wash.2d at 664, 674 P.2d 165 (quoting Costantini v. Trans World Airlines, 681 F.2d 1199, 1201–02 (9th Cir.1982)); accord Spokane County v. Miotke, 158 Wash.App. 62, 67, 240 P.3d 811 (2010). "This cause of action analysis is unnecessary, however, when a ground of recovery or defense could not have been asserted in the prior action. In such cases, the defense or ground of recovery falls outside the scope of claim preclusion". (See Brown v. Felsen, 442 U.S. 127,131 (1979). "In general, one cannot say that a matter should have been litigated earlier if, for some reason, it could not have been litigated earlier"; (See Cummings v. Sherman, 16 Wash.2d 88, 101, 132 P.2d 998 (1943). " thus, res judicata will not operate if a necessary fact was not in existence at the time of the prior proceeding", Mellor v. Chamberlin, 100 Wash.2d 643, 647, 673 P.2d 610 (1983); Curtiss v. Crooks, 190 Wash. 43, 53, 66 P.2d 1140 (1937); Harsin v. Oman, 68 Wash. 281, 283-84, 123 P. 1 (1912). The defendants hid the necessary facts and the identities of most the state actors, making it impossible to identify all the claims. The stark differences in the new claims amongst others are that Worthington makes conversion, negligence and nuisance claims against the state law actors, who hid their actual roles and actions until after the federal complaint had been written and

dismissed. These claims simply would not have been valid claims against the DEA or someone acting on behalf of the DEA (Fred Bjornberg) or infringe upon Worthington's rights, as they relate to the previous circumstances and facts given to Worthington, because medical marijuana is illegal federally. Now that the public records show state law enforcement officers are the clear tortfeasors, it is clear the true facts were withheld from Worthington. "The doctrine of res judicata does not apply where the claims are not the same". International Bhd. of Pulp, Sulphite & Paper Mill Workers, AFL-CIO v. Delaney, 73 Wash.2d 956, 960, 442 P.2d 250 (1968). The previous claims against the state actors were based on their actions prior to the summoning of the DEA, based on a ultra vires medical marijuana plant limit, which was created in violation of the open public meetings act. The previous claims were also about the use of state funds to allow Fred Bjornberg to function in a federal capacity. "The burden of showing that an issue raised in a subsequent proceeding "is identical to one that was raised and necessarily decided in the prior action rests squarely on the party moving for preclusion." Sullivan v. Gagnier,225 F.3d 161, 166 (2d Cir.2000).The defendants have failed to show that the issues in both proceedings were identical. Now the claims are made against state actors who were pretending to be acting on behalf of the DEA or pretending that they were not the responsible tortfeasors when in fact they were (WEST NET and Roy Alloway). The defendants have admitted on the record that there are now new claims in the

state complaint, that were not in the federal complaint, and that they were nearly identical, but not identical. (CP 452) The defendants failed to meet the burden of proof that the previous claims are identical. As shown above, the trial court erred in ruling the previous claims were identical.

c. **Were there new parties?**

The City of Auburn and the Washington State Department of Corrections were added to the new claims, because at the time of the previous federal claims, Worthington only knew of those state actors as federal actors wearing DEA wind breakers and hats, handing out DEA business cards. "A judgment is not *res judicata* nor is one collaterally estopped by judgment in a later case if there is no identity or privity of parties in the same antagonistic relation as in the decided action". Riblet v. Ideal Cement Co., 54 Wn.(2d) 779,345 P.(2d) 173(1959) Rufener v. Scott, 46 Wn. (2d) 240, 280 P. (2d) 253(1955). "An estoppel must be mutual and cannot apply for or against a stranger to a judgment since a stranger's rights cannot be determined in his absence from the controversy". Owens v.Kuro, 56 Wn.2d 564,354 P.2d 696 (1960). The City of Auburn and the Washington State Department of Corrections actors, along with other state law enforcement agencies, pretended to be a federal entity and hid their antagonistic identity from Worthington. The defendants have admitted on the record that there are now new parties in the state complaint not in the federal complaint. (CP454) The defendants

failed to meet the burden of proof that the parties are the same. As shown above the trial court erred in ruling that the parties were the same.

d. **Was there a new nucleus of facts and new burden of proof?**

As shown in the federal court judge's order, the nucleus of facts in the federal case was centered on Fred Bjornberg of TNET taking the medical marijuana plants, not Roy Alloway or WEST NET. (CP 450) The burden of proof in the first proceeding was regarding the actions of Roy Alloway and WEST NET determining that a 27 medical marijuana plant limit was the basis for calling the DEA, and the actions of Fred Bjornberg and TNET for actually taking the plants. The burden of proof in the second proceeding was the actions of TNET pretending to be the DEA on a phony DEA raid prior to the arrival of the search warrant, and then Roy Alloway or WEST NET actually taking the plants after claiming he was leaving them. The unavailability of issue preclusion is reinforced by these differences in the burdens of proof in the two proceedings. "Such differences in the burden of proof also prevent issue preclusion" Clark v.Bear Stearns & Co, 966 F.2d at 1322 (9th Cir. 1992). The defendants themselves have admitted that there is now a new transactional nucleus of facts, and a new burden of proof, when they admitted that Worthington's medical marijuana plants were seized by Roy Alloway or a Bremerton Police Department employee of WEST NET and not Fred Bjornberg of TNET, in their reply to Worthington's Motion for Preliminary

Injunction. (CP 489) (Roy Alloway was the only City of Bremerton employee assigned to WEST NET at the time of the raid on Worthington). The defendants failed to meet the burden of proof that the nucleus of facts and burden of proof are the same. As shown above, the trial court erred when it ruled that the nucleus of facts and burden of proof for the state case were the same as in the federal case.

As shown above, the trial court also erred in ruling that res judicata and collateral estoppel applied and Worthington should have prevailed on his motion for summary judgment. Worthington's Washington state case law relied upon cases that were dismissed for lack of standing and jurisdictional defects. The defendants case law relied upon cases that made it past the standing and jurisdictional phase and were made in the summary judgment phase. Worthington's federal case law relied upon a U.S. Supreme Court ruling on hypothetical jurisdiction, and jurisdictional standing rulings in the U.S. Ninth Circuit showing the only decision. The defendants relied upon federal case law dealing with summary judgment decisions and statutory law requirements, and did not provide any U.S. Supreme Court controlling cases regarding hypothetical jurisdiction.

3. Did the statute of limitations apply

Worthington also opposes the trial court's orders granting defendant's joint motion for summary judgment pursuant to RCW 4.16.080 (4) ,(6), due to the fact

that Worthington's complaint and motion for summary judgment were not barred by statute of limitations, due to acts of fraud which were not discovered until 2011. (CP 18, CP 494-495)

a. Did the doctrines of equitable estoppel and equitable tolling apply?

Worthington also argues that the doctrines of equitable estoppel and equitable tolling apply because WEST NET and TNET used deception and bad faith to prevent Worthington from discovering the truth of the raid on his residence. WEST NET and TNET intentionally caused the loss of Worthington's property, and "prevented the discovery of all the essential elements of the cause of action". (*See* Finkelstein v.Sec. Props., Inc., 76 Wn.App. 733, 739-40, 888 P.2d 161, *review denied,* 127 Wn.2d 1002 (1995) (equitable tolling requires a showing of bad faith, deception) Roy Alloway has made a career out of bad faith, and has had many of his cases refused or dismissed by prosecutors. (CP 497,593-624)

"The gravamen of equitable estoppel with respect to the statute of limitations is that the defendant made representations or promises to perform which lulled the plaintiff into delaying timely action." Allan E. Korpela, Annotation, *Promises To Settle or Perform as Estopping Reliance on Statute of Limitations,* 44 A.L.R.3d 482, § 4(a) (1972); Herman v. Brown, 91 Cal.App.2d 758, 205 P.2d 1086, 1088 (1949)." Equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence". Mercer v.

State, 48 Wash.App. 496, 500, 739 P.2d 703, *review denied,* 108 Wash.2d 1037 (1987). "The elements to be proved are: first, an admission, statement, or act inconsistent with a claim afterwards asserted; second, action by another in reasonable reliance on that act, statement, or admission; and third, injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission. Board of Regents of Univ. of Wash. v. Seattle, 108 Wash.2d 545, 551, 741 P.2d 11 (1987). The defendants pretended to be fully empowered DEA agents acting on behalf of the federal government. In truth however, that was all a hoax which was purposely withheld for years. Due to the fact WEST NET and Roy Alloway fraudulently claimed they were leaving the plants when they were in fact taking them, the doctrines of equitable estoppel and equitable tolling apply. As shown above the trial court erred when it failed to rule equitable estoppel and equitable tolling applied and should have granted Worthington's motion for summary judgment.

b. Should the allegations of fraud have been determined by a trier of fact, or did Worthington prevail in summary judgment?

Worthington made allegations of fraud pursuant to RCW 4.16.080 (4), (6), which should be accepted as true. "When considering a summary judgment motion, we must construe all facts and reasonable inferences in the light most favorable to the nonmoving party". Lybbert v. Grant County, 141 Wn.2d 29, 34, 1

P.3d 1124 (2000)."Whether Worthington can prove fraud is a question of fact for the trier of fact to resolve. (See Duke v. Boyd 133 Wn.2d 80,87.942 P.2d 351 (1997), quoting Douglas Northwest, Inc. v. Bill O'Brien & Sons Constr., Inc.,64 Wn.App. 661, 678, 828 P.2d 565 (1992) ("Each element of fraud is a material issue to be resolved and must be proven by clear, cogent and convincing evidence"). "Factual issues may be decided as a matter of law only if reasonable minds could reach but one conclusion". Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

The only reasonable conclusion was that Roy Alloway took Worthington's property after declaring he was going to leave it, and that Fred Bjornberg only pretended to be acting for the DEA. (CP 494-495) Common sense dictates fraud is the only conclusion that could possibly be reached. Worthington relied upon WEST NET and TNET's fabrication of a phony DEA raid and DEA property seizure and was cheated out of due process. "Elements of fraud include knowingly false representations justifiably relied upon" (*See* Stiley v.Block,130 Wn.2d 486, 505, 925 P.2d 194 (1996) The defendants now admit a City of Bremerton employee took Worthington's property after stating he was leaving it, and that Worthington's property was not taken by the DEA.(CP 489) Two years later the DEA agent in charge of TNET confided in an email to another TNET participating member that: Worthington was not a federal suspect at the time, and; that WEST

NET took the plants, and; that Worthington had tried unsuccessfully numerous times to get records from the DEA and the U.S. Department of Justice, and; then instructed the other TNET participating member to not give anything to Worthington. (CP 494-495) These documents not only show fraud, but illustrate there was a cover up of that fraud as well.

As shown above, the trial court erred when it failed to allow a trier of fact to determine issues of fraud or whether RCW 4.16.080 (4), (6) applied. Or in the alternative, the trial court erred when it failed to award Worthington a judgment after the defendants' admitted to the fraud and acknowledged Fred Bjornberg did not take the plants and that a Bremerton Police detective did. (CP489)

c. Should statute of limitations should be tolled from November of 2011

Under the discovery rule, the cause of action accrues, and the statute of limitation begins to run, when the plaintiff discovers or reasonably could have discovered all the essential elements of the cause of action. re Estates of Hibbard , 118 Wash.2d at 744, 826 P.2d 690; United States Oil & Ref. Co. v. State Department of Ecology, 96 Wash.2d 85, 92, 633 P.2d 1329 (1981), and the statute does not begin to run until the plaintiff knows or with reasonable diligence should know that the defendant was the responsible party. Orear v.International Paint Co., 59 Wash App. 249, 257, 796 P.2d 759 (1990).The Washington Supreme

Court adopted the discovery rule in a medical malpractice action, Ruth v. Dight, 75 Wash.2d 660, 453 P.2d 631 (1969). Although the rule has been extended only to "certain torts," Bowles v. Washington Dep't of Retirement Sys., 121 Wash.2d 52, 80, 847 P.2d 440 (1993), it has been applied where the defendant has concealed information from the plaintiff. Kittinger v. Boeing Co., 21 Wash.App. 484, 488, 585 P.2d 812 (1978). Worthington did not sleep on his claims and spent thousands of dollars on due diligence to find the truth, but has been prevented from discovering the whole truth . Worthington did not discover all the elements of the fraud until he was provided a public records response from Kitsap County and the City of Bonney Lake in August ,October and November of 2011.

(CP40, 494-495)

As shown above, the trial court erred when it failed to toll the statute of limitations from 2011, and allow a trier of fact to determine allegations of fraud. Or in the alternative, the trial court erred when it failed to accept as true Worthington's allegations of fraud, after the defendants admitted that a Bremerton police detective took the plants instead of Fred Bjornberg. (CP489)

4. Should Worthington's tort claims have been granted

Worthington made a simple straight forward tort claim for the wrongful conversion of his property. (CP 17-CP143) (The federal court never acknowledged Worthington's tort claims and only referenced injunctive relief in

his order) WEST NET has admitted they took Worthington's property, (CP 489) and WEST NET did not charge Worthington within the three year statute of limitations. Since the time for charging Worthington has passed, the property must be returned. RCW 69.50.505 (3) required WEST NET to file a fifteen day notice of intent to seize Worthington's property, which they did not do because they were pretending the DEA and Bjornberg were making a federal drug seizure. "The power to order forfeiture is purely statutory and will be denied absent compliance with proper forfeiture procedure". State v. Alaway, 64 Wash.App. 796, 799-801, 828 P.2d 591, rev. denied, 119 Wash.2d 1016, 833 P.2d 1390 (1992).; Espinoza v. City of Everett, 87 Wn.App. 857, 872, 943 P.2d 387 (1997), *review denied,* 134 Wn.2d 1016, 958 P.2d 315 (1998). 'Forfeitures are not favored; they should be enforced only when within both the letter and the spirit of the law'. Bruett v. 18328 11th Ave., N.E, 93 Wash.App. at 295, 968 P.2d 913 (1998) RCW 69.50.505 provides the exclusive mechanism for forfeiting property of the type involved in this case, and the defendants failed to comply with that statute. Therefore, forfeiture must be denied and the property must be returned. Worthington should be compensated for the fair market value of his property as established in his tort claim. (CP 17-19, 644-649,659)

5. Should the injunctions have been granted

Worthington presented a thorough public records trail of exhibits

showing that the creation of the HIDTA grants was done for the sole purpose of giving the federal government a way to disrupt the state medical marijuana laws by leveraging this state's own resources to enforce a federal drug control policy. (CP 568-569,589-591,626,628-643)Worthington then clearly demonstrated thru public disclosure how that policy was enforced on him, and also showed that it was a past, present and future policy, which meant Worthington had standing and could still be a victim of this state malfeasance. (CP 626,568- 569) Worthington also showed that the Multi-Jurisdictional drug task forces used the military on him in violation of the Posse Comitatus Act. As shown above, Worthington should have prevailed on his request to enjoin the State, and local law enforcement from accepting the HIDTA grant bribes leveraging state resources to effectively declare a federal sovereignty to seize medical marijuana for the DEA, The defendants' should also be enjoined from entering into contracts to use the military in Washington State police actions like the one in the WEST NET interlocal agreement. (CP 283-300)

CONCLUSION

As well evidenced by the exhibits in Worthington's briefs, the doctrine of collateral estoppel does not apply, because the only issue resolved in the 2009 Lawsuit was the issue of Worthington's lack of Article III standing with the federal court, because Worthington allegedly only made claims on behalf of others,

and the court could not interfere with legislative matters. Any further decision by the court would have been under hypothetical jurisdiction which could only amount to an ultra vires advisory opinion and not a decision on the merits of the case. Due to the fact that there was no decision "on the merits" in the 2009 federal Lawsuit, neither collateral estoppel nor *res judicata* apply. Any decision, to dismiss with prejudice after hypothetical jurisdiction was exercised would have been in violation of the hypothetical jurisdiction doctrine and ultra vires. Worthington's individual state law claims were not recognized by the federal court and were never considered in the "advisory" opinion. Worthington appealed that he had in fact made claims for himself, and challenged federal subject matter jurisdiction. The federal courts ruled they saw no state law claims then also ruled that jurisdictional arguments were moot and never ordered show cause hearings to determine jurisdictional issues of the remaining state law claims. The Washington State Department of Corrections and the City of Auburn were also not in "privity" for lawsuit purposes, applying those factual tests required by Washington law. It would be unjust to apply either doctrine to preclude Worthington's 2012 Lawsuit claims, as this would give the WEST NET and TNET defendants a factually undeserved escape from any accountability for faking a DEA raid and continuing to hide all the culpable parties involved. The same deficiencies exist with regard to the legal doctrine of *res judicata.* Specifically, the "issues" presented by the 2009

litigation were not substantively determined by the Court.

Due to the fact that the Washington State Department of Corrections and the City of Auburn were indispensable parties, in order to be bound by any court decision, it was legally necessary that the Washington State Department of Corrections and the City of Auburn be joined to that litigation. Since they were not, and because the court ultimately dismissed Worthington's claims on procedural and not substantive grounds, the doctrine of *res judicata* just does not apply. It is also true that the 2012 Lawsuit involved different facts and different tortfeasors *(i.e.,* WEST NET seizing the property instead of the DEA, Alloway acting instead of Bjornberg) which substantively made Worthington's claims legally different than those he presented in the 2009 Lawsuit. For this reason as well, the *res judicata* doctrine does not apply. It is also now clear that precluding Worthington's claims now that he has the truth regarding the facts would be an injustice, serving as a visual aide for law enforcement on how to avoid future claims. Additionally, Worthington's claims of fraud should have been accepted as true by the trial court and should have been decided by a trier of fact. Or in the alternative the trial court should have ruled in favor of Worthington's motion for summary judgment after the defendants admitted to the fraud, when the defendants acknowledged Worthington's written description of the events.

Furthermore, the statute of limitations defense was overcome by the

discovery rule, equitable estopple and equitable tolling, due to a fraudulent misrepresentation of the facts and Worthington's obvious reliance on those false representations in the first federal complaint to bring premature and unripe claims. As a result of that fraud and pursuant to RCW 4.16.080 (4), (6), the statute of limitations should be tolled from November of 2011, and not January 12, 2007, thus permitting Worthington's 2012 claims. Worthington established the fair market value of his property in his tort claim and should be compensated.

For these and all other reasons set forth, the summary judgment order and other final judgments issued by the lower court should be reversed, and the case should be remanded back for a trial on the merits. Or in the alternative, the Washington State Court of Appeals of Division I should rule that Worthington prevailed on his motion for summary judgment, and remand the case back to the trial court for the judgment phase and for orders to enjoin the defendants' from accepting HIDTA grants and entering into contracts to use the U.S. Military in Washington State police actions.[1]

[1] Worthington respectfully requests the Appellate court act because the Superior courts in King County have a conflict of interest with the drug task force members of TNET from the City of Auburn. These task force members' work without prosecutors and work directly with the Judges in King County. The Appellate court is the only forum without this conflict, which could avoid the appearance of judicial impropriety.

DATED at Renton, Washington this 4TH day of October, 2012.

BY John Worthington

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Certificate of Service

I certify that on the date and time indicated below, I caused to be served via email and U.S. MAIL, a true and complete copy of the APPELLANT'S OPENING BRIEF, to the attorneys of record in this case.

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I declare under penalty of perjury under the laws of the United States that the foregoing is True and correct.

Executed on this 4TH day of October, 2012

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