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,

Respondent

APPELLANT'S REPLY BRIEF

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

NO. 68979-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN WORTHINGTON,

Appellant

V.

WASHINGTON STATE ATTORNEY GENERAL ET AL,

Respondent

APPELLANT'S REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

OUT OF STATE CASES

STATUTES

FEDERAL COURT RULES

U.S. CONSTITUTION

WASHINGTON STATE CONSTITUTION

RAP

I. ARGUMENT IN REPLY

A. Hypothetical Jurisdiction

The defendants have failed to show the appellate court that the federal court judge in the previous case could take hypothetical jurisdiction for the purpose of ruling on the merits of a case. The defendants have not provided any U.S. Supreme court case law that overcomes Worthington's hypothetical jurisdictional arguments and supports the trial court's ruling that the federal court was able to take hypothetical jurisdiction of the previous federal case, then render a binding ruling on the merits. In the first case, the defendants, argued in a 12 (b) (6), and 12 (b) (2), that there was no case or controversy or personal jurisdiction. (CP 443), and the federal judge ruled in their favor. Now the defendants are judicially estopped from changing positions." Judicial estoppel precludes a party from asserting one position in a court proceeding and then later, in a different court, seeking an advantage by taking a clearly inconsistent position".. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn.App. 222, 224-25, 108 P.3d 147 (2005).

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 before determining the merits of any claims and described jurisdictional deficiencies that prevented Worthington's "claims on behalf of others" from meeting the Article III U.S. Constitutional requirement. (CP 516). After the federal court judge refused to accept federal jurisdiction of Worthington's "claims on behalf of others' because the federal court could not" interfere with what was a Washington State "legislative matter", the federal judge could only dismiss without prejudice or take

hypothetical jurisdiction to make any other rulings.

"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 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), which also relies on the same U.S. Supreme court

case law in Steel Co. v. Citizens for a better Environment 523 U.S. 83 (1998) "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). As shown above the only decision the federal court judge could make once it had determined Worthington had not met the Article III Constitutional requirements to accept jurisdiction was to dismiss without prejudice. The controlling legal case law for hypothetical jurisdiction and cases dismissed for lack of standing for Washington State and federal cases all rely on Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998). The defendants rely on the fact Worthington's case went to the federal appellate courts for rulings on the merits, but the appellate court only had jurisdiction to rule on jurisdiction not the merits. "When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." United States v. Corrick , 298 U. S. 435, 440 (1936) (footnotes omitted)." Arizonans for Official English v. Arizona , 520 U. S, (slip op., at 28) (1997), quoting from Bender v. Williamsport Area School Dist. , 475 U.

S. 534, 541 (1986) . When Worthington challenged federal jurisdiction directly the federal courts ruled those challenges were moot, proving the federal court never took jurisdiction of Worthington's case. As shown above the trial court erred when it accepted an advisory, ultra vires opinion, as a final decision on the merits to allow a defense of collateral estoppel and res judicata.

B. No elements of res judicata and collateral estoppel were met

The defendants' again hang their hat on a courtroom exchange between the trial court judge and Worthington in the preliminary injunction hearing. In this exchange, Worthington, who is hard of hearing and required the use of courtroom hearing assistance devise, thought the trial court judges had said "nearly the same" and not" the same". This is evident by all the parties' pleadings. The defendants have admitted the claims were nearly identical in all their briefs including in the response to the appellate court, and Worthington also had briefed the claims were "nearly identical" Worthington corrects the statements on the record because he could not properly hear the trial court judge. The appellate court can make the determination themselves by looking at the four state law claims the federal court judge identified in his order. (CP 402), and compare them to the claims in Worthington's motion for summary judgment in the 2012 case. (CP 12-19) The appellate court will see that the defendants responded to new claims Worthington made in 2012 in their response brief, that are in addition to the 4 state

law claims identified in the federal judge's order. The defendants want to have it both ways. They want to argue the claims are identical, and then argue Worthington was not entitled to the additional claims that were not one of the 4 claims in the federal judge's order. Furthermore, the trial courts order shows the trial court judge did not consider any of the briefs filed in the preliminary injunction. As shown in the federal judge's order the judicial deception, fraud, negligence, Breach of public duty, and conversion claims were not considered in the previous federal case. As shown above there are new parties, new claims, and a new burden of proof, and the trial court erred when it ruled otherwise.

C. Worthington could not have discovered the truth before the first case was filed

The defendants argue Worthington had access to the truth before or during the federal case, and could have named the new parties and written his new claims within the statute of limitations. This is a complete distortion of the truth. The truth is, the defendants asked for a stay of all discoveries in the federal case, which was granted by the federal court judge, and Worthington never got a chance to obtain anything in discovery. Worthington has also shown that he was being denied access to the public records from both members of the two drug task forces ,who have argued either it was the DEA that had all the documents (Worthington v. WSP, 3- 8697-6-II) or they were immune from suit (Worthington v. WEST NET,43689-2-II). All the while, TNET has refused to honor the PRA and has thru

Pierce County provided minimal documents, then instructed its participating members to deny Worthington's request for documents.) (CP 494-495).The U.S. Department of Justice denied all of Worthington's requests for records when he sought to defend the alleged federal allegations. (CP494-495), as shown below:

> Worthington (through our HQ in DC) has tried multiple times to get copies of any DEA reports, to which is has repeatedly been told no, as he is not a Federal defendant (There are only a few to begin with and only one concerning him.

As shown above Worthington exercised due diligence and was purposely denied access to any information regarding the raid prior to the filing of the original suit. As argued in the opening brief, and this brief, privity of the City of Auburn and the Washington State Department of Corrections could not be established prior to the federal case, because the defendants were hiding all records. It was not until most of the WEST NET General Report was received in August of 2011, well after the federal case had been dismissed could Worthington prove there were additional parties. Worthington has shown that Bjornberg and WEST NET were not truthful in their descriptions of the raid, and that there is now a new burden of proof, when the DEA agent assigned to TNET, admitted WEST NET seized the plants and not TNET or the DEA. It would be a manifest injustice to prevent further discovery and deny Worthington a chance to get justice. As shown above and in the appellants opening brief, the defendants have not met any

of the other elements of res judicata or collateral estoppel and the trial court's decision should be reversed for ruling otherwise.

D. Worthington's claims of fraud should be determined by a trier of fact.

Worthington made allegations of fraud pursuant to RCW 4.16.080 (4), (6), and in other claims, 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)

The defendants want to argue issues of fraud on appeal, but the trial court ruled there was an absence of an issue of material fact. What the defendants have shown in their response brief is that there are issues of material fact for the trier of fact to resolve, and that the trial court erred in ruling there was an absence of an issue of material fact. "The moving party bears the initial burden of showing the absence of an issue of material fact". (See Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).The defendants failed to meet this burden, and did not address whether Worthington's arguments that allegations of fraud are required to be determined by the trier of fact. The defendants have conceded that argument to

Worthington, and their extensive briefing about issues of fraud only serve as proof to the appellate court that there was not an absence of an issue of material fact and that Worthington's claims of fraud should not have been dismissed in summary judgment. "Even, though the trier of fact is free to believe or disbelieve any evidence presented at trial, [a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact." Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn.App. 710, 717, 225 P.3d 266 (2009) (citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 572, 343 P.2d 183 (1959)), rev. denied, 168 Wn.2d 1041 (2010). If the appellate court wishes to weigh evidence, they should start with the issue of why Bjornberg would seize Worthington's medical cannabis for the DEA if he was not a federal defendant, as shown below. (CP 495)

> Worthington (through our HQ in DC) has tried multiple times to get copies of any DEA reports, to which is has repeatedly been told no, as he is not a Federal defendant

As shown above, Bjornberg pretended Worthington was a federal defendant so he could seize Worthington's medical cannabis for the DEA. The appellate court should rule the trial court erred in ruling issues of fraud and disputes of material fact did not have to be resolved by the trier of fact in a trial. Or, in the alternative, rule that Bjornberg only pretended to be acting on behalf of the DEA.

E. Defendants did take a position regarding who seized the property

In the substitution of the United States for Fred Bjornberg, Bjornberg had to specifically address the charges made so the U.S. Department of Justice could represent him. (CP 689-692) To do so Bjornberg was instructed to write a letter to Tim Garren alleging he was acting within the scope of employment in regards to the acts alleged in the complaint, as shown below:

> The essence of your FTCA letter should be to persuade the deputizing agency that it should request the USAO to certify that the deputized agent was acting within the scope of employment in regards to the acts alleged in the complaint and to provide sufficient facts to support that contention. We will carefully review the question of scope before certifying the matter to the district court.
>
> Similarly, the letter from the deputized agent seeking DOJ representation needs to show that the wrongful acts alleged came about as a result of carrying out responsibilities associated with the deputization.

As shown above the defendants were required to take the position that Fred Bjornberg was acting within the scope of employment in regards to the acts alleged in the complaint, in order to substitute the United States for Fred Bjornberg. This was also part of a strategy to misrepresent the facts to the federal court to get Worthington's federal claims dismissed for failing to file a tort claim with the feds. (CP 689-692) The record clearly shows all of the defendants being advised to have Bjornberg take responsibility for the acts alleged in the federal complaint.

Now the defendants falsely claim to the appellate court that they did not take a position with the U.S. district court as to who seized Worthington's property, after incorporating their arguments into the State of Washington's argument that the property was seized by a "loaned state employee". The argument that the defendants took no legal position regarding the seizure of Worthington's property is incorrect. The defendants made arguments Bjornberg seized the property even though they had possession of the WEST NET General Report which had officers' reports showing Duane Dobbins and John Halstead reported the WEST NET seizure. The defendants now also admit they attempted to mislead the trial court regarding a seizure by a Bremerton Police Officer, before being caught by Worthington and being forced to admit their deception.

F. Worthington could legally possess the cannabis, and its forfeiture was invalid

The defendants erroneously claim that Worthington could not possess cannabis legally, and argue Worthington had no rights to reclaim his cannabis since he was not charged with a crime, making its forfeiture valid. However, Worthington is allowed to legally possess cannabis as an ultimate user under RCW 69.50.302(c) (3) shown below:

> "(c) The following persons need not register and may lawfully possess controlled substances under this chapter:
>
> (3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner or in lawful possession of a substance included in Schedule V."

An ultimate user is defined as someone who lawfully possesses controlled substances for their own use, as shown below in RCW 69.50.101 (cc) :

> (cc) "Ultimate user" means an individual who lawfully possesses a controlled substance for the individual's own use or *******

As shown above Worthington was the ultimate user of the cannabis confiscated and was not charged with manufacturing with intent to deliver. Since it was not proven that Worthington was not an ultimate user of the cannabis, Worthington could lawfully possess the cannabis and it can be returned since the statute of limitations for charging Worthington has passed or since the forfeiture was invalid for failing to follow RCW 69.50.505 (3). Worthington can also legally possess cannabis under RCW 69.51A, if he complies with RCW 69.51A.040 as shown below:

> RCW 69.51A.040
> Compliance with chapter — Qualifying patients and designated providers not subject to penalties — Law enforcement not subject to liability.
>
> The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences, for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, or have real or personal property seized or forfeited for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, cannabis under state law, and investigating peace officers and law enforcement agencies may not be held civilly liable for failure to seize

cannabis in this circumstance, if:

(1)(a) The qualifying patient or designated provider possesses no more than fifteen cannabis plants and:
(i) No more than twenty-four ounces of useable cannabis;
(ii) No more cannabis product than what could reasonably be produced with no more than twenty-four ounces of useable cannabis; or
(4) The investigating peace officer does not possess evidence that:
(b) The qualifying patient has converted cannabis produced or obtained for his or her own medical use to the qualifying patient's personal, nonmedical use or benefit;

As shown above, since it was not proven that Worthington converted any cannabis, or was found to have more than the limit of 15 plants or 24 ounces of cannabis, Worthington was not supposed to have his personal property seized or forfeited for possession. Worthington's property was also protected by RCW 69.51A.050 as shown below:

RCW 69.51A.050
Medical marijuana, lawful possession — State not liable.

(1) The lawful possession or manufacture of medical marijuana as authorized by this chapter shall not result in the forfeiture or seizure of any property.

As shown above Worthington was protected from property forfeiture by the language of RCW 69.51A.040 and RCW 69.51A.050. The defendants' arguments that Worthington is not entitled to the provisions of RCW 69,51A or RCW 69.50.505, since he was not charged with a crime, is internally inconsistent with both statutes and RCW 69.50.505 (3) which states that the forfeiture process is

commenced with the seizure as shown below:

> (3) In the event of seizure pursuant to subsection (2) of this section, proceedings for forfeiture shall be deemed commenced by the seizure.
> *******

Since the cannabis was seized under RCW 69.50.505[1], the proceedings for forfeiture were deemed commenced by the seizure, WEST NET or TNET was required by law to give 15 day notice of intent to seize Worthington's property. Washington's forfeiture statute is exclusive and that unless statutory procedures are followed, a Washington court cannot order forfeiture. The power to order forfeiture is purely statutory and will be denied absent compliance with proper forfeiture procedure. State v. Alaway, 64 Wash.App. at 801, 828 P.2d 591(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 admitted they failed to comply with that statute, even though both of the interlocal agreements for WEST NET

---

[1] Both WEST NET and TNET interlocal agreements have specific language that states all seizures and forfeitures will be made pursuant to RCW 69.50.505. The WEST NET seizure and forfeiture language can be found at (CP 290), and the TNET seizure and forfeiture language is found at (CP 589).

and TNET states that all seizure and forfeiture will be done under RCW 69.50.505. The defendants' claim that Worthington was not able to legally possess his property and his property is not required to be returned is incorrect. Washington State case law has held that "only if the agency can make a substantial showing that the property does not belong to the defendant is the defendant required to show the court sufficient facts of his right to possession". (See State v. Marks, 114 Wn.2d 724, 736, 790 P.2d 138 (1990). WEST NET or TNET has never made any claims that the cannabis plants did not belong to Worthington, and are absent any proof the cannabis plants do not belong to Worthington, so the property is required to be returned. The defendants admit they did not follow the requirements of RCW 69.50.505 (3) and want the appellate court to interpret the statutes above to mean that statutory requirements in RCW 69.50.505(3) are never triggered unless charges are brought. This interpretation would lead to an absurd result where law enforcement could make up probable cause and seize property without having to prove probable cause. This absurd result would lead to millions of Washington State citizens being led to believe they have statutory rights which they do not have, and never legally contest a property seizure. "Courts avoid interpreting a statute in a way that leads to an absurd result because we presume the legislature did not intend an absurd result." (See SEIU Healthcare 775NW v. Gregoire, 168 Wn.2d 593, 620, 229 P.3d 774 (2010). As shown above the trial

court erred as a matter of law in ruling Worthington couldn't legally possess cannabis and that the forfeiture was valid.

G. Breach of the Public Duty Doctrine

The defendants clearly breached the mandatory provisions of RCW 69.50.505, even though they signed an interlocal agreement which stated all seizure forfeitures where to be executed under RCW 69.50.505. The defendants also breached their duty to enforce the legislative intent of RCW 69.51A.040.RCW 69.561A.050, and RCW 69.50.302(c) (3). To prove a claim for injury Worthington must prove the existence of a duty and breach of that duty. In Washington State, the Supreme Court has adopted the public duty doctrine. The Washington Supreme Court has recognized four exceptions to the public duty doctrine:(1) legislative intent,(2) failure to enforce,(3) the rescue doctrine, and (4) a special relationship. The legislative intent exception applies to Worthington, because the terms of RCW 69.51A, evidence a clear legislative intent to identify and protect a particular and circumscribed class of persons (medical cannabis patients) to which Worthington is a member (Alloway admitted Worthington is a qualified medical cannabis patient) (CP 501). Hannum v. Washington State Dep't of Licensing, 181 P.3d 915, 144 Wash.App. 354 (2008), citing Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 929, 969 P.2d 75 (1998). The statutory language must clearly express this intent; a court will not imply it. Ravenscroft,

136 Wn.2d at 930. Where the legislative intent exception applies, a member of the identified class may bring a tort action against the governmental entity for its violation of the statute. *Ravenscroft*, 136 Wn.2d at 929. WEST NET and TNET violated RCW 69.50.505 (3), RCW 69.51A.040, RCW 69.561A.050, and RCW 69.50.302(c) (3). Worthington is within the class (medical cannabis patients) the statute intended to protect. Bailey v. Forks, 108 Wn.2d 262, 737 P.2d 1257(1987), citing Campbell v. Bellevue, 85 Wn.2d 1, 530 P.2d 234(1975). Worthington's causes of action are based on statutory or common law, (violations of RCW 69.50.505(3), RCW 69.51A.040.RCW 69.561A.050, RCW 69.50.302(c) (3) RCW 7.48, and RCW 4.24.630), imposing a duty to refrain from the prohibited conduct and the statute or common law rule must be adopted to protect the plaintiff against harm of the general type. Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982) (quoting Rikstad v. Holmberg 76, 268, 456 P.2d 355 (1969)). Worthington's claims meet this test, and he is entitled relief for the defendants' negligence, emotional, consequential, and statutory damages.
The trial court erred and abused its discretion when it denied Worthington relief under the Public Duty Doctrine.

H. Nuisance and RCW 4.24.630 claims

In order to establish a wrongful invasion or physical trespass of land, in violation of RCW 4.24.630, there must be a finding that a person acted intentionally, unreasonably, and knew or had reason to know that he or she acted without authorization. TNET has declared they will continue to be a nuisance and

seize medical cannabis for the DEA which is confirmed by the TNET executive board meeting minutes. (CP 626). In doing this, TNET admitted to a policy to bypass the forfeiture process in RCW 69.50.505 (3). Alloway and WEST NET's terrorization of Washington State medical cannabis patients is well documented. (CP 593-624) "A nuisance is an unreasonable interference with another's use and enjoyment of property." Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 592, 964 P.2d 1173 (1998). RCW 7.48.010 provides: [W]hatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other and further relief. A planned conspiracy to interfere with medical practice in Washington State and confiscate property used to treat pain is declared interference, which most certainly is not reasonable. The defendants have not disputed Worthington's claims that HIDTA grants were intended to bypass Washington State laws, or that the policy was not applied to Worthington, nor have they disputed WESTS NET's track record of abuses as documents by the media. The trial court erred when it failed to rule Worthington prevailed on his Nuisance And timber trespass claims.

I. Conversion claim

Conversion is "`the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.'" Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn.App. 80, 83, 18 P.3d 1144 (2001) (quoting Wash. State Bank v. Medalia Healthcare, LLC, 96 Wn.App.

547, 554,984 P.2D 1041(1999)) Potter v. Wash. State Patrol, 165 Wn.2d 67, 78-79, 196 P.3d 691 (2008) (quoting In re Marriage of Langham & Kolde, 153 Wn.2d 553, 564, 106 P.3d 212 (2005)) The defendants admitted they were going to willfully interfere with; Washington State seizure and forfeiture laws; and the Washington State medical cannabis Act; and deprive Worthington possession of his medical cannabis. (CP 626) The defendants have not disputed the intent of HIDTA grants, nor if the HIDTA grant policy to use state resources to seize medical cannabis for the DEA was applied to Worthington .The defendants can no longer charge Worthington since the statute of limitations for charging have expired. "[A] court may refuse to return seized property no longer needed for evidence only if (1) the defendant is not the rightful owner; (2) the property is contraband; or (3) the property is subject to forfeiture pursuant to statute." State v: Alaway, 64 Wash.App.796, 798, 828 P.2d 591 (1992), *citing* United States v. Farrell, 606 F.2d 1341, 1347(D.C.Cir.1979); United States v. Wright, 610 F.2d 930, 939 (D.C.Cir.1979); United States v. Wilson, 540 F.2d 1100, 1101 (D.C.Cir.1976); United States v. Brant, *684* F.Supp. 421, 423, (M.D.N.C.1988). "In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence that the property is subject to forfeiture." If law enforcement cannot establish a grounds for forfeiture, items are thus to be returned

to the defendant upon the court's determination that they are no longer needed for evidentiary purposes. State v. Pelkey, 58 Wn. App. 610, 794 P.2d 1286 (1990)

Worthington is plainly the rightful owner of the medical cannabis at issue. It was in his possession at the time he was raided, and there is no claim in this case that the property did not belong to him. Further, the property cannot be considered contraband, as shown in the arguments above, and the statute says it is not subject to forfeiture. Clearly, forfeiture of the medical cannabis legally possessed cannot be considered anything other than a civil penalty for the possession of the cannabis, and that forfeiture cannot therefore be allowed under Washington law.

The federal law arguments to seize medical cannabis have failed in California. (See City of Garden Grove v. Kha, 157 Cal. App. 4th 355, 68Cal. Rptr. 3d 656 (2007), review denied (2008), cert. denied, U.S., 129 S. Ct. 623,172 L. Ed. 2d 607 (2008). The trial court erred as a matter of law when it held Worthington's cannabis could be forfeited without the required due process of law. Worthington is now owed the fair market value of the stolen property since WEST NET or TNET failed to follow the Washington State seizure and forfeiture laws.

J. The Discovery Rule does apply

Washington follows the discovery rule: A cause of action does not accrue until the plaintiff knew or should have known the essential elements of his or her cause of action, (See RCW 4.16.080 (4); Green v. A.P.C., 136 Wn.2d 87, 95, 960

P.2d 912(1998). Accrual begins when the "aggrieved party discovers, or should have discovered, the fact of fraud" Hudson v. Condon, 101 Wn. App. 866, 875, 6 P.3d 615 (2000), review denied, 143 Wn.2d 1006 (2001). In order to survive summary judgment on the statute of limitations, Worthington must not have had an actionable claim for damages before January 17, 2010. (Three years before he filed his claim). Worthington did not have an actionable conversion claim against the United States, because there are no federal medical cannabis laws, and indeed Worthington never made such claims in the federal case. The defendants had a duty to disclose who seized the medical cannabis under RCW 69.50.505 (3) and misrepresented the facts so the defendants could utilize a federal cross designation and a honor a federal grant contract specifically written to deprive Worthington of due process. (CP 568-569, 589-591, 626, 628-643) 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, 796, 770 P.2d 686, *review denied,* 113 Wn.2d 1033, 784 P.2d 531 (1989). "When a duty to disclose does exist, however, the suppression of a material fact is tantamount to an affirmative misrepresentation." (See Washington Mut. Sav. Bank v. Hedreen, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994); *Oates,* 31 Wash.2d at 902, 199 P.2d 924.The defendants had that duty to disclose the material fact that WEST NET

seized Worthington's property and not the "DEA", and consequently, owed Worthington an affirmative duty of disclosure. When WEST NET and TNET did not disclose their actions to Worthington, they breached this duty, and their silence constitutes an affirmative act of misrepresentation. Consequently, RCW 4.16.080 (4), the statutory discovery rule for fraud, applies. RCW 4.16.080 (6) itself is a discovery rule and also applies. The trial court erred as a matter of law when it held otherwise

K. The Doctrines of equitable estoppel and equitable tolling apply

The doctrines of equitable estoppel and equitable tolling apply because Alloway and Bjornberg acted in bad faith. 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, or false assurances by the defendant and the exercise of diligence by the plaintiff); Peterson v. Groves, 111 Wn.App. 306, 311, 44 P.3d 894 (2002) (gravamen of equitable estoppel is that the defendant made representations or promises to perform that lulled the plaintiff into delaying timely action) As shown above the trial court erred in ruling equitable estoppel and equitable tolling did not apply

L. The warrant was not valid, nor was it properly served

The warrant clause of the Fourth Amendment to the United States Constitution and Article I, section 7 of our state constitution require that a trial

court issue a search warrant only on a determination of probable cause. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002). Probable cause requires a nexus between (1) the criminal activity and the items to be seized and (2) the items to be seized and the place to be searched. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Alloway did not tell the issuing judge that the CI Zach Joy stated that "he did not know John Worthington". (CP 552-560) Without Joy knowing Worthington or having been to his residence, Alloway could not establish any criminal nexus between any activity at Steve Sarichs' house and Worthington's house, and the warrant would fail to withstand any legal challenge. Searching for dirt at the request of a U.S. Attorney for helping a man to change his federal plea does not constitute probable cause, and smacks of retaliation under color of law. (CP 532- 534) To establish probable cause based on an informant's tip, the affidavit must demonstrate the basis for the informant's information and the basis for the officer's conclusion that the informant was credible (the two prongs of the *Aguilar-Supinelli t*est).(See State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002). Here, Joy did not know Worthington nor had he ever been to Worthington's house. The defendants were simply digging for dirt for U.S. Attorney in order to retaliate against Worthington for interfering with a federal court case. (CP 532- 534) Worthington politely asked the officers to go get a search warrant and 'go thru the process". The officers, who represented themselves as

DEA agents, left and returned without possession of a warrant and ordered Worthington and his family out of the house at gunpoint after phoning Worthington to the door. Bjornberg and Alloway arrived later after TNET's Thatchel and Poston conducted the raid with other support. (CP 320-325,502).

The trial court erred in ruling the issuing Judge did not abuse its discretion by issuing a warrant for a guy named John, and ruling that Alloway was truthful in his affidavit for a telephonic search warrant.

M. Worthington is entitled Declaratory and Injunctive relief

The defendants never addressed the issue of whether the HIDTA grants were created as a means to get around the Washington State medical cannabis act, or whether the policy embodied in the HIDTA grant was applied to Worthington, and could be applied to Worthington again. The defendants also failed to address the issue of using the U.S. Military in state police actions. In failing to address these issues the defendants conceded the arguments to Worthington and shows the appellate court that the trial court abused its discretion in ruling there was no cause for an injunction or declaratory relief.

N. The defendants raise new issues of standing

The issue of not identifying parties and declaratory judgment were not raised in the summary Judgment, and not considered by the trial court. "Issues and contentions neither raised by the parties nor considered by the trial court when ruling on a motion for summary judgment may not be considered for the first time on appeal." (See RAP 9.12; Green v. Normandy Park Riviera Section Cmty. Club,

137 Wn.App. 665, 687, 151 P.3d 1038 (2007) (contention that was pleaded, but not raised in opposition to summary judgment, cannot be considered for the first time on appeal). The defendants failed to raise this argument to the trial court at summary judgment, and failed to preserve this argument. Worthington was not given the proper chance to cure these defects. The defendants conceded there was a case and controversy when they moved for summary judgment and waived all standing issues in the process. Furthermore, Worthington met the two-part test for standing under the Declaratory Judgments Act. Worthington satisfied the first criteria when he claimed he was a medical cannabis patient who had his property forfeited without due process and was within the zone of interests to be protected or regulated by the statutes in question. Worthington also satisfied the second part of the test when he alleged he suffered an "injury in fact." To establish harm in a Declaratory Judgment action, a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract." *Id.; accord,* Am.Legion Post # J 49 v. Washington State Dep 't of Health, 164 Wn.2d 570,593-94, 192 P.3d 306 (2008).

Worthington's rights and claims under the statutes identified above is based on a true event and the allegations of harm are for interfering with Worthington's medical treatment, and is not hypothetical or speculative. Furthermore, the court can "finally and conclusively resolve the dispute between the parties." Pasado's Safe Haven v. State, 162 Wn. App. 746, 749, 259 P.3d 280(2011). The defendants want to have it both ways. As shown above Worthington met the criteria for a ruling under the Declaratory Judgment Act.

II. CONCLUSION

Based on the aforementioned arguments, res judicata and collateral estopple does not apply and Worthington is entitled either a tort judgment in his favor for the loss of his property, after the defendants intentionally violated the statutory requirements of the Washington State laws identified above, or in the alternative a remand to the trial court with instructions to proceed with a trial to determine disputed issues of material fact concerning allegations of fraud.

Worthington's requests for Declaratory and injunctive relief should be granted in order to provide a much needed published opinion[2] to resolve the issues at stake in this dispute, or in the alternative remanded to the trial court with instructions to proceed to trial to determine issues of material fact concerning allegations of fraud.

DATED at Renton, Washington this 21ST day of November, 2012.

BY John Worthington

John Worthington
4500 SE 2ND PL.
Renton WA.98059

[2] Worthington respectfully requests a published opinion on the issues presented. It is clear that the issues in this case are compounded by the passage of I-502. If law enforcement has found a bypass around the medical cannabis law then they have also found a way around the provisions of I-502, since both laws are exemptions to a crime and are based on the same legal premise. If the defendants are correct in that all law enforcement has to do is not charge individuals that attempt to exercise their rights under these laws, Worthington would like to present a published opinion to the legislature in order to close this bypass.

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 REPLY BRIEF, to the attorneys of record in this case.

ANN E. TRIVETT
CHRISTIE LAW GROUP
2100 WESTLAKE AVENUE N., SUITE 206
SEATTLE, WA.98109
206-957-9669
bob@christielawgroup.com

MARK KOONTZ
345 6TH STREET, SUITE 600
BREMERTON, WA. 98337
360-473-5161
mark.koontz@ci.bremerton.wa.us

STEWART ESTES
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WA. 98104-3175
206-623-8861
sestes@kbmlawyers.com

ALLISON STANHOPE
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA. 98104-3188
206-464-7352
allisonc@atg.wa.gov

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

Executed on this 21st day of November, 2012

BY John Worthington

John Worthington
4500 SE 2ND PL.
Renton WA.98059