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NO. 68979-7-1

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

JOHN WORTHINGTON, Appellant,

v.

STATE OF WASHINGTON, et al., Respondents.

BRIEF OF RESPONDENTS

Ann E. Trivett
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and City of Poulsbo, as Respondents

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I. INTRODUCTION

Plaintiff John Worthington was present at his home on January 12, 2007 when City of Bremerton Detective Roy Alloway, Washington State Trooper and cross-deputized federal agent Fred Bjornberg, and other law enforcement officers searched Mr. Worthington's home. While executing the warrant, one or more law enforcement officers seized Mr. Worthington's property, including six marijuana plants, and Agent Bjornberg gave Mr. Worthington an identification card.

Within three years of this search, Mr. Worthington brought suit against a number of these defendants. The lawsuit was removed to federal court, and Mr. Worthington filed a total of five amended complaints. Finally, the district court dismissed Mr. Worthington's lawsuit for lack of standing, with prejudice. Mr. Worthington appealed, and the Ninth Circuit Court of Appeals upheld the decision.

Mr. Worthington is now attempting to either relitigate his claims or assert new ones against these defendants. Not only are his claims barred by the doctrines of res judicata and collateral estoppel, but they are also time barred. The trial court properly dismissed Mr. Worthington's new lawsuit with prejudice, and defendants now requests that this Court affirm that decision.

II. COUNTER STATEMENT OF ISSUES

A. Whether Mr. Worthington's claims were properly dismissed under the doctrines of res judicata and collateral estoppel when his federal court claim included identical claims and parties and Judge Robart's dismissal was a final judgment on the merits.

B. Whether Mr. Worthington's claims were properly dismissed under the statute of limitations when the execution of the search warrant occurred on January 12, 2007 in Mr. Worthington's presence, he knew all relevant facts in order to bring a timely suit, and he filed his suit five years after the incident which gave rise to the suit.

C. Whether Mr. Worthington's tort claims should be dismissed on substantive grounds because the seizure of his marijuana was lawful and based on a valid search warrant.

III. STATEMENT OF THE CASE

A. The Search of Mr. Worthington's Home.

In 2006, Bremerton Police Detective Roy Alloway was a member of the West Sound Narcotics Enforcement Team ("WestNET"), a regional drug task force created to combat controlled substance trafficking. (CP 283-314.) In August 2006, Detective Alloway began an investigation into Steve Sarich and Mr. Worthington on suspicion of a violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.401. (CP

305-14.) Detective Alloway gathered evidence that gave him probable cause to believe that Mr. Sarich was operating a marijuana grow operation at his residence located at 1604 Cedar Street, Everett, Washington. (*Id.*) On January 4, 2007, the Kitsap County Superior Court issued a warrant to search that Cedar Street property. (CP 316-18.)

Detective Alloway, along with his WestNET colleagues, executed the search warrant on January 12, 2007. (CP 321.) WestNET detectives located nearly one thousand growing marijuana plants at the Cedar Street property. (CP 322.) Due to the large amount of marijuana plants, Detective Alloway contacted the United States Drug Enforcement Administration ("DEA") to assist in the investigation. (*Id.*) WestNET detectives interviewed occupants of the house, including Zach Joy. (*Id.*) Mr. Joy informed detectives that Mr. Worthington was a partner of Mr. Sarich and that Mr. Worthington resided at 4500 S.E. Second Place, Renton, Washington. (*Id.*)

After receiving this information, Detective Alloway applied for and obtained a search warrant for Mr. Worthington's Second Place property in Renton. (CP 320-29.) The warrant authorized law enforcement officers to search the premises and seize evidence of a VUCSA violation, including "Marihuana in all forms." (*Id.*)

On January 12, 2007, a number of law enforcement officers, including Detective Alloway and DEA Agent Fred Bjornberg, conducted the search of Mr. Worthington's home. (CP 339.) Mr. Worthington was present during the search, and Agent Bjornberg handed Mr. Worthington his identification card. (*Id.*) Six marijuana plants were seized from the premises as evidence of a VUCSA and entered into property at the Kitsap County Sheriff's Office. (CP 331-33.) Ultimately, Mr. Worthington was not charged with any crime, and no law enforcement agency sought forfeiture of any property seized from Mr. Worthington's residence under RCW 69.50.505.

WestNET is a multi-jurisdictional narcotics task force, whose jurisdiction includes Pierce, Kitsap, and Mason Counties. (CP 283-303; 54.) The cities of Poulsbo, Port Orchard, and Bremerton are members. (*Id.*) TNET is a multi-jurisdictional task force overseen by the Drug Enforcement Administration. (CP 54.) Most of its prosecutions are filed in federal court in Tacoma. (*Id.*) The Washington State Patrol and the City of Auburn are members. (*Id.*)

B. Mr. Worthington's Original Lawsuit.

On December 21, 2009, almost three years after the search of his home, Mr. Worthington filed a 49-page Complaint in King County Superior Court, Cause No. 09-2-45809-0, seeking monetary damages and declaratory

and injunctive relief. (CP 87-136.) He named 27 defendants, including present defendants the City of Bremerton, the City of Poulsbo, the City of Port Orchard, and the State of Washington. (*Id.*) Mr. Worthington did not name the City of Auburn as a defendant in this original lawsuit, but as the trial court below already recognized, the City of Auburn is in privity with these other defendants. (VRP: February 14, 2012 hearing, p. 26, ll. 13-16.)

In this original lawsuit, Mr. Worthington asserted a variety of federal and state law claims, including claims for the alleged violation of his Fourth and Fourteenth Amendment rights, intentional infliction of emotional distress, negligence, tortious violation of Chapter 69.51A RCW, and violation of RCW 4.24.630. (CP 87-135.) Mr. Worthington specifically alleged that the municipal defendants were negligent in creating and/or participating in interagency task forces. (CP 131-35.) Mr. Worthington sought declaratory and injunctive relief, requesting a ruling that defendants violated the Washington State Medical Marijuana Act, and an order requiring defendants to terminate all federal grants, regional task force agreements, and multi-jurisdictional drug task force interlocal agreements until they comply with the Washington State Medical Marijuana Act. (CP 134-35.) Mr. Worthington also concedes that his federal lawsuit was "littered with damages claims for himself, and specific injury claims for interfering with [his] medical treatment ..." (Appellant's Opening Brief, p.

13.)

The factual basis for Mr. Worthington's claims, as outlined in his original complaint, involves the January 12, 2007 search of his home and seizure of his marijuana. (CP 87-135.) His original complaint states, in part:

> The Two Task forces found and confiscated medical records for 200 patients, including Worthington's on the premises. ... [T]he drug task forces attempted a knock and talk procedure at Worthington's house. Worthington denied the task forces entry and asked them to get a search warrant. A few hours later the task forces returned with a warrant, and found 6 marijuana plants with a valid Washington State medical marijuana authorization from a Doctor Tom Orvald posted at the grow site. ... 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. A man identifying himself as a DEA agent, presented an identification card with no photo, and confiscated the 6 plants. ... Worthington, suspicious of the intent of the raid, pursued the issue thru public disclosure requests investigating the raid, and finds out that the DEA agent was WSP officer Fred Bjornberg, cross designated as a DEA officer assigned to the IAD division of the WSP to supervise TNET. ... Thru 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 90-91.)

Mr. Worthington's original lawsuit was removed to the United States District Court for the Western District of Washington and assigned to the Honorable James L. Robart. (CP 138-41.) Mr. Worthington then filed his

first amended complaint, over 70 pages long. (*Id.*) The defendants moved for a more definite statement, the court granted the motion, and Mr. Worthington filed a number of additional amended complaints. (*Id.*) On March 1, 2010, Judge Robart ruled that Mr. Worthington's Fourth Amended Complaint failed to meet the requirements of Fed. R. Civ. P. 8(a). (*Id.*) The court ordered Mr. Worthington to file a short and plain statement showing that he was entitled to relief and that the court had jurisdiction over the matter. (*Id.*)

Mr. Worthington filed his Fifth Amended Complaint on March 3, 2010, still 35 pages long. (CP 143-77.) It contained claims nearly, if not completely, identical to the ones he already attempted to assert. (*Id.*) Mr. Worthington alleged, among other things, that the defendants entered into interlocal and multi-agency agreements, unlawfully interfering with his right to possess medical marijuana plants. (*Id.*)

On March 11, 2010, a number of defendants filed a motion to dismiss Mr. Worthington's claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim and under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. (CP 179-202.) The Cities of Poulsbo and Port Orchard, the City of Bremerton, and the State of Washington joined that motion, requesting the court to dismiss Mr. Worthington's claims. (CP 65; 204-25.) The defendants argued, in part, that Mr. Worthington did not have standing

to assert any claims based upon their participation in any multi-agency task force or their enforcement of a 27 medical marijuana plant limit. (*Id.*)

On April 20, 2010, Judge Robart issued his ruling with respect to these motions to dismiss. (CP 227-35.) The April 20, 2010 order states, in part:

> The court grants Defendants' motions because Mr. Worthington lacks standing to pursue his alleged claims as he has not shown that there is a real or immediate threat of future injury and he does not seek redress of any past harm ... Mr. Worthington's Fifth Amended Complaint does not allege any actual or threatened injury arising from a 'violation of law by' Defendants. Mr. Worthington's requested relief seeks (1) a declaratory judgment for alleged violations of Washington's medical marijuana law; (2) an injunction enjoining the 'State, County, and City Defendants' and issuing an order giving a 'written 30 day notice to terminate all HIDTA grants, Regional Task Force agreements and Multijurisdictional drug task force interlocal agreements, until these grants and contracts can be properly written to remove the conflict with the Washington State medical marijuana law.' ... Mr. Worthington seeks the court's intervention in what is a legislative matter ... Even if Mr. Worthington could show an entitlement to damages from the alleged raids and confiscation of his and Mr. Sarich's plants – which he does not seek in his complaint – a past history of wrongs or past exposure to illegal conduct does not 'itself show a present case or controversy regarding injunctive relief.

(CP 232-34.) Judge Robart granted the defendants' motions and dismissed Mr. Worthington's Fifth Amended Complaint without leave to amend. (CP 234-35.) Judgment was entered the same day. (CP 237.) Mr. Worthington moved for reconsideration, which was denied on May 10, 2010. (CP 239-

40.) Mr. Worthington appealed, and on June 27, 2011, the Ninth Circuit Court of Appeals summarily affirmed the district court's judgment:

> 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 ... 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.

(CP 242.) On August 29, 2011, the Ninth Circuit denied Mr. Worthington's motion for reconsideration and closed the appeal. (CP 244.) Then, on February 24, 2012, the Supreme Court of the United States denied Mr. Worthington's petition for a writ of certiorari. (CP 246.)

C. Mr. Worthington's Second Lawsuit in State Court.

On January 17, 2012, more than five years after the search of his home, Mr. Worthington filed the present lawsuit along with a motion for a preliminary injunction. (CP 71-72.) His motion requested that the trial court order defendants to (1) cease and desist from participating in TNET; (2) cease and desist from enforcing TNET's policy to seize medical marijuana; (3) cease and desist from using the NCIS in Washington State police actions; and (4) not destroy any documents or other material that may be related to his lawsuit. (*Id.*)

Mr. Worthington filed an Amended Complaint on February 3, 2012, asserting causes of action for negligence, "breach of duty" under Chapter

69.51A RCW, violation of RCW 4.24.630, nuisance, and conversion. (CP 410-22.) He requested compensatory damages, declaratory relief, and a permanent injunction prohibiting defendants from entering into or participating in interlocal agreements that enforce federal marijuana laws. (*Id.*)

The factual basis for Mr. Worthington's lawsuit is again based upon the January 12, 2007 search of his home. His Amended Complaint states, in part:

> On January 12, 2007 Worthington was raided by two Washington State multi jurisdictional drug task forces WEST NET and TNET, who at the time stated they were "the DEA". Roy Alloway of WEST NET stated Worthington was a legal medical marijuana patient, and that he was leaving the plants. TNET's Fred Bjornberg stated he was a DEA agent and said he was taking the plants. Months later Worthington found out Bjorneberg [sic] was a cross designated Washington State patrolman and a member of TNET, a Washington State multi jurisdictional drug task force. Years later Worthington found out that the DEA seizure by Bjornberg was a hoax and that WEST NET actually took the plants and never filed a notice of intent to seize Worthington's property. Worthington asserts that WEST NET and TNET acted in concert as part of both a retaliatory act and a planned conspiracy to get around the Washington State medical marijuana law.

(CP 411.)

On February 14, 2012, this Court heard oral argument on Mr. Worthington's motion for a preliminary injunction. (VRP.) In response to Mr. Worthington's motion, defendants jointly filed a response, arguing that

Mr. Worthington's motion was barred by the doctrines of *res judicata* and collateral estoppel. (CP 67-244.) During oral argument, Mr. Worthington conceded that the claims in the present case are identical to those in his previous federal lawsuit:

> **The Court:** Can I ask you a question?
> **Mr. Worthington:** Yeah.
> **The Court:** Is that the same argument you made in front of Judge Robart?
> **Mr. Worthington:** Robart never heard that argument. He dismissed it before he even ruled on anything about it.
> **The Court:** He dismissed it because he said you didn't have standing.
> **Mr. Worthington:** He didn't even come close to addressing the argument.
> **The Court:** But this is the same claim you made, is it not? That's my question.
> **Mr. Worthington:** It's the same claim. Yeah, on the preliminary injunction, is that he never even ruled, yes that's the same.
> ...
> **The Court:** No, I understand what you are saying there. But your claims, I mean, when I compare the claims, are there any differences?
> **Mr. Worthington:** The difference is that when I made the previous claim, I hadn't attached it to the federal register and I hadn't quite – it wasn't quite as extensive for what I knew at the time.
> **The Court:** So you are saying your evidence was a little different. What I'm trying to ascertain is was your legal claim any different?
> **Mr. Worthington:** I don't believe so because I didn't have the documents to support my legal position, didn't have those yet.

(VRP: February 14, 2012 hearing, p. 5, l. 16 – p. 7, l. 4.) At the conclusion of that hearing, the trial court ruled that Mr. Worthington's motion for a

preliminary injunction was barred by the doctrines of *res judicata* and collateral estoppel. (CP 253.)

D. The Parties' Motions for Summary Judgment.

On March 19, 2012, the defendants jointly filed a motion for summary judgment, requesting that the trial court dismiss Mr. Worthington's claims under the doctrines of *res judicata* and collateral estoppel. (CP 52-63.) The defendants argued that Mr. Worthington's current claims either were or should have been litigated in his original federal lawsuit and should therefore be dismissed as a matter of law. (*Id.*)

Mr. Worthington also moved for summary judgment seeking a declaratory judgment that defendants are liable for retaliating against him and that certain defendants conspired with the federal government to undermine the medical marijuana affirmative defense afforded by Chapter 69.51A RCW. (CP 8-20.) Mr. Worthington also sought a judgment that defendants are liable to him for the loss of his property (six marijuana plants) and personal injuries. (*Id.*) In response, defendants argued that Mr. Worthington's claims are barred by the statute of limitations and, alternatively, argued that their actions were at all times lawful. (CP 254-279.) The parties presented oral argument on April 13, 2012. (VRP.)

The Honorable Regina S. Cahan issued a written order on May 21, 2012, granting defendants' motion for summary judgment and denying Mr. Worthington's motion. (CP 504-05.) The trial court dismissed all of Mr. Worthington's claims on the basis of *res judicata*, collateral estoppel, and failure to comply with the statute of limitations. (*Id.*) Mr. Worthington now appeals.

E. Mr. Worthington's Claim of Fraud.

As part of this appeal, Mr. Worthington contends that the defendants somehow acted fraudulently. It is difficult to understand the exact nature of Mr. Worthington's "fraud" allegations. During oral argument, Mr. Worthington appeared to be claiming that the some or all of the defendants misrepresented that Detective Alloway was acting as a cross-designated agent in order to keep Mr. Worthington's original lawsuit in federal court. (VRP: April 13, 2012 hearing, p. 21, l. 5 – p. 22, l. 13.) In his appellate brief, Mr. Worthington claims that some or all of the defendants "fudged with the facts" to obtain the search warrant for his home; improperly executed the warrant; "pretended to be the DEA to get around the Washington State medical marijuana law;" and hid documents responsive to public record requests. (Opening Brief, p. 16.) Mr. Worthington also suggests that it was improper for Detective Alloway to take his property after "declaring he was going to leave it," and that the defendants

somehow "cheated" him out of due process. (*Id.*, p. 25.) Mr. Worthington also appears to be arguing that the defendants withheld information that, had Mr. Worthington known, would have been the basis for a valid claim within the statute of limitations. (VRP: April 13, 2012 Hearing, p. 39, l. 4 – p. 42, l. 5.)

The identity of the officer who physically took and/or placed Mr. Worthington's plants is a complete red herring and immaterial to the issues on appeal. Regardless, defendants will address the facts relevant to this claim.

The parties did not exchange or participate in any type of discovery in the federal lawsuit. Indeed, the defendants never filed answers to Mr. Worthington's various complaints. However, sometime during the course of that lawsuit, Mr. Worthington discovered what he believed to be new and material information about who took his marijuana plants. (CP 390-91.) He filed a declaration stating: "I recently discovered a declaration by Fred Bjornberg which states Fred Bjornberg was not the case agent for the DEA … I recently discovered a West Net Property seizure report showing West Net seized my medical marijuana." (*Id.*)

The United States District Court considered Mr. Worthington's March 18, 2010 declaration and held that these supposed facts did not support Mr. Worthington's claims or motion to amend:

> Next, in lieu of responding to the various motions to dismiss, Mr. Worthington filed a motion to amend his complaint (Dkt. # 41) and file his Sixth Amended Complaint. In this motion, ***Mr. Worthington requests leave to amend his complaint to "incorporate newly found evidence," i.e., a document which states that Mr. Bjornberg was not a case agent for DEA and a "West Net Property seizure report showing West Net seized my medical marijuana."*** (Supplemental Declaration of John Worthington (Dkt. # 41-2) at 1-2.) First, proffers of evidence are not required in a motion to amend a pleading. Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief"; the rule does not require the production of evidence.
>
> Second, ***the evidence offered by Mr. Worthington does not support his requested amendment. For example, Mr. Bjornberg's declaration states simply that he was not involved in the January 2007 investigation relating to Mr. Worthington's medical marijuana grow operation.*** The court therefore DENIES Mr. Worthington's motion to amend his complaint to include this evidence.

(CP 403-04.)

Despite Mr. Worthington's evidence regarding who took his plants, Judge Robart dismissed Mr. Worthington's complaint without leave to amend. Defendants did not make any representations to the District Court concerning the identity of the officer who took Mr. Worthington's plants.

Mr. Worthington then filed the present lawsuit and filed a motion for a preliminary injunction. When responding to that motion, defendants filed a joint response, which erroneously stated: "Plaintiff's marijuana was

seized under federal law, by a cross-deputized federal officer employed by the City of Bremerton." (CP 80.) Mr. Worthington filed an additional declaration with the trial court pointing out the mistake and making a number of allegations about the validity of the search warrant executed on his home. (CP 485-503.) He also filed a motion for sanctions based upon that representation. (VRP: April 13, 2013 Hearing, p. 59, l. 6 – p. 60, l. 6.) Upon notice of the erroneous statement, counsel for defendants immediately filed an errata, which replaced the incorrect sentence with the following: "Fred Bjornberg, a Washington State Patrol Trooper cross-deputized as a DEA agent and assigned to TNET and Bremerton Detective Roy Alloway searched plaintiff's home." (Sub. No. 73, CP ___.) Mr. Worthington agreed to strike his motion for sanctions once the errata was filed. (VRP: April 13, 2013 Hearing, p. 59, l. 6 – p. 60, l. 6.)

It should also be clear that Mr. Worthington allegedly submitted a number of public records requests and then sued the Washington State Patrol in the context of those requests. (VRP: April 13, 2013 Hearing, p. 41, ll. 17-22.) Mr. Worthington did not assert any claims under the Washington State Public Records Act in this case. Regardless, the sufficiency of any public records response is not at issue on appeal and should not be re-litigated here.

F. Mr. Worthington Makes Numerous False Allegations.

Mr. Worthington falsely claims that Defendants "admitted Roy Alloway seized the medical marijuana instead of Fred Bjornberg...." *App. Brief* at 5 (citing CP 489). This claim is made in bad faith. An erroneous statement was made in a brief and quickly corrected when the error was identified.[1]

Mr. Worthington next falsely claims: "Worthington was also sent documents from WestNET showing the Naval Criminal Investigative Service (NCIS), the City of Auburn, and the Washington State Department of Corrections also participated in the raid." *App. Brief* at 4-5 (citing CP 39). This document supports *none* of these assertions. It is merely a memorandum from a WSP detective to a WestNET detective indicating

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[1] When responding to one of Mr. Worthington's endless motions, defendants filed a joint response which incorrectly stated: "Plaintiff's marijuana was seized under federal law, by a cross-deputized federal officer ***employed by the City of Bremerton***." CP 80 (emphasis supplied). The emphasized portion was in error. Mr. Worthington filed an additional declaration with the trial court pointing out the mistake. CP 485-503. He also filed a motion for sanctions based upon that representation. VRP: April 13, 2013 Hearing, p. 59, l. 6 – p. 60, l. 6. Upon notice of the incorrect statement, counsel for defendants immediately filed an errata sheet which replaced the incorrect sentence with the following: "***Fred Bjornberg,*** a Washington State Patrol Trooper cross-deputized as a DEA agent and assigned to TNET and Bremerton Detective Roy Alloway searched plaintiff's home." (Sub. No. 73, CP ___) (emphasis supplied). Satisfied with the correction, Mr. Worthington agreed to strike his motion for sanctions. VRP: April 13, 2013 Hearing, p. 59, l. 6 – p. 60, l. 6. Strangely he now attempts to use the former erroneous and corrected statement against Defendants.

that the investigation into Worthington's criminal conduct (including his involvement with a large scale marijuana grow operator) is ongoing. There is no mention of the City of Auburn, or the WDOC, and the only reference to NCIS is that it is a federal agency that has a separate procedure for obtaining their records. CP 39. Mr. Worthington's falsehoods do not support his claim of deception, or not receiving any relevant information.

Next, Mr. Worthington argues in his brief: "The defendants pretended to be fully empowered DEA agents acting on behalf of the federal government." *App. Brief* at 24. This is non-sense and knowingly false. Is it is beyond dispute that WSP officer Bjornberg was cross-designated as a DEA agent. And in fact, the U.S. Attorney's Office submitted pleadings in federal court in the prior case "Stating Defendant Fred Bjornberg was an agent of the DEA," and actually substituting the United States for Agent Bjornberg as a defendant. CP 471, 474 (*Koontz Decl., Exh.* 1, at p. 4).

Mr. Worthington even admits in his own pleadings that each officer identified themselves:

> On January 12, 2007 Worthington was raided by two Washington State multi jurisdictional drug task forces WEST NET and TNET, who at the time stated they were "the DEA". Roy Alloway of WEST NET stated Worthington was a legal medical marijuana patient, and that he was leaving the plants. TNET's Fred Bjornberg stated he was a DEA agent and said he was taking the

> plants. Months later Worthington found out Bjorneberg (sic) was a cross designated Washington State patrolman and a member of TNET, a Washington State multi jurisdictional drug task force. Years later Worthington found out that the DEA seizure by Bjornberg was a hoax and that WEST NET actually took the plants and never filed a notice of intent to seize Worthington's property.

CP 143, 144 (*Amended Complaint* at 2).

Apparently the hidden evidence is that Bjornberg was also a WSP trooper in addition to being DEA. This (rather common modern occurrence) is of no legal consequence as Agent Bjornberg obviously could act as a *federal* law enforcement officer as well a state officer. And as discussed above, *state* law enforcement officers can themselves lawfully seize the plants of a "medical marijuana patient," as that status only presents an affirmative defense to prosecution. Washington law does not make marijuana possession legal. *See*, *State v. Fry,* 168 Wn.2d 1, 228 P.3d 1 (2010).

Next, Mr. Worthington makes the ridiculous assertion that "WEST NET and Roy Alloway fraudulently claimed they were leaving the plants when they were in fact taking them...." *App. Brief* at 24. As Mr. Worthington was *present* when the plants were removed, his assertion is baseless.

From these thin claims, Mr. Worthington reaches the rather lathered conclusion that:

> The only reasonable conclusion was that Roy Alloway took Mr. 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).

App. Brief at 25.

Mr. Worthington now claims that he 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. *App. Brief* at 27 (citing CP 40, 494-495). He argues:

> 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.

App. Brief at 27-28. This assertion is flatly false; and completely unsupported by that document.

Lastly, Mr. Worthington (accurately) asserts that WestNET "never filed a notice of intent to seize Worthington's property," as he knew that he was not served with such a document. However, that is information Mr. Worthington possessed in 2007. [2]

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[2] See, RCW 69.50.505(3) ("The law enforcement agency under whose authority the seizure was made shall cause notice to be served within

IV. ARGUMENT

A. Standard of Review.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law." CR 56(c). In a summary judgment proceeding, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Once the movant's initial burden has been met, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Rathvon v. Columbia Pac. Airlines*, 30 Wn. App. 193, 201, 633 P.2d 122 (1981). The non-moving party "may not rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists." *Las v. Yellow Front Stores*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992). The Court of Appeals reviews summary judgment *de novo*. *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 383, 198 P.3d 493 (2008).

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fifteen days following the seizure on the owner of the property seized....").

Here, the trial court properly determined that Mr. Worthington's claims should be dismissed on the basis of *res judicata*, collateral estoppel, and the statute of limitations. The Court should affirm this order.

B. Mr. Worthington's Claim Are Barred By Res Judicata.

Under the doctrine of *res judicata*, or claim preclusion, a plaintiff is barred from litigating claims that either were, ***or should have been***, litigated in a former action. *Kuhlman v. Thomas*, 78 Wn. App. 115, 120, 897 P.2d 365 (1995) (emphasis added). The purpose of the doctrine is to ensure the finality of judgments and eliminate duplicitous litigation. *Landry v. Luscher*, 95 Wn. App. 779, 783, 976 P.2d 1274 (1999).

> [R]es judicata 'applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, *exercising reasonable diligence*, might have brought forward at that time.'

Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997); *citing Golden v. McGill*, 3 Wn.2d 708, 720, 102 P.2d 219 (1940). Application of *res judicata* requires a final judgment on the merits in the prior suit. *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 865, 93 P.3d 108 (2002).

1. Judge Robart's Order Was A Final Judgment.

Mr. Worthington argues that *res judicata* should not apply, because Judge Robart did not have jurisdiction to enter a final judgment on the merits. Judge Robart explicitly dismissed Mr. Worthington's case "without leave to amend." A dismissal without leave to amend the complaint is the same as a dismissal with prejudice. *Nordyke v. King*, 644 F.3d 776, 788-89 (9th Cir. 2011) ("a denial of leave to amend for futility should be with prejudice whenever a dismissal of the proposed complaint would have been with prejudice, that is, if the proposed complaint could not be saved by amendment").

Additionally, federal cases are routinely dismissed with prejudice on the basis of standing. *Lake Washington School District No. 414 v. Office of Superintendent of Public Instruction*, 634 F.3d 1065, 1066 (9th Cir. 2011); *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 817, 824 (9th Cir. 2002) ("the district court also properly dismissed Schmier's complaint with prejudice, meaning it also correctly denied Schmier leave to amend his complaint"); *Cato v. United States*, 70 F.2d 1103, 1111 (9th Cir. 1995).

Moreover, Washington courts recognize that a dismissal with prejudice is a final adjudication on the merits. "Although the Court of Appeals did not expressly address whether the *Adams* dismissal was a

final adjudication on the merits, ... this threshold res judicata requirement is satisfied because *Adams* was dismissed with prejudiced." *Hisle*, 151 Wn.2d at 866, n.10; *see also Maib v. Md. Cas. Co.*, 17 Wn.2d 47, 52, 135 P.2d 71 (1943) (a dismissal with prejudice constitutes a final judgment on the merits).

Mr. Worthington also relies on a Court of Appeals case, *Ullery v. Fullerton*, 162 Wn. App. 596, 256 P.3d 406 (2011), for the proposition that a dismissal in federal court based on standing is not a judgment on the merits. Mr. Worthington overstates the holding in *Ullery*. In *Ullery*, the federal district court dismissed the plaintiff's case on a "curable standing defect." *Id.* at 598[3]. To the contrary, in Mr. Worthington's case, Judge Robart made it clear that Mr. Worthington's standing defect was not curable when he refused permission to amend the Fifth Amended Complaint.

While Judge Robart did not use the words "with prejudice," without question his order and judgment dismissing Mr. Worthington's case and refusing to allow any further amendments to his complaint clearly were intended to be a dismissal with prejudice, which is a final

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[3] To the extent Mr. Worthington argues that *Ullery* holds that a dismissal with prejudice is not a judgment on the merits, it is at odds with *Hisle*. Since *Hisle* is a Supreme Court holding, this Court is bound to follow *Hisle*.

judgment on the merits for the purposes of *res judicata*. Any challenges to Judge Robart's decision or dismissal with prejudice would properly have been litigated in Mr. Worthington's appeal of that order. The Ninth Circuit's summary affirmation of Judge Robart's judgment is a final judgment precluding Mr. Worthington from re-litigating this issue.

2. Res Judicata Applies In This Case.

Dismissal on the basis of *res judicata* is appropriate if the moving party can prove "a concurrence of identity between the two actions in four respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made." *Kulhman*, 78 Wn. App. at 120; *Schoeman v. New York Life*, 106 Wn.2d 855, 726 P.2d 1 (1986).

While there is no specific test for determining identity of causes of action, the following criteria should be considered:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Kuhlman, 78 Wn. App. at 122, *citing Rains v. State*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983).

Additionally, if the relationship between plaintiff and defendants

was adversarial in both proceedings, then the quality of the person for or against whom the claim is made in each case is identical. *Landry*, 95 Wn. App. at 785; *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 397-98, 429 P.2d 207 (1967).

For the same reason that *res judicata* barred Mr. Worthington's motion for a preliminary injunction, the doctrine of *res judicata* bars all of Mr. Worthington's claims asserted in his Amended Complaint against Bremerton, Poulsbo, Port Orchard, Auburn, and the State of Washington. There is a concurrence of the identity between Mr. Worthington's original federal court action and this present action, because (1) Mr. Worthington and these defendants were all party (or privy) to the federal action; (2) Mr. Worthington's current cause of action is nearly identical to his cause of action in federal court; (3) the subject matter of the two lawsuits are the same; and (4) Mr. Worthington's relationship with the defendants in both actions is adversarial.

The "new parties" are in privity with the former parties for purposes of collateral estoppel. The trial court found that Auburn is in privity with the other Defendants in this lawsuit. *Transcript of February 14, 2012 Hearing*, p. 26:14-16.

Mr. Worthington asserts in his brief:

> 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.

App. Brief at 20.

In his 2009 federal court action, Mr. Worthington named seven cities and their police chiefs who were members in TNET or WestNET (along with seven State employees individually, three state agencies). CP 87-88. The City of Auburn was a member of TNET. Mr. Worthington had inundated TNET with Public Record Act requests and received hundreds of documents. He clearly knew – or should have known – that Auburn was a member. It was no secret.

Mr. Worthington submits that he should be allowed to sue entities who were members of the same task force, but who he chose not to sue the first time. This would create a dangerous situation for multi-member task forces, inter local city/county operations, and even private joint ventures or LLCs. Under Mr. Worthington's theory, a plaintiff could chose to sue less than all members of a group, lose, and then continue to bring suit against the members he held back on. This could result in a multiplicity of litigation and frustrate the purposes of the res judicata doctrine.

Furthermore, both these lawsuits involve the same nucleus of facts, and Mr. Worthington relies upon the same evidence and argument. Both

lawsuits are based upon the search and seizure at Mr. Worthington's home on January 12, 2007. When Mr. Worthington filed his complaint in federal court (and when he filed four separate amended complaints), Mr. Worthington had the opportunity to assert any federal or state law causes of action against these defendants related to that search and/or seizure. It was his obligation to state a claim upon which relief could be granted, and the federal court gave him ample opportunity to do so. Mr. Worthington had six bites at the apple in federal court.

This new state law cause of action pleads nearly identical claims, requests identical relief, and is based on identical conduct. It is immaterial which defendant actually seized Mr. Worthington's marijuana plants. His claims against the defendants are the same. The purpose of *res judicata* is to prevent this type of duplicative litigation, unfairly exposing defendants to substantial additional costs, while denying them any final resolution. The doctrine of *res judicata* undisputedly bars Mr. Worthington from pursuing his current lawsuit, and the Court should therefore affirm the trial court's order dismissing Mr. Worthington's claims on the basis of *res judicata*.

C. Mr. Worthington's Claims Are Barred By Collateral Estoppel.

Under the doctrine of collateral estoppel, or issue preclusion, a plaintiff is barred from re-litigating an issue that was previously decided.

Shoemaker v. City of Bremerton, 107 Wn.2d 504, 507, 745 P.2d 858 (1987). The issue whether Mr. Worthington has standing to request this type of injunctive relief is barred by the doctrine of collateral estoppel. The requirements for application of collateral estoppel are:

> (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

Malland v. State Dept. of Retirement Systems, 103 Wn.2d 484, 489, 694 P.2d 16 (1985).

The issue whether Mr. Worthington has standing to request injunctive relief that would effectively disband WestNET, TNET, or any other multi-jurisdictional drug task force agreement between state and federal agencies has already been decided in federal court. The legal basis for standing in federal court and state court is practically and substantially identical (both of which are briefed in Defendants' Joint Response to Plaintiff's Motion for Preliminary Injunction, CP 75-77); Judge Robart issued a final ruling on the merits with respect to standing; all present defendants were either defendants or in privity with defendants in the previous lawsuit; and application of collateral estoppel does not work any injustice against Mr. Worthington.

Additionally, the trial court already ruled that Mr. Worthington's request for a preliminary injunction was barred by *res judicata* and collateral estoppel, a decision which Mr. Worthington did not appeal. The Court should affirm the trial court's order dismissing Mr. Worthington's request for injunctive relief, because that claim is barred by the doctrine of collateral estoppel.

D. Mr. Worthington's Claims Are Barred By the Statute of Limitations.

Even if this Court does not determine that Mr. Worthington's claims are barred by the doctrines of res judicata and collateral estoppel, they are still barred by the applicable statute of limitations. This is a straightforward issue. "[A] cause of action accrues when a claimant knows, or in the exercise of due diligence should have known, all the essential elements of the cause of action..." *Matter of Estates of Hibbard,* 118 Wn.2d 737, 752, 826 P.2d 690,698 (1992). Mr. Worthington was present on January 12, 2007, when a number of law enforcement officers, including Detective Alloway and Agent Bjornberg, searched his home and seized his property. Agent Bjornberg also handed Mr. Worthington an identification card. The statute of limitations in Washington applicable to Mr. Worthington's claims, which all arise from this January 12, 2007 search and seizure, is three years. RCW 4.16.080. Mr. Worthington

waited more than five years to bring this lawsuit, and it is now time barred.

1. The "Discovery Rule" Does Not Apply.

Knowing that the statute of limitations has already run, Mr. Worthington attempts to apply the discovery rule to improperly extend it. The Court should reject this argument as contrary to the law and the facts of this case.

The common law discovery rule exception has "limited application," and applies only to those cases in which plaintiffs do not immediately know of their injuries or in which plaintiffs could not immediately know the cause of their injuries. *Matter of Estates of Hibbard*, 118 Wn.2d 737, 749-50, 826 P.2d 690 (1992); *Metropolitan Services, Inc. v. Spokane*, 32 Wn. App. 714, 770, 649 P.2d 642, *review denied*, 98 Wn.2d 1008 (1982). The undisputed facts show that Mr. Worthington had personal knowledge of the material facts relevant to this lawsuit on January 12, 2007. In fact, he named Bjornberg and Alloway in his first lawsuit filed in 2009. Even if Mr. Worthington did not know the identity of all of the individuals involved in the search and seizure, or the identity of the individual who actually took his marijuana plants, Mr. Worthington had every opportunity to file a complaint and conduct civil discovery to learn any additional information and amend his complaint if

necessary.

The irony of Mr. Worthington's wild assertions is that the "new evidence" that he claims defendants withheld is not even consistent with this personal observations. Mr. Worthington's 2009 lawsuit described what he saw:

> A man identifying himself as a DEA agent, presented an identification card with no photo, and confiscated the 6 plants.... Worthington, suspicious of the intent of the raid, pursued the issue thru public disclosure requests investigating the raid, and finds out that the DEA agent was WSP officer Fred Bjornberg, cross designated as a DEA officer assigned to the IAD division of the WSP to supervise TNET. ... Thru 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 90-91, *Amended Complaint* at ¶3.7.

Mr. Worthington's response to a clearly time-barred claim is that he learned minor bits of information after he filed his 2010 lawsuit. However, he had all the information he needed to commence the running of the statute of limitations *on the day of the incident*. Anything else he learned during discovery or investigation would merely be refined information that all civil litigants collect after commencing suit.

The discovery rule does not apply.

2. With Due Diligence, Mr. Worthington Could Have Discovered the Basis of His Claim.

Even if the Court believes that the discovery rule should apply here, Mr. Worthington's failure to exercise due diligence to discover the factual basis for his claims precludes his reliance on the discovery rule. Where a plaintiff has notice that some harm has been caused by another's conduct, the law imposes a 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, 960 P.2d 912 (1998) (citing *Hawkes v. Hoffman*, 56 Wn. 120, 126, 105 P. 156 (1909) (other citations omitted) (emphasis added). *See also Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992); *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 added).

The Supreme Court's decisions in *Allen* and *Hibbard* are

illustrative. In *Hibbard*, a man on probation for burglary raped the plaintiff and murdered her parents seven months following his release from Western State Hospital. *Hibbard*, 118 Wn.2d at 740. The plaintiff did not bring claims on her own behalf or for the wrongful death of her parents until almost six years later. *Id.* at 691-92. Noting that there was no evidence that the plaintiff did anything to determine the liability of the State during the limitations period, the Court held that the discovery rule did not apply. *Id.* at 750-53.

In *Allen*, the plaintiff similarly claimed that the State had negligently supervised two parolees who murdered her husband. *Allen*, 118 Wn.2d at 754-55. The court again rejected application of the discovery rule, because the plaintiff had not exercised due diligence to discover the basis of her claims within the limitations period, noting that the plaintiff's "attempts to discover the facts surrounding her husband's death were minimal." *Id.* at 758. The court noted that various sources of information regarding the facts of her husband's death were available to her. *Id.* at 758-59. In dismissing the plaintiff's claims, the court reviewed the policy reasons for enforcing statutes of limitation:

> [A]ny statute of limitations that puts inquiry burdens on a plaintiff . . . entails a degree of ghoulish behavior. Patients or survivors, whose instinct may well be to shut off from their minds the grim experience through which they have passed, are required instead to follow up on their leads. For

> persons of any sensitivity this must be a difficult or even repugnant process. Yet, to protect defendants from stale claims, legislatures put potential plaintiffs to the hard choice of proceeding with such inquiries or risking loss of possible claims.

Id. at 759 (quoting *Sexton v. United States*, 832 F.2d 629, 636 (D.C. Cir. 1987)).

The Courts' reasoning in *Hibbard* and *Allen* rejecting extension of the discovery rule applies equally here. The factual crux of Mr. Worthington's claims is that defendants conspired to deprive him of important information. However, he offers not a shred of evidence as to fraud or conspiracy. This baseless claim should be rejected. In addition, Mr. Worthington had all the information necessary for his claim to accrue on the date of the incident. And even if not, Mr. Worthington was or should have been aware of the factual basis for these claims within the limitations period. Mr. Worthington knew that law enforcement officers searched his home and seized his property; he had three years in which to file suit. The Court should affirm dismissal of Mr. Worthington's claims, because they are barred by the statute of limitations.

3. The Statute of Limitations Was Not Tolled by Alleged Fraud or Estoppel: Mr. Worthington's Assertions are Without Any Factual Basis – and Untrue.

Significantly, Mr. Worthington has failed to submit a shred of admissible evidence to support any of his claims. The documents that he

attached to his declaration were all altered -- being small pieces of unidentified (and unauthenticated) larger documents, many containing Mr. Worthington's own hand-scrawled personal comments, supposedly used as proof. Even if any of his arguments had *legal* significance, they have no factual support as nothing he submitted is admissible.

Nor has Mr. Worthington offered any evidence of *when* he "discovered" any hidden evidence, or how these Defendants had anything to do with the supposed deception, or why these accused *non-parties* did not have a complete legal right to withhold confidential investigative records.

As an example of the weakness of Mr. Worthington's argument, the entire support for his "fraud" argument is an unauthenticated portion of an email *from one non-party to another non-party*, *App. Brief* at 25 (citing CP 494-495). But, the document makes no statement of any significance. Indeed, all the message does is repeat *Mr. Worthington's* own accusation that the author had not retained handwritten notes of task force meetings. CP 494 ("he [Worthington] feels I have been unlawfully shredding documents…."). Mr. Worthington somehow thinks that because someone repeated his false allegation, it is proven.

In this same (unauthenticated and hearsay) message, Mr. Worthington quotes another non-party, a DEA employee, who describes

that agency's proper and lawful rejection of his FOIA requests for DEA reports[4]. The DEA's actions have nothing to do with *these Defendants.* This message does not even demonstrate that the DEA was hiding evidence. Mr. Worthington has nothing but wild conspiracy theories without factual basis.

Even if Mr. Worthington's theories of withholding documents were true, Mr. Worthington would have no claim. Nowhere does Mr. Worthington establish *what information* was withheld from him that would toll the statute of limitations, much less that the actions would amount to "fraud" or "deception." Again, Mr. Worthington had every piece of information he needed for his cause of action to accrue on January 12, 2007.

Mr. Worthington sued both DEA/TNET agent Bjornberg and WestNET detective Alloway in 2009, and made allegations against each of them for the actions that he personally observed at his residence. He set forth specific allegations of what each man did and said to him. Mr. Worthington now claims that he was not sure exactly what actions each man took when he left. However, these nuances are completely irrelevant.

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[4] Unlike Washington's Public Records Act, federal law precludes disclosure of law enforcement reports except in limited circumstances. 5 U.S.C. § 552a(k)(2) ("investigatory material compiled for law enforcement purposes" is exempt from disclosure under the FOIA).

E. The Trial Court Properly Dismissed Mr. Worthington's Negligence Claim.

Mr. Worthington claims the defendants are liable for negligence. To establish negligence, a plaintiff must prove: (1) the existence of a duty; (2) breach of that duty; (3) resulting injury; and (4) proximate cause. *Musci v. Graoch Assocs. P'ship #12*, 144 Wn.2d 847, 854, 31 P.3d 684 (2001). The primary determination of whether a duty of care exists is a question of law the court decides. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Mr. Worthington's negligence appears to be based on his assumption that defendants owed him a duty not to seize his marijuana plants.

Under the public duty doctrine, "a public entity has a duty of care when it owes a duty of care 'to the injured plaintiff,' but does not have a duty of care when it owes a duty 'to the public in general.'" *Osborn v. Mason County*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (*citing Babcock v. Mason County Fire Dist. No. 6.*, 144 Wn.2d 774, 785, 30 P.3d 1261 (2001)). This rule is often paraphrased as "a duty to all is a duty to no one." *Osborn*, 157 Wn.2d at 27. "The policy behind the public duty doctrine is that legislation for the public benefit should not be discouraged by subjecting the government to unlimited liability for individual

damages." *Donohoe v. State*, 135 Wn. App. 824, 834, 142 P.3d 654 (2006).

There are four exceptions to the public duty doctrine: (1) special relationship; (2) legislative intent; (3) failure to enforce; and (4) volunteer rescue. *Babcock*, 144 Wn.2d at 786. If an exception applies, the public entity owes a duty to the plaintiff, the breach of which is actionable. *Donohoe*, 135 Wn. App. at 834. At summary judgment, Mr. Worthington contended the defendants owed him a duty under the legislative intent and failure to enforce exceptions. (CP 14-15.)

1. The Legislative Intent Exception Does Not Apply.

The legislative intent exception applies "when the terms of a legislative enactment evidences an intent to identify and protect a particular and circumscribed class of persons." *Donohoe*, 135 Wn. App. at 844. This exception will apply only if a statute provides specific duties that are clearly intended to protect a narrow class of beneficiaries from a particular harm. *Hartley v. State*, 103 Wn.2d 768, 782, 698 P.2d 77 (1985). The intent to impose these duties must be "clearly expressed, not implied." *Donohoe*, 135 Wn. App. at 844. The court is to look to the statute's declaration of purpose to determine the legislative intent. *Id.*

Mr. Worthington alleges that he is within the class of individuals that Chapter 69.51A RCW, the Medical Use of Marijuana Act (MUMA),

intended to protect. MUMA was originally passed in 1999 via voter initiative.[5] The intent section of the statute states: "Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana . . ." RCW 69.51A.005. This language does not create any duty on behalf of defendants, but instead, merely provides medical marijuana users who are charged with a crime with an affirmative defense. As such, there was no clear intent on behalf of the legislature to impose an affirmative duty on any governmental entity to protect any particular class of people.

Further, even if this Court were to determine that MUMA did create specific duties, there is no evidence that Mr. Worthington belongs to the protected classes. MUMA was passed to protect individuals who are charged with a marijuana related crime. RCW 69.51A.040(1). Mr. Worthington was never charged with a crime related to the search of his home on January 12, 2007. Even if this Court interpreted MUMA so broadly as to protect all medical marijuana users, Mr. Worthington

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[5] Chapter 69.51A RCW has gone through several permutations since 1999. The version of the law that was in effect on January 12, 2007, the day the search warrant was executed at Mr. Worthington's home, can be found at CP 277-79.

produced no evidence to establish that he was a "qualifying patient" as that term was defined under RCW 69.51A.010(3) on January 12, 2007. The legislative intent exception to the public duty doctrine does not apply.

2. The Failure to Enforce Exception Does Not Apply.

The failure to enforce exception applies only where the public entity has a mandatory duty to take a specific action to correct a known statutory violation. *Donohoe*, 135 Wn. App. at 849. "Such a duty does not exist if the government agent has broad discretion about whether and how to act." *Id.*, *citing Halleran v. Nu West Inc.*, 123 Wn. App. 701, 714, 98 P.3d 52 (2004), *review denied*, 154 Wn.2d 1005 (2005)).

Mr. Worthington cited to meetings of the TNET board to support his argument that this exception applies; however, those meeting occurred *after* the search of his home. In order for the failure to enforce exception to apply, Mr. Worthington must prove that the defendants' failure to take specific action or correct a known statutory violation damaged him personally. Mr. Worthington does not have standing to pursue claims on behalf of other medical marijuana users.

Additionally, Mr. Worthington appears to allege that the defendants owed him a duty under MUMA to not search his home or seize marijuana found during the search in January 2007. Mr. Worthington comes to this conclusion by incorrectly construing MUMA as legalizing

the use of medical marijuana. Case law on this point makes it clear that the use and possession of marijuana is still a crime both federally and in Washington State. *State v. Fry*, 168 Wn.2d 1, 3, 228 P.3d 1 (2010); *see also* RCW 69.50.4014, 21 U.S.C. §§ 812, 844(a). Furthermore, an individual's assertion to a police officer that his possession of marijuana is legal under MUMA does not negate probable cause for a valid search warrant or seizure of a person's marijuana. *Fry*, 168 Wn.2d at 3.[6] Given that Mr. Worthington's home was searched pursuant to a valid search warrant and his marijuana seized pursuant to that warrant, there was no failure to correct a known statutory violation. Thus, the defendants owed no duty to plaintiff to not search his home or seize the marijuana located there. The failure to enforce exception simply does not apply, and Mr. Worthington cannot establish any cognizable claim of negligence. The Court should affirm the order denying Mr. Worthington's motion for summary judgment on this issue.

F. Defendants' Actions Did Not Violate the Timber Trespass Statute.

Mr. Worthington alleges that defendants violated RCW 4.24.630, the timber trespass statute, by entering his land and removing marijuana

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[6] *See also id.* at 4: "the officer is not a judge or jury; he does not decide if the legal standard for self-defense is met." (Citing *McBride v. Walla Walla County*, 95 Wn.App. 33, 40, 975 P.2d 1029 (1999)).

plants growing there. This statute prohibits the entry onto another person's property and removal of his timber, crops, or other valuable property from the land. RCW 4.24.630. However, the removal must be wrongful. *Id.* "[A] person acts 'wrongfully' if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act." *Id.*

On January 12, 2007, Kitsap County Superior Court Judge Spearman issued a valid search warrant for Mr. Worthington's residence, specifically allowing for the seizure of any marijuana plants. Judge Spearman's search warrant was based upon the information telephonically presented by Detective Alloway (CP 320-25). Law enforcement officers lawfully seized Mr. Worthington's plants and did not violate RCW 4.24.630. The Court should affirm the order denying Mr. Worthington's motion for summary judgment on this issue.

G. Defendants Are Not Liable Under RCW 69.50.505.

Mr. Worthington contends that defendants are liable under RCW 69.50.505, because defendants did not follow the administrative hearing procedures set forth in the statute, therefore improperly seizing and forfeiting his personal property (marijuana plants). However, RCW 69.50.505 does not create a damages cause of action. The statute merely

creates an administrative hearing procedure for property seized by a law enforcement agency when the agency *intends to seek forfeiture of the property*. RCW 69.50.505(2)-(3). In the current matter, there is no evidence that any law enforcement agency intended to seek forfeiture of the marijuana plants. The marijuana plants were seized on the authority of a search warrant as evidence of a crime during a criminal investigation. The seizing agency did not violate RCW 69.50.505 because the marijuana plants were not seized with intent to seek their forfeiture. The Court should affirm the order denying Mr. Worthington's motion for summary judgment on this issue.

H. Defendants Are Not Liable for Nuisance.

Mr. Worthington contends that defendants committed the tort of nuisance when they seized his medical marijuana plants. The tort of nuisance is codified in Chapter 7.48 RCW. Nuisance is defined as

> unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.120.

It is unclear whether Mr. Worthington's nuisance claim is based on intentional or negligent conduct. When a nuisance claim is based on the negligent conduct of the defendant, courts treat the nuisance claim as a negligence claim:

> In Washington, a "negligence claim presented in the garb of nuisance" need not be considered apart from the negligence claim. *Hostetler v. Ward,* 41 Wn.App. 343, 360, 704 P.2d 1193 (1985); *see also Re v. Tenney,* 56 Wn.App. 394, 398 n. 3, 783 P.2d 632 (1989). In those situations where the alleged nuisance is the result of the defendant's alleged negligent conduct, rules of negligence are applied. *Hostetler,* 41 Wash.App. at 360, 704 P.2d 1193. *Cf. Albin v. National Bank of Commerce,* 60 Wash.2d 745, 753, 375 P.2d 487 (1962) (trial court properly refused to give a proposed instruction on nuisance which was based on the same omission to perform a duty which allegedly constituted negligence).

Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Development Co., 115 Wn.2d 506, 527-28, 799 P.2d 250 (1990); *see also Kaech v. Lewis County Public Utility District No. 1,* 106 Wn. App. 260, 23 P.3d 529 (2001). If the claim is based on negligent conduct, the claim fails for the same reasons that Mr. Worthington's negligence claim fails.

Regardless, Mr. Worthington still must prove that defendants acted "unlawfully." RCW 7.48.120. He cannot do so. First, law enforcement officers were executing a valid search that specifically authorized the seizure of "marihuana in all forms" from Mr.

Worthington's home.[7] Second, at the time of the seizure, it was still a crime in Washington State to possess marijuana. *Fry*, 168 Wn.2d at 7-8 ("Possession of marijuana, even in small amounts, is still a crime in the state of Washington....[Defendant's possession of a medical marijuana authorization card] only created a potential affirmative defense that would excuse the criminal act."). Third, possessing marijuana is a crime under federal law. 21 USC § 812; 21 USC § 841. Mr. Worthington cannot meet his burden to show that any of the defendants acted unlawfully. The Court should affirm the order denying Mr. Worthington's motion for summary judgment regarding nuisance.

I. Defendants Are Not Liable for Conversion.

Conversion occurs "when, without lawful justification, one willfully interferes with, and thereby deprives another of, the other's right to a chattel." *Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 721-22, 197 P.3d 686 (2008). As described above, the law enforcement officers seized Mr. Worthington's marijuana lawfully. At the time of the seizure, it was illegal to possess marijuana in the State of Washington and under federal law. *Fry*, 168 Wn.2d at 7; 21 USC 812; 21 USC 841. Defendants cannot be liable for conversion, and the Court

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[7] Mr. Worthington does not allege that the search warrant issued by Kitsap County Superior Court on January 12, 2007 was invalid or otherwise unlawful.

should affirm the order denying Mr. Worthington's motion for summary judgment on this issue.

J. Mr. Worthington Does Not Have a Viable "Judicial Deception" Claim.

In his motion for summary judgment, Mr. Worthington argues that Detective Alloway somehow engaged in "Judicial Deception," thus preventing defendants from asserting a qualified immunity defense. No such "judicial deception" cause of action is recognized by Washington law, and the Court should affirm the order denying Mr. Worthington's motion for summary judgment on this issue.

K. The Court Should Dismiss Any Claim Under the Uniform Declaratory Judgments Act.

On page one of his motion for summary judgment, under the "Relief Sought" section, Mr. Worthington appears to be requesting some kind of declaratory relief. Under Chapter 7.24 RCW, the court has authority to declare rights, status, and other legal relations. RCW 7.24.010.

To the extent Mr. Worthington is requesting a declaratory statement that defendants violated plaintiff's state law rights, the Court should deny that request for all of the reasons stated above. Mr. Worthington's claims against these defendants are not supported by the

facts or the law, and his entire lawsuit should be dismissed. To the extent Mr. Worthington is seeking some other type of declaratory relief, that request should be denied, because Mr. Worthington failed to articulate any such separate cause of action or separately requested declaratory relief in his motion for summary judgment. The Court should affirm the order denying Mr. Worthington's motion for summary judgment on this issue.

L. Mr. Worthington Fails to Distinguish the Named Defendants.

If the Court substantively considers Mr. Worthington's various claims against these defendants, it is important to note that Mr. Worthington fails to allege any specific conduct by a number of individuals. For example, there is no evidence upon which a jury could conclude that any law enforcement officers from the City of Poulsbo, the City of Port Orchard, or the City of Auburn participated in the January 12, 2007 search and seizure at Mr. Worthington's home. The Court may affirm dismissal of some or all of Mr. Worthington's claims against specific defendants for this reason as well.

V. CONCLUSION

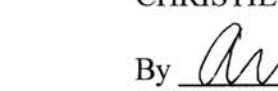
In federal court, Mr. Worthington had the opportunity to litigate any and all causes of action he wished to pursue against these defendants related to the January 12, 2007 seizure of his marijuana. Mr. Worthington may be unsatisfied with the outcome of that federal lawsuit, but the doctrines of *res*

judicata and collateral estoppel bar him from forum shopping here and seeking a different result. All his current claims either were or should have been litigated in his original federal lawsuit, and accordingly, defendants respectfully request that this Court affirm dismissal of Mr. Worthington's lawsuit with prejudice as a matter of law.

Additionally, the Court should affirm denial of Mr. Worthington's motion for summary judgment, and indeed dismiss his entire case, because all of his claims are barred by the applicable statute of limitations. Mr. Worthington was present at the January 12, 2007 search of his home and seizure of his property, and, with due diligence, he could have brought any number of actionable claims against the defendants within the three year period. He failed to do so. Even now, more than five years after the subject incident, Mr. Worthington cannot establish that defendants acted unlawfully. The defendants respectfully request that this Court affirm Judge Cahan's order and dismiss Mr. Worthington's claims with prejudice as a matter of law.

Respectfully submitted this 5th day of November, 2012.

CHRISTIE LAW GROUP, PLLC

By 

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