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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN WORTHINGTON,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

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I. INTRODUCTION

This appeal challenges the trial court's decision to dismiss Mr. John Worthington's claim on summary judgment because there was no genuine issue of material fact that the Washington State Patrol (WSP) lacked any responsive records to Mr. Worthington's January 22, 2008 public records request. Mr. Worthington requested public records regarding a search of his residence. The search was not conducted by the WSP; a United States Drug Enforcement Agency (DEA) task force conducted the investigation and executed the search and possesses any records related to that search. The WSP's only connection is that it entered a contract that authorized Detective Sergeant Fred Bjornberg to work for the task force.

None of Mr. Worthington's exhibits or arguments show that the WSP possessed records related to the DEA investigation, or create a genuine issue of material fact suggesting that WSP has responsive documents. Mr. Worthington does not have evidence that the task force is part of the WSP, because it is not. He cannot dispute that the task force maintains records separate from the WSP. Thus, the superior court properly dismissed the case because there was no dispute that the WSP possessed no responsive records and had no access to records related to

the DEA's investigation of Mr. Worthington. The Court should affirm the trial court's decision.

II. ISSUES PRESENTED

The appeal raises the following two issues:

1. Did the trial court properly grant the Washington State Patrol's motion for summary judgment dismissing Mr. Worthington's claim that the WSP failed to produce public records, where the WSP offered evidence that it had no responsive records, and where there is no competent evidence that the WSP possessed records responsive to Mr. Worthington's January 22, 2008 public records request?

2. Did the trial court properly deny Mr. Worthington's Motion for Reconsideration because the additional evidence he presented was not material?

This Court should resolve each of these issues by affirming the trial court's decisions.

III. STATEMENT OF THE CASE

On January 22, 2008, Mr. Worthington submitted a public records request to the WSP. CP at 25, 31-32. According to Mr. Worthington, the request related to a search of his residence on January 12, 2007. Br.Appellant at 4, 9. Mr. Worthington specifically requested:

1. I am requesting the written records of WSP Officer Fred

Bjornberg regarding a knock and talk procedure, and follow up search warrant that was executed at my address at 4500 se 2nd Pl Renton Wa. 98059 on January 12 2007.

2. I am asking for all materials given to West Net Detective Alloway that was used to get a search warrant by telephone, from Kitsap County Judge Theodore Spearman for my residence on January 12 2007.
3. I am also requesting any copies of Medical records that were seized at my house on January 12 2007.

CP at 25, 27-28, 31-32, 69-70.

On January 25, 2008, the WSP Public Records Manager acknowledged Mr. Worthington's request and estimated a response would be provided within 20 days. CP at 25. On February 15, 2008, the WSP Public Records Manager replied that the WSP did not have any responsive records. *Id.* If the WSP possessed the records, the WSP confirmed that it would either disclose the records, or cite a specific public records exemption. CP at 25, 29.

On June 11, 2008, Mr. Worthington filed a Public Records Act, RCW 42.56, action against the WSP. CP at 82-84. The complaint alleged that the WSP withheld records responsive to the January 22, 2008 request. CP at 83-84.

On December 5, 2008, the trial court heard the WSP's motion for summary judgment. RP 12-5-08 at 3. The issue was whether the WSP properly responded to Mr. Worthington's January 22, 2008 request when

it informed Mr. Worthington that it had no responsive records to produce. *Id.* at 5-6. The WSP submitted several declarations to establish why the agency lacked responsive records. CP at 14-17, 22-26, 287-88. The declarations explained that the WSP's Investigative Assistance Division (IAD) assigns WSP detectives, like Detective Sergeant Bjornberg, to various multi-agency law enforcement task forces. CP at 16-17. The Tacoma Regional Task Force and the Westsound Narcotics Enforcement Team (WestNET) are examples of these multi-agency task forces. CP at 17.

Each task force has a lead agency. *Id.* WestNET's lead agency is the Kitsap County Sheriff's Office. *Id.* Any WestNET records are in the Kitsap County Sheriff's Office's custody. *Id.*

The lead agency for the Tacoma Regional Task Force is the DEA. *Id.* Records generated from task force activities are DEA records and are neither created, nor stored on an officer's home agency computer system. CP at 15. The records from task force investigations are not provided to a member's home agency. *Id.* Unless the task force member is a "case agent," task force members generally do not write reports regarding investigations. *Id.* The WSP contracted Detective Sergeant Fred Bjornberg to the DEA Tacoma Regional Task Force. CP at 25-26. However, Detective Sergeant Bjornberg was not the case agent for the

January 2007 investigation regarding Mr. Worthington and did not recall creating any records during that investigation. CP at 15. Additionally, the WSP lacked any records regarding Detective Roy Alloway, because he is not a WSP employee. CP at 17, 23. Both the WSP Public Records Manager and the WSP IAD did not find any records responsive the January 22, 2008 request. CP at 26.

Based on the summary judgment record, the trial court concluded that the WSP did not have any records responsive to the January 22, 2008 request. RP 12-5-08 at 12. The trial court recognized that the WSP had come forward with substantial evidence showing that it possessed no records responsive to the request and reasoned “I do not read the Public Records Act as requiring state agencies to go to whatever lengths to find documents that are in the possession of some other agency.” RP 12-5-08 at 11.

On December 30, 2008, the trial court heard Mr. Worthington’s motion for reconsideration. RP 12-30-08 at 3. Mr. Worthington now offered other documents obtained from subsequent records requests, and included Tacoma Regional Task Force Executive Board meeting minutes. RP 12-30-08 at 4-5. The WSP argued that he offered no records that were responsive to the January 22, 2008 request. CP at 302. Mr. Worthington,

however, contended that these documents impeached the WSP's declarations. RP 12-30-08 at 5.

The trial court found Mr. Worthington failed to produce any material evidence: "I am not persuaded that there is any of that that would permit the Court to reconsider its decision, and I am still not persuaded, despite participation in this task force, that the State Patrol has the records that he is requesting." RP 12-30-08 at 9-10.

IV. ARGUMENT

A. **The Trial Court Properly Granted Summary Judgment In Favor Of The WSP By Finding An Absence Of Evidence That The WSP Possessed Records Responsive To Mr. Worthington's January 22, 2008 Request**

1. **Standard Of Review**

A summary judgment decision is subject to de novo review and the appellate court reviews "all facts in the light most favorable to the nonmoving party." *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 194, 165 P.3d 4 (2007) (citations omitted).

2. **Burden Of Proof To Succeed On Summary Judgment**

Summary judgment is appropriate when the pleadings and supporting declarations before the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

“The object and function of the summary judgment procedure is to avoid a useless trial.” *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963) (citation omitted). The moving party bears the initial burden to show “an absence of evidence to support the nonmoving party’s case.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)) (internal quotation marks omitted). The moving party can prove an absence of material fact by pointing to “those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 170, 801 P.2d 4 (1991) (citing *Celotex Corp.*, 477 U.S. at 323 (quoting Fed.R.Civ.P. 56)) (internal quotation marks omitted).

Once the moving party satisfies the burden, the non-moving party “must set forth specific facts rebutting the moving parties’ contentions and disclose that a genuine issue as to a material fact exists.” *Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008) (citation omitted). A non-moving party cannot satisfy the burden “by responding with conclusory allegations and/or argumentative assertions regarding the existence of unresolved factual issues.” *Hill v. Cox*, 110 Wn. App. 394, 403, 41 P.3d 495 (2002) (citations omitted). A genuine issue of material fact

does not exist when the non-moving party presents “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Young*, 112 Wn.2d at 225 (citing *Celotex Corp.*, 447 U.S. at 322-23) (internal quotation marks omitted). “A fact is a reality rather than supposition or opinion.” *McBride v. Walla Walla Cy.*, 95 Wn. App. 33, 37, 975 P.2d 1029 (1999) (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988)) (internal quotations omitted).

In this case, the material fact that doomed Mr. Worthington’s claims is the fact that the WSP has no records responsive to his request. As shown below, the evidentiary record is undisputed on this point and Mr. Worthington’s arguments claiming evidence that the WSP has records are without merit. The WSP’s public records manager had direct knowledge of what records were in the WSP’s possession, and stated that the WSP did not possess any records responsive to Mr. Worthington’s specific request. CP at 24-25. The WSP further explained why the WSP lacked any responsive records to Mr. Worthington’s request. Detective Sergeant Bjornberg’s involvement with the investigation of Mr. Worthington was limited to his assignment on a DEA task force. CP at 14-15. Detective Sergeant Bjornberg had no recollection of creating records responsive to Mr. Worthington’s request. CP at 15. Both

Detective Sergeant Bjornberg and Captain Timothy Braniff explained that the DEA maintains the task force records, not the WSP. CP at 15, 17. The explanations in the declarations eliminate any circumstantial evidence to the contrary.

3. The WSP Offered Evidence Based On Personal Knowledge Showing That It Did Not Possess Records Responsive To Mr. Worthington's January 22, 2008 Public Records Request

In a show cause action based on an agency's denial of access to public records, the issue is typically whether an agency properly withheld public records pursuant to an exemption. RCW 42.56.550(1). However, agencies can only disclose those records which they possess. "An agency has no duty to create or produce a record that is non-existent." *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004) (citing *Smith v. Okanogan Cy.*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000)).

In *Smith*, the plaintiff requested (among other items) a list of all employees of the prosecutor's office, including their titles, job descriptions, and salaries, as well as copies of other records. 100 Wn. App. at 14. The county responded that no such list existed. *Id.* The court held that where a record does not exist there is no duty to create one. *Id.* at 13-14.

Similarly, in the summary judgment proceeding below, there is no evidence from which a reasonable fact finder could conclude that the WSP possessed or withheld records responsive to the January 22, 2008 public records request. First, there is no dispute that Mr. Worthington requested three specific items from the WSP on January 22, 2008. CP at 25, 27-28, 31-32, 69-70; Br.Appellant at 4. There is no dispute that the WSP responded to Mr. Worthington's public records request by informing him that the WSP did not possess any responsive records. CP at 25, 34-35, 72-73; Br.Appellant at 4.

The dispute is whether the trial court properly dismissed the case because there was no evidence that the WSP possessed responsive records. This was shown first by the WSP's motion for summary judgment and supporting declarations, which included declarations based on personal knowledge attesting that there were no responsive records and logically explaining why the agency did not possess records responsive to each of the items requested by Mr. Worthington on January 22, 2008.

In regards to Mr. Worthington's first requested item, any written records by Detective Sergeant Fred Bjornberg regarding a search at Mr. Worthington's residence, Detective Sergeant Bjornberg explained why he did not create any responsive records, and why the United States Drug Enforcement Agency would possess any records regarding the

investigation. CP at 14-15. First, Detective Sergeant Bjornberg explained that generally the “case agent” for a DEA investigation writes a case report, not other agents. CP at 15. He was not assigned as the case agent for the DEA’s investigation of Mr. Worthington. *Id.* He did not recollect creating any records while participating in the DEA’s investigation of Mr. Worthington, nor creating any WSP records regarding that investigation. *Id.*

Second, even if he was the case agent, he explained that the DEA, not the WSP, is responsible for operating the task force and maintaining any records from task force operations. CP at 14-15. He explained that the DEA’s computer system stores all records and reports created from DEA task force operations, not an officer’s home agency computer system. *Id.* He stated that the DEA does not send task force records to the officer’s home agency. *Id.*

Captain Timothy Braniff further addressed why the WSP would not possess responsive records regarding “West Net Detective Alloway’s” application for a search warrant on Mr. Worthington’s residence, and why the WSP did not possess any records seized by the DEA. CP at 16-17. First, Captain Braniff stated that the Kitsap County Sheriff’s Office is the lead agency, and maintains any records, for WestNET. CP at 17. He further stated Detective Roy Alloway was not employed by the WSP. *Id.*

Captain Marc Lamoreaux, Administrator of the WSP Human Resources Division, also confirmed that there is no record that Roy Alloway was a WSP employee. CP at 22-23.

Second, Captain Braniff described the WSP detective roles in multi-agency law enforcement task forces. CP at 16-17. He explained that the lead agency for a task force is generally responsible for maintaining the records. CP at 17. Consequently, any records seized by the DEA task force during the investigation of Mr. Worthington's residence would be possessed by the DEA, not the WSP.

Lieutenant Richard Wiley also explained the term "intelligence sharing" between task forces. CP at 287. "Intelligence sharing" generally involves sharing information about "drug trends, trafficking and methods," not sharing information related to a specific case. CP at 287-88. He also stated that the Regional Information Sharing System (RISS) "does not include police reports of any kind." CP at 288.

Finally, Gretchen Dolan explained how she responded to Mr. Worthington's January 22, 2008 public disclosure request. CP at 24-26. Ms. Dolan has been the WSP Public Records Manager for seven years. CP at 24. She is the custodian of WSP records and responsible for releasing the records in response to public disclosure requests. *Id.* She confirmed that she received a public records request from

Mr. Worthington on January 22, 2008. CP at 24-25. Three days later, she acknowledged the request and estimated 20 days to respond. CP at 25. On February 15, 2008, she informed Mr. Worthington that the WSP did not possess records responsive to his specific request. *Id.*

On February 19, 2008, Ms. Dolan responded to Mr. Worthington's concern that the records should be subject to disclosure because WSP employees were involved in the investigation. *Id.* She explained to Mr. Worthington that neither the Tacoma Regional Narcotics Task Force, nor WestNET are part of the WSP. *Id.* She explained that Detective Sergeant Bjornberg was only contracted to the DEA task force, and that the DEA maintains its own records. *Id.* She further stated that if the WSP possessed records responsive to his request, the WSP would either provide the records or cite a specific exemption under the Public Records Act to justify withholding the records. *Id.* To confirm that the WSP did not possess responsive records, Ms. Dolan sent Mr. Worthington's request to the WSP IAD, which monitors WSP employees assigned to task forces, and corroborated that there were no responsive records in WSP custody. CP at 26.

By explaining why the WSP did not possess responsive records to each of Mr. Worthington's three specific requests, the WSP established an absence of evidence that the agency possessed any records responsive to

the January 22, 2008 records request.

4. Mr. Worthington's Evidence Does Not Create A Genuine Issue Of Material Fact That The WSP Possessed Records Responsive To His January 22, 2008 Request

At the summary judgment proceeding, and on appeal, Mr. Worthington presents numerous exhibits attempting to show that WSP should have responsive records. First, none of his exhibits include any statement based on personal knowledge that shows that the WSP would have documents responsive to his public records request. Second, Mr. Worthington's exhibits do not raise genuine issues of fact because they do not produce evidence from which a fact finder could determine that the WSP had responsive documents. "Broad generalizations and vague conclusions are insufficient to resist a motion for summary judgment." *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993). The exhibits Mr. Worthington presented in opposition to summary judgment are not *substantial evidence* to show that the WSP possessed records responsive to his January 22, 2008 public records request.

Thompson illustrates how a litigant cannot avoid summary judgment based on broad allegations that do not provide substantial evidence of a material fact. In *Thompson*, a patient sued a medical clinic

for negligent supervision of a doctor. *Id.* at 554. In opposition to the medical clinic’s motion for summary judgment, the patient submitted an affidavit from an expert psychologist who opined that the clinic failed to properly supervise the doctor and should have required the doctor to submit to psychological tests. *Id.* However, the expert failed to review the doctor’s application for employment, admitted that “he could not specifically state whether additional psychological testing would have alerted the Clinic to any potential behavioral problems,” and acknowledged that he was unsure whether patient questionnaires “would have identified any potential problems with” the doctor. *Id.*

Based on the evidence submitted by the patient, the Court of Appeals concluded that the patient “failed to offer any *substantial evidence* to establish the existence of a genuine issue of material fact as to whether the Clinic knew or should have known, or failed to exercise reasonable care in failing to know of [the doctor’s] inappropriate sexual conduct . . . [and] the trial court properly concluded there was *no competent evidence* suggesting the Clinic breached a duty to exercise ordinary care.” *Id.* at 555-56 (emphasis added).

Likewise, none of Mr. Worthington’s exhibits provide competent evidence that the WSP possessed records responsive to his January 22, 2008 public records request. None of the exhibits affirmatively establish a

procedure for the WSP to obtain specific investigative records from task forces. None of the exhibits show that the task force sent specific investigative records to the WSP.

Mr. Worthington's exhibits fall into three categories: (1) sundry documents that lack any relevance as to whether the WSP possessed responsive records to the January 22, 2008 request;¹ (2) documents that reference "intelligence sharing" or "information sharing;"² and (3) documents that reference records maintenance provisions and reporting procedures.³

¹ These documents include: (1) Mr. Worthington's emails to the Washington Department of Community, Trade and Economic Development (CTED); CP at 39-41; (2) various emails from CTED employees; CP at 42-45, CP at 67-68; (3) documents relating to Detective Alloway's application for a search warrant for Mr. Worthington's residence; CP at 46-63; (4) Mr. Worthington's public disclosure request to CTED; CP at 66; (5) lists of WSP employees and their monthly pay; CP at 71; (6) Bonney Lake's Resolution to participate in the Tacoma Regional Narcotics Task Force; CP at 154; (7) local agency responses to Mr. Worthington's various public disclosure requests; CP at 163-75; (8) Mr. Worthington's September 25, 2008 public disclosure request to the WSP; CP at 176; (9) Mr. Worthington's public disclosure requests to CTED; CP at 197, 222-25; (10) forms titled as "Progress Reports" to the Bureau of Justice Assistance; CP at 198-207, 210-20; (11) summary of state sovereignty and anti-commandeering cases; CP at 226-37; and (12) an announcement for a public seminar on prescription opiate abuse; CP at 243-46.

² These documents include: (1) WSP's Investigative Services Bureau program description; CP at 85-86; (2) WSP's involvement with the Drug Interdiction Participation Program; CP at 87-90; (3) CTED's Annual Report on Drug Control and System Investment Formula Grant; CP at 91-98; (4) Governor's Council on Substance Abuse Report; CP at 129-41; (5) RISS Program information; CP at 142-46; and (6) WSP's Technical Services Bureau information; CP at 151-53.

³ These documents include: (1) CTED Criminal Justice Grants Policy and Procedure Guide; CP at 99-120; (2) Tahoma Narcotics Enforcement Team Agreement; CP at 155-60; (3) Tacoma Regional Task Force Executive Board Meeting Minutes from January 3, 2007; CP at 177-78; (4) WSP's Interagency Agreement with TNET; CP at 187-89; (5) Tacoma Regional Task Force Provisional Agreement; CP at 190-92; (6) Tacoma Regional Task Force Agreement; CP at 193-96; (7) the *Hervey v. Estes* opinion; CP at 238-42; and (8) WSP policy and procedure manuals; CP at 347-420.

The first class of documents reference irrelevant issues as varied as a summary of case law regarding the anti-commandeering doctrine to an announcement about a public seminar on opiate abuse. CP at 226-37, 243-46. None of these documents shed any light on whether WSP employees generated responsive records, or whether the WSP possessed any responsive records to Mr. Worthington's January 22, 2008 public records request.

The second class of Mr. Worthington's exhibits involves documents that reference "intelligence sharing" or "information sharing" between multi-jurisdictional task forces. However, none of these documents define "intelligence sharing" as task forces sending specific case reports to home agencies. Lieutenant Wiley explained that intelligence sharing generally does not include sharing specific investigative reports. CP at 287-88. Mr. Worthington's exhibits do not contradict Lieutenant Wiley's explanation.

The third class of Mr. Worthington's exhibits involves agreements, minutes of meetings, and various procedural manuals to establish that the WSP should have had responsive records to the January 22, 2008 request. Br.Appellant at 8-10. None of the documents cited by Mr. Worthington establish that the DEA's Tacoma Regional Task Force submitted documents related to the January 22, 2008 request to the WSP. The

procedural manuals do not mandate the WSP to collect or maintain records from specific investigations. CP at 347-420. The WSP Investigative Reporting Procedures apply to WSP-IAD investigations, not to DEA investigations. CP at 363-68. The manuals do not apply to an IAD detective contracted to the Tacoma Regional Task Force. CP at 190 (“The WSP Officers assigned to the Task Force shall adhere to all DEA policies and procedures.”). None of these documents require, establish, or verify that the WSP had records responsive to the specific January 22, 2008 request. None of these documents establish any facts that contradict the declarations.

Mr. Worthington also appears to argue that the records maintenance provisions of the WSP’s agreement with the DEA requires the WSP to possess and maintain copies of police reports prepared by WSP employees assigned to the DEA. Br.Appellant at 8-9. This is not the case. The agreement provides that the “WSP shall permit and have readily available for inspection and auditing by DEA, the United States Department of Justice, the Comptroller General of the United States . . . any and all records, documents, accounts, invoices, receipts or expenditures *relating to this agreement.*” CP at 19, 194 (emphasis added). The records that must be maintained are those that relate to the formation and administration of the agreement itself. This provision does not relate

to police reports created as part of a DEA investigation. In fact such a reading would make no sense as it would require the WSP to obtain and maintain records that were originally created by the DEA for inspection by the DEA or the federal government. This section does not mean that the WSP maintains copies of DEA police reports.

Mr. Worthington claims that the declarations contained inaccurate statements regarding whether the task forces are separate entities from the WSP. Br.Appellant at 7-8. Mr. Worthington supports his argument by citing to *Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995),⁴ and referring to documents produced from subsequent public disclosure requests.⁵ Br.Appellant at 7-9. These assertions are tangential and collateral to the issue of material fact – whether the WSP possessed records responsive to the January 22, 2008 public records request. Even if the task force is not a “separate entity,” which Mr. Worthington has failed to show, it does not tend to show that the WSP possessed responsive records. Mr. Worthington’s arguments do not impeach the declarations, nor

⁴ *Hervey* addressed the issue of whether “an intergovernmental task force” is liable under Section 1983 for “use of excessive force” during a raid. 65 F.3d at 786. The Ninth Circuit found that the task force was not a separate legal entity or a “person” subject to Section 1983 actions. *Id.* at 791-92. The issue of whether a task force is a “person” subject to Section 1983 actions is distinct from whether the participating agencies have equal access to the DEA task force records.

⁵ Mr. Worthington refers to subsequent public disclosure requests to both the WSP and other agencies. Br.Appellant at 8-10. However, this appeal only addresses the January 22, 2008 public records request. The WSP’s responses to other public records requests are irrelevant.

establish that the WSP had responsive records to the January 22, 2008 records request.

Since none of the exhibits impeach or contradict the statements in the declarations, Mr. Worthington thus failed to put forth sufficient evidence to establish the elements of his claims. The trial court correctly ruled that there were no genuine issues in dispute. Reasonable minds could easily conclude that the WSP lacked any records based on the declarations and lack of contradicting evidence. The WSP responded to Mr. Worthington's public records request by informing him that the agency did not possess any responsive records. Although Mr. Worthington raised numerous factual issues, none are material. Because there are no material issues of fact, and because even viewing the evidence in light most favorable to Mr. Worthington, there is an absence of any evidence to support his case, and this Court should affirm the trial court's grant of summary judgment.

B. The Trial Court's Decision To Deny Worthington's Motion For Reconsideration Should Be Affirmed

1. Standard Of Review

An appellate court's review of "[a] motion for new trial upon the basis of newly discovered evidence is addressed to the sound discretion of the trial court . . . [and] [t]he trial court's determination upon such motion will not be disturbed on appeal unless it be for an abuse of discretion."

Brown v. General Motors Corp., 67 Wn.2d 278, 287, 407 P.2d 461 (1965) (citations omitted). The standard of review is abuse of discretion “whether the ground urged for granting the new trial is newly-discovered evidence, recantation of an important witness, or any of the other grounds which are available to a litigant.” *Skov v. MacKenzie-Richardson, Inc.*, 48 Wn.2d 710, 712, 296 P.2d 521 (1956). “Newly discovered evidence” merits granting a motion for reconsideration when “the evidence will probably change the result if a new trial is granted, that it has been discovered since the trial, that it could not have been discovered before the trial by the exercise of diligence, and that it is *material* to the issue and *not merely cumulative or impeaching.*” *Id.* at 715 (citation omitted) (emphasis added).

2. Mr. Worthington’s Discovery Of The Tacoma Regional Task Force Executive Board Meeting Minutes Did Not Qualify As “Newly Discovered Evidence” That Mr. Worthington Could Not Have Found Before The Motion By Exercising Due Diligence, Nor Would Have Changed The Outcome Of The Summary Judgment Motion

An aggrieved party may move the court for reconsideration when “[n]ewly discovered evidence, *material* for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.” CR 59(a)(4) (emphasis added). To qualify as “newly discovered evidence,” the party moving for reconsideration must

show the evidence “has been discovered since the trial, that it could not have been discovered before the trial by the exercise of diligence.” *Skov*, 48 Wn.2d at 715. In this instance, Mr. Worthington’s motion for reconsideration relied on minutes from a February 14, 2007 Tacoma Regional Task Force Executive Board meeting. CP at 429. The document existed for well over a year when the trial court considered the motion for reconsideration. Between January 22, 2008 and the hearing on motion for summary judgment, Mr. Worthington made additional public disclosure requests to the WSP and other agencies. CP at 36-37. Mr. Worthington should have been able to exercise due diligence to locate this document before the summary judgment hearing.

Moreover, Mr. Worthington’s evidence was immaterial and merely cumulative of the documents Mr. Worthington presented at the summary judgment proceeding. In *Wick v. Irwin*, 66 Wn.2d 9, 13, 400 P.2d 786 (1965), the Washington State Supreme Court affirmed the trial court’s denial of a motion for new trial based on a “newly discovered witness.” The Court reasoned “that the newly discovered evidence would have been merely cumulative and would not have changed the result.” *Id.* (citations omitted). Likewise, the task force meeting minutes are cumulative of the evidence that the WSP contracted officers to multi-jurisdictional task forces. The meeting minutes do not establish that the task forces sent

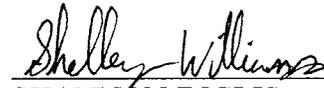
records to the WSP, that Detective Sergeant Bjornberg generated a report regarding the DEA investigation of Mr. Worthington, or that the WSP had any records responsive to the January 22, 2008 records request. Consequently, the trial court properly denied Mr. Worthington's motion for reconsideration.

V. CONCLUSION

The WSP respectfully requests this Court to affirm the trial court's decisions granting summary judgment and denying the motion for reconsideration.

RESPECTFULLY SUBMITTED this 27th day of March, 2009.

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