

NO. 90037-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JOHN WORTHINGTON,

Appellant/Petitioner,

v.

WEST NET,

Respondent.

ON DISCRETIOANRY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 43689-2-II

SUPPLEMENTAL BRIEF OF RESPONDENT

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SERVICE	John Worthington 4500 SE 2 <sup>nd</sup> PL Renton, WA 98059 <a href="mailto:worthingtonjw2u@hotmail.com">worthingtonjw2u@hotmail.com</a>	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, or, if an email address appears to the left, electronically. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 8, 2014, Port Orchard, WA <i>Batman-Fredst.</i> Original e-filed at the Supreme Court; Copy to pro se Appellant listed at left.
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the Appellate Court Properly affirmed the trial court's dismissal of all claims against WestNET for failure to state a claim upon which relief can be granted (pursuant to CR 12(b)(6)), because WestNET is not a separate legal entity subject to suit.

## **II. STATEMENT OF THE CASE**

WestNET hereby adopts and incorporates by reference the Procedural History and Facts as set forth in WestNET's Answer to Petition for Review.

## **III. ARGUMENT**

### **A. INTRODUCTION**

The Kitsap County Sheriff's Office, a participating member of WestNET, responded to a public records request made by Mr. Worthington regarding a WestNET investigation. Dissatisfied with the response, Worthington filed suit, not against Kitsap County, but against WestNET. WestNET moved for summary dismissal pursuant to CR 12(b)(6) for failure to state a claim upon which relief can be granted as it is not a legal entity subject to suit. The Court granted WestNET's motion

for dismissal, and Worthington appealed. Accordingly, the appeal was not about whether Kitsap County or any other participating member of WestNET was subject to the Public Records Act for records relating to WestNET activities; but involved only a review of whether or not WestNET was an independent legal entity.<sup>1</sup> Finding only that WestNET is not an independent legal entity subject to suit, the Court of Appeals, Division II, affirmed the CR 12(b)(6) dismissal for failure to state a claim upon which relief could be granted.

#### **B. STANDARD OF REVIEW**

The court reviews de novo a ruling on a motion to dismiss a claim under CR 12(b)(6). *In re CMF*, 179 Wn.2d 411, 419, 314 P.3d 1109 (2013). Dismissal under CR 12(b)(6) is appropriate if “it appears beyond a reasonable doubt that no facts exist that would justify recovery.” *Cutler v. Phillips Petroleum Co.*, 124 Wash.2d 749, 755, 881 P.2d 216 (1994).

In the present case, de novo review warrants affirmation of both

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<sup>1</sup> WestNET’s argument was and has been only that the Interlocal cooperative working agreement does not create a separate legal entity and thus WestNET is not an entity subject to suit. At no point has WestNET argued that Worthington had no remedy at law or other ability to seek or enforce a request for public records regarding matters the collaborative members of WestNET may have investigated. Indeed, Worthington has filed no less than two separate lawsuits against Kitsap County to enforce his perceived right to the very records which were the subject of the present suit. *See*, Pierce County Superior Court Cause No. 11-2-09032-5; and, Kitsap County Superior Court Cause No.

the trial court's dismissal of the action for failure to state a claim upon which relief can be granted, and the Court of Appeals affirmation of the same, because WestNET is not a legal entity against which a suit can be maintained.

**C. APPELLATE COURT PROPERLY RULED THAT WESTNET IS NOT SEPARATE LEGAL ENTITY SUBJECT TO SUIT**

WestNET is a task force that formed pursuant to an Interlocal Agreement whereby the participating entities have agreed to cooperate in fighting drug-related crimes. The Interlocal Agreement between the parties was created pursuant to RCW 39.34.030(2) which provides that "two or more public agencies can enter into agreements with one another for joint cooperative actions." The statute also provides that the Interlocal Agreement need not establish a separate legal entity to conduct the joint or cooperative undertaking. RCW 39.34.030(4). The WestNET Interlocal Agreement specifically provides that "[t]he parties do not intend to create a separate legal entity subject to suit." CP at 127.

When Worthington filed suit against WestNET, WestNET immediately moved for dismissal pursuant to CR 12(b)(6); because

WestNET was not a separate legal entity subject to suit, there was no set of facts whereby Worthington could state a claim against WestNET upon which relief could be granted.

Per the terms of Interlocal Agreement by which the WestNET cooperative agreement was formed, it is clear that WestNET is not a separate legal entity against which a suit can be maintained:

- The purpose of this agreement is *to provide for and regulate the joint efforts* of the City, County, State and Federal law enforcement to combat violations of controlled substance laws within the contracting jurisdictions for their mutual advantage. (CP 127, Section 2; emphasis added.)
- The parties *do not intend to create* through, this agreement, a *separate legal entity* subject to suit. (CP 127, Section 2; emphasis added.)
- Each jurisdiction shall pay all costs associated with its officers and equipment when assigned to the Task Force. (CP 128, Section 3.b.)
- Each contributing agency shall act as an independent contractor and not as an employee of the Task Force or of another party to

this agreement. (CP 128, Section 3.c.)

- As such, each party shall not have the authority to bind other parties nor control employees of other parties, contractors or entities. (CP 128, Section 3.c.)
- Pursuant to RCW 10.93.040, *personnel assigned to the Task Force shall be considered employees of the contributing agency*, which shall be solely and exclusively responsible for that employee. (CP 128, Section 3.d; emphasis added.)
- The Office of the Kitsap County Prosecutor shall, in addition to its normal duties in the prosecution of Kitsap County felony drug violations, represent the Cities, Kitsap County, and the State in real and personal property forfeitures and drug nuisance abatement proceedings initiated by Task Force assigned personnel. (CP 129, Section 3.e.) [*Of note, the agreement does not provide for the Task Force (e.g. WestNET) to initiate forfeitures or abatements; nor does it reflect that the Prosecutor's Office would represent the Task Force.*]
- Personnel assigned to the Task Force shall conform to their agency's rules and regulations, as well as Task Force policy.

All disciplinary matters will be the responsibility of the individual agencies. (CP 129, section 3.f.)

Based upon the totality of these provisions, WestNET is not its own legal entity subject to suit. Accordingly, claims filed against WestNET were properly dismissed for failure to state a claim upon which relief can be granted.

Worthington argues that the Court of Appeals erred in holding “that [WesNET’s] motion to dismiss should be granted because “WestNET is not subject to the PRA or OPMA.” This claim is without merit because the Appellate court never made any such ruling. The court simply ruled upon WestNET’s motion for dismissal based upon the fact that WestNET was not a separate legal entity and therefore was not subject to suit.

**D. APPELLATE COURT DID NOT FAIL TO GIVE MEANING TO THE SPECIFIED PROVISION OF THE PUBLIC RECORDS ACT**

Worthington argues that the Appellate Court failed to give plain effect and meaning to provision of the Public Records Act (RCW 42.56.010(1); .030; .040 and .580). This claim is without merit because the Appellate Court was not in a position to evaluate these provisions.

Simply put, Mr. Worthington's lawsuit was waged against the wrong defendant. Though his public records request(s) were delivered and responded to by representatives of the Kitsap County Sheriff's Office (CP 33-35, 38, 50), Mr. Worthington's Complaint named only WestNET (of which the Sheriff's Office is a participating member) as a defendant.

Because the Appellate Court properly concluded that WestNET was not a legal entity subject to suit and dismissed the action, the court never had an opportunity to address the Public Records Act, or whether any WestNET member agency (including Kitsap County, who had responded to Mr. Worthington's public records request), had correctly published their public records procedures or identified their public records officer. As Mr. Worthington filed his action against a collaborative working group, instead of a legal entity subject to suit, the questions he wanted answered were not properly before the court to address.

**E. WHETHER THE TRIAL COURT SHOULD HAVE CONVERTED THE CR 12(B)(6) MOTION TO ONE FOR SUMMARY JUDGMENT WAS NOT AN ISSUE RAISED BEFORE THE APPELLATE COURT**

Worthington next claims that the trial court should have converted WestNET's CR 12(b)(6) Motion for Dismissal for Failure to State a Claim to one for Summary Judgment. However, as this claim was not raised on

appeal and was not addressed by the Appellate Court, the matter should not be considered at this time.

Plaintiff did not raise this issue before the Court of Appeals. (See, Worthington's Notice of Appeal to Court of Appeals, Division II, Appellant's Opening Brief, Appellant's Amended Opening Brief, Appellant's Reply Brief, Motion to Reconsider, and Amended Motion to Reconsider.) Because the Supreme Court's review at this juncture is a review of the Appellate Court's decision(s), this issue is not properly raised at this time. RAP 13.7(a) and (b). While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wash.App. 52, 81, 322 P.3d 6, 21 (2014), quoting, *Karlberg v. Otten*, 167 Wash.App. 522, 531, 280 P.3d 1123 (2012).

Mr. Worthington failed to preserve the alleged error he now asserts on appeal, and he fails to argue why an exception to this rule should apply. Accordingly, his request for reversal of the trial court's decision in this regard should be denied.

**F. THE APPELLATE COURT'S DECISION WAS PROPERLY PUBLISHED**

Worthington next claims that the Court of Appeals violated the

Washington State Constitution by creating new law with a published opinion. This claim is without merit because Mr. Worthington moved to have the Court of Appeals' Opinion published. One cannot appeal based upon a ruling he or she invited.

The doctrine of invited error applies when a party takes affirmative and voluntary action that induces the court to take the action that that party later challenges on appeal. 15A WAPRAC § 88.4. Invited error results when a party's own action during trial creates the error, which may not thereafter be complained of on appeal. *Shanlian v. Faulk*, 68 Wash. App. 320, 843 P.2d 535 (1992).

Here, Worthington claims error based on the fact that the Court of Appeals decision was published. However, Worthington affirmatively requested that the Court of Appeals' decision be published (see Worthington's Motion to Publish, February 12, 2014). Moreover, even were such decision to be reviewed, Worthington has failed to identify how the Court of Appeals' decision created new law and has failed to provide any authority for his assertion that the published opinion violates the Washington State Constitution. Again, the Court of Appeals' decision declared simply that you cannot sue a collaborative working group which

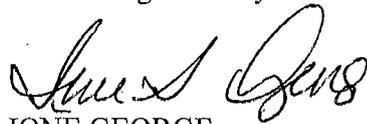
is not itself a separate legal entity. This legal premise is neither new law, nor does it violate the Constitution of the State of Washington in any manner.

#### IV. CONCLUSION

For the foregoing reasons, the trial court's order dismissing this action with prejudice, and the Court of Appeals ruling affirming the Order of Dismissal should be affirmed.

DATED August 8, 2014.

Respectfully submitted,  
RUSSELL D. HAUGE  
Prosecuting Attorney



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WSBA No. 18236  
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## OFFICE RECEPTIONIST, CLERK

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**To:** Batrice Fredsti  
**Cc:** Ione S. George; Carrie A. Bruce  
**Subject:** RE: Email Filing for Worthington v. West Net, Case No. 90037-0 - Supplemental Brief of Respondent

Received 8/8/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Batrice Fredsti [mailto:[bfredsti@co.kitsap.wa.us](mailto:bfredsti@co.kitsap.wa.us)]  
**Sent:** Friday, August 08, 2014 8:19 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Ione S. George; Carrie A. Bruce  
**Subject:** Email Filing for Worthington v. West Net, Case No. 90037-0 - Supplemental Brief of Respondent

Good Morning,

Attached for filing with the court is the Supplemental Brief of Respondent (prepared by Ione S. George, WSBA No. 18236) for the following case:

John Worthington v. West Net, Supreme Court No. 90037-0

Please let us know if you have any questions.

Please Note: We will mail 12 copies for the panel of judges reviewing the case. They will be sent to the court in today's mail.

Sincerely,

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*and Neil Wachter*  
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