NO. 46364-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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JOHN WORTHINGTON,

Appellant,

v.

CITY OF BREMERTON, et. al.,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-2-00474-7

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# BRIEF OF RESPONDENT KITSAP COUNTY

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# I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly granted Kitsap County's CR 12(b)(6) motion for dismissal for failure to state a claim upon which relief can be granted (or in the alternative for Summary Judgement dismissal) because Plaintiff John Worthington waived his right to pursue this action by entering into a settlement agreement with the County on July 1, 2008?

2. Whether the trial court properly granted Kitsap County's CR 12(b)(6) motion (or in the alternative, motion for Summary Judgment) because the statute of limitations for any action related to Plaintiff's public records request of February 5, 2010, had expired pursuant to RCW 42.56.550(6)?

3. Whether the trial court properly granted Kitsap County's CR 12(b)(6) motion (or in the alternative, motion for Summary Judgment) because Plaintiff failed to set forth any facts upon which a violation of the Open Public Meeting Act could be found?

4. Whether the trial court properly granted Kitsap County's CR 12(b)(6) motion (or in the alternative, motion for Summary Judgment) because Plaintiff had no standing to initiate a criminal prosecution?

5. Whether the trial court properly imposed CR 11 sanctions after finding and concluding that the Plaintiff's cause was precluded by the terms of a settlement agreement, was filed after the expiration of the statute of limitations, was filed in violation of the terms of and conditions of a prior court order, was not interposed for proper purposes, but instead for purposes such as harassment or to cause unnecessary delay, and that the action, which was filed in violation of the terms of a settlement agreement, was not well grounded in law and was harassing in nature?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Worthington filed suit against Kitsap County, complaining of violations of the Public Records Act, the Open Public Meeting Act (OPMA), and criminal statutes prohibiting the altering of a public record. CP 388-398. Kitsap County moved for dismissal of the action pursuant to CR 12(b)(6)[1], asserting that Worthington had failed to state a claim upon which relief could be granted because:

1. Worthington had waived his right to pursue this action by entering into a settlement agreement with the County;

2. Pursuant to RCW 42.56.550(6), the statute of limitations for any action related to Worthington's

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[1] When ruling upon a CR 12(b)(6) motion, the court may take judicial notice of public documents if their authenticity cannot be reasonably be disputed . *Rodriguez v. Loudeye Corp.* 144 Wn.App. 709, 725-726, 189 P.3d 168, 176 (2008).

public records request of February 5, 2010, had expired;

3. The action was foreclosed by the court's order in Pierce County Cause No. 11-2-13236-1, which directed that transfer of venue should be completed within 60 days of October 14, 2011;

4. Worthington had failed to set forth any facts upon which a violation of the OPMA could be found; and

5. Worthington could not file a civil cause of action for violation of Washington State criminal laws.

CP 1-15; 6

In support of its motion, the County pointed out that in ruling upon such a motion, the court may take judicial notice of public documents if their authenticity cannot be reasonably disputed. *Rodriguez v. Loudeye Corp.* 144 Wn.App. 709, 725-726, 189 P.3d 168, 176 (2008). Thus, the existence of Court records related to earlier versions of the present lawsuit were offered in support of the County's Motion for Dismissal[2]. Alternatively, per CR 12(b)(6), "if matters outside the pleadings are presented to and not excluded by the court" the 12(b)(6) motion "shall be treated as one for summary judgment and disposed of as provided in rule 56. . ." The County asserted that dismissal was appropriate under both standards.

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[2] ER 201(b) authorizes the court to take judicial notice of a fact that is "not subject to reasonable dispute in that it is ...capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Rodriguez,* 144 Wn. App. at 725 – 726.

The County additionally sought sanctions, pursuant to CR 11 for the untimely and repeated filing of an action that was precluded by settlement agreement, court order, statute of limitations, and after due warning had been given. CP 1-15.

Worthington responded by filing an anti-SLAPP motion for dismissal and for imposition of sanctions. CP 205-206. The court found that Worthington's motion was not well grounded in fact or supported by rational argument and entered judgment against him. CP 206.

The court further found that Worthington's cause of action was not well grounded in fact or warranted by existing law, was interposed for improper purpose, was harassing in nature, and was frivolous and advanced without reasonable cause. CP 210-211. The court granted the County's motion for dismissal with prejudice, and for imposition of CR 11 Sanctions, inclusive of attorney's fees, in the amount of $5,000.00. CP 209-211.

**B. FACTS**

On July 6, 2007, Worthington delivered a claim for damages to the Kitsap County Department of Risk Management. CP 3; 16-18; 20-56. His claim described injury that he alleged to have suffered when contacted

by WestNET[3] representatives at his home on January 12, 2007. CP 20-56. Ultimately, on July 1, 2008, the County entered into a settlement agreement with Mr. Worthington regarding his claim. CP 79-81. Through the settlement agreement, Worthington forever released Kitsap County:

> from all claims and causes of actions, including, but not limited to, all claims for damages, penalties, attorneys fees and costs and any forms of relief of any kind whatsoever, whether presently known or unknown, that may ever be asserted by [John Worthington] … that in any way arise out of facts related to, or resulting from … or (c) stemming from or related to the incident described in the claim which [Worthington] described in the claim which [he] filed on or about July 6, 2007.

CP 79-81.

In May of 2011, Worthington filed his first civil action against Kitsap County in violation of this settlement agreement. CP 16-18; 82-89. Under Pierce County Superior Court Cause No. 11-2-09032-4, Worthington named Kitsap County and the Kitsap County Sheriff's Office[4] as defendants in an action where he alleged violations of the Public Records Act based on the County's response to his requests for

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[3] WestNET is "a regional task force created to combat drug-related crime in western Washington." *Worthington v. WestNET, 179* Wn. App. 788, 789, 320 P.3d 721, *reversed,* 182 Wn.2d 500, 341 P.3d 995 (2015). The task force was created by an Interlocal Agreement of which Kitsap County is one of the participating members. CP 57-78.

[4] Of note, a department of the County is not an entity subject to suit. *Bibbs v. Tukwila Police Dept.* 2009 WL 1531801, 2 (W.D. Wash. 2009), *report and recommendation adopted in part, rejected in part on unrelated grounds, Bibbs v. Tukwila Police Dept.*, 2009 WL 1531797 (W.D. Wash. May 29, 2009); *Nolan v. Snohomish County*, 59 Wn. App. 876, 883, 802 P.2d 792 (1990) ("in a legal action involving a county, the county itself is the only legal entity capable of suing and being sued.").

documents related to the incident complained of in his July 6, 2007, claim for damages. CP 82-89. The subject records request was dated February 5, 2010, and was directed to (then) Lt. Collings of the Kitsap County Sheriff's Office. CP 82-89. Worthington complained that the response made available to him on March 26, 2010 was inadequate. CP 82-89.

On May 19, 2011, counsel for Kitsap County wrote to Mr. Worthington, reminding him that he had entered into a settlement agreement with the County by which he had waived his right to sue the County for causes of action or claims for relief that related in any manner to the incident complained of in his July 6, 2007 claim for damages. CP 16-18; 90-92. He was advised that if he pursued the cause of action under Pierce County Superior Court Cause 11-2-09032-4 further, in violation of the settlement agreement, the County would seek CR 11 sanctions against him. CP 90-92.

Mr. Worthington subsequently voluntarily dismissed that cause of action. CP 16-18; 93-94.

Next, Worthington filed suit under Pierce County Cause Number 11-2-13236-1. CP 16-18; 95-107. This suit, though naming WestNET as a defendant, as opposed to Kitsap County, alleged the same violations of the Public Records Act as had been alleged in the previous complaint: that is, the County's response to his request for records regarding the January

12, 2007 "raid" which was the subject of his settled claim. CP 95-107. The State of Washington, City of Poulsbo and City of Bremerton were named as co-defendants. CP 95-107. Kitsap County Chief Deputy Prosecuting Attorney Ione S. George appeared on behalf of defendant "WestNET"[5], and moved for dismissal, arguing that WestNET was not an entity subject to suit. CP 16-18; 108-115.

The Court did not rule upon WestNET's motion for dismissal, but instead transferred venue to Kitsap County Superior Court. The transfer order required Worthington to pay the cost of transferring the records and files to the Kitsap County Superior Court, and directed that transfer of venue should be completed within 60 days. The court deferred ruling on the defendants' request for legal fees to the Kitsap County court. CP 16-18; 116-119.

Transfer of venue was never effected, and the action against WestNET, Washington, Poulsbo and Bremerton was not re-initiated in Kitsap County Superior Court. CP 16-18.

Instead, Worthington filed a third lawsuit, this time naming only WestNET as the defendant, but alleging the same violations of the Public

[5] The Interlocal Agreement provides that each member agency is responsible for its own actions. Additionally, pursuant to the agreement, each agency agrees to hold harmless, defend and indemnify the other parties to the agreement in any action arising from the acts of that agency's employee. Thus, when WestNET was named in an action for alleged public records violations by the County, it was the County's responsibility to defend against the claim. CP 16-18; 57-78.

Records Act by Kitsap County Sheriff's Office employees as he had in the second Pierce County suit. CP 16-18; 120-138. Again, Chief Deputy Prosecuting Attorney Ione S. George appeared on behalf of WestNET. CP 16-18.

WestNET again moved for dismissal because it was not an entity subject to suit; the motion was granted, and the case was dismissed. CP 16-18; 139-141. Worthington appealed, and the Court of Appeals ultimately ruled in a published opinion that WestNET was not an entity subject to suit. CP 16-18; 142-148.

Shortly after entry of the Court of Appeals' decision, Worthington initiated the present action against Kitsap County, in which he reiterated the claims he made in each of the three prior actions. Relying on identical facts and naming the County instead of WestNET, in this action he again added the State of Washington, City of Poulsbo and City of Bremerton as defendants, and with slight rewording, essentially refiled the cause of action the Pierce County Superior Court directed be transferred to the Kitsap County Superior Court on or before December 13, 2011. CP 116-119. Worthington additionally, without any factual support, alleged in this action a violation of the OPMA, as well as criminal acts of records destruction.

## III. ARGUMENT

### A. STANDARD OF REVIEW

A trial court's ruling on a motion to dismiss for failure to state a claim on which relief can be granted is a question of law which is reviewed de novo. CR 12(b)(6); *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Courts should dismiss a claim under CR 12(b)(6) if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Cutler*, 124 Wn.2d at 755; see also *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986) (action may be dismissed under CR 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, that would entitle him to relief).

A similar evaluation is to be performed even if considered under a summary judgment standard. The standard of review on summary judgment is de novo, with the court engaging in the same inquiry as the trial court. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.,* 134 Wn.App. 819, 825, 142 P.3d 209 (2006). Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

## B. THE TRIAL COURT PROPERLY GRANTED KITSAP COUNTY'S CR 12(B)(6) MOTION FOR DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED (OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT) BECAUSE PLAINTIFF FILED HIS SUIT IN VIOLATION OF THE TERMS OF A SETTLEMENT AGREEMENT; NO FACTUAL HEARING IS WARRANTED

By execution of the settlement agreement and release of claims, Worthington discharged Kitsap County, its employees, officers, agents, successors, assigns and sureties from *all* claims, demands, causes of action or forms of relief of any kind whatsoever, known or unknown, asserted or unasserted, and those injuries yet to be suffered, "that in any way arise out of facts related to, or resulting from … or stemming from or related to the incident described in his 2007 claim for damage." CP 3, 16-18, 79-81. The present action was in direct contradiction of terms of the settlement agreement and release of claims where Worthington released Kitsap County from all claims arising from or related to the alleged "raid" on his residence.

Having released and discharged Kitsap County from all such claims, Worthington cannot now maintain this action against Kitsap County. This action is precluded by the terms of the settlement and release of claims.

In responding to this argument below, Worthington attempted to

argue that such a waiver was not his intent, or that the settlement agreement should not be enforced against him. CP 155-157. However, he offered no *evidence* showing that his claim for damages addressed anything other than what he described as the ransacking of his residence by WestNET representatives on January 12, 2007. Nor did he refute that the settlement agreement he entered into with the County released and discharged the County from all claims that relate in any way to the claim received by the County's Risk Management Department on July 6, 2007.

With the uncontroverted language of the settlement agreement before it, the trial court correctly concluded that Worthington was precluded from pursuing the present action by the terms of his agreement with the County.

In a similar manner before this court, in his supplemental assignment of error and argument, Worthington again argues that the settlement agreement had other meaning to him, and it should be set aside. He now raises the argument that he should have been entitled to an evidentiary hearing regarding breach of contract of the agreement.

Though he reiterates much of the argument made before the trial court, Worthington has yet to provide any reference to the record in support of his theories. Moreover, his assertion, raised in his supplemental brief, that an evidentiary hearing is warranted is one never previously

raised. An argument raised for the first time on appeal will normally not be reviewed absent unusual circumstances. *Savage v. State,* 72 Wn. App. 483, 495 n.9, 864 P.2d 1009 (1994), *reversed in part on other grounds,* 127 Wn.2d 434, 899 P.2d 1270 (1995); RAP 2.5(a). Worthington has shown no such unusual circumstances. Indeed, having cited to no fact of record, and having raised only his own conjecture, there is no evidentiary merit warranting further consideration.

Simply put, Worthington's assertion to both the Superior Court and this Court that the settlement agreement did not arise from the 2007 Risk Management claim is not supported by any fact that exists in the record. Instead, the record affirmatively establishes that the trial court properly concluded that Worthington's present claim was precluded by his settlement agreement. Accordingly, any lawsuit against the County in any way relating to that incident was precluded by his settlement agreement with the County.

### C. THE TRIAL COURT PROPERLY GRANTED KITSAP COUNTY'S CR 12(B)(6) MOTION (OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT) BECAUSE PLAINTIFF FILED HIS SUIT AFTER THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

As he had in three prior lawsuits, Worthington below complained of the County's response to his public record requests. He made the first

on February 5, 2010, and a second on May 23, 2011, which reiterated the first request. Both requests related to the January 12, 2007 incident. Although he challenges the scope of the redactions in the materials he was provided and the specificity of the exemption log he was given, by his own complaint, Worthington concedes that records were provided in response to both requests on March 26, 2010, and July 28, 2011. See CP CP 390-391, ¶¶ 3.3 and 3.8.

"The PRA's one-year statute of limitations is clearly triggered by either one of 'two occurrences: (1) the agency's claim of an exemption or (2) the agency's last production of a record on a partial or installment basis.'" *Greenhalgh v. Department of Corrections*, 170 Wn. App. 137, 146, 282 P.3d 1175 (2012) (*quoting Tobin v. Worden*, 156 Wn. App. 507, 513, 233 P.3d 906 (2010)). Worthington was provided access to records in response to public records requests on both March 26, 2010 and August 9, 2011. Accordingly, the statute of limitations was "triggered" on the latter date at the latest, and this action was filed two and one-half years later.

Worthington did not challenge this authority below, and does not challenge the Superior Court's findings in this regard. Thus it is uncontested that Worthington's claim regarding the public records act was filed approximately three years after the expiration of the statute of

limitations. Accordingly, the trial court properly ruled that Worthington had failed to state a claim upon which relief could be granted, and that his claim was not well grounded in law or fact.

**D. THE TRIAL COURT PROPERLY GRANTED WESTNET'S CR 12(B)(6) MOTION (OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT) BECAUSE PLAINTIFF FAILED TO SET FORTH ANY FACTS UPON WHICH A VIOLATION OF OPMA COULD BE FOUND.**

Although his complaint did not articulate an actual cause of action for a violation of the Open Public Meetings Act ("OPMA") under RCW 42.30.030, it did include reference to a failure to comply with the OPMA by "WestNET Affiliate Jurisdictions" in a section of the complaint titled "Argument." CP 393-395. Similarly, in the "Request for Relief" section of the complaint, Plaintiff asked the court to fine the current WestNET policy board members $100 for each member for each meeting for the past three years. CP 396-397.

However, absent an actual claim and with nothing more than a bare assertion that a violation of OPMA occurred, Worthington offered no facts to support his allegations, and identified no person upon whom such penalties should be imposed. Perhaps most importantly, he made no allegation, much less a factual assertion, that the defendant Kitsap County at any specific time or place or in any specific instance violated the Open

Public Meetings Act. Accordingly, the trial court properly ruled that the plaintiff had failed to state a claim upon which relief could be granted because he had failed to identify any person, defendant or violation upon which to base his claim.

### E. THE TRIAL COURT PROPERLY GRANTED KITSAP COUNTY'S CR 12(B)(6) MOTION (OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT) BECAUSE PLAINTIFF HAD NO STANDING TO FILE A CRIMINAL COMPLAINT.

Worthington complained of a criminal violation without identifying his allegations as a cause of action or identifying who committed the purported acts. As such, he stated no claim upon which relief might have been granted. Moreover, any such cause of action would be a legal impossibility.

Only the county prosecuting attorney's office or the Attorney General's Office may initiate a criminal proceeding in Superior Court. CrR 2.1(a) and (a)(1) provide that a criminal indictment or information must be filed and signed by the prosecuting attorney. RCW 43.10.232 grants the Attorney General concurrent authority with prosecuting attorneys to initiate and conduct prosecutions. As a private citizen, the plaintiff lacks standing to initiate a criminal prosecution in the Superior Court.

Furthermore, there is no law establishing a Superior Court's

jurisdiction over a criminal matter initiated by a civilian because the superior court acquires subject matter jurisdiction over a criminal action only when an indictment or information is filed in accordance with CrR 2.1(a). *State v. Barnes*, 146 Wn.2d 74, 83, 43 P.3d 490 (2002).

Accordingly, the trial court correctly concluded that Worthington did not, and could not, state a claim for which relief could be granted when he attempted to initiate criminal charges against Kitsap County.

### F. THE TRIAL COURT PROPERLY FOUND THAT PLAINTIFF'S VIOLATION OF THE TERMS AND CONDITIONS OF THE ORDER TRANSFERRING VENUE IN PIERCE COUNTY SUPERIOR COURT CAUSE NO. 11-2-13236-1 EVIDENCED THAT THE PRESENT ACTION WAS NOT INTERPOSED FOR PROPER PURPOSES, BUT INSTEAD FOR PURPOSES SUCH AS HARASSMENT OR TO CAUSE UNNECESSARY DELAY.

In Pierce County Cause No. 11-2-13236-1, Worthington filed a nearly identical action (alleging identical facts regarding the County's response to his records request) against each of the defendants named in the present case, though substituting WestNET as a defendant in place of Kitsap County. CP 16-18; 95-107. On October 14, 2011, the Court ordered transfer of venue of that matter to Kitsap County Superior Court. CP 117-119. Worthington was ordered to pay the cost of transferring the files and records and was directed to complete the transfer of venue within 60 days of entry of the order. CP 117-119.

In lieu of complying with the court's order, Worthington failed to transfer venue within 60 days, but instead, waited nearly two and one-half years, refiled the same action, and petitioned the Kitsap County Superior Court to waive his filing fee. CP 117-119. Initiation of this action contravened the Pierce County Superior Court's order. It not only circumvented the penalty provisions that were incorporated into that order (imposition of costs as well as deferral of ruling regarding further penalties to the Kitsap County Superior Court) but denied the defendants the certainty of a 60-day limit on the plaintiff's ability to proceed with his action. After the 60-day period had run, and the matter had not been transferred, the defendants (including Kitsap County, on behalf of WestNET), were assured, per the court's order, that the matter was over.

The present action and the Pierce County cause under which the order transferring venue was rendered involved the same parties, the same counsel, and were premised upon the same underlying complaint. As such, the Pierce County order, directing transfer of venue within 60 days, acted as a bar warranting dismissal of the present action. Plaintiff should not have been able to reinitiate an action that was foreclosed to him, by his own inaction, two and one-half years earlier.

When the parties below argued that collateral estoppel and/or res judicata precluded the refiling of his cause of action, Worthington made

no response. It is not until now on appeal that for the first time he argues that he did indeed transfer venue. An argument raised for the first time on appeal will normally not be reviewed absent unusual circumstances. *Savage v. State,* 72 Wn. App. 483, 495 n.9, 864 P.2d 1009 (1994), *reversed in part on other grounds*, 127 Wn.2d 434, 899 P.2d 1270 (1995); RAP 2.5(a). Worthington offers no such unusual circumstances. Moreover, in support of an argument that was not previously made, Worthington now offers factual assertions that are not supported by the record. As with arguments that were not previously raised, this Court should not consider evidence outside of the record. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Additionally, though the County urged that the earlier order transferring venue was grounds warranting dismissal of the present action, the trial court below disagreed:

> The Plaintiff's violation of the terms and conditions of the Order Transferring Venue under Pierce County Superior Court Cause No. 11-2-13236-1 does not constitute legal grounds for dismissal of the present action but supports the imposition of CR 11 sanctions in that it is further evidence that the present action was not interposed for proper purposes, but instead for purposes such as harassment or to cause unnecessary delay.

CP 242-246. Having offered no record of facts in support of his argument, Worthington clearly has failed to establish that the trial court abused its

discretion in awarding sanctions for this CR 11 violation. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

### G. MULTIPLE GROUNDS SUPPORTED THE TRIAL COURT'S IMPOSITION OF CR 11 SANCTIONS.

A trial court's award of sanctions under CR 11 is reviewed for an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.,* 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). A trial court abuses its discretion if its order is manifestly unreasonable or is based on untenable grounds. *Id.*, 122 Wn.2d at 339.

The trial court found that Worthington filed his cause of action in violation of a settlement agreement, in violation of a prior Pierce County Superior Court order transferring venue, nearly three years after the expiration of the statute of limitations, without standing, and for improper purposes such as for harassment. CP 244-45. Independent of any of the other reasons that Plaintiff's claims were erroneous, these grounds support the imposition of CR 11 sanctions.

## H. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A VISITING JUDGE FROM JEFFERSON COUNTY OR REMOVAL OF THE CASE TO KING COUNTY BECAUSE THE PLAINTIFF FAILED TO IDENTIFY THE BIAS OR PREJUDICE OF ANY MEMBER OF THE KITSAP COUNTY BENCH, AND BECAUSE KITSAP COUNTY CANNOT BE SUED IN KING COUNTY.

A trial court's refusal to grant a change of venue is reviewed for an abuse of discretion. *Hickey v. City of Bellingham,* 90 Wn. App. 711, 719, 953 P.2d 822 (1998). Worthington asked to have the matter heard by a visiting judge from Jefferson County, or in the alternative to have the venue transferred to King County. CP 149-151. Worthington alleged that because in a separate proceeding, Kitsap County Judge Laurie had declared on the record that WestNET detectives were permitted to call Kitsap County Judges directly to obtain telephonic search warrants without first contacting a prosecuting attorney, she, and the entire Kitsap County bench, should be precluded from hearing the present case. CP 149-154.

The trial court did not abuse its discretion in denying either alternative presented in Worthington's motion. Worthington made no showing that would warrant the removal of the entire Kitsap County bench.

In the earlier proceeding that the plaintiff referred to, Judge Laurie

simply advised the plaintiff that WestNET detectives called her and other members of the local bench to obtain authorization for search warrants. CP 401-406; 412-413. Judge Laurie made no representation that such contact with WestNET officers (or any officer) had biased her against the plaintiff.

Simply put, Judge Laurie did nothing more than advise the plaintiff that she had contact with WestNET officers when they were seeking search warrants. She did not indicate that this contact imputed to her any bias or prejudice either towards those officers or towards the plaintiff. CP 154.

"Due process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CDC)...require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned." *State v. Dominguez*, 81 Wn. App. at 328. Clearly, Judge Laurie's statements did not in any way reflect that she believed she had such a bias or prejudice, as she continued to preside over the action to its conclusion.[6] CP 415-416. Neither, obviously, did Mr. Worthington or his attorney believe that the Judge's statement indicated

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[6]Also, logic would dictate that simple contact with detectives who are requesting authorization for search warrants does not impute bias to the Judge. Were such the case, no Kitsap County Superior Court judge could preside over any criminal prosecution that was investigated by an officer from any department whose employees had petitioned the judge for a warrant.

that she was prejudiced or biased as, after the court's advisement, counsel took a moment to confer with his client, then indicated to the court that it was "not an issue" and the case proceeded before Judge Laurie. CP 413.

Absent the statutory right to the peremptory removal of one judge, a party seeking to remove a judge claiming bias or prejudice must support the claim. *Dominguez*, 81 Wn. App. at 328-29. Prejudice is not presumed. *Id.* Instead, the party seeking removal of a judge for such grounds must produce evidence of actual prejudice or bias. *Id.* (*Citing State v. Post*, 118 Wn.2d 596, 618-19 & n.9, 826 P.2d 172 (1992)).

Plaintiff has produced no evidence of actual prejudice or bias by Judge Laurie, or any other Superior Court judge. Accordingly his motion for removal of the entire Kitsap County Superior Court bench was appropriately denied.

Independent of the absence of evidence of prejudice, the trial court properly denied Plaintiff's request for transfer of venue to King County. RCW 36.01.050(1) provides that actions against a county shall be commenced in the Superior Court of either of the two nearest judicial districts. The determination of which are the two nearest districts is delegated by statute to the Administrative Office of the Courts. RCW 36.01.050(2). The Administrative Office of the Courts has determined that the two nearest judicial districts to Kitsap County are Pierce and

Mason counties. CP 418. King County is thus not a proper venue for an action filed against Kitsap County, and the trial court properly exercised its discretion in denying the plaintiff's motion in this regard.

### I. THE SUPREME COURT'S DECISION IN *WORTHINGTON V. WESTNET* HAS LITTLE RELEVANCE TO THE PRESENT APPEAL FROM THE TRIAL COURT'S ORDERS DISMISSING THE CASE AND IMPOSING SANCTIONS.

Worthington argues that the Supreme Court's reversal and remand in *Worthington v. WestNET*, warrants reversal of the trial court's decisions below. Because the present matter and the Supreme Court's decision in *Worthington v. WestNET,* 182 Wn.2d 500, 341 P.3d 995 (2015), do not share the same legal issues (despite the shared factual scenario, as discussed above) that decision has minimal relevance to the present appeal.

In *Worthington v. WestNET*, the Superior Court dismissed the case, finding that WestNET was not a legal entity, and thus, found that Worthington had failed to state a claim against an existing legal entity subject to suit. *Id.,* 182 Wn.2d at 505. The Supreme Court, however, determined that the record was insufficiently developed to determine WestNET's amenability to suit via a CR 12(b)(6) motion, as there remained a question of fact as to the actual functioning of WestNET independent of the terms of the interlocal agreement. *Id.*, 182 Wn.2d at

512. Accordingly, the Court of Appeals' decision was reversed, and the matter has been remanded to the Superior Court where it remains for further litigation.

Worthington now asserts that the trial court improperly relied upon *Worthington v. WestNET* in denying his special motion to strike (anti-SLAPP motion) and in dismissing his cause of action. He argues that because the trial court considered the now-overturned appellate court decision of *Worthington v. WestNET*, so too, must this trial court's decision be overturned. Mr. Worthington is incorrect on both assertions.

#### ***1. The trial court did not rely on the Court of Appeals' decision in Worthington v. WestNET in its anti-SLAPP decision***

Initially, with regard to his anti-SLAPP motion, other than alleging that the court relied upon the overturned Court of Appeals' opinion in *Worthington v. WestNET*, Worthington offers no reference to the record to support his assertion. Indeed, no reference is made to *Worthington v. WestNET* in the County's response to Worthington's motion to strike, or the County's motion and supportive briefing for sanctions for Worthington's frivolous anti-SLAPP motion. CP 420-425; 428-432; 433-439. His argument, finding no support in the record, should be disregarded.

Additionally, regardless of the trial court's consideration, the Washington State Supreme Court has recently ruled that the Anti-SLAPP statute (RCW 4.24.525) is unconstitutional. *Davis v. Cox*, ___ Wn.2d ___, 2015 WL 3413375 (May 28, 2015). Accordingly, further consideration of the Plaintiff's anti-SLAPP motion is not warranted.

***2. The trial court relied on multiple grounds for dismissal independent of Worthington v. WestNET.***

As discussed above, multiple grounds supported dismissal of the complaint. In its argument the County made a limited reference to *Worthington v. WestNET* in a footnote discussing Worthington's reference to OPMA in his Complaint. CP 12, n.45. Independent of *Worthington v. WestNET*, the County argued, as discussed in more detail above, that Worthington's OPMA claim did not meet the CR 12(b)(6) standard because he had named no policy board member as a defendant, had identified no meeting date as the basis of his claim, and because the Court had no jurisdiction over anyone against whom the Plaintiff sought financial penalties. CP 1-15.

Thus, regardless of *Worthington v. WestNET*, Worthington's OPMA claim was appropriately dismissed because he failed to state a claim upon which relief could be granted when he failed to identify any person or any specific violation upon which to base his claim. As for the

remaining claims raised by Worthington's complaint, *Worthington v. WestNET* had no bearing whatsoever.

### 3. ***Multiple grounds supported sanctions independent of Worthington v. WestNET.***

Similarly, the ruling of *Worthington v. WestNET* had little impact on the imposition of sanctions in this proceeding. In addition to moving for CR 12(b)(6) dismissal, the County also moved for CR 11 sanctions against Worthington, arguing that the same or substantially similar actions had been filed three times before, that the matter was precluded by a prior settlement, that it was filed after the expiration of the statute of limitations, and that it defied a prior judgment. CP 242-245. The "prior judgment" referred to the Court of Appeals' opinion in *Worthington v. WestNET*, which at the time was binding precedent in the trial court.

In granting the motion for CR 12(b)(6) dismissal and ordering sanctions, this court entered the following conclusions of law:

> 1. Filing and/or pursuit of the present matter is barred by the settlement agreement between the parties on July 1, 2008.
> 2. Filing of this action violated the terms of the settlement agreement, and Plaintiff is equitably estopped from pursing this action.
> 3. The one-year statute of limitations for Plaintiff's claim regarding the public records act began to run upon the County's release of records on March 26, 2010, and expired on March 26, 2011. This action was filed approximately three years after the

expiration of the statue of limitations.

4. The Plaintiff's violation of the terms and conditions of the Order Transferring Venue under Pierce County Superior Court Cause No. 11-2-13236-1 does not constituted [sic] legal grounds for dismissal of the present action but supports the imposition of CR 11 sanctions in that it is further evidence that the present action was not interposed for proper purposes, but instead for purposes such as harassment or to cause unnecessary delay.

5. WestNET is not a board or agency under the Public Records Act, and is not an entity subject to suit; similarly, it is not a public agency subject to compliance with the Open Public Meetings Act.

6. Plaintiff Worthington does not have standing to file a criminal complaint.

7. Plaintiff's cause of action, which was filed in violation of the terms of his settlement agreement with the county, was not well grounded in law and was harassing in nature.

CP 242-45.

Based upon these numerous conclusions of law, even if item no. 5 were to be disregarded, multiple grounds supported both the dismissal of Worthington's lawsuit and the imposition of sanctions. The trial court made clear and distinctive findings that Mr. Worthington's suit was filed in violation of a settlement agreement, was filed well beyond the expiration of the statute of limitations, was filed without standing and was filed with improper purpose but instead for purposes such as harassment. No abuse of discretion in the imposition of sanctions can be shown.

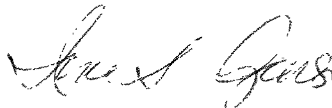
## IV. CONCLUSION

For the foregoing reasons, the order granting the County's motion for dismissal with prejudice should be affirmed.

Dated this 6th day of July, 2015.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



IONE S. GEORGE, WSBA No. 18236
Chief Deputy Prosecuting Attorney

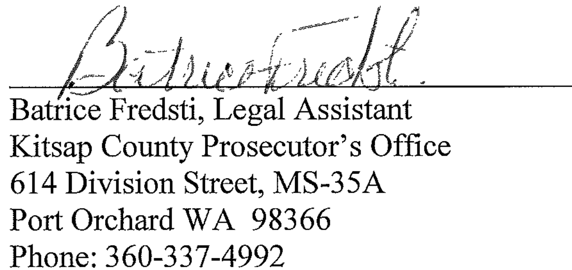
CERTIFICATE OF SERVICE

I, Batrice Fredsti, declare, under penalty of perjury under the laws of the State of Washington, that I am now and at all times herein mentioned a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the above document in the manner noted upon the following:

| | |
|---|---|
| John Worthington<br>4500 SE 2nd Place<br>Renton, WA 98059 | [X] Via U.S. Mail<br>[ ] Via Fax:<br>[X] Via Email:<br>[ ] Via Hand Delivery |

SIGNED in Port Orchard, Washington this 6th day of July, 2015.



Batrice Fredsti, Legal Assistant
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Port Orchard WA 98366
Phone: 360-337-4992

# KITSAP COUNTY PROSECUTOR

## July 06, 2015 - 2:28 PM

**Transmittal Letter**

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Case Name: John Worthington v. City of Bremerton, et al.
Court of Appeals Case Number: 46364-4

**Is this a Personal Restraint Petition?** ○ Yes ◉ No

## The document being Filed is:

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- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Respondent's
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): ________
- ○ Personal Restraint Petition (PRP)
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- ○ Other: ________

**Comments:**

Brief of Respondent Kitsap County

Sender Name: Batrice K Fredsti - Email: bfredsti@co.kitsap.wa.us