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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 463644-II

WASHINGTON STATE COURT OF APPEALS FOR DIVISION II

**JOHN WORTHINGTON,
Plaintiff - Appellee,**

v.

**KITSAP COUNTY
CITY OF BREMERTON ET AL
Defendants - Respondents.**

ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT

WORTHINGTON'S REPLY BRIEF

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

ORIGINAL

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I. INTRODUCTION

This appeal should be decided in Worthington's favor because the trial court erred when it determined that Worthington's new OPMA and PRA claims, which were never previously alleged or litigated prior to this suit, were the cause for dismissal and sanctions.

The new OPMA and PRA claims were not part of any previous settlements or lawsuits and the current complaint was requested to be pared down to just those issues. Rather than let those issues survive, the trial court erred when it concluded those claims in the complaint were harassing and frivolous because the COA Division II opinion in *Worthington v. WestNET* determined Worthington should have known WestNET was not an entity subject to suit, even though the complaint was filed against the jurisdictions not WestNET..

The trial court was required to consider Worthington's complaint as a whole, but chose instead to focus on issues Worthington had either agreed to drop or could have dropped or bifurcated to avoid any settlements or previously litigated issues.

The Court of Appeals should reverse and remand this case on that issue alone. It is not harassing or frivolous to request WestNET affiliate jurisdictions to follow the sunshine laws so other people do not have to play 7 year public records shell games to discover the truth.

As for the other issues, Kitsap County has avoided the issue of fraud in regards to the settlement agreement and whether the issue of fraud has to be decided by a trier of fact in an evidentiary hearing once the factual dispute is raised. Just as they

did at the trial court, Kitsap County avoids the issue and wants the Court of Appeals to use the cherry picked evidence provided by Kitsap County to decide that issue. Kitsap County has cleverly substituted a claim to Risk Management in when the settlement refers to the claim to the County Commissioners.

Worthington has proven there are two forms, Kitsap County tactfully decided not to disclose that vital fact to the trial court.

Kitsap relies solely on the settlement agreement and the tort claim filed in 2007. Kitsap intentionally leaves out the answer by Kitsap County denying the tort claim because it confirms the misrepresentation regarding the issue of whether Kitsap claimed its employees were not part of the raid as a reason to deny the tort claim, when they knew in fact that they were involved in the raid on Worthington.

Worthington obviously relied on that misrepresentation that was in fact central to the issues in the settlement, when he filed his civil suit in federal court case Worthington v. Washington State Attorney General et al No. C10-0118 JLR.

That federal case was ultimately dismissed based on the fraudulent Misrepresentation that the DEA raided Worthington.

Using common sense the Court of Appeals can see that the settlement agreement is based on factors a-c. Kitsap left documents out so they could trick the trial court to believe the issues referred to in the settlement were regarding the raid on Worthington, when in reality the evidence, which Worthington had to provide, clearly shows that part of the agreement was to settle a previous public records request regarding FLIR. Kitsap also failed to explain the difference between a tort claim to the commissioners and a tort claim to risk management. There are two

different forms for each entity. Worthington provided those details but Kitsap never offered any evidence showing that those documents were not central to the issue of the settlement in question. Kitsap again remains silent on these alleged facts

Kitsap did not provide any arguments or evidence as to their position that the DEA raided Worthington at the time of settlement at the trial court, whether Worthington relied upon that misrepresentation or whether the fact that the DEA did not conduct the raid was material to the settlement agreement. These are issues for a trier of fact and are not appropriate to decide in a motion to dismiss. Kitsap County simply avoids that issue again on appeal. Again Worthington asks the Court of Appeals to use common sense. If Worthington had any idea the settlement agreement meant that Kitsap County did the raid and not the DEA, he would have used the settlement agreement in the federal case to show it was Kitsap County and WestNET that did the raid not the DEA and prevent the federal Court from dismissing the case on the grounds a federal agent was immune from state medical marijuana laws.

The issue of whether allegations of fraud should be determined by a trier of fact are not being brought up for the first time on appeal. That issue was brought up at the trial court and also brought up on appeal. The case law on whether an evidentiary hearing is required just supports the general assignment of error that the issue was required to be decided by a trier of fact. Even if it were being brought up for the first time, the Court of Appeals has discretion to consider the argument pursuant to RAP 10.8, and Worthington has asked for that discretion by

motion.

Kitsap distorts the record on the previous Pierce County case. Ione George first appeared as WestNET for the City of Bremerton¹, and claims for the first time the court never decided whether WestNET was a defendant. However, the court obviously had to acknowledge a defendant WestNET after George filed a notice of appearance for WestNET and requested relief for defendant WestNET and referred to itself as a co-defendant in its briefs.

The Pierce County Superior Court in its order transferring WestNET to Kitsap County not only acknowledged a defendant WestNET, the court gave relief to WestNET and documented WestNET as a defendant in two orders.

WestNET was a defendant in the Pierce County case and never appealed the ruling denying their motion to dismiss based on the argument that WestNET was not a legal entity. All WestNET affiliate jurisdictions waived their objections to WestNET being a legal entity when they failed to appeal the Pierce County Superior court order creating the defendant WestNET, in order to transfer them to Kitsap County in the change of venue orders.

All WestNET affiliate jurisdictions also waived their objections to Worthington not transferring that case, when Worthington filed Worthington v. WestNET in Kitsap County Superior court. It was obvious they got the venue they wanted, and the arguments were identical.² The affiliates never objected to that issue until

¹ The Kitsap County prosecutor cannot represent the City of Bremerton in civil cases.

² That WestNET was not subject to suit.

Worthington brought another complaint on those request some three years later.

Now for the first time on appeal Kitsap claims the Pierce County court did not decide the issue of whether WestNET was a defendant. Yet somehow in that case, WestNET went from being affiliate jurisdictions doing business as WestNET, to just being defendant WestNET. Simply put, there is no way possible for the Pierce County Superior court to transfer a defendant to another venue, without them actually being a legal defendant to transfer in the first place. Furthermore, how does a defendant collect attorney's fees without being a defendant. How can this court let WestNET have it both ways.

If it was not the intention of Ione George or the attorneys for the other affiliate jurisdictions to create a defendant WestNET by having Ms. George file a notice of appearance as WestNET, while simultaneously representing City of Bremerton, Ione George and the affiliate jurisdictions should have appealed the two orders creating the defendant WestNET, granting them a transfer and attorney's fees, and Ms. George should have argued to the court she just wanted to remain counsel for the City of Bremerton.³

The Court of appeals need not consider the settlement agreement or the previous Pierce County case because Worthington dropped the claims regarding the issues pertinent to the settlement and attempted to only litigate the issue of holding open public meetings and naming public records officers and publishing public records procedures. Since those legitimate claims were tethered to the complaint and because the complaint was required to be considered as a whole,

³ See WSBA complaint # 14-01940.

Worthington respectfully argues the Court of Appeals should reverse and remand this case with orders for Kitsap County to comply with the OPMA and PRA, by holding open public meetings, naming public records officers and publishing public records procedures for WestNET.

II. ARGUMENT

A. Worthington's claims were required to be considered as a whole.

(Issues Pertaining To Assignments of Error 2, 3 and 4)

Worthington's OPMA and PRA claims requesting the WestNET affiliate jurisdictions comply with the OPMA and PRA hold open public meetings, name a public records officers and publish public records procedures,⁴ were not harassing nor were they frivolous. Worthington should not have been sanctioned for attempting to get WestNET affiliate jurisdictions to comply with the OPMA and PRA. Worthington's lawsuit was not frivolous under RCW 4.84.185.

A lawsuit is frivolous under RCW 4.84.185 when it cannot be supported by any rational argument on the law or facts. *Smith v. Okanogan County*, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). "The action must be viewed in its entirety and only if it is frivolous as a whole will an award of fees be appropriate." *Biggs v. Vail*, 119 Wn.2d 129, 133-37, 830 P.2d 350 (1992). Relying on *Havsy v. Flynn*, 88 Wn. App. 514, 521, 945 P.2d 221 (1997).

Worthington respectfully argues that the trial court's findings in this case to

⁴CP 168, 389

support an award of fees under RCW 4.84.185, did not consider the case as a whole and relied upon case law that has since been overturned and should be reversed and remanded.

Here, the trial court used *Worthington v. WestNET* to determine that Worthington's OPMA and PRA claims to hold open public meetings, name a public records officers and publish public records procedures were frivolous as a whole. Since that case has been overturned, Worthington's complaint can no longer be considered frivolous as a whole and the sanctions and fees awarded to Kitsap County are no longer justified. Since the sanctions were based on the findings pursuant to RCW 4.84.185, which relied upon *Worthington v. WestNET* and failed to consider Worthington's complaint as a whole, the trial court's ruling should be reversed .

The issue of whether Worthington's claims the WestNET affiliates should hold open public meetings, name a public records officers and publish public records procedures were before the trial court and are in the assignments of error. If the court determines they were not, the court of appeals *has the discretion* to either reject or consider claims of error that were not raised below, and it does not commit error by doing either. See, e.g., *Bennett v. Hardy*, 113 Wn.2d 912, 918-19, 784 P.2d 1258 (1990).

B. All other issues on appeal are moot.

Since the complaint was not frivolous as a whole, none of the other issues need to be addressed because they were either ignored, dropped during the lawsuit or

were going to be corrected if the complaint survived dismissal, and because Worthington's complaint as a whole was neither frivolous nor harassing.

III. CONCLUSION

Based on the aforementioned arguments, Worthington respectfully requests a reversal and remand with orders for Kitsap County to hold open public meetings, name a public records officers and publish public records procedures for WestNET in the WestNET Interlocal agreement.

Respectfully submitted this 23rd day of July, 2015

BY



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Declaration of Service

I declare that on the date and time indicated below, I caused to be served
Via email, a copy of the documents and pleadings listed below upon the attorney of
record for the defendants herein listed and indicated below.

1. APPELLANT'S REPLY BRIEF

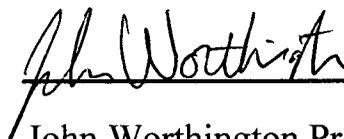
IONE GEORGE/KITSAP COUNTY

614 Division Street MS-35A
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I declare under penalty of perjury under the laws of the United States that the
foregoing is True and correct.

Executed on this 23rd day of July, 2015.

BY



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