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APR 10 2019  
WASHINGTON STATE  
SUPREME COURT

# THE SUPREME COURT OF WASHINGTON

JOHN WORTHINGTON,	)	NO. 90037-0
	)	
Petitioner,	)	<b>ORDER</b>
	)	
v.	)	C/A NO. 43689-2-II
	)	
WEST NET,	)	
	)	
Respondent.	)	
_____	)	

This case came before the Court on its April 4, 2019, En Banc Conference to consider the motion to supplement the record and to take judicial notice, motion to recall mandate and for sanctions, and motion to disqualify. A majority of the Court voted in favor of the following result.

Now, therefore, it is hereby

ORDERED:

That the motion to recall the mandate is denied. Therefore, no action is taken on the other motions.

DATED at Olympia, Washington this 10<sup>th</sup> day of April, 2019.

For the Court

Fairhurst, CJ.  
CHIEF JUSTICE

No. 90037-0

John Worthington moves this court to recall its mandate in *Worthington v. WestNET*, 182 Wn.2d 500, 341 P.3d 995 (2015) (*Worthington I*). In that case, defendant West Sound Narcotics Enforcement Team (WestNET) responded to Worthington’s Public Records Act (PRA)<sup>1</sup> lawsuit by claiming that it was not an entity subject to suit. Our decision in *Worthington I* recognized that while defendants like WestNET—that is, multijurisdictional task forces formed under the Interlocal Cooperation Act (ICA)<sup>2</sup> that claim nonentity status—*might* be unamenable to suit, they *might* also make themselves amenable to suit by behaving inconsistently with their nonentity designation. We therefore remanded the case to the superior court to determine whether WestNET had behaved in that manner.

But we would not have needed to remand the case if WestNET had been forthright with this court about its pattern of behaving like a fully cognizable legal entity with capacity to sue and be sued. At oral argument, WestNET informed the

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<sup>1</sup> See ch. 42.56 RCW.

<sup>2</sup> See ch. 39.34 RCW.

court that it had never initiated proceedings in its own name or otherwise voluntarily appeared in court. But as Worthington later showed, that was untrue. And Worthington now brings forward new, undisputedly authentic evidence of WestNET’s entity behavior—a contract that WestNET entered into that required it to, among other things, keep and maintain certain records. Because I believe that WestNET’s previously undisclosed behavior would have changed the outcome of *Worthington I*—by judicially estopping WestNET from claiming that it is not a legal entity—I would grant the motion to recall the mandate and consider the newly discovered evidence.

I therefore respectfully dissent from the court’s denial of Worthington’s motion to recall the mandate.

#### FACTS AND PROCEDURAL HISTORY

##### I. The Underlying Proceedings

“WestNET is a . . . drug task force formed by an ‘Interlocal Drug Task Force Agreement’” pursuant to the ICA. *Worthington I*, 182 Wn.2d at 503. Kitsap County is one of the governmental entities that was a party to the interlocal agreement—and therefore part of WestNET. *Id.* at 503 n.1.

“In 2007, the WestNET drug task force conducted a drug raid on Worthington’s home.” *Worthington v. WestNET*, No. 48590-7-II, slip op. at 2

*Worthington v. WestNET*, No. 90037-0  
(Gordon McCloud, J., Dissent to Order)

(Wash. Ct. App. Sept. 19, 2017) (unpublished), *amended on recons.* (Nov. 28, 2017) (*Worthington II*), <http://www.courts.wa.gov/opinions/pdf/D2%2048590-7-II%20Order%20Amending%20Opinion.pdf>, *review denied*, 190 Wn.2d 1018 (2018).

“In 2010, Worthington filed a public records request with WestNET to disclose records related to the 2007 raid on his home by the WestNET drug task force. WestNET did not respond.” *Id.* at 3 (citation omitted) (citing *Worthington I*, 182 Wn.2d at 504).

Worthington then brought this lawsuit, alleging that WestNET had violated the PRA. *Worthington I*, 182 Wn.2d at 504. WestNET argued that it was not a legal entity and could not be sued for any purpose. *Id.* at 505. As WestNET would later put it, “WestNET is simply [a] framework under which independent law enforcement agencies can work together to solve crime. . . . All that the Interlocal Agreement accomplished was a means by which . . . agencies could perform their duties in cooperation with other law enforcement agencies to enhance their independent efforts.” *Worthington I*, Br. of Resp’t at 8-9.

The trial court agreed, granted WestNET's CR 12(b)(6) motion, and dismissed Worthington's lawsuit. *Worthington I*, 182 Wn.2d at 505. The Court of Appeals affirmed.<sup>3</sup>

We granted review. At oral argument, I asked whether "WestNET [had] ever appeared voluntarily as a plaintiff or petitioner in any forum, for example, in a forfeiture case."<sup>4</sup> WestNET told the court that it "has not ever filed a legal action, as it is not a legal entity to do so."<sup>5</sup> This statement comported with WestNET's argument that "the [formation] agreement does not provide for [WestNET] to initiate forfeitures or abatements." *Worthington I*, Suppl. Br. of Resp't at 5 (emphasis omitted). And when another justice asked how a citizen would obtain WestNET's records if the constituent governmental entities did not also have copies of those records, WestNET responded, "[T]hat is to presume that there is an

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<sup>3</sup> *Worthington v. WestNET*, 179 Wn. App. 788, 320 P.3d 721 (2014), *rev'd*, 182 Wn.2d 500.

<sup>4</sup> Wash. Supreme Court oral argument, *Worthington I*, No. 90037-0 (Oct. 23, 2014), at 16 min., 56 sec. to 17 min., 27 sec., *video recording by TVW*, Washington State's Public Affairs Network, <http://tvw-legacy-media.s3.amazonaws.com/201410/2014100012.mp4>.

<sup>5</sup> *Id.*

entity maintaining records, and that's what I am saying is there is not an entity.

They are not maintaining records.”<sup>6</sup>

Relying on those representations, we held that “[t]he court cannot rely solely on the self-imposed terms of an interlocal agreement because the document does not reveal whether the task force, in fact, behaves consistently with that nonentity designation.” *Worthington I*, 182 Wn.2d at 508. We therefore remanded the case to the superior court to determine whether, based on the facts, WestNET could be sued under the PRA. *Id.* at 508-09, 512.

After discovery on remand, WestNET moved for summary judgment, which the superior court granted. *Worthington II*, slip op. at 4, 10.

Worthington then moved for reconsideration, pointing out that he had public records and discovery documents showing that WestNET had in fact behaved as a legal entity. *See Worthington II*, Clerk’s Papers (CP) at 713-31 (Am. Mot. to Reconsider). In particular, these materials showed that WestNET had voluntarily filed pleadings as a party and initiated forfeiture proceedings in its own name—as late as 2015 and in 25 separate cases. *Id.* at 733-34 (Decl. of John Worthington), 735-903 (exhibits), 979-1124 (exhibits); *see also id.* at 2124-29 (Decl. of Batrice

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<sup>6</sup> *Id.* at 19 min., 4 sec. to 19 min., 36 sec.

Fredsti) (providing an overview of cases organized by date), 2131-2439 (exhibits of Worthington’s case materials organized by date, supplemented by materials from the Kitsap County Prosecuting Attorney’s Office). They also showed that WestNET had conducted a variety of other activities in its own name, including obtaining records from other government agencies. *Id.* On the basis of those materials, Worthington argued that WestNET should be judicially estopped from arguing that it is not an entity. *Id.* at 718-24 (Am. Mot. to Reconsider).

While the motion was pending—and after Worthington filed the documents showing that WestNET had actually filed pleadings and initiated forfeitures in its own name in 25 cases—counsel for WestNET informed the superior court that she had learned that she had unintentionally provided this court with incorrect information in *Worthington I*. Counsel stated:

“Yesterday . . . I discovered that Deputy Prosecuting Attorneys who were involved in drug forfeiture proceedings related to WestNET drug task force operations had in the past filed pleadings in those actions which indicated that they . . . were representing WestNET, as opposed to the underlying WestNET member agency or employee, and that the forfeiture proceeding was brought by WestNET, rather than, again, the underlying WestNET member agency.”

*Worthington II*, slip op. at 10-11 (quoting CP at 2118-19); *see* RPC 3.3. Counsel also stated in a separate declaration “that the pleadings generated for WestNET

related property forfeiture proceedings are created from templates stored within the Prosecutor's database." *Worthington II*, CP at 2441.

Based on that admission, Worthington moved this court to recall the mandate that we had issued nine months earlier in *Worthington I*. See RAP 12.9. We denied the motion, however.

Meanwhile, the superior court still had Worthington's motion for reconsideration pending before it and called on the parties to brief whether counsel's admission created any genuine issues of material fact. *Worthington II*, slip op. at 11. After briefing, the court determined that no genuine issues of material fact existed, and it denied Worthington's motion. *Id.* at 12-13.

Worthington appealed, and the Court of Appeals affirmed. *Id.* at 32. That court held that Worthington had waived his judicial estoppel argument and that, even if he had not, WestNET's prior appearances as a party plaintiff did not estop it from arguing that it is not an entity because it had really been Kitsap County, not WestNET, making those appearances. *Id.* at 22-24.

We denied review. *Worthington II*, 190 Wn.2d 1018.

## II. The Present Motions

Worthington has now obtained a 2011 interagency agreement between WestNET and the Washington State Patrol (WSP). See Appellant[']s Am. Mot. to

Recall Mandate and for Sanctions, Ex. 1. WestNET does not dispute the authenticity of the interagency agreement. WestNET's response (Feb. 5, 2019) at 11.

The interagency agreement is titled "Washington State Patrol Interagency Agreement," and it states that it "is between the State of Washington, Washington State Patrol and the Public Agency identified below, and is issued pursuant to the Interlocal Cooperation Act, chapter 39.34 RCW." Appellant[']s Am. Mot. to Recall Mandate and for Sanctions, Ex. 1, at 1. The identified public agency is WestNET. *Id.*

The agreement contemplated that WestNET and the WSP would work together "to conduct intelligence-led investigations into major marijuana manufacturing organizations operating in Washington State." *Id.* at 5 (Ex. A). As part of that effort, WestNET would carry out "investigative activities," including, but "not limited to, use of confidential informants, . . . search warrants, . . . subpoenas, . . . asset seizures, . . . and prosecutions." *Id.*

The agreement also contemplated that WestNET would keep its own records of those activities. In fact, it *required* WestNET to keep such records. Section 11 of the agreement, entitled "Inspection; Maintenance of Records" stated:

[T]he Public Agency shall give reasonable access to the Public Agency's place of business and records to WSP . . . for the purpose of inspecting the Public Agency's place of business and its records, and monitoring, auditing and evaluating the Public Agency's performance and compliance with applicable laws, regulations, rules and this Agreement.

During the term of this Agreement and for six years following termination or expiration of this Agreement, the Public Agency *shall* maintain records sufficient to document:

- Performance of all acts required by statute, regulation, rule, or this Agreement;
- Substantiate the Public Agency's statement of its organization's structure, tax status, capabilities and performance; and
- Demonstrate accounting procedures, practices and records which sufficiently and properly document the Public Agency's invoices to WSP and all expenditures made by the Public Agency to perform as required by this Agreement.

*Id.* at 3 (emphasis added). Exhibit C to the agreement further provided that WestNET "*shall* maintain transaction records" for its use of funds and "*shall* maintain confidential records documenting informant identities, actual receipts, and other information that the Public Agency deems appropriate." *Id.* at 9-10 (emphasis added).

Worthington obtained this agreement after this court denied review of *Worthington II* and after the Court of Appeals issued its mandate. WestNET's response (Feb. 5, 2019) at 2. He contends, however, that WestNET wrongfully

withheld the documents while the proceedings were live. He moves this court to recall the mandate of *Worthington I* and to take judicial notice of the agreement.

#### ANALYSIS

RAP 12.9(b) provides that this court may recall its mandate “to correct an inadvertent mistake or to modify a decision obtained by the fraud of a party or counsel in the appellate court.”

Knowing what we know now, this court should have held in *Worthington I* that WestNET was judicially estopped from arguing that it is not an entity subject to legal process in any way.<sup>7</sup> The only reason that we did not know to apply judicial estoppel in the first instance is that counsel unintentionally misled the court about WestNET’s pattern of behaving like an entity. That certainly qualifies as at least a mistake within the meaning of RAP 12.9(b).

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<sup>7</sup> “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (internal quotation marks omitted) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)). We consider three factors when deciding whether to apply this doctrine: (1) whether the party’s later position is clearly inconsistent with its prior position, (2) whether accepting the later inconsistent position would create the perception that the party misled either the first or second court, and (3) whether asserting the inconsistent position would give an unfair advantage to the asserting party or an unfair detriment to the opposing party. *Id.* (quoting *Arkison*, 160 Wn.2d at 538-39). The test is clearly satisfied here.

While counsel's admission that WestNET had been initiating forfeiture proceedings in its own name for years would have been enough for us to apply judicial estoppel, Worthington's new evidence makes application of that equitable doctrine all the more imperative.

First, WestNET and the WSP entered their interagency agreement pursuant to the ICA, which is the same act that authorized the formation of WestNET. It provides that "[a]ny two or more public *agencies* may enter into agreements." RCW 39.34.030(2) (emphasis added). Even though counsel repeatedly represented to this court that WestNET is not an agency but instead simply a working agreement,<sup>8</sup> WestNET asserted that it was an agency to form the agreement. While there is no question that the constituent governmental entities could form such an agreement, WestNET's doing so is troubling in light of its argument that it is not a legal entity in any way. And it is especially troubling in light of WestNET's assertion to this court that a citizen must submit public records requests to all of its constituent governmental entities to obtain all WestNET-related documents.<sup>9</sup>

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<sup>8</sup> See *Worthington I*, Suppl. Br. of Resp't, *passim*; Wash. Supreme Court oral argument, *supra*, *passim*.

<sup>9</sup> Wash. Supreme Court oral argument, *supra*, at 21 min., 30 sec. to 23 min., 8 sec.

WestNET puts citizens to that inconvenience when it comes to the PRA, but when it comes to forming a new interlocal agreement, WestNET spares itself the trouble of bringing all the signatories to the table.

Second, the ICA itself provides that agencies that form interlocal agreements are subject to suit “in any case or controversy involving performance or interpretation thereunder” as the real party in interest. RCW 39.34.040. So if this agreement had not been wrongfully withheld as Worthington contends, it would have been clear as a matter of law that WestNET is an entity subject to suit by virtue of having entered into an interagency agreement—or at least that WestNET would not be permitted to argue that it was not a public agency subject to suit.

Third, WestNET told this court that it maintains no records—only the constituent governmental entities do. But WestNET’s agreement with the WSP plainly requires WestNET to keep all kinds of records. And it just as plainly requires WestNET to make those records available to the patrol for inspection, in much the same way that the PRA requires public agencies to make public records available for inspection. *See* ch. 42.56 RCW. That inconsistency is yet another basis for applying judicial estoppel.

Moreover, that contractual provision suggests that Worthington’s underlying allegations on the merits may be correct—that WestNET does have records about

its raid on his residence and that it wrongfully failed to respond to his records request in violation of the PRA. In light of that significant possibility, it is difficult to characterize WestNET's flatly contradictory assertions that blocked access to resolution of Worthington's PRA lawsuit as anything other than a miscarriage of justice.

#### CONCLUSION

WestNET appears in court to initiate forfeiture proceedings but doesn't want to be called into court by another. WestNET acts like a legal entity when it enters into agreements that it deems beneficial but doesn't want to be treated as a legal entity otherwise. WestNET agrees to keep records but maintains that it has no records, and contends that it would be impossible for it to keep records. These contradictory positions—once hidden, but now in plain view—impair the integrity of our prior decision in *Worthington I* and all related proceedings.

I would grant Worthington's motion to recall the mandate and take judicial notice of the newly discovered, undisputedly authentic evidence.

I respectfully dissent.

*Worthington v. WestNET*, No. 90037-0  
(Gordon McCloud, J., Dissent to Order)

Gordon McCloud, J.

I agree with the dissent.  
Fairhurst, C.J.