Supreme Court No. 93479-7

SUPREME COURT OF THE STATE OF WASHINGTON

IGNACIO MARIN,
Petitioner,

v.

KING COUNTY, WASHINGTON
Respondent,

RESPONDENT KING COUNTY, WASHINGTON'S ANSWER TO PLAINTIFF'S PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

Respondent King County, Washington opposes plaintiff Ignacio Marin's Petition for Discretionary Review ("Pl.'s Mot.").

II. INTRODUCTION

Plaintiff's appeal arose from a unanimous (12-0) jury verdict in favor of King County. He asserted eighteen assignments of error before the Court of Appeals—all of which the Court of Appeals rejected. The Court of Appeals also found numerous problems with plaintiff's briefing, including that he "misrepresent[ed]" the trial court record in support of his arguments and he failed to preserve many of his assignments of error. *See, e.g., Marin v. King County, Wash.*, No. 72666-8-I, at 12 (Wash. Ct. App. June 6, 2016) ("Op.") (finding that Marin "misrepresent[ed]" the "actions" taken by King County in support of his appellate arguments).[1]

Plaintiff now seeks discretionary review of four aspects of the Court of Appeals' decision. However, he completely ignores the standards for review set forth in RAP 13.4(b), none of which are satisfied here. Indeed, plaintiff's total failure to address these standards is, in-and-of-itself, sufficient reason to deny his petition. *See, e.g., State v. Johnson,*

[1] The Court of Appeals filed its opinion on June 6, 2016, and decided to publish its opinion on July 11, 2016, but the decision has not yet received page numbers in the Washington Appellate Reports or Pacific Reporter. Accordingly, King County cites to the page numbers in the slip opinion included with plaintiff's appendix.

179 Wn.2d 534, 558, 315 P.3d 1090 (2014) (a party's failure to "elaborate" on an argument "waives consideration" of that argument).

Plaintiff's substantive arguments are also wrong on the merits. *First*, Marin argues that the Court of Appeals erred in affirming a directed verdict for King County on the retaliation component of his hostile work environment claim. He makes the conclusory assertion that the Court of Appeals' decision was "contrary" to this Court's opinion in *Hill v. BCTI*, 144 Wn.2d 172, 23 P.3d 440 (2001). Pl.'s Mot. at 7. But plaintiff never actually explains how the Court of Appeals' decision contradicted *Hill*. *Id.* at 7-13. In reality, there was no inconsistency. In this case, the trial court and Court of Appeals correctly found that a directed verdict was warranted because "Marin's evidence was not sufficient for any rational juror to find retaliatory animus," as Marin did not point to a single person "who both knew of his protected activity and, afterward, took some action that could reasonably be construed as harassment." Op. at 25. The opinion in *Hill* did not speak to this issue. In fact, it related to different topics entirely.

Second, plaintiff argues that the Court of Appeals erred in affirming dismissal of his stand-alone retaliation claim on summary judgment. His sole theory is that the Court of Appeals misconstrued the standard for finding an adverse employment action, which goes to one

element of that claim. Pl.'s Mot. at 13-14. Plaintiff's argument *is* mistaken for multiple reasons. The simplest reason to deny review of this issue, however, is that the Court of Appeals articulated three additional, independently sufficient grounds for affirming summary judgment on this claim, none of which were included in plaintiff's petition for review. *See* Op. at 16-18. It would serve no purpose for the Supreme Court to review this issue alone. Even if this Court were to agree with plaintiff and find that the Court of Appeals erred in holding that there was no adverse employment action as a matter of law, the Court of Appeals' decision affirming summary judgment on plaintiff's retaliation claim would still stand on alternative grounds.

Third, before filing this lawsuit, Marin secretly tape recorded two one-on-one meetings with his supervisor, James Sagnis. The trial court excluded those recordings, and related evidence, under the Washington Privacy Act. The Court of Appeals affirmed, holding that the meetings were sufficiently "private" to merit Privacy Act protection. Op. at 7-9. Plaintiff challenges this ruling and argues that the meetings were not "private" because Marin and Sagnis subsequently "revealed and used" some of the information from the meetings. Pl.'s Mot. at 15. Plaintiff cited no precedent for this argument before the Court of Appeals, Op. at 8, and he cites none now. The Court of Appeals correctly rejected this

theory and applied the definition of "private" set forth in *State v. Christensen*, 153 Wn.2d 186, 192-93, 102 P.3d 789 (2004) and related cases. *See* Op. at 7-9 & n. 7-8.

Finally, the trial court sanctioned plaintiff's counsel $5,000 for willfully delaying their production of Marin's secret tape recordings until after Sagnis was deposed, and the Court of Appeals affirmed. Op. at 9-10. Plaintiff's attorney Mark Rose, an associate supervised by Mary Ruth Mann, admitted that he knew about the recordings 10 days before deposing Sagnis, knew they were responsive to discovery, and told Ms. Mann about them, but then chose to wait until six days *after* the deposition before producing them. Op. at 9. As the Court of Appeals held, "[t]he trial court acted within its discretion in sanctioning Mann based on this conduct." *Id.* Plaintiff now challenges this ruling based on a variety of factual assertions regarding what Ms. Mann knew or remembered about the recordings before Mr. Rose told her about them. Pl.'s Mot. at 17-19. Marin recited these same facts to the Court of Appeals, and it correctly found that they were "irrelevant and obfuscatory." Op. at 9. There is no compelling reason to review this decision.

In sum, plaintiff has not identified any issues that merits Supreme Court review.

III. STATEMENT OF THE CASE

King County relies upon and incorporates by reference the detailed Background section set forth in the Court of Appeals' decision affirming the judgment for King County. *See* Op. at 2-7. The County disputes the accuracy of plaintiff's Statement of the Case, which mischaracterizes the record. The County does not address that dispute in detail here, however, because the facts alleged in plaintiff's Statement of the Case are not material to whether the Court should grant discretionary review.

IV. ARGUMENT

King County requests that the Court deny plaintiff's petition for review. His decision not to invoke any of the standards governing review is eloquent testimony to the fact that those standards are not satisfied here. Moreover, as the Court of Appeals found, plaintiff's arguments on the merits are both legally flawed and inconsistent with the record.

A. Plaintiff's Appeal Does Not Satisfy the Standards for Review.

The Washington Rules of Appellate Procedure would permit discretionary review of the Court of Appeals' decision "only" if one of the following circumstances were met:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). In his petition, plaintiff does not cite any of these standards for review and presents no argument as to why they could be satisfied. The reason is obvious. There is no inconsistency between the Court of Appeals' decision in this case and any other published Washington precedent. Further, this is a routine employment discrimination case which does not involve *any* question of Constitutional law, nor any "issue of substantial public interest that should be determined by the Supreme Court." Plaintiff's request for discretionary review is without merit.

B. Plaintiff's Arguments on the Merits Are Also Erroneous.

Plaintiff's petition focuses solely on the substance of the issues he seeks to present for review. These arguments are likewise meritless.

1. The Court of Appeals Correctly Affirmed the Directed Verdict on Plaintiff's Retaliatory Hostile Work Environment Claim.

The Washington Law Against Discrimination ("WLAD") prohibits retaliation based on protected conduct. Washington courts have defined the scope of such conduct narrowly: the making of complaints is only "protected" if the employee explicitly complains about *discrimination* based on protected class. *See Alonso v. Qwest Commc'ns. Co.*, 178 Wn.

App. 734, 754, 315 P.3d 610 (2013) (a complaint "does not rise to the level of protected activity . . . absent some reference to the plaintiff's protected status."). Further, the plaintiff must establish a "causal link" between the employer's alleged misconduct and the plaintiff's "protected activity," which necessarily requires a showing that the "individuals [plaintiff] alleges retaliated against him knew of his protected activity." Op. at 24 (citing *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 746-47, 332 P.3d 1006 (2014) and *Alonso*, 178 Wn. App. at 753-54).

When a plaintiff grounds a hostile work environment claim on allegations of retaliation, rather than simply pursuing a stand-alone retaliation claim, the plaintiff also must prove the traditional elements of a hostile work environment. Thus, plaintiff bears the burden to prove that he experienced "severe or pervasive harassment in retaliation for engaging in protected activity." *Noviello v. City of Boston*, 398 F.3d 76, 92 (1st Cir. 2005). In that context, "[i]t is only those actions, directed at a complainant, *that stem from a retaliatory animus* which may be factored into the hostile work environment calculus." *Id.* at 93 (emphasis added). Where an alleged harasser is unaware of the plaintiff's protected conduct, their actions cannot form the basis for a retaliatory hostile work environment as a matter of law: . .

> [T]here must be, at a minimum, . . . competent evidence that the alleged retaliators *knew* of the plaintiff's protected activity and that a retaliatory motive played a part in the adverse employment actions. . . . The reasons underlying such a requirement are obvious: if a supervisor or other employee is unaware of the fact that a plaintiff engaged in protected conduct, any actions attributable to him could not plausibly have been induced by retaliatory motives.

Alvarado v. Donahoe, 687 F.3d 453, 459-60 (1st Cir. 2012) (quotations and citations omitted; emphasis in original).

The trial court and the Court of Appeals applied these basic principles under the WLAD. Specifically, the trial court directed a verdict for King County on the retaliation component of plaintiff's hostile work environment claim only after finding that "Marin presented no evidence [at trial] that anyone harassed him after knowing about his protected activity." *See* Op. at 24. The Court of Appeals carefully reviewed the record and affirmed, holding that "[t]he record supports that finding[.]" *Id.*

Plaintiff now challenges the Court of Appeals' ruling, asserting in his "Issues Presented for Review" that it is inconsistent with this Court's decision in *Hill v. BCTI*, 144 Wn.2d 172, 23 P.3d 440 (2001). But plaintiff never even tries to explain this supposed inconsistency. Plaintiff quotes a lengthy excerpt from *Hill*, but does not clarify its significance. *See* Pl.'s Mot. at 8. In reality, this Court's opinion in *Hill* did not address

the issues presented in this appeal. To the extent plaintiff is trying to use the quoted excerpt to argue that "no directed verdict should issue" in an employment case "before both parties...have set forth their evidence," *Hill*, 144 Wn.2d at 187 n.9, it is beside the point. As plaintiff admits, the trial court did not issue a directed verdict in this case until after both parties had rested. Pl.'s Mot. at 8 (the directed verdict "was granted at the close of the evidence"). And to the extent plaintiff relies on *Hill* for the proposition that a directed verdict is *never* appropriate in an employment case, his theory is directly contrary to the language he quotes. *See* Pl.'s Mot. at 8 (quoting that, "[w]henever a party is entitled to a verdict, *it should be granted* . . .") (emphasis added).

Instead of providing any meaningful discussion of *Hill*, plaintiff focuses instead on an argument that the Court of Appeals "disregarded the evidence and inferences" ostensibly supporting his claim. Pl.'s Mot. at 9. That too is incorrect. In fact, the Court of Appeals combed through the long and complex record in careful detail. Op. at 24-25. Based on that review, the Court of Appeals agreed with the trial court in finding that "Marin's evidence was not sufficient for any rational juror to find retaliatory animus." *Id.* at 25. The Court explained: "Nowhere does [plaintiff] point to an individual who both knew of his protected activity

and, afterward, took some action that could reasonably be construed as harassment." *Id.*

Plaintiff does not acknowledge these findings in his petition for discretionary review. Instead, he simply reasserts many of the same factual arguments that the Court of Appeals considered and rejected. Plaintiff's disagreement with the Court of Appeals' reading of the record does not warrant Supreme Court review.

Plaintiff's characterization of the record is also substantively inaccurate. For example, plaintiff argues that he was subjected to a retaliatory hostile work environment because "[m]anagement made Marin's transfer to [the South Plant in Renton] permanent," rather than returning him to the West Point treatment plant in Seattle where he had worked for 25 years. *See* Pl.'s Mot. at 10. Plaintiff also made this argument in front of the Court of Appeals, but he simultaneously argued the opposite: he claimed that King County subjected him to a hostile work environment by telling him "that he was 'welcome to go back to West Point D Crew.'" Op. at 25. The Court of Appeals rejected this contortion. Specifically, after reviewing the portions of the record cited by plaintiff, it found that he based these arguments "on the County offering him a *choice* of remaining at South Plant or returning to West Point," and it concluded that "[n]o reasonable juror could interpret those offers to accommodate

Marin as harassment. . . ." Op. at 25 (emphasis added).[2] There is no reason to believe that this Court would reach a different result if it were to grant discretionary review.

In sum, plaintiff has not identified any inconsistency between the Court of Appeals' ruling and any other precedent, nor has he demonstrated any other error meriting review.

2. The Court of Appeals Correctly Affirmed Summary Judgment on Plaintiff's Retaliation Claim.

Plaintiff next argues that the Court of Appeals erred by affirming summary judgment for King County on his stand-alone retaliation claim. His theory is that the Court of Appeals applied a higher standard than appropriate for assessing the adverse employment action element of that claim. Pl.'s Mot. at 13-14. But, contrary to the contentions in his brief, the Court of Appeals did *not* hold that plaintiff was required to prove a reduction in "workload or pay" to demonstrate an adverse employment action. *See id.* Rather, the Court of Appeals held only that plaintiff was required to demonstrate "a change in employment conditions that is more than an 'inconvenience or alteration of job responsibilities," and it listed a

[2] By way of additional example, Marin claims that "[m]anagement knows Marin reported harassment when they help Sagnis prepare the May 10, 2009 discipline." Pl.'s Mot. at 10. In support of that notion, he cites emails between Human Resources and Disability Services analysts regarding the County's efforts to accommodate him, as well as notes taken by an Employee Assistance Program counselor, Tony Hansen, and a Disability Services analyst, Carol Gordon. *Id.* (citing Exs. 65, 67, 69, and 78). Plaintiff cites no evidence that people who were named in these exhibits subsequently harassed him.

reduction in "workload and pay" as one example of such a change. Op. at 15. This standard is consistent with a long line of Washington precedent, including cases cited by both sides. *See, e.g.*, *Boyd v. State*, 187 Wn. App. 1, 13, 349 P.3d 864 (2015) ("An adverse employment action involves a change in employment that is more than an inconvenience or alteration of one's job responsibilities."); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 465, 98 P.3d 827 (2004) (similar). The entire premise of plaintiff's appeal on this issue is therefore based on a misconception of the Court of Appeals' ruling.

The Court of Appeals also correctly found that plaintiff's cited evidence did not meet this standard. As the Court noted, plaintiff's briefing primarily relied on evidence from trial, which was improper in challenging the trial court's summary judgment ruling. *See* Op. at 12 n. 20 ("In arguing he created a genuine issue of material fact as to adverse employment actions, Marin again cites primarily to portions of the trial record, which is not an appropriate basis for review."). Further, the Court of Appeals found that plaintiff mischaracterized the record in support of his argument that he suffered an adverse employment action. *Id.* ("None of the actions he points to, many of which he misrepresents, amount to a

tangible change in employment status.").[3] Plaintiff does the same thing in his petition for discretionary review. Indeed, in the two pages plaintiff dedicates to this issue in his petition, he does not cite a single piece of evidence.[4]

In any event, even if plaintiff had articulated a viable argument for error, no purpose would be served by Supreme Court review of this issue. The Court of Appeals identified multiple, independently sufficient grounds for affirming summary judgment on plaintiff's retaliation claim—and the lack of an adverse employment action was just one of them. Op. at 16-18. The Court of Appeals also held that summary judgment was proper because "Marin failed to show that his protected activity caused or was a 'substantial factor' in the County taking any of the alleged adverse employment actions." Op. at 16 (emphasis added). And, summary judgment was warranted because "Marin failed to show any evidence of pretext for retaliation." *Id.* at 17. Plaintiff does not challenge these alternative grounds for summary judgment in his petition for review, which means that they are now final. It would make no sense for this

[3] The Court of Appeals made this finding in response to plaintiff's argument that he suffered an adverse action in connection with his disparate treatment claim, Op. at 12, but it logically carries over to plaintiff's argument that he suffered an adverse action on his retaliation claim because plaintiff relied on the same evidence for both. *See id.* at 15.

[4] Plaintiff's only citation to the Clerk's Papers references the trial court's November 20, 2013 Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment. *See* Pl.'s Mot. at 13 (citing CP 1752-1757).

Court to review one ground for the Court of Appeals' decision on plaintiff's retaliation claim, knowing that it would have no impact on the dismissal of that claim overall.

3. The Court of Appeals Correctly Affirmed the Exclusion of Marin's Secret Recordings of Private Meetings.

Before filing this lawsuit, Marin secretly tape recorded two one-on-one meetings with his supervisor, James Sagnis. The trial court excluded the recordings and related evidence pursuant to the Washington Privacy Act, RCW 9.73.030, and the Court of Appeals affirmed. Op. at 7-9. Marin does not dispute that the Privacy Act requires exclusion of secret tape recordings of "private" conversations. Instead, he incorrectly argues that his meetings with Sagnis were not "private."

Both the trial court and the Court of Appeals applied a well-established, six-factor test in determining that Marin's meetings with Sagnis were "private" under this Court's precedent:

> To determine whether a conversation is private under the privacy act, we consider "(1) the subject matter of the communication, (2) the location of the participants, (3) the potential presence of third parties, (4) the role of the interloper, (5) whether the parties 'manifest a subjective intention that it be private,' and (6) whether any subjective intention of privacy is reasonable."

Op. at 8 (quoting *State v. Mankin*, 158 Wn. App. 111, 118, 241 P.3d 421 (2010) and *State v. Christensen*, 153 Wn.2d 186, 193, 102 P.3d 789 (2004)). Under this test, the Court of Appeals found that the meetings

were private because "Marin and Sagnis had lengthy conversations in an office at work that involved only the two of them," and "[n]o third party was present." *See* Op. at 8.

Plaintiff appears to acknowledge that the Court of Appeals applied the right test. He actually quotes from *State v. Kipp*, 179 Wn.2d 718, 729, 317 P.3d 1029 (2014), in which this Court refused to depart from that same approach. *See* Pl.'s Mot. at 15. He also does not dispute the facts underpinning the Court of Appeals' ruling. Instead, plaintiff effectively argues that this Court should now add a new factor and treat it as dispositive—*i.e.*, he claims that a meeting cannot have been "private" if the participants subsequently "revealed and used" some of the information communicated in that meeting. *See* Pl.'s Mot. at 15. The Court of Appeals found no support for this theory, and plaintiff cites none. Plaintiff's argument also defies commonsense: people use and reveal information learned in private conversations every day, but it does not mean that those conversations retroactively cease to be "private" in the usual sense of the word.

Plaintiff's theory that a meeting between public employees related to discipline cannot be "private" is equally unavailing. *See* Pl.'s Mot. at 15-16. As the trial court found, plaintiff's theory would have perverse implications: "such a construction would mean that supervisors could

record these conversations without the consent of their employees." CP 1092. Further, plaintiff's theory is contrary to *Smith v. Employment Security Department*, 155 Wn. App. 24, 39, 226 P.3d 263 (2010), in which the court held that various meetings between public employees were "private" under the Privacy Act. *See* Op. at 8.

Finally, plaintiff did not preserve his argument that the recordings were subject to a statutory exception for "unlawful requests and demands," *see* Pl.'s Mot. at 16, because he did not raise that argument in his briefing before the Court of Appeals.[5] *See generally* King County App'x.[6]

4. The Court of Appeals Correctly Affirmed Sanctions Against Plaintiff's Counsel for Discovery Misconduct.

Finally, the trial court sanctioned plaintiff's counsel for willfully delaying the production of the secret tape recordings until after Sagnis's deposition. This decision is reviewable only for an abuse of discretion. *See Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036

[5] As a factual matter, plaintiff's argument that the recordings would show that Sagnis "pressur[ed]" Marin not to go on FMLA leave and not to complain about harassment is also unsupported. Although plaintiff cites to the Clerk's Papers, the cited pages only reference a brief that he had filed with the trial court—in which he cited no evidence. *See* Pl.'s Mot. at 16 (citing CP 604).

[6] For the sake of economy, King County's appendix is limited to the section of plaintiff's appellate brief addressing this topic, as well as the cover and signature pages.

(1997). The trial court did not abuse its discretion, and the Court of Appeals correctly affirmed. Op. at 9-10.

The trial court correctly found that plaintiff's counsel intentionally withheld the recordings until after Sagnis's deposition. CP 1093-94. Plaintiff provides a lengthy recitation of alleged facts underlying his counsel's failure to produce the tapes, but ignores the factual predicate for the trial court's holding. Mark Rose, an associate supervised by two partners, Mary Ruth Mann and Jim Kytle—all of whom were counsel of record for plaintiff—submitted a declaration admitting he was aware of the recordings as of June 19, 2012 and that he knew they were responsive to King County's requests for discovery. CP 44-46. He informed Ms. Mann and Mr. Kytle of the recordings, then took the deposition of Sagnis on June 29. CP 45-46. Nevertheless, plaintiff did not produce the recordings until July 5, six days after the deposition. CP 52. This testimony properly formed the basis for the trial court's finding that plaintiff's counsel intentionally withheld these tapes. CP 1093-94. The Court of Appeals held that "[t]he trial court acted within its discretion in sanctioning Mann based on this conduct." Op. at 9.

Plaintiff's counter-recitation of facts does not rebut this evidence. Rather, it only raises strawmen. For example, plaintiff's claim that Ms. Mann did not sign the pertinent discovery responses is misleading. In his

motion, plaintiff cites to his June 2012 discovery responses, signed by Mr. Rose, Pl.'s Mot. at 18 (citing CP 3732-33), but he omits that Ms. Mann signed plaintiff's original, April 2012 responses. *See* CP 3722. Of course, regardless of who signed those responses, Mr. Rose was Ms. Mann's subordinate lawyer and co-counsel for plaintiff, necessitating the same result. CP 44-46; *see also* RPC 5.1. Given the strength of the evidence upon which the trial court grounded its order, the Court of Appeals correctly found that plaintiff's factual assertions on this issue were "irrelevant and obfuscatory." *See* Op. at 9.

Plaintiff also implies in his petition that the trial court somehow imposed a double standard on his counsel, as compared to defense counsel. Pl.'s Mot. at 19-20. The difference is that plaintiff's counsel knowingly delayed the production of responsive records until after a key deposition, whereas defense counsel did no such thing. Plaintiff cites no evidence to show that defense counsel engaged in willful delay, because there is no such evidence. Indeed, the trial court found that plaintiff's counsel only raised this attack against defense counsel in an attempt to avoid responsibility for their own conduct. CP 1095 ("The Court is troubled that Plaintiff['s] counsel's defense to the request for sanctions is an attack on the County's alleged conduct during the discovery process. She has to take responsibility for her own actions.").

Finally, the single case cited by plaintiff, *Giddens v. Kansas City So. Railway Co.*, 29 S.W.3d 813 (Mo. 2000), is inapposite. There was no indication in that case that the sanctioned party knowingly delayed the production of evidentiary records. The issue in *Giddens* was the appropriate timing for supplementing interrogatory responses, which had been accurate when originally made. *Id.* at 820. By contrast, here, the issue is whether plaintiff's counsel violated the discovery rules by willfully delaying the production of records that they knew were responsive. *See* Op. at 9-10. The two cases are not comparable.

If this Court were to adopt plaintiff's requested approach to discovery, it would mean that any party could intentionally withhold records they knew were responsive until the best strategic moment, including after key depositions. It would promote gamesmanship and undermine the purpose of discovery, which is to uncover the truth. The trial court properly exercised its discretion when it imposed a small monetary sanction for plaintiff's counsel's decision to withhold Marin's secret tape recordings.

V. CONCLUSION

King County respectfully requests that the Court deny plaintiff's petition for review.

RESPECTFULLY SUBMITTED this 9th day of September, 2016.

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APPENDICES

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

IGNACIO B. MARIN,

Appellant,

v.

KING COUNTY, WASHINGTON.

Respondent,

APPELLANT IGNACIO MARIN'S OPENING BRIEF

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process for consideration of the motion, staying discovery and authorizing Marin to file his own discovery related motions against the county. The Court declined to conduct an evidentiary hearing but made a "finding" by its February 19, 2013 order that Marin violated RCW 9.73.030 and that Mann willfully failed to disclose the recordings in response to County discovery requests. CP 1089-1096. The Court excluded the recordings and sanctioned Mann. *See* Order CP 1089-1096.

B. The Sagnis Complaint/Discipline Conversations were not Private.

The Court concluded as a matter of law, without the public hearing , that Marin's recording of his April 20, 2009 and May 10, 2009 conversations with Sagnis violated RCW 9.73.030 because such conversations were "private." The Court on that basis further ruled the recordings were inadmissible under RCW 9.73.050 and specifically ruled that Marin was barred from testifying regarding those conversations at trial. CP. 1089-1096. However, the Court erred in its analysis of RCW 9.73.030. It is undisputed that the two conversations at issue involved a public employment supervisor and employee over Marin's discrimination/harassment complaint to Sagnis, and Sagnis' job-related commencement of discipline of Marin. The Court acknowledged that Sagnis may have intended to [and immediately did] disclose the information he learned in the conversations to others, but the court deemed

that point "irrelevant." Order at 3 CP 1091. That is not correct. The fact that the conversations were intended for a public purpose is evidence that they were not private in the first place.

The Court properly acknowledged in its order that RCW 9.73.030 does not define "private" for purposes of that statute, and acknowledged the dictionary definition of that tenn, referenced in State v. Clark, 129 Wn.2d 211, 224-25, 916 P.2d 384 (1996) and other cases, requires that such a conversation be confidential, in secret, or not in public. However, the Court failed to apply the proper test for whether the conversations were private. Washington courts determine if a matter is private on a case-by-case basis. Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190, 829 P2d 1061 (1992) citing State v. Forrester, 21 Wn. App. 855,861,587 P2d 179 (1978), *review denied,* 92 Wn.2d 1006 (1979) ("court must consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case. "). The Supreme Court has stated, citing State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004), that courts must look to "the subject matter of the calls, the location of the participants, the potential presence of third parties, and the role of the interloper." Moreover, a communication is private "(1) when parties manifest a subjective intent that it be private and (2) where that expectation is reasonable." State v. Modica, 164 Wn.2d 83,

186 P.3d 1062 (2008) (telephone conversation between jail inmate and grandmother; jail inmate had no privacy expectation).

Thus, in this case, the context of the conversation, the parties' subjective intent regarding it, and the parties' use of information derived from the conversation were all relevant factors for the trial court's analysis. The trial court placed principal emphasis on two decisions, Kitsap County v. Smith, 143 Wn. App. 893, 180 P.3d 834, *review denied, 164* Wn.2d 1036 (2008) and Smith v. Employment Security Dep't, 155 Wn. App. 24, 226 P.3d 263 (2010). That emphasis is misplaced. In Kitsap County, a County employee removed documents from his office and gave them to his attorney. The County learned that Smith had also recorded conversations with fellow employees and citizens without their knowledge. The conversations apparently took place in meetings or when the employee contacted individuals regarding neighbor disputes or trespassing. Id. at 908. The Court of Appeals reversed the trial court's denial of declaratory relief on RCW 9.73, finding a justiciable controversy. The Court only decided the issue could be heard, not whether the conversations were private. In Smith, the Court upheld the denial of unemployment compensation benefits to Smith for misconduct. The Court noted that Smith's recordings were expansive covering conversations in vehicles, local businesses, and inside people's homes. Smith, 155 Wn.

App. at 30. Smith was denied benefits by ESD because he was terminated for violating a County policy against such recordings. The Court further concluded that the conversations indiscriminately recorded by Smith were private under RCW 9.73.030. Id. at 39.

By contrast, the recordings here were public in their nature as they involved a public employment supervisor and employee over an employment disciplinary matter about which Sagnis indicated he would converse with others upon the conclusion of the meeting. He believed Marin engaged in misconduct on the job. In the second meeting, Sagnis actually handed Marin a reprimand that had been reviewed and edited by other County managers. Marin asked for union representation and filed a grievance. He subsequently spoke to the County Employee Assistance Program counselor, and consulted with his union representative who filed a grievance Exh. 84 Sagnis had no reasonable expectation of privacy.[7]

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[7] That there was no reasonable expectation of privacy on Sagnis's part is further reinforced by public records cases. For example, under the Public Records Act, for purposes of RCW 42.56.230(2) relating to the exemption for personal information of public employees, while *employee evaluations* are confidential *employee disciplinary proceedings* are not. *See, e.g., Bellevue John Does* 1-11 *v. Bellevue School District No. 405,* 164 Wn.2d 199,215, 189 P.3d 139 (2008) ("when a complaint regarding misconduct during the course of public employment is substantiated or results in some sort of discipline, an employee does not have a right to privacy in the complaint."). *See also, Cowles Publishing Co. v. State Patrol,* 109 Wn.2d 712, 727, 748 P.2d 597 (1988) (police officer has no right to privacy regarding substantiated misconduct complaint). Indeed, even if Sagnis was merely "investigating" Marin, that was not private. An investigative report regarding alleged hostile work environment in the Federal Way Municipal Court that touched on a judge's conduct was not private. *Morgan v. City of Federal Way, 166* Wn.2d 747, 756-57, 213 P.3d 596 (2009).

Neither Marin nor Sagnis intended the conversations to be private. In sum, the trial court committed error in finding that RCW 9.73.030 applied here.

7. The Trial Court failed to Properly Consider Marin's Discovery and Spoliation Motions; and Failed to Use a Burnet Analysis Before Admitting the County's Prejudicial Undisclosed Documents.

Marin's motions about County discovery abuse and spoliation were improperly denied by the trial court. CP 825-1087; CP 1098 (Order); CP 2939-2940 (Order).

At trial the County offered in evidence Exh 618, 619 " summary exhibits", based on massive Excel spreadsheets represented to be time card information "sent to payroll" coding Marin's work hours, neither of which were produced in discovery. RP 9/18/2014 P. 210-13. Data entered by unknown supervisors, without any "code sheet" to understand its meaning. Such data would be responsive to Marin's first discovery requests served with his complaint about training and assignments, but not produced. Ass't Plant Manager Woolfort not a witness competent for cross examination of the data or its meaning or the statistics summaries. Id.

Likewise with Exhs. 458, 629 and 630; RP 9/09/2104 P. 38,105-109, the County produced new "emails" and "logs" during testimony of Marin's witnesses. RP 9/09/2014 P.104-109 Trial court erred in failing to go through any analysis of prejudice as required by law though Marin's the discovery request was very specific.

The trial court declined to give any preventive bias instructions RP 9/03/2014 p.1-8. Marin's Batson challenges regarding Hispanic and Black Jurors, were essential to Marin. State v. Saintcalle, supra, at 42-43. This plaintiff immigrant of color with a Hispanic accent, was refused any instructions about bias or inherent bias, denied "Batson" motions while burdening him with time-consuming struggles to remove majority jurors with pro-Defendant bias, refused voir dire time to follow up on bias raised on juror questionnaires; charged trial time to examine an obviously biased juror; and degraded by Defense Counsel in a civil case closing, labeled twice as "the defendant"; RP 9/25/2014 p.48, 49, 52. This overt and implicit "bias" cries out for a remedy. Saintcalle at 71-72.

VI. CONCLUSION

Ignacio Marin should receive a full and fair jury trial, with all claims and admissible evidence, before an unbiased jury, with protection against bias. Marin seeks attorney fees and costs on this appeal.

DATED this 30 day of June, 2015.

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CERTIFICATE OF SERVICE

I, Sara Delvecchio, declare under penalty of perjury under the laws of the State of Washington:

I am employed by the law firm of Calfo Eakes & Ostrovsky PLLC, a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On September 9, 2016, I caused a true and correct copy of the foregoing document to be served on counsel listed below in the manner indicated:

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DATED this 9th day of September, 2016.

s/Sara Delvecchio
Sara Delvecchio

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Subject: Ignacio Marin v. King County, Washington – No. 93479-7

Dear Clerk,

Attached for filing with the Court, please find Respondent King County, Washington's Answer to Petitioner's Petition for Discretionary Review.

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