NO. 93449-5

SUPREME COURT OF THE STATE OF WASHINGTON

TODD NEWLUN,

Petitioner,

v.

SUCEE, et al.

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION AND DECISION BELOW

Todd Newlun seeks review of a May 23, 2016, unpublished decision by the Court of Appeals, *Newlun v. Sucee*, 194 Wn. App. 1008 (2016). That decision affirmed he is not entitled to certain statutorily created exemplary damages that are only available in limited circumstances. This lawsuit is based on Mr. Newlun's allegation that his privacy rights were violated by a multi-agency Task Force of law enforcement officers who investigated his 2011 unlawful sale of marijuana. (Task Force) During the sale, an undercover police officer wore a sound transmitting wire for officer safety purposes (i.e., to monitor the well-being of the officer in an area with poor cell phone coverage), not to gather evidence, while he purchased marijuana from Mr. Newlun. Mr. Newlun alleges the officers erred in using the wire without first completing statutorily required paperwork. However, State law does not allow exemplary damages for procedural errors involving officer safety wire interceptions. The trial court and court of appeals correctly read the plain language of the Privacy Act and found Mr. Newlun wasn't entitled to pursue statutory exemplary damages.

Besides failing to show that the Court of Appeals erred, Mr. Newlun's Petition also fails to meet the RAP 13.4(b) standards. His arguments under RAP 13.4(b)(3) fail because there is no constitutional question at issue. Indeed, he fails to even mention or cite to one. Likewise, Mr. Newlun does

not establish that his request for exemplary damages under an inapplicable statute for an unlawful drug transaction is a matter of substantial public interest. Because his case does not meet the criteria for review set forth in RAP 13.4(b), this court should deny review.

In addition to holding that Mr. Newlun was not entitled to exemplary damages, the Court of Appeals also affirmed the trial court's denial of two other summary judgment motions made by the Task Force. Mr. Newlun discusses these motions at length in his Petition. Although this court should not accept review of Mr. Newlun's exemplary damages claim, if it does, the court should also review the trial court's denial of the law enforcement agencies' motions for summary judgment based on the felony tort defense statute and the privacy act.

II. COUNTERSTATEMENT OF ISSUES

As explained below, this Court should deny review because this case presents no issues that warrant review under RAP 13.4(b). However, if the Court were to accept review, the following issues would be presented:

1. **Where it is undisputed that the Task Force did not use an evidence gathering wire during their investigation of Newlun, are the damages specified in RCW 9.73.230(11) unavailable to him?**

2. **Where it is undisputed that Mr. Newlun was engaging in the commission of a felony at the time of his alleged privacy violation, does RCW 4.24.420 require that his claims be dismissed?**

3. **Where it is undisputed that Mr. Newlun was engaging in an illegal drug transaction with strangers, in areas susceptible to public view, should the Task Force have been granted summary judgment on the issue of privacy?**

III. COUNTERSTATEMENT OF THE FACTS

The Task Force agrees with Mr. Newlun that, except for the reported quantity of marijuana sold, the facts recited in the Court of Appeals' decision are accurate. However, in addition to those facts, the following undisputed facts also exist:

A. Procedural History

In 2011, Mr. Newlun was arrested and charged with the sale and delivery of approximately three pounds of marijuana, a Class C felony. Clerk's Papers (CP) at 85-87. During that criminal proceeding, he successfully moved to suppress testimony regarding his conversations with an undercover officer based on the Task Force's failure to obtain written authorization to use an officer safety wire transmitter as required by RCW 9.73.210[1]. CP at 175-76, 990-93. Consequently, Mr. Newlun was able to negotiate a favorable plea bargain. He ultimately pleaded guilty to a reduced misdemeanor charge of possession of 40 grams or less of marijuana.

His criminal case resolved, Mr. Newlun filed this lawsuit under RCW 9.73, the Privacy Act. In it, he claims the officers who arrested him violated his privacy rights by electronically transmitting his voice from one

[1] A verbal authorization to use the safety was granted by Task Force Commander Rick Sucee when the undercover purchase was planned. CP at 123-24, 241-42.

officer to another during the drug sale. CP at 21-25. In his Complaint, Mr. Newlun sought general damages pursuant to RCW 9.73.060 and exemplary damages against each defendant of $25,000, citing RCW 9.73.230[2]. CP at 25.

Because it is undisputed that Mr. Newlun's voice was transmitted during the marijuana sale, but that no attempt to record his voice occurred, and that the purpose of the transmission was solely to protect officer safety rather than gather evidence, the trial court granted summary judgment in favor of the Task Force on Mr. Newlun's RCW 9.73.230 claim for exemplary damages. CP at 738-41. The Court of Appeals affirmed.

Additionally, both the trial court and the Court of Appeals denied summary judgment in favor of the Task Force regarding whether RCW 4.24.420, "The Felony Tort Statute," barred Newlun's claims, and whether Mr. Newlun had a privacy interest in the conversations he had during his marijuana sale.

B. Factual History

Mr. Newlun's transmitted marijuana sale took place on March 16, 2011. CP at 83. On that date, Task Force member Trooper B.L. Hanger and a confidential informant met with Mr. Newlun and paid him over $8,000 for three pounds of marijuana. CP at 83. During this sale, Mr. Newlun

[2] Initially, Mr. Newlun also sought to certify a class of individuals who were also allegedly transmitted improperly by the Task force. However, due to lack of proof that such a class of individuals exists, the trial court ruled that no evidence from any other Task Force case will be admitted at trial. Mr. Newlun did not appeal that ruling. CP at 1116.

advised that he had an additional four pounds of marijuana that he was going to sell later in the day. CP at 84. The statement proved true as officers watched a private citizen buy approximately 4.2 pounds of marijuana from Mr. Newlun shortly after their own purchase was completed. CP at 83.

Bellingham Police Officer Craig Johnson (one of the named Defendants in this lawsuit) was the lead officer in the investigation. He was also the person who could hear the transmitted conversations between Mr. Newlun and Trooper Hanger. Officer Johnson wrote a report immediately after Mr. Newlun's arrest on March 16, 2011, that described Johnson's involvement in the case. In that report, Officer Johnson advised, "I monitored unrecorded conversation in the undercover vehicle that was being transmitted from a wire-intercept device worn by Detective Hanger." CP at 656.

When questioned during the criminal proceeding about the decision to use that transmitting device, Officer Johnson testified that he had a number of safety concerns. CP at 99. He stated:

> First and foremost, we were at a tactical disadvantage in terms of not necessarily knowing specifically where it was going to happen at, per se, didn't know a whole lot about either of our suspects in terms of them being from out of state, what sort of associates they might have. We were concerned about the presence of weapons or additional parties that they, that the suspect might bring with them for protection. We knew that they, they knew they, they being the suspects, knew already that Detective Hanger was going to be coming with upwards of $10,000 in anticipation of a purchase, of a large purchase of marijuana or purchase of a large amount of marijuana.
> ...

> [The parties] never had any face-to face communications or contact or prior dealings. All their communications had been done over the phone.

CP at 99-101.

In addition, the neighborhood street on which Mr. Newlun lived was in an area that posed radio and cell phone communication difficulties due to "the topography of the land there in terms of the [surrounding] hills and valleys." CP at 101-02. All of these concerns were discussed at an operational briefing prior to the sale. During that briefing the Task Force Commander verbally authorized the use of the transmitting device for the purpose of protecting officer safety. CP at 123-24, 241-42.

The officers were also questioned regarding the use of a verbal, rather than written, authorization for the transmitter. Officer Johnson described the use of a safety wire as very uncommon, only recalling one other case which employed one. CP at 303. Given this rarity of use, Officer Johnson was unaware that a written authorization was required. CP at 304. Officer Johnson's supervisor, Sergeant Richard Frakes, testified that the verbal-only authorization was "an honest mistake that was made on our part." CP at 260. Sgt. Frakes stated that once the Mr. Newlun's criminal attorneys brought the issue to the prosecutor's office, "we came up with a specific form for officer/CI safety wire." CP at 260.

Nonetheless, the criminal trial judge properly found that the Mr. Newlun transmitting wire had been incorrectly authorized and, pursuant to RCW 9.73.210(4), suppressed testimony concerning conversations that were had while the wire was in use. CP at 175.

IV. REASONS REVIEW SHOULD BE DENIED

Without specific explanation, Mr. Newlun argues that the decision below satisfies RAP 13.4(b)(3) and (4). Mr. Newlun has failed to articulate a basis for review under either standard.

A. Mr. Newlun Offers No Basis For Review Under RAP 13.4(b)(3)

Mr. Newlun argues that this Court should accept review under RAP 13.4(b)(3). However, his Petition fails to allege any specific constitutional violation, instead arguing that the Court of Appeals erred in its statutory construction analysis. Because Mr. Newlun failed to identify a constitutional issue in his Petition, his petition fails on its face and review should be denied.

B. Mr. Newlun Has Failed to Articulate a Basis For Review Under RAP 13.4(b)(4) Because the Court of Appeals Did Not Err And There Is No Matter of Substantial Public Interest

Mr. Newlun's Petition for Review involves the interpretation of an unambiguous statute. His Petition all but concedes that the language of RCW 9.73.230 is clear; he simply doesn't agree with these statutory limitations on exemplary damages. To that end, the statute states that exemplary damages are limited and require a court finding that there was

either no reasonable suspicion or probable cause to believe the surveilled conversation would involve an illegal drug sale. RCW 9.73.230(11). Conversely, officer safety wires or other general violations of the privacy act are not eligible for exemplary damages. Aggrieved plaintiffs in these cases instead can pursue actual damages or liquidated damages. RCW 9.73.060.

Nonetheless, Mr. Newlun asks this Court to accept review in order to judicially change the statute for the sole purpose of making it applicable to the specific facts of his case. Asking the court to graft additional provisions into a statute is not a matter of public importance, especially where the Legislature has spoken in plain terms. The Court of Appeals was correct that these statutes are unambiguous and need no interpretation beyond their plain language. Therefore, further review should be denied.

C. Dismissal of Mr. Newlun's Claim For Exemplary Damages Was Appropriate

Mr. Newlun argues that, despite the plain language of the statute, the Legislature intended to permit exemplary damages in cases outside the scope of RCW 9.73.230. Petition for Review (Petition) at 5-10. The Court of Appeals properly determined that there was no need to read Mr. Newlun's suggested intent into such an unambiguous statute. Moreover, since it is undisputed that the Task Force had a reasonable suspicion that they would be discussing an unlawful sale of marijuana with Mr. Newlun, he could not recover exemplary damages even if the RCW 9.73.230 remedy was

applicable to this case. Further review of Mr. Newlun's argument is not merited.

1. The Court of Appeals Correctly Held That Dismissal of Mr. Newlun's Claim For Exemplary Damages Was Proper

Pertinent to this matter, the Privacy Act provides that, for wires used as part of a bona fide criminal investigation to gather evidence[3], twenty-five thousand dollars in exemplary damages shall be awarded to a claimant if is determined by a reviewing court that:

(a) the wire authorization was made without probable cause to believe the conversation communication will involve the unlawful manufacture, delivery or sale of controlled substances, and

(b) the authorization was also made without a reasonable suspicion that the conversation or communication would involve the unlawful manufacture, delivery or sale of controlled substances. RCW 9.73.230(1)(b), (7), (11).

Here, as stated by the Court of Appeals, "Newlun points to no evidence from any source that suggests the necessary probable cause or reasonable suspicion was lacking. Accordingly, the trial court was correct to dismiss his claim." 194 Wn. App. 1008, at *7. In support of his Petition, Mr. Newlun simply states that "[t]he recitation of facts by the Court of

[3] As discussed below, it is undisputed that the transmitting device used in this case was not an evidence gathering device and, therefore, RCW 9.73.230 does not apply. However, for the purpose of responding to Mr. Newlun's arguments, the details of .230 are discussed here.

Appeals is generally correct." Petition at 3. Nowhere does Mr. Newlun's Petition allege that the Task Force did not have a reasonable suspicion or probable cause to believe that their conversations with Mr. Newlun would involve an illegal drug sale. As the record makes clear, such facts simply do not exist[4].

Thus, the question of whether RCW 9.73.230(11) is applicable to this case need not be reached. Assuming arguendo that .230 applies, Mr. Newlun concedes there are no facts under which he could recover those damages. Specifically, there is no colorable fact-based argument to be made that Mr. Newlun could successfully meet the RCW 9.73.230(11) requirements. Mr. Newlun is simply asking the court to judicially change the statute. For these reasons, dismissal of the exemplary damages claim via summary judgment was proper and need not be further reviewed.

2. The Court of Appeals Correctly Interpreted RCW 9.73

Should this Court consider Mr. Newlun's arguments concerning whether RCW 9.73.230(11) applies in this case, Mr. Newlun's arguments that it does are unpersuasive. He recognizes that his argument is unsupported by a plain reading of the statute, and instead offers *King v. Burwell*,

[4] The Court of Appeals also properly concluded that there was no need to accept Mr. Newlun's invitation to extend the so called "four corner rule" to review of transmitted conversations. Here, Mr. Newlun "ignore[d] his own burden to present evidence supporting the essential elements of his claim," namely evidence that the Task Force had no reason to believe it would be discussing a drug transaction with Mr. Newlun. *Newlun* at 194 Wn. App. 1008, at *7

135 S. Ct. 2480, 2489, 192 L. Ed. 2d 483 (2015) – the U.S. Supreme Court's decision interpreting a provision of the Affordable Care Act. However, the *Burwell* decision does not aid Mr. Newlun here. The *Burwell* Court began its analysis by stating:

> If the statutory language is plain, we must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme. Our duty, after all, is to construe statutes, not isolated provisions.

Burwell, 135 S. Ct. at 2489 (internal quotation marks and citations omitted).

Applying the above principles to the issue of whether the Federal [Health Insurance] Exchange was "established by the State" for purposes of the Act. *Id.* at 2488. As required, the Court first made a determination regarding ambiguity. Having found the pertinent provision to be ambiguous, the Court noted, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Id.* at 2492.

Here, however, RCW 9.73.230(11) is unambiguous. It creates a remedy for persons "whose conversation or communication was intercepted, transmitted, or recorded pursuant to an authorization **under this section**" (emphasis added). Also, 'this section' (i.e., 9.73.230), involves protocols for use of evidence gathering wires employed in furtherance of a bona fide criminal investigation. Thus, it is clear that the Legislature intended this

language to limit the availability of exemplary damages to persons wrongly intercepted, transmitted, or recorded "as part of a bona fide criminal investigation" in which the purpose of the device is to aid in gathering evidence of a crime.

It is logical that the Legislature confined the Privacy Act's most severe remedy to cases in which a person is criminally investigated without reasonable suspicion. All can agree that such action by law enforcement should be harshly addressed. Still, no such action was attempted here, and this Court need not strain to "punish" the good faith actions of the Task Force. The verbal authorization for the safety wire used during the Mr. Newlun drug sale did not fully comply with the requirements of the statute. As a result, evidence was suppressed and Mr. Newlun's criminal case was all but wiped away. The statute worked as intended. The officers erred in using a safety wire with a verbal-only authorization. The criminal trial judge addressed this violation of protocol by applying the sanction specified in RCW 9.73.050, and a just result was achieved.

3. The Court of Appeals' Decision Is in accord with *State v. Salinas*

Mr. Newlun argues that the Court of Appeals erred by "disregarding" *State v. Salinas*, 121 Wn.2d 689, 829 P.2d 1068 (1993). Petition at 8. Throughout this litigation, Mr. Newlun has consistently claimed that *Salinas* supports his exemplary damages claim. It does not. *Salinas* is a criminal case

in which drug sale evidence was suppressed because officers used an evidence gathering body wire during the investigation without first obtaining the required verbal or written authorization. This is consistent with the result in Mr. Newlun's criminal case in which trial judge suppressed evidence due to the lack of written authorization for a safety wire transmitter. CP at 990-93. *Salinas* is not instructive here, and should not be grounds for further review.

D. If Review Is Accepted, the Court Should Also Review the Task Force's Appeal Issues

If this Court accepts review, it should also review the denial of summary judgment in favor of the Task Force. Specifically, there is no material issue of fact regarding whether, but for his commission of a felony drug sale, Mr. Newlun's voice would have ever been transmitted. Thus, RCW 4.24.420 bars his claims. Likewise, it is undisputed that Mr. Newlun had no reasonable expectation of privacy in conducting this marijuana sale with strangers and within public view. As such, the Privacy Act does not protect those conversations. His lawsuit should be dismissed.

1. Mr. Newlun's Claims Should Be Dismissed Pursuant to RCW 4.24.420

In this case, the Privacy Act worked as intended by the Legislature. The criminal trial court found that during the course of an undercover, felony level drug buy, police officers did not follow required procedures related to

the use of an officer safety wire. Consequently, some evidence was properly suppressed in the resulting criminal case. Thus, although he was caught "red handed," Mr. Newlun received a substantial benefit in the criminal case because the Privacy Act remedied the transmission of some of his conversations about the drug sale without his consent by rendering testimony about the content of those conversations inadmissible. With evidence of the transmitted conversations suppressed, the prosecution agreed to reduce the felony charges against Mr. Newlun to one simple misdemeanor. Due to the protections the Privacy Act afforded him, Mr. Newlun avoided a felony conviction and a substantial sentence.

Now, Mr. Newlun seeks the additional remedy of financial compensation for injuries he claims resulted from the transmission of his drug sale conversations. However, the Legislature has determined that persons who are injured may not civilly recover if they are engaged in the commission of a felony at the time of the injury, and the felony was a proximate cause of the injury. Therefore, while the person may have other remedies or protections available to redress the alleged harm (just as Plaintiff was redressed during the criminal proceeding), civil damages simply are not available.

It is undisputed that the only reason Mr. Newlun and Trooper Hanger had any conversations on March 16, 2011, was to consummate the sale of

approximately three pounds of marijuana; a sale that had been arranged over the phone before the officer safety wire was used. CP at 852-53. It is undisputed that Mr. Newlun and Hanger were strangers prior to that date, and would never have been in contact with one another or transmission of Mr. Newlun's voice but for that drug sale. It is also undisputed that the sale of three pounds of marijuana is a felony under Washington State law.

The Court of Appeals agreed that RCW 4.24.420 is an available defense in this case, but concluded "it is at least arguable that but for the Task Force's decision to transmit Newlun's conversations without complying with the statute, none of Newlun's claimed injuries would have occurred." *Newlun*, 194 Wn. App. at *6. Respectfully, while most things in modern society are arguable, the undisputed facts here are that the drug deal was agreed upon over the phone before the safety wire was even used. CP at 852 53. There are no facts to suggest the deal would have unfolded any differently if the transmitter authorization was reduced to writing.

These facts are genuinely undisputed. Mr. Newlun placed no evidence or responding affidavits before the trial court that would even allow some inference that he was not in the course of committing a felony at the time his conversations relating to that felony were transmitted. If review is accepted, this Court should dismiss Mr. Newlun's claims pursuant to RCW 4.24.420.

2. Mr. Newlun's Privacy Act Claims Should Be Dismissed Because He Had No Reasonable Expectation of Privacy in His Illegal Acts[5]

The trial court and the Court of Appeals erred in finding that the conversations between Mr. Newlun, the informant, and Trooper Hanger were not private as a matter of law. The evidence was uncontroverted below and showed that the conversations at issue were between total strangers, took place in a public place in a stranger's car, and concerned only routine illegal drug sales. Consistent with this Court's holdings in *State v. Kipp*, 179 Wn.2d 718, 318 P.3d 1029 (2014); and *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996), these conversations were not private and the courts below erred in concluding otherwise.

The protections of the Privacy Act apply only to private communications or conversations. *Clark*, 129 Wn.2d at 224. The term "private" was not defined by the Legislature, but Washington courts have analyzed the term in different contexts to determine whether a conversation or communication is private. "[T]he intent and reasonable expectations of the participants as manifested by the facts and circumstances of each case controls as to whether a conversation is private." *Id.*, quoting *Kadoranian v.*

[5] In his Petition, Mr. Newlun inappropriately asks this Court to review whether a jury can decide, as a question of fact, whether a conversation is private or not. Petition at 15-17. Mr. Newlun did not appeal this issue, nor did he ask the trial court to make this determination. Mr. Newlun isn't entitled to review of a question he did not raise in the trial court or on appeal. RAP 2.5 and *see also Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879, 886 (2008).

Bellingham Police Dep't, 119 Wn.2d 178, 829 P.3d 1061 (1992). The term "private" is to be given its ordinary meaning. *Id.* at 224-25. The definition of "private" includes, in part: "secret," "holding a confidential relationship to something," "not open or in public." *Id.*

In looking at the reasonable expectations of the participant, the court examines: (a) the duration and subject matter of the conversation, (b) the location and presence of third parties, and (c) the relationship of the parties. *Clark* at 225-27. Subjective intentions of the parties do not control the analysis. Instead, courts look to other factors bearing on the reasonable expectations and intent of the participants. Whether a conversation is private is question of fact, except where the facts are undisputed and reasonable minds could not differ. *Clark* at 225; see also *Kipp* at 722-23. Then, the matter should be decided as a matter of law. *Kipp* at 722-23.

Here, Mr. Newlun did not submit any affidavits or declarations to the trial court regarding the Task Force's privacy arguments. CP at 887-96. Thus, the facts in the affidavits presented by the Task Force are verities on appeal. *Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989) ("When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established."). These undisputed facts establish that Mr. Newlun's claim fails all three prongs of the *Clark* analysis.

First, the subject matter of the drug sale conversations was routine and thus not private in nature. The transmitted conversations at issue were about an unlawful marijuana sale and could have occurred with any one of Mr. Newlun's customers. CP at 852, 861. Further, the record undisputedly shows Mr. Newlun was a known drug dealer, he sold drugs to Trooper Hanger, he responded to what amounted to a cold (untransmitted) call for drugs from an informant whom Mr. Newlun did not know, and that the conversations were solely about the drug transaction and the possibility of future deals. CP at 852, 866-68.

As further evidence of the routine business conversation, Mr. Newlun also discussed coming to Bellingham every two weeks to sell marijuana and that he arranged another purchase of marijuana immediately after the deal with Hanger. CP at 852, 866-68. The detectives confirmed there was indeed a second deal done with another party soon after the informant and Hanger left. CP at 852, 866-68. All of these facts showed Mr. Newlun was in the business of dealing marijuana and that his conversations with Hanger were routine.

Second, the conversations at issue occurred in public locations where no ordinary person would have an expectation of privacy. Specifically, Mr. Newlun talked through an open car window at the front curb of a mini-mall parking strip being used by other shoppers, and where he conducted a drug deal on a residential neighborhood and public street in a stranger's car.

Clark's ruling is in accord with other decisions, which have held that a conversation cannot be private if it occurs in public, *Johnson v. Hawe*, 388 F.3d 676, 683 (9th Cir. 2004) ("With his window rolled down in a public parking lot, Chief Nelson's police radio communications were 'within the ... hearing of passersby' such as Johnson and other members of the public, and thus could not be private under the Act."), or in a private home where drugs are sold, *State v. Hastings*, 119 Wn.2d 229, 830 P.2d 659 (1992) (conversations in private residence regarding routine drug sales not private).

Moreover, Trooper Hanger was a third party to the transaction which means Mr. Newlun had no expectation of privacy with either Hanger or the informant. As *Clark* suggests, a reasonable person would not have an expectation of privacy or that a secret will be held when there is a third person present. Accordingly, Mr. Newlun had no reasonable expectation of privacy as a matter of law.

Third, as noted above, Mr. Newlun did not have any pre-existing relationship with either Hanger or the informant. It is undisputed that Mr. Newlun and Hanger were perfect strangers. Likewise, Mr. Newlun and the informant did not know one another prior to the day of the sale[6]. Importantly, the transaction ultimately occurred in Hanger's car. The *Clark* Court held that there is no expectation of privacy while in a stranger's car.

[6] At his deposition in this matter, Mr. Newlun inadvertently revealed that he does not even know the informant's name. He incorrectly identified the informant as "Mike Burger" during his deposition. CP at 857-58.

For these reasons, Mr. Newlun did not have an expectation of privacy. Thus, the conversations at issue were not private and Mr. Newlun has no cause of action under the Privacy Act. Accordingly, the trial court and Court of Appeals erred in denying the Task Force's joint motion for summary judgment based on lack of privacy. Both the lower court decisions are also inconsistent with this Court's reasoning in *Kipp* and *Clark*. If this Court accepts review of this case, it should request briefing on this issue, dismiss Mr. Newlun's claims because he had no expectation of privacy in his conversations during this routine drug transaction.

V. CONCLUSION

Mr. Newlun has not demonstrated that this case merits review pursuant to RAP 13.4(b). The Court of Appeals properly interpreted RCW 9.73.230, and its interpretation does not involve a question of substantial public interest or present a significant question of law under the Constitution. For the foregoing reasons, the State respectfully requests that this Court deny review.

RESPECTFULLY SUBMITTED this 22nd day of September, 2016.

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DECLARATION OF SERVICE

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of September at Seattle, Washington

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KELLY HADSELL
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No. 92950-5
Newlun v. Sucee, et al.
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