No. 72642-1-I

93449-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

RICK SUCEE, Commander of the Northwest Regional Drug Task Force, CRAIG JOHNSON, Police Officer for the City of Bellingham, RICHARD FRAKES, Deputy Sheriff for Whatcom County, and B. L. Hanger, Trooper, Washington State Patrol, and the City of Bellingham, a Subdivision of the State of Washington, Whatcom County, a subdivision of the State of Washington, and the State of Washington,

Appellants,

v.

TODD NEWLUN,

Respondent and Cross Appellant.

CORRECTED

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS FOR DIVISION ONE

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A. IDENTITY OF PETITIONER

Todd Newlun asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

A copy of the decision is in the Appendix at pages 1-18. A copy of the order denying the motion to reconsider is in the Appendix 2. A copy of RCW 9.73.210 is Appendix 3. A copy of RCW 9.73.230 is Appendix 4.

C. ISSUES PRESENTED FOR REVIEW

1. Does RCW 9.73.230 (11) signal legislative intention to impose exemplary damages where the police disregard the statutory mandate of always preparing a written authorization signed by a supervisory police officer and verbally intercept a private conversation?

2. When police officers illegally intercept a private conversation at the verbal direction of a supervisory police officer, may the responsible police department escape exemplary damages by later presenting testimony to the existence of probable cause or reasonable suspicion, though that information was never contained within the four corners of any written application or authorization? Or is the person whose conversation has been illegally intercepted automatically entitled to exemplary damages because the only quantum of facts that any court can examine to establish reasonable suspicion or probable cause must come from the four corners of the written authorization?

3. The Superior Court and the Court of Appeals refused to decide whether the conversation at issue was private, holding it was a question of fact for the trier of fact upon remand. Does the record establish the conversation was private as a matter of law? If not, is the question of whether a conversation is private a matter exclusively reserved to the court and not the jury?

4. Does RCW § 4.24.420 apply as a defense, and if so, did the Superior Court and the Court of Appeals err in concluding that application of the defense was a question of fact for the jury?

D. STATEMENT OF CASE

The recitation of facts by the Court of Appeals is generally correct. Reference to the drug transaction as only involving two half pounds bags of marijuana, see Slip Opinion at page 3 is incorrect. The actual amount was over three pounds and the amount of cash involved was approximately $8,000.00. CP 76.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case meets the criteria for review under RAP 13.4 (3) and (4). This case presents a question concerning the exemplary damage award of $25,000 per interception provided by statute. When a supervisory police officer disregards the command of the statute that there must be a written authorization completed and signed before any interception of private communications can take place and he verbally directs that a private conversation be intercepted, the citizen whose conversation is intercepted should be entitled to exemplary damages as the officer has committed the most egregious violation of the statute imaginable.

1. The recent decision of the United States Supreme Court in King v. Burwell, 135 S. Ct 2480 (2015) provides the legal authority to construe the statute and to conclude clearly that the legislature intended to sanction illegal police interception of private

> communication without a written authorization by imposing exemplary damages. Without it, the central command of the statute of always mandating a written authorization becomes unenforceable.

In King v. Burwell, the United States Supreme Court rejected the implementation of clear statutory language because acceptance of it would undermine the successful functioning of the Affordable Care Act and make it economically unworkable. The court rejected the plain meaning reached a result, which contradicted the plain meaning because it would have frustrated the legislative intention that the Affordable Care Act be workable. The same circumstance exists here. There is no conceptual difference between King v. Burwell and the statutory construction urged here by plaintiff Newlun. The 1989 amendments to the privacy act allowing police to intercept without court approval created a right to exemplary damages as a bulwark against police transgression of the central requirement of the 1989 amendments- there must always be a written authorization so there can be review. It is absurd to conclude that the legislature intended the imposition of exemplary damages only when police are negligent in preparation of their paper, but not when they utterly fail to prepare any written authorization whatsoever. The Court of Appeals blind adherence to the plain language rule of statutory construction has resulted in making the statute unworkable and denying legislative intent; see Slip Opinion at 14-17. This court should hold that interception by the police of a conversation without any written authorization entitles the person whose conversation was illegally intercepted to

exemplary damages as a matter of law to preserve the integrity and inviolability of the privacy act and to fulfill the obvious legislative intent.

The Court of Appeals holds that the exemplary damage sanction applies only in a case where the police complete a written authorization for an evidence gathering wire under RCW 9.73.230 and it is later determined that the authorization does not establish reasonable suspicion. The Court of Appeals ruled that an exemplary award cannot apply when a police supervisory officer verbally directs the interception, even though this action of disregard for the necessity of completing a written authorization is a felonious act under RCW 9.73.230 (10).

The best the Court of Appeals could do was to recognize that its own interpretation of the statute creates an anomaly, "It would be anomalous that a good faith, but inadequate, attempt to comply with the statute could result in the imposition of exemplary damages, but ignoring the statute altogether would not." Slip Opinion page 15, footnote 9 last sentence. Intercepting with only a verbal authorization is criminal in nature because RCW 9.73.230 (10) makes it a Class C Felony for a person to intentionally violate the provisions of the 1989 amendments. RCW 9.73.210 (10) does not make knowledge by the police supervisory officer that his actions are illegal an element of the legislatively created Class C felony. The only way a supervisory police officer could commit a felony offense under the 1989 amendments would be to verbally direct the interception of a communication without preparation of any paperwork as

required by the statute.[1]

The Court of Appeals concluded that because the statutes are unambiguous, citing State v. J.P. 149 Wn2d 444, 450, 69 P.3d 318 (2003), its hands were tied and it could not add words to the statute to implement the result desired by Newlun. Slip Opinion, page 16. In State v. J. P., supra, the court stated the following as the operative principles of statutory construction:

> Principles of Statutory Interpretation. Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wash.2d 9, 19, 978 P.2d 481 (1999). Our starting point must always be "the statute's plain language and ordinary meaning." Id. When the plain language is unambiguous—that is, when the statutory language admits of only one meaning—the legislative intent is apparent, and we will not construe the statute otherwise. State v. Wilson, 125 Wash.2d 212,

[1] The circumstances around the interception of Joaquin Meza offers an example of possible prosecutable case against Craig Johnson and Brent Hanger because they intercepted the conversation of Meza and did not disclose their illegal action in their police reports. All of the other police officers involved did not recall that Meza's conversation was being intercepted and Lieutenant Sucee, whom Craig Johnson and Brent Hanger claimed verbally authorized the interception, did not recall giving verbal authorization. Meza and his attorney were never advised of the illegal interception. Meza was sentenced to ten (10) years imprisonment and is still incarcerated. The police reports of Craig Johnson and Brent Hanger in the Meza case are found at CP 439-478. Sergeant Frakes who was involved in the Meza purchase where Craig Johnson and Brent Hanger used a wire, did not recall that a wire was used CP 254, 255. 256, lines 24, 25. Frakes did not prepare a written report in the Meza interception. Craig Johnson testified that there was no written authorization in the first Meza buy, CP 296 line 6. Craig Johnson disclosed a wire was used in the second buy which was recorded, CP 297, line 21 but he did not disclose it in his report of the first purchase, CP 297, line 4. Johnson was aware that Hanger was to wear a wire on the first buy and that all the police involved met at the Snoqualmie Police Department. Commander Sucee testified in the first hearing on suppression on August 23, 2011 that the Newlun case was the only verbal authorization of an officer safety wire, CP 1042. Later, on September 8, 2011 when the suppressing hearing reconvened, Sucee recalled another one, the Meza case, CP 1052 line 9.

> 217, 883 P.2d 320 (1994). Just as we "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language," State v. Delgado, 148 Wash.2d 723, 727, 63 P.3d 792 (2003), we may not delete language from an unambiguous statute: " 'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.' " Davis v. Dep't of Licensing, 137 Wash.2d 957, 963, 977 P.2d 554 (1999)(quoting Whatcom County v. City of Bellingham, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996)). The plain meaning of a statute may be discerned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 11, 43 P.3d 4 (2002); State v. Clausing, 147 Wash.2d 620, 630, 56 P.3d 550 (2002) (Owens, J., dissenting) (noting that "[a]pplication of the statutory definitions to the terms of art in a statute is essential to discerning the plain meaning of the statute"). Where we are called upon to interpret an ambiguous statute or conflicting provisions, we may arrive at the legislature's intent by applying recognized principles of statutory construction. ***A kind of stopgap principle is that, in construing a statute, "a reading that results in absurd results must be avoided because it will not be presumed that the legislature intended absurd results."*** **Delgado,** ***148 Wash.2d at 733, 63 P.3d 792 (Madsen, J., dissenting) (citing, among other cases.*** **State v. Vela,** ***100 Wash.2d 636, 641, 673 P.2d 185 (1983)).***

To the same effect, see State v. Fiermestad, 114 Wash. 2d 828, 835, 791 P.2d 897 (1990) where the Supreme Court remarked that "statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided. "

The analysis of the Superior Court and Court of Appeals and police interpretation misses the mark by trying to categorize a verbal directive to intercept a private communication, if motivated to protect officer safety, as a RCW 9.73.210 wire or the equivalent thereof. See Slip Opinion at 15, n. 9. This is error because State v. Salinas 121 Wash.2d 689 (1993) holds an interception

based upon a verbal command of a supervisory police officer is neither a 9.73.210 or a 9.73. 230 wire. The language of Salinas is very specific. " In conclusion, the State concedes that Detective Johal's body wire was not authorized under either RCW 9.73.210 or 9.73.230. ***Consequently neither RCW 9.73.210 nor RCW 9.73.230 applies." Salinas 121 Wash2d at 697.***

The Court of Appeals concluded, "We reject the argument, however, because the statutes are unambiguous. Section .230 explicitly provides for exemplary damages, section .210 does not.[2] If a statute is unambiguous, our role is to interpret the statute as enacted. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We will neither add words nor subtract them in the guise of interpretation. Slip Opinion page 16.

The Court of Appeals opinion is flawed by its disregard for Salinas and acceptance of the police argument that an interception without a written authorization can be the equivalent of a 210 wire for officer safety. Because Section 210 does not expressly state that an exemplary damage award is available, the Court of Appeals ruled that an exemplary damage award could be possible only under Section 230 (11).

The interpretation of the Court of Appeals limits the application of the exemplary damage provision to evidence gathering wires under RCW 9.73.230 (11) where later judicial review establishes supervisory negligence, i.e. that the written authorization order failed to even meet the standard of reasonable

[2] This statement reflects the Court of Appeals adoption of the police argument and the Superior Court's analysis in this regard.

suspicion. But even this remedy is threatened by the Superior Court in this case. The Superior Court permitted the police to after the fact of an interception effected as a result of a verbal command from a police supervisory officer, to come forward and present evidence to show that there was reasonable suspicion. Logically this after the fact cure would also be available to the police when they are sued for a deficient written authorization under RCW 9.73.230 (11).

It is more than ironic that the police, having come to the legislature in 1989 seeking a grant of authority premised upon absolute compliance with the requirement for written authorization, now present an interpretation of the act, which eliminates the possibility of any exemplary damage award for total failure to comply. In statutory construction, no part of a statute should be rendered superfluous.

The specification of an exemplary damage award in circumstances where the police follow the command but miscalculate in their written presentation of probable cause establishes ambiguity in the statute. Looking at each of the two sections in isolation, it is possible to say that exemplary damages can be awarded only under Section 230 "pursuant to an authorization under this section", RCW 9.73.230 (11). But looking at the statute as a whole in an effort to discern its intent, the court can hold that exemplary damages are available when the police interception is not pursuant to any authorization under any section. Respectfully, it is an absurd legislative intent to impose exemplary damages where the police are negligent in a good faith attempt to comply with the statute, and withhold

exemplary damages when the police ignore the central command of the statute that there must be a written authorization prepared and signed by a supervisory police officer before the police intercept any private conversation. This is particularly true when the legislature has increased the penalty for illegal police interception to a Class C felony offense, RCW 9.73.230 (10) and where a litany of cases emphasize that Washington has enacted the strongest privacy laws in the nation.

The Court of Appeals decision eviscerates the central requirement of the statute to mandate a written order before any interception takes place. The legislative decision to punish police severely for negligent administration of the statute establishes ambiguity and frees the court to determine that the legislature intended the same penalty when the police ignore the statute and proceed to intercept with no written authorization.

2. When police officers illegally intercept a private conversation at the verbal direction of a supervisory police officer, may the responsible police department escape exemplary damages by later presenting testimony to the existence of probable cause or reasonable suspicion, though that information was never contained within the four corners of any written application or authorization? Or is the person whose conversation has been illegally intercepted automatically entitled exemplary damages because the only quantum of facts that any court can examine to establish reasonable suspicion or probable cause must come from the four corners of the written authorization?

The only evidence that should be necessary to establish a claim for the exemplary damage award is the fact that no written authorization was obtained before the interception. The statutory language is very explicit. It requires a

written document referred to as an "authorization" which contains in the written document all the necessary requisite facts. RCW 9.73.230 (2). When this document is reviewed ex parte by a Superior Court Judge, the review is of the written authorization document order. If the Superior Court determines that the facts asserted in the written authorization are insufficient to establish even reasonable suspicion, the person whose conversation was intercepted is entitled to recover $25,000 from each police agency.

The absence of a written authorization establishes, a fortiori, the absence of any quantum to support the intercept. The four corner rule applied to judicial scrutiny of affidavits in support of a search warrant applies. Under that rule, the facts supporting the warrant are limited to only the information available to the issuing judge or magistrate at the time the warrant was requested. State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 16, see also Whiteley v. Warden, 401 US 560, 565 n. 8 (1971).

The 1989 amendments created RCW 9.73.210, the officer safety wire, and RCW 9.73.230, the evidence gathering wire. Central to both is the absolute necessity of a written authorization order signed by a supervisory police officer showing the requisite probable cause or reasonable suspicion in writing within the four corners of the document. There is no indication that the legislature intended or contemplated that supervisory police officers would be so bold as to direct the interception of a private communication by a verbal authorization.

Salinas applied the total suppression remedy of RCW 9.73.050 and rejected the state's attempt to admit the visual observations of the undercover police officer made when he was intercepting the conversation of the defendant in his residence. The Court of Appeals dodges by pointing out in Salinas there was no showing there that any supervisory police officer verbally directed the interception; see Slip Opinion, page 15, footnote 9. The state argued in Salinas that the visual observations should be admissible based upon after-the –fact testimony under the savings provisions of RCW 9.73.210 (5) and and RCW 9.73. 230 (8). This court rejected that argument.

The response of the police here is a similar one and is reflected in its reply brief at pages 16-18. The police cite remarks of Superior Court Judge Snyder, who granted Newlun's motion to suppress in the criminal case. Judge Snyder said he considered this interception to be an officer safety wire under Section 210. The police argued, "There was never any use of an evidentiary wire to gather evidence against Mr. Newlun." Thus, they say, RCW 9.73.230 with its provision for exemplary damages in 230 (11) does not apply, Reply Brief at page 19.

In rejecting this argument, this court in Salinas analyzed the wording in the statute and reached a conclusion at odds with the reasoning of the Superior Court, as condoned by the Court of Appeals in this case. Under Salinas, a paperless wire, i.e. where a police supervisor verbally directs the interception of a conversation, regardless of motivation determined after the fact, does not qualify as either an officer safety wire or an evidence gathering wire.

The Salinas case is instructive because it explains the purpose and difference between the two statutes, RCW 9.73.210 and RCW 9.73.230. Its concluding remarks are here: " In conclusion, the State concedes that Detective Johal's body wire was not authorized under either RCW 9.73.210 or 9.73.230. Consequently neither RCW 9.73.210 nor RCW 9.73.230 applies." This language in Salinas controls and the Superior Court erred in determining after the fact that the wire in this case was for officer safety under Section 210.

The Superior Court accepted the police argument that because the police later testified that they were motivated to intercept Newlun's conversation because they legitimately feared for the undercover officer's safety, the interception was "an officer safety wire." And because the Officer Safety Wire section RCW 9.73.210 has no exemplary damage section, as does the evidence gathering section, RCW 9.73.230 (11), the court concluded there is no possibility for recovery of exemplary damages by Newlun. The court's analysis suggests that if the police testified after the fact that they recorded the conversation here to use as evidence that Newlun would been entitled to exemplary damage award provision of RCW 9.73.230 (11).

The analysis of Salinas makes clear that the necessary precondition of a lawful intercept is that it be authorized. And authorized is defined in the statute to require the written order containing all requisite information including probable cause or reasonable suspicion to support the intercept. The written "authorization" referenced throughout the privacy act is the act's counterpart to an affidavit of

probable cause. It is clear from the language of RCW § 9.73.230 that the word "authorization" itself refers to a written record. An "authorization" is valid only "from the time it is signed." See RCW § 9.73.230(5). Any "extension" of the "authorization" must also be signed. Id. The law enforcement agency must submit a report to the Superior Court that includes "the original authorization" within fifteen days of the interception. RCW § 9.73.230(6).

Thus, the plain language of the statute supports the argument that for the police to escape liability under the exemplary damages provision of RCW 9.73.230(11), they must rely on evidence contained in a written "authorization." Under RCW 9.73.230(11)(a), a reviewing court must determine that an "authorization was made without the probable cause required by subsection (1)(b)" of the section. This language presupposes that a written authorization exists. And under RCW 9.73.230(11)(b), the court must satisfy itself that the "authorization" was also made with adequate reasonable suspicion. Again, this assumes that the court will have some type of written authorization to review on this basis.

The Court of Appeals acknowledged Newlun's rule, automatic exemplary damages if a police supervisor directs the interception of a private communication without a written "authorization." Slip Opinion, pages 15-17.

> "Newlun argues that the reach of subsection 230 (11) should be extended to section 210 when a police agency makes no attempt to comply with the procedures requiring written authorization. He argues that we should be guided by the legislative intent and purpose of the statute, to punish intentional wrongs, and deter their future commission by "'making an

> example'" of police agencies that disregard the statute's procedural requirements. Br. of Resp. at 24. We reject the argument, however, because the statutes are unambiguous. Section .230 explicitly provides for exemplary damages, section .210 does not. If a statute is unambiguous, our role is to interpret the statute as enacted. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We will neither add words nor subtract them in the guise of interpretation.
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> 3. The Superior Court and the Court of Appeals refused to decide whether the conversation at issue was private, holding it was a question of fact for the trier of fact upon remand. Does the record establish the conversation was private as a matter of law? If not, is the question of whether a conversation is private a matter exclusively reserved to the court and not the jury?

This case meets the requirement for review for the additional reason that, for the first time, a court has evaluated the circumstances of the typical drug deal, that requires a written authorization for the wire and says that it is not a private communication as a matter of law, but instead a question of fact for the trier of fact. The holding of the Superior Court, affirmed by the Court of Appeals, is error. The argument of the police to this effect is totally disingenuous because at the time of the verbal authorization by the supervisory police officer, he, as well as all of the seasoned drug police officers, concluded that it was a private communication to which the privacy act applied. That is why the undercover police officers asked their supervisory office for permission to intercept. The County Prosecutor conceded in the criminal case that the conversation was private. It was only late into the litigation that the police raised this argument that the conversation was not private. The record is ample on the testimony presented and there is no disputed question of fact which might change the conclusion as to whether the conversation was private or not. If affirmed, the holding of the Court

of Appeals is significant because it would dramatically diminish the necessity for the police to seek wire authorization in drug cases. The fact pattern in this case is identical to or very similar to the typical drug deal involving an informant or undercover officer.

The Court of Appeals rejected the police argument that the conversation was not private as a matter of law and affirmed the Superior Court that the issue was to be resolved by the trier of fact.

In the Court of Appeals briefing as well as before the Superior Court, Newlun argued that while in some circumstances the question of whether a conversation is private may be a question of fact, that determination must always be done solely by the court, and not by the jury. Newlun's position is predicated on the exclusionary rule of RCW 9.73.050 which prohibits introduction of evidence taken in violation of the privacy act unless the national security is implicated. Newlun reasoned it is rudimentary that the court, not the jury, will decide whether or not a conversation is private. Newlun moved for reconsideration asking the Court of Appeals to clarify its position here, lest upon remand all of the conversation evidence is placed before the jury. A demand for jury trial was filed in this case.

The police argument that the conversation here was private is based upon State v. Clark, 129 Wn2d 211, 916 P.2d 384 (1996) and State v. Kipp, 179 Wn2d 718, 317 P.3d 1029 (2014). The conversation bears no similarity to what occurred in Clark. In Kipp, the Washington Supreme Court was able to resolve the question

whether the conversation intercepted and recorded was private on the short record of undisputed facts. In this case, the record is longer but the facts are still undisputed. The record consists of testimony of the police officers before Judge Snyder who presided at the criminal suppression hearing as well as brief testimony on the record in the civil case supplemented by lengthy depositions of the major police officer participants. The record is more than ample for the court to make this determination.

In remanding the case back to the trial court for resolution whether the conversation was private, the Court of Appeals identified no factor that had to be addressed as to provide a basis to make the ultimate determination of whether the conversation is private or not. The court should hold as a matter of law that the conversation was private.

4. The Felony Tort Statute, RCW § 4.24.420, Does Not Apply To Actions For Violations Of The Privacy Act

The Court of Appeals erroneously found disputed issues of fact about whether there is a causal relationship between Newlun's commission of a felony and his alleged injuries, Slip Opinion at 14. Under Washington's felony tort statute, RCW § 4.24.420, a defendant is completely absolved of liability if a causal relationship can be established between a plaintiff's felonious conduct and the plaintiff's injuries. The statute provides the defendant with a defense to an action for damages for personal injuries or wrongful death if the plaintiff was injured or killed in the commission of a felony and the plaintiff's commission of the felony was causally related in time, place, and activity to the plaintiff's

injuries. Id. RCW § 4.24.420 is inapplicable to bar the civil remedies that are explicitly provided for in Washington's privacy act. And even if it did apply, the defendants here cannot show, as a matter of law, the requisite causation.

a. The Felony Tort Statute Does Not Apply To Cancel the Statutory Civil Damages Provided For In The Privacy Act

The felony tort statute was adopted in a fervor of tort reform that resulted in the passage of the Washington Tort Reform Act. It was passed to limit recovery for common law actions for tort, not statutorily prescribed remedies that punish illegal government activity. See, e.g., 1986 JOURNAL, 49th Leg., Reg. Sess. & 1st Spc. Sess at 15 ("We have seen all kinds of crazy cases in which a felon runs across a skylight and falls into a school and sues and gets a quarter of a million dollars. Those kinds of cases are what has driven the cost up and we have to do something to change our tort system and bring it in line."). Indeed, the statute itself contains an exception for actions brought under 42 U.S.C. § 1983. See RCW § 4.24.420 ("nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983"). This exception effectively prevents government officials sued under Section 1983 from taking advantage of the statute's complete defense.

The felony tort statute has been almost universally enforced to prevent plaintiffs from recovering in tort for injuries incurred due to police action taken in hot pursuit of the fleeing plaintiff. See, e.g., Estate of Villarreal ex rel. Villarreal v. Cooper, 929 F. Supp. 2d 1063, 1078 (E.D. Wash. 2013) (wrongful death tort); White v. Pletcher, 170 Wash. App. 1012 (2012) (unpublished) (assault, battery,

and negligent and intentional infliction of emotional distress torts); Estate of Lee ex rel. Lee v. City of Spokane, 101 Wash. App. 158, 175 (2000) (wrongful death, survivor and outrage torts). The only case the defendants can point to for the proposition that the felony tort statute limits statutorily prescribed remedies is Dickinson v. City of Kent, No. C06-1215RSL, 2007 WL 4358312 (W.D. Wash. Dec. 10, 2007). Dickinson too involved the classic felony tort scenario – a plaintiff was involved in a police chase that ended when a police dog immobilized him; he sustained puncture wounds on his leg in the process. Id. at *1. The plaintiff sued under Washington's strict liability dog bite statute, RCW 16.08.040. Ultimately, the Court found that whether or not RCW § 4.24.420 provides a complete defense to plaintiff's strict liability claim was a matter properly reserved for trial. Id. at *3.

In any event, the felony tort statute cannot provide a defense to the exemplary damages provision of RCW § 9.73.230(11). Exemplary damages, by definition, are not damages awarded for personal injury. Their purpose is to deter. See Brief of Respondent and Cross Appellant, p. 23-26, supra; see also Restatement (Second) of Torts § 908, cmt. a ("The purposes of awarding punitive damages, or 'exemplary' damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future."); BMW of North America, Inc. v. Gore, 517 U.S. 559, 582 (1996) (recognizing that heavier punitive damages awards have been thought to be justifiable when wrongdoing is hard to detect, increasing the defendant's

chances of getting away with it); Exxon Shipping Co. v. Baker, 554 U.S. 471, 494-95 (2008) (recognizing that some regulatory schemes provide by statute for multiple recovery in order to induce private litigation to supplement official enforcement that might fall short if unaided).

In this case, applying the felony tort statute to limit the remedies of the privacy act would thwart the purpose of the privacy act's broad remedial scheme—"The Washington privacy act puts a high value on the privacy of communications. In light of its strong wording, the act must be interpreted to effectuate the legislative intent." State v. Christensen, 153 Wash. 2d 186, 200 (2004). It would also insulate police misconduct of the type exemplified here. Defendant police officers in actions brought under the privacy act should not be absolved of civil liability simply because their negligence—here, their utter failure to comply with the privacy act— was directed at a plaintiff, who, luckily for defendants, may have committed a crime. There is no language within the privacy act to suggest that it only protects those innocent individuals targeted by the police. Instead, the Act affords a robust remedial scheme, designed to deter police misconduct and to keep the number of privacy violations low.

b. Even If the Felony Tort Statute Did Apply, The Defendants Cannot Show The Requisite Causation As A Matter of Law

Even if the felony tort statute did apply, the defendants still must show two things: that Mr. Newlun's conduct constituted a felony and that this felony was the proximate cause of his injury. See RCW § 4.24.420.

First, Mr. Newlun was not convicted of a felony in the underlying criminal proceeding—he pleaded guilty to a misdemeanor. Second, any evidence that might establish the commission of a felony is inadmissible due to police noncompliance with the Washington privacy act. See CP 175-77; see also RCW § 9.73.050.

Third, the defendants cannot establish that Mr. Newlun's injury was causally related to the commission of a felony in time, place, or activity. Under the law, the unlawful act must be found to have proximately caused the injury. RCW § 4.24.420. Here, it was the officers' failure to get a signed written authorization satisfying the statutory requirements that caused the statutory breach of Mr. Newlun's right to privacy, not any illegal act he committed. Indeed, Mr. Newlun's injury— caused by the police failure to obtain the lawful authorization—was not caused by the alleged illegal activity. It occurred prior to that activity. Thus, there can be no causal link between Mr. Newlun's alleged illegal activity and the officers' decision to violate RCW § 9.73.230 by illegally intercepting and transmitting Mr. Newlun's conversation. Thus, the defendants cannot meet the proximate causation requirement of RCW § 4.24.420.

F. CONCLUSION

The record in this case demonstrates a complete breakdown in Whatcom County of the statutory mandate that before any interception of a private communications is attempted in Washington, a supervisory police officer must complete a written application and sign the same before any interception is

attempted. In the testimony presented in the pretrial suppression hearing, Commander Succee testified first that there was only one occasion where a paperless officer safety wire was used, which was the Newlun case. But later he recalled another one, CP 1052 line 9, after he had been briefed CP 409, line 7, which involved Joaquin Meza, but Sucee had no memory of the event, CP 409, line 10. Sucee also testified that thirty three (33) per cent, or thirty per cent (30) or twenty five (25) per cent of all the interceptions executed by the Northwest Regional Drug Task Force were telephone wires, CP 417, 418. Sucee described the telephone wire as one in which he verbally authorizes the intercept after a police officer in the field "reads" probable cause over the telephone. The contents of the telephone conversation are not recorded and preserved for later judicial review. The non supervisory police officer (not the supervisory police officer) supposedly completes the authorization at the time of the telephone call and then later, sometimes days later, the written authorization is presented to Sucee, who signs it. CP 1056-1058. [3] In the month of June 2011 out of ten (10) wires

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[3] RCW 9.73.230 provides c) A written report has been completed as required by subsection (2) of this section.
(2) ***The agency's chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a written report at the time of authorization indicating:***
(a) The circumstances that meet the requirements of subsection (1) of this section;
(b) The names of the authorizing and consenting parties, except that in those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged;
(c) The names of the officers authorized to intercept, transmit, and record the conversation or communication;
(d) The identity of the particular person or persons, if known, who may have committed or may commit the offense;

authorized, Sucee testified that 25 to 30 % "is not unusual." CP 681. It is important to understand that Sucee had no idea of the identity of the officers Sucee was verbally authorizing to intercept, transmit, and record the conversation or communication. This practice of illegal telephone wires was commonplace as far back as 2007 according to Trooper Brent Hanger, CP 354, line 12. Finally, it was stopped in this case in response to a motion to enjoin the practice; see Declaration of Kevin Hester, CP 811-812. Newlun was denied any attorney fees for his action in terminating this pernicious illegal practice because since the police agreed to terminate the practice, no injunction was needed. These telephone wires were never released to the defendant or to their attorneys and the overwhelming percentage of these defendants were charged with delivery of controlled substances and received and served prison sentences.

For all of the aforementioned reasons, this case presents this court with the opportunity to examine and decide if a litigant can sue for damages under the 1989 amendments and if so, whether exemplary damages applies, whether the conversation was private when the police at the time they intercepted it thought it was a "private communication; " and also whether the police can apply the felony tort statute to defeat recovery. All of these considerations qualify this case for review under RAP 13.4 (b) (3) and (4).

(e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication; and
(f) Whether there was an attempt to obtain authorization pursuant to RCW 9.73.090(2) and, if there was such an attempt, the outcome of the attempt.

26th

Respectfully submitted this day of July, 2016

William Johnston, WSBA 6113
Attorney for Petitioner Todd Newlun

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TODD NEWLUN, and all other persons similarly situated Respondent/Cross-Appellant, v. RICK SUCEE, Commander of The Northwest Regional Drug Task Force, CRAIG JOHNSON, Police Officer for the City of Bellingham, RICHARD FRAKES, Deputy Sheriff for Whatcom County, and B. L. HANGER, Trooper, Washington State Sub-Division of the City of Bellingham, Whatcom County Sheriff's Office, a Subdivision of the County of Whatcom and the Washington State Patrol, a subdivision of the State of Washington, Appellants/Cross-Respondents.	)	No. 72642-1-I Consolidated with No. 72841-5-I DIVISION ONE UNPUBLISHED OPINION FILED: May 23, 2016

SPEARMAN, J. — In 2011 respondent and cross-appellant Todd Newlun was charged with delivery of marijuana, a felony. During the delivery, an undercover police officer wore a body wire that transmitted the voices of Newlun and others to another nearby officer. Newlun successfully moved to suppress evidence obtained by use of the body wire, because written authorization for its use was not obtained as required by RCW 9.73.210 and .230. The charge was reduced to a misdemeanor to which Newlun pleaded guilty. Newlun then sued the members of the Northwest Regional Drug Task Force (collectively, Task Force) for violation of the Privacy Act, seeking exemplary and

Appendix 1

actual damages. The Task Force moved for summary judgment on grounds that the transmitted conversations were not private and that Newlun's claims were barred by statute. It also moved for dismissal of Newlun's claim for exemplary damages. The trial court dismissed the claim for exemplary damages but denied the other motions. Both parties appeal. Finding no reversible error, we affirm.

FACTS

Bellingham Police Detective Craig Johnson used a confidential informant to arrange a marijuana purchase from Todd Newlun. The informant made a call to Newlun's Oregon residence and spoke with his wife. Newlun agreed to meet the informant in the parking lot of the Valley Village Shopping Mall in Bellingham, Washington on March 16, 2011. The informant had been given Newlun's name by another dealer and had no prior relationship with him.

Washington State Patrol Detective B.L. Hanger, working undercover, drove the informant to meet Newlun. Hanger wore a body wire that broadcasted his voice and other sounds to Johnson, who was monitoring from a nearby location. Hanger and the informant parked in the mall parking lot and called Newlun. Newlun drove to the mall and parked next to Hanger's minivan. The parties were near enough to talk through the open windows of their vehicles. Newlun asked Hanger to follow him to his residence and he agreed to do so.[1]

[1] Detective Hanger testified that Newlun "talked loudly" and that other vehicles and pedestrians were passing by during the conversation. Clerk's Papers (CP) at 866. But he does not state whether any other person overheard or were in a position to overhear the conversation.

At Newlun's residence, Hanger parked the minivan on the street next to Newlun's vehicle. Newlun got out of his vehicle and went into his house. He returned a few minutes later and got in Hanger's minivan. Newlun talked with Hanger and the informant about his marijuana business, and told them he had four kids to support. He said that he owned his home but that he rented out a portion of it. He also told them that he owned an additional five acres. The men exchanged money and two one-half pound bags of marijuana, completing the transaction. Then Newlun talked in detail about his particular method of processing hashish and offered to sell some to Hanger and the informant, which they agreed to buy. They then discussed the possibility of future deals and Newlun told them that he comes to Bellingham every two weeks to make deliveries. He also explained how he cultivates certain products and sets prices for sales. He told Hanger that he had another customer coming right after them.

Hanger and the informant then left to meet Johnson. About twenty-five minutes later another customer arrived at Newlun's home. Newlun was arrested and charged with delivery of marijuana, a felony. The Whatcom County Superior Court granted Newlun's motion to suppress the evidence obtained by use of the body wire because the officers failed to obtain written authorization as required by RCW 9.73.210.[2] As a result, the prosecutor reduced the charge to possessing forty grams or less of marijuana, a misdemeanor, to which Newlun pleaded guilty.

[2] The court specifically found that the violation arose under RCW 9.73.210 and not RCW 9.73.230. According to the court "the fact that [the transmission] wasn't recorded . . . would indicate to me that that's more in line with an officer safety wire rather than something intended under .230 which was to obtain information which could be used at trial." CP at 172.

Newlun subsequently filed this action under chapter 9.73 RCW, claiming that his privacy rights were violated by the electronic transmission of his voice during the drug sale. He named Commander Rick Sucee of the Northwest Regional Drug Task Force, Officer Craig Johnson, Whatcom County Sheriff's Deputy Richard Frakes, Detective Hanger, the Washington State Patrol, the Whatcom County Sheriff's Office, and the Bellingham Police Department (collectively, Task Force). Newlun sought general damages under RCW 9.73.060 and exemplary damages of $25,000 under RCW 9.73.230(11).

The parties cross-moved for summary judgment on the issue of damages. The trial court dismissed Newlun's claim for exemplary damages under RCW 9.73.230 but ruled that he could proceed on a claim for actual or liquidated damages under RCW 9.73.060.[3] Next, the Task Force moved for summary judgment on the grounds that the transmitted conversation was not private under state law. The trial court denied this motion on April 4, 2014. The Task Force then moved for summary judgment on the grounds that Newlun's claims were barred under RCW 4.24.420. The trial court denied this motion on September 25, 2014. The court granted the parties' joint motion for a stay of proceedings and a CR 54(b) order permitting the parties to seek appellate review of each of the orders.

[3] The Task Force later moved for summary judgment on the basis that Newlun had not proved any actual damages and was only entitled to liquidated damages. The trial court denied this motion and the Task Force did not request that final judgment be entered with respect to that order or that it be certified for appeal.

The Task Force appeals the judgment as to whether the transmitted conversations were private and whether RCW 4.24.420 bars Newlun's claims. Newlun cross-appeals the dismissal of his claim for exemplary damages.

DISCUSSION

We review orders on summary judgment de novo. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Summary judgment is appropriate if the pleadings, depositions and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id. We consider the facts and inferences in the light most favorable to the nonmoving party. Id.

RCW 9.73.030 generally prohibits interception, transmission, or recording of any "private communication" or "private conversation" without the consent of all parties involved. Two exceptions to this general prohibition are provided in RCW 9.73.210 and .230. These subsections establish a procedure for law enforcement personnel to lawfully intercept conversations concerning controlled substances without prior judicial approval as long as one party consents. In addition, under RCW 9.73.230, the interception must be part of a bona fide criminal investigation with probable cause to believe that the conversation or communication involves the unlawful manufacture,

delivery, or sale of controlled substances.[4] Under RCW 9.73.210, a supervising officer may also authorize the interception of a private communication without prior judicial approval if he or she has reasonable suspicion that the safety of the consenting party is

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[4] The pertinent portion of RCW 9.73.230 states:

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

(a) At least one party to the conversation or communication has consented to the interception, transmission, or recording;

(b) Probable cause exists to believe that the conversation or communication involves:

(i) The unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; or

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and

(c) A written report has been completed as required by subsection (2) of this section.

(2) The agency's chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a written report at the time of authorization indicating:

(a) The circumstances that meet the requirements of subsection (1) of this section;

(b) The names of the authorizing and consenting parties, except that in those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged;

(c) The names of the officers authorized to intercept, transmit, and record the conversation or communication;

(d) The identity of the particular person or persons, if known, who may have committed or may commit the offense;

(e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication; and

(f) Whether there was an attempt to obtain authorization pursuant to RCW 9.73.090(2) and, if there was such an attempt, the outcome of the attempt.

in danger.[5] Under either section, before intercepting, transmitting, or recording a conversation or communication, a written authorization must be completed. In the case of section .230, the authorization must establish probable cause regarding the unlawful controlled substance activity. Under section .210, the authorization must establish reasonable suspicion regarding the safety concerns and the unlawful controlled substance activity. RCW 9.73.230(11) also provides for $25,000 in exemplary damages if the interception, transmission, or recording occurs during a bona fide criminal investigation without probable cause and reasonable suspicion to believe that the communication involves the manufacture, delivery, sale, or possession with intent to sell, manufacture, or deliver controlled substances.

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[5] RCW 9.73.210 states in part:

(1) If a police commander or officer above the rank of first line supervisor has reasonable suspicion that the safety of the consenting party is in danger, law enforcement personnel may, for the sole purpose of protecting the safety of the consenting party, intercept, transmit, or record a private conversation or communication concerning:

(a) The unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; or

(b) Person(s) engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102.

(2) Before any interception, transmission, or recording of a private conversation or communication pursuant to this section, the police commander or officer making the determination required by subsection (1) of this section shall complete a written authorization which shall include (a) the date and time the authorization is given; (b) the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known; (c) the expected date, location, and approximate time of the conversation or communication; and (d) the reasons for believing the consenting party's safety will be in danger.

Private Communications

The Task Force argues that the trial court erred in failing to conclude that the transmitted conversations were not private as a matter of law. Newlun contends that because triable issues of fact exist as to whether the conversations were private, the trial court properly denied summary judgment on the issue.[6]

Only private communications are protected by chapter 9.73 RCW. Whether a particular conversation is private is generally a question of fact unless facts are undisputed and reasonable minds could not differ. State v. Clark, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996). Our supreme court has interpreted the word "private" to mean "'belonging to one's self ... secret ... intended only for the persons involved (a conversation) ... holding a confidential relationship to something ... a secret message: a private communication ... secretly: not open or in public.'" Kadoranian by Peach v. Bellingham Police Dep't, a Div. of City of Bellingham, 119 Wn.2d 178, 190, 829 P.2d 1061, (1992) (quoting State v. Forrester, 21 Wn. App. 855, 861, 537 P.2d 179 (1978)). A communication is private "(1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable." State v. Kipp, 179 Wn.2d 718, 729, 317 P.3d 1029 (2014) (citing State v. Townsend, 147 Wn.2d 666, 672, 57 P.3d 255 (2002)). Intercepting or recording telephone calls violates the privacy act "'except under

[6] Newlun argues that the Task Force is judicially estopped from arguing that the conversation is not private because they claimed earlier that the remedy was liquidated damages, not exemplary damages. We disagree. Judicial estoppel precludes a party from gaining an advantage by taking one position and then asserting an inconsistent position in later proceedings. Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The Task Force's position that the conversations are not subject to the protections of the Privacy Act is not inconsistent with seeking to limit the damages that Newlun could recover if he were to prevail at trial.

narrow circumstances, and we will generally presume that conversations between two parties are intended to be private.'" State v. Hinton, 179 Wn.2d 862, 872, 319 P.3d 9 (2014), (quoting State v. Modica, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008)).

The reasonable expectation standard calls for a case-by-case consideration of all the surrounding facts. State v. Faford, 128 Wn.2d 476, 484, 901 P.2d 447 (1996). The primary focus is on the subjective expectations of the parties, i.e., "was the information conveyed in the disputed conversations intended to remain confidential between the parties?" Id., (citing Kadoranian, 119 Wn.2d at 190. Factors bearing on the reasonableness of an expectation of privacy include "(1) duration and subject matter of the conversation, (2) location of conversation and presence or potential presence of a third party, and (3) role of the nonconsenting party and his or her relationship to the consenting party." Lewis v. State, Dep't. of Licensing, 157 Wn.2d 446, 458-59, 139 P.3d 1078 (2006), (citing State v. Clark, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996)).

Both parties cite Clark in support of their respective positions. In that case, our supreme court concluded that brief conversations on public streets between strangers, concerning routine illegal drug transactions, and which sometimes occurred in front of third persons, were not private. Clark, 129 Wn.2d at 228. The Task Force contends that Clark forecloses Newlun's claim that his conversations with Hanger and the informant were private, while Newlun maintains that Clark is "unique to its circumstances" and is factually distinguishable from this case. Br. of Resp. at 36. We agree with Newlun.

In Clark, the Seattle Police Department and the Federal Bureau of Investigation obtained court authorization to record conversations between an informant, Kevin

Glass, and prospective cocaine dealers. Id. at 217. Glass was assigned to a specific location each day. Once on the street, Glass would honk his horn or call out to dealers, making it clear that he wanted to buy cocaine. Id. Often several individuals would step forward to compete to sell. Id. at 218. After the purchases, Glass would call the police and describe the seller. Id. Glass did not know any of the persons who responded to his offers to buy drugs. Id. at 219. The brief conversations, usually lasting one to two minutes, often occurred in the presence of other people. While some took place on the street or in the informant's car, the parties exchanged little more than information about the transaction or the goods. Id. The transactions typically ensued as follows:

> Glass spoke with defendant Clark in front of several other persons. Glass drove up to four men standing in the parking lot of an L-shaped apartment building with open walkways overlooking the lot. Glass said, "What's up, you soupin', man?" [i.e., are you selling rock cocaine?] Three men approached; Clark arrived first and got in the passenger seat. The other two men stood by, leaning forward at the window. Glass asked for a "double"; Clark showed him cocaine, and said, "I'll give you all that for what you got right now." Glass said, "No." Clark said, "This is like, $160." Glass said, "No." One of the other men said, "A blue van," indicating a law enforcement vehicle. Clark and the others looked behind Glass' car briefly. After a moment, Glass and Clark made an exchange, and Clark got out of the car. In front of the others, Clark turned around and yelled back to Glass, "Hey, come back, all night." This conversation lasted one minute.

Id. at 219.

In determining whether the defendants manifested a subjective intention that their conversation were private and, if so, whether those expectations were reasonable, the Clark court considered the duration and subject matter of the conversation, the location of the conversation and the presence or potential presence of a third party, and the relationships among the parties. Id. at 225-27. The court was careful to note that the

presence or absence of a single factor, however, is not conclusive to the analysis. Id. at 227.

Taking each factor in turn, the Clark court first found that the conversations were "[e]ach ... a brief and routine sales conversation, just like any other," weighing against a finding that they were private. Id. at 228. Second, the conversations took place either on a public street or in the informant's car, often in front of passersby or other dealers. Id. The court found that the defendants had no reasonable expectation of privacy just because they consummated their transactions in a car. Id. at 229. Finally, the informant was a complete stranger to the defendants and the conversations were essentially the same as the defendants might have had with other persons seeking to buy cocaine. Id. at 228. The court concluded that on these undisputed facts, as a matter of law, the defendant had no reasonable expectation of privacy in these conversations.

The conversations at issue in this case involve the same subject matter as in Clark, illegal drug sales, but are otherwise distinguishable. First, while the specific length of the conversations at issue here is not in the record, it is evident that they were far more extensive in duration and content than those in Clark. The conversation began in the mall parking lot and continued in Hanger's minivan outside Newlun's home. The men discussed Newlun's children and real estate holdings, marijuana and hashish production methods, the terms of the deal and the potential for future deals. In addition, the conversations here were not in the presence of third parties. Although the three men initially met in a parking lot and conversed through the open vehicle windows, there is little in the record to indicate that the conversations were likely to be overheard by

others. Similarly, nothing in the record suggests the conversation that took place outside Newlun's home in Hanger's minivan was likely to be overheard by third parties. Nor is there evidence that the transaction was or could have been observed by others. Unlike in Clark, here there are indications that Newlun intended the conversations to be private.

With regard to the parties' relationship, neither Hanger nor the informant had had any prior dealings with Newlun. Newlun testified, however, that he thought "the other person he was dealing with" was "Mike Burger" and that he had met him before.[7] Furthermore, the meeting with Newlun and the informant had been prearranged and Newlun testified that he thought the officer was someone who had come highly recommended to him and that he had seen him before and felt comfortable with him. CP at 857. While not friends or acquaintances, there is evidence that at least in Newlun's mind, the men were not completely unknown to him like the drug dealers in Clark.

On these facts, reasonable minds could differ on whether Newlun had a reasonable expectation of privacy. The trial court correctly concluded that there are issues of material fact regarding whether the privacy act applies to the conversations amongst Newlun, the detective, and the informant and properly denied summary judgment.

[7] This may be the "third party" that Johnson refers to in his declaration who put the informant in touch with Newlun, but the record is not clear. CP at 852.

Felony Tort Statute

Under RCW 4.24.420:

> [i]t is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.

That Newlun was engaged in the commission of a felony at the time of the occurrence that caused his alleged injury is not subject to reasonable dispute. Thus, our focus is on whether the felony was a proximate cause of the alleged injury.

Proximate cause is generally a question for the jury but it is a question of law "when the facts are undisputed and the influences therefrom are plain and incapable of reasonable doubt or difference of opinion. . . ." Graham v. Public Emps. Mut. Ins. Co., 98 Wn.2d 533, 539, 656 P.2d 1077 (1983) (citing Bordynoski v. Bergner, 97 Wn.2d 335, 644 P.2d 1173 (1982)). A "'proximate cause' of an injury is defined as a cause that, in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which the injury would not have occurred." Mohr v. Grantham, 172 Wn.2d 844, 878, 262 P.3d 490 (2011). To establish proximate cause, the plaintiff must show both "cause in fact" (that the injury would not have occurred but for the act in question) and "legal causation." Ayers v. Johnson & Johnson Baby Products, Co., 117 Wn.2d 747, 753, 818 P.2d 1337 (1991) (citing Baugh v. Honda Motor Co., Ltd., 107 Wn.2d 127, 142, 727 P.2d 655 (1986)).

The Task Force contends there is a causal relationship between Newlun's commission of a felony and his claimed injuries. It argues that "[b]ut for Mr. Newlun's

agreement [to sell the informant drugs] and steps toward engaging in the sale, his voice would have never been transmitted." Reply Br. of Appellant at 3. But in the absence of the unauthorized body wire, neither the agreement nor the sale would have resulted in Newlun's alleged injuries. 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. We agree with the trial court that there are disputed issues of fact about whether there is a causal relationship between Newlun's commission of a felony and his alleged injuries. [8]

Exemplary Damages

Newlun contends the trial court erred when it dismissed his claim for exemplary damages under RCW 9.73.230(11). That subsection provides:

> An authorizing agency is liable for twenty-five thousand dollars in exemplary damages, in addition to any other damages authorized by this chapter or by other law, to a person whose conversation or communication was intercepted, transmitted, or recorded pursuant to an authorization under this section if:
>
> (a) In a review under subsection (7) of this section, or in a suppression of evidence proceeding, it has been determined that the authorization was made without the probable cause required by subsection (1)(b) of this section; and
>
> (b) The authorization was also made without a reasonable suspicion that the conversation or communication would involve the unlawful acts identified in subsection (1)(b) of this section.

Insofar as it is relevant here, subsection (1)(b) requires the existence of probable cause to believe the conversation or communication to be monitored involves the unlawful

[8] Newlun also argues that the felony-tort statute does not apply to his claim for damages because it only precludes recovery of damages in common law tort claims, not damages created by statute. But because he cites no relevant authority in support of the argument, we decline to consider it.

manufacture, delivery, sale or possession with intent to manufacture, deliver or sell a controlled substance or imitation controlled substance.

The trial court dismissed Newlun's claim because it concluded section .230 did not apply.[9] It found the evidence was undisputed that the body wire was not for a bona fide criminal investigation under section .230, but was instead for officer safety under section .210. The court further found that even if section .230 was applicable, the evidence was undisputed that the transmitted conversation was going to involve the unlawful sale of a controlled substance. Because Newlun was unable to establish a disputed issue of material fact on either issue, the court dismissed his claim for exemplary damages.

Newlun contends the trial court erred in concluding that exemplary damages were not available under section .210 and that there were no disputed issues of fact that section .230 did not apply. He is incorrect.

The trial court properly rejected Newlun's claim that exemplary damages are available for violations of both sections .210 and .230. Newlun argues that the reach of subsection .230(11) should be extended to section .210 when a police agency makes

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[9] The trial court also dismissed Newlun's claim in reliance on State v. Salinas, 121 Wn.2d 689, 853 P.2d 439 (1993). We think that reliance was misplaced for two reasons. First, the case is distinguishable on its facts because there the officers made no attempt to comply with sections .210 or .230. In that case, "[n]o authorization was obtained prior to the use of this body wire." Id. at 691. Whereas here, the officers were clearly attempting to fall within the statute. It is undisputed that Lieutenant Sucee, the Task Force commander, verbally authorized the transmission of Newlun's conversations. In addition, Salinas did not address whether mere noncompliance with the statute was sufficient to render exemplary damages inapplicable. At issue there was only whether, if a police agency failed to comply with the statute, the State could nonetheless take advantage of the exceptions allowing the admission of some evidence that otherwise would have been excluded by RCW 9.73.050. ("Any information obtained in violation of RCW 9.73.030 ... shall be inadmissible in any civil or criminal case...."). The answer was no. Salinas, 121 Wn.2d at 693. It would be anomalous that a good faith, but inadequate, attempt to comply with the statute could result in the imposition of exemplary damages, but ignoring the statute altogether would not.

no attempt to comply with the procedures requiring written authorization. He argues that we should be guided by the legislative intent and purpose of the statute, to punish intentional wrongs, and deter their future commission by "'making an example'" of police agencies that disregard the statute's procedural requirements. Br. of Resp. at 24. We reject the argument, however, because the statutes are unambiguous. Section .230 explicitly provides for exemplary damages, section .210 does not. If a statute is unambiguous, our role is to interpret the statute as enacted. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We will neither add words nor subtract them in the guise of interpretation. Id.

Newlun also contends that the trial court erred in dismissing his claim for exemplary damages under section .230, because it improperly relied on testimony from the officers at the suppression hearing in the criminal proceeding and in declarations submitted in support of the motions to dismiss. He argues that in determining whether police interception of a private conversation is lawful, the court must be limited to those facts set forth in writing before the interception occurs. And because there were no such written facts in this case, there was no basis for the trial court to find undisputed evidence that the body wire was for officer safety or the necessary probable cause. Newlun analogizes to the so-called "four corner" rule applied to judicial scrutiny of affidavits in support of a search warrant. Under that rule, the facts supporting the warrant are limited to only the information available to the issuing judge or magistrate at the time the warrant was requested. State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d

487 (1988). He contends the same rule should be applicable to private conversations transmitted pursuant to sections .210 and.230.

But we need not address this issue because regardless of whether the court erred in considering the officers' testimony, Newlun's claim was properly dismissed. In a summary judgment proceeding, the moving party bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. "If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." Id., (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986)).

Here, even if we assume, for purposes of summary judgment, the existence of disputed issues of fact on the issue of whether the use of the body wire arose under section .230, Newlun's claim still fails. Newlun contends the trial court erred by considering testimony of the Task Force officers, but he ignores his own burden to present evidence supporting essential elements of his claim. Under section .230, Newlun has to prove the Task Force lacked probable cause or reasonable suspicion to believe the conversations at issue would involve the unlawful sale of a controlled substance. And regardless of the officers' testimony, 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.

The rulings of the trial court are affirmed. The case is remanded for further proceedings consistent with this opinion.

Spearman, J.

WE CONCUR:

Dwyer, J.

Appelwick, J.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TODD NEWLUN, and all other persons similarly situated Respondent/Cross-Appellant, v. RICK SUCEE, Commander of The Northwest Regional Drug Task Force, CRAIG JOHNSON, Police Officer for the City of Bellingham, RICHARD FRAKES, Deputy Sheriff for Whatcom County, and B. L. HANGER, Trooper, Washington State Sub-Division of the City of Bellingham, Whatcom County Sheriff's Office, a Subdivision of the County of Whatcom and the Washington State Patrol, a subdivision of the State of Washington, Appellants/Cross-Respondents.	No. 72642-1-I Consolidated with No. 72841-5-I DIVISION ONE ORDER DENYING APPELLANT'S MOTION TO PUBLISH AND MOTION TO RECONSIDER

Respondent/Cross-Appellant Todd Newlun filed a motion to publish and motion for reconsideration of the opinion filed on May 23, 2016. A majority of the panel has determined the motions should be denied.

Now, therefore, it is hereby

ORDERED that the motion to publish and the motion to reconsider is denied.

DATED this 27th day of June 2016.

Spearman, J.

Presiding Judge

Appendix 2

Effective: August 1, 2011

West's RCWA 9.73.210

9.73.210. Intercepting, transmitting, or recording conversations concerning controlled substances or commercial sexual abuse of a minor--Authorization--Monthly report--Admissibility--Destruction of information

Currentness

(1) If a police commander or officer above the rank of first line supervisor has reasonable suspicion that the safety of the consenting party is in danger, law enforcement personnel may, for the sole purpose of protecting the safety of the consenting party, intercept, transmit, or record a private conversation or communication concerning:

(a) The unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; or

(b) Person(s) engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102.

(2) Before any interception, transmission, or recording of a private conversation or communication pursuant to this section, the police commander or officer making the determination required by subsection (1) of this section shall complete a written authorization which shall include (a) the date and time the authorization is given; (b) the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known; (c) the expected date, location, and approximate time of the conversation or communication; and (d) the reasons for believing the consenting party's safety will be in danger.

(3) A monthly report shall be filed by the law enforcement agency with the administrator for the courts indicating the number of authorizations made under this section, the date and time of each authorization, and whether an interception, transmission, or recording was made with respect to each authorization.

(4) Any information obtained pursuant to this section is inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except:

(a) With the permission of the person whose communication or conversation was intercepted, transmitted, or recorded without his or her knowledge;

(b) In a civil action for personal injury or wrongful death arising out of the same incident, where the cause of action is based upon an act of physical violence against the consenting party; or

(c) In a criminal prosecution, arising out of the same incident for a serious violent offense as defined in RCW 9.94A.030 in which a party who consented to the interception, transmission, or recording was a victim of the offense.

(5) Nothing in this section bars the admission of testimony of a participant in the communication or conversation unaided by information obtained pursuant to this section.

(6) The authorizing agency shall immediately destroy any written, transcribed, or recorded information obtained from an interception, transmission, or recording authorized under this section

unless the agency determines there has been a personal injury or death or a serious violent offense which may give rise to a civil action or criminal prosecution in which the information may be admissible under subsection (4)(b) or (c) of this section.

(7) Nothing in this section authorizes the interception, recording, or transmission of a telephonic communication or conversation.

Credits

[2011 c 241 § 3, eff. Aug. 1, 2011; 1989 c 271 § 202.]

Effective: August 1, 2011

West's RCWA 9.73.230

9.73.230. Intercepting, transmitting, or recording conversations concerning controlled substances or commercial sexual abuse of a minor--Conditions--Written reports required--Judicial review--Notice--Admissibility--Penalties

Currentness

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

(a) At least one party to the conversation or communication has consented to the interception, transmission, or recording;

(b) Probable cause exists to believe that the conversation or communication involves:

(i) The unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; or

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW 9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and

(c) A written report has been completed as required by subsection (2) of this section.

(2) The agency's chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a written report at the time of authorization indicating:

(a) The circumstances that meet the requirements of subsection (1) of this section;

(b) The names of the authorizing and consenting parties, except that in those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged;

(c) The names of the officers authorized to intercept, transmit, and record the conversation or communication;

(d) The identity of the particular person or persons, if known, who may have committed or may commit the offense;

(e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication; and

(f) Whether there was an attempt to obtain authorization pursuant to RCW 9.73.090(2) and, if there was such an attempt, the outcome of the attempt.

(3) An authorization under this section is valid in all jurisdictions within Washington state and for the interception of communications from additional persons if the persons are brought into the conversation or transaction by the nonconsenting party or if the nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction.

Appendix 4

(4) The recording of any conversation or communication under this section shall be done in such a manner that protects the recording from editing or other alterations.
(5) An authorization made under this section is valid for no more than twenty-four hours from the time it is signed by the authorizing officer, and each authorization shall independently meet all of the requirements of this section. The authorizing officer shall sign the written report required under subsection (2) of this section, certifying the exact date and time of his or her signature. An authorization under this section may be extended not more than twice for an additional consecutive twenty-four hour period based upon the same probable cause regarding the same suspected transaction. Each such extension shall be signed by the authorizing officer.
(6) Within fifteen days after the signing of an authorization that results in any interception, transmission, or recording of a conversation or communication pursuant to this section, the law enforcement agency which made the interception, transmission, or recording shall submit a report including the original authorization under subsection (2) of this section to a judge of a court having jurisdiction which report shall identify (a) the persons, including the consenting party, who participated in the conversation, and (b) the date, location, and approximate time of the conversation.
In those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged.
A monthly report shall be filed by the law enforcement agency with the administrator for the courts indicating the number of authorizations granted, the date and time of each authorization, interceptions made, arrests resulting from an interception, and subsequent invalidations.
(7)(a) Within two judicial days of receipt of a report under subsection (6) of this section, the court shall make an ex parte review of the authorization and shall make a determination whether the requirements of subsection (1) of this section were met. Evidence obtained as a result of the interception, transmission, or recording need not be submitted to the court. If the court determines that any of the requirements of subsection (1) of this section were not met, the court shall order that any recording and any copies or transcriptions of the conversation or communication be destroyed. Destruction of recordings, copies, or transcriptions shall be stayed pending any appeal of a finding that the requirements of subsection (1) of this section were not met.
(b) Absent a continuation under (c) of this subsection, six months following a determination under (a) of this subsection that probable cause did not exist, the court shall cause a notice to be mailed to the last known address of any nonconsenting party to the conversation or communication that was the subject of the authorization. The notice shall indicate the date, time, and place of any interception, transmission, or recording made pursuant to the authorization. The notice shall also identify the agency that sought the authorization and shall indicate that a review under (a) of this subsection resulted in a determination that the authorization was made in violation of this section provided that, if the confidential informant was a minor at the time of the recording or an alleged victim of commercial child sexual abuse under RCW 9.68A.100 through 9.68A.102 or 9[A].40.100, no such notice shall be given.

(c) An authorizing agency may obtain six-month extensions to the notice requirement of (b) of this subsection in cases of active, ongoing criminal investigations that might be jeopardized by sending the notice.

(8) In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if:

(a) The court finds that the requirements of subsection (1) of this section were met and the evidence is used in prosecuting an offense listed in subsection (1)(b) of this section; or

(b) The evidence is admitted with the permission of the person whose communication or conversation was intercepted, transmitted, or recorded; or

(c) The evidence is admitted in a prosecution for a "serious violent offense" as defined in RCW 9.94A.030 in which a party who consented to the interception, transmission, or recording was a victim of the offense; or

(d) The evidence is admitted in a civil suit for personal injury or wrongful death arising out of the same incident, in which a party who consented to the interception, transmission, or recording was a victim of a serious violent offense as defined in RCW 9.94A.030.

Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.

(9) Any determination of invalidity of an authorization under this section shall be reported by the court to the administrative office of the courts.

(10) Any person who intentionally intercepts, transmits, or records or who intentionally authorizes the interception, transmission, or recording of a conversation or communication in violation of this section, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

(11) An authorizing agency is liable for twenty-five thousand dollars in exemplary damages, in addition to any other damages authorized by this chapter or by other law, to a person whose conversation or communication was intercepted, transmitted, or recorded pursuant to an authorization under this section if:

(a) In a review under subsection (7) of this section, or in a suppression of evidence proceeding, it has been determined that the authorization was made without the probable cause required by subsection (1)(b) of this section; and

(b) The authorization was also made without a reasonable suspicion that the conversation or communication would involve the unlawful acts identified in subsection (1)(b) of this section.

Credits

[2011 c 241 § 2, eff. Aug. 1, 2011; 2005 c 282 § 17, eff. July 24, 2005; 1989 c 271 § 204.]

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

TODD NEWLUN, Respondent and Cross Appellant, vs. RICK SUCEE, Commander of the Northwest Regional Drug Task Force, CRAIG JOHNSON, Police Officer for the City of Bellingham, RICHARD FRAKES, Deputy Sheriff for Whatcom County, and B. L. Hanger, Trooper, Washington State Patrol, and the City of Bellingham, a Subdivision of the State of Washington, Whatcom County, a subdivision of the State of Washington, and the State of Washington, Appellants and Respondent on Cross Appeal,	No. 72642-1-I DECLARATION OF SERVICE

DECLARATION OF WILLIAM JOHNSTON

I, William Johnston , declare under penalty of perjury under the laws of the State of Washington, as follows:

WILLIAM JOHNSTON
Attorney at Law
401 Central Avenue
Bellingham, WA 98225
Phone: (360) 676-1931
Fax: (360) 676-1510

1. I am the attorney for the Respondent and Cross Appellant Todd Newlun;
2. On this day, July 26, 2016 I personally delivered a copy of my Petition to Review (Second one) and a Motion for Leave to Exceed Twenty Page Limitation on the Office of the Prosecuting Attorney for Whatcom County, Whatcom County Courthouse, Bellingham, Washington 98225.
3. I also served a copy of my Petition to Review (Second one) and a Motion for Leave to Exceed Twenty Page Limitation on the Office of the City Attorney for Bellingham and its office at 210 Lottie Street, Bellingham, Washington.
4. I also served a copy of my Petition to Review(Second one) and a Motion for Leave to Exceed Twenty Page Limitation on the Office of the Washington State Attorney General at its office on the 3rd floor of the Key National Bank Building on Holly Street in Bellingham, Washington 98225

Executed this 26th day of July, 2016 at Bellingham, Washington.

WILLIAM JOHNSTON

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