No. 95908-1

SUPREME COURT
OF THE STATE OF WASHINGTON

LARSON MOTORS, INC., a Washington corporation,

Petitioner,

v.

PAUL SNYPP,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The petitioner in this matter is Larson Motors, Inc. ("Larson"). Larson was the plaintiff in the trial court and the respondent/cross-appellant in the Court of Appeals.

II. COURT OF APPEALS DECISION

A published opinion of the Court of Appeals, Division II, in *Larson Motors, Inc. v. Paul Snypp*, No. 49671-2-II, was filed on March 20, 2018. App'x A. Larson and Paul Snypp ("Snypp") both moved for reconsideration. On May 1, 2018, the Court issued a Published Order granting Larson's motion for reconsideration in part and ordering amendment of the March 20, 2018 opinion "to fix a scrivener's error." App'x B. In the same order, the Court denied Snypp's motion for reconsideration. *Id.*

III. ISSUES FOR REVIEW

1. Did the Court of Appeals err by holding that Snypp's telephone calls with Larson were private *as a matter of law* under Washington's Privacy Act on the sole basis of Snypp's self-serving declaration, which was contradicted by his earlier deposition testimony that the calls were not private?

2. Did the Court of Appeals err in reversing the trial court's grant of summary judgment and entry of judgment for Larson, when Snypp's

recorded telephone calls showed that he authorized Larson to repair his car, but he falsely denied doing so in his answer and deposition?

3. Did the Court of Appeals err in affirming the trial court's denial of Larson's motion for sanctions when recorded telephone calls revealed that Snypp lied in his answer to the complaint and in his deposition testimony regarding key issues in the case?

IV. STATEMENT OF THE CASE

In 2015, Snypp brought his Porsche to Larson two times for services and repairs. CP 127-28. In a series of three telephone calls, Snypp discussed many of the requested repairs with his Larson service technician, repeatedly thanked the technician for his hard work, and volunteered to pay for the repairs using a credit card. CP 105-21; CP 128-29; CP 137. It is uncontested that Snypp was not notified that the calls were being recorded. *See id.*

After Snypp picked up his car, he contacted his credit card company and disputed the charges. CP 102-03; CP 123; CP 129. The credit card company reversed the transactions and Larson was never paid. CP 129.

Larson filed suit in Pierce County Superior Court seeking $9,081.42 in damages, plus attorney fees pursuant to RCW 4.84.250, which authorizes an award of attorney fees to the prevailing party in matters where the damages sought are under $10,000.00. CP 2-6. In Snypp's answer and at his deposition, he falsely alleged that he did not authorize Larson to do most of

the repairs. *Compare* CP 13, 93 *with* CP 117-118. Snypp further alleged that he only made the credit card payment because he was forced to do so to get his car back, and that he told Larson at the time of the payment that he would put a stop on the charges. CP 13, 17, 93.

At Snypp's deposition, he repeatedly admitted that none of his communications with Larson were private:

> Q. So there wasn't any kind of private, secret communications happening between you and Mr. Cabrera [the Larson representative]?
>
> A. Oh, no.
>
> ...
>
> Q. ... Were you saying anything to Mr. Cabrera that you wouldn't say to everybody around the table today?
>
> A. No.
>
> Q. Were you saying anything to Mr. Cabrera that you wouldn't tell the judge who ultimately decides this case?
>
> A. Oh, no.
>
> Q. That's what I mean. Were there kind of secret, private communications that you didn't want documented going on between you and Mr. Cabrera?
>
> A. Oh, no. I wanted everything documented...
>
> ...
>
> Q. [E]verything that you told to Larson Motors or they told you, you'd tell to anybody else?
>
> A. Exactly or tell to a judge, tell to a jury, whatever.

CP 94-97.

Larson filed a motion for summary judgment and/or sanctions on the basis of Snypp's demonstrably false allegations and testimony. CP 63-75. The motion asked the trial court to sanction Snypp for perjury revealed by the recorded calls by imposing a default judgment or by striking Snypp's false statements from the record and granting summary judgment. *Id.* In response, Snypp moved to strike the recorded telephone calls and submitted a declaration alleging, contrary to his deposition testimony, that he believed the calls were private. CP 169-71.

The trial court granted Larson's motion for summary judgment but denied its motion for sanctions. CP 252-53, 424-25. The trial court denied Snypp's motion to strike the telephone calls but declined to consider them in its ruling on summary judgment. Verbatim Report of Proceedings, August 22, 2016, at 7:4-6. The trial court subsequently entered judgment in Larson's favor in the amount of $9,081.42, plus attorney fees and costs. CP 401-02. Snypp appealed, and Larson cross-appealed the denial of the motion for sanctions.

In a published opinion, the Court of Appeals, Division II, reversed the Court's order granting summary judgment and entry of judgment in Larson's favor. App'x A. The Court reasoned that the recorded telephone calls were private *as a matter of law* based solely on the statement in

Snypp's declaration that he believed the calls were private—notwithstanding that Snypp testified to the contrary and that the declaration was submitted only after Larson filed its motion for sanctions and summary judgment. App'x A at 6-7. The Court went on to conclude that because the telephone calls were private and Snypp did not consent to their recording, they were inadmissible under Washington's Privacy Act. App'x B at 7. The Court reversed the grant of summary judgment and entry of judgment and affirmed the denial of sanctions, reasoning that without the recorded telephone calls, genuine issues of material fact precluded summary judgment and no proof of Snypp's perjury remained to justify sanctions. App'x A at 7-9.

Larson moved for reconsideration. The Court granted the motion in part to add a single word to its opinion, but otherwise left the opinion unchanged.[1] App'x B. Larson now petitions for this Court's review.

V. ARGUMENT

This Court should accept review pursuant to RAP 13.4(b)(1) and (2) because the Court of Appeals' opinion is in conflict with published opinions of the Supreme Court and Courts of Appeals. First, the holding that Snypp's calls were private as a matter of law conflicts with *State v. Townsend,*

[1] Snypp also moved for reconsideration on the issue of attorney fees, and the Court denied his motion.

147 Wn.2d 666, 673, 57 P.3d 255 (2002) and *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 60, 316 P.3d 1119 (2014), which hold that whether a conversation is private under Washington's Privacy Act must be determined as an issue of fact unless the facts are undisputed. Second, the Court of Appeals' reliance on Snypp's declaration conflicts with the published decisions in *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002), *Selvig v. Caryl*, 97 Wn. App. 220, 225, 983 P.2d 1141 (1999), and *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989), which establish that a party cannot create a factual issue to defeat summary judgment merely by submitting a declaration that contradicts the party's deposition testimony.

The Court of Appeals' errors would create problematic precedent for future cases, an issue of substantial public importance warranting this Court's review under RAP 13.4(b)(4). The Court's holding that Snypp's conversations were private *as a matter of law* based solely on his contradictory declaration would effectively expand the Privacy Act to apply to all conversations, not just private ones. It would also encourage the submission of false testimony by allowing litigants to keep key evidence out of court simply by filing self-serving, after-the-fact declarations claiming their conversations were private, even when their own prior testimony or other evidence confirms otherwise.

Furthermore, Snypp's choice to lie about the key elements of his case in his answer to the complaint and at his deposition is an affront to the judicial system, and this Court is the last opportunity for him to face any consequence. It is an issue of substantial public importance for the Court to uphold the integrity of the judicial system by meeting perjury with consequences.

A. The holding that Snypp's conversations were private as a matter of law under RCW 9.73.030 conflicts with published opinions holding that whether a conversation is private is an issue of fact.

This Court and the Court of Appeals have unequivocally stated that whether a communication is private under the Privacy Act is generally a question of fact. *Townsend,* 147 Wn.2d at 673; *Dillon*, 179 Wn. App. at 60. The issue may be decided as a question of law *only* if the facts are undisputed. *Id.* "Private" means: "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." *Dillon*, 179 Wn. App. at 60. For a communication to be private under the Privacy Act, (1) the parties must manifest a subjective intention that it be private, and (2) that expectation of privacy must be reasonable. *Id.*

Here, the Court of Appeals erroneously determined that Snypp's calls were private *as a matter of law* in the face of Snypp's sworn deposition

testimony stating he had no private communications with Larson. The Court of Appeals' opinion does not mention the definition of "private" or apply the two factors set forth in *Dillon* (subjective intention and reasonable expectation of privacy). *See* App'x B at 6. Rather, the Court appears to have relied solely on Snypp's declaration stating that he believed the calls were private to conclude that it was so as a matter of law. *Id.*

At a minimum, Snypp's deposition testimony created a factual issue about whether the calls were private, which should have been submitted to a trier of fact—not decided by the Court of Appeals. For the Court of Appeals to decide the issue directly contravened the clear mandate of *Dillon* and *Townsend.* Review is therefore warranted under RAP 13.4(b)(1) and (2).

B. The Court of Appeals' reliance on Snypp's self-serving declaration conflicts with published opinions establishing that a party cannot create a genuine issue of fact with a declaration that contradicts the party's earlier testimony.

The Court of Appeals' reliance on Snypp's declaration, which contradicted his earlier, sworn deposition testimony, conflicts with published decisions of the Court of Appeals and Supreme Court. This Court and the Court of Appeals have both held that a party cannot create a factual issue simply by submitting a declaration that contradicts the party's earlier

deposition testimony. *Overton*, 145 Wn.2d at 430; *Selvig*, 97 Wn. App. at 225; *Marshall*, 56 Wn. App. at 185.

Snypp testified repeatedly that his communications with Larson were not private and that anything he said to Larson, he would say to a judge, jury, or anyone else. CP 94-97. Only later, when he faced Larson's motion for sanctions and summary judgment, did Snypp claim in his declaration that he now believed the calls were private. *See* CP 183.

Under *Overton, Selvig*, and *Marshall*, the Court of Appeals should have disregarded Snypp's contradictory declaration on that issue. Had the Court of Appeals done so, Snypp's deposition testimony would be the only evidence in the record about whether the calls were private. The Court would have therefore concluded Snypp's calls were *not* private—and therefore admissible—as a matter of law. The Court erred by doing the exact opposite: crediting self-serving, contradictory declaration testimony, disregarding earlier deposition testimony, and holding that the calls were private as a matter of law. Review of this error is warranted under RAP 13.4(b)(1) and (2).

C. The holding that Snypp's conversations were private as a matter of law is of substantial public importance because it would effectively expand the Privacy Act to apply to any communication, not just private ones.

By its terms, Washington's Privacy Act applies only to "private" communications. Specifically, the statute provides that it is unlawful to "record any: (a) ***Private*** communication transmitted by telephone...without first obtaining the consent of all the participants in the communication; (b) ***Private*** conversation...without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1) (emphasis added).

As detailed above, the Court of Appeals held that Snypp's calls were private as a matter of law without any discussion of the definition of "private" or the relevant factors under established case law. Instead, it held that the calls were private—and therefore inadmissible—as a matter of law based solely on Snypp's self-serving declaration, which was contradicted by his deposition testimony.

The Court's holding would judicially alter the statutory scheme, allowing future litigants to render critical evidence inadmissible by submitting a declaration stating that a recorded communication was private—even where the party's earlier testimony admitted the opposite. The impact would be especially problematic in criminal cases,[2] where

[2] The Privacy Act applies in criminal cases as well as civil ones. RCW 9.73.050.

recording a conversation without consent may be the only way to obtain evidence needed to convict an offender.

The holding of *Townsend,* 147 Wn.2d at 673, and *Dillon*, 179 Wn. App. at 60, that it is an issue of fact whether a conversation is private, unless the facts are undisputed, preserves the right balance between an individual's privacy interest and the judicial system's legitimate need to use non-private conversations as evidence. The Court of Appeals' opinion changes that balance in a way the statute cannot justify.

D. Snypp's perjury is an affront to the judicial system that must be addressed to maintain the system's integrity, so the failure to impose sanctions is of substantial public importance.

"The integrity of our judicial system depends largely on the truthfulness of statements made under oath." *State v. Abrams*, 163 Wn.2d 277, 287, 178 P.3d 1021 (2008). "Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." *U.S. v. Mandujano*, 425 U.S. 564, 576, 96 S. Ct. 1768, 1776, 48 L. Ed. 2d 212 (1976). Accordingly, Washington courts impose and uphold severe sanctions for conduct that undermines the truthfulness of judicial proceedings. *E.g., Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 576, 220 P.3d 191 (2009).

The recorded phone conversations prove that Snypp lied in his answer to the complaint and during his deposition about a central issue in this case: whether Snypp authorized Larson to repair his car. The following chart illustrates the stark contrast between Snypp's claims and reality:

Answer	Deposition	Telephone Call
"Snypp was again coerced to make a credit card payment [of $8,189.42] for non-authorized services or the dealership would retain his car." CP 13.	**Q.** [W]hy did you pay north of $8,000 if you didn't authorize Larson Motors to perform any of this work? **A.** Because you have to sign this, and you have to pay it before they will give you your car back. ... **Q.** You are at the dealership when you are making the payment? **A.** Yes. CP 93.	**Cabrera:** I had emailed you a completed invoice. Have you had time to review that? **Snypp:** Yep, yeah. Can I give you a credit card? **Cabrera:** Did you want to do it over the phone? Okay. **Snypp:** Yeah, that's fine. **Cabrera:** Okay, I can do that. **Snypp:** If that suits you? Are you ready? [Snypp reads credit card information] **Cabrera:** Okay, and that was July of 16 and completed invoice amount was $8,189.42. **Snypp:** Okay. CP 117-118.

To allow Snypp's falsehoods to go unchecked would undermine the integrity of the judicial process. While the trial court undeniably had discretion to choose an appropriate sanction, its decision to do nothing to

address Snypp's perjury and the demonstrably false allegations in his pleadings was manifestly unreasonable. By affirming the trial court's denial of Larson's motion for sanctions, the Court of Appeals continued to let Snypp get away with an affront to the Court's truth-finding function. This Court's review is the last opportunity for a court to protect the judicial process. That purpose is an issue of substantial public importance that warrants this Court's review under RAP 13.4(b)(4).

VI. CONCLUSION

This Court's review is necessary to preserve established precedent and the integrity of our judicial system. The Court of Appeals' opinion conflicts with multiple published Supreme Court and Court of Appeals' opinions holding that whether a conversation is private must be decided as a matter of fact unless the facts are not in dispute, and that a declaration cannot be used to contradict a party's earlier sworn testimony. This departure from precedent expands the scope of the Privacy Act beyond what its language supports and encourages parties to falsely claim communications are private in order to escape relevant evidence. The denial of sanctions against Snypp is also of substantial public importance because it allowed Snypp to face no consequence for a fundamental affront to our

court system's truth-finding function. Accordingly, this Court should accept review pursuant to RAP 13.4(b)(1), (2), and (4).

Respectfully submitted this 31st day of May, 2018.

RYAN, SWANSON & CLEVELAND, PLLC

By: _____
Bryan C. Graff, WSBA #38553
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VIII. APPENDIX

A. Court of Appeals March 20, 2018 Published Opinion

B. Court of Appeals May 1, 2018 Order Denying Appellant's Motion for Reconsideration and Order Granting Respondent's Motion for Reconsideration in Part and Order Amending Opinion

CERTIFICATE OF SERVICE

I hereby declare that I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Ryan, Swanson & Cleveland, PLLC, 1201 Third Avenue, Suite 3400, Seattle, Washington, 98101 3034. On May 31, 2018, I caused the Petition for Discretionary Review to be served upon counsel of record at the addresses and in the manner described:

Mark Gregory Olson Olson Law Firm, PLLC 3600 15th Ave. W, #200 Seattle, WA 98119 mark@mgolsonlaw.com	Christopher M. Constantine Of Counsel, Inc., P.S. P.O. Box 7125 Tacoma, WA 98417-0125 ofcounsl1@mindspring.com
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: May 31, 2018

By _____
Janet Petersen, *Legal Assistant*

Appendix A

Filed
Washington State
Court of Appeals
Division Two

March 20, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARSON MOTORS, INC., Respondent, v. PAUL SNYPP, Appellant.	No. 49671-2-II PUBLISHED OPINION

SUTTON, J. — Paul Snypp appeals the superior court's order granting partial summary judgment to Larson Motors, Inc., and entering judgment against him. Snypp argues that Larson Motors recorded telephone calls they had with him without his permission, that the telephone calls were private, and the calls were not admissible. He also argues that there were genuine issues of material fact as to whether he authorized the car repairs made by Larson Motors. Thus, he argues that the superior court erred by granting partial summary judgment to Larson Motors, awarding Larson Motors its attorney fees and costs, and entering judgment against Snypp. Larson Motors cross appeals, arguing that the superior court abused its discretion by denying its motion to sanction Snypp for his alleged perjury.

We hold that the recorded telephone calls that Snypp had with Larson Motors were private and that the calls were not admissible at summary judgment. Because there are genuine issues of material fact as to whether Snypp authorized the car repairs, we reverse the superior court's order granting partial summary judgment and we reverse the related judgment in its entirety. Further, because the superior court did not abuse its discretion by not sanctioning Snypp, we affirm the

superior court's order denying Larson Motors' motion for sanctions. Lastly, we deny both parties' request for attorney fees on appeal.

FACTS

Larson Motors performed repairs on Snypp's car in February and April of 2015. On February 11, Snypp brought the car in for an oil change and for other repairs that Snypp claims Larson Motors previously said it would fix at the next scheduled appointment. Snypp later claimed that he changed his mind and called Larson Motors the next day to cancel the repairs, but that the repair work had already been done without his authorization. Then, on February 19, Snypp took his car back to Larson Motors because his car was having a different problem.

Snypp and Larson Motors also spoke over the telephone in March and April to discuss the car repairs. Snypp admits that he authorized Larson Motors to "install new belts" during a telephone conversation and claims that Larson Motors said it would not charge him. Clerk's Papers (CP) at 92. On April 13, Snypp retrieved his car and Larson Motors charged him for the repair work done.

After Larson Motors had completed the car repairs, it provided Snypp with invoices totaling $892.00 for February's repairs and $8,189.42 for April's repairs. Snypp paid the invoices, but later disputed both charges with his credit card company and the credit card company reversed both transactions. Thus, Larson Motors was never paid.

Larson Motors sued Snypp alleging breach of contract and unjust enrichment. Larson Motors sought damages in the amount of $9,081.42 for the car repair work and requested an award

of reasonable attorney fees and costs under RCW 4.84.250.[1] In his answer to the complaint, Snypp alleged that the repair work was not authorized by him.

After Snypp refused to pay the February invoice, Larson Motors recorded their telephone calls with Snypp on March 17 and April 2 without Snypp's knowledge. The transcripts of the telephone recordings do not contain any authorization by Snypp permitting the telephone calls to be recorded. Larson Motors claims that these recorded telephone calls prove that Snypp authorized the car repairs. During Snypp's deposition, counsel for Larson Motors asked Snypp multiple times whether he had any conversations with the dealership that were "secret," and whether he said anything to Larson Motors that Snypp "wouldn't tell the judge," or whether Snypp did not want any calls "documented." CP at 94, 95. Snypp replied, "No" to these questions and stated that he wished that the communications had been documented.[2] CP at 94, 95, 97.

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[1] RCW 4.84.250 allows for the recovery of reasonable attorney fees and costs in actions for damages where the amount pleaded is $10,000 or less.

[2] Specifically, that section of Snypp's deposition states:

> Q. So there wasn't any kind of private, secret communications happening between you and [Larson Motors' Service Manager]?
> A. Oh, no.
> . . . .
> Q. Were you saying anything to [Larson Motors' Service Manager] that you wouldn't say to everybody around the table today?
> A. No.
> . . . .
> Q. That's what I mean. Were there kind of secret, private communications that you didn't want documented going on between you and [Larson Motors' Service Manager]?
> A. Oh, no. I wanted everything documented.
> . . . .
> Q. [E]verything that you told to Larson Motors or they told you, you'd tell to anybody else?
> A. Exactly or tell to a judge, tell to a jury, whatever.

Larson Motors filed a motion for partial summary judgment on the breach of contract and unjust enrichment claims and argued that the car repairs were made based on Snypp's authorization. Snypp responded that he did not authorize the car repairs and that because there were genuine issues of material fact, partial summary judgment was not appropriate. Snypp also filed a declaration that disputed whether he authorized the February and April car repairs.

Larson Motors filed a motion for sanctions under CR 11, CR 26, CR 37, and RCW 7.21.010, as well as under the superior court's inherent ability to sanction bad faith litigation. Larson Motors argued that Snypp had lied under oath and that he should be sanctioned. In support of the motion for sanctions, Larson Motors sought to admit the transcripts of the recorded telephone calls.

In response, Snypp filed a motion to strike the transcripts of the recorded telephone calls and all documents attached to Larson Motors' motion for summary judgment that reference the telephone calls. In his declaration attached to the response, Snypp stated that the recorded telephone calls were intended to be private, that he had no knowledge that the calls were being recorded at that time, and that the transcripts that Larson Motors sought to admit lacked the authorization to allow the calls to be recorded as required under RCW 9.73.030 and .050.

The superior court denied Snypp's motion to strike, but declined to consider the recorded telephone calls, stating, "I don't know how you [Larson Motors] get around RCW [9.]73.030." Verbatim Report of Proceedings (VRP) (8/19/16) at 18. After a hearing, the superior court granted partial summary judgment to Larson Motors, but denied Larson Motors' motion for sanctions.

CP at 94, 95, 97.

Larson Motors then filed a motion requesting an award of attorney fees and costs. After a hearing, the superior court ruled that Larson Motors was the prevailing party under RCW 4.84.010, .030, and 4.84.250-.280. VRP (9/16/26) at 16. The superior court entered judgment against Snypp in the amount of $9,081.42 for the car repair work and awarded $30,350.73 in attorney fees and costs to Larson Motors. Subsequently, the superior court amended the order granting partial summary judgment and certified the partial summary judgment order as a final judgment for appeal under CR 54(b).

Snypp appeals the order granting partial summary judgment, the award of attorney fees and costs, and the judgment entered against him in the amount of $39,432.15. Larson Motors cross appeals the order denying its motion for sanctions.

ANALYSIS

I. RECORDED TELEPHONE CALLS

Snypp argues that the telephone calls that Larson Motors recorded are inadmissible and that we should not consider them.[3] We agree.

Washington's "Privacy Act" states that except as otherwise provided in chapter 9.73 RCW, it shall be unlawful for any individual to intercept, or record any

> [p]rivate conversation, by any device electronic or otherwise . . . without first obtaining the consent of all the persons engaged in the conversation.

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[3] Snypp also argues that the superior court erred in certifying this matter for appeal under CR 54(b). We agree that the superior court improperly certified the partial summary judgment order as a final judgment under CR 54(b) because the superior court did not make express findings as to why there was no just reason for delay. Because the order was improperly certified, this case is not appealable as a matter of right. However, we exercise our discretion to treat this appeal as a motion for discretionary review pursuant to RAP 5.1(c), and we grant discretionary review and resolve this case on its merits.

RCW 9.73.030(1)(b). A communication is private within the meaning of the Privacy Act "'(1) when parties manifest a subjective intention that it be private and (2) where that expectation [of privacy] is reasonable.'" *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 60, 316 P.3d 1119 (2014) (internal quotation marks omitted) (alteration in original) (quoting *State v. Modica*, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008)). RCW 9.73.050 states that any information obtained in violation of the Privacy Act is inadmissible in any civil proceeding except with the permission of the individual whose rights were violated.

Here, Larson Motors argues that because Snypp testified in his deposition that he had no desire that the telephone calls between he and the dealership be private, that Snypp had no subjective intention that the conversation be private. However, in Snypp's declaration, he stated that he did believe that all calls he had with Larson Motors were private. The Privacy Act requires that parties who want to record a conversation must *first* obtain the "consent of all persons engaged in the conversation." RCW 9.73.030(1)(b). Our Supreme Court has stated, "As we read the statute, it expresses a legislative intent to safeguard the private conversations of citizens from dissemination in any way." *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990).

Thus, the Privacy Act expresses a desire to protect citizens from having private conversations recorded without consenting to such a recording. While the application of the Privacy Act may be harsh, we interpret a statute's plain language to mean precisely what it says. *See HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Post-conversation statements of a party to a private conversation do not necessarily render an otherwise private conversation "not private" for Privacy Act purposes.

Here, the Privacy Act compels our decision. Because Larson Motors did not obtain Snypp's consent prior to recording the telephone calls, and his declaration expressed his understanding that any telephone calls with the dealership were private, we hold that the transcripts and any reference to the telephone calls were inadmissible. RCW 9.73.030. Because the transcripts of the recorded telephone calls and any reference to them were not admissible, we do not consider them on appeal. *See Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 569-70, 157 P.3d 406 (2007).

II. ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Snypp argues that the superior court erred in granting partial summary judgment to Larson Motors and entering judgment against him for the cost of the repairs, because (1) there were genuine issues of material fact regarding whether he authorized the car repairs and (2) the superior court did not resolve his affirmative defenses and counterclaims for the damages to his car, which claims he argues were related. We agree with Snypp that genuine issues of material fact preclude partial summary judgment.

We review a superior court's decision to grant summary judgment de novo. *Shanghai Commercial Bank Ltd. v. Kung Da Chang*, 189 Wn.2d 474, 479, 404 P.3d 62 (2017). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We review all facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor, and summary judgment will be upheld if we find that reasonable minds could have reached but one conclusion. *Youker v. Douglas County*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). A genuine issue of material fact that could preclude summary judgment is one upon which reasonable people may

disagree. *Youker*, 178 Wn. App. at 796. A material fact is one that controls the litigation's outcome. *Youker*, 178 Wn. App. at 796.

Larson Motors alleges a breach of contract because Snypp entered into "valid and enforceable agreements" with them requesting the car repairs and Larson Motors conferred a benefit to Snypp by making the requested car repairs. CP at 5. Because Larson Motors "did not intend or agree to volunteer" its services, they also alleged a claim of unjust enrichment. CP at 5. Larson Motors relies heavily on the inadmissible recorded telephone call transcripts in support of its motion for partial summary judgment.

We do not consider inadmissible evidence on summary judgment. *See Allen,* 138 Wn. App. at 569-70. As discussed above, we hold that the recorded telephone call transcripts are inadmissible. Because Snypp disputed that he authorized the work, and we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party, there are genuine issues of material fact as to whether Snypp authorized the car repairs. Because genuine issues of material fact exist, the superior court erred in granting partial summary judgment to Larson Motors. Therefore, we reverse the superior court's order granting partial summary judgment and the related judgment in its entirety.

III. Cross Appeal–Sanctions

In its cross appeal, Larson Motors argues that the superior court erred by denying its motion to sanction Snypp for his alleged perjury. A superior court has broad discretion to impose sanctions and its determination will not be disturbed absent a clear abuse of discretion. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009); *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002). A superior court abuses its discretion when its decision is

manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014).

Here, Larson Motors' request for sanctions was based on information contained in the recorded telephone calls. Because the recorded telephone call transcripts are inadmissible, we do not consider them on appeal. Thus, consistent with our holding, there is no basis for an award of sanctions against Snypp for perjury, and the superior court did not abuse its discretion by denying Larson Motors' motion for an award of sanctions against Snypp.

IV. ATTORNEY FEES AND COSTS ON APPEAL

Larson Motors requests an award of attorney fees and costs on appeal under RCW 4.84.250[4] as the prevailing party and under RAP 18.1. RAP 18.1 allows this court to award attorney fees and costs if "applicable law" permits. However, because we reverse the order granting partial summary judgment, Larson Motors is not the prevailing party and is not entitled to an award of attorney fees and costs on appeal under RCW 4.84.250[5] and RAP 18.1.

Snypp also requests an award of attorney fees and costs on appeal "pursuant to RCW 4.84.250-.280, RCW 46.71.070, and RCW 19.86.090" or, alternatively, that we direct the superior court to determine the amount of attorney fees and costs on remand under RAP 18.1. Br. of Appellant at 35. However, Snypp makes no accompanying argument to justify an award of

[4] RCW 4.84.250 allows a prevailing party at superior court to collect attorney fees in an action for $10,000 or less.

[5] Snypp also argues that the superior court erred in awarding attorney fees and costs to Larson Motors under RCW 4.84.010, .030. Because we reverse the superior court's order granting partial summary judgment, there exists no statutory basis to award reasonable attorney fees or costs to Larson Motors. Therefore, we reverse the award.

attorney fees or costs. Br. of App. at 35. We will not consider claims unsupported by legal authority or argument. RAP 10.3(a)(6); RAP 18.1(b); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Because Snypp does not provide argument, we decline to award him attorney fees and costs on appeal.

CONCLUSION

We reverse the superior court's order granting partial summary judgment and we reverse the related judgment in its entirety. We affirm the superior court's order denying Larson Motors' motion for an award of sanctions against Snypp. We deny both parties' request for attorney fees on appeal.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J
WORSWICK, P.J.

J. J
LEE, J.

Appendix B

Filed
Washington State
Court of Appeals
Division Two

May 1, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARSON MOTORS, INC., Respondent, v. PAUL SNYPP, Appellant.	No. 49671-2-II ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND ORDER GRANTING RESPONDENT'S MOTION FOR RECONSIDERATION IN PART, AND ORDER AMENDING OPINION

The published opinion in this case was filed on March 20, 2018. Upon the motions of both parties for reconsideration, it is hereby

ORDERED that Appellant's motion for reconsideration is denied. It is further

ORDERED that Respondent's motion for reconsideration is granted in part to fix a scrivener's error, and that the remainder of Respondent's motion for reconsideration is denied. The opinion previously filed on March 20, 2018, is hereby amended as follows:

Page 6, the third sentence of the paragraph which starts at line #11 will be deleted and replaced with the following sentence:

The Privacy Act requires that parties who want to record a private conversation must *first* obtain the "consent of all persons engaged in the conversation."

IT IS SO ORDERED.

Sutton, J.
SUTTON, J.

We concur:

, A.C.J.
LEE, A.C.J.

Worswick, J.
WORSWICK, J.

Filed
Washington State
Court of Appeals
Division Two

March 20, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LARSON MOTORS, INC., Respondent, v. PAUL SNYPP, Appellant.	No. 49671-2-II PUBLISHED OPINION

SUTTON, J. — Paul Snypp appeals the superior court's order granting partial summary judgment to Larson Motors, Inc., and entering judgment against him. Snypp argues that Larson Motors recorded telephone calls they had with him without his permission, that the telephone calls were private, and the calls were not admissible. He also argues that there were genuine issues of material fact as to whether he authorized the car repairs made by Larson Motors. Thus, he argues that the superior court erred by granting partial summary judgment to Larson Motors, awarding Larson Motors its attorney fees and costs, and entering judgment against Snypp. Larson Motors cross appeals, arguing that the superior court abused its discretion by denying its motion to sanction Snypp for his alleged perjury.

We hold that the recorded telephone calls that Snypp had with Larson Motors were private and that the calls were not admissible at summary judgment. Because there are genuine issues of material fact as to whether Snypp authorized the car repairs, we reverse the superior court's order granting partial summary judgment and we reverse the related judgment in its entirety. Further, because the superior court did not abuse its discretion by not sanctioning Snypp, we affirm the

superior court's order denying Larson Motors' motion for sanctions. Lastly, we deny both parties' request for attorney fees on appeal.

FACTS

Larson Motors performed repairs on Snypp's car in February and April of 2015. On February 11, Snypp brought the car in for an oil change and for other repairs that Snypp claims Larson Motors previously said it would fix at the next scheduled appointment. Snypp later claimed that he changed his mind and called Larson Motors the next day to cancel the repairs, but that the repair work had already been done without his authorization. Then, on February 19, Snypp took his car back to Larson Motors because his car was having a different problem.

Snypp and Larson Motors also spoke over the telephone in March and April to discuss the car repairs. Snypp admits that he authorized Larson Motors to "install new belts" during a telephone conversation and claims that Larson Motors said it would not charge him. Clerk's Papers (CP) at 92. On April 13, Snypp retrieved his car and Larson Motors charged him for the repair work done.

After Larson Motors had completed the car repairs, it provided Snypp with invoices totaling $892.00 for February's repairs and $8,189.42 for April's repairs. Snypp paid the invoices, but later disputed both charges with his credit card company and the credit card company reversed both transactions. Thus, Larson Motors was never paid.

Larson Motors sued Snypp alleging breach of contract and unjust enrichment. Larson Motors sought damages in the amount of $9,081.42 for the car repair work and requested an award

of reasonable attorney fees and costs under RCW 4.84.250.[1] In his answer to the complaint, Snypp alleged that the repair work was not authorized by him.

After Snypp refused to pay the February invoice, Larson Motors recorded their telephone calls with Snypp on March 17 and April 2 without Snypp's knowledge. The transcripts of the telephone recordings do not contain any authorization by Snypp permitting the telephone calls to be recorded. Larson Motors claims that these recorded telephone calls prove that Snypp authorized the car repairs. During Snypp's deposition, counsel for Larson Motors asked Snypp multiple times whether he had any conversations with the dealership that were "secret," and whether he said anything to Larson Motors that Snypp "wouldn't tell the judge," or whether Snypp did not want any calls "documented." CP at 94, 95. Snypp replied, "No" to these questions and stated that he wished that the communications had been documented.[2] CP at 94, 95, 97.

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[1] RCW 4.84.250 allows for the recovery of reasonable attorney fees and costs in actions for damages where the amount pleaded is $10,000 or less.

[2] Specifically, that section of Snypp's deposition states:

> Q. So there wasn't any kind of private, secret communications happening between you and [Larson Motors' Service Manager]?
> A. Oh, no.
> . . . .
> Q. Were you saying anything to [Larson Motors' Service Manager] that you wouldn't say to everybody around the table today?
> A. No.
> . . . .
> Q. That's what I mean. Were there kind of secret, private communications that you didn't want documented going on between you and [Larson Motors' Service Manager]?
> A. Oh, no. I wanted everything documented.
> . . . .
> Q. [E]verything that you told to Larson Motors or they told you, you'd tell to anybody else?
> A. Exactly or tell to a judge, tell to a jury, whatever.

Larson Motors filed a motion for partial summary judgment on the breach of contract and unjust enrichment claims and argued that the car repairs were made based on Snypp's authorization. Snypp responded that he did not authorize the car repairs and that because there were genuine issues of material fact, partial summary judgment was not appropriate. Snypp also filed a declaration that disputed whether he authorized the February and April car repairs.

Larson Motors filed a motion for sanctions under CR 11, CR 26, CR 37, and RCW 7.21.010, as well as under the superior court's inherent ability to sanction bad faith litigation. Larson Motors argued that Snypp had lied under oath and that he should be sanctioned. In support of the motion for sanctions, Larson Motors sought to admit the transcripts of the recorded telephone calls.

In response, Snypp filed a motion to strike the transcripts of the recorded telephone calls and all documents attached to Larson Motors' motion for summary judgment that reference the telephone calls. In his declaration attached to the response, Snypp stated that the recorded telephone calls were intended to be private, that he had no knowledge that the calls were being recorded at that time, and that the transcripts that Larson Motors sought to admit lacked the authorization to allow the calls to be recorded as required under RCW 9.73.030 and .050.

The superior court denied Snypp's motion to strike, but declined to consider the recorded telephone calls, stating, "I don't know how you [Larson Motors] get around RCW [9.]73.030." Verbatim Report of Proceedings (VRP) (8/19/16) at 18. After a hearing, the superior court granted partial summary judgment to Larson Motors, but denied Larson Motors' motion for sanctions.

CP at 94, 95, 97.

Larson Motors then filed a motion requesting an award of attorney fees and costs. After a hearing, the superior court ruled that Larson Motors was the prevailing party under RCW 4.84.010, .030, and 4.84.250-.280. VRP (9/16/26) at 16. The superior court entered judgment against Snypp in the amount of $9,081.42 for the car repair work and awarded $30,350.73 in attorney fees and costs to Larson Motors. Subsequently, the superior court amended the order granting partial summary judgment and certified the partial summary judgment order as a final judgment for appeal under CR 54(b).

Snypp appeals the order granting partial summary judgment, the award of attorney fees and costs, and the judgment entered against him in the amount of $39,432.15. Larson Motors cross appeals the order denying its motion for sanctions.

ANALYSIS

I. RECORDED TELEPHONE CALLS

Snypp argues that the telephone calls that Larson Motors recorded are inadmissible and that we should not consider them.[3] We agree.

Washington's "Privacy Act" states that except as otherwise provided in chapter 9.73 RCW, it shall be unlawful for any individual to intercept, or record any

> [p]rivate conversation, by any device electronic or otherwise . . . without first obtaining the consent of all the persons engaged in the conversation.

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[3] Snypp also argues that the superior court erred in certifying this matter for appeal under CR 54(b). We agree that the superior court improperly certified the partial summary judgment order as a final judgment under CR 54(b) because the superior court did not make express findings as to why there was no just reason for delay. Because the order was improperly certified, this case is not appealable as a matter of right. However, we exercise our discretion to treat this appeal as a motion for discretionary review pursuant to RAP 5.1(c), and we grant discretionary review and resolve this case on its merits.

RCW 9.73.030(1)(b). A communication is private within the meaning of the Privacy Act "'(1) when parties manifest a subjective intention that it be private and (2) where that expectation [of privacy] is reasonable.'" *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 60, 316 P.3d 1119 (2014) (internal quotation marks omitted) (alteration in original) (quoting *State v. Modica*, 164 Wn.2d 83, 88, 186 P.3d 1062 (2008)). RCW 9.73.050 states that any information obtained in violation of the Privacy Act is inadmissible in any civil proceeding except with the permission of the individual whose rights were violated.

Here, Larson Motors argues that because Snypp testified in his deposition that he had no desire that the telephone calls between he and the dealership be private, that Snypp had no subjective intention that the conversation be private. However, in Snypp's declaration, he stated that he did believe that all calls he had with Larson Motors were private. The Privacy Act requires that parties who want to record a conversation must *first* obtain the "consent of all persons engaged in the conversation." RCW 9.73.030(1)(b). Our Supreme Court has stated, "As we read the statute, it expresses a legislative intent to safeguard the private conversations of citizens from dissemination in any way." *State v. Fjermestad*, 114 Wn.2d 828, 836, 791 P.2d 897 (1990).

Thus, the Privacy Act expresses a desire to protect citizens from having private conversations recorded without consenting to such a recording. While the application of the Privacy Act may be harsh, we interpret a statute's plain language to mean precisely what it says. *See HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009). Post-conversation statements of a party to a private conversation do not necessarily render an otherwise private conversation "not private" for Privacy Act purposes.

Here, the Privacy Act compels our decision. Because Larson Motors did not obtain Snypp's consent prior to recording the telephone calls, and his declaration expressed his understanding that any telephone calls with the dealership were private, we hold that the transcripts and any reference to the telephone calls were inadmissible. RCW 9.73.030. Because the transcripts of the recorded telephone calls and any reference to them were not admissible, we do not consider them on appeal. *See Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 569-70, 157 P.3d 406 (2007).

II. ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Snypp argues that the superior court erred in granting partial summary judgment to Larson Motors and entering judgment against him for the cost of the repairs, because (1) there were genuine issues of material fact regarding whether he authorized the car repairs and (2) the superior court did not resolve his affirmative defenses and counterclaims for the damages to his car, which claims he argues were related. We agree with Snypp that genuine issues of material fact preclude partial summary judgment.

We review a superior court's decision to grant summary judgment de novo. *Shanghai Commercial Bank Ltd. v. Kung Da Chang*, 189 Wn.2d 474, 479, 404 P.3d 62 (2017). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We review all facts in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor, and summary judgment will be upheld if we find that reasonable minds could have reached but one conclusion. *Youker v. Douglas County*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). A genuine issue of material fact that could preclude summary judgment is one upon which reasonable people may

disagree. *Youker*, 178 Wn. App. at 796. A material fact is one that controls the litigation's outcome. *Youker*, 178 Wn. App. at 796.

Larson Motors alleges a breach of contract because Snypp entered into "valid and enforceable agreements" with them requesting the car repairs and Larson Motors conferred a benefit to Snypp by making the requested car repairs. CP at 5. Because Larson Motors "did not intend or agree to volunteer" its services, they also alleged a claim of unjust enrichment. CP at 5. Larson Motors relies heavily on the inadmissible recorded telephone call transcripts in support of its motion for partial summary judgment.

We do not consider inadmissible evidence on summary judgment. *See Allen,* 138 Wn. App. at 569-70. As discussed above, we hold that the recorded telephone call transcripts are inadmissible. Because Snypp disputed that he authorized the work, and we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party, there are genuine issues of material fact as to whether Snypp authorized the car repairs. Because genuine issues of material fact exist, the superior court erred in granting partial summary judgment to Larson Motors. Therefore, we reverse the superior court's order granting partial summary judgment and the related judgment in its entirety.

III. Cross Appeal–Sanctions

In its cross appeal, Larson Motors argues that the superior court erred by denying its motion to sanction Snypp for his alleged perjury. A superior court has broad discretion to impose sanctions and its determination will not be disturbed absent a clear abuse of discretion. *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009); *Eugster v. City of Spokane*, 110 Wn. App. 212, 39 P.3d 380 (2002). A superior court abuses its discretion when its decision is

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CONCLUSION

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Sutton, J.

SUTTON, J.

We concur:

Worswick, J.

WORSWICK, P.J.

J.

LEE, J.

RYAN, SWANSON & CLEVELAND PLLC

May 31, 2018 - 2:50 PM

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