

ORIGINAL

NO. 72642-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

RICK SUCEE, ET AL.,

Respondent,

v.

TODD NEWLUN,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANTS

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I. REPLY ARGUMENT

The trial court erred in not dismissing Todd Newlun's Privacy Act lawsuit. This Court should reverse and dismiss Mr. Newlun's lawsuit because his claims are barred by RCW 4.24.420, and also because he had no reasonable expectation of privacy in his transmitted drug sale conversations.

In addition, Mr. Newlun's issue on appeal—that RCW 9.73.230(11) is an available remedy—is without merit. Since there is no evidence that law enforcement violated procedures relating to evidence gathering wires, which is a precondition to seeking those damages, Mr. Newlun cannot be awarded exemplary damages as a matter of law.

A. RCW 4.24.420 Affords The Appellants A Complete Defense In This Case

In this case, the system worked. The criminal trial court found that during the course of an undercover, felony level drug buy, police officers did not follow procedures related to the use of an officer safety wire. As a result, some evidence was suppressed in the resulting criminal case. Thus, although he was caught "red-handed," Todd Newlun received a substantial benefit in the criminal case because the Privacy Act

rendered key prosecution evidence—his conversations about the drug sale—inadmissible. With evidence of the transmitted conversations suppressed, the prosecution agreed to reduce the felony charges against Mr. Newlun to one simple misdemeanor. Due to the protections of the Privacy Act, Mr. Newlun avoided a felony conviction and a substantial prison sentence.

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

1. RCW 4.24.420 Applies To “Any Action For Damages For Personal Injury,” Including Claims Of Privacy Violation

RCW 4.24.420 provides a “complete defense to any action for damages for personal injury.” This language is not ambiguous. The statute reflects a clear legislative decision to preclude state claims of injury damages where the injury occurred during the commission of a

felony. Mr. Newlun provides no authority to support his argument that the defense does not apply to RCW 9.73 claims for injury damages.

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Bd. of Ct. Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). There is no way to adopt Mr. Newlun's argument that RCW 4.24.420 does not apply without rendering the entire statute meaningless.

Mr. Newlun's argument that that RCW 4.24.420 does not apply because he committed the felony after his alleged injury occurred is also misplaced. Mr. Newlun was "engaged in the commission of a felony," as required by RCW 4.24.420, from the moment he telephonically agreed with the confidential informant to sell the informant drugs. Mr. Newlun made the agreement to sell drugs, agreed to a time and place for a meeting, and went to the meeting at the given location at the agreed date and time—all before his words were ever captured or transmitted by the officer safety wire. But for Mr. Newlun's agreement and steps toward engaging in the sale, his voice would never have been transmitted.

RCW 4.24.420 applies to claims of personal injury, whether those claims are based in common law or statute, even where the claim is of

strict liability. *See, e.g., Dickinson v. City of Kent*, C06-1215RSL, 2007 WL 4358312, (W.D. Wash. 2007)¹ (RCW 4.24.420 applies to statutory dog bite liability claims). There is no valid argument or authority supporting denial of the commission of a felony defense in this case. RCW 4.24.420 provides a complete defense, and requires entry of judgment as a matter of law in favor of Appellants.

2. Mr. Newlun Disputes None Of The Material Facts In This Case

It is undisputed that the only reason Mr. Newlun and Detective Hanger had any conversations on March 16, 2011, was to consummate the sale of approximately three pounds of marijuana. It is undisputed that Mr. Newlun and Detective Hanger were strangers prior to that date, and would never have been in contact with one another—therefore, no transmission of Mr. Newlun’s voice—but for that drug sale. It is undisputed that the sale of three pounds of marijuana is a felony under Washington state law.

After the party moving for judgment as a matter of law submits adequate affidavits, the nonmoving party must set out specific facts sufficiently rebutting the moving party’s contentions and disclosing the existence of a material issue of fact; in doing so, the nonmoving party

¹ Citation to unpublished federal opinions decided after January 1, 2007 is permitted by GR 14.1(b) and Fed. R. App. P. 32.1.

may not rely on speculation, argumentative assertions that unresolved factual issues remain, or have its affidavits accepted at face value. *Heath v. Uraga*, 106 Wn. App. 506, 24 P.3d 413 (2001). The trial court erred in denying state, city, and county law enforcement (Appellants) judgment as a matter of law.

Here, there is no evidence before the Court that suggests Mr. Newlun was not in the course of committing a felony at the time his conversations relating to that felony were transmitted. Therefore, as a matter of law, Mr. Newlun's submissions are insufficient to preclude judgment as a matter of law. Where reasonable minds could reach but one conclusion from the admissible facts in evidence, judgment as a matter of law is required. *White v. State*, 131 Wn. 2d 1, 929 P.2d 396 (1997). The trial court erred in not granting judgment to Appellants.

3. Trial In This Case Is Not Necessary, And Would Needlessly Expend Time And Resources

Summary judgment is a procedural device designed to avoid the time and expense of a trial when no trial is necessary. *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960). The purpose of a summary judgment is to avoid a useless trial. It permits the trial court to cut through formal allegations and grant relief when it appears from uncontroverted facts, set forth in affidavits, depositions, admissions on

file or in the pleadings, that there are no genuine issues as to any material fact. *Id.* at 605. The trial court should have awarded judgment as a matter of law to the state, city, and county law enforcement.

Here, Mr. Newlun has only claimed injury in the form of alleged mental anguish due to allegedly being “tricked” by the officers to whom he sold marijuana. CP at 766-72. To be caused to suffer mental anguish is a form of personal injury. *See, e.g.*, 3 Louis R. Frumer, *Personal Injury* § 3.04(1) (1965) (“The elements of compensatory damages for personal injuries are: (1) pain incident to physical injury, commonly called physical pain; (2) various forms of mental suffering and anguish . . .”). RCW 4.24.420 is “complete defense to any action for damages for personal injury.” Mr. Newlun’s claim is barred by statute, and must be dismissed.

B. Mr. Newlun Has Failed To Articulate A Factual Or Legal Basis To Show The Transmitted Conversations Were Private

Mr. Newlun presents a single argument in response to the Appellants’ privacy arguments: that *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996) is not factually identical to his own case. The trial court erred in accepting this analysis. Mr. Newlun failed to articulate any meaningful distinction between his case and the facts in *Clark* and, at the same time, failed to articulate how his conversations are private in light

of the *Clark* factors. While the facts in this case are not identical to *Clark*, the *Clark* factors show that the conversations in this case cannot, as a matter of law, be private.

1. Pursuant To *State V. Clark* And *State V. Kipp*, The Transmitted Conversations Cannot Be Private

The court in *Clark* established the test for determining whether a conversation is private. The courts must analyze the (1) subjective intent of the participants and (2) the factors bearing on the reasonable expectations of the participants. *Clark* at 225. In looking at the reasonable expectations of the participant, the court examines: (a) the duration and subject matter of the conversation, (b) the location and presence of third parties, and (c) the relationship of the parties. *Id.* at 225-26.² This test was recently affirmed by the state Supreme Court without equivocation. *See State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014). Thus, *Kipp* and *Clark* provide the legal analysis to determine, on a case by case basis, whether a conversation is private. *Kipp* at 729; *Clark* at 224.

Because any criminal defendant could assert that a conversation was private, the court focuses on the reasonable expectation of privacy factors outlined in *Clark*: the subject matter of the conversation, location and presence of third parties, and the relationship between the parties.

² A more thorough discussion of *Clark* can be found in Appellants' Opening Brief.

Clark at 225. Mr. Newlun failed to articulate how, under the *Clark* factors, his conversations with Detective Hanger and the informant were private. *Clark* and *Kipp*, as applied to the undisputed facts here, demonstrate that the conversations were *not* private. The trial court erred when it failed to apply the *Clark* factors to this case.

a. Subject Matter Of Conversations

Like the drug dealers in *Clark*, Newlun's conversations were "essentially the same conversations that [he] might have had with a great many other strangers" who called and asked him to buy marijuana. *Clark* at 227. During the first conversation in the strip-mall parking lot, the parties discussed where they would drive next to execute the drug deal. CP 863. During the second conversation on the residential street in front of Newlun's house, the parties discussed business, conducted the drug deal itself, and planned future drug deals. CP 867. In the car, Mr. Newlun explained his manufacturing process, his standard pricing for marijuana, and told Hanger that he visits Bellingham every few weeks to sell drugs. CP 867.

Mr. Newlun dealt with Detective Hanger and the informant as he would have dealt with anyone else from the public who was interested in his business. *See Clark* at 228 ("They dealt with him as they would have dealt with anyone else on the street in conducting their business with the

public.”). In fact, the detectives arrested the next customer who went to Newlun’s house to buy drugs immediately after Detective Hanger and the informant’s purchase. CP 868. Because the subject matter of the conversations concerned information Newlun would have shared with any customer, the first *Clark* factor is satisfied here.

b. Location And Presence Of Third Parties

“An ordinary person does not reasonably expect privacy in a stranger’s car.” *Clark* at 230. A person in a car who is visible to passersby has no reasonable expectation of privacy. *Id.* at 229.

The first conversation took place in the parking lot of a strip-mall in broad daylight through open car windows. CP 861-62. The parties parked directly in front of open businesses during the day with other people passing by and with a multitude of other cars present. CP 862, 870-74 (pictures of strip-mall parking lot). The parties spoke to each other through open car windows and Newlun himself spoke “loudly.” CP 862.

The second conversation took place in a residential neighborhood in Detective Hanger’s vehicle. CP 862-63. Hanger and the informant were strangers to Mr. Newlun. CP. 852, 861. While the topography of the neighborhood made the cell phone reception unpredictable and the street that Mr. Newlun lived on was a dead-end, CP 1011, Mr. Newlun’s house was in a residential neighborhood where the houses and driveways were in

close proximity to one another. CP 862, CP 853-54, and CP 878-81 (pictures of Mr. Newlun's house and surrounding neighborhood area). There were houses and cars parked in close proximity to the parked car where the drug deal took place. CP 862.

No reasonable person would expect to have a private conversation talking through a car window into another car window at a public shopping center. Further, there is no reasonable expectation of privacy in a stranger's car parked on a public-street.³ This is especially true here, where Mr. Newlun was talking loudly through open car windows at a crowded shopping complex, talking through open car windows outside his house, and traveling to and from his house with a duffel bag for all his neighbors to see. CP at 860-64. Accordingly, the second *Clark* factor applies to the facts of this case.

c. Relationship Of The Parties

"The non-consenting party's apparent willingness to impart the information on to an unidentified stranger evidences the non-private nature of the conversation." *Clark* at 226-27. Neither Detective Hanger nor the informant had a previous relationship with Mr. Newlun. CP 852,

³ The term "privacy" in RCW 9.73 is to be given its ordinary meaning. *Clark* at 224. As the *Clark* court observed, the definition of "privacy" includes "holding a confidential relationship to something...secretly: not open or public." *Id.* at 225. It certainly stretches the bounds of reason to argue that a conversation in a public parking lot through open car windows or performing a drug deal on a residential street is "secret" or "confidential."

861. The parties were strangers. CP 852, 861. The informant made a cold call to Newlun and Newlun agreed to sell him drugs. CP 852. Mr. Newlun himself talked to the informant for the first time, on the phone, the day before the drug deal. CP 852. That conversation only concerned the drug deal. CP 852. Because the parties were undisputedly strangers, the third *Clark* factor applies to the facts of this case.

2. Mr. Newlun's Interpretation of *Clark* Is Incorrect

Mr. Newlun argues that because the drug deal in this case did not occur in a marketplace setting, this Court should reject *Clark's* analysis. But the *Clark* Court stated that it was not making a per se ruling about the privacy of conversations for street drug deals. *Clark* at 231. *Clark* implored that the courts should use the factors it enunciated on a case by case basis in determining whether a conversation is private. *See Clark* at 227, 231. Newlun would like *Clark* confined to its own facts and having no application at all. The *Clark* Court, however, made no such limitation. Instead, the *Clark* Court provided the framework for courts to determine whether a conversation is private or not. The Appellants are simply asking this Court to use and apply that framework to the undisputed facts in this case.

Moreover, the facts in this case are analogous and closer to the facts in *Clark* than Mr. Newlun acknowledges. The conversations here

and in *Clark* happened in public. The conversations here and in *Clark* were solely about the routine sale of drugs and involved an established dealer selling his goods. As in *Clark*, the conversations and drug deals in this case occurred in a vehicle. Finally, the parties in both cases did not know each other. While the deal here did not develop as quickly as the face-to-face solicitations in *Clark*, the mechanics are similar: customer reaches out to unknown dealer, dealer and customer discuss transaction, deal consummates the sale in a vehicle in public. Newlun's attempt to distinguish *Clark* should be unpersuasive to this Court.

Finally, Newlun argues that the Appellants are arguing to "expand the bounds" of *Clark* and to allow for the police to intercept a conversation without following RCW 9.73. Br. Resp't at 38. This argument is a red herring. The Appellants are asking the Court to follow *Clark* and to find, based on the unique facts in this case, that the conversations were not private. A ruling for the Appellants would not give law enforcement "carte blanche" to violate the Privacy Act. That certainly has not happened in the 18-year period since *Clark* was decided. Moreover, the Appellants did not "carefully" plan to ensure the deal happened in public so they could use a wire intercept. Br. Resp't at 38. In

fact, the opposite is true. The Newluns were “calling the shots” about when and where the deal would take place. CP 1011-012.⁴

Law enforcement has every incentive to follow the protocols in RCW 9.73 for obtaining wires. Officers who avoid the requirements of RCW 9.73 create the possibility that evidence will be suppressed in criminal cases, (CrR 3.6, RCW 9.73), subject themselves to civil suits (RCW 9.73.060), subject themselves to criminal prosecution (RCW 9.73.080) and expose themselves to potential discipline from employers. More significantly, *State v. Clark* has been the law for 18 years and there is no indication law enforcement statewide has forsaken the requirements of RCW 9.73 in the name of *Clark*. Ruling for the Appellants in this case would not have any effect on law enforcement’s compliance with the Privacy Act.

While it is true the drug deal in this case did not occur in a “bazaar-like” setting as Newlun alleges, the analysis from *Clark* and *Kipp* applies. *See* Br. Resp’t at 38. It’s not enough for Newlun to simply state that *Clark* is not controlling based on a minor factual difference. That argument ignores the factors this Court is required to analyze. Under the

⁴ It is worth noting that Detective Hanger, the officer who wore the wire transmitting device, did not intend on intercepting Newlun. According to Detective Hanger’s unrefuted declaration, Hanger wore the wire as a means to communicate officer safety concerns to Detective Johnson and did not plan on communicating with/intercepting Newlun. CP 864. Hanger stated he was surprised when Newlun entered his vehicle. CP 864.

Clark and *Kipp* factors, the conversation between Hanger and Newlun was not private.⁵ This Court should reverse the trial court and grant judgment as a matter of law for the Appellants.

3. There Is No Basis To Argue Judicial Estoppel

Newlun also argues that the Appellants should be precluded from seeking summary judgment on liability based on judicial estoppel. Br. Resp't at 32-34. This argument is frivolous and should be rejected by the Court.

At the early stages of this litigation, the parties' efforts and motions were focused on clarifying what damages Newlun could pursue and prove under RCW 9.73. *See* Section C, *infra*, CP 70-81, CP 744-55. It was in this context that the Appellants argued that Newlun was only entitled to \$100 liquidated or actual damages *if he prevailed* in the litigation.

Importantly, in litigating what damages Newlun might be entitled to pursue, the Appellants never admitted liability or asked the trial court to find for Newlun on liability. Newlun's argument that the Appellants should now be precluded from arguing about liability is presented without

⁵ *State v. Kipp* is an example of the court using the *Clark* factors to find that a conversation was private. In *Kipp*, the conversation was between brothers-in-law (close relationship) in the family kitchen (traditional private location), and one of the parties asked a third party to leave so they could speak privately (no third parties). *Kipp* at 730-33.

context and is baseless. The Appellants have made two distinct legal arguments: (1) that the conversations at issue are not private conversations subject to the protections of the Privacy Act and (2) if Newlun prevails at trial, he is entitled to \$100 damages. These two arguments are distinct and not inconsistent. The trial court summarily rejected the judicial estoppel argument Newlun is making here:

Mr. Brady: We've never argued we're liable for damages, the argument for . . . the argument is if Mr. Newlun prevails those [the \$100 liquidated damages] are the damages that he's entitled to, which is not an admission of liability.

The Court: That's my understanding of the defense position that all of this [the argument about damages] is assuming *arguendo* that the jury is considering damages. But I have heard the words *arguendo* either stated or implied.

RP at 28 (March 13, 2014 Hr'g).

For the above reasons, the Court should reject Mr. Newlun's judicial estoppel arguments.

C. The Trial Court Properly Denied Exemplary Damages under RCW 9.73.230(11) Because That Provision Does Not Apply To this Case

The Washington State Privacy Act (Privacy Act) sets forth privacy protections, exceptions, and sections allowing law enforcement to administratively authorize the use of an intercept, transmission or recording device. RCW 9.73.030 provides for protections and exceptions

in private communications, and RCW 9.73.060 provides for liability for damages in a civil action. A particular section of the Privacy Act, RCW 9.73.230(11), allows for exemplary damages in a privacy act lawsuit, but a plaintiff must establish certain prerequisites to pursue those damages. Because Mr. Newlun cannot meet the prerequisites for recovery set forth in RCW 9.73.230(11), he is not entitled to the exemplary damages he seeks in this case.

1. Mr. Newlun Cannot Meet The Prerequisites For Recovery Set Forth In RCW 9.73.230(11)

RCW 9.73.210 sets forth the procedure for use of an “officer safety” wire, and RCW 9.73.230 governs “evidence gathering” wires. Section 210 enables law enforcement to authorize the use of wire devices when they are involved in a drug investigation and there is reason to be concerned about the safety of an investigating officer. RCW 9.73.210. RCW 9.73.230, on the other hand, provides a means by which the police may use a recording device to obtain evidence as part of a bona fide criminal investigation of drug trafficking. RCW 9.73.230.

RCW 9.73.230 provides an avenue to obtain exemplary damages if certain conditions are met. This is the only section in the Privacy Act that allows for exemplary damages. Specifically, RCW 9.73.230(11) allows for \$25,000 in exemplary damages when: (1) there is a prior court finding

that an “evidence gathering” wire was authorized without probable cause of a specified drug offense, **and** (2) the wire was also authorized without reasonable suspicion that the intercepted communication would relate to controlled substances. In contrast, RCW 9.73.210 does not contain a damages provision. If a .210 violation occurs, a person would only be entitled to general damages pursuant to RCW 9.73.060.

Here, there is no finding that probable cause or a reasonable suspicion was lacking. At the suppression hearing, the criminal court did not make a judicial finding that probable cause or reasonable suspicion was lacking. In fact, at Mr. Newlun’s criminal suppression hearing, the Court found that “no matter how you look at this, and particularly under the provisions of [.210] I consider this to be an officer safety wire under those circumstances.” CP at 172-73.

In this later civil case, the trial court not only agreed with the criminal court’s findings, but analyzed the facts independently. The trial court found that Mr. Newlun could not pursue exemplary damages because there was no requisite finding on probable cause or reasonable suspicion and, as the criminal court found, the officers proceeded under the officer safety wire statute and not § .230 (evidentiary wire). Mr. Newlun failed at his opportunity at the suppression hearing to prove otherwise. As the trial court said:

The Court doesn't find that, as I indicated earlier, Section 210 or Section 230 apply in this case, which means we're left with the statute as it existed in the absence of those two sections that gives an action for damages to Mr. Newlun with damages as specified in [RCW 9.73.060].

This reasoning echoed that of *State v. Salinas*, 121 Wn.2d 689, 697, 853 P.2d 439 (1993) where officers used a wire in a controlled substance investigation and did not receive verbal authorization or prepare a written report. The Washington State Supreme Court in *Salinas*, stated:

In conclusion, the State concedes that Detective Johal's body wire was not authorized under either RCW 9.73.210 or RCW 9.73.230. Consequently neither RCW 9.73.210 nor RCW 9.73.230 applies; therefore, their respective subsections (5) and (8) cannot serve to provide an exception to the general prohibition in RCW 9.73.030 against electronic eavesdropping. Accordingly, RCW 9.73.050 prohibits the admission of all information obtained in violation of RCW 9.73.030.

As in *Salinas*, the trial court in this case ruled that Mr. Newlun has a cause of action under RCW 9.73.030(1)(b) and the available remedies are set forth in RCW 9.73.060. CP at 740. He is not entitled to RCW 9.73.230(11) exemplary damages.

The trial court evaluated the facts and determined that the wire in the drug purchase with Mr. Newlun was not without probable cause and not without reasonable suspicion and dismissed the exemplary damage claim. CP at 740. The court ordered that "The penalties specified in

RCW 9.73.230(11) do not apply in this case.” CP 740. The court stated the following:

I think the facts are very clear and I don't think there is a factual dispute that the officers who authorized and put into place the interception at issue here had every reason to believe that the conversation they were seeking to record involved the sale or delivery for sale of controlled substances.

...

I think it's clear from the facts of this case that the parties did have, that the parties really have not contested that it was reasonable to believe that the conversation was going to have to do with the sale of drugs and that's what RCW 9.73.230(11) requires in the Court's view, that's why the Court doesn't find that that section applies.

RP August 9, 2013 Hr'g Tr. 9-10,.

The trial court was correct, and the facts of this case are undisputed. There was never any use of an evidentiary wire to gather evidence against Mr. Newlun. Thus, RCW 9.73.230 does not apply, the trial court did not err, and Mr. Newlun's claims must be dismissed.

2. The Four-Corners Rule Does Not Apply To This Unambiguous Statutory Scheme

Even so, Mr. Newlun analogizes the Fourth Amendment four-corners rule and asserts that failing to provide a written authorization is akin to submitting a blank application. He then leaps to the conclusion that, absent a written report, RCW 9.73.230 has been per se violated and he can recover exemplary damages. The four-corners rule as argued by

Mr. Newlun does not apply for two reasons. First, the statute is clear that the wire used in Mr. Newlun's would have to be an RCW 9.73.230(11) evidence gathering wire for exemplary damages to be available. It is clear both from the evidence and the two available judicial findings that this was not a section .230 "evidence gathering" wire. Hence, by law, exemplary damages are unavailable to Mr. Newlun in this case.

Additionally, RCW 9.73.230 is unambiguous as to how and when exemplary damages can be awarded. That provision states there are two threshold requirements a plaintiff seeking exemplary damages must meet: (1) the wire must have been authorized without probable cause, and (2) there must not have been a reasonable suspicion that the wired communication would relate to controlled substances. RCW 9.73.230(11). Mr. Newlun offers no evidence that either of the above conditions is met.

Nonetheless, Mr. Newlun urges the Court to apply the "four corners" doctrine, a Fourth Amendment standard, to this case in an attempt to correct a statute he argues is unfair and unjust. However, time and again, our courts have chosen not to invoke that constitutional doctrine in Privacy Act cases, instead relying on the language of the statute itself. *See e.g., State v. Corliss*, 67 Wn. App. 708, 710-711; 838 P.2d 1149 (1992); *State v. Costello*, 84 Wn. App. 150, 153-154, 925 P.2d 1296 (1996). Mr. Newlun erroneously focuses on a Fourth Amendment

standard, when the issue at hand involves statutory requirements to pursue exemplary damages under a statutory cause of action.

Also, Mr. Newlun's reliance on *Salinas* in this context is misplaced. By undertaking this lawsuit, Mr. Newlun necessarily consented to the exposure of all relevant evidence admissible and admitted at trial. *Rhinehart v. Seattle Times*, 98 Wn.2d 226, 257, 654 P.2d 673 (1982). Thus he has consented to admissibility of all relevant and admissible facts surrounding the transmission of his drug sale for purposes of his claims. Neither RCW 9.73.230 nor the four-corners rule applies to this case, and Mr. Newlun's claims are without merit.

3. Law Enforcement Will Not Unjustly Benefit If Newlun's Case Is Dismissed

Mr. Newlun argues that when police do not complete a written report, it provides a "free pass on civil liability" for officers who can later say it was officer safety, and escape the \$25,000 penalty. This argument is speculative as to officer's motives and inconsistent with the significant consequences police would be subjected to when they fail to prepare a written report, such as, suppression of evidence, criminal and civil liability. Mr. Newlun's argument is also contrary to .230(11), which allows for a party to inquire at a suppression hearing into the nature of the wire. Indeed, the criminal proceeding gave Mr. Newlun an opportunity to

establish that probable cause and reasonable suspicion were lacking. Unfortunately for him, no such finding was made. Mr. Newlun's concerns and arguments are best fought in the Legislature if he believes the law should be changed to expand the application of the exemplary damages provision of section 230.

The officers in this case did not completely ignore the Privacy Act. The officers received verbal authorization for the wire from a lieutenant as required by the statute. CP at 122-23, 172-73. Law enforcement did not attempt to conceal the use of transmission wire as it is plainly written in their reports. CP 656. Lieutenant Sucee, who had previously commanded the drug task force, could only remember two occasions of officer safety wire use during his ten-year tenure. CP 142. An officer safety wire was rarely used by officers and, unfortunately, they mistakenly believed if an officer safety transmission wire was used and not recorded, a written report was not required. CP 129.

Full discovery was conducted in this civil case and the parties are only aware of one other case where application paperwork was not completed. The second case is the other officer safety wire recalled by Lieutenant Sucee, discussed above. There is simply no evidence of Mr. Newlun's alleged rampant, nefarious, or intentional failure by law enforcement to complete written reports in controlled substance

investigations to gain a benefit. The trial court's ruling dismissing the claim for exemplary damages was correct.

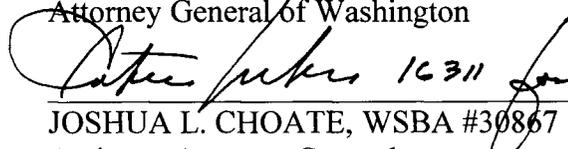
II. CONCLUSION

Although the trial court correctly ruled that exemplary damages are not available to Mr. Newlun, it erred in not dismissing his lawsuit entirely. Mr. Newlun has no reasonable expectation of privacy in his drug sale conversations with strangers, thus, his claims are not actionable. In addition, his claims are barred by RCW 4.24.420 because his commission of a felony was a proximate cause of his alleged harm. For either or both of those reasons, this Court should dismiss Mr. Newlun's lawsuit as a matter of law.

RESPECTFULLY SUBMITTED this 20th day of July, 2015.

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I declare that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of

Washington that the foregoing is true and correct.

DATED this 20 day of July at Seattle, Washington

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