

ORIGINAL

NO. 35878-6-II

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

KITSAP COUNTY,
Plaintiff-Appellant,

vs.

DAVID N. SMITH, CLAYTON LONGACRE, CHARLES J. SHANK,
and LONGACRE LAW OFFICES,

Defendants-Appellees.

APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY

BRIEF OF APPELLEES ATT. LONGACRE AND LONGACRE LAW

Clayton Ernest Longacre
Of Longacre Law Inc.
Co-Counsel for Appellees

Office and Post Office Address:

529 Division Street, Suite F
Port Orchard, WA 98366
(360) 876-7290

RECEIVED
JAN 10 2011
CLAYTON ERNEST LONGACRE
OF LONGACRE LAW INC.
CO-COUNSEL FOR APPELLEES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES	iii
I. RESPONSE TO ASSIGNMENTS OF ERROR.	1
II. RESPONSE TO COUNTY'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
III. STATEMENT OF THE CASE	3
IV. ARGUMENT.	5
A. THE COUNTY FAILS SUMMARY JUDGMENT REVIEW STANDARD	5
B. LONGACRE DID NOT VIOLATE RCW 40.14. OR RCW 42.17.020(36). . . .	6
C. LONGACRE FACILITATING HIS CLIENT'S COMPLIANCE WITH LAWFUL DISCOVERY DID NOT VIOLATE ANY LAWS	9
D. LONGACRE IS NOT LIABLE FOR SMITH'S TAPE RECORDING PUBLIC CONVERSATIONS.	12
1) Smith's Recorded Meetings With Citizens	12
2) Smith's Recorded Meeting With Fellow Employees	13
i) <i>Clark's First Factor; Subject of the Conversation</i>	14
ii) <i>Clark's Second Factor: Location and Potential Participants</i>	15
iii) <i>Clark's Third Factor: The Role of The Recorded Parties</i> . . .	16
3) Longacre Recorded Noone	17
E. JUDGE HABERLY PROPERLY DENIED DECLARATORY JUDGMENT: FINDING ISSUE OF PAST TAPING OF CONVERSATIONS BY AN EX- EMPLOYEE NOT A TRUE JUSTICIABLE CONTROVERSY	18
V. CONCLUSION	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Ackerley Communications, Inc. v. City of Seattle</u> , 92 Wn.2d 905, 602 P.2d 1177 (Wash., 1979).....	21
<u>Alford v. Haner</u> , 333 F.3d 972, 978 (9th Cir. 2003).....	16
<u>Barrett v. Freise</u> , 119 Wash.App. 823, 119 Wash.App. 1026, 82 P.3d 1179 (2003).....	6,8,10,17
<u>Devenpeck v. Alford</u> , 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004).....	16
<u>Diversified Indus. Dev. Corp. v. Ripley</u> , 82 Wash.2d 811, 815, 514 P.2d 137 (1973).....	19,21
<u>Grimwood v. University of Puget Sound, Inc.</u> , 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).....	6,8,10,17
<u>Johnson v. Hawe</u> , 388 F.3d 676, 682-83 (9th Cir. 2004).....	16
<u>Jones v. Allstate Ins. Co.</u> , 146 Wn. 2d 291 (2002).....	5
<u>Kardoranian v. Bellingham Police Dept.</u> , 119 Wn. 2d 178 (1992).....	12,13,14
<u>Nollette v. Christianson</u> , 115 Wash.2d 594, 599, 800 P.2d 359 (1990).....	19
<u>Smith v. Safeco Ins. Co.</u> , 150 Wn. 2d 478 (2003).....	5
<u>Spokane v. Taxpayers of Spokane</u> , 111 Wash.2d 91, 758 P.2d 480 (1988).....	19
<u>State v. Bonilla</u> , 23 Wash.App. 869, 873, 598 P.2d 783 (1979)	16
<u>State v. Clark</u> , 129 Wash. 2d 211 (1996).....	12,13,14,16

TABLE OF AUTHORITIES CONTINUED

<u>Cases</u>	<u>Page</u>
<i>State v. Flora</i> , 68 Wash.App. 802, 808, 845 P.2d 1355 (1992).....	16
<i>State v. Forrester</i> , 21 Wash.App. 855, 861, 587 P.2d 179 (1978).....	14
<i>State v. Slemmer</i> , 48 Wash. App. 48 (1987).....	12
<i>State v. Wajtoyna</i> , 70 Wash. App. 689 (1993).....	12
<i>Walker v. Munro</i> , 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994).....	19,21
<i>Wilson v. Steinbach</i> , 98 Wn. 2d 434 (1982).....	5

TABLE OF STATUTES

Rev. Code Wash. 9.73.030.....	12,16
Rev. Code Wash. 40.14 et seq.....	1,6, 8,22
Rev. Code Wash. 40.16 et seq.....	6,8,22
Rev. Code Wash. 42.17.020.....	1,6,8,22

I. RESPONSE TO ASSIGNMENTS OF ERROR.

1. The Superior Court did not err in granting Summary Judgment dismissal of Kitsap County's claims against Clayton Longacre and Longacre Law (hereinafter combined into "Longacre") when it found that David Smith did not unlawfully remove or keep public records from Kitsap County.

2. The Superior Court, claiming no justiciable issue, did not err in denying Kitsap County's request for declaratory relief against Longacre (and Mr. Smith) for recordings made by Mr. Smith years earlier when Mr. Smith was an employee of Kitsap County, and when nobody ever sued the County for the recordings.

II. RESPONSE TO COUNTY'S ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1.1: No County records were appropriated by David Smith, and none were removed without knowledge, consent and/or direction of Jacquelyn Aufderheide. Those removed by Ms. Aufderheide's directions, were removed in order to comply with a lawfully issued Federal Subpoena. After the Subpoena had been complied with, they were returned. So whether the records were public records within the meaning of RCW 40.14.010 and RCW 42.17.020(36) is irrelevant. Further, the county has failed to show any liability of Longacre for the actions alleged to have been committed by Smith.

Issue 1.2: No County records were appropriated by David Smith, and none were removed without knowledge, consent and/or direction of Jacquelyn Aufderheide. They were removed in order to comply with a lawfully issued Federal Subpoena, and

later returned. So no laws were violated in the process. Further, the county has failed to show any liability of Longacre for the actions alleged to have been committed by Smith.

Issue 1.3: Because no County records were appropriated by David Smith, and none were removed without knowledge, consent and/or direction of Jacquelyn Aufderheide, and all were removed in order to comply with a lawfully issued Federal Subpoena, and all were later returned after compliance with that subpoena, no laws or legal duties were abrogated. Accordingly, when the County failed to identify a single document related to its legal claims, the lower court rightly dismissed all claims, including those against Longacre who had merely facilitated compliance with the federal subpoenas, and had only provided legal advise and counsel to Mr. Smith.

Issue 2.1: Whether any law or duty was abrogated by ex employee David Smith recording public works conversations years earlier was not justiciable since no claims against the county had been brought in the interim and since David Smith no longer worked for the County. Declaratory judgment was further not warranted against Longacre as the recordings occurred before he even became Mr. Smith's attorney.

Issue 2.2: David Smith's recording of conversations, occurring while in the course of County Business with County Employees, and while in the course of County Business with members of the public who contacted him to lodge complaints they wanted the county to act upon, were not private conversations. Further, whether such conversations were public or private do not relate to Longacre since his firm

did not represent Mr. Smith during the recording of the conversations.

III. STATEMENT OF THE CASE

Appellees Longacre adopt David Smith's State of the Case with the following additions:

1. All but one of the recordings at issue in this case occurred in July through October of 2002. Sam Hadley Declaration, CP 417; Joan Martin Declaration, CP 218; Leon Thomas Declaration, CP 63; Steve Johnson Declaration, CP 272; Gordon Roycroft Declaration, CP 129; and, Greg Cioc Declaration, CP 440. The only other recording occurred in October 2004. John Brand Declaration, CP 508-09. At the time of seeking the Declaratory Judgment, Kitsap County never experienced a single lawsuit because of the recordings. CP 22-720; CP 755-56. Indeed, by that time, Mr. Smith no longer worked for the county. CP 731. Neither was there an issue of Mr. Smith or anyone else being involved in the ongoing recording of county employees, or of private individuals by county employees. CP 22-270; CP 755-56. At all times, Longacre merely supported his client in his client's contention that the recordings, made years earlier, were made legally. CP 22-756.
2. Kitsap County terminated Smith on April 19, 2006. CP 731.
3. Attorney Longacre and Mr. Smith had conversations over the years regarding issues at his workplace, including but not limited to

conversations about illegal civil rights violations, witness tampering and extortion by superiors. Those conversations remained Attorney Client privilege and were not shared with anyone. When asked by Shank's attorney for information regarding what David Smith knew, the reply was that he would have to subpoena testimony and information, it would not be forthcoming without a legal requirement to do so. CP 788-791.

4. Kitsap County threatened, and then sued Clayton Longacre, Longacre Law Office, and David Smith for the consultations noted above in paragraph three (3) even though they occurred in the context of Mr. Longacre advising David Smith of his rights and duties under State and Federal Law. Id.; CP 794; CP 11-20 (Amended Complaint, paragraphs 2.7, 3.6, 4.6, 4.11 & 4.12); CP 807 (para. 26).
5. Mr. Smith turned all private and County Documents, as well as all recordings made during the course of his employment, over to the county. CP 731 As well, Mr. Smith turned over all originals of the County Documents over to the county after he complied with Mr. Shank's lawfully issued and uncontested federal Subpoena. CP 809 (Smith July 20, 2006 Declaration, para. 31).
6. In the responsive declaration of Ms. Aufderheide, Kitsap County's only witness to the Plaintiffs' Motion for Summary Judgement, Kitsap County did not, and could not, cite one document that had not been returned to the County after the Attorney for Shank returned the lawfully subpoenaed

documents. CP 810 -14.

7. Any stipulated protective order between the parties in the Shank v. Kitsap County Federal Civil Rights Case regarding the documents Shank had copied after receiving them by subpoena from Longacre's Office, were made after Smith returned the documents, and three months after (September '05) the County had already begun its lawsuit against David Smith and Longacre. CP 845-49; CP 809 id.

IV. ARGUMENT.

A. THE COUNTY FAILS SUMMARY JUDGMENT REVIEW STANDARD

The Court of Appeals reviews a grant of summary judgment de novo. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.2d 1068 (2002). In so doing, the Court engages in the same inquiry as the trial court, viewing all facts and inferences in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment should be granted when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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.' CR 56(c). The Court will affirm a grant of summary judgment where reasonable minds can reach only one conclusion based on the admissible facts in evidence. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

To defeat summary judgment, the nonmoving party must set forth specific facts

showing there is a genuine issue for trial with respect to each element of its claim. CR 56(e). Ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). *See; Barrett v. Freise*, 119 Wash.App. 823, 119 Wash.App. 1026, 82 P.3d 1179 (2003).

B. LONGACRE DID NOT VIOLATE RCW 40.14. OR RCW 42.17.020(36).

The County asserts that Mr. Smith removed public records from the County which were under the County's custody and control pursuant to RCW 40.14, RCW 40.16 and RCW 42.17.020(36). However, Mr. Smith removed all documents at Ms. Aufderheide's direction, pursuant to a lawfully issued federal subpoena by Mr. Shank's attorney. Further, Mr. Smith supplied copies of all documents relating to County business during Mr. Shank's lawsuit prior to honoring the federal subpoena. In addition, after honoring Shank's lawfully issued federal subpoena, Mr. Smith returned all of Kitsap County's documents to the County's offices.

The documents at issue are accessible to any citizen under both the Freedom of Information Act and Washington State's Public Disclosure Act. As well, copies became part of the Shank and Sutherland lawsuits and were published. For the county to argue Mr. Smith could not keep copies of pertinent documents related to his employment and his observations of supervisor misconduct is disingenuous.

Mr. Smith did keep personal records in order to protect his interests in his own employment. Those personal records are not public records and do not fit within the

meaning of public records as defined by any of the statutes cited by the County in its complaint. Still, Mr. Smith supplied the county with copies of all those documents several months before Kitsap County initiated this lawsuit.

Ms. Aufderheide, in her May 25, 2005 letter to Mr. Longacre threatened civil and criminal sanctions if Mr. Smith did not turn over all copies of his personal notes to Ms. Aufderheide. CP 794. She went on to order Longacre or Mr. Smith to return all copies of the records she had already copied, records subpoena'd by Shank, even those she knew were David Smith's personal records:

We are hereby directing you or Dave Smith to deliver all 4,612 pages to my office by close of business, Friday May 29, 2005. If the documents are not delivered by that time, the County will proceed with appropriate legal action to recover them.

Some of the records are the personal property of Dave Smith: his whistleblower complaint and attachments, drafts of his declaration, and copies of his personnel records (e.g. performance evaluations, training records). After all of the records are returned to the County, we would be willing to arrange a meeting between Mr. Smith and the County's public records officer to determine which records are personal and may be returned to Mr. Smith.

CP 794. But, then, as now, Kitsap County offered no legal support for its claim of right to confiscate Mr. Smith's personal documents, and copies he made of public documents.

The County, through Mr. Smith's disclosure of all of the documentation which he possessed, was well aware when it filed this instant cause of action that Mr. Smith did not violate any laws in obtaining the records he possessed. As well, it knew that Mr. Smith voluntarily returned all originals of County records to the County and even provided copies of his personal documents.

Indeed, the County made no more than vague legal and factual conclusions in its

answer to defendants' summary judgment. It completely failed to cite a single document related to its conclusory claims that Longacre and Mr. Smith violated RCW 40.14, 40.16 and/or RCW 42.17 and any other law or duty. The lower court rightfully dismissed the County's claims against the defendants. The court was especially right in dismissing the County's claims against Longacre, who simply facilitated the gathering and exchange of lawfully subpoena'd documents.

Accordingly, the Superior Court's decision dismissing the County's above causes of action against Mr. Smith and Longacre should be upheld. *See Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); *See also; Barrett v. Freise*, 119 Wash.App. 823, 119 Wash.App. 1026, 82 P.3d 1179 (2003). As a matter of law, there are no set of facts which can prove that Mr. Smith, or Longacre, violated any statute by: 1) keeping personal notes regarding his employment issues; 2: refusing to return, or destroying the original of any public records; and 3) communicating employment concerns and federal discovery issues to private counsel for the purpose of knowing his rights and duties in the employment setting, as well as his rights and duties when issued a federal subpoena and a notice to give testimony.

In addition, Longacre, under CR 11, should be allowed sanctions against both the County and Ms. Aufderheide due to the frivolous nature of the instant action. This action was commenced solely for the purpose of harassing and intimidating Longacre and Mr. Smith into ignoring Mr. Shank's lawfully issued federal subpoena for Mr. Smith's personal and public records.

C. LONGACRE FACILITATING HIS CLIENT'S COMPLIANCE WITH LAWFUL DISCOVERY DID NOT VIOLATE ANY LAWS

During Mr. Shank's lawsuit, Mr. Smith was served with a notice of deposition by Ms. Aufderheide. CP 805. Mr. Longacre prepared Mr. Smith to testify. Mr. Smith would testify that Mr. Shank had indeed been wrongfully retaliated against constitutionally protected activity. Mr. Smith had previously informed Ms. Aufderheide that he possessed documentation that county supervisory personnel retaliated against Shank. He also informed her that he was in possession of tape recordings which could prove Mr. Shank's claims of retaliation. Mr. Smith did this to ensure that he could prove the truth of his own testimony, due to the fact that his supervisors, Mr. Casteel, Mr. Yingling, and Mr. Brand would often deny making comments that they had, in fact, made, and in this instance they had tried to intimidate him in to providing false testimony at his deposition in order to hide their indiscretions. Mr. Smith answered all deposition questions truthfully despite the fact that his supervisors threatened him harm if he did not maintain the County's untruthful assertions regarding Mr. Shank. Mr. Smith testified about retaliatory behavior towards Mr. Shank. Id.

Around this time, Mr. Smith received a subpoena to prepare and deliver documents to Shank's attorney. Mr. Longacre let Mr. Smith use his office to gather and store those documents until the subpoena had been complied with. Mr. Longacre informed Ms. Aufderheide that he would not go through documents to weed out ones that might be questionably not covered by the subpoena. Instead he let Ms. Aufderheide know he would have his client submit all documents gathered. He also let Ms. Aufderheide know that if she chose to contest the release of any documents she would

have to do the motion to quash the subpoena.

Weeks before turning the documents over to Mr. Shank's attorney, Mr. Longacre arranged for Ms. Aufderheide to take and copy all the documents and tape recordings so that she could decide which to attempt to suppress and which to let go. She made no motions to quash. Instead she sent a threatening letter demanding the documents all be returned to the county. Her request came at a time she knew Shank had yet to finish executing his subpoena.

Ms. Aufderheide cites no case law or statutes to support Kitsap County's claim that by facilitating compliance with lawful discovery directed to his client, Longacre is liable for damages to the county. Her claims again fail for lack of law or specific facts to support a law violation. *See Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988); *See also; Barrett v. Freise*, 119 Wash.App. 823, 119 Wash.App. 1026, 82 P.3d 1179 (2003).

Most grievous, Ms. Aufderheide, in her threatening letter of May 25, 2005 to Mr. Longacre demanding a return of all documents, also claimed Mr. Smith did not have a right to consult with an attorney about illegal employment practices, the felony witness tampering, or other illegal acts by county supervisors and the lawyers hired to protect those supervisors' indiscretions:

I feel compelled to call your attention to RPC 4.2 which prohibits an attorney from engaging in communications with employees of a business organization who have authority to "speak for and bind" the organization without the consent of the organization's lawyer. (Cites omitted) As a senior program manager in the Department of Public Works, Dave Smith is a speaking agent of Kitsap County. Ex parte communications with Mr. Smith as to acts or omissions conducted within the scope of his official duties, or as to confidential information gained by reason of his position are improper.

CP 794. Her lawsuit, filed June 7th, claimed Mr. Smith and Longacre were liable for Mr. Longacre discussing and giving legal advise to Mr. Smith about his rights and his duties related to the illegal acts of his supervisors at his place of employment with Kitsap County. CP 1-20 (See Amended Complaint CP 11-20, paragraphs 2.7, 3.6, 4.6, 4.11 & 4.12).

By Ms. Aufderheide's reasoning, any time a county employee in a managerial position needs outside legal advise, they first have to get permission from the Attorney who represented the aggrieved employee's supervisors, tell that County Attorney what they intend to talk about with counsel, identify the counsel they intend to consult with, and only after getting permission for that attorney and that consult, may they speak to a private attorney.

Ms. Aufderheide's assertion violates the right to counsel, as well as the right to keep that counsel private and unknown to any others. Further, it is a conflict of interest in that the Attorney for the miscreant supervisors is in control of information and knowledge that would be privileged between the aggrieved employee manger and his/her attorney.

Yet, the County sued both Mr. Smith and Longacre for engaging in an attorney client relationship regarding the very serious employment related issues facing Mr. Smith. The County provided no legal argument below, or now, to support such a claim against not only the employee, but the attorney with whom the employee consulted.

The Court should impose CR 11 sanctions against both the County and Ms. Aufderheide for bringing this cause of action against Longacre merely because he facilitated compliance with legally issued subpoenas and deposition notices and consulted

with his client about employment concerns. The chilling effect of this lawsuit on other county employees can only be imagined. Not only will they be afraid to document and gather proof of illegal activities of supervisors, they will be afraid to even consult with an attorney about their concerns.

D. LONGACRE IS NOT LIABLE FOR SMITH'S TAPE RECORDING PUBLIC CONVERSATIONS.

Kitsap County sued Longacre along with Smith for the tape recordings Smith made years earlier. But the county failed to present any evidence that Longacre had any connection to the tape recordings (other than his stated position that his client violated no law in making the tape recordings). CP 22-720.

Yet, Mr. Smith's recordings were indeed legal.

1) Smith's Recorded Meetings With Citizens

Under RCW 9.73.030, the protections of the Privacy Act apply only to private communications or conversations. *Kadoranian v. Bellingham Police Dep't*, 119 Wash.2d178, 189, 829 P.2d 1061 (1992). A person has no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others. *State v. Clark*, 129 Wash. 2d 211, 225-226 (1996); *State v. Slemmer*, 48 Wash. App. 48, 53 (1987). When any person may turn out to be the recipient of information resulting from a communication, that communication is not private. *State v. Wojtyna*, 70 Wash. App. 689, 695-696 (1993).

In the instant case, David Smith was an employee of Kitsap County who recorded meetings with citizens who had called the county to lodge a complaint and/or concern to

the County's representative. CP 417-18 (Sam Hadley); CP 218-19 (Joan Martin); and, CP 62-63 (Leon Thomas). Each sought a meeting with a county representative on site. Id. And each of those meetings with private citizens were in response to the citizens complaining and/or seeking action to resolve respective concerns. Id. They expected Dave Smith, the county's representative, would take their complaints and concerns back to the county offices to report and resolve them. Their expectations were that their meeting would be in some way documented, reported to others, and acted upon. At all times in dealing with such citizens, Mr. Smith acted in his official public capacity.

The recordings made with citizens were not intended by anyone to be private conversations. Therefore they are not private conversations as set forth by law. *See Clark supra*.

2) Smith's Recorded Meeting With Fellow Employees

Whether a conversation is private is a question of fact, unless the facts are undisputed and reasonable minds could not differ, in which case it is a question of law. *State v. Clark*, 129 Wash.2d 211, 225, 916 P.2d 384 (1996) (citing *Kadoranian v. Bellingham Police Dep't*, 119 Wash.2d 178, 190, 829 P.2d 1061 (1992)).

For recorded conversations, *Kadoranian* adopted the *Webster's Third New International Dictionary* (1969) definition of "private:"

[B]elonging 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.

119 Wash.2d at 190, 829 P.2d 1061 (quoting *State v. Forrester*, 21 Wash.App. 855, 861, 587 P.2d 179 (1978)). To determine whether a particular conversation is private, the court looks to the subjective intentions of the parties to the conversation. *Clark*, 129 Wash.2d at 225, 916 P.2d 384.

Because most proponents of a claim of privacy would contend that their conversations were intended to be private – whether or not they were indeed so – a court must look to factors bearing on the reasonable expectations and intent of the parties. *See Clark, id.* *Clark* identified three factors bearing on the reasonable expectations and intent of the parties: (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. *Id.* at 225-27, 916 P.2d 384.

i) *Clark's First Factor; Subject of the Conversation*

Most compelling in this case is the first *Clark* factor – the subject matter of the conversations. For county employees, any wrongdoing they observed or overheard, they were required to report to proper County personnel. There is no expectation of privacy by county officials when it comes to conversations discussing wrongdoing, or conversations that demonstrate illegal acts or motives done in the course of county business. And those are precisely the type of conversations David Smith recorded. Further, he used those conversations to support his whistleblower report to Ms. Aufderheide. David Smith's Whistleblower Complaint contained a reference, for the sake of proof, to the

conversations he had recorded. CP 805-08.

County employees violating federal, state and/or county law or policy have no expectation of privacy in conversations involving those violations. This is especially true when those conversations occur in public buildings during work hours. *See Clark, supra; Flora, id.* The county has not cited, nor did it cite, one conversation that was about private, nonpublic, topics. Neither does the county contend the conversations were simply ordinary business conversations. Instead, each of the employees who testified by declaration for the county specifically state in their declarations that they would have been more careful with their words if they had known they were being recorded. CP 509 (Jon Brand); CP 440 (Greg Cioc); CP 129 (Gordon Roycroft); and, CP 273 (Steve Johnson). The county fails under the first *Clark* factor.

ii) *Clark's Second Factor: Location and Potential Participants*

Second, the place the conversations occurred was in a public office building with the constant potential for third parties to be present (if not already present). Unlike the out of state cases cited by Kitsap County, the conversations here occurred in the recorder's office with the recording individual present in each conversation. Sometimes there were more than two persons present, sometimes only two, but always in Mr. Smith's office with Mr. Smith present and part of the conversation – and always in a location where others could enter at any time. The county employees cannot claim a privacy interest in the workspace of another. Kitsap County fails under the second *Clark* factor. *See Clark, supra.*

iii) *Clark's Third Factor: The Role of The Recorded Parties*

The third *Clark* factor – the role of the recorded parties – may, by itself, define the reasonable expectations and intent of the parties. For instance, a police officer's conversation, when that officer acting in his official public capacity with a private citizen, is never private because the role of the police office is of a public, rather than a private, nature. *See, e.g., Clark*, 129 Wash.2d at 226, 916 P.2d 384 (no reasonable expectation of privacy in a conversation with an undercover police officer when it "takes place at a meeting where one who attended could reveal what transpired to others."); *State v. Bonilla*, 23 Wash.App. 869, 873, 598 P.2d 783 (1979) ("It would strain reason for Bonilla to claim he expected his conversations with the police dispatcher to remain purely between the two of them."); *State v. Flora*, 68 Wash.App. 802, 808, 845 P.2d 1355 (1992) ("Because the exchange [between a police officer and an arrestee during an arrest] was not private, its recording [by the arrestee] could not violate RCW 9.73.030 which applies to private conversations only."); *Alford v. Haner*, 333 F.3d 972, 978 (9th Cir. 2003), *rev'd on other grounds, Devenpeck v. Alford*, 543 U.S. 146, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004) (noting that *State v. Flora* established that a traffic stop was not a private encounter for purposes of the privacy act); *Johnson v. Hawe*, 388 F.3d 676, 682-83 (9th Cir. 2004) (holding that an individual who videotaped a police officer during an arrest did not violate RCW 9.73.030 because the officer had no reasonable expectation of privacy in his communications with others over his police radio).

Here, Smith's role was first that of a public official carrying out public duties. His fellow employees and/or supervisors shared the same role. All conversations were

recorded in the workplace by Smith, a participant and a reporter of those conversations. Contrary to Kitsap County's out-of-state cited cases, the recording individual here only recorded public business conversations to which Smith was a party. And always the conversations occurred during the course of conducting county business while the parties remained in the role of public servants.

By their role as public officials acting in their official capacity, they had no reasonable expectation of privacy. *See Flora*, supra. It does not matter, as *Clark* suggests, that they now, for self-serving reasons, claim their conversations were private. Their roles, as set forth in the third *Clark* factor, prevent such a distorted claim. *Clark*, id. Accordingly, their conversations were not private. *Clark*, id.

3) Longacre Recorded Noone

The County continually lumps Smith and Longacre together when it seeks a declaratory judgment that the Smith recordings were illegal. County's Brief, pg. 30. However, Longacre did no more than provide legal argument in support of Smith after the County sued Smith and Longacre. The county has presented no evidence whatsoever that Longacre somehow had a hand in the recordings that occurred years earlier. Their claims against him fail as a matter of law. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988). *See; Barrett v. Freise*, 119 Wash.App. 823, 119 Wash.App. 1026, 82 P.3d 1179 (2003).

Yet, this court should not stop here. For the inclusion of Longacre in this lawsuit

defies both legal and ethical imagination. The lawsuit was initiated and clearly intended to intimidate and cause, as it did, disruption to the attorney client relationship of Smith and Longacre. The manipulation of the legal system was meant to cause Smith to have to fire Longacre, or at least hire co-counsel. It also required Longacre to recommend and allow co-counsel in the event this case ever went to trial.

The County, via Ms. Aufderheide, purposely and maliciously included Longacre in this lawsuit. Their doing so is more than merely frivolous, it is vindictive and meant to harass both Smith and Longacre. It's chilling effect on other county employees who would like to seek legal advise is only imaginable, but definitely real. Rule 11 Sanctions, including actual attorney fees being awarded to Mr. Smith and Longacre, are warranted.

E. JUDGE HABERLY PROPERLY DENIED DECLARATORY JUDGMENT:
FINDING ISSUE OF PAST TAPING OF CONVERSATIONS BY AN EX-
EMPLOYEE NOT A TRUE JUSTICIABLE CONTROVERSY

Judge Haberly twice declined to issue a Judgment Declaring the Smith Taping was illegal. CP 755-56. For her, as is the case here, the issue was at best long moot. More to the point, no one had come forward to make a claim against the County. Accordingly, the county was the wrong person to seek an answer to the question, rendering the issue not a true justiciable controversy.

The county wanted the issue resolved in their favor so they could legitimize their illegal retaliatory firing of Mr. Smith for not going along with their illegal activities; e.g., sexual discrimination, race discrimination, first amendment rights violations, illegal

nepotism, perjury and witness tampering, etc. The county needed a pretext for firing Mr. Smith and fell upon the issue of the tapes. But the taping had ended years earlier.

Indeed, Mr. Smith had long ago informed Ms. Aufderheide of the taping. It did not become an issue until Mr. Smith refused pressure to perjure his testimony in the Shank (first amendment violations) and Sutherland (sexual discrimination) cases. CP 801-809. Accordingly, the court rightly found the issues contrived and not a true justiciable controversy.

The County correctly identifies the applicable cases, but then quickly misapplies to conform to their law their contorted facts. *Walker v. Munro* correctly states the law:

For declaratory judgment purposes, a justiciable controversy is: (1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Walker v. Munro 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994); citing, *Nollette v.*

Christianson, 115 Wash.2d 594, 599, 800 P.2d 359 (1990) (citing *Diversified Indus. Dev.*

Corp. v. Ripley, 82 Wash.2d 811, 815, 514 P.2d 137 (1973)); *Spokane v. Taxpayers of*

Spokane, 111 Wash.2d 91, 758 P.2d 480 (1988).

Munro requires all four elements before a cause of action is justiciable. Absent any one, and the court "steps into the prohibited area of advisory opinions." *Walker v.*

Munro, id., quoting *Diversified Indus.*, 82 Wash.2d at 815, 514 P.2d 137.

In our case, there is not "actual present and existing dispute." Instead, it is at most

a moot disagreement that ended years before the lawsuit commenced. When the County brought their motion for declaratory judgment, Mr. Smith no longer worked for the county, nor did he have any need for further tape recording. The County failed the first element of *Munro*. More correctly, the County's claim is a hypothetical disagreement the County would like resolved in its favor to better its position against Mr. Smith in other forums.

Neither does the County's facts meet the second element of *Munro*. The parties do not have genuine and opposing interests. Mr. Smith does not foresee ever being a County employee again, or ever again needing to tape record conversations as a county official. He is not fighting for the right to tape record in that manner. It is a non issue and has been since the fall of 2004.

The County's claims are therefore not ones "which involves interests" that are "direct and substantial." Their claims also lack potential. The County's interests are merely "theoretical, abstract or academic" for the purposes of making an argument in another forum. Accordingly, the County fails the third element of *Munro*.

As well, the County fails the fourth and final element of *Munro*. For "a judicial determination" at this point will not be "final and conclusive." It will not resolve the other claims in other forums. Those claims rely on much more than the single issue of whether the taping was legal or illegal.

A declaratory judgment at this point would violate *Diversified Indus.*'s warning and cause this court to step "into the prohibited area of advisory opinions." *Walker v.*

Munro, id., quoting *Diversified Indus.*, 82 Wash.2d at 815, 514 P.2d 137.

The County, citing *Ackerly Communications, Inc. v. City of Seattle*, 92 Wn.2d 905, 602 P.2d 1177 (Wash., 1979), argues that this Court can ignore *Munro*'s four elements when "the real merits of the controversy are unsettled and the continuing question of great public importance exists." *Ackerly* @ 912. However, *Ackerly* is off point. First, it involved real issues between the parties, e.g. sign companies and the City of Seattle over billboards. The city had enacted criminal codes to coincide with its civil restrictions of bill boards. *Ackerly* found the billboard companies had failed to exhaust their administrative remedies and therefore were not entitled to declaratory relief. The court noted however, that the dismissed (dismissed because the lower court wrongly issued a declaratory judgment) criminal charges against the billboard companies would immediately bring the issue back before the court. Therefore, the court reviewed the issue and struck down the lower court's declaratory judgment against the city on the merits.

Our case is distinguished from *Ackerly*. Here, the issue is not waiting below should this court rule one way or the other. It may arise in the course of other litigation as a side issue, but then again it may not. In *Ackerly* the sign companies intended to continue to fight and disobey the ordinance invoking both criminal and civil penalties which would then wind up right back at the appellate court. That is not the case here, no one will be cited either criminally or civilly. There is no true justiciable controversy here.

V. CONCLUSION

Kitsap County failed to meet its burden to avoid summary judgement. First, Longacre did not violate RCW 40.14., 40. 16, or RCW 42.17.020(36). Neither did Mr. Smith for that matter. Nor did Longacre violate any laws or commit any torts against Kitsap County by merely facilitating his client's compliance with lawful discovery demands and engaging in an attorney client relationship with Mr. Smith.

And definitely, Longacre is not liable for Smith's recordings. Yet, even Mr. Smith violated no laws when, while acting in his official capacity as a public servant, he recorded meetings with citizens seeking to have him take their complaints and concerns back to the County for review and response. Nor did Mr. Smith violate any laws when, while acting in his official capacity as a public servant, and while in his own office, he recorded meetings with fellow employees who spoke of illegal activity by county officials. For Mr. Smith reported those conversations in a Whistleblower complaint against supervisors in the County Government. Those supervisors were violating state and federal laws and regulations to the detriment of the citizens of Kitsap County. Theirs were not private conversations.

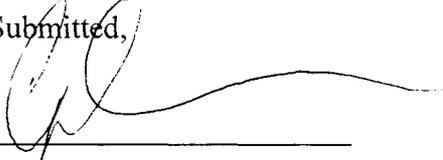
Judge Haberly properly denied Kitsap County's Motion for Declaratory Judgment because the issue was long moot and theoretical – not a true justiciable controversy.

Accordingly, this Court should affirm the Superior Court's Orders Granting Summary Judgment and denying Declaratory Judgment in this case. As well, this court should issue sanctions against Kitsap County and Ms. Aufderheide for bringing forward

this lawsuit against Mr. Smith's attorney, Longacre.

DATED this 6th day of September, 2007.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'C. Longacre', written over a horizontal line.

Clayton Ernest Longacre, WSBA # 21821

Co-Counsel for Appellees

ORIGINAL

COURT OF APPEALS
07 SEP 10 AM 9:26

STATE OF WASHINGTON
BY: *[Signature]*
DEPUTY

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

KITSAP COUNTY

Plaintiff-Appellant,

vs.

DAVID N. SMITH, CLAYTON
LONGACRE, CHARLES SHANK, and
LONGACRE LAW OFFICES,

Defendant-Appellees.

COURT OF APPEALS CAUSE NO.
35878-6-II

CERTIFICATE OF SERVICE

The undersigned declares:

That he is now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of eighteen, and competent to be a witness herein.

I declare under penalty of perjury under the laws of the State of Washington that on this, the 6th day of September, 2007, this declarant duly served by the method(s) indicated below copies of:

BRIEF OF APPELLEES ATT. LONGACRE AND LONGACRE LAW.

By U.S. mail:

Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

By hand:

Kitsap County Prosecutor's Office
614 Division Street
Port Orchard, WA 98366


Maureen Smith

DATED this 6th day of September, 2007 at Port Orchard, WA.