NO. 72642-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

RICK SUCEE, ET AL.

Appellants,

v.

TODD NEWLUN,

Respondent.

OPENING BRIEF

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I. INTRODUCTION

Todd Newlun ("Newlun"), Plaintiff in the underlying matter, was arrested in 2011 for selling approximately three pounds of marijuana to an undercover police officer. During the sale, the officer wore a "safety wire" that transmitted his voice, and the voices of those around him, to another police officer who was monitoring the drug sale. The one-way transmissions were not recorded. During the resulting criminal proceeding, Newlun successfully moved to suppress some evidence of the sale because the officers involved had received verbal, but not written, permission to use the officer safety wire from a supervisor. That authorization procedure did not comply with that set forth by RCW 9.73.210. Consequently, the charges against Newlun were reduced by the prosecutor, and Newlun pleaded guilty to a misdemeanor charge of possessing 40 grams or less of marijuana.

Afterward, Newlun sued a group of government defendants, including the officers who investigated and arrested him. He seeks monetary damages for alleged violations of Ch. 9.73 RCW, the Washington State Privacy Act. Newlun's claims fail as a matter of law for two reasons:

First, it is a complete defense to any action for damages for personal injury that the person injured was engaged in the commission of

a felony at the time of the occurrence causing the injury, and the felony was a proximate cause of the injury or death. RCW 4.24.420. Because Newlun's alleged injuries would not have occurred but for his engagement in a felony drug sale, his claim must be dismissed.

Second, the Act only protects "private communication." RCW 9.73.030. Because Newlun had no reasonable expectation of privacy during his sale of marijuana to two strangers, in the strangers' car on a public road, his statements during the sale are not covered by the Act. The parties agree there are no materially disputed facts regarding either of the above issues. In accordance with that agreement, these issues have been certified for decision by this Court as controlling questions of law. RAP 2.3(b)(4).

The State of Washington and Trooper B. L. Hanger, joined by the other law enforcement agencies and individual officers who have been sued by Todd Newlun, request that this Court grant judgment as a matter of law in their favor, and dismiss this lawsuit against them in its entirety.

II. ASSIGNMENTS OF ERROR

1. Assignments of Error

a. The trial court in entering its September 25, 2014 Order Denying Defendants' Washington State Patrol and Trooper B.L. Hanger's Motion for Summary Judgment.

b. The trial court erred in entering its April 4, 2014 Order re: Summary Judgment.

2. Issues Pertaining to Assignments of Error

a. Does RCW 4.24.420 bar a lawsuit for injury damages where the alleged damages would not have occurred unless the Plaintiff was actively engaging in an illegal sale of drugs?

b. Does a drug dealer have a reasonable expectation of privacy in conversations had with strangers during the course of an illegal sale of marijuana?

III. STATEMENT OF THE CASE

A. Procedural History

In 2011, Mr. Newlun was arrested and charged with the sale and delivery of marijuana, a Class C felony. CP at 85-87. During that criminal proceeding, he successfully moved to suppress evidence based on the arresting officers' failure to complete a written application to use an officer safety wire transmitter as required by RCW 9.73.210. CP at 175-176, 990-93. Because the evidence required for conviction was suppressed, Mr. Newlun was able to negotiate a plea bargain. He ultimately pleaded guilty to a reduced misdemeanor charge of possession of 40 grams or less of marijuana.

As part of the criminal proceeding, Whatcom Superior Court Judge Charles Snyder held an evidentiary hearing on the application of RCW 9.73 to the facts of Mr. Newlun's case. CP at 89-178. Judge Snyder determined that only RCW 9.73.210, and not RCW 9.73.230, was applicable to the facts of this case. CP at 172.

After his criminal case resolved, Mr. Newlun filed this action under RCW 9.73, the Privacy Act, claiming the officers who arrested him violated his privacy rights electronically transmitting his voice from one officer to another during the drug sale. CP at 21-25. Mr. Newlun sued The Washington State Patrol, Whatcom County Sheriff's Office, and Bellingham Police Department – all members of the Northwest Regional Drug Task Force responsible for the investigation into his marijuana sales. CP at 21. Mr. Newlun also sued the individual officers involved in that investigation: Whatcom County Sheriff Sergeant Rick Sucee, Whatcom County Sheriff Deputy Richard Frakes, Bellingham Police Officer Craig Johnson, and WSP Detective B.L. Hanger. CP at 21. In his Complaint, Mr. Newlun sought general damages against each entity pursuant to RCW 9.73.060 and exemplary damages against each defendant of $25,000, as set forth in RCW 9.73.230.[1] CP at 25.

[1] Newlun also requested that the trial court certify a class action of plaintiff's who were also improperly transmitted. CP at 25. The court denied class certification on September 20, 2013. CP at 742-43.

On May 24, 2013, the Defendants jointly moved for summary judgment. CP at 70. They argued that, because this case involved an "officer safety wire" (governed by RCW 9.73.210), rather than an "evidence gathering wire" (governed by RCW 9.73.230), the RCW 9.73.230 exemplary damages were unavailable to Mr. Newlun in this case. CP at 78-79. On September 18, 2013, this Court entered an order granting partial summary judgment to Defendants. CP at 738-41. There, the Court dismissed Mr. Newlun's claim for exemplary damages and held that "[t]he penalties specified in RCW 9.73.230(11) do not apply in this case." RCW 9.73.230; CP at 740.

In February 2014, the Defendants filed a joint motion for summary judgment and dismissal on the grounds that the conversations during the marijuana sale between Detective Hanger, the confidential informant, and Mr. Newlun were not private under state law. CP at 836-50. The Defendants argued that because (1) there was a third party present during the conversations, (2) the parties were strangers, and (3) the conversations took place in public in a stranger's car the conversations were not private and Mr. Newlun therefore had no cause of action. CP at 836-50. This motion was denied by the trial court. CP at 958-60.

Finally, in August 2014, the Defendants filed a third joint motion for summary judgment based on RCW 4.24.420, which provides

immunity from suit by a plaintiff who was damaged while committing a felony. CP at 961-66, 1105-09. The trial court also denied this motion. CP at 1163-65. However, following that denial and by agreement of the parties, the trial court stayed the proceedings and entered a CR 54(b) order entitling the parties to appellate review of each of the above three summary judgment rulings as a matter of right. CP at 1180-83; RAP 2.3(b)(4).

This Court should reverse these denials of summary judgment because, as a matter of law, Mr. Newlun's lawsuit is barred by RCW 4.24.420. In addition, this Court should also reverse the trial court's decision and grant judgment as a matter of law to the Defendants because the drug sale conversations were not private and, as such, were not protected by the Privacy Act.

B. Statement of Facts

The Defendant law enforcement officers in this case worked together on the multi-agency Northwest Regional Drug Task Force ("the Task Force"). CP at 851-52, 859-60. The Task Force includes members of the Bellingham Police Department, the Whatcom County Sheriff's Office, and the Washington State Patrol. CP at 284, 851-52, 859-60. The purpose of the Task Force is to investigate controlled substance related crime throughout Whatcom County. CP at 859-60. In March 2011, as part of

their duties on the Task Force, WSP Detective B.L. Hanger, Bellingham Police Detective Craig Johnson, Lieutenant Rick Sucee, and Sergeant Richard Frakes became involved in an investigation of illegal drug sales by Mr. Newlun. CP at 239-40, 301-03, 347-50.

Specifically, Detective Johnson was advised by a confidential informant that Mr. Newlun had a large amount of marijuana for sale. CP at 94-5, 307-08, 852. Based on the informant's tip, Detective Johnson worked with that person to arrange the purchase of a large quantity of marijuana from Mr. Newlun and his wife. CP at 94-95. The deal was arranged when the informant made a cold call to the Newluns' Oregon residence and spoke to Mr. Newlun's wife. CP at 852. The informant had no prior existing relationship with the Newluns, but was given their names by another known drug dealer. CP at 852. Ultimately, Mr. Newlun agreed to sell marijuana to the confidential informant. CP at 852. To consummate the transaction the parties agreed to meet at the Valley Village Shopping Mall in Sudden Valley, Wash. on March 16, 2011. CP at 852-53. This "strip mall" style shopping center was open to the public at the time of the meeting. CP at 853, 871-74.

Detective Hanger worked in an undercover role, and drove the informant to the mall to meet Mr. Newlun. Detective Hanger drove the vehicle and was in the driver's seat at all times during the transaction.

CP at 105-06, 853. The parties arrived at the mall at approximately 1:30 p.m. CP at 853. Detective Hanger wore a transmitting device that broadcast his voice and the voices of those near him to Detective Johnson, who was monitoring the device in a location close-by. CP at 103, 348-49. Detective Hanger wore the transmitting device based on concerns for officer safety. Limited cell phone service in Sudden Valley impaired his ability to communicate with Detective Johnson. CP at 347-50, 860-61.

Once at the mall, the informant phoned Mr. Newlun to advise him of their location in the parking lot. CP at 862. Newlun then parked his car next to Detective Hanger's vehicle and the parties communicated through the open windows of their respective vehicles in the public parking lot. CP at 862. The shopping plaza was busy at the time of the conversation and other vehicles and shoppers were present. CP at 862. There were shoppers passing by as Detective Hanger, the informant, and Plaintiff talked loudly to each other through open car windows. CP at 862. Detective Hanger activated the transmitting device immediately before the face-to-face conversation with Mr. Newlun in the parking lot. CP at 112-13.

The parties had a brief conversation in the parking lot and agreed to drive to a nearby Whatcom County house owned by Mr. Newlun to conduct the sale. CP at 862. They arrived at approximately 1:30 p.m.,

and Detective Hanger parked on the public street in front of Mr. Newlun's house. CP at 853, 862-63. The house was on a residential street with other homes on each side and across the street. CP at 876-81.

At the house, Mr. Newlun got out of his vehicle and stood alongside Detective Hanger's vehicle while he and Hanger talked together through Hanger's open car window. CP at 866-67. Through Detective Hanger's window, the parties discussed how much marijuana was going to be sold. CP at 866-67. Mr. Newlun then went into his house to retrieve the marijuana. CP at 863. When he returned with the drugs, Mr. Newlun spontaneously entered Detective Hanger's vehicle where the deal was completed. CP at 349.

While in Detective Hanger's vehicle, the parties only discussed the terms of the drug transaction and potential future deliveries to Detective Hanger. CP at 867-68. Mr. Newlun stated he came to Bellingham from Oregon every two weeks to deliver marijuana. CP at 867-68. He also stated another customer would be arriving soon after Hanger to purchase marijuana from Mr. Newlun. CP at 867-68. Mr. Newlun also explained how he cultivates certain marijuana products and that he had set prices for his marijuana sales. CP at 867-68.

The confidential informant had never met Mr. Newlun in person prior to March 16, 2011. CP at 99-101, 852. Additionally, Mr. Newlun

was previously unknown to the involved detectives. CP at 852, 861. Detective Hanger and Mr. Newlun had never met or even spoken on the phone; they were perfect strangers. CP at 852, 861.

After the drug deal, Mr. Newlun exited Detective Hanger's car. CP at 863. Detective Hanger and the informant then left and met Detective Johnson at a prearranged location. CP at 107. The transmitter was turned off at that time. CP at 107.

Approximately 25 minutes after Detective Hanger left Mr. Newlun's house, a man named Eric Pitts arrived at Mr. Newlun's house and purchased marijuana from Mr. Newlun. CP at 868. Pitts was arrested while driving away from the Mr. Newlun's house and found to have four pounds of marijuana in his car. CP at 868.

Mr. Newlun was later arrested and charged with delivery of a controlled substance, a felony. CP at 85-87. During the criminal proceeding, he successfully moved to suppress evidence based on the officers' failure to complete a written application to use the officer safety wire transmitter as required by RCW 9.73.210. CP at 175-76, 900-993. Because key evidence was supressed, Mr. Newlun was able to negotiate a plea bargain and pleaded guilty to a reduced misdemeanor charge of possession of 40 grams or less of marijuana. He later sued the Task Force

agencies and the individual officers who investigated him for violation of the Washington State Privacy Act, Ch 9.73 RCW.

IV. ARGUMENT

A. Standard of Review

Appellate courts review decisions on summary judgment motions de novo. *City of Sequim v. Malkasian,* 157 Wn.2d 251, 261, 138 P.3d 943 (2006). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008) (internal citation omitted). When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party, Ranger Insurance. *See Reid v. Pierce Cnty.,* 136 Wn. 2d 195, 201, 961 P.2d 333 (1998). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); *Barrie v. Hosts of Am., Inc.,* 94 Wn.2d 640, 618 P.2d 96 (1980).

Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. *See Meyer v. Univ. of Wash.,* 105 Wn.2d 847, 719 P.2d 98 (1986). The nonmoving

party avoids summary judgment when it "set[s] forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Id.* at 852. To this end the nonmoving party "may not rely on speculation, [or] argumentative assertions that unresolved factual issues remain." *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. The Trial Court Erred in Denying Summary Judgment Pursuant to RCW 4.24.420

This is a lawsuit concerning an alleged violation of Ch. 9.73 RCW, the Washington State Privacy Act. RCW 9.73.060 permits the bringing of a lawsuit for damages where the plaintiff claims "that a violation of this statute [RCW 9.73] has ***injured his or her business, his or her person, or his or her reputation***." RCW 9.73.060 (emphasis added). In addition,

> A person ***so injured shall be entitled to actual damages***, including mental pain and suffering endured by him or her on account of violation of the provisions of this chapter, ***or liquidated damages*** computed at the rate of one hundred dollars a day for each day of violation, not to exceed one thousand dollars, and a reasonable attorney's fee and other costs of litigation.

Id. (emphasis added).

However, it is undisputed that during the events which Mr. Newlun alleges give rise to his claims in this case, he was in the course of

commission of a felony, that is, the sale and delivery of a controlled substance. RCW 4.24.420 states:

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

Because it is undisputed that Mr. Newlun was engaged in the commission of a felony during his interaction with Detective Hanger, damages for alleged contemporaneous injury suffered are not available to him. The Task Force Defendants have a "complete defense" in this case, and it must be dismissed.

1. It Is Undisputed That Mr. Newlun's Alleged Injury Occurred While He Was Committing a Felony

It is unlawful for any person to deliver, or possess with intent to deliver, a controlled substance. RCW 69.50.401(1). When the controlled substance in question is marijuana, its delivery is a Class C felony. RCW 69.50.401(2)(c). On March 16, 2011, Mr. Newlun possessed three pounds of marijuana with intent to deliver it, and then did sell and deliver it to Detective Hanger and the informant. Mr. Newlun admitted these facts during his deposition in this matter. CP at 857-58.

2. It Is Undisputed That Mr. Newlun's Drug Sale Was a Proximate Cause of His Alleged Injury

Where the facts are not in dispute, legal causation is for the court to decide as a matter of law. *Schooley v. Pinch's Deli Mkt, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). In the case at bar, the facts are not in dispute. Mr. Newlun would never have even met Detective Hanger if he had not agreed [through the informant] to sell him drugs. CP at 861. During the drug deal, Hanger wore an officer safety wire that transmitted, but did not record, Mr. Newlun's voice. Any alleged injury Mr. Newlun sustained because the officer safety wire was worn without a written authorization by the Task Force commander occurred during the drug deal. Thus, the drug deal was a proximate cause of Mr. Newlun's alleged injury. RCW 4.24.420 provides a "complete defense" in this case, and it should be dismissed.

3. There Are No Disputed 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, that is, no transmission of Mr. Newlun's voice – but for that drug sale. It is also undisputed that the sale of three pounds of marijuana is a felony under Washington State law.

After the party moving for summary judgment 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 may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value. *Heath v. Uraga*, 106 Wn. App. 506, 24 P.3d 413 (2001). Here, Mr. Newlun has placed no evidence before this Court that supports an assertion that he was not in the course of committing a felony at the time his conversations relating to that felony were transmitted.

Moreover, Mr. Newlun did not attempt to dispute any of the facts surrounding the drug sale. Rather, Mr. Newlun cited to *State v. Salinas*, 121 Wn.2d 689, 853 P.2d 439 (1993), a criminal case, and argued to the trial court that all evidence relating to his drug sale should be suppressed at trial in this case. CP at 988-89. In other words, while certain evidence was properly suppressed in the criminal case against Mr. Newlun, he argued that the fact he was engaged in a drug sale should also not be admitted in *this* case.

Mr. Newlun's reliance on *Salinas* in this civil litigation was obviously misplaced. By undertaking this lawsuit the plaintiff 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); *see also McDaniel v. City of Seattle*, 65 Wn. App. 360, 366, 828 P.2d 81 (1992) ("We cannot permit the plaintiff to conceal highly probative evidence under the guise of the protection of a rule which was intended to deter unlawful police conduct."). Since Mr. Newlun did not contest the facts of the felonious drug sale, and instead argued those facts should be ignored, and the facts of the sale are verities on appeal. Because, but for that sale, Mr. Newlun's alleged injuries would never have occurred, RCW 4.24.420 bars his lawsuit. Where reasonable minds could reach but one conclusion from admissible facts in evidence, judgment as a matter of law should be granted. *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997).

C. The Trial Court Also Erred in Denying Summary Judgment Because Mr. Newlun's Transmitted Statements Are Not "Private" for Purposes of The Privacy Act

Only "private communications" are protected by RCW 9.73, the Privacy Act. *State v. Clark*, 129 Wn.2d 211, 225-27, 916 P.2d 384 (1996). A conversation is not private if (1) there was a third party present, (2) the parties were strangers, or (3) the conversations took place in a public place in a stranger's car. *Id.* As explained below, Newlun's conversations with the Task Force Defendants in this case were not private under *Clark* because there was a third party present, the parties

were strangers, and the conversations took place in public in a stranger's vehicle. Mr. Newlun has not disputed these facts. He, therefore, has no cause of action under the Privacy Act. The trial court erred in denying the Defendant's joint motion for summary judgment.

1. Background: Only "Private Communications" Are Protected by The Privacy Act

Under RCW 9.73.030, the protections of the Privacy Act apply only to private communications or conversations. *Clark*, 129 Wn.2d at 224. The term "private" was not defined by the legislature, but Washington courts have analyzed the term in different contexts to determine whether a conversation or communication is private. *Clark* at 224. "[T]he intent and reasonable expectations of the participants as manifested by the facts and circumstances of each case controls as to whether a conversation is private." *Id.*, quoting *Kadoranian v. Bellingham Police Dep't*, 119 Wn.2d 178, 829 P.3d 1061 (1992). The term "private" is to be given its ordinary meaning. *Clark* at 224-25. The definition of "private" includes, in part: "not open or in public." *Id.*

The court looks at three general factors when determining whether or not a conversation is private: (1) duration and subject matter of the conversation, (2) location of the conversation and presence of third

parties, and (3) the role of the non-consenting party and his or her relationship to the consenting party. *Clark* at 225-27.

Whether a conversation is private is a question of fact, except where the facts are undisputed and reasonable minds could not differ. *Clark* at 225; *see also State v. Kipp*, 179 Wn.2d 718, 722-23, 317 P.3d 1029 (2014). Then, the matter should be decided as a matter of law. *Kipp* at 722-23. In deciding whether a particular conversation is private, this court considers the subjective intentions of the parties to the conversation. *Id.* But, the court's "inquiry does not stop there because any defendant [in a criminal case] will contend that his or her conversation was intended to be private. *We also look to other factors bearing upon the reasonable expectations and intent of the participants.*" *Id.* (emphasis added).

2. *State v. Clark*

In *Clark*, the Supreme Court analyzed sixteen consolidated criminal cases that arose from a police informant buying drugs in the City of Seattle. *Clark*, 129 Wn.2d at 214. The drug deals were recorded by police and all took place in the same general manner. *Id.* The informant in *Clark* parked his car on a public street and then inquired about drugs to passersby. *Id.* After being approached, the parties, in most cases, conducted the transaction in the informant's car, which was parked on a

public street. *Id.* Many of the deals happened in the car with a third party present. *Id.* at 228. A few of the conversations did not take place in front of a third party, but did occur in the informant's vehicle. *Id.* at 228-29.

The *Clark* Court determined, in all sixteen cases, that the conversations were not private. As stated above, the Supreme Court focused on: (1) the duration and subject matter of the conversation, (2) the location and presence of third parties, and (3) the relationship of the parties. *Clark* at 225-27.

First, the Court found that the because of the duration and subject matter of the conversations, they were not private. *Clark* at 227-28. The Court reasoned that the conversation about the drug deal was "essentially the same conversation that the defendants might have had with a great many of strangers who approached" and asked for drugs. *Id.* The Court stated: "The conversations were not private because they were routine conversations between strangers on the street concerning routine illegal drug sales." *Id.* at 227-28. Further, "[t]he fact that a transaction is conducted with the public has been enough for us to find that such transaction is not private, even when the transaction takes place inside a private home." *Id.* at 226.

Next, the *Clark* Court found the conversations were not private because of the location of the conversations and because third parties were present. *Id.* at 228. A conversation on a public street in the presence of a third party and within sight of a passerby is not private. *Id.* In fact, *the presence of another during the conversation means the matter is not secret or confidential. Id.* The Court said: "[w]e believe that the presence of one or more third parties in these cases, regardless of whether the defendant and third party were in the car, means the conversations were not private in any ordinary or usual meaning of that word." *Id.* at 228. The Court went on to state that the interactions were not private because they took place in a car that was visible to a passerby. *Id.* at 229. "[A]n ordinary person does not have an expectation of privacy in a stranger's car." *Id.*

Finally, *Clark* looked at the relationship of the parties and concluded that because they were strangers there could be no privacy. *Id.* at 226-27. "The nonconsenting party's apparent willingness to impart the information to an unidentified stranger evidences the non-private nature of the conversation." *Id.* Further, there is no reasonable expectation of privacy when a person decides to willingly engage in a drug transaction with a stranger. *Id.,* citing *State v. Goucher*, 124 Wn.2d 778, 881 P.2d 210 (1994). "A communication is not private where anyone may turn out

to be the recipient of the information or the recipient may disclose the information." *Clark* at 226-27.

The holding and analysis in *Clark* was recently affirmed by the State Supreme Court in *State v. Kipp*. In *Kipp*, the court relied on *Clark's* analysis in finding a conversation was private because (1) it was between two family members (close relationship), (2) it happened in the family kitchen (discrete location) and (3) one of the parties asked others to leave the room before the conversation commenced (no third parties present). *Kipp* at 729. Thus, lest there be any doubt, the analysis from *Clark* and *Kipp* is well-settled. *Accord State v. Babcock*, 168 Wn. App. 598, 279 P.3d 890 (2012).

3. As a Matter of Law, the Conversations In This Case Were Not Private Under *Clark*

Mr. Newlun has provided no facts to demonstrate that it would be reasonable for him to expect privacy in his conversations with Hanger and the informant. The facts that are before this Court establish that Mr. Newlun's claim fails all three prongs of the *Clark* analysis:

First, the subject matter of the drug sale conversations was routine for that activity and, thus, not private in nature. Like the conversations in *Clark*, Mr. Newlun's conversation with Detective Hanger and the informant were about selling illegal drugs and could have occurred with

any one of Mr. Newlun's customers. CP at 852, 861. The record undisputedly shows Mr. Newlun was a known drug dealer and that he sold drugs to Hanger. Mr. Newlun responded to what amounted to a cold call for drugs from an informant whom Mr. Newlun did not know. CP at 852. The conversations between the informant, Mr. Newlun, and Detective Hanger were solely about the drug transaction and the possibility of future deals. CP at 866-68.

As further evidence of the routine nature of the conversations, Mr. Newlun had arranged another purchase of marijuana immediately after the deal with Hanger. CP at 866-68 He told Hanger he came to Bellingham every two weeks to sell marijuana. CP at 866-68. Officers saw the next customer arrive, and leave the property. CP at 866-68. That person was found to have four pounds of marijuana in his car that had been delivered to him by Mr. Newlun and was later charged criminally. CP at 866-68. Further, Mr. Newlun discussed potential future drug deals between himself and Hanger. He had prearranged prices for the drugs he sold, and discussed his growing process in Oregon. CP at 866-68. All of these facts show Mr. Newlun was in the business of dealing marijuana and that his conversations with Dectective Hanger were routine.

Second, the conversations at issue occurred in public locations. The conversations took place in both a public mall parking lot through

open car windows and on the side of a neighborhood street. No ordinary person would have an expectation of privacy in these public locations. This principle is underscored here, where Mr. Newlun talked through an open car window at the mall parking lot, where shoppers were milling about and where he conducted a drug deal on a neighborhood street in a stranger's car. Discussing where to meet through an open car window in a parking lot and then conducting the drug deal on the side of a neighborhood street can hardly be considered private. *Clark's* ruling is in accord with other decisions, which have held that a conversation cannot be private if it occurs in public. *See Johnson v. Hawes*, 388 F.3d 676, 683 (2004) ("With his window rolled down in a public parking lot, Chief Nelson's police radio communications were 'within the . . . hearing of passersby' such as Johnson and other members of the public, and thus could not be private under the Act.").

Moreover, Detective Hanger was a third party to the transaction, which means Mr. Newlun had no expectation of privacy with either Hanger or the informant. Conversations with another party present are not private. It is undisputed that both Detective Hanger and the informant were in the car for all conversations with Mr. Newlun. As *Clark* suggests, a reasonable person would not have an expectation of privacy

or that a secret will be held when there is a third person present. Accordingly, Mr. Newlun had no expectation of privacy.

Third, as noted above, Mr. Newlun did not have any pre-existing relationship with either Detective Hanger or the informant. It is undisputed that Mr. Newlun and Detective Hanger were perfect strangers. Likewise, Mr. Newlun and the informant did not know one another.[2] Importantly, the transaction ultimately occurred in Detective Hanger's car. The Supreme Court in *Clark* has unequivocally stated there is no expectation of privacy while in a stranger's car. *Clark*, 129 Wn.2d at 230.

Importantly, the facts presented by the Defendants for summary judgment went unchallenged. Mr. Newlun did not submit any affidavits or declarations to contradict the sworn testimony offered by the Defendants. *See* CP at 887-96 (Memorandum of [Mr. Newlun] in Response to City of Bellingham's Motion for Summary Judgment). Since Mr. Newlun failed to controvert any facts supporting summary judgment, those facts are verities on appeal. *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989) ("When a nonmoving party fails to controvert relevant facts supporting a

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

summary judgment motion, those facts are considered to have been established.")

Because the conversations were not private, Mr. Newlun has no cause of action under the Privacy Act. Accordingly, the trial court erred in denying the Defendants' joint motion for summary judgment based on privacy. This Court should reverse the trial court and grant the Defendants' motion for judgment as a matter of law and dismiss Mr. Newlun's claims.

V. CONCLUSION

For the foregoing reasons, the trial court erred in denying summary judgment in favor of Defendants. This Court should grant summary judgment and order that this matter be dismissed.

RESPECTFULLY SUBMITTED this 2nd day of March, 2015.

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