72642-1

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No. 72642-1-I

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON FOR DIVISION ONE

RICK SUCEE, et al.,
Appellants,

v.

TODD NEWLUN,
Respondent and Cross Appellant.

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
FOR WHATCOM COUNTY

HONORABLE DEBORRA GARRETT

BRIEF OF RESPONDENT AND CROSS APPELLANT

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A. INTRODUCTION

Washington's privacy act allows police officers to temporarily "self-authorize" wiretaps in drug investigations. *See* RCW §§ 9.73.210 and 230. Police officers may do so *only* after fully complying with an application process detailed in the act. The application process substantially resembles the process police must undergo when applying for a warrant. A high-ranking officer must specify—with particularity—the time, place and manner of the anticipated interception. The officer must detail—in writing—the probable cause or reasonable suspicion that exists to support the interception. *See* RCW §§ 9.73.230(2); 9.73.210(2). Any authorization obtained will only be temporary and must be reviewed by a court soon after. *See* RCW §§ 9.73.230(5) and (7)(a); *see also* RCW § 9.73.210(3) (requiring a monthly report filed with the administrator for the courts).

If police are negligent in complying with the statute's "self-authorization" procedures—if they fail to demonstrate sufficient probable cause or reasonable suspicion—then they have violated the privacy act. The remedies are comprehensive. First, any information acquired pursuant to the wiretap is inadmissible in any civil or criminal case. *See* RCW §§ 9.73.210(4); 9.73.230(8). Second, the intercepting officers may be guilty of a Class C Felony. *Compare* RCW § 9.73.230(10) (Class C Felony when

police violate the self-authorization procedure) *with* RCW § 9.73.080 (one who commits a general violation of the privacy act is guilty of a gross misdemeanor). Third, the responsible law enforcement agencies may be liable for damages, including the imposition of exemplary damages in the sum of $25,000. *See* RCW § 9.73.230(11).

This is not a case about police officers who were merely negligent in obtaining a wiretap authorization pursuant to these procedures. Rather, this is a case about officers who *ignored* the procedures entirely. Prior to intercepting the plaintiff's conversation, the investigating officers made no attempt to demonstrate probable cause or reasonable suspicion to support the authorization. A supervisory police officer prepared no written report. A judge never reviewed the adequacy of probable cause or reasonable suspicion to ensure compliance with the statute. All the officers did was the get verbal go ahead from one of their supervisors. By failing to produce the documentation to support of the interception, they precluded *any* meaningful judicial review or oversight of the authorization at all.

In short, this was not a "good faith" attempt to comply with the statute. This was *no* attempt to comply. The violation was plenary and the question this case now presents is what civil remedies are appropriate?

The defendants say none at all, though they admit the interception was accomplished without the written authorization required by the

privacy act. They first argue that Mr. Newlun's recovery is barred by application of the felony tort statute, RCW § 4.24.420. They urge that this statute, in the past employed to prevent criminal defendants from recovering in tort from police officers who injured them while in hot pursuit, should now prevent Mr. Newlun from recovering statutory damages specifically provided for in the privacy act. The felony tort statute should not be read so broadly to terminate civil remedies for plaintiffs whose conversations were illegally intercepted by police officers during drug investigations under RCW §§ 9.73.210 or 230. And even if the statute did apply, the defendants cannot show that the commission of a felony caused their violation of the privacy act. The defendants cannot demonstrate with admissible evidence that the Mr. Newlun was engaged in the commission of a felony, or that this felony was the proximate cause of the illegal interception. Indeed, the officers' failure to obtain the wiretap authorization could not have been caused by the felony since it occurred *before* any drug transaction took place.

Second, the defendants argue that under the privacy act, the conversations between the confidential informant, the undercover officer, and Mr. Newlun were not private at all. Thus, no wiretap authorization was necessary. Such a reading is incompatible with the history and context of the privacy act, caselaw, and the facts of this case. Such a reading

would also greatly diminish the broad protections afforded by the act.

This Court should reject these arguments and affirm the Superior Court's denial of summary judgment on these claims. This Court should also reverse the Superior Court's grant of summary judgment finding that the exemplary damages provision of RCW § 9.73.230(11) is inapplicable in this case. The legislature made exemplary damages available as a way to deter police agencies from violating the law. Here, exemplary damages are appropriate because the police allowed an interception to occur without demonstrating in any formal or reviewable way that probable cause or reasonable suspicion existed to support that interception.

B. ASSIGNMENTS OF ERROR

> That the Superior Court erred in entering its order of August 9, 2013 dismissing, as a matter of law, plaintiff's claim for exemplary damages under RCW § 9.73.230(11).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

> Whether, when police officers illegally intercept a private conversation without first obtaining a written authorization under RCW §§ 9.73.230 or 210, they may escape the imposition of exemplary damages under RCW § 9.73.230(11) by later testifying to the existence of probable cause or reasonable suspicion, though that information was never contained within the four corners of any written application or authorization.

D. STATEMENT OF THE CASE

1. Factual Background

The interception or "wire-tap" at issue in this case was part of a criminal investigation conducted by the Northwest Regional Drug Task Force in 2011. CP 865-69. The Task Force was comprised of members of a number of local law enforcement agencies, including the Bellingham Police Department, the Whatcom County Sheriff's Office, and the Washington State Patrol. CP at 284, 851-52, 859-60.

The investigation began when the officers received a tip from a confidential informant identifying Mr. Newlun as a marijuana dealer. The informant admittedly had no prior existing relationship with Mr. Newlun. He had never met Mr. Newlun or spoken to him on the phone. But he nonetheless identified Mr. Newlun as a suspected dealer based on information supposedly obtained from another, different drug dealer. CP 866-69.

The officers in the Task Force had also never heard of Mr. Newlun. But based solely on this tip, they proceeded to investigate him. Their plan went like this: the confidential informant telephoned Mr. Newlun at his home in Oregon. The informant spoke with Mr. Newlun's wife, and arranged to meet Mr. Newlun at a mini-mart in Sudden Valley, Washington, on March 16, 2011. CP at 852-53. On the afternoon of the

meeting, a member of the Task Force, Trooper B.L. Hanger, drove the informant to the meeting location. CP 105-06, 853. Trooper Hanger was outfitted with a hidden body wire. Another Task Force member, Det. Steve Johnson, monitored the audio from nearby. CP 103. Bellingham Police Lieutenant Rick Succee had verbally authorized this wiretap interception in his capacity as a Commander of the Task Force. CP 350. But Lt. Succee did not complete and sign the required written authorization identifying the purpose of the interception, and the probable cause or reasonable suspicion to support it. CP 122-23. *See* RCW §§ 973.210 or 9.73.230.

When they arrived at the mini-mart in Sudden Valley, Trooper Hanger and the informant parked in the parking lot. The informant telephoned Mr. Newlun. Mr. Newlun then parked his own car next to the undercover vehicle. It was at this time Trooper Hanger activated the transmitting device. *See* CP 866-69.

The parties had a brief conversation and arranged to drive to Mr. Newlun's house nearby. CP 862. There, Mr. Newlun talked to Trooper Hanger through the windows of the undercover vehicle. CP. 866-67. Mr. Newlun then went inside his house and returned with a small backpack. CP 349, 656, 863. He got into the undercover vehicle and the exchange took place. After the deal, Mr. Newlun got out of the undercover car.

Trooper Hanger and the informant then drove off to meet up with Det. Johnson, who was still monitoring the conversations nearby. It was only at this point that Trooper Hanger turned off the transmitter. CP 107.

The police arrested Mr. Newlun later that day. Mr. Newlun was charged with delivery of a controlled substance. CP 85-87. The superior court granted his motion to suppress, because the police officers involved in the investigation failed to obtain a written authorization for a body wire. CP 175-77. This suppression order covered and included any of Trooper Hanger or the confidential informant's visual observations during their encounter with Mr. Newlun. No evidence of what took place while the wire was operating and transmitting was permitted pursuant to RCW § 9.73.050 and *State v. Salinas*, 121 Wn.2d 689 (1993).

Based on this suppression of evidence, the state could no longer sustain a felony charge against Mr. Newlun. *See* CP 175-77. Instead, Mr. Newlun pleaded guilty to a reduced misdemeanor charge of possession.

Mr. Newlun filed suit against the police officers and their law enforcement agencies under the Washington Privacy Act, Ch. 9.73 RCW, for damages and attorney fees for the illegal intercepting and transmitting of his conversation. CP 21-25. In the pretrial aspect of this case, Superior Court Judge Garrett entered three rulings that are now subject to interlocutory appeal. CP 1173-76. First, she rejected the plaintiff's claim

for exemplary damages under RCW § 9.73.230(11) as a matter of law. Instead, she held that Mr. Newlun was entitled to pursue statutory damages in the sum of $100.00 under RCW § 9.73.060. *See* Report of Proceedings August 9, 2013 at pages 4-7. Second, Judge Garrett denied defendants' motion to dismiss under Washington's felony tort statute, RCW 4.24.420. CP 1163-65. Third, the Court denied the defendants' motion for summary judgment on the basis that the conversation between Mr. Newlun, Det. Hanger, and the confidential informant was not a private communication under the Privacy Act. CP 958-60.

2. Statutory Background

Mr. Newlun seeks civil remedies provided for under Washington's privacy act, which generally prohibits the interception and recording of private communications. *See* RCW § 9.73.030. In most circumstances, in order for a private conversation to be lawfully recorded, transmitted, or intercepted, all parties to that conversation must consent. RCW § 9.73.030(1)(a) ("[I]t shall be unlawful for . . . the state of Washington [or] its agencies . . . to intercept or record any . . . [p]rivate communication transmitted by telephone, telegraph, radio, or other device . . . without first obtaining the consent of all the participants in the communication."). The term "private communication" is an all-embracing term, broad enough to include a conversation between a defendant and his attorney or a police

officer. "To construe the words 'private conversation' narrowly and grudgingly would unnecessarily fail to give full effect to the legislative purpose to protect the freedom of people to hold conversations intended only for the ears of the participants." *State v. Grant*, 9 Wash. App. 260, 265 (1973).

The privacy act contains certain limited exceptions for law enforcement to intercept private communications when conducting criminal investigations. RCW §§ 9.73.090, 9.73.210, 9.73.230. But these exceptions are accompanied with a number of procedural safeguards to ensure that police wiretaps are supported by probable cause and reasonable suspicion.

Police must follow procedures that largely mirror the procedures required in an application for a warrant. If the police can demonstrate that probable cause exists to believe "the nonconsenting party has committed, is engaged in, or is about to commit a felony," they can obtain a written or telephonic authorization to intercept from a judge or magistrate. RCW § 9.73.090(2). If that authorization is provided telephonically, "the authorization and officer's statement justifying such authorization must be electronically recorded . . . and reduced to writing as soon as possible thereafter." *Id.* A recording ensures that a full and reviewable record of the judicial authorization exists.

The legislature amended the privacy act in 1989 during the height on the war on drugs to enable police officers to temporarily self-authorize wiretaps for use in drug investigations. *See* RCW 9.73.200 *et seq.*; Laws of 1989, ch. 271. To balance the broad expansion of police power, the legislature devised a more protective system of procedural safeguards just for the police authorized wiretaps. *See* RCW § 9.73.200. These procedures are at the heart of this case.

a. The "Investigation Wire" Exception Of RCW § 9.73.230

The "investigation wire" exception, RCW § 10.73.230, allows police officers to intercept private communications "as part of a bona fide criminal investigation." RCW § 9.73.230(1). This statute contemplates that "evidence obtained through the interception or recording of a conversation or communication" may be used in a criminal prosecution. RCW § 10.73.230(8). For an investigation wire to be lawful, the police must obtain an "authorization" by meeting certain requirements. First, "the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor" must approve the interception. RCW § 10.73.230(1.) Second, at least one party to the conversation must consent. RCW § 10.73.230(1)(a). Third, probable cause to believe that the conversation involves the "unlawful manufacture, delivery, sale or possession with intent to manufacture, deliver, or sell,

controlled substances . . ." must exist. RCW § 10.73.230(b)(i). Fourth, the authorizing officer must "prepare and sign a written report at the time of authorization. RCW §§ 10.73.230(c); 10.73.230(2). The authorization is valid only if those four steps are fulfilled.

The linchpin of the "authorization" is the written report. The report is similar to an affidavit of probable cause. It must describe the probable cause and indicate the names of the parties consenting to be intercepted or recorded. RCW §§ 10.73.230(2)(a), (b), (c). It must identify the "target" of the interception—that person "who may have committed or may commit the offense." RCW § 10.73.230(2)(d). It must also describe the "details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication." RCW § 10.73.230(2)(e). The authorization is valid for no more than 24 hours from the date and time the authorizing officer *signs* it. RCW § 10.73.230(5). And within fifteen days, the police must submit a report containing the original written authorization and the approximate time of the intercepted conversation to a judge for review. RCW § 10.73.230(6). Only then will a judge definitively determine whether the requirements of the statute were met. RCW § 9.73.230(7)(a).[1]

[1] There are also provisions in the statute to ensure that those whose conversations are intercepted in violation of the statute are notified. The

b. The "Officer Safety" Exception Of RCW § 9.73.210

The other exception, the "officer safety wire" exception, allows police officers to intercept private communications "for the sole purpose of protecting the safety of the consenting party." RCW § 9.73.210(1). For an officer safety wire to be lawful, a "police commander or officer above the rank of first line supervisor" must approve the wire. *Id.* Like an investigation wire, the police commander must complete *in advance* a "written authorization which shall include (a) the date and time the authorization is given; (b) the persons, including the consenting party, expected to participate in the conversation or communication, to the extent known; (c) the expected date, location, and approximate time of the conversation or communication; and (d) the reasons for believing the consenting party's safety will be in danger." RCW § 9.73.210(2).

In contrast to an investigation wire, the police commander need only demonstrate reasonable suspicion to believe the safety of the consenting party (the undercover officer or informant) is in danger, and that the communication sought to be intercepted will involve the unlawful

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agency must file a monthly report with the court administrator "indicating the number of authorizations granted, the date and time of each authorization, interceptions made, arrests resulting from an interception, and subsequent invalidations." *See* RCW § 9.73.230(11).

manufacture or sale of drugs. RCW § 9.73.210(1). Any evidence obtained through the safety wire is inadmissible in a criminal proceeding. RCW § 9.73.210(4). This makes sense – if the "sole" purpose of an wiretap is to protect safety, and when that intercept is only supported by reasonable suspicion and not probable cause, the police should not be allowed to profit from any evidence obtained through that wiretap.[2]

c. The Privacy Act's Remedial Scheme

The privacy act is designed to remedy a wrong and create a right which otherwise did not exist. *See State v. Von Thiele*, 47 Wn.App. 558, 562 (1987) ("A statute is remedial when it provides for the remission of penalties and affords a remedy for the enforcement of rights and redress of injuries"); *Haddenham v. State*, 87 Wash. 2d 145, 148 (1976) ("Remedial statutes, in general, afford a remedy, or better or forward remedies already existing for the enforcement of rights and the redress of injuries.").

To that end, the privacy act also includes a broad exclusionary rule: "Any information obtained in violation of RCW 9.73.030" is inadmissible "in any civil or criminal case . . . except with the permission

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[2] An officer safety wire, though itself inadmissible, does not bar the admission of testimony of a participant in the communication or conversation unaided by information obtained pursuant to the officer safety wire. RCW § 9.73.210(5). In other words, as long as an officer safety wire was lawfully authorized, a police officer or informant may testify to what he or she *saw* while wearing the wire. RCW §§ 9.73.210(1), (1)(a).

of the person whose rights have been violated." RCW § 9.73.050; *see also* RCW § 9.73.230(8); RCW § 9.73.210(4); *State v. Fjermestad*, 114 Wn.2d 828 (1990) (not only is information directly derived from illegal transmissions or recordings inadmissible in court, but the visual observations of the investigating officers, made concurrently with the audio tapes, are also inadmissible); *State v. Salinas*, 119 Wn. 2d 192, 199 (1992).

The act also provides for damages against "[a]ny person who, directly or by means of a detective agency or any other agent, violates the provisions of this chapter. . ." The injured party is entitled to actual damages or liquated damages of $100 per day plus attorney's fees. *Id.* RCW § 9.73.230(11) provides for exemplary damages when a law enforcement agency authorizes the interception of a conversation without a demonstration of probable cause and reasonable suspicion. RCW § 9.73.230(8). Finally, the act makes the illegal interception a Class C felony when committed by a police officer. *See* RCW 9.73.230(10).

E. ARGUMENT

1. The Exemplary Damages Provision Of RCW § 9.73.230(11) Is Appropriate When Police Make No Attempt To Comply With The Privacy Act At All

The exemplary damages provision of RCW § 9.73.230(11), allowing for damages of twenty-five thousand dollars, was set in 1989 and acts to deter police misconduct in authorizing wiretaps for drug investigations. The liquidated damages remedy of RCW § 9.73.060 also acts to stimulate private enforcement of the act and thus the preservation of privacy in this state. The defendants' interpretation of these remedial provisions would effectively wall off these civil remedies for only plaintiffs who are completely innocent. Such an interpretation is not consistent with the plain language of the act and would frustrate its broad purpose "to protect the freedom of people to hold conversations intended only for the ears of the participants." *State v. Grant*, 9 Wash. App. 260, 265 (1973).

The Superior Court erred when it ruled that the exemplary damages provision of RCW § 9.73.230(11) does not apply in this case. *See* Report of Proceedings of Aug. 9, 2013 at 5-7. The Superior Court failed to recognize that the text, structure, and policy of the statute require courts to apply the four-corner rule of search warrants when reviewing wiretap authorizations. An alternate reading would result in an imbalanced

construction of the statute that would provide police-authorized wiretaps *more* flexibility than judicially-authorized wiretaps.

In this case, an application of the four-corner rule bars the defendants from justifying their illegal intercept through evidence presented long after that illegal intercept was accomplished. Without that evidence, the defendants cannot prove—as a matter of law—that the exemplary damages provision of RCW § 9.73.230 does not apply to the facts of this case.

a. The Wiretap Authorization Procedures Of Ch. 9.73 RCW Are Substantially Similar To The Procedures Employed In Warrant Authorizations And Require The Application Of The Four Corner Rule

RCW § 9.73.230(11) provides that an

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

of this section.

The Superior Court construed this language to provide for exemplary damages in "very limited circumstances"—only for "violations where [there is] no probable cause to believe the conversation will involve the sale of a controlled substance and sale or delivery of a controlled substance." Report of Proceedings of Aug. 9, 2013 at 8. The Court then found that exemplary damages were not appropriate as a matter of law based on "the testimony of the officers that they anticipated this was going to be a conversation about a drug transaction." Report of Proceedings of Aug. 9, 2013 at 20. This testimony concerned the purpose of the wiretap, and why the police believed the conversation between Det. Hanger, Mr. Newlun and the informant would likely lead to a discussion about the illegal transfer of drugs. This testimony ultimately convinced the Superior Court that at the time the intercept took place, the officers *did* have sufficient probable cause and reasonable suspicion to support the wiretap – they just failed to follow the procedures and obtain the formal "authorization." Based on this finding, the Court held that the defendants may escape the imposition of exemplary damages under RCW §§ 9.73.230(11)(a) and (b). *See* Report of Proceedings of Aug. 9, 2013 at

20.[3]

The officers' testimony was only presented *after* the illegal wiretap had taken place—at the suppression hearing and during the pretrial stages of this civil action. CP 175-77. It was improper for the Superior Court to consider this testimony because it was not included in any valid *written* authorization prepared pursuant to RCW §§ 9.73.230 or 210.

A better construction of the statute would have recognized that the formal "authorizations" of RCW §§ 9.73.210 and 230 are like search warrants and logically should be reviewed in the same way. When a court appraises the legality of a search warrant, it does not entertain evidence or testimony that is outside of the four corners of the warrant. *See State v. Murray*, 110 Wash. 2d 706, 709-10 (1988). It does not allow the police officers who applied for the warrant to present testimony to "clarify" the existence of probable cause or reasonable suspicion. suspicion.

It is appropriate to impose the four corner rule on authorizations completed under RCW §§ 9.73.230 and 210. First, like search warrants, RCW § 9.73.230 requires the demonstration of "probable cause." Probable cause is a creature of the Fourth Amendment, and there has been no decisional law in Washington construing that term differently from the

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[3] The Superior Court found that the remedy available was limited to the general action for damages as specified in RCW § 9.73.060. *See* Report of Proceedings of Aug. 9, 2013 at 20.

Fourth Amendment. *See also State v. Salinas*, 119 Wash. 2d 192, 199 (1992) ("the Legislature has not defined the term 'probable cause' in RCW 9.73.230, [so] we will apply the jurisprudence defining this term in a judicial context.").

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

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

have some type of written authorization to review on this basis.

The four-corner rule makes sense for a written authorization under Ch. 9.73 RCW for the same reasons it makes sense for a warrant. Under the four-corner rule, judicial review is limited to the information contained within the four corners of the affidavit supporting probable cause: "When adjudging the validity of a search warrant, we consider *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested." *Murray*, 110 Wash. 2d at 709-10 (*citing Whiteley v. Warden,* 401 U.S. 560, 565 n. 8 (1971); *Spinelli v. United States,* 393 U.S. 410, 413 n. 3 (1969)). As the United States Supreme Court explained, "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." *Whiteley*, 401 U.S. at 574 n.8 (internal citations omitted). Like an affidavit of probable cause, the *written* authorization serves to ensure that a reviewing court charged with determining the adequacy of probable cause may do so in a principled manner. That is its chief purpose. *See*, *e.g.*, RCW § 9.73.230(7) (requiring a court to make an "ex parte review of the authorization" within

two days of receiving the report); *see also State v. Neth*, 165 Wash. 2d 177, 182 (2008).

Here, allowing police to later testify about the purpose of Trooper Hanger's wiretap, or the probable cause and reasonable suspicion that may have supported that wiretap, is akin to allowing a police officer testify about information he possessed but did not disclose to the magistrate who issued a search warrant. Thus, by ignoring the four-corner rule and considering untimely testimony justifying the interceptions in this case, the Superior Court erred.

b. Allowing Police To Belatedly Demonstrate Reasonable Suspicion Or Probable Cause To Avoid Exemplary Damages Creates An Imbalanced Reading Of The Act

By ignoring the four-corner rule, the Superior Court's reading of the statute imposes greater procedural protections on judicially-authorized wiretaps than on police-authorized wiretaps.

Before the legislature amended the privacy act in 1989, the only way law enforcement officers could use wiretaps was by securing judicial approval. *See* RCW § 9.73.090(2). This section remains the general rule.

The four corner rule applies to judicial authorizations issued under RCW § 9.73.090(2). A judge issuing an intercept order under this section has considerable discretion to determine whether the statutory safeguards have been satisfied. *See State v. Porter*, 98 Wash. App. 631, 634 (1999).

However, officers still must present on-the-record testimony to support the existence of probable cause. *See* RCW 9.73.090(2) (requiring "written" authorization or "telephonic" authorization that is "electronically recorded"). The "written" requirement ensures that a record may later be considered by a reviewing court on appeal. The reviewing court does not review the sufficiency of the application de novo. *State v. Cisneros,* 63 Wash.App. 724, 728–29 (1992). It does, however, employ the four-corner rule. A reviewing court will not affirm the issuance of the wiretap when the facts *set forth in the application* are not minimally adequate to support the determination of probable cause. *See Porter*, 98 Wash. App. At 634; *State v. Knight,* 54 Wash.App. 143, 150–51 (1989).

It would create an imbalance in the statutory scheme to impose the four-corner rule for the review of judicially authorized wire-taps, but not for the review of police-authorized wiretaps. This is especially the case since the provisions of the privacy act allowing police to temporarily self-authorize wiretaps are *exceptions* to the general rule requiring judicial approval. *See* RCW §§ 9.73.090(2), 9.73.200. And as discussed, the standards law enforcement must meet to obtain a lawful authorization to intercept under RCW §§ 9.73. 230 and 210 are much higher than the standards required of judicially-authorized wiretaps. Indeed, all of the procedures dictated by RCW §§ 9.73.210 and 230 ensure that a

meaningful judicial review of the police self-authorizations can be accomplished. Only by requiring the police to clearly state – *in advance* – the names of those sought to be intercepted, the reason for the interception (investigation, officer safety or both), and the basis for the interception (probable cause or reasonable suspicion), can a court later ensure that the police did not overstep the legitimate bounds of their authority. Without a written record of what the police knew *before* the intercept took place, a court is unable to make a principled determination of the adequacy of probable cause. The remedial scheme – involving suppression, inadmissibility and civil damages – ensures that the officers may not profit from the contents of illegal surveillance in any way – either in a criminal or civil proceeding.

In summary, a reading of the statute that would subject judicially-approved wiretaps to greater scrutiny than those authorized by the police themselves would result in an imbalanced statutory construction that is inconsistent with the broad protections of the privacy act.

c. Exemplary Damages Are Appropriate In This Case Because An Invasion Of Privacy Is Most Acute When Perpetrated By A Police Agency

The legislature created the exemplary damages remedy in 1989 when it expanded the authority of the police to self-authorize wiretaps in drug investigations. *See* RCW § 9.73.230(11). The legislature clearly

recognized that the general civil remedy previously available under RCW § 9.73.050 provided an insufficient check on this newly ratified police discretion. Because the violation that occurred in this case was perpetrated by police officers who invalidly "self-authorized" the wiretap, the exemplary damages provision of RCW § 9.73.230(11) is appropriate.

Exemplary damages refer to non-compensatory damages designed to punish intentional wrongs and deter their future commission by "making an example" of the offender. *See Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (1763) (exemplary damages awarded against the Secretary of State for an unlawful search of John Wilkes' papers). The more familiar term, "punitive damages" came into regular use a century later, and tends to obscure the deterrence-based origin and function of such damages by suggesting their principal function is retributive. The older term more accurately reflects the original function of such extra-compensatory damages: *deterrence*. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490 (2008).

This function of deterrence is frustrated by the Superior Court's construction of the statute. The consequence of this reading is that police are *more* insulated from liability when they completely fail to follow the procedures of RCW §§ 9.73.210 or 230 than when they are merely negligent. Under the Superior Court's reading, police may be punished

with exemplary damages when an authorization for an investigation wire provides no probable cause or reasonable suspicion, so long as there is some scrap of paper identifying it as an "authorization" made under RCW § 9.73.230. But where, as here, police produce no written documentation at all, they are insulated from the exemplary damage award.

This construction is wrong. It undermines the purpose of the exemplary damages remedy—to punish police misconduct. It also undermines the statutory command that all interceptions be supported—in advance—by an written authorization detailing—with particularity—the elements of RCW §§ 9.73.210 or 9.73.230. It provides a free pass on civil liability for police officers who simply state, after an illegal interception has taken place, that their conduct was necessary for officer safety. Under such a construction, the police would be financially better off to ignore the law entirely and follow no procedures, than to be neglectful by obtaining a written authorization to intercept without the necessary probable cause or reasonable suspicion. Indeed, the Superior Court itself recognized the dilemma of its own construction: "that in some ways it's even worse if the police do no application or no written authorization than if they followed the process in a flawed way." Report of Proceedings August 9, 2013 at pages 19-20.

The evil of this construction is further illustrated by the Joaquin Meza case. Mr. Meza was the only other person, according to the police, whose conversation was intercepted by Trooper Hanger and Det. Johnson without advance written authorization under RCW §§ 9.73.230 or 210. On the basis of this investigation, Mr. Meza was referred to federal court for prosecution and was sentenced to ten years. A salient fact of Mr. Meza's case is that neither Trooper Hanger, who carried the wire, nor Det. Johnson, who monitored from nearby, ever disclosed their use of the wire in the written reports. Thus, but for the litigation in case, Mr. Meza would never have made aware of the potentially illegal police activity that led to his arrest. The police documents related to Mr. Meza's case are available at CP 439-78.

In summary, when police fail to comply with the privacy act completely – as they did here – they should not be allowed to avoid exemplary damages by presenting evidence of the reasonable suspicion or probable cause required under RCW § 9.73.230(11) when that evidence is presented after the illegal intercept has already taken place. In an application for a wire under RCW §§ 9.73.210 and 230, the necessary factual showing must be made in the written application. The Superior Court was wrong to credit the officers' late testimony to establish what the purpose of the wiretap was, and any probable cause or reasonable

suspicion that may supported it. Without a written "authorization," the police have no evidence with which to demonstrate the requisite probable cause or reasonable suspicion.

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

Under Washington's felony tort statute, RCW § 4.24.420, a defendant is completely absolved of liability if a causal relationship can be established between a plaintiff's felonious conduct and the plaintiff's injuries. The statute provides the defendant with a defense to an action for damages for personal injuries or wrongful death if the plaintiff was injured or killed in the commission of a felony *and* the plaintiff's commission of the felony was causally related in time, place, and activity to the plaintiff's injuries. *Id.* RCW § 4.24.420 is inapplicable to bar the civil remedies that are explicitly provided for in Washington's privacy act. And even if it did apply, the defendants here cannot show, as a matter of law, the requisite causation.

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

The felony tort statute was adopted in a fervor of tort reform that resulted in the passage of the Washington Tort Reform Act. It was passed to limit recovery for common law actions for *tort*, not statutorily

prescribed remedies that punish illegal government activity. *See, e.g.*, 1986 JOURNAL, 49th Leg., Reg. Sess. & 1st Spc. Sess at 15 ("We have seen all kinds of crazy cases in which a felon runs across a skylight and falls into a school and sues and gets a quarter of a million dollars. Those kinds of cases are what has driven the cost up and we have to do something to change our tort system and bring it in line."). Indeed, the statute itself contains an exception for actions brought under 42 U.S.C. § 1983. *See* RCW § 4.24.420 ("nothing in this section shall affect a right of action under 42 U.S.C. Sec. 1983"). This exception effectively prevents government officials sued under Section 1983 from taking advantage of the statute's complete defense.

The felony tort statute has been almost universally enforced to prevent plaintiffs from recovering in *tort* for injuries incurred due to police action police taken in hot pursuit of the fleeing plaintiff. *See, e.g.*, *Estate of Villarreal ex rel. Villarreal v. Cooper*, 929 F. Supp. 2d 1063, 1078 (E.D. Wash. 2013) (wrongful death tort); *White v. Pletcher*, 170 Wash. App. 1012 (2012) (unpublished) (assault, battery, and negligent and intentional infliction of emotional distress torts); *Estate of Lee ex rel. Lee v. City of Spokane*, 101 Wash. App. 158, 175 (2000) (wrongful death, survivor and outrage torts). The only case the defendants can point to for the proposition that the felony tort statute limits *statutorily* prescribed

remedies is *Dickinson v. City of Kent*, No. C06-1215RSL, 2007 WL 4358312 (W.D. Wash. Dec. 10, 2007). *Dickinson* too involved the classic felony tort scenario – a plaintiff was involved a police chase that ended when a police dog immobilized him; he sustained puncture wounds on his leg in the process. *Id.* at *1. The plaintiff sued under Washington's strict liability dog bite statute, RCW 16.08.040. Ultimately, the Court found that whether or not RCW § 4.24.420 provides a complete defense to plaintiff's strict liability claim was a matter properly reserved for trial. *Id.* at *3.

In any event, the felony tort statute cannot provide a defense to the exemplary damages provision of RCW § 9.73.230(11). Exemplary damages, by definition, are not damages awarded for personal injury. Their purpose is to deter. *See* p. 23-26, *supra*; *see also* Restatement (Second) of Torts § 908, cmt. a ("The purposes of awarding punitive damages, or 'exemplary' damages as they are frequently called, are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future."); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996) (recognizing that heavier punitive damages awards have been thought to be justifiable when wrongdoing is hard to detect, increasing the defendant's chances of getting away with it); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494-95 (2008) (recognizing that some regulatory schemes provide by statute for multiple recovery in

order to induce private litigation to supplement official enforcement that might fall short if unaided).

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

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

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

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

Second, the defendants cannot establish that Mr. Newlun's *injury* was causally related to the commission of a felony in time, place, or activity. Under the law, the unlawful act must be found to have proximately caused the injury. RCW § 4.24.420. Here, it was the officers' failure to get a signed written authorization satisfying the statutory requirements that *caused* the statutory breach of Mr. Newlun's right to privacy, not any illegal act he committed. Indeed, Mr. Newlun's injury—caused by the police failure to obtain the lawful authorization—was not caused by the alleged illegal activity. *It occurred prior to that activity.* Thus, there can be no causal link between Mr. Newlun's alleged illegal activity and the officers' decision to violate RCW § 9.73.230 by illegally intercepting and transmitting Mr. Newlun's conversation. Thus, the defendants cannot meet the proximate causation requirement of RCW § 4.24.420.[4]

[4] And even if that were not true, the proximate cause component of RCW § 4.24.420 will almost always be a question of fact. *See Petersen v.*

3. The Conversation Between Mr. Newlun, Trooper Hager And The Confidential Informant Was A "Private Communication" Under Washington Case Law

The defendants argue that the case should be terminated because, as a matter of law, the intercepted conversation between Mr. Newlun, the confidential informant and Trooper Hager was not "private" under the Washington privacy act. Thus, the defendants maintain, no authorization under RCW §§ 9.73.090, 210 or 230 was required.

It is a strange turn when police agencies supposedly constrained by the Washington Privacy Act present an argument which would eliminate the need for written authorizations when the undercover police converse with the public.

a. The Defendants Have Waived The Argument That Mr. Newlun Was Not Engaged In A Private Conversation

The defendants have previously told the court repeatedly that this case involves a violation of the Washington Privacy Act, and that the appropriate remedy is one hundred dollars in liquidated damages, not twenty five thousand dollars in exemplary damages.

Washington, 100 Wn.2d 421, 436 (1983) ("We have consistently held that 'the question of proximate cause is for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court.' ") (*quoting Mathers v. Stephens*, 22 Wn.2d 364, 370 (1945).

Judicial estoppel, also known as the doctrine of inconsistent positions, is a judicially created doctrine developed to preclude parties in judicial or quasi–judicial proceedings from asserting or adopting legal or factual positions in litigation that are inconsistent with positions taken in prior judicial or quasi–judicial proceedings or earlier in the same proceeding. *See Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538 (2007). Judicial estoppel is designed to protect the integrity of the courts and to preclude parties from playing fast and loose with the judicial system. *See, e.g., Ergo Science, Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996). Courts have recognized that it is wrong to allow a person to abuse the judicial process by advocating one position, then later advocating a different position at a time when the changed position becomes beneficial. Accordingly, the purpose of judicial estoppel is to protect the integrity of the judicial system rather than to protect the litigants. *See Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wash. App. 222, 225 (2005).

Judicial estoppel precludes a party from gaining an advantage by taking one position and then seeking a second advantage by taking an incompatible position in a subsequent action. "The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by

a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time." *Seattle-First Nat'l Bank v. Marshall*, 31 Wash. App. 339, 343 (1982); *Johnson v. Si-Cor Inc.*, 107 Wash. App. 902 (2001).

From the outset in this case, the police agencies took the position that the only damages available for the interception of Newlun's conversation was $100 under RCW 9.73.060. *See* CP 80. The City joined the motion. CP 190-191. In its motion for summary judgment, filed on May 24, 2013 at page 2, lines 24-28, the City wrote, "Plaintiff is therefore only entitled to damages under this section of the statutory scheme (RCW 9.73.060, the $100 liquidated damages section)." In its motion for summary judgment filed on November 5, 2013, the City, in its conclusion, wrote, "the court should grant the City's Motion and find that Plaintiff is entitled to $100 liquidated statutory damages plus costs and attorney fees. " CP 754, lines 16-18. Later on, the City repeated, "Plaintiff's remedy is $100 liquidated damages." CP 754, line 24. Judicial estoppel should apply to prevent the defendants from now arguing that the privacy act does not apply at all.

b. *State v. Clark* Supports The Proposition That The Interception In This Case Involved A Private Conversation

The defendants point to *State v. Clark* for the proposition that the planned drug buy that took place in Trooper Hanger's car was not "private" under the Washington Privacy Act. *See State v. Clark*, 129 Wn.2d 211 (1996). Thus, they maintain, no authorization under RCW §§ 9.73.210 or 230 was required. The defendants read *Clark* too broadly.

In *Clark*, our Supreme Court found that in some circumstances, brief conversations between strangers on a public street, concerning the terms of a routine illegal drug transaction, sometimes in front of third persons, are not "private" under the Washington Privacy Act. *See Clark*, 129 Wn.2d at 228. In *Clark*, the Seattle police employed a confidential informant named Kevin Glass to help "address drug trafficking in high crime areas of Seattle." *Clark*, 129 Wn. 2d at 216. Mr. Glass posed as a drug purchaser, and was deployed to approach "street traffickers dealing drugs in high drug trafficking areas" of Seattle. *Id.* The typical conversation between Mr. Glass and a street seller was very short and concerned the quantity, quality, and selling price of the drugs. *Id.* The parties would then engage in a "[q]uick exchange between money and narcotics, and then both just disperse there." *Clark*, 129 Wn. 2d at 218.

The conversations were recorded and subsequently challenged as violations of the privacy act.

In finding that these conversations were not private, the Court compared the defendant dealers to "vendors of merchandise selling their wares on a public street to anyone who wished to be a customer." *Clark*, 129 Wn.2d at 224 (*quoting State v. D.J.W.*, 76 Wash. App. 135, 141 (1996). The Court reasoned that "[j]ust as a clerk in a store would be willing to engage in a conversation about a product with any customer who happened by, so did the [defendants] manifest a willingness to engage in a conversation with any prospective buyer." *Id.*

State v. Clark is unique to its circumstances. The case involved drug transactions conducted in "a bazaar-like setting on the street." *Clark*, 129 Wn.2d at 214. The Court emphasized that "[w]e are not suggesting or deciding that a conversation is not private solely because it takes place on a street or solely because it relates to a commercial or illegal transaction." *Id.* Indeed, throughout the opinion, the Court makes clear that the decision is limited to the context of a sidewalk drug trade and "conversations where the defendants approached a stranger for brief, routine conversations on the street about drug sales." *Id.* at 231.

The meeting between Mr. Newlun, Trooper Hanger, and the confidential informant was not of the type described in *Clark*. To begin

with, the Task Force operation that culminated in the illegal interception of Mr. Newlun's conversation was not a street drug sale—it was a controlled buy using a body wire, an undercover officer, and a confidential informant. Moreover, the meeting was pre-planned in advance over the several phone conversations between the confidential informant, and Mr. Newlun and his wife. CP 866. The participants planned to and did meet in front of a small mini-mart, what the defendants refer to as the "Sudden Valley Shopping Mall." *See* CP at 852-53, 866-67. The deal was ultimately accomplished not at the mini-mart, but inside a car parked in front of Mr. Newlun's house in a residential neighborhood with no witnesses other than the parties to the deal. CP 867. The Newlun's property was secluded. As Trooper Hanger described, "The area of Mr. Newlun's property in Sudden Valley is a dead end with no traffic, essentially no traffic and not able to be surveilled." CP 348. In summary, the conversation was not in the context of "dealers wrestling for business in a marketplace atmosphere." *See Clark*, 129 Wn.2d at 228.

The defendants attempt to equate Det. Hanger with strangers present during some of the drug transactions in *Clark*. In that case, the transactions were between two parties—Mr. Glass purchasing from a defendant dealer. Here, the transaction was between three parties—Det. Hanger, the confidential informant, and Mr. Newlun. Det. Hanger and the

confidential informant arrived at the meeting location together. They drove in the same vehicle. And Det. Hanger was clearly affiliated with the confidential informant. Though they were meeting Mr. Newlun for the first time, they were not passersby on the street who happened to witness the drug transaction. CP 866-67.

Moreover, the transaction was ultimately accomplished inside a car in a residential neighborhood, a far cry from the "bazaar" environment in *Clark*. CP 866-67.

In summary, this Court should decline the defendants' invitation to expand the bounds of *Clark* beyond its proper context. *Clark* does not stand for the proposition that the police may intentionally intercept a conversation that occurs during a carefully arranged and pre-planned single drug transaction taking place in a residential neighborhood. *Clark* does not support the right of police officers to surreptitiously wear wiretaps that are not judicially authorized or reviewed during their contact with the public. If the Washington Privacy Act means anything, it is that an undercover police officer does not have carte blanche to carry a concealed transmission device while interacting with the public.

In short, the conversation here was a private. And, at the very least, the decision is for the trier of fact.

F. CONCLUSION

This Court should affirm the Superior Court's denial of summary judgment on the claim that Mr. Newlun's recovery is barred by application of the felony tort statute, RCW § 4.24.420. This statute, intended to limit tort action, should not be read to prevent Mr. Newlun from pursuing statutorily prescribed civil remedies for violations of the privacy act. Even if the felony tort statute does apply, the defendants cannot show that Mr. Newlun's commission of a felony caused the police officers to violate the privacy act. This Court should also affirm the Superior Court's denial of summary judgment on the claim that Mr. Newlun is barred from pursuing damages under the privacy act because his conversation with the undercover officer and confidential informant was not "private" under *State v. Clark*. Finally, this Court should reverse the Superior Court's grant of summary judgment finding the exemplary damages remedy of RCW § 9.73.230(11) inapplicable to the interception in this case. Exemplary damages are available in the privacy act to deter police agencies from violating the law. Exemplary damages are here appropriate because the police allowed an interception to occur without demonstrating in any formal or reviewable way that probable cause or reasonable suspicion existed to support that interception. The plain language of the statute requires adequate probable cause and reasonable suspicion to be

contained in a *written authorization*. Any review of that authorization is limited to the four corners of the document. The Superior Court erred by allowing the police officers to later testify as to the purpose and facts surrounding the Newlun investigation, as a way to rehabilitate the non-existent authorization.

Respectfully submitted this 16th day of June, 2015.

By: William Johnston

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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

DECLARATION OF WILLIAM JOHNSTON

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

WILLIAM JOHNSTON
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1. I am the attorney for the Respondent and Cross Appellant Todd Newlun;
2. On this day, June 16, 2015 I personally delivered a copy of my Motion to File Brief Late along with a copy of Respondent Cross Appellant's Opening Brief on the Office of the Prosecuting Attorney for Whatcom County, Whatcom County Courthouse, Bellingham, Washington 98225.
3. I also served a copy of my Motion to File Brief Late along with a copy of Respondent Cross Appellant's Opening Brief on the Office of the City Attorney for Bellingham and its office at 210 Lottie Street, Bellingham, Washington.
4. I also served a copy of my Motion to File Brief Late along with a copy of Respondent Cross Appellant's Opening Brief on the Office of the Washington State Attorney General at its office on the 3rd floor of the Key National Bank Building on Holly Street in Bellingham, Washington 98225

Executed this 16th day of June, 2015 at Bellingham, Washington.

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