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NO. 99279-7

SUPREME COURT OF THE STATE OF WASHINGTON

JASON LOWERY,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Petition for Review comes before the Washington State Supreme Court following Division 1 of the Court of Appeals affirming the post-trial judgment of the King County Superior Court. The trial court found that while employed by Relationships Toward Self-Discovery (RTS), Jason Lowery, along with a co-defendant, Laird Richmond, was liable for damages under the Washington Medicaid Fraud False Claims Act. The court found that Lowery caused a "reverse false claim" by joining with Richmond to inflate reported work hours on cost reports in an effort to decrease the amount of State funds that RTS was required to reimburse the State.

Lowery's Petition seeks to relitigate the Court of Appeals' determination that substantial evidence supported the post-trial findings that he committed fraud against the Washington State Medicaid fund. These findings were amply supported by the record, a record from which Lowery has never identified a specific factual assignment of error. This matter does not present an issue of substantial public interest and does not warrant this Court's review.

II. IDENTITY OF RESPONDENT

Respondent is the State of Washington, the plaintiff in the trial court below.

III. DECISION BELOW

The decision for which Lowery seeks review is a published opinion by the Court of Appeals, Division I, *State of Washington, ex. rel. Hunter v. Lowery,* 475 P.3d 505 (2020), filed on November 2, 2020, which affirmed a finding of civil liability against Lowery under Chapter 74.66 RCW.

IV. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals correctly conclude that substantial evidence supports the trial court's findings that Lowery: (i) caused fraudulent cost reports to be submitted to the State, and (ii) knowingly violated the Washington Medicaid False Claims Act?

B. Did the Court of Appeals correctly affirm the trial court's application of joint and several liability to Lowery, where Lowery failed to challenge that determination at trial or on appeal?

V. STATEMENT OF THE CASE

A. Substantive History

The Petitioner, Lowery, is a former administrator with RTS, a supported living program in King County. Clerk's Papers (CP) at 619-21. RTS contracted with the Developmental Disability Administration (DDA), a division of the Department of Social and Health Services (DSHS), to provide care to adults with developmental disabilities. CP 622-23.

Lowery began working at RTS in 1990. Report of Proceedings (RP) at 365. In 2000 he was named director of RTS, and by 2011, RTS's owner,

Laird Richmond,[1] issued a written grant of authority extending control of RTS to Lowery in Richmond's absence. RP at 365-69; CP at 380-81, 395. Due to declining health, Richmond was frequently absent. RP at 509-512. In 2015, Lowery was named as corporate secretary and treasurer. CP at 401 and 621; RP 393. During the relevant time frame, Lowery was serving as the Chief Financial Officer of RTS. CP at 620.

The DDA contracted RTS to provide around-the-clock care of its patients. RP at 76-77. RTS staff that worked the overnight shift were not paid for hours they were asleep. RP at 433-34. RTS directed overnight employees to sign an agreement that would forego overnight pay except for time they were awoken to actively provide patient care. RP at 353, 446; CP at 625. That policy was not consistent with DDA's rules for reimbursement. RP at 355.

DSHS paid RTS for its services in advance and its billing was reconciled through yearly cost reports to the State. RP at 521-22, CP at 628. RTS sought reimbursement from the State for costs associated with sleep hours, despite having contracted with its employees to work that time without pay. CP at 636-39. RTS continued to report the sleep hours as "actual paid hours" on the annual cost reports. RP at 184, 186-88, 194-98;

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[1]Richmond died in 2017 while this matter was in litigation. The Court substituted the Estate of Laird Richmond for Richmond in May 2019, and the estate was defaulted soon thereafter. CP 618-19. He is not a party to the appeal.

CP at 639-41, 678-82. The State was not aware that RTS was not paying employees for those hours. RP at 580-81, 326.

Under Developmental Disability Administration (DDA) Policy 6.04, supported living programs like RTS are allowed to seek reimbursement for costs associated with sleep hours only when they are "actual paid hours." The policy states that paid hours and payroll cost must be verifiable. RP at 340. DDA Policy 6.02 further instructs service providers to provide only "paid hours worked" in submitting cost reports. RP at 297.

Lowery acknowledged that he reviewed RTS's cost reports for accuracy. RP at 627. CP at 412. He further admitted having devised a formula to set the number of paid sleep hours that would be reported to the State in the absence of actual information to provide. RP at 184, 186-88, 194-98; CP at 640-41, 678-82. Lisa Hunter, a contracted bookkeeper for RTS, notified both Richmond and Lowery "year after year" that she felt the calculations from Lowery's "sleep hours formula" should not be entered on the cost reports. RP at 205-8, CP at 640-41.

Shortly after raising specific complaints regarding the reporting of sleep hours in 2015, RTS terminated Hunter from her position. CP at 641. Hunter's successor prepared and submitted the 2015 cost report, which again included the calculations from Lowery's formula. RP at 426.

B. Procedural History

Hunter filed this *qui tam* action in 2015 against RTS, Richmond, and Lowery, alleging that they violated the Washington Medicaid False Claims Act (WAFCA), RCW 74.66. CP at 645. The State intervened, filing its own complaint alleging that the defendants violated WAFCA, and specifically RCW 74.66.020(1)(g), which concerns submitting false statements related to an obligation to pay the State. RTS, which is now defunct, and Richmond, who died in 2017, both defaulted before trial. CP 618-19.

At the conclusion of the bench trial, the trial court found that Lowery was liable for violating WAFCA. CP 646-47. The court found that Lowery and Richmond "directed Ms. Hunter to prepare internal reports that falsely included Sleep Hours as part of the Instruction and Support Services hours for 2012, 2013, and 2014" to attempt to minimize the amount that RTS would be obliged to refund to DSHS. CP at 635 and 640. It further found that Lowery and Richmond, "acting together and in concert as senior officers of RTS, knowingly caused RTS's" 2012, 2013, 2014, and 2015 cost reports "to be prepared and submitted to DSHS." CP at 636-38. Richmond and Lowery "both knew that DSHS would rely on the false statements in the Cost Report[s] and intended that DSHS would overpay RTS based on the … Cost Report[s]." CP at 636-38.

The Court of Appeals affirmed the trial court's judgment that Lowery violated WAFCA, and specifically RCW 74.66.020(1)(g), by submitting false statements related to an obligation to pay the State. *State of Washington, ex. rel. Hunter v. Lowery,* 15 Wn. App.2d 129, 142, 475 P.3d 505 (2020). The Court concluded that Lowery was a "person" subject to liability within the plain meaning of WAFCA, and that substantial evidence supported the trial court's findings that: (1) Lowery caused fraudulent cost reports to be submitted to the State; (2) the State was unaware of RTS's fraudulent billing practices; and (3) Lowery knowingly violated WAFCA. *Id.* at 135-41.

In affirming the judgment, the Court struck the trial court's findings related to two claims that the State either withdrew or did not plead. First, the Court struck the finding that Lowery submitted false "claims for payment" under RCW 74.66.020(1)(a)-(b), a claim the State had withdrawn because the cost reports did not "cause the State to pay RTS," but rather related to payments already made. *Id.* at 137-38. Second, the Court struck the finding that Lowery conspired to violate the statute under RCW 74.66.020(1)(c), because while the State had alleged that the defendants were jointly and severally liable, it had not alleged a conspiracy, and Lowery did not have sufficient notice to defend against that charge. *Id*. at 141-42. The Court noted that Lowery "has not argued … that he cannot be

jointly and severally liable." *Id.* at 142.

However, the Court concluded that these errors were harmless, unnecessary to confer liability, and did "not affect the judgment," because the trial court correctly found that Lowery violated WAFCA pursuant to RCW 74.66.020(1)(g). *Id.* at 138, 142.

VI. ARGUMENT

Pursuant to RAP 13.4(b), a petition for review will be accepted by the Supreme Court only under certain limited circumstances. Lowery only raises substantial public interest as grounds for the involvement of this Court. Pet. for Review at 5-7; *See* RAP 13.4(b)(4). But neither of Lowery's disagreements with the decision below warrant review under this Court's rules. The Court of Appeals' determination that substantial evidence supports the trial court's fact-specific findings as to causation and intent does not present an issue of substantial public interest. The same is true for Lowery's contention, which he failed to raise at trial or on direct appeal, that the trial court erred in applying joint and several liability.[2]

Comparing this case with the case cited by Lowery to support his

[2]Notably, the Court of Appeals' decision primarily reviewed and affirmed the trial court's findings of fact on substantial evidence review, and it is those substantial evidence determinations that Lowery challenges. *Lowery*, 15 Wn. App.2d at 138-41. The only issue of law considered by the Court was whether Lowery was a "person" subject to liability under WAFCA, *Id.* at 135-36, but Lowery does not seek review of that determination. To the contrary, he acknowledges that the Court of Appeals was correct on that point. Pet. for Review at 7.

claim of substantial public interest, *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005), only reinforces this point. Pet. for Review at 5. The underlying facts of *Watson* set forth a strong demonstration of an emergent issue that would create substantial public interest. In *Watson,* the court was responding to a set of circumstances primed to affect every Pierce County criminal sentencing in which the drug sentencing alternatives could be at issue. *Id.* at 577.

By contrast, here, the findings challenged by Lowery applied well-established legal standards—proximate causation and actual knowledge—to Lowery's specific factual situation. Unlike *Watson*, this case does not create a circumstance in which any class of individuals will be broadly and unexpectedly affected by the Court of Appeals' decision. There is no risk of unnecessary litigation and confusion on a common issue if this Court rejects review.

Lowery also points to the potential impact of the underlying statute, WAFCA, as an enforcement tool. But the importance of WAFCA as a statute, standing alone, does not justify granting review of this particular case. Notably, Lowery makes statements (without citation) about the total scope of WAFCA's impact, inaccurately claiming that it has "resulted in over $5 Billion in total recoveries to the State between 1996 and 2009." Pet. for Review at 5. Setting aside the clearly erroneous dollar amount, RCW

74.66 was not enacted until June 2012. *See* 2012 Wash. Legis. Serv. Ch. 241 (S.S.B. 5978).

Lowery's arguments amount to no more than disagreement with the Court of Appeals' clear and coherent application of RCW 74.66 and determination that substantial evidence supports the trial court's findings of fact. Lowery's disagreements with those findings are insufficient to confer substantial public interest, and this Court should decline his invitation to overturn the well-reasoned decision below.

A. Lowery's Disagreement With the Court of Appeals' Substantial Evidence Findings Regarding Causation and Intent Does Not Warrant Review

The Court of Appeals correctly applied RCW 74.66 in determining that substantial evidence supports the trial court's findings regarding causation and intent. Lowery argues that the Court of Appeals misinterpreted RCW 74.66 and erroneously found him liable under the statute. This argument hinges on Lowery's claimed lack of knowledge of his employer's actions. But these fact-specific issues were properly adjudicated below and Lowery presents no justification for review.

The Court of Appeals properly noted that the questions of whether Lowery caused a false statement to be submitted, and whether he acted knowingly in violating the statute, are both questions of fact. *Lowery* at 138-39; *see also Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265,

275, 979 P.2d 400 (1999). Because substantial evidence exists in the record to support both findings of liability, the appellate court affirmed the trial court's decision. *See McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012). Lowery's arguments are no more than restatements of the same unsuccessful claims regarding his knowledge that he made at summary judgment, at trial, and on appeal.

First, with regard to causation, Lowery claims that because he did not sign the certifications on the cost reports or review them for accuracy or compliance, it was Richmond—who signed the reports—who should be liable. Pet. for Review at 10-11. This is precisely the unsuccessful claim Lowery made at trial and on direct appeal. But as the Court of Appeals held, Lowery's characterization of his role as a mere "conduit" is "not supported by the record." *Lowery*, 15 Wn. App.2d at 138. Rather, Hunter testified that Lowery was "much more 'hands on' in the preparation of cost reports than Richmond," that Lowery "gave her the formula with which to determine the number of sleep hours to submit in the cost reports," and that Lowery "would adjust the formula to make sure it was 'on target.'" *Id*. at 138-39. Hunter also testified that when she raised her concerns, Lowery responded that "[S]omething has to be done. I'm going to lose my business and my house." *Id*. at 139. Lowery's Petition completely ignores this evidence, and any disagreement he might have with the trial court's

assessment of Hunter's credibility does not present an appropriate ground for this Court's review. As the Court of Appeals concluded, the record "is sufficient to persuade a rational, fair-minded person that Lowery caused the false statements in the cost reports to be submitted." *Id.*[3]

Second, with regard to intent, Lowery claims that the decision below "concludes [he] acted knowingly because he incorrectly relied on the federal DOL audit in calculating sleep hours." Pet. for Review at 8. This is not an accurate summation of the decision below. Rather, the Court of Appeals relied on Hunter's testimony that she brought her concerns about the cost reports' noncompliance with DDA regulations directly to Lowery "continually … year after year," and the trial court's finding that "Lowery's testimony that he believed the reporting of unpaid sleep hours was permissible was not credible." *Lowery*, 15 Wn. App.2d at 141. In the face of this evidence, the Court of Appeals correctly determined that Lowery's claimed reliance on irrelevant DOL regulations did not defeat the evidence of his actual knowledge of noncompliance. *Id.* at 140-41.

Finally, and further meriting against review of the Court of Appeals' substantial evidence determination, Lowery made no assignment of error to

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[3]Lowery also asserts that "[c]ausation under the act should be clarified to mean proximate cause" (Pet. for Review at 10), but he does not explain how the trial court—or the Court of Appeals—applied any standard other than proximate cause in evaluating his role in submitting the false statements.

any specific factual determination by the trial court. Unchallenged findings of fact are accepted as verities upon appeal. *McCleary*, 173 Wn.2d at 514; *In re Matter of Custody of A.T. and S.T.,* 11 Wn. App. 451 P.3d 1132, 1138 (2019).

B. Lowery's Unpreserved Challenge to the Trial Court's Application of Joint and Several Liability Does Not Warrant Review

Lowery did not contest the trial court's determination that he was jointly and severally liable for violating WAFCA, nor did he challenge it on direct appeal. *Lowery* 15 Wn. App.2d at 142. He now claims for the first time (Pet. for Review at 11-14) that the trial court erred because joint and several liability can only be applied following a finding of conspiracy under RCW 74.66.020(1)(g).

As an initial matter, Lowery waived this argument by failing to raise it before the trial court or on appeal. As the Court of Appeals noted, despite challenging the conspiracy finding, "Lowery does not challenge the trial court's determination that he can be jointly and severally liable under the statute. He has not argued that liability should be apportioned or that he cannot be jointly and severally liable." *Lowery*, 15 Wn. App.2d at 142. In other words, this petition for review is the first point at which Lowery has objected to the finding of joint and several liability. His unpreserved argument does not justify a grant of review, and he has not alleged, let alone

shown, that it would fall within any of the exceptions to RAP 2.5(a). *See Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990); RAP 2.5(a).

In any event, although the Court of Appeals struck the trial court's conspiracy finding for lack of notice (rather than lack of evidence), joint and several liability does not turn on a finding under WAFCA's conspiracy section. Rather, the trial court found that Lowery and Richmond acted in concert to submit false cost reports. CP 637, 638, 639, and 640. Based upon this unchallenged finding, Lowery and Richmond were "consciously act(ing) together in an unlawful manner." *See Kottler v. State*, 136 Wn.2d 437, 48-49, 963 P.2d 834 (1998). This finding establishes the predicate for joint and several liability. RCW 4.22.070(1)(a); *See Gilbert H. Moen Co. v. Island Steel Erectors, Inc*. 75 Wn. App. 480, 487-88, 878 P.2d 1246 (1994), *reversed on other grounds*, 128 Wn.2d 745, 912 P.2d 472 (1996). Lowery's contention regarding the federal False Claims Act (Pet. for Review at 12) also misstates the law: joint and several liability is in fact the *default* rule in federal False Claims Act cases involving multiple defendants.[4]

[4] *See Mortgages, Inc. v. U.S. Dist. Court for Dist. of Nev.*, 934 F.2d 209, 212 (9th Cir. 1991) ("[w]here one or more persons have committed a fraud upon the government in violation of the FCA, each is joint and severally liable for the treble damages and statutory penalty"); *United States v. Cabrera-Diaz*, 106 F. Supp. 2d 234, 242 (D.P.R. 2000) ("[a]s with other civil claims, when two or more persons act in concert in violation of the False Claims Act, they are jointly and severally liable"); Civ. Qui Tam Actions 7366216, § 2.10 Joint and Several Liability (Dec. 2020) ("Under most case law interpreting the FCA, where more than one person has committed a violation of the Act, each is jointly and severally

Lowery now claims that he should not be liable either jointly or severally, because "the evidence does not support a finding of individual liability by Lowery where he did not prepare, certify or submit the cost reports," and because he disagrees with the trial court's finding that he and Richmond acted in concert. Pet. for Review at 11-12. These unpreserved factual disputes regarding Lowery's and Richmond's roles in submitting fraudulent cost reports do not merit review.

VII. CONCLUSION

Lowery's petition does not present an issue of substantial public interest, nor does he raise any other reason why this Court should grant review. The State respectfully requests that this Court deny review.

RESPECTFULLY SUBMITTED this 4th day of February 2021.

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liable for the penalties and damages imposed … liability under the False Claims Act triggers joint and several liability") (collecting cases).

CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of February, 2021, at Olympia, Washington.

s/ Heather Sutherland
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WA AGO/MFCU

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