

ORIGINAL

NO. 35878-6-II

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

KITSAP COUNTY,
Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

APPEAL FROM THE SUPERIOR COURT FOR KITSAP COUNTY

BRIEF OF APPELLEE DAVID SMITH

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ORIGINAL

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1. **RESPONSE TO ASSIGNMENTS OF ERROR.**

A. The Superior Court did not err in granting Summary Judgment dismissal of Kitsap County's claims that David Smith unlawfully removed public records from Kitsap County.

B. The Superior Court did not err in denying Kitsap County's request for declaratory relief regarding David Smith's recording of private conversations.

2. **STATEMENT OF THE CASE.**

Defendant, David Smith, began working for the Kitsap County Department of Public Works in 1990. CP 43, Exhibit A p. 10-11; CP 35 p. 1. Mr. Smith was supervised by the Director of Public Works, Mr. Randy Casteel, and Mr. Casteel's cousin, Ron Yingling, who was, at the time, the Assistant Director of Public Works. Id. The Public Works Department was referred to as a "family business" by Mr. Casteel and Mr. Yingling, as well as others in the department. CP 35 p. 2. In 1992, a vacancy opened up in the Public Works Department for a Transportation Planner, and Mr. Smith contacted a former co-worker, Chuck Shank about the position and Mr. Shank was hired. Id.; CP 43, Exhibit A p. 15.

Certain professional opinions of Mr. Shank became politically unpopular, and the members of the "family business" began retaliating against Mr. Shank by taking away

his job duties and his staff, and eventually Mr. Shank was terminated due to his politically unpopular professional opinions. CP 35 p. 2-7.

Prior to, and during the retaliation of Mr. Shank, Mr. Smith consulted with attorney Clayton Longacre in order to protect his own interests in his employment. CP 44 p. 1-2. During the time that Mr. Shank was being retaliated against, Mr. Smith documented the retaliation of both Mr. Shank and another public works employee, Carlee Sutherland. Mr. Smith recorded business meetings concerning the administration of the Public Works Department. CP 35, p. 4-7; CP 43 Ex. A, p. 16-21, 27-32, 50-52. Mr. Smith also kept documents and notes concerning the retaliatory behavior of his supervisors and other employees at the Public Works Department. CP 35 p. 5-7; CP 44 p. 2-3.

When Mr. Shank sued the County for the retaliation and wrongful termination, the County deposed Mr. Smith. CP 43, Ex. A. Prior to his being deposed, Mr. Smith's supervisor, Randy Casteel and Jon Brand informed Mr. Smith that he should lie during his deposition testimony and claim that Mr. Shank was not qualified for his position and did not do his job. CP 35 p. 4-7. Following the advise of his counsel, Mr. Longacre, Mr. Smith testified truthfully regarding the retaliation Mr. Shank had experienced. Id. In

the deposition, Mr. Smith testified that he had made copies of various documents, constructed logs, journals, and diaries of various meetings, and of tape recording various public meetings involving County business concerning the retaliation which Mr. Shank was experiencing. Id.; CP 43, Ex. A p. 16-21; 27-32; 50-52. Mr. Smith's records were used in Mr. Shank's lawsuit as well as Ms. Sutherland's lawsuit against the County with no objection or effort to seal the records by the County's attorney and, since they were used in two federal civil actions, they are public records. Id.

Due to the fact that Mr. Smith refused to lie about the retaliation that Mr. Shank experienced, as well as Mr. Shank's abilities and work ethic, during the County's deposition of Mr. Smith, the members of Kitsap County Public Works Department began to also retaliate against Mr. Smith. CP 35 p. 8.

During Mr. Shank's lawsuit against the County, Mr. Shank's attorney subpoenaed Mr. Smith's documents and tape recordings, including those prepared both professionally and personally by Mr. Smith. CP 44 p. 2-3. The lawful subpoena issued by Mr. Shank's attorney was delivered, along with a notice of deposition of Mr. Smith. Id. The notice of deposition and the subpoena issued by Mr. Shank's attorney was served on Mr. Smith prior to the notice of deposition by the

County. Id. The Kitsap County Prosecutor assigned to represent the County, Jaquelyn Aufderheide, advised Mr. Smith to compile all documents and recordings in his possession and take them to his attorney (Mr. Longacre), in order to determine which documents to release under the subpoena. CP 35 p. 5-8; CP 44 p. 2-3. Mr. Longacre informed Ms. Aufderheide that he would not withhold any documents which were subpoenaed by Mr. Shank's attorney and would release all documents and tape recordings in accordance with the lawfully issued subpoena. Id. Ms. Aufderheide then issued a subpoena for the same documents which Mr. Shank's attorney subpoenaed. Id.

Before complying with Mr. Shank's subpoena, Mr. Longacre allowed Ms. Aufderheide to copy all of the documents and recordings which Mr. Smith had delivered to Mr. Longacre's office. CP 44 p. 2-3. Although Ms. Aufderheide had ample time (two months) to attempt to quash the subpoena for Mr. Smith's documents and recordings issued by Mr. Shank, Ms. Aufderheide took no action, and Mr. Longacre and Mr. Smith complied with the lawfully issued subpoena and released the documents and recordings to Mr. Shank's attorney. Id. In lieu of attempting to quash Mr. Shank's subpoena through the federal judicial system, and, only after Mr. Longacre and Mr. Smith complied with Mr. Shank's subpoena, Ms. Aufderheide

threatened Mr. Longacre and Mr. Smith with criminal and civil actions for complying with the lawfully issued subpoena. Id.; CP 35 p. 5-7; See exhibits to CP 44.

Prior to Mr. Shank's lawsuit being settled, Ms. Aufderheide initiated this instant cause of action against Mr. Smith, Mr. Longacre, and Mr. Shank. CP 35 p. 7-8; CP 44 p. 3. During the course of Mr. Shank's lawsuit, Ms. Aufderheide was given all documents in Mr. Smith's possession which were business related and the property of the County. CP 44. After Mr. Shank's attorney copied the documents and recordings, they were returned to the County. CP 35 p. 8-9. At no time did Mr. Smith destroy any documents which were County property. Id.

Ms. Aufderheide never attempted to quash Mr. Shank's subpoena for Mr. Smith's records, and it was only after Mr. Smith and Mr. Longacre honored the subpoena by Mr. Shank's attorney and the records were disclosed to Mr. Shank's attorney that the County brought the instant cause of action. CP 44 p. 2-3. All of the recordings made by Mr. Smith were during meetings which involved the County's Public Works Department and nobody in attendance at those meetings had any reason to believe that the content of the meetings would not be disclosed to others who were not in attendance. CP 35 p. 5.

At a hearing on Ms. Aufderhiede's Motion for Declaratory Judgment regarding the legality of these recordings, the Superior Court found that there was, in this lawsuit, no pending justiciable controversy regarding the declaratory judgment sought by the County. See CP 41 and RP of June 2, 2006 p. 12-16. Ms. Aufderheide moved for reconsideration of this ruling based upon the fact that Mr. Smith and Mr. Longacre filed claims for damages with the County. CP 37. The County's Motion for Reconsideration was denied. Id.

The defendants then moved for summary judgment dismissal of plaintiff's claims. CP 47. This motion was granted. CP 62. Kitsap County, at no time, ever identified a single document which it considered to be a "County record," during any time in this litigation. The County merely made an arbitrary and blanket claim that Mr. Smith's private records belonged to the County.

3. ARGUMENT.

A. SUMMARY JUDGMENT REVIEW STANDARD.

The Court of Appeals reviews a grant of summary judgment de novo. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.2d 1068 (2002). The Court engages in the same inquiry as the trial court, viewing all facts and inferences in the light most favorable to the nonmoving party. Wilson v.

Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment should be granted when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' CR 56(c). The Court will affirm a grant of summary judgment where reasonable minds can reach only one conclusion based on the admissible facts in evidence. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.3d 1274 (2003).

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

The County asserts that Mr. Smith removed public records from the County which were under the County's custody and control pursuant to RCW 40.14.010 and RCW 42.17.020(36). However, Mr. Smith removed all documents, at Ms. Aufderheide's direction, pursuant to a lawfully issued federal subpoena by Mr. Shank's attorney. Further, Mr. Smith supplied copies of all documents relating to County business during Mr. Shank's lawsuit prior to honoring the federal subpoena. In addition, Mr. Smith returned all documents relating to the County to Ms. Aufderdeide during Mr. Shank's lawsuit after he had honored the lawfully issued subpoena. The documents at issue were used by both parties in the Shank and Sutherland lawsuits

without objection by the County attorney and without protection orders being issued, and, are, therefore, a matter of public record.

Those documents, if, in fact, public records, are accessible to any citizen under both the Freedom of Information Act and Washington State's Public Disclosure Act. Mr. Smith did keep personal records in order to protect his interests in his own employment. Those personal records are not public records and do not fit within the meaning of public records as defined by any of the statutes cited by the County in its complaint. The County can not, therefore, claim a right to confiscate Mr. Smith's personal documents as Ms. Aufderheide threatened to do in her letter to Mr. Longacre.

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

The Superior Court's decision dismissing the County's causes of action for violations of RCW 40.14., et. seq., 40.16., et. seq. and 42.17., et. seq. against Mr. Smith should be upheld, due to the fact that, as a matter of law, there are no set of facts which can prove that Mr. Smith

violated any of these statutes by keeping personal notes regarding public issues. There are also no set of facts which can prove that Mr. Smith refused to return or destroyed any public records in his possession.

In addition, Mr. Smith, under CR 11, should be allowed sanctions against both the County and Ms. Aufderheide due to the frivolous nature of the instant action, which was commenced solely for the purpose of harassing and intimidating Mr. Smith during Mr. Shank's lawsuit against the County.

C. MR. SMITH'S ACTIONS IN COOPERATING DURING THE DISCOVERY PROCESS OF MR. SHANK'S LAWSUIT DID NOT VIOLATE ANY LAWS.

During Mr. Shank's lawsuit, Mr. Smith was served with a notice of deposition by Ms. Aufderheide. Smith Dec. p. 5. Mr. Smith testified that Mr. Shank had been retaliated against. Mr. Smith had previously informed Ms. Aufderheide that he possessed documentation that Mr. Shank was retaliated against and also was in possession of tape recordings which could also prove Mr. Shank's claims of retaliation. Mr. Smith did this to ensure that he could prove the truth of his own testimony, due to the fact that his supervisors, Mr. Casteel, Mr. Yingling, and Mr. Brand would often deny making comments that they had, in fact, made. Mr. Smith answered all deposition questions truthfully in spite of the fact that his supervisors threatened him if he did not maintain the County's

untruthful assertions regarding Mr. Shank as well as Mr. Shank's and Mr. Smith's supervisors retaliatory behavior towards Mr. Shank.

As stated above, the actions of Mr. Smith in documenting comments made in public regarding the administration and workings of the Kitsap County Department of Public Works did not violate any state or federal laws. Mr. Smith prepared to comply, and, did comply, with Mr. Shank's lawfully issued federal subpoena, after he and Mr. Longacre informed Ms. Aufderheide that neither Mr. Smith nor Mr. Longacre would take any action to quash the subpoena, but would comply with it and not withhold any documents or recordings in the possession of Mr. Smith and Mr. Longacre's office. Mr. Smith complied with the County's and Ms. Aufderheide's own subpoenas during the discovery process of Mr. Shank's lawsuit, and provided the County and Ms. Aufderheide with copies of all of his documentation. Mr. Smith violated no laws by cooperating with both the plaintiff and the defendants during Mr. Shank's lawsuit against the County.

The Court should impose CR 11 sanctions against both the County and Ms. Aufderheide for bringing this cause of action against Mr. Smith merely because he decided to document the fact that fellow employees were being retaliated against.

D. MR. SMITH DID NOT VIOLATE PRIVACY LAWS
BY TAPE RECORDING PUBLIC MEETINGS.

Under RCW 9.73.030, the protections of the Privacy Act apply only to private communications or conversations. Kadoranian v. Bellingham Police Dep't, 119 Wash.2d178, 189, 829 P.2d 1061 (1992).

A person has no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others. State v. Clark, 129 Wash. 2d 211, 225-226 (1996); State v. Slemmer, 48 Wash. App. 48, 53 (1987). When any person may turn out to be the recipient of information resulting from a communication, that communication is not private. State v. Wojtyna, 70 Wash. App. 689, 695-696 (1993).

In the instant case, David Smith was an employee of Kitsap County who recorded meetings and contacts on complaints. The fact several people were involved in the meetings and that David Smith could testify to what was said at these meetings demonstrates that these were not private conversations. By contacting citizens who were complaining about situations to a county employee in an attempt to correct what these citizens viewed as a problem, Mr. Smith was not engaging in private communications. These citizens were contacting an employee of a public agency in order to have some action taken on their behalf. Nothing about such

communications is private in nature. These citizens were in fact asking that action be taken.

For any action to be taken on such complaints, the information provided by the citizens would necessarily have to be relayed to other individuals in order for the complaints to be investigated to determine if the complaints were valid and determine what action could be taken on these complaints. These citizens were talking to a stranger, a county employee, and they could not expect such conversations to be private and that the information they provided would not be passed on. In fact such communications would necessarily be disclosed to others in order take action on the complaints.

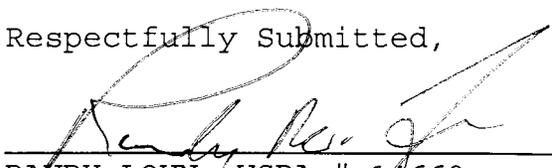
The County has no evidence that Mr. Smith actually recorded any private communications whatsoever. This Court should affirm the trial court's dismissal regarding the County's claim that Mr. Smith violated the privacy act.

4. CONCLUSION.

For all of the reasons stated above, the Court should affirm the Superior Court's Orders Granting Summary Judgment and denying Declaratory Judgment in this case.

DATED this 29th day of August, 2007.

Respectfully Submitted,



RANDY LOUN, WSBA # 14669
Attorney for Appellee

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IN THE WASHINGTON STATE COURT OF APPEALS DIVISION TWO

KITSAP COUNTY, a political subdivision of the
State of Washington,

Plaintiff,

vs.

DAVID N. SMITH, CLAYTON E. LONGACRE,
CHARLES J. SHANK, AND LONGACRE LAW
INC., a Washington corporation,

Defendants.

NO. 35878-6-II

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

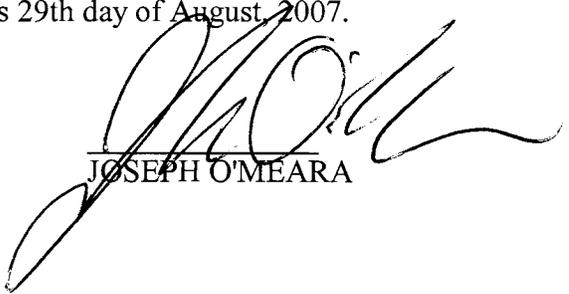
I hereby certify that on August 29, 2007, I caused to be delivered by messenger a copies of the following documents to The Kitsap County Prosecutor's Office:

Brief of Appellee David Smith

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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 at Bremerton, Washington, this 29th day of August, 2007.


JOSEPH O'MEARA