

No. 89961-4

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 69300-0

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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JASON DILLON, an individual;
Appellant,

v.

SEATTLE DEPOSITION REPORTERS, LLC, a Washington
company; DAVIS WRIGHT TREMAINE, LLP, a Washington
Company; JAMES GRANT and Jane Doe Grant, individually and
the marital community composed thereof if any;
Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
THE HONORABLE BRUCE HELLER

Dillon's Response to Amici Curiae Briefs

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ORIGINAL

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I. INTRODUCTION

Jason Dillon requests that this Court affirm the Washington Court of Appeals opinion finding that Davis Wright Tremaine (“DWT”) lawyers and their “assistants” violated the Privacy Act by misrepresenting themselves to a witness and making a verbatim recording of their telephone conversation with Mr. Dillon without his knowledge or consent. The Allied Daily Newspapers of Washington and the Washington Newspaper Publishers Association (hereafter together “Newspapers”), and the Washington Court Reporters Association (WCRA) have come to the aid of the DWT lawyers, seeking to trivialize the lawyers egregious conduct as simply an occasion of “superior note taking.” Referring to the recording as mere note-taking ignores all the of the facts in this case including but not limited to (1) the court reporter initially made an audio recording but was allegedly told to destroy it or turn it off by DWT¹ (CP 635-636) (2) a court reporter swears an oath to be impartial but in this case allowed himself to be misrepresented by DWT as an employed legal assistant even though the certificate on the recording states the exact opposite, (CP 626-626) (3) the verbatim transcript contains an oath that it is a full, true and correct transcription, and (4) the transcript was not

¹ Without discovery it is impossible at this point to verify or dispute whatever facts are created in attempts to defeat Mr. Dillon’s case.

offered to both sides or even the witness, but instead was deemed private work product by the lawyer, who refused to turn it over unless a Mr. Dillon provided a confidentiality agreement. *See* CP 629-633 (Grant informing Dillon he would need a Court order or an agreed confidentiality order to obtain a copy).

The Amicus briefs of the Newspapers and the WCRA also provide further evidence of the flawed procedural process created by the anti-SLAPP statute. Both minimize the activity and make assertions as to their conduct and DWT's conduct, but under the SLAPP procedure provided by the statute, Mr. Dillon was not given the opportunity of discovery, the Court reporters did not need to respond to a subpoena, and the DWT attorneys have never had to be questioned about their activities. Instead, Dillon was required to meet a standard higher than summary judgment at an initial hearing without discovery and without the normal summary judgment burden shifting required by the civil rules and case law.

No ethical lawyer could actually believe that making misrepresentations to a witness and having a court reporter take down the conversation is ethical or legal in this state, but the anti-SLAPP statute hijacked the legal process and placed burdens upon Mr. Dillon's right to redress grievances in Court that the SLAPP statute is supposed to protect.

The Privacy Act, RCW 9.73.030, by its clear and concise terms, requires that a person recording a telephone conversation “by any device electronic or otherwise, designed to record or transmit such conversation regardless of how the device is powered or actuated” is acting unlawfully. The only question remaining is whether this Court is willing to create exceptions where the legislature chose not to, and thereby ensure that DWT’s conduct becomes the standard for lawyers interviewing witnesses. DWT wanted this Court to find as a matter of law the conversation wasn’t private (normally a question of fact for a jury) even though, DWT lied to the witness, claimed work product privilege, refused to turn over the transcript without a confidentiality agreement, and have not answered any discovery or subpoenas relating to the private nature of the conversation. The Amici try to support DWT’s claim that the conversation was not private, but they have no evidence to supply, or knowledge of anything. They are simply making a judgment because they believe it helps their industry group.

Next, the Amici go to great lengths to proclaim this as a case of lawyers and reporters exercising their constitutional right to take notes of a conversation. That did not happen. DWT and the court reporters it hired were not exercising any freedom speech rights, they were lying to a witness about who they were and what they were doing, and then recorded

the conversation. It is difficult to contemplate such activity being a protected activity under the anti-SLAPP Statute. The Court should not expand its analysis of free speech under the anti-SLAPP act in order to decriminalize acts that the legislature in this state has sought to criminalize. The Court in protecting the right to public participation cannot simply ignore and decriminalize the acts and penalties Congress has set forth in the Privacy Act RCW 9.73.030.

II. The Certificates Signed By the Court Reporters Belie Any Claim that Attorneys Were Merely Taking Notes, and Further Demonstrate That The DWT Attorneys Lied To Dillon

DWT's final nuance in defense of its conduct is to trivialize the role of Court Reporters as mere note takers and these Amici are helping to support that cause. Although the two Amici proclaim that DWT attorneys were merely taking notes, as opposed to recording conversations, the Court Reporters both indicated that simple note taking did not occur:

I, the undersigned Washington Certified Court Reporter hereby certify that the foregoing teleconference was taken Stenographically before me and transcribed under my direction;

That the transcription is a full, true and correct transcription to the best of my ability; that I am neither attorney for, nor a relative or employee of any of the parties to the action or any attorney or counsel employed by the parties hereto, nor financially interested in the outcome.

/s/Thad Byrd

I, undersigned Certified Court Reporter and an officer of the Court under my commission as a Notary Public for the State of Washington, hereby certify that the foregoing telephone conference was taken before me on September 16, 2011;

That the transcript of the conference is a full, true and correct transcript to the best of my ability; that I am neither attorney for, nor a relative or employee of, any of the parties to the action or any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of September, 2011.

/s/Mark Hovila

CP 625-626; See Appendix, where they are provided.

Both the Seattle Deposition reporters signed similar statements, and both referred to a full, true and correct transcription. Thad's signed certificate indicates that he is not an employee of DWT, yet he willfully remained silent while being referred to as an employee of DWT. DWT decided not to lie to Mr. Dillon in the second telephone conference, instead DWT didn't tell Dillon that anyone was taking recording the conversation at that time.

Both Court Reporters have the ability to change their certification, but neither of them certified they were taking notes of a conversation. DWT lawyers were not taking notes, or at least they haven't mentioned whether they did or not, they were relying on having a "full, true and

correct transcription” as provided by the Court Reporters. The fact that the Court Reporters signed a certification, when doing so would be unnecessary if they were just taking notes, evidences the intention to fully record a conversation. If just taking notes, there would be no value to the litigation process. For one reason or another, DWT wanted a full recording of the conversation, with the exception of several minutes of the telephone conversation that are missing according to the phone records, but due to the discovery constraints of the SLAPP hearing process, DWT has never had to account for them. Nevertheless, the Court Reporters were recording the conversation, and in doing so violated the very standards of conduct the WSCR is supposed to promote:

WAC 308-14-130

Standards of Professional Practice.

All certified court reporters (CCR) shall comply with the following professional standards except where differing standards are established by court or governmental agency. Failure to comply with the following standards is deemed unprofessional conduct. Certified court reporters shall:

(1) Offer arrangements on a case concerning court reporting services or fees to all parties on equal terms.

(7) Disclose conflicts, potential conflicts, or appearance of conflicts to all involved parties.

(8) Be truthful and accurate in advertising qualifications and/or services provided.

- (9) Preserve the confidentiality of all information obtained during a proceeding and take all steps necessary to ensure its security.
- (10) Notify all involved parties when transcripts are ordered.
- (11) All parties shall be notified when a transcript is ordered by a person not involved in the case. If any party objects, the transcript cannot be provided without a court order.
- (12) Supply certified copies of transcripts to any involved party, upon appropriate request.

Here the Court Reporters let their allegiance to DWT cloud their judgment, and led them to violate their standards of conduct. They should be held accountable for choosing profit over ethics just like any other defendant under the Privacy Act.

1. The Fact that An Audio Recording Was Stopped, Or Destroyed Does not Alleviate the Conduct Under the Privacy Act.

The DWT attorneys, once they realized there could be repercussions for their conduct, and after they lied under oath about whether an audio tape existed, claimed that they had the audio tapes stopped or erased once they realized such a recording was being made. CP 635-636. The alleged claim is not supported by the transcript itself. Nevertheless, DWT and the Amici claim the lack of an electronic audio file gives them protection under the statute. It does not.

Nevertheless, Amici have requested in their conclusion that the Privacy Act statute require “recording” only by “electronic” means. This Court should not do so, as the Washington Legislature has specifically declined to institute such a definition, and in fact the Act itself states that

recording need not be by electronic means to fall within the purview of the statute. In fact, the act does not require an electronic device, or require a powered piece of electronic equipment at all:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual...or the state of Washington, its agencies, and all political subdivisions to intercept or record any:

(b) Private conversation, by any device electronic or otherwise, designed to record or transmit such conversation regardless of how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

RCW 9.73.030(1)(A).

Mr. Dillon is certainly cognizant of the Court Reporters desire to maintain what is likely a very lucrative business opportunity with DWT as it is a large law firm that has clients that spend huge sums of money on Court Reporting Services, however, proper ethical and standard behavior would have been for the Court reporters to announce their presence, and/or at least correct the record when being introduced as an "assistant" and employee of DWT, when they were also going to produce a full and complete transcript and claim to be impartial. The Court should not rewrite a statute merely because Court Reporters may lose financial opportunities by not following a lawyer's scheme.

The lies and deceit in this case have gone too far, and violate the ethics for lawyers and Court reporters. Claiming that this case is about

note taking as opposed to “recording” is the last ditch effort by DWT to continue the clandestine practice and continue to avoid any penalties for conduct any lawyer practicing in this state should deem unethical and dishonest.

If this was simple note taking, why would DWT take the active steps to deceive Mr. Dillon in the first conversation, and say nothing to him in the second. Additionally, it is undisputed that “Thad” intended to audio record the conversation as well, and did so until Mr. Grant allegedly told him to destroy the audio². The fact is that the defendants got caught, and thus far it has been worth it for the defendants who received a monetary windfall in the Akrie companion case, and the Court Reporters who were paid to conspire in the deceit. The Court of Appeals rightly sent a message that the practice should not be tolerated or else it will become the standard practice. But we have rules that our legislature passed for a reason, they want them enforced. That is what this Court should do.

2. Without the Benefit of Discovery and a Normal Summary Judgment Procedure, Parties and now Amici are able to Substitute opinion for Fact.

It is important for Mr. Dillon to correct some of the misstatements in the Newspapers briefing, wherein the Newspaper implies that MR.

² As this Court is aware, the SLAPP procedures deny discovery and require an expedited hearing. Consequently Seattle Deposition Reporters did not respond to subpoenas for information, which they most certainly will have to do should this case be remanded for trial, as it should be.

Dillon didn't object to a "note-taking" when he saw the first draft of his declaration. The accusation is pure nonsense. Mr. Dillon was never told that his statements were taken down verbatim. He didn't know at that time his statements were recorded. Certainly lawyers have been known to draft declarations for witnesses to sign and many do so without having a court reporters transcription or what is alleged as "superior" note-taking. The idea that Mr. Dillon would presume that his conversation was recorded when he received a declaration to sign is absurd. The undersigned has drafted numerous declarations for witnesses and parties to sign, many that had to do with the parties in this case and companion cases, and not once was recording a conversation necessary.

Second, superior note-taking is not needed to make an evidentiary record. Note taking wouldn't be admissible in any court unless they were a parties own notes, so any concerns about this case somehow harming the ability to create evidence for use in a lawsuit is nonsense. Ethical lawyers take witness statements, obtain declarations, take depositions, and take notes within the bounds of zealous advocacy and the ethical rules. Requiring lawyers to inform a witness that a court reporter is recording their telephone call does no harm to anyone in the legal field, or in the media or otherwise.

Moreover, as Dillon stated in a previous response to the Amici of the Allied Newspaper Association, the Privacy Act has a legislatively mandated exception for journalists wanting to take notes. They merely need to follow the conduct set forth in the statute and they will never have reason to worry about being sued under the Privacy Act. This is merely an attempt to create Constitutional confusion where there is clearly none.

The Amici's attempt to protect DWT's conduct with the SLAPP statute adds absolutely nothing for the Court to consider. The briefs provide opinions about whether Dillon believed his conversation was private, and offer judgment on the strength of his case, but none of those opinions are based upon personal knowledge or fact. They are merely opinions levied to help support a party with whom they are aligned – nothing more.

Finally, as DWT did in its briefing, and the Amici engage in hyperbole as to the destruction of the anti-SLAPP statute and the First Amendment if Lawyers to secretly record conversations. The sky will not fall if DWT has to conform to the tenets of the Privacy Act in dealing with witnesses. The First Amendment does not mandate that a person be able to record a telephone conversation with another without obtaining consent. Make a telephone to an insurance company, cable provider, public utility, or any business and you are informed that your conversation may be

recorded. If you object they turn off the recorded. The law in this state applies to everyone as it should. This Court should not make a Davis Wright Tremaine exception to that rule.

Conclusion

The Washington Legislature wanted the privacy act to be one of the strongest protections of privacy in the nation. If a person wants to record a conversation with another person over the telephone, they need to disclose and obtain consent. Amici and DWT are looking for the Court to create new exceptions for a particular group of lawyers that the legislature decided not to create. There is an exemption for Journalists, which begs the question why they are involved in this case, but nevertheless, the Court should not be swayed by the Amici's requests that this Court carve out judicial exceptions for lawyers when it may help them obtain or hide information in a case.³ This was not a case of criminalizing behavior or routine lawyer behavior, at least Mr. Dillon hopes that the actions of DWT are not routine and standard practice for lawyers. The Court of Appeals should be affirmed.

³ DWT actually redacted portions of the transcript at one point as the conversation with Mr. Dillon was private and protected work product that DWT did not want disseminated to the public.

Signed and Dated this 17th Day of September, 2014 at Seattle,
Washington

/s/William A. Keller
William A. Keller, WSBA #29361
Attorney for Mr. Dillon
billkellerlaw@gmail.com

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing document was served on all parties of
record by email.

Dated and signed this 17th Day of September 2014 at Seattle, Washington

/s/William A. Keller

William A. Keller

APPENDIX

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C E R T I F I C A T E

STATE OF WASHINGTON)
COUNTY OF KING)

I, the undersigned Certified Court Reporter and an officer of the Court under my commission as a Notary Public for the State of Washington, hereby certify that the foregoing telephone conference was taken before me on September 16, 2011;

That the transcript of the conference is a full, true, and correct transcript to the best of my ability; that I am neither attorney for, nor a relative or employee of, any of the parties to the action or any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of September, 2011.



Mark Hovila
Washington Certified Court Reporter No. 2599
License expires October 4, 2012

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Attached for filing is Jason Dillon's Response to Amici Curiae Briefs

Case Name: Jason Dillon, Respondent v. Seattle Deposition Reporters LLC, et al, Petitioners
Case Number No. 89961-4

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