No. 89897-9

WASHINGTON STATE SUPREME COURT

WASHINGTON STATE COURT OF APPEALS DIV III
NO. 309681

JASON YOUKER, Petitioner

v.

DOUGLAS COUNTY, a municipal corp. and LISA WHITE, a single woman, and WILLIAM BLACK and JANE DOE BLACK, a marital community, Respondents

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Jason Youker asks this court to accept review of the Court of Appeals decision in Youker v. Douglas County, No. 309681 terminating review in Part B of this petition.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals Youker decision dated January 9, 2014, which affirmed the Douglas County Superior Court's grant of summary judgment as to Mr. Youker's claim for invasion of privacy against Douglas County, et al.

C. ISSUES PRESENTED FOR REVIEW

1. Were there genuine issues of material fact sufficient to go to the jury in a case involving Jason Youker's invasion of privacy claim, where (1) the deputies did not obtain a warrant, (2) the sheriff's officers knew that JoAnn Youker was Jason Youker's ex-wife, (3) there was a no-contact order prohibiting the ex-wife from the residence, and (4) the Sheriff's deputies

had no evidence that JoAnn Youker had authority to consent to the entry into her ex-husband's residence prior to entry?

D. STATEMENT OF THE CASE

On or about April 20, 2007, Jason Youker's ex-wife, JoAnn Youker, was being held at the Douglas County Sheriff's office on an arrest warrant. CP 116. While JoAnn Youker was in custody, she reported that her ex-husband, Jason Youker, had a rifle under his bed at his residence. CP 116. Jason Youker was not allowed to be in possession of a firearm because of his status as a convicted felon. CP 116.

JoAnn Youker claimed that she knew the rifle was there because of contact she had had with Jason Youker. CP 116. At the time this report was made, JoAnn Youker had a no-contact order against her, which prohibited any and all contact between her and Jason Youker or his residence. CP 116, 120. Deputy White knew about this order. CP 165. Despite knowledge of this order, Douglas County Sheriff's deputies Lisa White and

William Black transported JoAnn Youker to Jason Youker's residence and obtained "consent" from JoAnn Youker to search Jason Youker's residence. CP 116.

Douglas County Sheriff Deputies White and Black entered the residence and were led by JoAnn Youker to a rifle located under the bed, along with a box of 30-30 ammunition. CP 116-117. Deputy White arrested Jason Youker on 4/21/07. CP 117.

Deputy White in her incident report submitted as evidence for the probable cause affidavit did not explain that JoAnn Youker was the Respondent in the no contact order, CP 196-7, and that it prohibited JoAnn Youker from going to Jason Youker's residence (although a copy of the no contact order was attached to her probable cause affidavit). CP 81; 2 JoAnn Youker told Deputy White that she did not have a key to Jason Youker's residence, (CP 210). Deputy White did not contact the landlord, nor did she ask who owned the house, contact neighbors, ask who paid the rent, or ask to see the lease. CP 211-212; 4) Deputy White saw the warrant for JoAnn Youker's

arrest before seeking the arrest warrant against Jason Youker, and that warrant listed a 308 S. Second Street, East Wenatchee address for JoAnn Youker--not Jason Youker's 920 ½ South Nancy address. Deputy White did not ask JoAnn Youker if that was her current address. CP 212. The incident worksheet Deputy White filled out before seeking the arrest warrant for Jason Youker, attached to the probable cause statement, contained that a "mailing address" of 331 Valley Mall Parkway # 206. CP 72; Deputy White did not ask her about whether the divorce with Jason Youker was amicable. CP 214.

During Deputy White's testimony in the federal case on the Motion to Suppress she testified that she talked to JoAnn Youker about 15 minutes prior to going to the residence. CP 166-167. Deputy White admitted that prior to entering Jason Youker's residence, JoAnn did not give her any document indicating that she lived at 920 ½ South Nancy. CP 199. JoAnn Youker told Deputy White that she did not have a key to the residence. Deputy White did not check if either of the other

addresses for JoAnn Youker were her current address.

As a result of Jason Youker's arrest, a no-contact order was entered, which prohibited Jason Youker from having contact with his son, Jetta Youker. CP 117. Jason Youker spent ½ day in jail. CP 117.

The criminal charges in Douglas County were dismissed on the merits on or about August 6, 2007. CP 117. The same day the charges were dismissed, the Douglas County prosecutor referred the case to the federal prosecutor. CP 117. Jason Youker spent 45 days in the Spokane County jail as a result of that referral. CP 117. Jason Youker filed a Motion to Suppress the evidence in federal court alleging that JoAnn Youker did not have the authority to consent to the search. Testimony was taken on the Motion to Suppress, but the court never ruled on the motion because the federal prosecutor moved to dismiss the case, and Jason Youker was released. CP 117. See transcript, CP 124-221.

Jason Youker alleged in his complaint against Douglas County that Deputies White and Black's entry into Jason Youker's residence without consent constituted an invasion of privacy causing him to be wrongfully charged with a crime which caused him to have lost income while he was in jail, incur bail, loss of residential time with his son, loss of his rental property, loss of his personal belongings which were repossessed during his incarceration, and to suffer emotional distress and humiliation. CP 117.

The following additional facts were established by the Declarations of Jason Youker and JoAnn Youker as follows: (1) JoAnn Youker admitted that she was not living at Jason Youker's residence at the time of the unlawful search, seizure, and arrest. CP 264-265; (2) JoAnn Youker was angry because Jason Youker, her ex-husband, had a new girlfriend. CP 262; (3) JoAnn Youker admitted that in retaliation against her ex-husband, she planted a rifle under his bed and then reported it to the Douglas County Sheriff's Department. CP 261.

In Jason Youker's Complaint, under Section V Cause of Action – Invasion of Privacy, Mr. Youker alleged a violation of Art. 1, Section 7 in Section 5.3. CP 35-41.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review is proper under RAP 13.4 (b)(3) because a significant question of law under the Constitution of the State of Washington or of the United States is involved.

a. JoAnn Youker did not have actual authority to consent to a search of Jason Youker's property.

Under both the federal and state constitutions, the "discoveries of an illegal search cannot be used to validate the probable- cause judgment upon which the legality of the search depends." (Emphasis added.) Turngren v. King County, 38 Wn. App. 319, 686 P. 2d 1110 (1984) ,rev. on other grounds, 104 Wn.2d 293 (1985), citing Whitely v. Warden, 401 U.S. 560, 567, n.11 (1971). Thus, if the Washington State Supreme Court agrees that JoAnn Youker had no authority to consent to

the search of her ex-husband's residence, the discovery of JoAnn Youker's mail and clothing in his residence after the entry should not have been used to justify a finding that JoAnn Youker had authority to consent to the search.

A third party has actual authority if he or she has been authorized by the owner to consent to a search, or if the third party has mutual use of the property. United States v. Ruiz, 428 F.3d 877, 880 (9th Cir. 1993).

JoAnn Youker does not meet either one of the two elements required to have actual authority to consent to a search. There is no evidence that Jason Youker authorized JoAnn to consent to a search of his home. Second, JoAnn did not have mutual use and joint access of the property. A third party cannot, as a matter of law, have mutual use of a property if the party cannot legally be on the premises because of restraining order prohibiting her from being on the property.

b. Apparent Authority does not apply.

Under the Washington State Constitution, the apparent

authority doctrine is not the appropriate standard. State v. Morse, 156 Wn.2d 1, 12, 123 P.3d 332 (2005). Under Article I, section 7 of the Washington State Constitution, warrantless searches are per se unreasonable. State v. Hendrickson, 129 Wn. 2d 61, 70, 917 P.2d 563 (1996). Exceptions to the warrant requirement for a search are to be "jealously and carefully drawn." State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004) (quoting Hendrickson, 129 Wn.2d at 72. The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement. State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003).

In the context of a search, consent is a form of waiver. State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). Ordinarily, only the person who possesses a constitutional right may waive that right. Id. To be valid, a consensual search requires voluntary consent by one having authority to consent and the search must be limited to the scope of the consent.

Illinois v Rodriquez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed. 2d 148 (1990).

Article I, section 7 of the Washington State Constitution is more protective of individual privacy than the 4th Amendment e.g. State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). Under the Washington State Constitution, authority to consent to a search is based upon a person's independent authority to consent and the reasonable expectation of his co-occupant about that authority. Morse, 156 Wn.2d at 8.

In Morse, the Washington Supreme Court held that "[s]tanding alone, a police officer's subjective belief made in good faith about the scope of a consenting party's authority to consent cannot be used to validate a warrantless search under Article I, SS 7." Id. at 12. Under Article I, Section 7 analysis: 1) the consenting party must be able to permit the search in his own right, and 2) it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit

a search. State v. Mathe, 102 Wn.2d 537, 543-544, 668 P.2d 859 (1984). "In short, while under the 4th Amendment the focus is on whether the police acted reasonably under the circumstances, whereas under Article I, Section 7 we focus on the expectation of the people being searched and the scope of the consenting party's authority." Morse, 156 Wn.2d at 10. (Emphasis added.)

Thus, Washington courts have found authority to consent to a search did not exist where a landlord consents to the search of a renter's room when the renter retains the exclusive control of the premises. See Mathe, 102 Wn.2d, 537, 688 P.2d 859 (1984); See also State v. Birdsong, 66 Wn.App. 354, 832 P.2d 533 (1992) (where guests of an apartment renter consented to search the apartment). The landlord did not have common authority of the area to be searched. Mathe, 102 Wn. 2d at 544.

In this case, at the time in question, JoAnn Youker was not legally in Jason Youker's home at 920½ S. Nancy because of the restraining order, and she lacked the common authority to

consent to a police search of that residence. At the time of JoAnn Youker's consent she was under the restrictions of an no contact order regarding Jason Youker which prohibited JoAnn Youker from "having any contact whatsoever..." with Jason Youker, and from, "entering, knowingly coming within, or knowingly remaining on" Mr. Youker's residence.

The Petition for Review should be granted because a significant question of law under the Washington State Constitution is involved under RAP 13.4(b)(3).

2. A question of public interest arises under RAP 13.4 (4) as to whether a private cause of action for invasion of privacy exists under Art. 1, Section 7 of the Washington State Constitution.

The Washington State Supreme Court has held a common law right of privacy exists in this state and that individuals may bring a cause of action for invasion of the right. Reid v. Pierce County, 136 Wn.2d at 206.

There are four types of invasion of privacy: intrusion, disclosure, false light, and appropriation. Mark v. Seattle Times, 96 Wn.2d 473, 497, 635 P.2d 1081 (1981). One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for the invasion of privacy, if the intrusion would be highly offensive to a reasonable person. Mark, 96 Wn. 2d at 497.

The Court of Appeals Div III opinion in this case states: "Considering the information available to them at the time, no trier of fact could find the deputies 'deliberately embarked on a course of conduct guaranteed to result in an unlawful [search] with the intent of causing distress and embarrassment to [Mr. Youker]," (emphasis added) citing Fisher v. Dept. of Health, 125 Wn.App. 869, 879, 104 P.3d 836 (2005), review denied, 155 Wn.2d 1013 (2005).

Here physical intrusion was at the highest level of offensive: (1) The intrusion was by his ex-wife, a person he had

and (2) the intrusion was by Douglas County Sheriff's deputies. There was a genuine issue of material fact as to whether the intrusion by the Sheriff's deputies would have been highly offensive to a reasonable person and whether Jason Youker suffered special damages because of the invasion. Reid v. Pierce County, 136 Wn. 2d 195, 205, n. 4, 961 P. 2d 333 (1998).

The Court of Appeals, Div III should not have affirmed the trial court's dismissal of the invasion of privacy claim where the evidence is undisputed JoAnn Youker did not have the legal power to authorize the warrantless search of Jason Youker's residence, and where there were questions of fact about whether the warrantless intrusion by the Douglas County Sheriff's Deputies caused mental distress of a kind that "normally results from such an invasion." Reid, 136 Wn.2d at 205, n.4.

The Court in Reid v. Pierce County reserved the issue of whether Art. 1, Section 7 provides a "civil cause of action."

The Court in Reid v. Pierce County reserved the issue of whether Art. 1, Section 7 provides a "civil cause of action." Reid v. Pierce County, 136 Wn.2d 195, 214, 961 P.2d 333 (1998). The Court in Reid declined to address whether Article 1, Section 7 creates a private right of action, because it believed the plaintiff in that case could obtain adequate relief under the common law of invasion of privacy. Reid, 136 Wn.2d at 213.

In Fisher, 125 Wn.App. at 879, review denied 155 Wn.2d 1013 (2005), Ms. Fisher only presented the facts as an intentional personal tort. The Court of Appeals held that Ms. Fisher could not establish the element of "intent" necessary for that personal tort.

The court noted, however, that "when the intruder is the government, the intrusion is a violation of Article 1, Section 7 of our constitution. It prohibits the government from disturbing any person in his or her private affairs or efforts without authority of law. Intent is not a factor. Fisher, 125 Wn.App. at 879.

Unlike the plaintiff in Fisher, Mr. Youker's complaint alleged that the deputies actions violated Art. 1, Section 7 of the Washington State Constitution. Because the intrusion was made by the Douglas County deputies, proof of intent is not required. See Fisher, 125 Wn.App. at 879.

The Deputies violated Youker's privacy before the prosecutor decided to prosecute. At the time the deputies entered Youker's residence, the prosecutor had not yet been contacted, nor had the deputies secured a warrant from any judge. Thus, with respect to the invasion of privacy violation, the Defendants cannot hide behind the argument that the emotional distress damages were "caused by the prosecutor's informed decision to prosecute."

The United States Supreme Court in Payton v. New York, 445 U.S. 573, 583-603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) emphasized the importance of privacy interests regarding entry into a private home under the Fourth Amendment as follows:

....

> (a) The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. To be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant, ... In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

The Washington State Supreme Court has analyzed Art. 1, Section 7 in the context of other civil lawsuits. See e.g., York v. Wahkiakum Sch. District No. 200, 163 Wn.2d 297, 178 P.3d 995 (2008) (holding that the granting of a summary judgment was error where a warrantless, random, and suspicionless drug testing violated a student's right to privacy under Wash. St. Const. Art. 1, Section 7.)

Judge Siddoway's dissent in this 2014 Court of Appeals decision emphasizes where the majority opinion is flawed because of the obvious "red flags" as follows:

> Construing all of the evidence and reasonable inferences in the light most favorable to Mr. Youker, a

genuine issue of material fact exists on the issues of intent and damages. He should have been permitted to proceed to trial.

Here, however, the sheriff's deputies were approached by JoAnn Youker, who informed them that Jason Youker whom she identified as her ex-husband, not her current husband--had a rifle in his home that she offered to show them: one red flag. She told them that her ex-husband was a convicted felon, and she knew that his possession of a rifle was forbidden: another red flag. Before traveling to the home with Ms. Youker, the sheriff's deputies learned that Mr. Youker had a no-contact order in effect against Ms. Youker: a third red flag. They also learned before traveling to the home with Ms. Youker that she had an outstanding arrest warrant for failing to appear or comply-a fourth red flag-although they did not determine before traveling to Mr. Youker's home to conduct the search, as they determined later, that the arrest warrant was for violating Mr. Youker's no-contact order.

In the dissent in Youker Judge Siddoway explains how other jurisdictions have dealt with the interplay between constitutional provisions and invasion of privacy:

When facts are presented that raise an issue as to a person's state of mind, summary judgment is seldom available. 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 56, at 417 (6th ed. 2013)(citing *Haubry v. Snow*, 106 Wn.App. 666, 31 P.3d 1186 (2001); *Pearson v. Gray*, 90 Wn.App. 911, 954 P.2d 343 (1998); *Sedwick v. Gwinn*, 73 Wn.App. 879, 873 P.2d 528 (1994)). A number of courts have recognized that a warrantless

and otherwise unauthorized entry into or search of a home by law enforcement can be actionable as intrusion upon seclusion if there is evidence from which to infer that the officers doubted their authority. See, e.g., *Mauri v. Smith*, 324 Or. 476, 929 P.2d 307, 311-12 (1996) (reversing directed verdict for defendant officers on plaintiffs' intrusion upon seclusion claim); *Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322, 327 (1977); *Muhammad v. United States*, 884 F.Supp.2d 306, 317 (E.D. Pa. 2012) (noting that "[a]ccording to the illustrations in the Restatement, a warrantless search of a home qualifies as a physical intrusion into a place where the plaintiff has secluded himself," (citing Restatement § 652B)); *Walker v. Jackson*, _____ F.Supp.2d ____, 2013 WL 3379685, at *6 (D. Mass. 2013) (plaintiffs' stated claim under Massachusetts' statutory right of privacy, which includes "unreasonable intrusion upon a person's right to seclusion,'" where police department traced the call reporting a crime in progress to an individual they knew had made prior false reports (quoting *Amato v. Dist. Attorney for Cape & Islands Dist.,* 80 Mass.App. Ct. 230, 952 N.E.2d 400 (2011)); *Garay v. Liriano*, 943 F.Supp.2d 1, 25 (D.D.C. 2013) (denying summary judgment dismissal of plaintiffs' invasion of privacy claim for warrantless entry into their home). Here, while a jury may well find in favor of the defending deputies, Mr. Youker has presented enough evidence to entitle him to argue to a jury that the deputies did not believe they had the necessary permission to conduct the search but decided to go ahead anyway.

Judge Siddoway also explained in his dissent that Washington State law allows a Plaintiff to testify about his own mental distress damages:

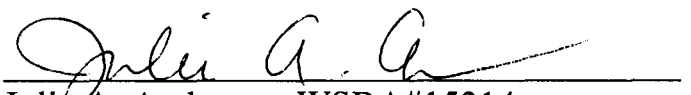
As to damages, Douglas County showed that most of the damages originally alleged by Mr. Youker were proximately caused by the prosecutor's charging decision, not the deputie's search. But Mr. Youker responded with his own declaration, in which he testified that learning of the search had caused him humiliation, a form of emotional distress. Damages for privacy invasion include "the harm to [the plaintiff's] interest in privacy resulting from the invasion' and "[the plaintiff's] mental distress proved to have been suffered if it is of a kind that normally results from such an invasion." *Reid v. Pierce County*, 136 Wn.2d 195, 205, n.4, 961 P.2d 333 (1998) (quoting RESTATEMENT § 652H). Though these damages may be nominal, Mr. Youker may prove them by his testimony alone. *See* 16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE§ 20.31, at 51 (3d ed. 2006); RESTATEMENT§ 652H cmt.c.

F. CONCLUSION

The Petition for Review should be granted.

Respectfully submitted this 7th day of February 2014.

LAW OFFICES OF JULIE A. ANDERSON



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

JASON YOUKER, Appellant, v. DOUGLAS COUNTY, a municipal corporation, LISA WHITE, a single woman, and WILLIAM BLACK and JANE DOE BLACK, Respondents.	)	No. 30968-1-III PUBLISHED OPINION

BROWN, J. — Jason Youker appeals the summary judgment dismissal of his common law privacy invasion suit against Douglas County and two of its sheriff's deputies, Lisa White and William Black, after the deputies performed a warrantless search of his home based on the consent of his ex-wife, JoAnn Youker. Mr. Youker contends genuine issues of material fact exist on Ms. Youker's authority to consent to the search and the amount of damages stemming directly from the search. Reasonable minds could solely conclude the deputies lacked intent to intrude upon Mr. Youker's seclusion. Accordingly, we affirm.

FACTS

In April 2007, Ms. Youker visited the sheriff's office to report her ex-husband, Mr. Youker, was a convicted felon with a rifle in his possession. Deputies White and Black learned Mr. Youker had in effect a no-contact order against Ms. Youker and she had an outstanding arrest warrant. Ms. Youker offered to show the deputies the gun's location in the home where she claimed to have resided with Mr. Youker for the previous five months despite the no-contact order.

The deputies drove Ms. Youker to the home where, in Mr. Youker's absence, she signed a consent to search form. A dog recognized her and allowed her to pass to the door that she knew was unlocked to allow Mr. Youker's employees access to business inventory. The deputies entered the home and seized the gun from under a bed Ms. Youker claimed to share with Mr. Youker. Ms. Youker showed them her clothing in half the bedroom closet and her mail sent to that address on the bed's side table. Back at the sheriff's office, Deputy White learned Ms. Youker's arrest warrant was for violating the no-contact order and arrested her. Deputy White arrested Mr. Youker the next day. Mr. Youker told Deputy White the gun belonged to Ms. Youker and she had resided in his home for the previous four months.

The State charged Mr. Youker with first degree unlawful firearm possession. State prosecutors later dropped the charge because the United States indicted him for the same incident. Federal prosecutors eventually dropped the indictment because evidence suggested Mr. Youker might not have owned the gun.

In April 2009, Mr. Youker sued the county and the deputies for privacy invasion, false arrest, false imprisonment, and malicious prosecution. The Youkers each gave evidence contradicting their prior alleged statements in material ways, generally claiming Ms. Youker did not reside in Mr. Youker's home at the time of the search. The trial court summarily dismissed all claims. Mr. Youker's first appeal followed. This court reversed and remanded solely regarding his privacy invasion suit, finding, "[T]he basis for dismissing [the] claim, at least with respect to damages directly related to the search, was insufficiently briefed below and on appeal." *Youker v. Douglas County*, 162 Wn. App. 448, 453, 258 P.3d 60, *review denied*, 173 Wn.2d 1002 (2011).

On remand, the trial court again summarily dismissed Mr. Youker's privacy invasion suit. The court "specifically f[ound] that there are issues of fact on . . . consent to search," but concluded these issues were not material because Mr. Youker could not prove damages. Clerk's Papers at 382. Mr. Youker again appealed.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing Mr. Youker's privacy invasion suit.

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). While we consider solely evidence and issues called to the trial court's attention, we may affirm on any ground the record is sufficiently developed for us to fairly consider. RAP 2.5(a); RAP 9.12.

Summary judgment is proper if the record shows "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974); *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). We construe all facts and reasonable inferences in the light most favorable to the nonmoving party, here Mr. Youker. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate solely when reasonable minds could reach but one conclusion. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

A person may sue the government for common law privacy invasion if it intentionally intrudes upon his or her solitude, seclusion, or private affairs. *Reid v. Pierce County*, 136 Wn.2d 195, 206, 213-14, 961 P.2d 333 (1998); RESTATEMENT (SECOND) OF TORTS § 652B (1977). The defendant's intrusion, whether physical or nonphysical, must substantially interfere with the plaintiff's seclusion in a manner highly offensive or objectionable to a reasonable person. *Mark v. Seattle Times*, 96 Wn.2d 473, 497, 635 P.2d 1081 (1981) (quoting and citing RESTATEMENT (SECOND) OF TORTS § 652B & cmt. d)). And, "The intruder must have acted deliberately to achieve the result, with the certain belief that the result would happen." *Fisher v. Dep't of Health*, 125 Wn. App. 869, 879, 106 P.3d 836 (2005). While "[i]ntent is not a factor" under article I,

section 7 of our state constitution,[1] *id.*, our Supreme Court has refused to create a constitutional cause of action for governmental privacy invasions. *Reid*, 136 Wn.2d at 213-14. Likewise, we decline to do so here.

Reasonable minds could solely conclude the deputies lacked intent to intrude upon Mr. Youker's seclusion. It is uncontested they were legitimately investigating Ms. Youker's report about a gun in Mr. Youker's home. The record contains no suggestion they acted under pretext. She signed a consent to search form after stating she had resided in the home for five months. When the deputies approached the home with Ms. Youker, they were greeted by a friendly dog and found papers and clothing belonging to her in the bedroom. Even Mr. Youker, when first contacted, said Ms. Youker had lived with him for four months. The deputies did not have the benefit of hindsight regarding the Youkers' later conflicting statements. Considering the information available to them at the time, no trier of fact could find the deputies "deliberately embarked on a course of conduct guaranteed to result in an unlawful [search] with the intent of causing distress or embarrassment to [Mr. Youker]." *Fisher*, 125 Wn. App. at 879.

In sum, we hold the trial court did not err in summarily dismissing Mr. Youker's privacy suit. Considering our analysis, we do not reach his remaining contentions.

[1] The constitutional provision reads, "No person shall be disturbed in his private

Affirmed.

Brown, J.

I CONCUR:

Korsmo, C.J.

affairs, or his home invaded, without authority of law." CONST. art I, § 7.

No. 30968-1-III

SIDDOWAY, J. (dissenting) — The unusual facts presented make this the rare case in which an individual subjected to an unlawful search by law enforcement officers is entitled to pursue a claim for common law invasion of privacy. I therefore respectfully dissent.

I say "rare," because as the majority opinion explains, invasion of privacy, including the cause of action for intrusion upon seclusion, is an intentional tort and therefore not one that many officers will ever commit or even be accused of committing. "The comments and illustrations to [*Restatement (Second) of Torts*] Section 652B [1977] disclose that an 'intrusion upon seclusion' claim usually involves a defendant who does not believe that he has either the necessary personal permission or legal authority to do the intrusive act." *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989). In most cases in which law enforcement officers are ultimately established to have entered a plaintiff's home without permission or legal authority, it is reasonable to expect that evidence will suggest only negligent, not intentional conduct. And as pointed out in our prior decision in this case, damages are limited, since a law enforcement officer's search will not be the legal cause of injury or damage occurring after any fully informed

decision to prosecute. *Youker v. Douglas County*, 162 Wn. App. 448, 467, 258 P.3d 60, *review denied*, 173 Wn.2d 1002 (2011).

Here, however, the sheriff's deputies were approached by JoAnn Youker, who informed them that Jason Youker—whom she identified as her ex-husband, not her current husband—had a rifle in his home that she offered to show them: one red flag. She told them that her ex-husband was a convicted felon, and she knew that his possession of a rifle was forbidden: another red flag. Before traveling to the home with Ms. Youker, the sheriff's deputies learned that Mr. Youker had a no-contact order in effect against Ms. Youker: a third red flag. They also learned before traveling to the home with Ms. Youker that she had an outstanding arrest warrant for failing to appear or comply—a fourth red flag—although they did not determine before traveling to Mr. Youker's home to conduct the search, as they determined later, that the arrest warrant was for violating Mr. Youker's no-contact order.

When facts are presented that raise an issue as to a person's state of mind, summary judgment is seldom available. 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 56, at 417 (6th ed. 2013) (citing *Haubry v. Snow*, 106 Wn. App. 666, 31 P.3d 1186 (2001); *Pearson v. Gray*, 90 Wn. App. 911, 954 P.2d 343 (1998); *Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994)). A number of courts have recognized that a warrantless and otherwise unauthorized entry into or search of a home by law enforcement can be actionable as intrusion upon seclusion if there is evidence

from which to infer that the officers doubted their authority. *See, e.g.*, *Mauri v. Smith*, 324 Or. 476, 929 P.2d 307, 311-12 (1996) (reversing directed verdict for defendant officers on plaintiffs' intrusion upon seclusion claim); *Monroe v. Darr*, 221 Kan. 281, 559 P.2d 322, 327 (1977); *Muhammad v. United States*, 884 F. Supp. 2d 306, 317 (E.D. Pa. 2012) (noting that "[a]ccording to the illustrations in the Restatement, a warrantless search of a home qualifies as a physical intrusion into a place where the plaintiff has secluded himself," (citing RESTATEMENT § 652B)); *Walker v. Jackson*, ___ F. Supp. 2d ___, 2013 WL 3379685, at *6 (D. Mass. 2013) (plaintiffs' stated claim under Massachusetts's statutory right of privacy, which includes "'unreasonable intrusion upon a person's right to seclusion,'" where police department traced the call reporting a crime in progress to an individual they knew had made prior false reports (quoting *Amato v. Dist. Attorney for Cape & Islands Dist.*, 80 Mass. App. Ct. 230, 952 N.E.2d 400 (2011)); *Garay v. Liriano*, 943 F. Supp. 2d 1, 25 (D.D.C. 2013) (denying summary judgment dismissal of plaintiffs' invasion of privacy claim for warrantless entry into their home). Here, while a jury may well find in favor of the defending deputies, Mr. Youker has presented enough evidence to entitle him to argue to a jury that the deputies did not believe they had the necessary permission to conduct the search but decided to go ahead anyway.

As to damages, Douglas County showed that most of the damages originally alleged by Mr. Youker were proximately caused by the prosecutor's charging decision,

not the deputies' search. But Mr. Youker responded with his own declaration, in which he testified that learning of the search had caused him humiliation, a form of emotional distress. Damages for privacy invasion include "'the harm to [the plaintiff's] interest in privacy resulting from the invasion'" and "'[the plaintiff's] mental distress proved to have been suffered if it is of a kind that normally results from such an invasion.'" *Reid v. Pierce County*, 136 Wn.2d 195, 205 n.4, 961 P.2d 333 (1998) (quoting RESTATEMENT § 652H). Though these damages may be nominal, Mr. Youker may prove them by his testimony alone. *See* 16A DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 20.31, at 51 (3d ed. 2006); RESTATEMENT § 652H cmt. c.

Construing all of the evidence and reasonable inferences in the light most favorable to Mr. Youker, a genuine issue of material fact exists on the issues of intent and damages. He should have been permitted to proceed to trial.

Siddoway, J.