

Supreme Court No. 89897-9

SUPREME COURT OF THE STATE OF WASHINGTON

JASON YOUKER,

Petitioner,

v.

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

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Stanley A. Bastian,
WSBA #13415
Jeffers, Danielson, Sonn &
Aylward, P.S.
Attorneys at Law
P.O. Box 1688
Wenatchee, WA 98807-1688
(509) 662-3685
Counsel for Respondents

I. TABLE OF CONTENTS

I. INTRODUCTION	1
II. RESTATEMENT OF THE ISSUES	2
III. STATEMENT OF THE CASE	2
A. Summary of the facts	2
B. Procedural History.....	3
IV. ARGUMENT	4
A. Youker misstates both the facts and the law.....	4
B. The invasion of privacy claim was properly dismissed as a matter of law.....	8
V. CONCLUSION	13

CASES

Blinka v. WSBA, 109 Wn.App. 575, 36 P.3d 1094
(2001) 8

Fisher v. State ex rel. Dept. of Health, 125 Wn.App.
869, 106 P.3d 836 (2005), *rev. den'd*, 155 Wn.2d
1013 (2005). 6, 7, 10, 11, 12

Reid v. Pierce County, 136 Wn.2d 195, 961 P.2d 333
(1998) 8, 10

Sparrell v. Block, 40 Wn.App. 854, 701 P.2d 529
(1985). 8

Youker v. Douglas Cnty., 30968-1-III, 2014 WL 97315
(2014) 2, 3, 4, 6, 7

Youker v. Douglas County, 162 Wn.App. 448, 258
P.3d 60, *review denied*, 173 Wn.2d 1002 (2011)..... 1, 3, 12

STATUTES

RCW 4.92.090..... 8

OTHER AUTHORITIES

Senate Bill 5154 (2001)..... 9

I. INTRODUCTION

This case involves a dispute between Jason Youker, the appellant (“Youker”), and JoAnn Youker, his ex-wife. Youker is a convicted felon and he is not allowed to possess guns. Mrs. Youker accused Youker of keeping a rifle under the bed in the family home that they shared together with her children. This accusation led to both state and federal criminal charges, which were later dismissed. In this lawsuit, Youker is attempting to blame the Douglas County defendants for his legal troubles. He has the wrong target. Instead, his legal efforts should be directed against his ex-wife.

This case has been to the Court of Appeals twice. On April 19, 2011, the Court of Appeals affirmed the trial court and concluded that Youker’s claims for malicious prosecution, false arrest, and false imprisonment were properly dismissed as a matter of law. The claim for invasion of privacy was remanded to the trial court for additional briefing and re-argument. *Youker v. Douglas County*, 162 Wn.App. 448, 258 P .3d 60, *review denied*, 173 Wn.2d 1002 (2011)(“*Youker I*”). The trial court subsequently dismissed the claim of invasion of privacy after briefing and re-argument on the motion of the Douglas County defendants. Youker again appealed

and the Court of Appeals affirmed the trial court's dismissal of Youker's remaining claim, invasion of privacy. *Youker v. Douglas Cnty.*, 30968-1-III, 2014 WL 97315 (2014)(*"Youker II"*).

II. RESTATEMENT OF THE ISSUES

The invasion of privacy claim was properly dismissed as a matter of law.

III. STATEMENT OF THE CASE

A. Summary of the facts.

The facts of this case are best summarized by the opinion of the Court of Appeals:

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.

Youker II, 30968-1-III, 2014 WL 97315 at 1 (emphasis added).

B. Procedural History.

In April 2009, Youker sued Douglas County and the deputies for privacy invasion, false arrest, false imprisonment, and malicious prosecution. CP 35-41. The trial court summarily dismissed all claims. CP 246. Youker's first appeal followed. CP 272. The Court of Appeals reversed and remanded solely regarding Youker's privacy invasion suit. *Youker I*, 162 Wn.App. 448.

On remand, the trial court again dismissed Youker's invasion of privacy claim. CP 381. The court "specifically f[ound] that there are issues of fact on ... consent to search," but concluded these issues were not material because Youker could not prove damages. CP at 382. Youker again appealed. CP 403. The Court of Appeals affirmed the trial court's summary dismissal of Youker's

privacy invasion claim, finding:

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). ...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. ...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.

Youker II, 30968-1-III, 2014 WL 97315 at 2-3.

IV. ARGUMENT

A. Youker misstates both the facts and the law.

The petitioner, Jason Youker, has consistently misstated both the facts and the law and his Petition for Review should be denied on those grounds. First, Youker has asked the lower courts and now asks this Court to find that an invasion of privacy can occur even when probable cause has already been determined to

exist by the trial court in both the criminal and civil proceedings. Youker's argument requires the Court to ignore that the state and federal courts in Youker's criminal case found that probable cause existed to arrest Youker after the search in his home. For probable cause to have existed, the search was deemed to be reasonable. Youker attempts to sidestep this issue by misstating the record and what actually occurred. Youker claims that, "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. " (Petition for Review at 5.)

In fact, the charges against Youker were dismissed by Douglas County because the United States Attorney's Office had elected to pursue a federal charge against Youker based upon the same incident. CP 86. Additionally, the charges were dismissed by Douglas County without prejudice. CP 86 . Youker's misstatement of the record creates false impressions of the criminal case, providing an inaccurate basis for appeal.

Second, Youker cites to additional facts regarding Mrs. Youker's ability to consent to the search as if these facts are relevant to the Court's inquiry. (Petition for Review at 6.) However,

the Court of Appeals already considered these additional facts and properly found them irrelevant to the tort of invasion of privacy:

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.

Youker II, 30968-1-III, 2014 WL 97315 at 2-3 (emphasis added).

Despite what Youker now argues in his Petition for Review, the facts in this case do not necessitate a reversal of this Court's previous decisions finding that intent is a requirement to prove a claim against the government for invasion of privacy.

Finally, Youker cites to *Fisher v. State ex rel. Dep't of Health*, 125 Wn. App. 869, 106 P.3d 836 (2005) as if it recognizes a cause

of action under the State Constitution for invasion of privacy outside of that provided for private parties:

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.

Youker's assertions regarding *Fisher* incorrectly state the law of that case.

The Court of Appeals correctly indicated that *Fisher* does not recognize a cause of action for invasion of privacy where there is no evidence of intent:

While intent 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.

Youker II, 30968-1-III, 2014 WL 97315 at 2.

Youker improperly cites to *Fisher* in an attempt to sidestep established precedent and convince this Court to create a new

cause of action that the Court has expressly declined to create in previous decisions. Youker confuses the standard for finding an unlawful search in the criminal context with the standard for civil causes of action against the government. The facts of this case do not warrant a change in precedent.

B. The invasion of privacy claim was properly dismissed as a matter of law.

The trial court properly granted the Defendants' motion for summary judgment and dismissed the invasion of privacy claim as a matter of law because (1) the officers did not have the requisite intent for an invasion of privacy claim and (2) Youker failed to present any evidence to support his claim for damages.

Washington courts have consistently rejected invitations to establish a cause of action for damages based upon violations of the state constitution. *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998); *Blinka v. WSBA*, 109 Wn.App. 575, 591, 36 P.3d 1094 (2001); *Sparrell v. Block*, 40 Wn.App. 854, 860-61, 701 P.2d 529 (1985).

Additionally, while the Legislature has provided that the state "shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation" under RCW 4.92.090, the Legislature rejected a proposed statute that

would have authorized the payment of damages to persons who are injured by a violation of the state Constitution. See Senate Bill 5154 (2001).

Youker asks this Court to create a new cause of action, but this Court has already ruled on this same issue and properly found that no such cause of action exists:

Plaintiffs assert the County violated their right of privacy under article I, section 7 of the Washington Constitution⁵ and, as such, they should be allowed to bring a civil action for damages against the County. Plaintiffs concede no such action under the state constitution is currently recognized but ask us to use this case to create one.⁶ Plaintiffs also ask us to hold article Const. art. I, § 7 provides greater protection than its federal counterpart. We decline both requests.

Plaintiffs assert a private right of action for damages “should be created for a violation of the Washington State Constitutional right to privacy, *Art. I § 7.*” Br. of Appellant (Reid) at 9. They further argue if a private action is available under Const. art. I, § 7, it should be extended to the immediate relatives of the deceased.

We feel, at this time, that Plaintiffs may obtain adequate relief under the common law and that such actions are better addressed under the common law invasion of privacy action. Plaintiffs have not presented a reasoned or principled basis upon which to construct a constitutional cause of action, nor have they established why a constitutional cause of action is more appropriate than the common law cause of action which already exists. Because we hold Plaintiffs are entitled to maintain an action for invasion

of privacy under the common law, we decline to reach this issue in this case.

Reid v. Pierce Cnty., 136 Wn. 2d 195, 213-14, 961 P.2d 333, 342-43 (1998).

Youker has not presented a reasoned or principled basis upon which to construct a constitutional cause of action, nor has Youker established why a constitutional cause of action is more appropriate than the common law cause of action which already exists. Instead, Youker misstates the record and case law in order to sidestep the inevitable conclusion that the trial court and Court of Appeals properly dismissed his cause of action for invasion of privacy.

Youker's claim for invasion of privacy by intrusion must be analyzed under general tort standards. Washington recognizes a tort common law cause of action for invasion of privacy. *Reid*, 136 Wn.2d at 206. There are two types of invasion of privacy claims: (1) false light, and (2) physical intrusion. *Fisher v. State ex rel. Dept. of Health*, 125 Wn.App. 869, 878-79, 106 P.3d 836 (2005), *rev. den'd*, 155 Wn.2d 1013 (2005). This case involves a claim for the second type, a physical intrusion, but it does not involve a claim of "false light" invasion of privacy.

A prima facie claim for the tort of invasion of privacy by physical intrusion consists of the following elements: a deliberate intrusion, physical or otherwise, into a person's solitude, seclusion, or private affairs. *Fisher*, 125 Wn.App. at 879. The intruder must have acted deliberately to achieve the result, with the certain belief that the result would happen. *Id.* Intent is thus an essential element. *Id.*

In *Fisher*, a patient sued the Department of Health and the Office of the Attorney General under various common law tort theories, including invasion of privacy by publication and intrusion, and for alleged statutory violations after her medical records were disseminated by those state agencies. *Id.*, at 872-73. The claims were dismissed by the trial court on summary judgment and that decision was affirmed on appeal because the plaintiff could not establish the intent element required for the tort of invasion of privacy by intrusion because “[n]o finder of fact could find that the attorney general’s office deliberately embarked on a course of conduct guaranteed to result in an unlawful disclosure with the intent of causing distress or embarrassment to any identifiable person.” *Id.*, at 879. The *Fisher* court affirmed the trial court’s dismissal of the cause of action for invasion of privacy by intrusion.

Like in *Fisher*, Youker's claim fails as a matter of law because there is no evidence that the Deputies "deliberately embarked on a course of conduct guaranteed to result" in an unlawful intrusion with the intent of causing distress or embarrassment to Youker. *Id.*, at 879.

In addition to failing to establish the necessary element of intent, Youker did not provide necessary evidence of his damages. The trial court's order properly dismissed the invasion of privacy claim because all damages claimed by Youker were barred by the probable cause finding and the prosecutor's fully informed decision to prosecute. The only damages potentially recoverable by Youker in such a case are damages directly related to the invasion of privacy (such as damages for physical injury, property damage, injury to reputation, etc.), which are not barred by the prosecutor's fully informed decision to prosecute, but were not claimed or pled by Youker.

Youker suffered no physical injury during the search because he was not present when the deputies conducted their search. *Youker I*, 162 Wn.App. at 454. Youker sustained no property damage during the search because JoAnn Youker opened the door for the deputies. *Id.* There is no evidence that personal

property was damaged in the course of the deputies' search. Finally, there is no evidence that Youker suffered damage to his reputation during the course of the search because JoAnn Youker was the only individual present. All of Youker's claimed damages, to the extent any were actually sustained, were suffered during and after the time of his arrest.

Youker argues that he suffered emotional distress damages as a result of the physical intrusion into his residence and argues that expert testimony is unnecessary to establish emotional and mental distress damages. This argument misses the point. The trial court's order granting summary judgment on the invasion of privacy claim was not based on any arguments that there was no evidence in the record of emotional distress damages. Rather, the trial court's order properly dismissed the invasion of privacy claim because all damages claimed by Youker were barred by the probable cause finding and the prosecutor's fully informed decision to prosecute.

V. CONCLUSION

The Douglas County defendants request that the Court deny the Petition for Review because it fails to meet any of the criteria required by RAP 13.4(b). The decision by the Court of Appeals is

consistent with established case law and involves no significant constitutional questions or issues of public concern. Finally, the petitioner, Jason Youker, has misstated both the relevant facts and the law.

The Petition for Review should be denied.

Respectfully submitted this 6th day of March, 2014.

JEFFERS, DANIELSON, SONN &
AYLWARD, P.S.

By



STANLEY A. BASTIAN

WSBA #13415

Attorneys for Respondents

Jeffers, Danielson, Sonn &

Aylward, P.S.

P.O. Box 1688

Wenatchee, WA 98807-1688

(509) 662-3685