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No. 70046-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON
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CASE NO. 70046-4

LAUREL PEOPLES, individually,

Appellant,

vs.

**KIM CHAU PHAM, "JOHN DOE" PHAM and the marital
community composed thereof**

Respondents.

AMENDED REPLY BRIEF

**Douglas E. Wilson, WSBA #21206
Law Office of Douglas E. Wilson
Attorney for Appellant
1200 Westlake Ave. N. #600
Seattle, WA 98109
Phone: (206) 338-7806**

 **ORIGINAL**

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I. ARGUMENT

A. Introduction

The present appeal addresses whether R.C.W. 9.73.030 was violated when the respondent converted the appellant's cell phone and used it to retrieve private text communications. Prior to February 27, 2014, the Washington Supreme Court had never extended the language of R.C.W. 9.73.030 to the unauthorized review of text communication.

On February 27, 2014 the Washington Supreme Court settled the issues on appeal in *State vs. Hinton*. No. 87663-1, slip op. "Whether individuals have an expectation of privacy in the content of their text messages under state law is an issue of first impression in Washington. *Id* slip op. at 3.

The respondent moved for summary judgment arguing that the appellant's cell phone was not a "device" under the statute and further that once the text message reached the intended cell phone it could no longer be "intercepted," as a matter of law. The Court ruled, based on the case law presented by the appellant, that her cell phone was a "device" under the statute. RP 15:5-11. Without the benefit of *Hinton*, the court then held that the respondent did not "intercept" the communication because it was retrieved after it had reached its intended destination, the appellant's cell phone. RP 18:4-8.

B. Recent Authority

Subsequent to the filing of the Appellant's Brief, the State Supreme Court on February 27, 2014, filed two decisions based on the same facts. *Hinton* and *State vs. Roden* No. 87669-0. *Hinton* and *Roden* both involved a police officer accessing text messages from a confiscated cell phone to obtain information used to convict Hinton and Roden. *Hinton* slip op. at 2, *Roden* slip op. at 1. The Supreme Court, in both *Hinton* and *Roden*, held that the privacy act protected text messages. *Hinton* slip op. at 9, *Roden* slip op. at 14.

The *Hinton* Court noted that text messages expose details about familial, professional, religious, and sexual associations. *Hinton* slip op. at 6, citing *United States v. Jones*, ___ U.S. ___, 132 S. Ct 945, 955, 181 L.Ed. 2d 911 (2012) (Sotomayor, J., concurring) (discussing GPS (global positioning system) monitoring). While modern technology makes it easier to invade privacy, it does not extinguish the privacy interests that Washington citizens are entitled to. *Hinton* slip op. at 7.

The legislature used sweeping language to protect personal conversations from intrusion. *Hinton* slip op. at 10 citing R.C.W. 9.73.030(1)(a). The Court has consistently extended statutory privacy in the context of new communications technology. *Hinton* slip op. at 10 citing *State vs. Faford* 128 Wn.2d 476, 910 P.2d 447 (1996). As the Trial Court did in the case at bar, the *Hinton* Court of Appeals concluded that any privacy interest in a text message is lost when it is delivered to the

recipient. Hinton slip at 10 citing *State v. Hinton*, 169 Wn. App. 28, 43, 280 P.3d 476 (2012).

The Supreme Court in *Roden* held that it was an “interception” to use a cell a phone to retrieve text messages before reaching the intended recipient. *Roden* slip op. at 12. The Court indicated that federal cases on the issue were not helpful given the differences between the state and federal statutory schemes. *Roden* slip op. at 12.

It is unfortunate that the parties and the Court did not have the benefit of the recent decisions, when the motion was heard, but it is now clear that a cell phone constitutes a “device” under the act and that using the phone to access private text messages is an “interception” under 9.73.030.

C. “Supplemental Authority” vs. “New Issue”

The Respondent argues that the appellant should be precluded from presenting “new” arguments. The appellant is not presenting any new arguments. The Respondent moved for summary judgment on two issues, whether the phone constituted a “device” under the act and whether a text message could be “intercepted” after it reached the intended phone.

The Appellant cited favorable case law regarding the meaning of the word “device” which the Trial Court found persuasive. RP 15:5-11 Unfortunately, the unauthorized “interception” of text communication was an issue of first impression and neither party could provide binding authority until February 27, 2014. The appellant relied on the plain

language from the statute asserting that the “intended recipient” of the message was not the phone, but rather, Ms. Peoples who could not receive the message because her phone had been converted by Ms. Pham. RP 10:13-18. Unfortunately, until *Hinton*, the appellant could not cite any Washington authority defining “interception.”

After ruling on the motion for summary judgment, the Trial Court did note that it was not considering argument regarding the history of similar statutes because there had not been any briefing. RP 18:9-16. The evolution of similar statutes was ancillary, at best, to the underlying issue of the definition of “interception.” Further, the argument came from a case cited by the respondent in support of the motion for summary judgment, *State vs. Christensen*. *State vs. Christensen*, 153 Wn.2d 186, 197-198, 102 P.3d 789 (2005).

In the absence of authority both parties argued from *Christensen*. During the hearing the respondent offered a copy of the *Christensen* opinion to the bench. RP 11:11-13. The Court indicated that the cases cited by the parties had all been read. RP 5:21. Both parties spent a significant portion of oral argument addressing the *Christensen* decision. CP 8:2 – 12:5.

Although the appellate courts will not consider a new “claim of error” that is first raised on review, courts will consider authority not argued in the trial court, as long as it relates to the same general theory of what was argued. See e.g. *Bennett vs. Hardy* 113 Wn.2d 912, 917-18, 784

P.2d 1258 (1990). In the present case, the only Washington authority was published after the case had been decided.

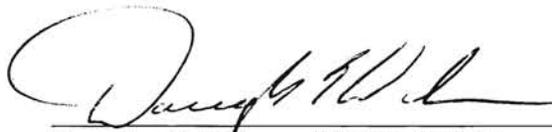
It is unnecessary for authority to have been cited to the trial court, as long as the applicable principals were argued to the court. See e.g. *State Farm Mut. Auto Ins. Co. vs. Amirpanahi*, 50 Wn. App. 869, 872 n.1, 751 P.2d 329, *review denied*, 111 Wn.2d 1012 (1988). The appellant argued the same issues contained in the *Hinton* decision but the appellant understandably lacked binding authority. There were no “new issues” presented in the opening brief just supplemental authority.

II. CONCLUSION

The appellant is not raising any new arguments, presenting new evidence or advancing a new theory. The issue on appeal has been decided by the Supreme Court and thus the appellant respectfully requests that the Trial Court’s Order dismissing the appellant’s claims be reversed and the case remanded back to the Trial Court for trial.

Respectfully submitted this 5th day of May, 2014.

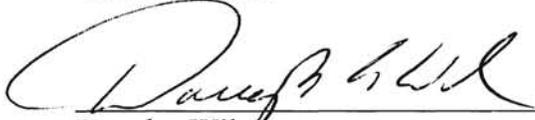
THE LAW OFFICE OF DOUGLAS E. WILSON



Douglas E. Wilson, WSBA #21206
Attorney for Appellants

Douglas Wilson hereby declares that copies of this was served on the following by depositing into the U.S. Mail a copy of this reply brief on May 5th, 2014.

Coreen Wilson, WSBA# 30314
Wieck Schwanz, PLLC
400 112th Ave NE Ste 340
Bellevue, WA 98004-5528
(425) 454-7437
VIA US MAIL



Douglas Wilson