

70046-4

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**COURT OF APPEALS, DIVISION I  
OF THE 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.**

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**APPELLATE BRIEF**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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**II. INTRODUCTION**

The Plaintiff/Appellant, Laurel Peoples (Peoples herein) seeks review of an Order of Dismissal in favor of Respondent, Kim Pham (Pham herein). On motion for summary judgment, the Trial Court held that Pham did not violate R.C.W. 9.73.030 (the Washington State Wiretap Statute) when she converted Peoples' cell phone and used it to access and read private text messages intended for Peoples.

Following a car accident Peoples sued Pham for negligence and conversion of her cell phone. She also brought a civil claim under R.C.W. 9.73.030 for invasion of privacy as a result of Pham using Ms. Peoples' stolen cell phone to access private communication. Pham countersued for negligence, alleging that Pham had a green light when she entered the intersection. Subsequent to the Trial Court's dismissal of Peoples' claims under R.C.W. 9.73, the case proceeded to trial on the remaining claims for negligence and conversion. The jury found Pham 100% negligent and awarded damages for Peoples' injuries. The jury also awarded damages for conversion of the cell phone. (CP 59)

**III. ASSIGNMENT OF ERROR**

1. The Trial Court erred when it summarily dismissed Peoples' claims under R.C.W. 9.73.030 on January 4, 2013.

#### **IV. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Whether Pham's conversion of a cell phone and accessing the private communication, without consent, constitutes an interception of private communication under R.C.W. 9.73.030.
2. Whether the converted cell phone is a "device" pursuant to R.C.W. 9.73.030.

#### **V. STATEMENT OF CASE**

A King County jury found that Pham converted Peoples' cell phone following a motor vehicle accident. (CP 59) Ms. Pham used the converted phone to read Peoples' text messages from around the time of the accident. (CP 47,48,49) Pham's intention was to learn whether Peoples was on the phone at the time of the accident. (CP48,49)

Pham testified that she enlisted the help of a co-worker to access text messages that were left for Ms. Peoples on her cell phone around the time of the accident. (CP 47, 50) The reason Ms. Pham and her co-worker accessed and read the text messages was to investigate whether Ms. Peoples was on the phone at the time of the accident. (CP 47, 48, 49, 50)

#### **V. ARGUMENT**

## A. SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56 ( c); *Reynolds v. Hicks*, 134 Wn. 2d 491, 495, 951 P.2d 761 (1998). The Court must accept all facts alleged by the non-moving party and all reasonable inferences in the light most favorable to the non-moving party. *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 429, 38 P.3d 322, 327 (2002). Summary judgment should be granted only if “reasonable persons could reach but one conclusion.” *Id.*; *Olympic Fish Products v. Loyd*, 93 Wn.2d 596, 611 P.2d 737 (1980).

On review of an order for summary judgment, the appellate court performs the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wash.2d 715, 722, 853 P.2d 1373 (1993)). The standard of review is de novo and summary judgment is appropriate only if 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).

In reviewing a summary judgment motion, the court views all facts in the light most favorable to the non-moving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wash.2d 506, 516, 799 P.2d 250 (1990)); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Cases involving

statutory interpretation are reviewed de novo. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

**B. PLAINTIFF'S DISMISSED CAUSE OF ACTION  
UNDER 9.73.030**

Peoples argues that Pham violated 9.73.030 when she converted the cell phone and used it to intercept private text messages without consent. Peoples argues that the facts of this case are similar to a person opening a letter intended for someone else.

R.C.W. 9.73.030 - Intercepting, Recording, or Divulging Private Communication:

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

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points... by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first

obtaining the consent of all the persons engaged in the conversation.

There are essentially four prongs in analyzing alleged violations of the privacy act. There must have been (1) a private communication transmitted by a device, which was (2) intercepted by use of (3) a device designed to record and/or transmit, (4) without the consent of all parties to the private communication.” *State vs. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2005). Christensen involved a mother surreptitiously obtaining information from a phone conversation between her daughter, and another, through the use of speaker phone function on the base of the phone while her daughter used the handset in a remote part of the home. The Court held that it was a violation of RCW 9.73.

In the case at bar, Pham’s motion for summary judgment challenged whether Peoples’ converted cell phone could function as a “device” used to intercept. Pham also challenged whether the use of a stolen cell phone, to access private messages, constituted an “interception” under the statute. Unfortunately, the Courts have not defined “interception.”

A court's goal in construing a statute is to determine and give effect to the legislature's intent. *Lake* at 526; *Dep't of Ecology v. Campbell & Gwinn, LLC*. 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the statute's meaning is plain on its face, courts give effect to the plain meaning as the expression of what was intended. *Campbell & Gwinn*, at 9-10. "The plain meaning of a statute may be discerned 'from all that the

Legislature has said in the statute and related statutes which disclose

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legislative intent about the provision in question." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Campbell & Gwinn*, 146 Wn.2d at 11).

Courts look to "the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Lake*, at 526. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Pham's motion for summary judgment was based on the argument that the communication was not "intercepted" through the use of a "device" as required by R.C.W. 9.73.030.

*Webster's Encyclopedic Unabridged Dictionary of the English Language* (2001) defines intercept: 1. to take, seize or halt (someone or something on the way from one place to another) ; cut off from an intended destination; 2. To see or overhear (a message, transmission, etc. meant for another)... *Webster's* at 992. Pham converted the cell phone and used it to retrieve private messages before they could be delivered to Ms. Peoples. Pham argued that once the message was received by the stolen phone it could no longer be "intercepted" and further, the phone was not a "device."

In *State vs. Christensen*, the Court concluded that a speaker phone function constituted a device under the act. *Christensen* at 190. The *Christensen* Court rejected the argument that the receiving device could not also be used to record. "It makes no difference that the [violation] was accomplished on a device that was used in the communication."

*Christensen* at 197 citing *State vs. Townsend* 147 Wash 2d at 674, 57 P.3d

255. There is no dispute that Pham used a converted phone to access and read the private messages. There is no dispute that a phone can record text messages much easier than a speaker phone function on the base of a telephone.

“We must interpret the privacy act in a manner that ensures that the private conversations of this state’s residents are protected in the face of an ever-changing technological landscape. This must be done so as to ensure that new technologies cannot be used to defeat the traditional expectation of privacy.” *Christensen* at 197. “While the statute itself is unambiguous, a survey of the legislative history only serves to buttress this conclusion. Since 1909, the privacy act has protected sealed message, letters, and telegrams from being opened or read by someone other than the intended recipient. *Christensen* at 198, RCW 9.73.010-.020. In 1967, the legislature amended the act in order keep pace with the changing nature of electronic communications and in recognition of the fact that there was no law that prevented eavesdropping. *Id.* Citing HOUSE JOURNAL, 40TH Leg., 1st Ex.Sess., at 2030031 (Wash.1967). In doing so, Washington’s privacy statute became “one of the most restrictive in the nation.” *Id.* citing *Towsend* at 672.

Communication has advanced from mailed envelopes to text messages and email but the concept that it is illegal to open and read private communications remain the same. Stealing the cell phone and reading text messages is the modern equivalent of taking an envelope out of a mailbox and opening it. The legislative intent was to prevent people from opening private messages not intended for them. This is exactly

what Ms. Pham did and her conduct directly violates both the plain language of RCW 9.73.030 but also the legislative intent behind the Statute. A jury has concluded that Ms. Pham's possession of the phone was improper, Ms. Pham has conceded that while she possessed the phone she contacted someone more sophisticated than herself to access Peoples' text messages.

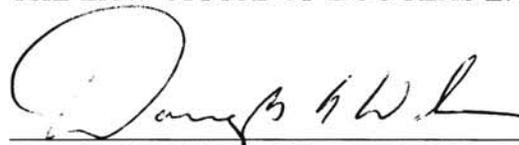
As stated in the Webster's Dictionary, "intercept" means "to take, seize or halt (someone or something on the way from one place to another) ; cut off from an intended destination. Webster's at 992. By stealing the "device" (the phone) she intercepted the message by cutting it off from the intended destination. Peoples had no way to retrieve her message other than with the phone which had been "taken or seized" by Ms. Pham.

## VI. CONCLUSION

Pham consciously converted People's cell phone and used it to invade People's private conversations for an improper purpose. It is hard to conceive of conduct less likely to fall under the Statute's broad intent. She intercepted the message by stealing the device precluding delivery. Accordingly, the Order dismissing the claim should be reversed and the case remanded back to the trial court for further proceedings.

Respectfully submitted this 22<sup>nd</sup> day of January, 2014.

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