

70046-4

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No. 70046-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LAUREL PEOPLES, individually,
Appellant,

vs.

KIM CHAU PHAM and "JOHN DOE" PHAM, and their marital
community,

Respondents.

BRIEF OF RESPONDENT

Coreen Wilson, WSBA #30314
Attorney for Respondents Pham
400 112th Ave NE, Suite 340
Bellevue, WA 98004
(425) 454-4455

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I. INTRODUCTION

This case involves a claim under RCW 9.73.030(1), a provision of the Washington Wiretap Act. Ms. Peoples alleged a claim under the Act against Ms. Pham because Ms. Pham viewed data on Ms. Peoples's phone. The trial court dismissed Ms. Peoples's claim, finding that Ms. Pham did not "intercept" a communication, which is required for liability to arise under the Act. In so holding, the trial court relied upon the plain meaning of "intercept" as well as upon federal case law, which universally supports dismissal in this case. Ms. Peoples now appeals, raising in support of her claim new arguments and legal authorities not presented below.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is Ms. Peoples precluded from presenting new arguments and authorities on appeal that were not presented to or considered by the trial court on summary judgment?

2. Did the trial court correctly grant summary judgment against Ms. Peoples on her wiretap claim because Ms. Pham did not intercept a transmission?

3. Did the trial court correctly grant summary judgment against Ms. Peoples on her wiretap claim because Ms. Pham did not use a device to record or transmit a communication?

III. STATEMENT OF THE CASE

This case arises out of a series of events that began when Ms. Peoples and Ms. Pham were involved in an auto accident. The accident occurred in an intersection, and both parties claimed to have had the green light. CP 10. Both parties were injured in the accident, and both parties brought injury claims against the other. CP 1-4; CP 10.

At the time the collision occurred, Ms. Peoples had her mobile phone either in her hand or on the dashboard of the car. CP 28, lns 15-20. When the collision occurred, the phone disappeared. *Id.* at 21-24. She tried to find the phone after the collision, but could not search for it because she broke her pelvis in the collision. CP 28, lns 3-8.

At some point after the collision, Ms. Pham came into possession of the phone. Defendant Pham's husband, Bryan Le, states that, several weeks after the collision, their son discovered the phone wedged underneath the hood of her car at the point at which the hood meets the windshield. CP 33-4. Ms. Peoples alleged that Ms. Pham acquired the phone nefariously. RP 9:12-19. In any event, the phone ended up in Ms. Pham's possession.

Ms. Peoples claims, and Ms. Pham admits, that Ms. Pham viewed data on the phone while the phone was in her possession. CP 49-50. Ms. Pham claims that she did so to identify the owner of the phone. CP 36, In

24 – CP 37, ln 13. The data accessed allegedly included a call log, text messages, and email messages. CP 31:12-20.

Once Ms. Pham realized that the phone belonged to Ms. Peoples, she returned the phone to her attorney, CP 36:13-23, who sent it Ms. Peoples’s insurance company, who then forwarded the phone along to Ms. Peoples. CP 39.

Following the collision, both parties brought claims for personal injury. CP 1-4; CP 10. Ms. Peoples amended her complaint during the course of the litigation to assert a claim against Ms. Pham under the Washington Wiretap Act for a violation of RCW 9.73.030(1), which imposes civil liability upon a person who “intercepts” a private communication by means of a “device...designed to record and/or transmit.” CP 6-8. Ms. Pham admitted that she accessed data on Ms. Peoples’s phone following the collision, but denied that her acts amount to a wiretap as defined by the Act. CP 11-12.

Ms. Pham moved for partial summary judgment on the wiretap claim, arguing both that there was no interception within the meaning of the statute and that there was no device used to record or transmit the communications. CP 9-18. Ms. Pham cited numerous Washington cases in support of her argument. *Id.* Ms. Peoples filed a counter-motion for partial summary judgment, but offered minimal analysis of the statute and

no case law from any jurisdiction in support of her position. CP 40-43. Her reply brief cited a single case. CP 56.

Argument on the motions for partial summary judgment was presented to King County Superior Court Judge Kimberly Prochnau. RP 1. At oral argument, counsel for Ms. Peoples attempted to advance a new theory in support of Ms. Peoples’s wiretap claim that he had not briefed. RP 7-11. The court declined to consider Ms. Peoples’s last-minute legal theory, and granted summary judgment in Ms. Pham’s favor. RP 16-18.

In granting the motion, the court concluded that an “interception” can only occur if the data is accessed when it is in transit “between points,” as required by the plain language of RCW 9.73.030. RP 15:15-25. Once the data arrives at its destination, it is simply stored data, and the statute does not apply to stored communications. RP 16:4-12. Because Ms. Pham did not view the data until after transmission was complete, there was no interception. RP 18:4-18.

In response to the new arguments raised at the hearing by counsel for Ms. Peoples, the court stated:

It’s interesting to hear this last comment [by counsel for Peoples] with regards to prior statutes, and not—prior statutes, not allowing people to read telegraphs and so forth, but I haven’t had any argument—I haven’t had any briefing on that issue, so I’m unable to determine whether the legislative history of those prior statutes should be read in conjunction with this statute, so I’m not considering that.

RP 18: 4-16. On appeal, Ms. Peoples advances the same argument regarding telegraphs that the trial court rejected as improperly presented.

IV. ARGUMENT

A. Standard of review.

In reviewing a summary judgment order, the Court of Appeals engages in the same inquiry as the trial court, evaluating the matter de novo. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). The appellate court considers the facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c); *Kruse*, 121 Wn.2d at 722.

B. Ms. Peoples is precluded from presenting new arguments on appeal that were not presented to, or considered by, the trial court.

Ms. Peoples did not cite or argue any case law in her counter-motion for summary judgment. Her reply cited a single case, *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002), in support of her argument that the “device” requirement of the wiretap statute was met. She did not cite any authority, either in briefing or in argument, to address

the interception requirement of the statute. Rather, in oral argument, Ms. Peoples's attorney suggested that viewing a text message or email was similar to viewing a telegram. In response, the trial court stated that the issue was not properly before the court because Ms. Peoples had failed to brief or argue it in her counter-motion. RP 18:9-16. Ms. Peoples did not avail herself of the opportunity to file a motion for reconsideration or otherwise attempt to brief her argument for the trial court.

Because she did not properly raise the argument on summary judgment, she is precluded from doing so now. RAP 9.12 explicitly forbids this practice, and states:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.

An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wash. App. 258, 265-66, 268 P.3d 958, 962 (2011). The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court. *Washington Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201, 1203 (1993). Ms. Peoples's argument related to telegrams is thus not properly before this court on appeal.

The court in *Silverhawk, LLC v. KeyBank Nat. Ass'n* refused to consider new legal arguments on appeal under similar circumstances. In *Silverhawk*, defendant KeyBank filed a motion to dismiss Silverhawk's claims under CR 12(b)(6). The motion was converted to a motion for summary judgment because additional evidence was submitted by the parties.

On summary judgment, KeyBank argued that it was released from the contract under the doctrine of accord and satisfaction because the parties negotiated an agreed upon fee to terminate the contract. Silverhawk argued that the fee KeyBank demanded was incurred, and must be calculated under the early termination provision of the contract. Silverhawk did not did not present any argument or evidence to support the conclusion that either party gave notice of an early termination date. In response to KeyBank's argument regarding accord and satisfaction, Silverhawk provided two paragraphs of conclusory argument that no agreement was reached.

The trial court found that an accord and satisfaction was made, and thus granted summary judgment on Silverhawk's claims. Silverhawk appealed.

On appeal, Silverhawk provided a detailed analysis of the early termination provision, and set forth an argument regarding its

applicability. The Court of Appeals, Division I, refused to consider this analysis and argument because it was untimely. The court held, “Because Silverhawk did not present its analysis of the contract to the trial court, this court will not consider it.” *Id.* at 266.

Our case is the same as *Silverhawk*. Ms. Peoples now advances arguments and sets for an analysis of the statute that she did not present to the trial court. In fact, the trial court explicitly stated during oral argument that it could not consider Ms. Peoples’ arguments regarding statutory interpretation because she failed to brief them. Because Ms. Peoples failed to properly present her arguments to the trial court on summary judgment, she is prohibited by both *Silverhawk* and RAP 9.12 from presenting them on appeal.

C. The trial court properly granted summary judgment on Ms. Peoples’s wiretap claim because Ms. Peoples did not intercept a transmission by means of a device.

The provision of Washington Wiretap Act at issue here, RCW 9.73.030, was enacted in 1967, the age of the rotary telephone. Although telecommunications technology has changed significantly since then, the Act itself has not changed to recognize these developments. It has, in fact, remained largely untouched.

Ms. Peoples’s claim relates specifically to RCW 9.73.030(1) of the Act, which imposes civil liability under the following circumstances:

(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 within or without the state 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.

RCW 9.73.030. There are thus four elements of a violation under the Act:

1. The conversation is private;
2. All participants have not consented to the interception of the communication;
3. The conversation was intercepted or recorded as it was being transmitted “between two or more individuals between points;”
4. The interception occurred by means of a device designed to record and/or transmit.

State v. Christensen, 153 Wn.2d 186, 192, 102 P.3d 789 (2005). Ms.

Peoples cannot satisfy the third and fourth elements in this case, because

the communications at issue were not “intercepted” by means of a “device...designed to record and/ or transmit.”

The interception requirement hinges on when the access occurred, e.g., the communication must have been intercepted between point A and point B. The statute specifies that the interception must occur “between points.” The device requirement, on the other hand, is concerned with how the access occurred. Under the statute, a “device” must be used to record or transmit the conversation. Neither the interception requirement nor the device requirement was met in this case.

1. No interception occurred because Ms. Pham did not intercept a communication as it was being transmitted between two points.

As set forth in the statute, an interception must occur “between points.” In this case, the text and email messages were sent to Ms. Peoples’s phone. At some point after they were received by Ms. Peoples’s phone, they were viewed directly from Ms. Peoples’s phone. There was no interception because the access did not occur during transmission.

Unfortunately, and perhaps surprisingly, Washington case law does not further define what it means to “intercept” a communication. The dictionary definition is “to take, seize or stop by the way or before arrival at the destined place.” *See, e.g., Webster's Third New International Dictionary* 1176 (1986). In other words, a transmission must be accessed

as it is being transmitted to its destination. This definition dovetails neatly with both the statutory language indicating that the interception must occur “between points,” and with the Washington cases that address interception.

In *State v. Faford*, 128 Wn.2d 476, 910 P.2d 447 (1996), the court held that using a police scanner to eavesdrop on a telephone call made via a cordless phone constituted an interception under the Act. This makes sense, because the police scanner was used to access the phone call during transmission. It intercepted the call between point A and point B.

In *State v. Corliss*, 123 Wn.2d 656, 870 P.2d 317 (1994), the court held that the act of listening in on a phone call via a tipped telephone receiver did not constitute an interception. In that case, the intended recipient of the phone call was a police informant, who tilted the receiver so that police officers could listen in. *Corliss*, 123 Wn.2d at 659. The court rejected the defendant’s wiretap claim, concluding:

Here the officers did not “intercept” an otherwise private communication by means of any kind of device. They simply listened, in person, to what they could hear emanating from the telephone.

Id. at 662. Looking to the dictionary definition of “intercept,” the court’s conclusion in *Corliss* is consistent. Listening in via a tipped receiver does

not involve accessing a transmission between point A and point B, and thus does not amount to an interception.

Likewise, in *State v. Gonzales*, 78 Wn. App. 976, 900 P.2d 564 (1995), the court held that answering someone else's phone is not an interception. *Gonzales* involved a phone call to the defendant's residence. A search of the residence was in progress, and a police officer answered the phone. The caller, unaware that he was speaking with a police officer, discussed a cocaine transaction that he and the defendant intended to make. The police officer arranged a reverse sting operation and arrested the defendant.

Even though the phone did not belong to the officer, and he did not have permission to use the phone, the court held that there was no interception. Applying the holding in *Corliss*, the court held that "the detective in the present case did not use a device or intercept a communication within the meaning of the statute." *Gonzales*, 78 Wn. App. at 982.

According to the statutory language and the relevant case law, in order for an interception to occur, it must take place "between points." In our case, the data was accessed directly from Ms. Peoples's phone. It was not intercepted "between points;" it was accessed after it had already arrived at its final destination. Just like in *Gonzales*, Ms. Pham used a

phone that did not belong to her to access information that was not intended for her. Because the access did not occur “between points,” the access does not amount to an interception.

In addition to considering Washington case law, the trial court in our case also relied in part on federal case law to reach the conclusion that no interception occurred. Federal courts have consistently held that an interception does not occur unless data is intercepted as it is in electronic transit, and before it reaches its destination.

Specifically, the trial court relied on *Global Policy Partners v. Yessen*, 686 F.Supp. 631 (E.D.Va. 2009). In that case, the plaintiff made a claim for unlawful interception of email communications under the Electronic Communications Privacy Act, 18 U.S.C. § 2511, as well as under the corresponding Virginia state statute. The plaintiff claimed that the defendant accessed her email inbox and viewed her messages without her permission. The court dismissed these claims, finding that no interception had occurred. In so holding, the court explained:

Courts applying the ECPA have consistently held that a qualifying “intercept” occurs only where the acquisition of the communication occurs contemporaneously with its transmission by its sender. Thus, interception includes accessing messages in transient storage on a server during the course of transmission, but does *not* include accessing the messages stored on a destination server.

Id. at 638. Because the messages were viewed once transmission was complete, no interception occurred.

Similarly, in *Miller v. Myers*, 766 F.Supp. 919 (W.D.Ark. 2011), the court dismissed a claim for unauthorized access to the plaintiff's email account because such access did not amount to an interception. The court recognized that email does not readily lend itself to "interception" within the meaning of the ECPA, but explained:

Simply because email is not readily susceptible to 'interception' does not mean that the courts should bend the language of the statute so it provides an additional avenue of relief to a supposedly aggrieved party.

Id. at 924. Bending the meaning of the statute to permit a cause of action is exactly what Ms. Peoples is asking the court to do here. She cannot show an interception under the meaning of the Act, so she has requested that the court turn a blind eye to technology, ignore the realities of the Information Age, and twist the statute into a shape that can contain her cause of action. Federal courts have unanimously refused to do this, and Washington Courts should do the same.

In fact, federal courts have declined to expand the meaning of the word "intercept" even though Congress has evidenced a desire to protect email communications, as is demonstrated by the enactment of the Electronic Communications Privacy Act. As the Third Circuit explained:

While Congress's definition of "intercept" does not appear to fit within its intent to extend protection to electronic communications, it is for Congress to cover the bases untouched.

Fraser v. Nationwide Mutual Ins. Co., 352 F.3d 107 (3rd Cir. 2003). Even though Congress has demonstrated a legislative intent to enact protections concerning electronic communications, federal courts have repeatedly declined to expand the protections beyond what is explicitly set forth in the ECPA.

In our case, the reasons for leaving the expansion of the Washington Wiretap Act to the legislature are even more compelling. There is no Washington equivalent of the Electronic Communications Privacy Act. The legislature of our state has shown no legislative intent to afford any special or additional protection to electronic communications aside from what is set forth in the plain meaning of the statute. There is no justification, therefore, to read any special protections or exceptions for electronic communications into the Wiretap Act.

Ms. Peoples may argue that under *State v. Roden*, 87669-0, 2014 WL 766681 (Feb. 27, 2014), an interception occurs any time a person views a text message on another party's phone without their permission. Such an argument would be incorrect, because the court in *Roden* does not apply when text messages are simply viewed.

Roden is a criminal case that involved a search of a criminal defendant's phone. In *Roden*, a police detective seized a criminal defendant's phone pursuant to arrest for possession of heroin. The detective then reviewed the data on the phone and found text messages between the criminal defendant and Roden. The detective used the phone to send a text message to Roden coordinating a drug deal. When Roden arrived to conduct the transaction, he was arrested.

Roden argued that the detective's actions amounted to an interception under the Wiretap Act. While the Supreme Court found an interception, it explicitly limited its holding as follows:

Detective Sawyer did not merely see a message appear on the iPhone. Instead, he manipulated Lee's phone, responded to a previous text from Roden, and intercepted the incoming text messages before they reached Lee. Whether it is also a violation of the act to access text messages that have already been received by the intended recipient and remain in storage is not the question before us today.

Id. at *6. The holding in *Roden* does not apply in situations in which a party simply views a text message without authorization. The detective's actions in *Roden* were far more egregious than simply viewing data. Not only did he conduct a warrantless search of the phone in a criminal context, but he used the phone to solicit incriminating messages from Roden which he could then intercept and use to arrange a sting operation. *Roden* involved an entirely different set of facts from our case. To apply

Roden to this case would subject to potential civil liability every person who found a phone and tried to ascertain its owner by viewing the data stored on the phone. Such a result was not the intent of the legislature in developing the Wiretap Act, and was not the intent of the court in Supreme Court in deciding *Roden*.

2. Ms. Pham did not use a device to record or transmit data on Ms. Peoples's phone.

Ms. Pham did not use a device to record or transmit the text messages or emails contained on Ms. Peoples's phone. She used the phone simply to view the data in the same exact manner that Ms. Peoples would have done. Ms. Peoples thus fails to meet the device requirement of the Act.

While a separate device need not be used to access the communications, *Townsend*, 147 Wn.2d at 674-75, the statute requires that the interception occur by means of a "device electronic or otherwise designed to record and/or transmit said communication." RCW 9.73.030. When a defendant views or hears a communication in the exact same manner that the intended recipient does, Washington courts have held that the device requirement was not met.

For example, in *State v. Corliss*, 123 Wn.2d 656, the court held that not only was the act of listening in on a phone call via a tipped

receiver not an interception, but that no device was used to record or transmit the eavesdropping. *Id.* at 662. Because no device was used to record or transmit, no violation of the Act had occurred. *Id.*

Similarly, in *State v. Wojtyna*, 70 Wn. App. 689, 855 P.2d 315 (1993), the act of viewing telephone numbers on a pager display did not involve the use of a device to record or transmit, and thus did not violate the Act. *Id.* at 696. Citing a federal case, the *Wojtyna* court held that viewing the display on a pager “did not utilize any electronic, mechanical or other device as proscribed by the statute.” *Id.* (quoting *U.S. v. Meriwether*, 917 F.2d 955 (6th Cir. 1990)). In our case, Ms. Pham used Ms. Peoples’s phone to view text and email messages, exactly like the detective in *Wojtyna* used the pager to view telephone numbers. Like *Wojtyna*, no device was used by Ms. Pham to record or transmit.

State v. Gonzales, 78 Wn. App. 976, reached the same result. The police officer who answered the phone did not have permission to use it. He tricked the caller into believing that he could facilitate a drug transaction, and used the opportunity to gather evidence against the defendant. However, the officer did not use any device to record or transmit the conversation; he simply used the phone itself in its typical fashion. Because a device was not employed to record or transmit, the police officer did not violate the Act.

Gonzales is exactly like our case. In our case, Ms. Pham used Ms. Peoples's phone to view messages in the exact same manner that Ms. Peoples herself would have used it. No device was used to record or transmit the text or email messages contained on the phone. Ms. Pham did not, therefore, violate the Act.

Ms. Peoples argues that *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002), supports her argument that the device requirement of the statute is met in our case. *Townsend*, however, provides no such support. In *Townsend*, a police detective recorded instant messages between himself and the defendant in such a fashion that he could review them at his leisure and print them out for purposes of criminal prosecution. *Id.* at 670. The court *Townsend* analyzed whether the communications could be considered "recorded" by a "device" given the fact that recording is inherent in computer usage. *Id.* at 674. The court concluded that the communications were recorded on a device as contemplated by the Act, even if the same device was used both to communicate and to record the communication. *Id.* at 674-75.

Our case involves a different issue. Unlike *Townsend*, Ms. Pham neither recorded nor transmitted the messages at issue here. Rather, she simply viewed them on the phone. Because Ms. Pham did not use the phone to record or transmit the messages, the device requirement of the

statute was not met. Summary judgment was thus proper on Ms. Peoples's wiretap claim.

D. The Phams are entitled to an award of attorney fees and costs.

As the prevailing parties on appeal, the Phams are entitled to an award of fees and costs under RAP 14.2.

V. CONCLUSION

Therefore, for the reasons set forth above, this court should affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 14th day of March, 2014.



COREEN WILSON, WSBA #30314
Attorney for Respondents Pham