

**FILED**

DEC 03 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 309681

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION III

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JASON YOUKER,

Appellant,

v.

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

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
FOR DOUGLAS COUNTY  
JUDGE JOHN M. ANTOSZ

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RESPONDENTS' BRIEF

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## I. INTRODUCTION

This case involves a dispute between Jason Youker, the appellant, and JoAnn Youker, his ex-wife. Mr. Youker is a convicted felon and he is not allowed to possess guns. JoAnn Youker accused Mr. 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, all of which were eventually dismissed. In this lawsuit, Mr. 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 already been to the Court of Appeals. On April 19, 2011, this Court 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 Co.*, 162 Wn.App. 448, 258 P.3d 60 (2011). The trial court subsequently dismissed the claim of invasion of privacy after briefing and re-argument on the motion of the Douglas County defendants.

## **II. RESTATEMENT OF THE ISSUES**

Did the trial court properly grant the Defendants' Motion for Summary Judgment and dismiss the invasion of privacy claim as a matter of law?

## **III. STATEMENT OF THE CASE**

### **A. Summary of the facts.**

The facts of this case were best summarized by the previous decision of this Court as follows:

On April 20, 2007, Jason Youker's ex-wife, JoAnn Youker, visited the Douglas County Sheriff's Office and notified the dispatch office that she wished to provide information on a crime committed by her ex-husband. CP 163. The dispatch office relayed notice of Ms. Youker's visit to Deputy Lisa White, who was next on rotation and would be assigned the matter but who was out on patrol, and Deputy William Black, who was in the deputies' room. CP 132, 163. The dispatch office simultaneously ran a check on Ms. Youker, and transmitted information to both deputies that Ms. Youker was subject to a no-contact order prohibiting her from having contact with her ex-husband and was subject to an outstanding arrest warrant out of East Wenatchee for [f]ail to appear or fail to comply. CP 52. Deputy White read the

information on the computer screen in her patrol car and returned to the sheriff's office to meet with Ms. Youker. CP 165

Deputy Black reviewed the information on the arrest warrant and no-contact order and met with Ms. Youker briefly while awaiting Deputy White's return from patrol. CP 131. He was told by Ms. Youker that her ex-husband was a convicted felon and was in possession of a rifle, which she knew was forbidden. CP 131. On Deputy White's arrival, Ms. Youker repeated the allegation to her, telling the deputy that she had asked her husband to get rid of the rifle several times because there were children in the house, but he refused. CP 166. Ms. Youker offered to show the officers where the rifle was hidden in the residence she claimed to share with Mr. Youker on Nancy Street in East Wenatchee. CP 52. She told them that she and Mr. Youker had lived together at the Nancy Street residence for the prior five months. CP 166. As these conversations were taking place, the dispatch office generated a report of its contact from Ms. Youker that indicated a different, Tonasket address for Ms. Youker. CP 148. The report could have been accessed by the deputies, but there is no evidence that they ever did access or become aware of the reported Tonasket address prior to traveling to Mr. Youker's home with Ms. Youker. CP 148.

After confirming that Mr. Youker was a convicted felon, the deputies drove Ms. Youker to the residence. CP 52. The deputies had been told by Ms. Youker that Mr. Youker had gone to Spokane for the day and would not be present at the home, and he was not. CP 52. Deputy White asked Ms. Youker if she had a key to the home and Ms. Youker said she did not, but that the home was unlocked. CP 168-169.

Relying on Ms. Youker's consent to search the home, the deputies entered and were directed by Ms. Youker to a 30–30 rifle and ammunition located under a bed. CP 52, 169. While inside the residence, Deputy White was shown mail addressed to Mr. Youker and Ms. Youker as well as Ms. Youker's clothing in a closet. Ms. Youker signed a consent to search form. CP 52, 170.

Upon returning to the sheriff's office, Deputy White learned that the nature of Ms. Youker's outstanding arrest warrant was a violation of a domestic violence protective order in favor of Mr. Youker. Deputy White arrested Ms. Youker on the warrant. CP 53, 201.

That afternoon, Deputy White also completed a notice of arrest and probable cause statement for the arrest of Jason Youker and completed a handwritten incident report, which identified an

address other than the Nancy Street address as a mailing address for Ms. Youker. CP 51, 72. The next day, Deputy White obtained signed statements from Ms. Youker's two minor children, one being her son with Mr. Youker, corroborating Mr. Youker's ownership of the rifle. CP 62-64.

Deputy White also pulled over and arrested Mr. Youker the next day. CP 75. When the deputy advised him that he was under arrest for being a felon in possession of a firearm, Mr. Youker asked her what gun and she responded it was the rifle under his bed. CP 75. According to Deputy White's report, Mr. Youker stated that the rifle belonged to Ms. Youker, who brought it with her when she moved in with her son. CP 75. The deputy's report also indicates that Mr. Youker told her, when asked, that he and his ex-wife had lived together at the residence for about four months. CP 75. Enroute to the jail, Mr. Youker accused Ms. Youker of setting him up and placing the gun under the bed; he said the gun had been in storage and she must have gotten it out of storage while he was in Spokane. CP 75.

On April 23, 2007, Mr. Youker made his initial appearance in court. The court determined that probable cause for the arrest existed based upon the evidence before it, which included Deputy

White's original notice of arrest and probable cause statement. CP 87-89. The information provided in the probable cause statement as to Ms. Youker's addresses and the no-contact order was limited to the following:

I confirmed that Jason Youker was a convicted felon. JoAnn advised me that they have lived together at this residence for approximately 5 months. JoAnn was not aware that the no contact order was still in [e]ffect.

CP 52.

Based upon the materials provided to the Douglas County prosecutor's office by the sheriff's office the prosecutor decided to file charges against Mr. Youker, and on April 25, 2007, an information was filed with the superior court charging Mr. Youker with unlawful possession of a firearm in the first degree, a felony. CP 85. The materials provided to the prosecutor's office by Deputy White included all of the witness statements, the arrest warrant for Ms. Youker, and the incident and dispatch-generated reports identifying other addresses for Ms. Youker. CP 85.

The charges against Mr. Youker were dismissed by Douglas County on August 6 because the United States Attorney's Office had elected to pursue a federal charge against Mr. Youker based upon the same incident. CP 86.

Mr. Youker moved in the federal proceeding to suppress evidence of the rifle and ammunition. CP 107. The district court heard evidence on October 26, 2007, and scheduled argument on the suppression motion for a later date. CP 124-221. Prior to the date for argument, the assistant United States attorney assigned to the case learned of witnesses whose testimony would contradict the government's key witness and determined that, if believed, their testimony could raise a reasonable doubt as to Mr. Youker's guilt. CP 108-109. The government filed a motion to dismiss the indictment without prejudice on February 21, 2008. CP 109.

Mr. Youker commenced this action against Douglas County and Deputies Black and White on April 17, 2009, in Chelan County Superior Court. CP 35. The court granted a motion to transfer the case to Douglas County over Mr. Youker's objection. CP 3-4.

Following the transfer to Douglas County, the defendants moved for summary judgment. CP 104. The trial court granted the motion. CP 251.

Mr. Youker filed a motion for reconsideration and submitted further declarations from himself and Ms. Youker, attesting that he had allowed her to stay with him for only several weeks in December 2006, a time when she and his son were otherwise

homeless; that he insisted that she leave at the end of December at which point she moved to her parents' home in Tonasket; that in late March 2007 she learned that Mr. Youker was in a new relationship and began following him, a violation of the no-contact order that he reported; that on the day the home was searched, she had taken her rifle and ammunition to Mr. Youker's home, which she knew would be unlocked because his employees needed access to inventory at his home; and that she placed the rifle and ammunition under his bed, and then went to the Douglas County sheriff to file the criminal complaint. CP 260-266.

*Youker*, 162 Wn.App. at 453-457 (internal citations omitted).

#### **B. Procedural History.**

The Court of Appeals has already concluded that Mr. Youker's claims for malicious prosecution, false arrest, and false imprisonment were properly dismissed as a matter of law. Specifically, this Court has already decided that: (1) probable cause to arrest was established as a matter of law; (2) Deputy White made a full and fair disclosure, in good faith, of what was learned during the investigation; (3) Mr. Youker failed to present evidence demonstrating any genuine issue of fact regarding malice; and (4) the action of the prosecutor was a superseding and

intervening cause and so the search was not the legal cause of injury or damages occurring after the fully informed decision to prosecute.

After establishing these legal conclusions as the law of the case, this Court then remanded to the trial court the claim of invasion of privacy for additional briefing and re-argument. *Youker*, 162 Wa. APP. at 468. On May 7, 2012, the trial court granted the Douglas County defendants' second motion for summary judgment and again dismissed the invasion of privacy claim as a matter of law. CP 381-384. A subsequent motion for reconsideration was also denied. CP 402.

#### IV. LEGAL ARGUMENT

**A. The trial court properly granted the Defendants' motion for summary judgment and dismissed the invasion of privacy claim 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 Mr. Youker failed to present any evidence to support his claim for damages, and because JoAnn Youker gave consent to search the property.

**i. The evidence presented did not support a claim for invasion of privacy.**

Mr. Youker continues to argue that he is entitled to damages because his constitutional right to privacy was violated when the Defendant deputies entered his home without a search warrant. However, 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).

As such, 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. *Id.*

Like in *Fisher*, Mr. 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 Mr. Youker. *Id.* at 879.

In addition, the trial court's order properly dismissed the invasion of privacy claim because all damages claimed by Mr. Youker were barred by the probable cause finding and the prosecutor's fully informed decision to prosecute. The only damages potentially recoverable by Mr. 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 Mr. Youker.

Mr. Youker suffered no physical injury during the search

because he was not present when the deputies conducted their search. *Youker*, 162 Wn.App. at 454. Mr. 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 Mr. Youker suffered damage to his reputation during the course of the search because JoAnn Youker was the only individual present. All of Mr. Youker's claimed damages, to the extent any were actually sustained, were suffered during and after the time of his arrest.

Mr. 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 Mr. Youker were barred by the probable cause finding and the prosecutor's fully informed decision to prosecute. The only damages potentially recoverable by Mr.

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.), and which are not barred by the prosecutor's fully informed decision to prosecute

As the record contains no evidence or claims of any damages directly related to the search (e.g. damages for physical injury, property damage, or injury to reputation during the course of the search), Mr. Youker claims no recoverable damages. The entirety of the damages claimed by Mr. Youker relate to the discovery of the incriminating evidence, arrest, and consequent criminal prosecution, which the trial court and the Court of Appeals previously found are barred based upon the prosecutor's informed decision to prosecute.

The trial court properly dismissed the invasion of privacy claim because the evidence presented did not support the claim. There was no evidence of liability and there was no evidence of recoverable damages

**ii. JoAnn Youker gave consent to search the property.**

"Consent to a search establishes the validity of that search if the person giving consent has the authority to so consent." *State v. Leach*, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989). "Under article

I, section 7, whether a person can consent to the search of a premises is based upon that person's independent authority to so consent and the reasonable expectations of his co-occupant about that authority." *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). "The existence and scope of common authority is a legal question which must be determined by the court based upon the facts of each case." *Id.* at 11.

In *Morse*, the Washington Supreme Court analyzed common authority to consent to search as follows:

Common authority to consent to a search is based upon authority to control the premises. A cohabitant who has common authority to use and control the premises has authority to consent to a search that is within the scope of that authority. Authority to control is determined by the shared use of the premises, the reasonable expectations of privacy, and the degree to which a cohabitant has assumed the risk that others will consent to a search.

*Id.* at 15. "The touchstone of the inquiry is that the person with common authority must have free access to the shared area and authority to invite others into the shared area." *Id.* at 10-11. Where a guest is more than a casual visitor and has "run of the house," her lesser interest in the property is sufficient to render consent to search, but effective only as to the areas of the home where a

visitor would normally be received or where the person has free access. *Id.* at 11. The common authority test rests “on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” *Leach*, 113 Wn.2d at 739.

In this case, the deputies received consent to search from JoAnn Youker, who represented to the deputies that she resided at the property and had been doing so for approximately five months. *Youker*, 162 Wn.App. at 454. At the time of search, the evidence indicated that JoAnn Youker had sufficient common control and access to the property as follows: (1) JoAnn Youker was storing belongings at the property, including clothing within the bedroom; (2) JoAnn Youker had access to the property and was aware the property was unlocked; and (3) JoAnn Youker received mail at the property. *Id.* Mr. Youker assumed the risk that JoAnn Youker might permit a search of the residence by permitting her to store belongings in the bedroom, receive mail at the property, and have access to the residence.

Regardless of the subsequent testimony of JoAnn Youker indicating that she did not reside at the property, in contradiction to her previous statements to the deputies, the evidence in the record indicates that JoAnn Youker had free access to the property, including the bedroom where she kept clothing, and that Mr. Youker acquiesced in such possession and control. *Id.*

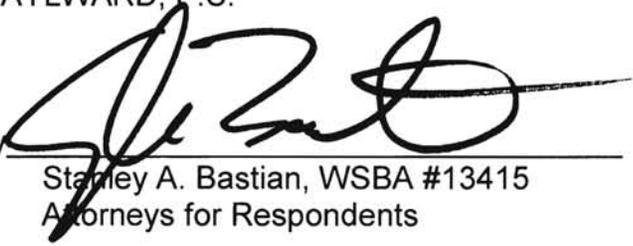
As JoAnn Youker had common authority to consent to the search under the *Morse* test, the deputies' search was legal.

#### V. CONCLUSION

This Court should affirm the trial court's order and dismiss this appeal.

RESPECTFULLY SUBMITTED this 29 day of November, 2012.

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

By 

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JANE DOE BLACK, a marital )  
community, )  
 )  
Respondents. )  
\_\_\_\_\_)  
STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF CHELAN )

KIMBERLY D. WHITE, being first duly sworn on oath,  
deposes and says: That she is, and all times hereinafter mentioned  
was, a citizen of the United States of America and a resident of the  
State of Washington, over the age of twenty-one (21) years, and  
competent to be a witness in this action and not a party thereto;

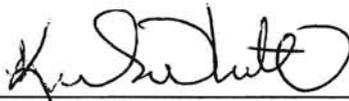
That on the 29<sup>th</sup> day of November, 2012, she mailed the original and one copy of Respondents' Brief in this action by depositing in the United States mails, postage prepaid, the original and one copy of said Respondents' Brief addressed as follows:

Ms. Renee S. Townsley  
Washington State Court of Appeals, Division III  
500 North Cedar Street  
Spokane, WA 99201-1905

and mailed copies of said Respondents' Brief by depositing in the United States mails, postage prepaid a copy of Respondents' Brief to:

Ms. Julie A. Anderson  
25 North Wenatchee Avenue, Suite 106  
Wenatchee, WA 98801

DATED this 29<sup>th</sup> day of November, 2012.

  
\_\_\_\_\_  
KIMBERLY D. WHITE

SUBSCRIBED AND SWORN to before me this 29<sup>th</sup> day of November, 2012, by Kimberly D. White.



  
\_\_\_\_\_  
Typed/Printed Name Camilla Lillquist  
NOTARY PUBLIC  
In and for the State of Washington.  
My commission expires 10.29.15