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DISTRICT IV

February 19, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2017AP472 Zachary Zugin v. Annmarie Geiss (L.C. # 2015CV1602)

Before Blanchard, Kloppenburg, and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Annmarie Geiss appeals a civil judgment that failed to find Zachary Zugin liable for invasion of privacy after he accessed her laptop to install keylogger software and surreptitiously reviewed her emails, bank statements, and other personal information. She contends that the circuit court erroneously determined as a matter of law that a laptop is not a "place" where privacy can be invaded within the meaning of WIS. STAT. § 995.50(2)(a) (2015-16),[1] and consequently provided an erroneous instruction to the jury that accessing her computer or

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

information would not "by itself" be an invasion of privacy. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm for the reasons discussed below.

The statute recognizing a right of privacy in Wisconsin defines an "invasion of privacy" as:

> Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, *in a place* that a reasonable person would consider private or in a manner which is actionable for trespass.

WIS. STAT. § 995.50(2)(a) (emphasis added). The statute further provides that the right of privacy it recognizes "shall be interpreted in accordance with the developing common law of privacy …." WIS. STAT. § 995.50(3).

In ***Hillman v. Columbia County***, 164 Wis. 2d 376, 392, 474 N.W.2d 913 (Ct. App. 1991), this court held that jail employees did not invade the statutory privacy of an inmate by opening an envelope containing his medical records and disclosing information contained therein to other inmates and staff, because a file of medical records did not constitute a "place" under WIS. STAT. § 995.50(2)(a)—a term whose plain meaning the court defined as being "geographical" in nature. Relying upon ***Hillman***, the circuit court here concluded that a laptop is not a geographical place, and therefore is not protected by the invasion of privacy statute.

On this appeal, Geiss first argues that ***Hillman*** was wrongly decided because the plain meaning of the term "place" is broader than geographical locations. Such an argument must be presented to the Wisconsin Supreme Court or the legislature, however, because this court is bound by our own prior cases. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

Geiss next argues that ***Hillman*** can be distinguished because, unlike a medical file, a laptop is "a physical thing" with weight and form and dimensions, akin to a filing cabinet with a definite location that "can be used to protect what is within from prying eyes." We are not persuaded, however, that a laptop is anymore a geographical place than the paper medical file in ***Hillman*** or the envelope in which it was concealed. That is, we understand ***Hillman*** to define the term place by reference to a fixed geographic location, not by reference to how tangible an item containing private information might be.

Geiss further contends that ***Hillman*** is not controlling because WIS. STAT. § 995.50(3) mandates that the right to privacy "be updated to take into account changes in the common law." Geiss then cites a new statute that has a cross-reference to the invasion of privacy statute and a federal district case as examples of changes that have occurred since ***Hillman*** was issued.

First, we note that statutes do not constitute common law. Furthermore, in our view the fact that the legislature has addressed various forms of electronic communications in new statutes without changing the language of WIS. STAT. § 995.50(2)(a) actually undercuts the argument that the legislature intended to broaden the scope of the invasion of privacy statute to include electronic data. Instead, it appears that the legislature has provided another avenue of relief for such claims. *See, e.g.,* WIS. STAT. § 968.31(2m).

As to the federal case, in ***Fischer v. Mt. Olive Luther Church, Inc.***, a federal district court stated that it was not bound by ***Hillman*** because the decision had not been issued by the highest court of this state. ***Fischer***, 207 F. Supp. 2d 914, 927 (W.D. Wis. 2002). The court then concluded that the statutory term "place" was broad enough to encompass "a person's private belongings as long as the place these private belongings are intruded upon is one that a

reasonable person would consider private." ***Id.*** at 928. If we were writing on a blank slate, this approach might well have merit. Again, however, ***Hillman*** establishes the approach we must follow, and a federal district court's decisions are not binding upon this court.

We turn next to the jury instruction. The special verdict that the circuit court submitted to the jury included the question, "Did Mr. Zugin violate Mr. Geiss's right to privacy by entering her bedroom?" Relevant to this claim, the circuit court instructed the jury:

> Ms. Geiss claims that Mr. Zugin invaded her privacy by entering her bedroom. To prove this claim, Ms. Geiss must prove the following three elements:
>
> 1. Mr. Zugin intentionally intruded upon the privacy of Ms. Geiss.
>
> 2. The intrusion by Mr. Zugin was of a nature that would be highly offensive to a reasonable person; and
>
> 3. The intrusion was in a place that a reasonable person would consider private.
>
> Accessing Ms. Geiss's computer or information in it is not by itself an invasion of privacy under Wisconsin law.

Geiss contends that the circuit court's instruction, in particular the final sentence, "misled the jury into thinking that if Zugin went into Geiss's bedroom solely to get the laptop, it could not be an invasion of privacy." We disagree. The use of the phrase "by itself" does not suggest that the jury could not consider Zugin's use of Geiss's laptop. Rather, the phrase, in conjunction with the instruction as a whole, correctly conveyed to the jury that Zugin's use of the laptop had to be considered in the context of his entry into her bedroom. In other words, under the given instruction, the jury needed to consider both the *nature* of the intrusion, including accessing information on Geiss's laptop, and the place the intrusion occurred—*i.e.*, Geiss's bedroom.

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals