IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 23, 2008 Session

F. CHRIS CAWOOD v. LINDA BOOTH, ET AL.

Appeal from the Circuit Court for Roane County
No. 13059 Russell E. Simmons, Jr., Judge

No. E2007-02537-COA-R3-CV - FILED NOVEMBER 25, 2008

The plaintiff, F. Chris Cawood, is an attorney. He represented Tammy Clark[1] ("the Client") in a divorce case. During the post-judgment phase of that representation, the plaintiff and the Client engaged in a sexual relationship. On occasion, while in the plaintiff's office, the plaintiff would masturbate in the presence of the Client, following which he would give her a credit on her bill. After she complained to local authorities, the Roane County Sheriff's Department equipped the Client with concealed audio and video equipment. Thereafter, unbeknownst to the plaintiff, she videotaped him while he was masturbating. During this event, the Client hit him on the buttocks and pinched his nipples. Following this event, the videotape was placed under the control of Linda Booth of the Sheriff's Department. Booth gave the video to another investigator, Dennis Worley, who happens to be the Client's uncle. Worley was not involved in the investigation but wanted to see the videotape to ascertain if his niece had done anything illegal. Worley viewed the videotape in an office shared by officers Randy Scarbrough and Jon French. During the viewing, the door to the office was open. The video was viewed not only by Worley, but also by Scarbrough and French, a bail bondsman who was passing by the office, and others. The plaintiff filed suit against Booth, Worley, Scarbrough and French alleging (1) a violation of the Wiretapping and Electronic Surveillance Act of 1994, (2) invasion of privacy by public disclosure of private facts, and (3) outrageous conduct. The trial court granted all defendants summary judgment as to all claims. Plaintiff appeals. We vacate the grant of summary judgment to Booth and Worley on the plaintiff's outrageous conduct claim. In all other respects, the trial court's judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Vacated in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Dan Channing Stanley, Knoxville, Tennessee, for the appellant, F. Chris Cawood.

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[1] Ms. Clark is referred to as Tammy Brooks in the complaint. In previous related proceedings, she was known as Tammy Clark.

John C. Duffy, Knoxville, Tennessee, for the appellees, Linda Booth, Dennis Worley, Randy Scarbrough, and Jon French.

OPINION

I.

The plaintiff is an attorney in Kingston. In 1999, he masturbated in front of the Client in return for reducing her legal bill by $100 per episode. After this occurred on two occasions, the Client complained to a local judge and eventually was referred to the Roane County Sheriff's Department. Based on her allegations, the Roane County Sheriff's Department began an investigation and provided electronic equipment to the Client so she could audiotape and videotape her next encounter with the plaintiff. When she returned to the plaintiff's office, he masturbated while the Client hit him on the buttocks with a belt and pinched his nipples. Following this, the plaintiff reduced her bill by $100. While the audio equipment operated properly, the camera in the Client's purse did not function as planned; hence, there was no videotape of the encounter. The Sheriff's Department believed that a videotape was necessary, so the Client returned to the plaintiff's office one more time. Upon her return, essentially the same sexual activity occurred, but this time both the audiotape and videotape equipment worked properly. Several people who worked at the Sheriff's Department but were not involved in this case, as well as a bail bondsman, were permitted to view the videotape. Criminal charges eventually were brought against the plaintiff and he was found guilty of two counts of attempting to patronize prostitution. The plaintiff appealed his conviction to the Court of Criminal Appeals. That Court determined that there was insufficient evidence to support the finding of guilt and the convictions were reversed.[2]

The plaintiff initially filed suit in the United States District Court for the Eastern District of Tennessee asserting various federal and state law violations. The crux of the plaintiff's lawsuit involved allegations of an invasion of privacy and a violation of 42 U.S.C. § 1983. The federal court ultimately dismissed all of the plaintiff's federal claims and expressly declined to exercise supplemental jurisdiction over the state law claims. The state claims were dismissed without prejudice. The plaintiff appealed the dismissal of the federal claims to the United States Court of Appeals for the Sixth Circuit. In April 2005, the Sixth Circuit filed a memorandum opinion affirming the dismissal of the plaintiff's federal claims.

In March 2004, the plaintiff re-filed his state law claims in the trial court. The plaintiff sued Linda Booth, Dennis Worley, Randy Scarbrough, and Jon French. At all relevant times, each of these defendants was employed by the Roane County Sheriff's Department.[3] The plaintiff asserted claims for: (1) invasion of privacy involving public disclosure of private facts; (2) invasion of privacy pursuant to Tenn. Code. Ann. § 39-13-601 and a violation of Tenn. Code Ann. § 40-6-301, both of which statutes are part of the Wiretapping and Electronic Surveillance Act of 1994; and (3)

[2] The Supreme Court denied the State's application for permission to appeal.

[3] All four defendants in the present case were defendants in the federal court proceedings.

outrageous conduct. Among other things, the plaintiff claimed that the defendants improperly allowed third parties not connected with the investigation to view the videotape. The plaintiff then claimed that

> [f]or those who did not see the video, defendants were more than glad to relate the contents to them. For over a week, the video tape and its contents were "the talk of the jail." Officers related the contents to clerks at the Rocky Top in Kingston. It was talked about between jailers at Walmart. Defendant Scarbrough told a new-hire jailer who was hired a week after the event about the contents. Employees of the courthouse and lawyers found out about the contents. . . .
>
> Plaintiff heard about the unauthorized playing of the video three days later from his mother in Knox County, who had been told by another son, who had been told by someone at church, who had been told by someone in Oak Ridge. Thus, the disclosure of the video and its contents had spread to at least three counties in three days.

The defendant Booth was an investigator with the Roane County Sheriff's Department. She was the individual whose responsibility it was to investigate the complaint made by the Client. Booth testified at deposition that she first became involved with the criminal investigation into the plaintiff's conduct when an assistant district attorney asked her to contact the Client. When she contacted her, the Client stated that the plaintiff had represented her in a divorce and that she still needed his assistance with post-divorce property issues. The Client told Booth that she and the plaintiff had been having sexual relations, but that "he was starting to get strange and wanting her to come after hours and she was afraid." Following this conversation, the Client agreed to return to the plaintiff's law office and to do so while wearing a wire and carrying a concealed camera. Booth acknowledged that she was not certain at that particular time that anything illegal had taken place, but she was concerned because the Client stated that the plaintiff was crediting the Client's legal bill depending on what sexual activity took place.

Booth shared an office at the Roane County Sheriff's Department with defendant Worley, who, as previously noted, is the Client's uncle. Worley's sister is the Client's mother. According to Booth, Worley told Booth that his sister had inquired about whether the Client had done anything illegal. Because of this inquiry, Worley asked Booth if he could view the videotape. Booth agreed and gave him the videotape even though he was not involved in the investigation of the plaintiff.

Worley acknowledged in his deposition testimony that he was not involved in the investigation. Worley admitted that he took the videotape to the office of defendants Scarbrough and French for viewing. He stated that this office was the most secure place at the Sheriff's Department to view a videotape. The defendants acknowledge that Worley permitted "a few corrections officers and one bondsmen [to see] a portion of the videotape."

Andy Kirkland is employed by City Bonding Company in Kingston. Kirkland testified that he viewed the videotape "probably the same day" that the plaintiff was arrested. Kirkland was in the Scarbrough/French office when he viewed the videotape. Kirkland testified as follows:

> Q. Now, on that particular day, . . . what drew your attention to that room?
>
> A. I just heard everybody out in the hallway talking about the video.
>
> Q. And when you say everybody, about how many . . . people were out there? . . .
>
> A. It's a small office, I know I was there, Jon French was there, Randy Scarbrough was there, Sam Bolden was there, Dennis Worley was there. Now, there was some people at the doorway back there, too, I could hear talking, but I don't know who they were. . . . [There were] a lot of people coming and going in the hallway. . . .
>
> Q. Was the video capable of being seen from looking in from the hallway door?
>
> A. Probably. . . .
>
> Q. And did you go down to the room yourself?
>
> A. Yes.
>
> Q. And you went in where the investigators were or the people you described as being in there?
>
> A. Yes.
>
> Q. Did they ask you to leave?
>
> A. No.
>
> Q. Did they have just the video or did they have an audio that played with it?
>
> A. Just the video.
>
> Q. Now, who if you can tell, who was in charge of actually playing the video?

> A. It was on when I got there and I don't know who put it on. I don't know, I saw it till it played to the end … but I believe Dennis Worley had a remote for it. . . .
>
> Q. Now, tell us in your own words, describe the character of the occasion, were people very solemn, were they laughing, was it a hilarious event, or how would you describe it?
>
> A. Up until I walked in the room, it was just kind of loud in the hallway and when I walked in the room, it was quiet, of course everybody was watching then, you know, and it wasn't loud. And when I left, I left immediately thereafter, I never heard anything else about it till I came back later that day and it was still kindly the buzz, you know. . . .
>
> Q. About what length of time would you have been in there? . . .
>
> A. Fifteen minutes, maybe. . . .
>
> Q. Now, if you can, estimate the total number of people who were either in the office or standing outside there where they could have had access to the video, viewing it?
>
> A. Six to eight, I would guess.

The defendants filed a motion for summary judgment asserting that the undisputed material facts establish that they are entitled to judgment as a matter of law on all three claims asserted by the plaintiff. The trial court agreed and filed a memorandum opinion granting the motion. According to the trial court:

> Plaintiff alleges that Defendants have committed the tort of invasion of privacy, in particular the public disclosure of private facts.
>
> The disclosure alleged by Plaintiff consisted of a single showing of a videotape that was in the possession of Defendant Booth who gave the tape to Defendant Worley to view. The videotape was viewed by Defendant Worley in the office of Defendants Scarbrough and French who also viewed the tape with two persons not named as defendants.
>
> Plaintiff's position is that from the viewing of the videotape the Defendants then publicly disclosed the private facts by conversations they had with others. Although there are no specific dates or specific conversations alleged (other than matters that are hearsay), the conversations happened a short time after the viewing. The viewing occurred on or about June 24, 1999, and the first lawsuit filed by

Plaintiff concerning his claim for invasion of privacy was in Federal Court on May 8, 2000.

In the case of West v. Media General Comergence, Inc. 53 S.W.3d 640 (Tenn. 2001) the Supreme Court has found in its discussion of invasion of privacy, in particular false light claims, that the claims should be limited to the same statute of limitations as libel and slander. In other words in a lawsuit involving invasion of privacy if the actionable tort involves words, the statute of limitations is six (6) months, and if the actionable tort involves print, writing, pictures, etc. then the statute of limitations is one (1) year.

In the event Plaintiff is alleging oral public disclosure of private facts by Defendants, the Court is sustaining the Motion for Summary Judgment since the lawsuit is filed later than six (6) months after disclosure.

As concerns the public disclosure of private facts the Tennessee Appellate Courts have adopted Restatement (Second) of Torts § 652(d) 1976 and the reasoning in Beard v. Akzona, Inc., 517 F. Supp. 127 (E.D. Tenn. 1981) that publicly "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."

There was no communicating to the public at large, and the limited exposure of one showing to a small group was not sufficient to make out a cause of action for invasion of privacy. Plaintiff held a news conference shortly after the viewing during which he alluded to a videotape and to the contents. Plaintiff also sent a fax to law

> enforcement agencies which alluded to the video and its contents.[4] Plaintiff's own actions created more public interest in the video than did the viewing of the video, and Plaintiff by his own actions made the alleged private acts public information thereby waiving any privacy interest.
>
> In addition, the Supreme Court of Tennessee has found that these same audiotapes and videotapes are public records, and thus are available for public access.[5]
>
> Based on the above the Court finds that the Defendants' Motion for Summary Judgment concerning the Plaintiff's claim of public disclosure of private facts should be sustained.…
>
> The Plaintiff has alleged the Defendants violated T.C.A. § 36-13-601 *et seq.* and T.C.A. § 40-6-301 *et seq.* and seeks compensatory damages under T.C.A. § 39-13-603. The pertinent facts that are not disputed is that a client of the Plaintiff with her consent allowed the

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[4] A couple of months after the plaintiff's arrest, he sent a facsimile to several law enforcement agencies, various attorneys, and the news media. The facsimile stated:

> **WARNING!**
>
> **Do no [sic] masturbate in Roane County.**
>
> A special task force composed of the Attorney General, . . . Sheriff Haggard, Linda Booth, TBI Agent Jason Legg, Deputy Jon French, and Harriman officer Kris Mynatt is undertaking to stamp out masturbation in Roane County.
>
> This team will send someone into your home with video and audio equipment to tape you masturbating (the audio is to see if you are enjoying it).
>
> Beware who you let into your home. By no means let . . . Tammy Clark into your home.
>
> You will be arrested for masturbation and taken to the Roane County Jail.
>
> If you want to join this task force, please contact the sheriff's office or the District Attorney's office.

(Capitalization and bold print in original).

[5] In ***State v. Cawood***, 134 S.W.3d 159 (Tenn. 2004), another related proceeding, the Supreme Court addressed the plaintiff's motion seeking possession of the audio and videotapes that were used in his criminal trial. The Supreme Court denied the request, concluding that the tapes were public records and that the plaintiff's asserted privacy claim under the Wiretapping and Electronic Surveillance Act was without merit because "any limitations imposed on the use of intercepted communications do not apply to evidence admitted at trial and which ultimately becomes part of the appellate record." ***Id***. at 166 (citations omitted).

Defendant, or Defendants, to equip her with devices that recorded the audio and video acts of the Plaintiff.

It is the position of Plaintiff that Defendants allowed persons outside the investigation to hear and/or view the contents which violated T.C.A. § 40-6-[306](a) and (b). The Plaintiff in his brief and orally argues that T.C.A. § 39-13-603 allows civil actions where there is a "violation of § 39-13-601 or title 40, chapter 6, part 3".

However, Plaintiff in his brief and oral arguments left out the first part of T.C.A. § 39-13-603(a) which states "(a) Except as provided in § 39-13-601(a)(4)". T.C.A. § 39-13-601(a)(4) states:

> "It is lawful under §§ 39-13-601 - 39-13-603 and title 40, chapter 6, part 3 for a person acting under the color of law to intercept a wire, oral or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

Since Plaintiff's client had given prior consent to the interceptions, the civil action allowed under T.C.A. 39-13-603 is not available to Plaintiff, and Defendant's Motion for Summary Judgment is sustained.

In addition, Plaintiff filed his lawsuit in Federal Court and from the pleadings filed as exhibits by Defendants it appears his cause of action concerning the statutory cause of action under T.C.A. 39-13-603 was not carried forward after a dismissal of state claims. Plaintiff did not offer any pleadings in rebuttal, and the Court finds that this claim was not filed within the statute of limitations or within any savings statute, and Summary Judgment is sustained....

Plaintiff has also claimed that the actions of Defendants Booth and French were outrageous in that they attempted to create a crime where none existed, videotaped a person engaged in consensual sexual activity, and then allowed others to view the tapes.

These Defendants were confronted with a victim who had taken her complaints of Plaintiff's actions to a Judge who referred her to an Assistant District Attorney who referred her to the Defendants for investigation. These Defendants investigated the complaint by use of hidden devices to videotape and audiotape the communications between Plaintiff and the victim. This information was taken to a

> Grand Jury and an indictment was returned. None of these actions of Defendants up to this point can be called outrageous.
>
> The videotape and audiotape were in the possession of Defendant Booth who allowed Defendant Worley to have the tape for a short period of time on his claim of viewing it for personal concern of a relative. The videotape was viewed by only three others besides the investigators Booth and French. While the actions of the Defendants were neither professional nor respectful of the person of the Plaintiff, the Court cannot find that the actions rise to the level of outrageous conduct. Therefore, the Defendants' Motion for Summary Judgment is sustained.…

(Footnotes added).

II.

The plaintiff appeals raising four issues, which we take verbatim from his brief:

> 1. Did the trial court err in ruling that Defendants' actions did not violate Tennessee's wire tapping statutes set forth in T.C.A. § 40-6-301 *et seq*. and T.C.A. § 39-13-603 *et seq*.?
>
> 2. Did the trial court err in ruling that Plaintiff's causes of actions were not carried forward after a dismissal of state claims from Plaintiff's federal court lawsuit, and thus barred by the statute of limitations?
>
> 3. Did the trial court err in ruling that a genuine issue of material fact did not exist regarding Plaintiff's claim of outrageous conduct?
>
> 4. Did the trial court err in ruling that a genuine issue of material fact did not exist regarding Plaintiff's claim of public disclosure of private facts and other privacy rights?

The defendants maintain that the trial court's ruling was proper in all respects. Alternatively, the defendants argue that the trial court's judgment should be affirmed because all of the defendants are entitled to common law immunity because they acted reasonably and believed that their actions were lawful.

III.

In ***Teter v. Republic Parking System, Inc.***, 181 S.W.3d 330 (Tenn. 2005), the Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. The High Court stated as follows:

> The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact. *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, the appellate court must view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. *See Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Id. at 337. Against this backdrop, we now proceed to evaluate the trial court's grant of summary judgment.

IV.

A.

We first address the plaintiff's statutory claim. As previously noted, Tenn. Code Ann. § 39-13-601 *et seq.* (2006) and § 40-6-301 *et seq.* (2006) are part of the Wiretapping and Electronic Surveillance Act of 1994. In relevant part Tenn. Code Ann. § 39-13-601(a)(1) and (b)(4) provide as follows:

> (a)(1) Except as otherwise specifically provided in §§ 39-13-601 - 39-13-603 and title 40, chapter 6, part 3, a person commits an offense who:
>
> (A) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

> (B) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:
>
> (i) The device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
>
> (ii) The device transmits communications by radio, or interferes with the transmission of the communication;
>
> (C) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection (a); or
>
> (D) Intentionally uses, or endeavors to use, the contents of any wire, oral or electronic communication, knowing or having reason to know, that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection (a).
>
> * * *
>
> (b)(4) It is lawful under §§ 39-13-601 - 39-13-603 and title 40, chapter 6, part 3 for a person acting under the color of law to intercept a wire, oral or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Tenn. Code Ann. § 39-13-601(a)(1) and (b)(4).

Tenn. Code Ann. § 39-13-603 provides for a civil cause of action for violations of the Wiretapping and Electronic Surveillance Act of 1994 and establishes a two year statute of limitations. The pertinent provisions of this section are as follows:

> (a) *Except as provided in § 39-13-601(b)(4)*, any aggrieved person whose wire, oral or electronic communication is intentionally intercepted, *disclosed, or used* in violation of § 39-13-601 or title 40, chapter 6, part 3 may in a civil action recover from the person or entity that engaged in that violation the following relief:
>
> (1) The greater of:

> (A) The sum of the actual damages, including any damage to personal or business reputation or relationships, suffered by the plaintiff and any profits made by the violator as a result of the violation; or
>
> (B) Statutory damages of one hundred dollars ($100) a day for each day of violation or ten thousand dollars ($10,000), whichever is greater;
>
> (2) Punitive damages; and
>
> (3) A reasonable attorney's fee and other litigation costs reasonably incurred.
>
> * * *
>
> (d) A civil action under this section or title 40, chapter 6, part 3 may not be commenced later than two (2) years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.

(Emphasis added).

The plaintiff is seeking damages pursuant to Tenn. Code Ann. § 39-13-603. The language in the statute quite clearly states at the beginning "Except as provided for in § 39-13-601(b)(4)." We interpret this to mean that there can be no civil cause of action when a defendant has complied with the provisions of § 39-13-601(b)(4). We conclude that the undisputed material facts demonstrate that Tenn. Code Ann. § 39-13-601(b)(4) was complied with in all respects given that the Client unquestionably consented to the use of the audiotape and videotape. *See* ***State v. Bacon***, No. 03C01-9608-CR-00308, 1998 WL 6925, at *12 (Tenn. Crim. App., filed Jan. 8. 1998)("[T]he surreptitious recording of conversations has been sanctioned by statute. Tenn. Code Ann. § 39-13-601(b)(4)."); *Cf.* ***State v. Mosher***, 755 S.W.2d 464, 467 (Tenn. Crim. App. 1988)("The principles previously established by the courts of this state preclude the expansive constitutional interpretation advanced by the defendant. So long as one of the participants to an electronically recorded conversation consents to the procedure, there exists no constitutional infringement [for an alleged illegal search and seizure].").

In light of the foregoing, we conclude that the prescriptions of Tenn. Code Ann. § 39-13-601(b)(4) were met and that, even assuming there was an "interception" in this case, a cause of action for damages is precluded by the explicit introductory language in Tenn. Code Ann. § 39-13-603(a). This would include any causes of action premised on an assertion that the electronic communication was improperly "intercepted, disclosed, or used," – which covers all of the plaintiff's Wiretapping and Electronic Surveillance Act claims. Given our holding on this issue, we pretermit

the issue concerning whether the statute of limitations had expired on the plaintiff's claims predicated upon the Wiretapping and Electronic Surveillance Act of 1994.[6]

B.

We next address whether the Trial Court properly determined that the defendants were entitled to summary judgment on the plaintiff's claim alleging public disclosure of private facts. This tort is discussed in the Restatement (Second) of Torts, § 652D. That section, including comment a., is as follows:

> § 652D. Publicity Given To Private Life
>
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public. . . .
>
> [Cmt.] a. Publicity. The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third

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[6] When disciplinary proceedings against the plaintiff were instituted with the Board of Professional Responsibility, the plaintiff argued in that forum that the audio and videotapes were obtained in violation of the Wiretapping and Electronic Surveillance Act and should, therefore, be suppressed. This argument was rejected by the hearing panel which found:

> [T]he recorded communications which are the subject of this dispute are communications which were intended to be conveyed directly to the person responsible for recording them. They were not communications intended for some third party not associated with the communications. Under these circumstances, the Panel is of the opinion that the communications were not "intercepted" within the meaning of the Act. Since the communications were not intercepted communications as defined in the Act, they were not controlled by the Act and not subject to a Motion to Suppress based upon violations of the Act.
>
> Even if the communications in question were subject to the Act, the Panel finds that the interception is a lawful interception pursuant to the provisions of T.C.A. § 39-13-601(b)(4) and (5). . . .

The plaintiff and Disciplinary Counsel for the Board of Professional Responsibility eventually agreed on a public censure as discipline for a violation of DR 5-101(A).

> person. "Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.
>
> Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication. . . .

The Restatement's pronouncement that the publicity is insufficient if made only to a single person or a small group of persons has been followed in Tennessee. *See* ***Lineberry v. Locke***, No. M1999-02169-COA-R3-CV, 2000 WL 1050627, at *2 (Tenn. Ct. App. M.S., filed July 31, 2000), *no perm. app. filed*, (limited exposure of materials seized insufficient to make out a cause of action for public disclosure of private facts when the materials found at the scene were viewed by some of the officers at the scene in the presence of the plaintiff's son and possibly two other persons); *see also* ***Parr v. Middle Tennessee State University***, No. M1999-01442-COA-R3-CV, 1999 WL 1086451 (Tenn. Ct. App. W.S. at Nashville, filed Dec. 3, 1999), *perm app. denied May 15, 2000*; ***Garmley v. Opryland Hotel Nashville, LLC***, No. 3:07-0681, 2007 WL 4376087 (M.D. Tenn. 2007).

In the present case, the showing of the videotape was to a very limited number of people. This does not and cannot qualify as a public disclosure under Restatement (Second) of Torts, § 652D. Indeed, there was no *public* disclosure of the contents of the videotape until a few days after it was viewed by a small group of people, and, on this later occasion, it was the plaintiff who issued a press release acknowledging his activities, a release that was followed up by the facsimile discussed *supra* at footnote 4. Accordingly, the trial court correctly granted summary judgment to the defendants on the plaintiff's claim of invasion of privacy by public disclosure of private facts.

C.

The plaintiff's final issue is whether the trial court correctly granted summary judgment to the defendants on the outrageous conduct claim. Under Tennessee law, there are three elements of

a claim for outrageous conduct or intentional infliction of emotional distress:[7] "(1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury." ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). The legal principles involving the tort of outrageous conduct are succinctly set forth in ***Alexander v. Inman***, 825 S.W.2d 102 (Tenn. Ct. App. 1991):

> The Tennessee Supreme Court first recognized the tort of outrageous conduct in *Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 478-79, 398 S.W.2d 270, 274 (1966). . . .
>
> Establishing a test or legal standard for determining whether particular unseemly conduct is so intolerable as to be tortuous has proved to be difficult. *Byran v. Campbell*, 720 S.W.2d 62, 64 (Tenn. Ct. App. 1986). However, the test often used by our courts is the one found in Restatement (Second) of Torts § 46 comment d (1964) which states, in part:
>
>> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a decree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Alexander, 825 S.W.2d at 104-05. Comment d. further provides that "[t]he liability [for this cause of action] clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[8]

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[7] Outrageous conduct and intentional infliction of emotional distress are different names for the same cause of action. ***Bain v. Wells***, 936 S.W.2d 618, 622 n. 3 (Tenn. 1997). The two names are used interchangeably.

[8] Prior to the plaintiff's state law claims being dismissed without prejudice by the federal court, that court considered a motion to dismiss for failure to state a claim that was filed by the defendants. With regard to the (continued...)

We must keep in mind that at this summary judgment stage of the proceedings, we must "view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party." ***Teter***, 181 S.W.3d at 337 (quoting ***Staples v. CBL & Assocs., Inc.***, 15 S.W.3d 83, 89 (Tenn. 2000)). The plaintiff's outrageous conduct claim was dismissed on the basis that the defendants' conduct, as a matter of law, could not be considered "outrageous." While we agree with the trial court that there was no outrageous conduct leading up to the taping and recording of the encounters, what followed presents different considerations. Given (1) the potential impact of the dissemination of the contents of the videotape on the plaintiff's personal and professional well-being, and (2) the highly private and embarrassing nature of the contents of the videotape, we hold that there is a genuine issue of material fact as to whether the allowing of third parties not connected with the investigation to view the contents of the videotape amounts to "intentional or reckless" conduct and whether it is outrageous in nature. In reaching this conclusion, we state only that a jury *could* reasonably find such conduct to be "intentional or reckless" and outrageous. Needless to say, we are not holding that they should or will so find. These determinations must be made by the trier of fact. In addition, we express no opinion as to whether the plaintiff will be able to prove the "serious mental injury" element of an outrageous conduct claim. This element and any affirmative defenses of the remaining defendants are not at issue on this appeal.

As the record now stands, it was the defendants Booth and Worley who permitted the tape to be viewed by third persons not connected to the investigation of the plaintiff's conduct. Booth permitted Worley – who had no role in the investigation of the plaintiff – to view the material. Worley, on the other hand, is implicated by allowing others not involved in the investigation of the plaintiff to view the tape.

As to Booth and Worley, we vacate the grant of summary judgment on the outrageous conduct claim and remand for further proceedings consistent with this opinion. The undisputed material facts further show that neither defendant Scarbrough nor defendant French was in possession of the tape. The most Scarbrough and French can be accused of is being allowed by

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[8](...continued)
outrageous conduct claim, the federal court, after discussing the applicable law, stated:

> In determining whether the complained of conduct rises to the requisite level, the factfinder is allowed to consider the relevant professional or ethical standards governing a particular group or community. *Bain v. Wells*, 936 S.W.2d 618, 622-23 (Tenn. 1997)(holding conduct that did not violate relevant health standards could not be outrageous). The alleged pretrial publication of the videotape is not as heinous as the conduct from the cases discussed above, yet it clearly rises above the level of "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." Consequently, since all factual inferences must be resolved in a plaintiff's favor when the Court is reviewing a motion to dismiss, the Court will give Cawood the benefit of the doubt and allow him to maintain his outrageous conduct claim until the facts and circumstances surrounding the videotape's disclosure can be developed further.

Worley to view the videotape in their office. We conclude that this is insufficient, as a matter of law, to state a claim for outrageous conduct against them. Therefore, the trial court's grant of summary judgment to defendants Scarbrough and French on all claims against them is affirmed.

V.

The final issue before us is the claim by the defendants that they are entitled to qualified immunity on the various causes of action asserted by the plaintiff. Since the only remaining claim is the outrageous conduct claim against Booth and Worley, we need only decide whether qualified immunity applies to this particular claim. In ***Rogers v. Gooding***, No. 02-5891, 84 Fed. Appx. 473, 2003 WL 22905308 (6th Cir. Nov. 24, 2003), the United States Court of Appeals for the Sixth Circuit discussed the doctrine of qualified immunity in the context of an alleged constitutional violation as well as how that doctrine has been applied by the appellate courts of this state to common law tort claims. According to ***Rogers***:

> Qualified immunity is an affirmative defense that shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). A court in this circuit undertaking a qualified immunity analysis must first determine whether the plaintiff has alleged a violation of a constitutionally protected right; if so, the court must examine whether the right was clearly established at the time of the alleged violation. *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). . . .
>
> The right allegedly violated cannot be asserted at a high level of generality, but, instead, "must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As the Supreme Court explained in Harlow, the "reasonable person," in this instance, is a "reasonably competent public official [who] should know the law governing his conduct." *Harlow*, 457 U.S. at 819, 102 S.Ct. 2727. The Supreme Court held in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), that an officer, sued in a civil suit, will be entitled to immunity if reasonably competent officers could disagree as to the reasonableness of the defendant officer's response. *Malley*, 475 U.S. at 341, 106 S.Ct. 1092. If a reasonably competent officer would not agree that the behavior was reasonable, however, then the defendant officer is not entitled to qualified immunity. *Id.* The burden of proving that the rights allegedly violated were clearly established falls upon the

> plaintiff, not the defendant. *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir.1987).
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> * * *
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> In response to the motion to clarify, the district court found that Rogers's assault and battery claim is a state law claim, which is precluded by qualified immunity and, therefore, is not actionable. Plaintiff argues that the granting of qualified immunity in an excessive force case does not preclude a state action for assault and battery. There is, however, Tennessee authority which applies qualified or good faith immunity to state law torts. In *Youngblood v. Clepper*, 856 S.W.2d 405 (Tenn. Ct. App. 1993), a state trooper was sued for negligently directing traffic, causing the plaintiff to have a car accident and suffer injuries. The Tennessee Court of Appeals held that the state trooper was entitled to qualified immunity, akin to the common law immunity given to government employees performing discretionary functions. *Youngblood*, 856 S.W.2d at 406. In so holding, the court cited several United States Supreme Court decisions that discuss qualified immunity for government employees, such as police officers. *Id.* at 406-08. The court noted that the United States Supreme Court decisions involved civil rights actions under § 1983, but it was "clear that the immunity recognized in those cases was not peculiar to § 1983 actions." *Id.* at 407. The court then held that qualified immunity applied to the state law claims against the state officer. *Id.*
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> * * *
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> Thus, the district court properly applied the qualified immunity defense to the assault and battery claim.

Rogers, 2003 WL 22905308, at *3-5.

It is clear from the foregoing that a qualified immunity analysis is premised in large part on the reasonableness of the officer's actions. As set forth previously, liability for an outrageous conduct claim is found "only where the conduct has been so outrageous, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." ***Alexander***, 825 S.W.2d at 104-05. Given that we have found a fact issue as to the plaintiff's outrageous conduct claims against Booth and Worley, we likewise must conclude that there is a fact issue as to whether the conduct of these defendants was reasonable. If the plaintiff succeeds on his outrageous conduct claim against the remaining defendants, it necessarily follows that their conduct was not reasonable. Likewise, if a jury concludes that the subject actions were reasonable, the plaintiff cannot succeed on his outrageous conduct claim. In the context of the facts of this case, reasonable conduct and outrageous conduct are mutually exclusive concepts.

In ***Weaver v. Shadoan***, 340 F.3d 398 (6th Cir. 2003), the United States Court of Appeals for the Sixth Circuit explained:

> Qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806 (emphasis in original). The Supreme Court has emphasized that questions of qualified immunity should be resolved "at the earliest possible stage in the litigation." *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (quoting Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)(per curiam)).

Weaver, 340 F.3d at 406. *Accord* ***Boling v. Pigeon Forge***, No. E2007-01652-COA-R10-CV, 2008 WL 4366119 (Tenn. Ct. App. E.S., filed September 22, 2008).

Because there is a genuine issue of material fact as to the outrageous conduct claims against Booth and Worley, we must conclude that these defendants are not entitled to summary judgment on the defense of qualified immunity. *See* ***Austin v. Sneed***, No. M2006-00083-COA-R3-CV, 2007 WL 3375335, at *10, (Tenn. Ct. App. M.S., filed November 13, 2007) *no appl. perm. appeal filed* (["We conclude] that Mr. Sneed has failed to demonstrate that the individual police officers would have been entitled to a judgment as a matter of law on Mr. Austin's excessive force claim. The officers were not entitled to qualified immunity, and Mr. Austin presented evidence from which the trier-of-fact could conclude that they did not act reasonably . . . .").

VI.

We affirm the judgment of the trial court granting all defendants summary judgment on plaintiff's claims based on the Wiretapping and Electronic Surveillance Act of 1994 and the claim of invasion of privacy by public disclosure of private facts. Furthermore, we affirm the grant of summary judgment to defendants Scarbrough and French as to the plaintiff's claim of outrageous conduct. The trial court's grant of summary judgment to Booth and Worley as to the outrageous conduct claim is vacated. This cause is remanded to the trial court for further proceedings consistent with this opinion. Exercising our discretion, we tax the costs on appeal one-half to the appellant, F. Chris Cawood and one-half to the appellees Linda Booth and Dennis Worley.

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CHARLES D. SUSANO, JR., JUDGE