

Private Eyes, and the California Supreme Court, are Watching You!

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The California Supreme Court, probably counting down until they have to decide cases regarding the new Electronic Discovery Act, weighed in with a case that will make people shake their heads and feel uncomfortable.

The Defendants ran a non-profit residential facility for neglected and abused children. The Plaintiffs worked for the Defendants in a shared office space. *Hernandez v. Hillsides, Inc.*, 2009 Cal. LEXIS 7804, 1-2 (Cal. Aug. 3, 2009).

The Defendants were alerted to someone going online late at night and viewing online pornography on the computers. In order to catch whoever was doing this in violation of the computer usage policy (let alone the concern the individual worked with children), the Defendants set up a hidden video camera in the Plaintiffs' shared work area. *Hernandez*, 1-2.

The Defendant did not intend to record the future Plaintiffs and the system was not operating during business hours. *Hernandez*, 1-2; 16-17. Additionally, the Plaintiffs were not told of the plan because the Defendants did not want to alert the person who was using the computers inappropriately. *Hernandez*, 14.

As one can imagine from a case going to the California Supreme Court, things did not work out as the Defendants had planned.

Procedural History

The Plaintiffs found the hidden office camera and filed suit. They sued for intrusion into "a protected place, interest, or matter, and violated their right to privacy under both the common law and the state Constitution." *Hernandez*, 3.

The trial court granted the Defendants motion for summary judgment. The Court of Appeals reversed and found "triable issues that plaintiffs had suffered (1) an intrusion into a protected zone of privacy that (2) was so unjustified and offensive as to constitute a privacy violation." *Hernandez*, 3.

The Defendants argued to the California Supreme Court that without evidence the Plaintiffs targeted, viewed or recorded the Plaintiffs, there was not actionable invasion of privacy on an intrusion cause of action. *Hernandez*, 3.

The Supreme Court of California agreed with the trial court that a summary judgment was proper, but not for the rationale the Defendants argued. *Hernandez*, 3.

The Supreme Court's View



[Associate Justice Marvin R. Baxter](#) split the difference with the Court of Appeals decision. First, the Court of Appeals did not err in holding a jury could find an intrusion. This was based on the fact Plaintiffs' privacy expectations in shared office space was not absolute, however, they would have a reasonable expectation of privacy their employer would not install video cameras without their knowledge or consent. *Hernandez*, 3-4.

However, the Court of Appeals was incorrect in finding triable issues as to whether the video camera intrusion was offensive enough to constitute violating the Plaintiffs' privacy. *Hernandez*, 4.

The Supreme Court stated any actual surveillance was limited and was not intended to record the Plaintiffs. The Court also factored in the Defendants concern for child safety in viewing the "offensiveness" and "relevant interest" of the case. *Hernandez*, 4.

The California Supreme Court's analysis was a blending of the common law tort of intrusion and the state Constitutional right to privacy. The two part test included:

- (1) The nature of any intrusion upon reasonable expectations of privacy; and
- (2) The offensiveness or seriousness of the intrusion, including any justification and other relevant interests. *Hernandez*, 28-29.

The Intrusion upon the Plaintiffs' Reasonable Expectation of Privacy



The Defendants' "intent" that they would never record the Plaintiffs was the Plaintiffs' strongest argument for their intrusion of privacy claim. *Hernandez*, 29.

The Plaintiffs' office was shared, but had a door that could be locked and shut, plus blinds that could be closed. *Hernandez*, 35-36. The Court stated, "Such a protective setting generates legitimate expectations that not all activities performed behind closed doors would be clerical and work related." *Hernandez*, 36.

The facts of the case clearly supported the Plaintiffs met the first element to show an invasion of privacy claim. *Hernandez*, 44. They shared an office that allowed for some semi-private space. The Plaintiffs could have reasonably expected there would not have been a camera set up to record them, potentially at will. *Hernandez*, 45.

However, that is only Part 1 of the test for the invasion of privacy.

The Defendants' Offensiveness of the Privacy Intrusion

The fact a camera was set up to watch the work area when the employees were not present is not enough to per se show an actionable invasion of privacy claim. The Plaintiffs need to show the intrusion was "highly offensive" to a reasonable person and "sufficiently serious" to be an "egregious breach of the social norms." *Hernandez*, 46-47.

The California Supreme Court agreed with Defendants that in light of the relevant circumstances, a jury could not find in the Plaintiffs' favor and impose liability. *Hernandez*, 47.

Many factors went into the Supreme Court's analysis, such as only one desk was targeted, the office space was not the main area of concern (a computer lab had higher traffic), and the recording was done long after the close of business and the Plaintiffs were not in the office. *Hernandez*, 47-52.

The California Supreme Court stated the Defendants' "successful effort to avoid capturing plaintiffs on camera is inconsistent with an egregious breach of social norms." *Hernandez*, 51.

The Defendants had legitimate business reasons for installing the cameras, namely the unauthorized computer usage to download pornography and the desire to protect at risk youth in the Defendants' care. *Hernandez*, 53-56.

The Supreme Court's Holding

The California Supreme Court was highly respectful to the Plaintiffs in this case. However, the limited use of the system and the business concerns justified an outcome for the Defendants. Associate Justice Baxter stated in closing:

We reach this conclusion from the standpoint of a reasonable person based on defendants' vigorous efforts to avoid intruding on plaintiffs' visual privacy altogether. Activation of the surveillance system was narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns. Plaintiffs were not at risk of being monitored or recorded during regular work hours and were never actually caught on camera or videotape. *Hernandez*, 60-61.