IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

May 28, 2021

BRIDGET JACKMAN and KEIRON JACKMAN, Appellants, v. CATHERINE CEBRINK-SWARTZ and RICHARD SWARTZ, Appellees.	)	Case No. 2D20-2384

BY ORDER OF THE COURT:

The appellees' motion for rehearing is granted only to the extent that the opinion issued on March 26, 2021, is withdrawn and the following amended opinion is substituted therefor. The disposition remains the same. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL, CLERK

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BRIDGET JACKMAN and KEIRON JACKMAN, Appellants, v. CATHERINE CEBRINK-SWARTZ and RICHARD SWARTZ, Appellees.	)	Case No. 2D20-2384

Opinion filed May 28, 2021.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Sarasota County; Stephen M. Walker, Judge.

Allison Martin Perry of Florida Appeals, P.A., Tampa, for Appellants.

Steele T. Williams of Steele T. Williams, P.A., Sarasota, for Appellees.

MORRIS, Judge.

Bridget and Keiron Jackman appeal a nonfinal order denying their motion for preliminary temporary injunction in their action for temporary injunction, invasion of privacy—intrusion upon seclusion, defamation, and malicious prosecution. The action arose after the escalation of a boundary dispute that the Jackmans had with their neighbors, Catherine Cebrink-Swartz and Richard Swartz, resulting in the Swartzes' installing a twenty-five-foot-high security camera on the gable of their roof that faced the

side of the Jackmans' home. Ahead of trial, the Jackmans sought a preliminary temporary injunction, but the trial court denied their motion. Because we conclude that the trial court erred in its analysis of the intrusion upon seclusion claim and, therefore, erred in denying the Jackmans' motion, we reverse.

BACKGROUND

The Jackmans and the Swartzes own adjoining lots with the border running along the sides of their respective homes. The Jackmans have a five-foot-high chain-link fence enclosing the backyard of their property; the fence has "no trespassing" signs affixed. However, in the border area between the two homes, the Jackmans' fence is approximately three feet inside of their actual property line. The Swartzes also have a fence that encloses part of their yard and runs up to the Jackmans' fence. However, the Swartzes did not initially install their own fence along the common border between the two homes. Instead, they used the Jackmans' fence in conjunction with the fencing they did install as a means to contain their dogs in their backyard. Initially, the Jackmans permitted the Swartzes to utilize the Jackmans' fence and property in this way, but they instructed the Swartzes not to plant anything or improve upon the property on the common border since the fence was technically three feet inside of the Jackmans' property. The Jackmans and Swartzes' common fence arrangement lasted for approximately two years without incident.

In February 2020, the Jackmans told the Swartzes they could no longer use their property or the fence that ran between the properties. This occurred after disputes arose about the Swartzes' improvements being made in the common border area and about the Swartzes' refusing to control their dogs in a manner suitable to the Jackmans. The Jackmans asked the Swartzes to remove their fencing that abutted the

Jackmans' fence along the common border as well as plants and trees that the Swartzes had planted along the common border inside of the Jackmans' property line. After obtaining help from the City of North Port to require the Swartzes to move their fencing, the Jackmans installed another fence inside the chain-link fence. This second fence was a six-foot-high privacy fence that enclosed the curtilage of the back portion of their home.

The parties continued to have disputes. In April 2020, the Swartzes installed a twenty-five-foot-high rooftop camera. The record reflects that the camera had night-vision capabilities and recorded twenty-four hours a day, seven days a week. The camera was positioned to see over the Jackmans' privacy fence, allowing the Swartzes to see into a portion of the Jackmans' backyard and the edge of their lanai. The Jackmans sent the Swartzes a letter demanding that the camera be removed. The Swartzes refused, and the Jackmans' suit followed.

Mrs. Jackman testified that she could see the camera from within her lanai and that she found it highly offensive and intrusive, frustrating her use and enjoyment of the Jackmans' property. Mrs. Jackman further testified she did not believe there was a legitimate reason for the installation of the camera since the Swartzes already had three other cameras installed on their home, two of which already faced the common border area between the homes, though they were not positioned to see over the Jackmans' privacy fence.

Mrs. Swartz testified the twenty-five-foot-high camera was installed due to her fear of Mr. Jackman, with whom she had had several confrontations. She testified

that after installation of the camera, Mr. Jackman ceased the activities that had caused her concern on prior occasions.[1]

The Jackmans presented testimony from two neighbors who confirmed that the camera was pointed towards the Jackmans' home and could be seen from within the Jackmans' lanai and who testified that they had never observed Mrs. Swartz acting like she was in fear of Mr. Jackman.

The Jackmans contended that they had a reasonable expectation of privacy in their backyard, particularly within their privacy fence and within the inner parts of their home. They argued that injunctive relief was appropriate for various reasons, including intrusion upon seclusion.

In response, the Swartzes argued that the Jackmans had not established a substantial likelihood of success on the merits because they had not proven that the recordings from the camera were ever published to anyone. The Jackmans contended that that element was not required for an intrusion upon seclusion claim.

Ultimately, however, the trial court sided with the Swartzes, concluding that the Jackmans did not prove they had a substantial likelihood of success on the merits. Thus their motion for a preliminary temporary injunction was denied.[2] In doing so, the trial court focused on the fact that the video footage was stored in the camera

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[1]Mrs. Swartz alleged that Mr. Jackman had previously followed her and paced along side of her as she was working in her side yard.

[2]During the pendency of this appeal, the Swartzes filed an unsworn motion to remand, arguing that the underlying issue was now moot because they had not only removed the offending camera but had moved out of the house next to the Jackmans and were in the process of selling it. After the Jackmans filed their response, this court denied the motion and proceeded to hear oral arguments in this appeal.

recording device, that there was no way to retrieve it, and that the device was not connected to a printer.

ANALYSIS

We review the factual findings in an order granting or denying a motion for temporary injunction using an abuse of discretion standard of review. Mapei Corp. v. J.M. Field Mktg., Inc., 295 So. 3d 1193, 1198 (Fla. 4th DCA 2020); see also Medco Data, LLC v. Bailey, 152 So. 3d 105, 107 (Fla. 2d DCA 2014). However, we review any legal conclusions using a de novo standard of review. Mapei Corp., 295 So. 3d at 1198; see also Medco Data, LLC, 152 So. 3d at 107.

To be entitled to a temporary injunction, a movant must plead and prove: "(1) a likelihood of irreparable harm; (2) unavailability of an adequate legal remedy; (3) a substantial likelihood of succeeding on the merits; and [that] (4) considerations of the public interest support the entry of the injunction." Salazar v. Hometeam Pest Defense, Inc., 230 So. 3d 619, 621 (Fla. 2d DCA 2017) (quoting Masters Freight, Inc. v. Servco, Inc., 915 So. 2d 666, 666 (Fla. 2d DCA 2005)). In this case, we focus on the third element, whether the Jackmans established a likelihood of success on the merits, because that was the basis for the trial court's denial of their motion.

The tort of invasion of privacy is comprised of several different forms. Intrusion upon seclusion is defined as where a person "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (Am. Law Inst. 1977); see also Purrelli v. State Farm Fire & Cas. Co., 698 So. 2d 618, 620 (Fla. 2d DCA 1997). Notably, this form of invasion of

privacy "does not depend on any publicity given to the person whose interest is invaded or to his affairs." Restatement (Second) of Torts § 652B cmt. a. (Am. Law Inst. 1977).

Here, the trial court erred by concluding that the Jackmans could not establish a likelihood of success on the merits because the Jackmans had not established that the videos from the offending camera had been published to a third party. That is not a required element for the tort of invasion of privacy—intrusion upon seclusion. See id.

Furthermore, there is a reasonable expectation of privacy within the curtilage of a residence, and we conclude that there is a material difference between occasionally viewing the activities within a neighbor's backyard that are observable without peering over a privacy fence and erecting a camera to see over a privacy fence to thereafter surveil and record those activities on a consistent basis. See Goosen v. Walker, 714 So. 2d 1149, 1150 (Fla. 4th DCA 1998) (recognizing that engaging in repeated surveillance of another person can constitute the tort of invasion of privacy—intrusion upon seclusion); Shafer v. City of Boulder, 896 F. Supp. 2d 915, 931 (D. Nev. 2012) (citing United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987), for the proposition that video surveillance of someone's backyard is different from a one-time overhead glance and that society would recognize a homeowner's expectation to be free from such video surveillance to be reasonable); Baugh v. Fleming, No. 03-08-00321-CV, 2009 WL 5149928 (Tex. App. Dec. 31, 2009) (holding that evidence was sufficient to establish intrusion upon seclusion claim where party videotaped neighbor through window by peering over six-foot-high privacy fence in their backyard). Indeed, the Jackmans expressly established their "subjective expectation of privacy" by erecting

the six-foot-high privacy fence and posting "no trespassing" signs. Cf. Brown v. State, 152 So. 3d 619, 624 (Fla. 3d DCA 2014) (recognizing that where homeowner enclosed his yard with two layers of fencing and posted "no trespassing" signs, the area was considered part of the curtilage of the home and also that because the area was not open or viewable to the public and not a place that the homeowner would have reasonably expected others to enter, the homeowner "exhibited an actual, subjective expectation of privacy that society is prepared to recognize as reasonable"); Baugh, 2009 WL 5149928 at *2 (noting distinction between someone watching someone else standing in front of a large window with the blinds open from across the street and someone watching someone else by peering over a privacy fence into their backyard).

We do not overlook the Swartzes' argument that the Jackmans had their own camera installed on their home and that it surveilled a portion of the Swartzes' home. However, the Swartzes have acknowledged that the Jackmans' camera is aimed primarily at the border area between the homes—rather than into the Swartzes' backyard. Further it is undisputed that the door of the Swartzes' home that is visible to the Jackmans' camera is a side door to the house which is visible from the street. Thus the Swartzes do not have the same subjective expectation of privacy related to that area of their home as they would if it was enclosed by a privacy fence adorned with "no trespassing" signs. Cf. Brown, 152 So. 3d at 624; Baugh, 2009 WL 5149928 at *2. Therefore we are not persuaded that the Jackmans' motion should have been denied on the basis of a defense of unclean hands.

Accordingly, we hold that the trial court erred by concluding that the Jackmans did not establish a likelihood of success on the merits of their claim for

invasion of privacy—intrusion upon seclusion and by therefore denying their motion for a preliminary temporary injunction on that basis.

Finally, we note that the trial court determined below that the position of the camera was not dispositive and that the dispositive issue was what footage the camera was capable of capturing. For the reasons we have already explained, we conclude that the position of the camera in this case—peering over a privacy fence into the curtilage of a neighbor's backyard—was dispositive. However, we also recognize that due to the proliferation of home surveillance cameras and drones, there is some uncertainty about what surveillance activities may be maintained without resulting in an invasion of privacy of another person. Thus we certify the following question as one of great public importance:

> DOES THE USE OF A CAMERA BY A PRIVATE CITIZEN TO MONITOR AND/OR RECORD ACTIVITIES OCCURRING WITHIN THE CURTILAGE OF A HOME SURROUNDED BY A PRIVACY FENCE NOT BELONGING TO THE CAMERA OPERATOR CONSTITUTE THE TORT OF INVASION OF PRIVACY—INTRUSION UPON SECLUSION?

Reversed and remanded; question certified.

SLEET and LUCAS, JJ., Concur.