UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 18-3707*, Javier Luis v. Joseph Zang, et al*
Originating Case No. : 1:12-cv-00629

Dear Mr. Luis and Mr. Wharton,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Ryan E. Orme
Case Manager
Direct Dial No. 513-564-7079

cc: Mr. Richard W. Nagel

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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No. 18-3707

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAVIER LUIS, Plaintiff-Appellant, v. JOSEPH ZANG, et al., Defendants, and AWARENESS TECHNOLOGIES, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

O R D E R

Before: GUY, GILMAN, and DONALD, Circuit Judges.

Javier Luis, a pro se Florida resident, appeals the district court's grant of summary judgment in favor of defendant Awareness Technologies ("Awareness") and the dismissal of his complaint. He also moves for the appointment of counsel or for a stay of the appeal while he seeks representation. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

This lawsuit originated in divorce proceedings between Joseph and Catherine Zang, during which Catherine learned that Joseph had installed on their home computer spyware called WebWatcher, which was manufactured by Awareness. Joseph allegedly used WebWatcher to

obtain emails and messages sent between Catherine and Luis, and Joseph used these messages as leverage in the ensuing divorce proceedings. In 2012, Luis filed suit in the United States District Court for the Middle District of Florida. That lawsuit was transferred to the Southern District of Ohio and consolidated with a companion case that was initiated by Catherine (Case No. 1:11-cv-884). The claims and parties in the companion case were later dismissed.

Awareness's motion to dismiss Luis's complaint was granted by the district court. This court reversed and remanded for further development of the record, finding that Luis had sufficiently alleged facts supporting claims that Awareness had: (1) intercepted an electronic communication, in violation of 18 U.S.C. § 2511; (2) manufactured, marketed, sold, or operated a wiretapping device, in violation of 18 U.S.C. § 2512(1)(b); (3) violated the Ohio Wiretap Act; and (4) committed an invasion of privacy under Ohio common law. *Luis v. Zang*, 833 F.3d 619, 626-43 (6th Cir. 2016). The district court denied Luis permission to add additional claims and defendants, but allowed him to expand upon his existing claims in the "Corrected Second Amended Lead Complaint." Awareness filed a motion for summary judgment, to which Luis responded. A magistrate judge recommended granting the motion. Over Luis's objections, the district court adopted the report and recommendation of the magistrate judge and granted summary judgment in favor of Awareness.

On appeal, Luis argues that the district court's construction of the Wiretap Act is contrary to Congressional intent and more technically and constitutionally sound judicial interpretations of an "intercept," runs afoul of the technical realities of computer hardware and messages sent over the internet, and allegedly contributes to the erosion of personal privacy rights in the "ever-changing Digital Age." Luis particularly focuses on the concept of Random Access Memory ("RAM"), which he claims is not permanent storage. He therefore argues that information copied from RAM should qualify as an "intercept" under 18 U.S.C. § 2510(4). Because Luis did not raise his state-law claims on appeal beyond a cursory reference in his reply brief, they are forfeited. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005). Nor may Luis incorporate arguments he has made prior to this appeal solely by reference. *See Thomas M. Cooley Law Sch. v. Am. Bar Ass'n*, 459 F.3d 705, 710 (6th Cir. 2006).

We review a district court's grant of summary judgment de novo. *Huckaby v. Priest*, 636 F.3d 211, 216 (6th Cir. 2011). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party must demonstrate "the absence of a genuine issue of material fact as to at least one essential element on each of Plaintiff's claims," at which point the non-moving party "must present sufficient evidence from which a jury could reasonably find for him." *Jones v. Muskegon County*, 625 F.3d 935, 940 (6th Cir. 2010). In resolving a summary-judgment motion, we view the evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Luis first claimed that Awareness "intercepted" his electronic communications, in violation of 18 U.S.C. § 2511. That section provides:

> (1) Except as otherwise specifically provided in this chapter[,] any person who—(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be punished [by a fine or imprisonment.]

18 U.S.C. § 2511(1)(a). The Wiretap Act provides for a private cause of action for persons victimized by such criminal conduct:

> (a) In general.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a). An "intercept" was defined by the Wiretap Act as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). Drawing on the distinction made by Congress between "electronic communications," protected by Title I, and "electronic storage," protected by Title II, this court concluded that an "intercept" requires contemporaneity to qualify as a violation of § 2511. Specifically, this court concluded that an "intercept" requires that the communication must be caught while it is still "in flight," and before the communication comes to

rest in storage on the recipient computer. *See Luis*, 833 F.3d at 627-29. Luis challenges this standard as antithetical to the purposes of the Wiretap Act and as bad policy, but we are bound by our prior, published decision. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

In its summary-judgment motion, Awareness presented the affidavit of its CEO, Brad Miller. In the affidavit, Miller attested that the version of WebWatcher purchased by Joseph Zang "can only access electronic information that has been stored in the computer's memory," "can only capture data that has already been received and stored in memory of the computer on which WebWatcher is installed," "can access only data previously received by . . . applications on that computer after it has been stored in memory," and "can only access such information after the electronic communication has been received by the computer and put into storage memory." Awareness has thus provided unrebutted evidence that WebWatcher could not have accessed Luis's communications until they had been placed in memory or storage on Catherine Zang's computer, and thus Luis's § 2511 claim must fail.

Luis argues, on the other hand, that Miller's affidavit actually supports his claim because he believes that the "memory" or "storage" that Miller referenced is a type of computer memory called RAM, which he claims is merely temporary storage that is still in flux. He therefore argues that information contained in RAM on a computer is technically still "in flight" and has not reached its final destination in permanent storage, if it will reach it at all. Putting aside the fact that Miller's affidavit explicitly stated that WebWatcher can only access data that "has been received by the computer and put into storage memory," Luis's argument might be compelling if the Wiretap Act and this court had not already contemplated the type of temporary storage or memory that Luis describes. This court emphasized in its discussion of the origin of the contemporaneity requirement that:

> Congress drew a distinction between "electronic communications" and "electronic storage." [*Steve Jackson Games Inc. v. U.S. Secret Service*, 36 F.3d 457, 461 (5th Cir. 1994)]. The former term is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." 18 U.S.C. § 2510(12). In contrast, "electronic storage" is defined as "(A) *any*

> *temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof*," and "(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17).
>
> The term "intercept," as noted above, applies only to electronic communications, not to electronic storage. *See id.* § 2510(4).

Luis, 833 F.3d at 627 (emphasis added). *But see United States v. Councilman*, 418 F.3d 67, 79 (1st Cir. 2005). Information stored on RAM therefore falls into the "electronic storage" camp pursuant to the statute, and information copied from a computer's RAM would not qualify as an "intercept." Because Luis did not present evidence on summary judgment supporting that WebWatcher collected the data from Catherine Zang's computer in a way other than that described by Miller's affidavit, his § 2511 claim fails.

The lack of an "intercept" in this case also dooms Luis's claim for manufacturing, marketing, selling, and operating a wiretapping device. Section 2512(1)(b) provides:

> [A]ny person who intentionally—(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious *interception* of wire, oral, or electronic communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce.

(emphasis added). Again, this claim must rely on § 2520's authorization that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter" may maintain a private cause of action against the person or entity that engaged in the violation. 18 U.S.C. § 2520(a). This claim therefore relies on Luis's communications having been "intercepted" by WebWatcher, which, as previously discussed, was not the case. Accordingly, Luis's § 2512(1)(b) claim also fails.

Luis also moves, post-briefing, for the appointment of counsel or for a stay of the proceedings. A plaintiff does not have a constitutional right to counsel in a civil case; rather, the appointment of counsel is "justified only by exceptional circumstances." *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir. 1993). Proper considerations in determining whether to appoint counsel include the plaintiff's ability to represent himself, the type of case, and the "complexity of the

factual and legal issues involved." *Id.* at 606 (quoting *Cookish v. Cunningham*, 787 F.2d 1, 3 (1st Cir. 1986)). No exceptional circumstances are present here that warrant the appointment of counsel. Neither does Luis present justification for a stay of the proceedings.

For the reasons discussed above, we **DENY** Luis's motion for the appointment of counsel or a stay of the proceedings, and we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk