

Miami Herald Publishing Co. v. Brown, 66 So.2d 679, 681 (Fla. 1953); and invasion of privacy, see *Cason v. Baskin*, 20 So.2d 243, 251 (Fla. 1944); *Rowell v. Holt*, 850 So.2d 474, 478 (Fla. 2003). See also Restatement (Second) of Torts §§569, 570, 652H, cmt. b (1977); *Hagan v. Coca-Cola Bottling Co.*, 804 So.2d 1234, 1237 (Fla. 2001).

3. **Four Types of Wrongful Conduct:** The supreme court noted that there are four types of wrongful conduct that can be remedied through an action for invasion of privacy. See *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239, 1252 n. 20 (Fla. 1996). These are: (1) appropriation—the unauthorized use of a person’s name or likeness to obtain some benefit; (2) intrusion—physically or electronically intruding into one’s private quarters; (3) public disclosure of private facts—the dissemination of truthful private information which a reasonable person would find objectionable; and (4) false light in the public eye—publication of facts which place a person in a false light even though the facts themselves may not be defamatory. *Id.* In considering the four types of invasion of privacy, it becomes clear that invasion of privacy is a separate and distinct cause of action from libel or slander. Three of the four types of invasion of privacy do not reference any type of false information or defamation. Only false light invasion of privacy contemplates any issue of falsehood; and even then, the tort may exist when the facts published are completely true. *Id.* Since no defamation is required to prosecute an action for invasion of privacy, the statute of limitations for defamation actions does not apply to invasion of privacy actions. *Heekin v. CBS Broadcasting, Inc.*, 789 So.2d 355, 358 (Fla. 2d DCA 2001), *rev. denied*, 799 So.2d 216 (Fla. 2001). See also *Allstate Ins. Co. v. Ginsberg*, 863 So.2d 156, 162 (Fla. 2003).
4. **Photographs:** An invasion of the right of privacy occurs not with the mere publication of a photograph, but occurs when a photograph is published where the publisher should have known that its publication would offend the sensibilities of a normal person, and whether there has been such an offensive invasion of privacy is to some extent a question of law. *Facchina v. Mutual Benefits Corp.*, 735 So.2d 499, 503 (Fla. 4th DCA 1999).

§9:40 SECURITY OF COMMUNICATIONS ACT, VIOLATION OF

§9:40.1 Florida Statutes

Florida Statutes §934.10:

- (1) Any person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of ss. 934.03 - 934.09 shall have a civil cause of action against any person or entity who intercepts, discloses, or uses, or procures any other person or entity to intercept, disclose, or use, such communications and shall be entitled to recover from any such person or entity which engaged in that violation such relief as may be appropriate, including:
 - (a) Preliminary or equitable or declaratory relief as may be appropriate;
 - (b) Actual damages, but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;
 - (c) Punitive damages; and
 - (d) A reasonable attorney’s fee and other litigation costs reasonably incurred.
- (2) A good faith reliance on:
 - (a) A court order, subpoena, or legislative authorization as provided in ss. 934.03 - 934.09,
 - (b) A request of an investigative or law enforcement officer under s. 934.09(7), or
 - (c) A good faith determination that Florida or federal law, other than 18 U.S.C. s. 2511(2)(d), permitted the conduct complained of shall constitute a complete defense to any civil or criminal, or administrative action arising out of such conduct under the laws of this state.
- (3) A civil action under this section may not be commenced later than 2 years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

SOURCE

Fla. Stat. §934.10 (2005).

Florida Statutes §934.27 - Civil action: relief; damages; defenses.

- (1) Except as provided in s. 934.23(5), any provider of electronic communication service,

- or subscriber or customer thereof, aggrieved by any violation of ss. 934.21 - 934.28 in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as is appropriate.
- (2) In a civil action under this section, appropriate relief includes:
- Such preliminary and other equitable or declaratory relief as is appropriate.
 - Damages under subsection (3).
 - A reasonable attorney's fee and other litigation costs reasonably incurred.
- (3) The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a plaintiff entitled to recover be awarded less than \$1,000.
- (4) A good faith reliance on any of the following is a complete defense to any civil or criminal action brought under ss. 934.21 - 934.28:
- A court warrant or order, a subpoena, or a statutory authorization, including but not limited to, a request of an investigative or law enforcement officer to preserve records or other evidence, as provided in s. 934.23(7).
 - A request of an investigative or law enforcement officer under s. 934.09(7).
 - A good faith determination that s. 934.03(3) permitted the conduct complained of.
- (5) A civil action under this section may not be commenced later than 2 years after the date upon which the claimant first discovered or had a reasonable opportunity to discover the violation.
- 68 Am. Jur. 2d *Searches and Seizures* §§332-373 (2000).
 - 86 C.J.S. *Telecommunication* §256 (1997).
 - Kirk W. Munroe, *Commercial Eavesdropping, A Catch 22*, 63 Fla. Bar J. 11 (March 1989).
 - Cynthia L. Greene, *Woods Have Eyes as Walls Have Ears: Intraspousal Wiretapping and Eavesdropping in Domestic Relations Cases*, 56 Fla. Bar J. 643 (1982).
 - Kirk W. Munroe, *Consensual Electronic Surveillance and the Explosive Impact of Sarmiento*, 56 Fla. Bar J. 355 (1982).
 - Barry Krischer, *Body Bugs*, 52 Fla. Bar J. 553 (1978).
 - James H. Walsh, *The Key to Legal Bugging*, 47 Fla. Bar J. 366 (1973).
 - Todd R. Smyth, Annotation, *Eavesdropping on Extension Telephone as Invasion of Privacy*, 49 A.L.R.4th 430 (1986).
 - Russell G. Donaldson, Annotation, *Construction and Application of State Statutes Authorizing Civil Causes of Action by Person Whose Wire or Oral Communication is Intercepted, Disclosed, or Used in Violation of Statutes*, 33 A.L.R.4th 506 (1984).
 - Annotation, *Eavesdropping as Invasion of Privacy*, 11 A.L.R.3d 1296 (1967).
 - Carol M. Bast, *Eavesdropping in Florida: Beware a Time-Honored But Dangerous Pastime*, 21 Nova L. Rev. 431 (Fall 1996).
 - Daniel J. Mumaw, Comment, *Does the "One-Party Consent" Exception Effectuate the Underlying Goals of Title III*, 18 Akron L. Rev. 495 (1985).
 - Jonathan J. Green, Note, *Electronic Monitoring in the Workplace: The Need for Standards*, 52 Geo. Wash. L. Rev. 438 (1984).
 - Mitchell K. Bloomberg & Harold Bluestein, Comment, *Intercepted Communications: "Just Cause" for Refusing to Answer the Questions of the Grand Jury*, 29 U. Miami L. Rev. 334 (1974-75).

SOURCE

Fla. Stat. §934.27 (2005).

§9:40.2 Statute of Limitations

Two Years. Fla. Stat. §934.27(5).

§9:40.3 References

- 14A Fla. Jur. 2d *Criminal Law* §§886-930 (2001).

§9:40.4 Defenses

- Good-Faith Reliance:** The plain language of the statute states that a good-faith reliance on a good-faith determination that federal or Florida law permits the conduct complained of shall constitute a complete defense to any criminal action arising out of the conduct. Because appellant's proffered testimony was

- relevant to this defense, the trial court abused its discretion by disallowing same. *Wood v. State*, 654 So.2d 218, 220 (Fla. 1st DCA 1995).
2. **Interspousal Tort Immunity:** The remedy afforded by section 934.10 should not be circumscribed by the doctrine of interspousal tort immunity. *Burgess v. Burgess*, 447 So.2d 220, 222 (Fla. 1984).
 3. **Jurisdiction:** For purposes of establishing a tort under the Act, the interception occurs where the words or the communication is uttered, not where it is recorded or heard. *Koch v. Kimball*, 710 So.2d 5, 7 (Fla. 2d DCA 1998). See also *State v. Mozo*, 655 So.2d 1115, 1117 (Fla. 1995); *Cohen Brothers, LLC v. ME Corp., S.A.*, 872 So.2d 321, 324 (Fla. 3d DCA 2004).
 4. **Safeguards:** Federal law has preempted the field of wiretaps, and any state law regulating the interception of wire communications must provide safeguards at least as stringent as those set out in the federal statute. *State v. Aurilio*, 366 So.2d 71, 74 (Fla. 4th DCA 1978).

§9:40.5 Related Matters

1. **Cordless Phone:** Oral communications conducted over a cordless phone within the privacy of one's own home are protected by Florida's Security of Communications Act, chapter 934, Florida Statutes (1991). *State v. Mozo*, 655 So.2d 1115, 1116 (Fla. 1995).
2. **Interrogatory Responses:** The court cannot compel petitioner to answer respondent's interrogatories as the answers relating to her alleged interception of the telephone conversation might incriminate her. *Roberts v. Jardine*, 358 So.2d 588, 589 (Fla. 2d DCA 1978), *appeal after remand*, 366 So.2d 124 (Fla. 1979).
3. **Legislative Intent:** Hence, the Florida act evinces a greater concern for the protection of one's privacy interests in a conversation than does the federal act. Equally certain is the fact that the 1974 amendment to chapter 934 was designed to proscribe the method of interception used in this case. On the floor of the Florida House of Representatives, the only recorded debate on the two-party consent requirement of section 934.03(2)(d) was this comment by Representative Shreve: [What this bill does] is to prevent, make it illegal, for a person to record a conversation, even though he's a party to it, without the other person's consent. *Guilder v. State*, 899 So.2d 412, 418 (Fla. 4th DCA 2005). The clear intent of the Legislature in enacting section 934.03 was to make it illegal for a person to intercept wire, oral, or electronic communications. *O'Brien v. O'Brien*, 899 So.2d 1133, 1135 (Fla. 5th DCA 2005).
4. **Oral Communication—Definition:** "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication. Fla. Stat. §934.02(2) (2001).
5. **Oral Communication, Elements of:** For a conversation to qualify as "oral communication," the speaker must have an actual subjective expectation of privacy in his oral communication, and society must be prepared to recognize the expectation as reasonable under the circumstances. Where both elements are present, the statute has been violated whether the intercepted communication is private in nature or not. *Stevenson v. State*, 667 So.2d 410, 412 (Fla. 1st DCA 1996). An oral communication is protected under §934.03 if it satisfies two conditions: A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy as well as whether society is prepared to recognize this expectation as reasonable. *Jatar v. Lamaletto*, 758 So.2d 1167, 1169 (Fla. 3d DCA 2000), *dismissed*, 786 So.2d 1186 (Fla. 2001). See also *State v. Smith*, 641 So.2d 849, 851 (Fla. 1994); *Cohen Brothers, LLC v. ME Corp., S.A.*, 872 So.2d 321, 324 (Fla. 3d DCA 2004).
6. **Persons Protected:** The purpose of Chapter 934 was to protect the victims of illegal intercepts, not those who perpetrate them. *State v. News-Press Publishing Co.*, 338 So.2d 1313, 1317 (Fla. 2d DCA 1976).
7. **Preemption:** Federal law has preempted the field of wiretaps, and any state law regulating the interception of wire communications must provide safeguards at least as stringent as those set out in the federal statute. *State v.*

- Aurilio*, 366 So.2d 71, 74 (Fla. 4th DCA 1978), *cert. denied*, 376 So.2d 76 (Fla. 1979). *See also State v. McGillicuddy*, 342 So.2d 567, 568 (Fla. 2d DCA 1977).
8. **Strictly Construed:** Portions of chapter 934 authorizing the interception of wire or oral communications are statutory exceptions to the federal and state constitutional right of privacy. *In re Grand Jury Investigation*, 287 So.2d 43 (Fla. 1973). As such, they must be strictly construed. *Copeland v. State*, 435 So.2d 842, 844 (Fla. 2d DCA 1983), *rev. denied*, 443 So.2d 980 (Fla. 1983). *See also State v. Aurilio*, 366 So.2d 71, 73 (Fla. 4th DCA 1978), *cert. denied*, 376 So.2d 76 (Fla. 1979).
 9. **Testimony of a Third Person:** Testimony of a third person who overhears a confidential communication is admissible. *Horn v. State*, 298 So.2d 194, 196 (Fla. 1st DCA 1974), *cert. denied*, 308 So.2d 117 (Fla. 1975).
 10. **Wire Communication—Definition:** “Wire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception including the use of such connection in a switching station furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce. Such term includes any electronic storage of such communication. Fla. Stat. §934.02(1) (2001).