Hide Your Cookies

Pixel Litigation in Washington

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What's a Pixel?

A piece of code embedded in a website's HTML that collects information about what visitors do on the website.

Who is tracking you?

Google

LinkedIn

ORACLE

Meta

They're everywhere!

March 2024 report found that approximately **47 percent** of websites use Meta Pixel, including:

- **55 percent** in the S&P 500
- **58 percent** in the retail industry
- **42 percent** in finance
- **33 percent** in healthcare.

Targets in Washington

Hospitals and Healthcare

Jane Doe v. Jefferson Healthcare

Class action lawsuit filed in March 2024, alleging:

- Patient who received healthcare services "in treatment of pneumonia, asthma, in the intensive care unit, for X-rays, as well as to treat her children's broken bones."
- Used the website "to search for health information, to find doctors, to research medical treatment services, and to pay bills."
- "[N]ow receives targeted health-related advertisements relating to asthma medications," that allegedly "reflect[ed] her private medical treatment information."
- No allegations of Pixel in MyChart

Jane Doe v. Jefferson Healthcare

Plaintiff's approach to pleading:

Jane Doe v. Jefferson Healthcare

Plaintiff's claims:

(1) Negligence;

(2) Breach of Implied Contract;

(3) Unjust Enrichment;

(4) Breach of Fiduciary Duty;

(5) Invasion of Privacy—Intrusion upon Seclusion;

(6) Invasion of Privacy—Public Disclosure of Facts;

(7) Fraudulent Concealment;

(8) Breach of Duty of Confidence;

(9) Identity Theft RCW 9.35.020;

(10) Violation of Washington Uniform Health Care Information Act RCW 70.02;

(11) Violation of Consumer Protection Act

Jane Doe v. Jefferson Healthcare

Jefferson's response:

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR JEFFERSON COUNTY

JANE DOE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

JEFFERSON COUNTY PUBLIC HOSPITAL DISTRICT NO. 2 D/B/A JEFFERSON HEALTHCARE,

Defendant.

NO. 24-2-00070-16

DEFENDANT'S MOTION TO DISMISS UNDER CR 12(b)(6)

Jane Doe v. Jefferson Healthcare

Key Arguments:

- **Public** vs. **private** website
- Website had limited features
- Intended and necessary data transmissions
- Data is not PHI without knowledge of visitor's **subjective motive**

Jane Doe v. Jefferson Healthcare

Negligence:

- **No duty**
  - No common law duty to safeguard online browsing data
  - Neither HIPAA nor FTC Act create any duty either
- **No causation**
  - Cannot prove that alleged disclosure was proximate cause of targeted advertising or other alleged injury
- **No damages**
  - No allegations that private information had any value that plaintiff could capitalize on, could have been monetized, or value was diminished

But see Nunley v. Chelan-Douglas Health District, 32 Wn. App. 2d 700 (2024).

Jane Doe v. Jefferson Healthcare

Breach of Fiduciary Duty:

- **No duty between hospital and public website visitor**
  - Washington only recognizes fiduciary duty between *physician* and *patient* or between *hospital* and *patient receiving care in the hospital*
  - Browsing a public website does not create a fiduciary duty where hospital was not aware of Plaintiff's identity or whether she was a patient while she was browsing

Jane Doe v. Jefferson Healthcare

Invasion of Privacy—Public Disclosure of Facts:

- **Publicity** is an essential element the action
- "Publicity… means communication to the public at large so that the matter is substantially certain to become public knowledge….; communication to a single person or a small group does not qualify."
- No allegations or evidence of communication to the public at large

Jane Doe v. Jefferson Healthcare

Breach of Duty of Confidence:

- Not a claim of action recognized in Washington

Jane Doe v. Jefferson Healthcare

Identity Theft:

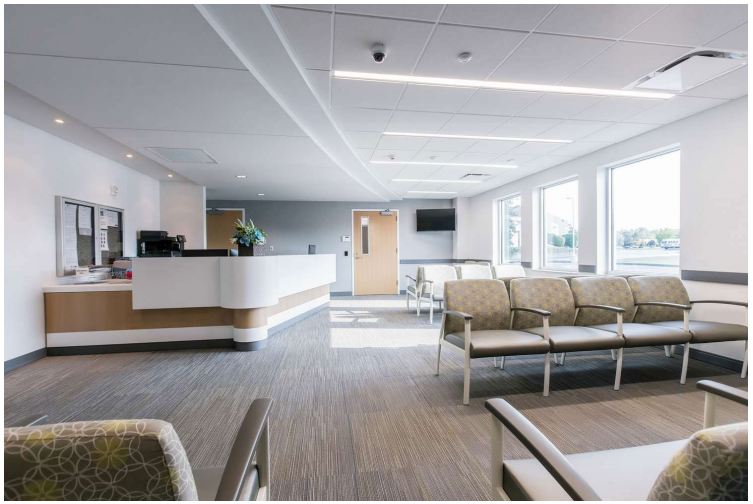
- RCW 9.35.020: "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet any crime."
- Three arguments:

1) Data not a "means of identification" as used in the statute;
   - Browsing data identifies devices, not people
2) No independent predicate criminal act as required by caselaw;
   - No violation of the Washington Privacy Act, RCW 9.73.030 because data not a "communication" as that term is used in the statute
   - No evidence of intent to commit a predicate crime
3) Not the type of behavior the Legislature intended to prohibit.

Jane Doe v. Jefferson Healthcare

Is public website more like this?

Or more like this?



Jane Doe v. Jefferson Healthcare

Result – case dismissed on CR 12(b) motion

- Plaintiff appealed
- Parties settled
  - Stipulated to class
  - Claimants received 12-month subscription to CyEx Privacy Shield product

Key Takeaways

- Marketing, IT, and risk management need to communicate
- If it's free, the price is your data
- New legal theories are coming (MHMDA)

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Baker v. SCH – Meta Pixel Litigation

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Baker v. SCH – Complaint Allegations/Claims

Plaintiffs alleged that SCH used Meta Pixel on ***public-facing*** website;

- Did NOT allege it was on MyChart.

Alleged seven claims based on perception that somehow SCH was sharing PHI and PII with Meta

- WPA;
- CPA;
- WUHICA;
- Intrusion upon seclusion;
- Conversion;
- Implied contract;
- Unjust enrichment

Baker v. SCH – Motion To Dismiss

Key Themes:

- Plaintiffs are not patients;
- No allegations that any search revealed anything private as to these Plaintiffs (or their kids)
- Logical Absurdity
  - Would mean that anyone running a search has a claim
  - Could sue judge based on his KCSC website;

Data sent to Meta is anonymous;

- Only way Meta could (not did) link data to a person is if that person had FB account, logged in, and same browser;
- Plaintiffs, not SCH, chose to reveal themselves to Meta

Baker v. SCH – Motion to Dismiss--Continued

Primary allegations Irrelevant:

- Were about things that could only occur on MyChart, where Pixel was ***not*** located;
- Untethered to these Plaintiffs or their kids;

"Any set of facts" standard;

- Must still be tethered to actual allegations as to these Plaintiffs;
- Can file under seal if necessary to allege core facts

Baker v. SCH – Motion to Dismiss Arguments

Washington Privacy Act

- Wiretapping statute, not generalized privacy statute;
- Requires interception of private communication between two or more individuals;

Arguments:

- No interception – sent directly to SCH;
- Nothing private – page views, clicks, etc. not private;
- No communication between two or more individuals—like a library card catalog;
  - Note: WA Legislature removed "divulging" from statute in 1970s, so sharing info not WPA claim
- Pixel is not an electronic recording device – java script code is not a recording device
- Plaintiffs consented via privacy policy as to gathering anonymous data;
- No injury alleged

Baker v. SCH – MTD Continued

- CPA Claim
  - Barred by WUHCIA
    - WUHCIA provides that "[a] violation of this chapter shall not be deemed a violation of the consumer protection act, chapter 19.86 RCW." RCW 70.02.170(4)
      - *Compare Svendsen v. Stock*, 143 Wn.2d 546, 554–55 (2001) (similar statutory language barred CPA claims); *State v. Schwab*, 103 Wn.2d 542, 552 (1985).
  - No injury;
  - No causation;
  - Not trade or commerce

Baker v. SCH – MTD Continued

No WUHCIA Claim

Anonymous data on public website is not healthcare information under the statute;

None of the data was about a patient—parents of a patient, at most.

Searching public website about generalized healthcare issues does not directly relate to patient healthcare.

None of the data could be associated with any patient.

Common sense: if any search on a hospital website could violate WUHCIA, then no limit to exposure;

Practical effect – who would get notice? Who would get paid?

Baker v. SCH – MTD–Intrusion Upon Seclusion

Must show:	intentional intrusion into private affairs, expectation of privacy, highly offensive to reasonable person, damages.
No intrusion – SCH was intended recipient of searches etc.	
No private place intrusion – public website (not MyChart) is not a private place;	
Sending website traffic data is not objectively offensive	Could see pages viewed, but not any PHI or PII and not of any SCH patient that could be linked to META

Baker v. SCH – MTD – Implied contract

Implied Contract Elements

- (1) SCH requested something from Plaintiffs, (2) Plaintiffs expect payment, and (3) SCH knows or should know the Plaintiffs expect payment.

No claim:

- Plaintiffs don't allege paying SCH anything;
- No breach relating to provision of medical care;
- No consideration given beyond HIPPA compliance, so no claim;
- No damages alleged

Baker v. SCH – MTD – Conversion Claim

Elements:

- (1) willful interference with chattel belonging to the plaintiff, (2) by either taking or unlawful retention, and (3) thereby depriving the owner of possession."

Square Peg, Round Hole—no claim:

- Website traffic data is not a chattel;
- No loss of possession –still possess all the data.;

Baker v. SCH – MTD – Unjust Enrichment

Elements:

- (1) SCH received a benefit, (2) at Plaintiffs' expense, and (3) under circumstances making it unjust for SCH to retain the benefit without payment.

Claim fails for three reasons:

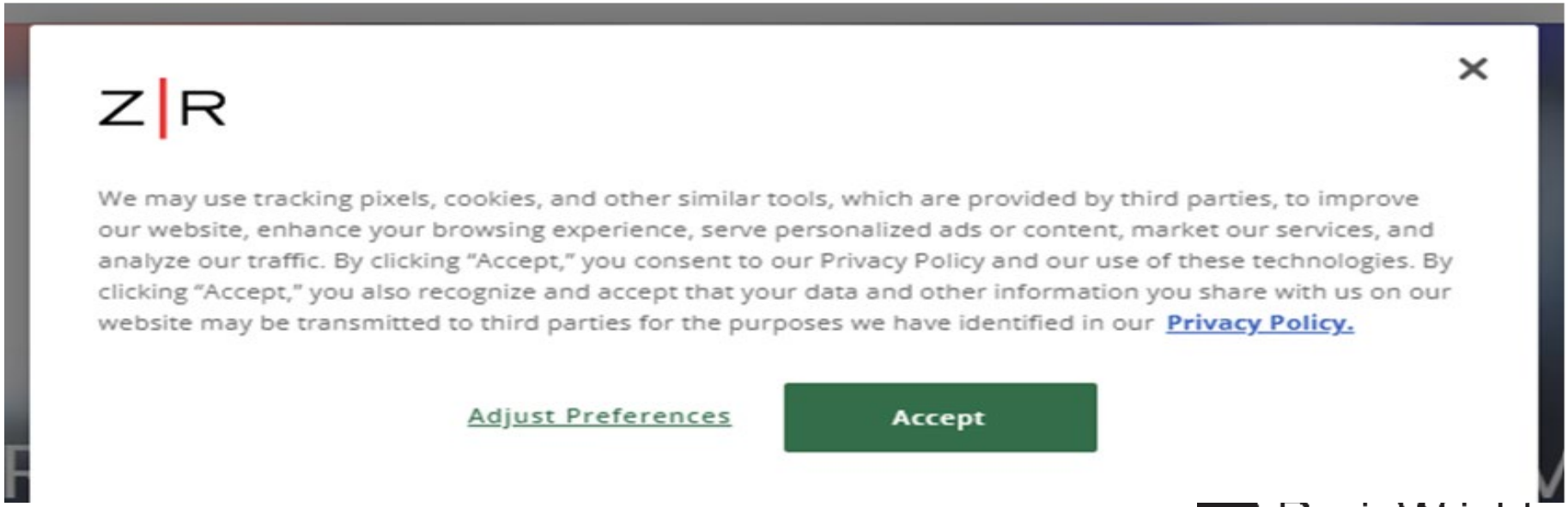
- SCH not enriched at their expense; no tangible economic loss;
- Do not allege economic value to web clicks and page views for anonymous data
  - Cannot simultaneously allege that lost ability to sell data but that you would never sell data.
- Adequate remedy at law under other claims, so no equitable claim allowed.

Baker v. SCH – MTD Granted

- Court Granted Motion to Dismiss With Prejudice on All Claims
  - First judgment in favor of a defendant in any court in the country as of that date;
- Plaintiffs did not seek leave to amend in opposition, but tried at argument—too late
- Used example of Court's website for Judge Holloway
- Plaintiff made vague arguments; conceded not on MyChart; no real answers

Baker v. SCH – Court of Appeals

- Plaintiffs chose to appeal SOLELY Washington Privacy Act Claim
- Plaintiff's counsel believed that federal courts getting WPA wrong, and wanted "to take a run at making some law."
- Plaintiffs Counsel Undeterred by the fact that they were doing the exact same thing upon investigation at 'ZRCLAIMS.com" but put up a new disclosure



Baker v. SCH – Court of Appeals Arguments

- Plaintiffs argued policy:
  - WPA is one of the broadest privacy statutes in the country
  - CA Courts have let similar claims proceed, so WA should too
  - Big tech is bad.
- We argued re policy:
  - Broad because two-party consent;
  - But narrower because requires communication between two or more individuals;
  - Ps trying to expand WPA
  - Criminal penalties, so rule of lenity applies

Baker v. SCH – Court of Appeals Continued

Made Arguments on Most Elements, but all centered on same theory that there was no communication between two people.

Core Arguments Were:

No interception;
Not private;
Not a communication between to or more individuals;
Code is not a "recording device";
Plaintiffs consented via Meta and also via privacy policy
No injury

Baker v. SCH – Victory in Court of Appeals

Court of Appeals Affirms in *Baker v. SCH*, 35 Wn.App.2d 1018 (2025)

- Ruled ***solely*** on communications prong of WPA

Core Holdings:

- "Plaintiffs' complaint did not allege that they navigated SCH's public website to transmit a message to or exchange information with another party. Rather, they merely allege to have clicked and entered search terms to retrieve publicly displayed information and webpages."
- "Distinguishable from "back-and-forth" messaging that is plainly protected by the act, SCH's alleged interception of plaintiffs' click-and-search activity did not affect other parties or involve multiple invasions of privacy."

Baker v. SCH – Court of Appeals

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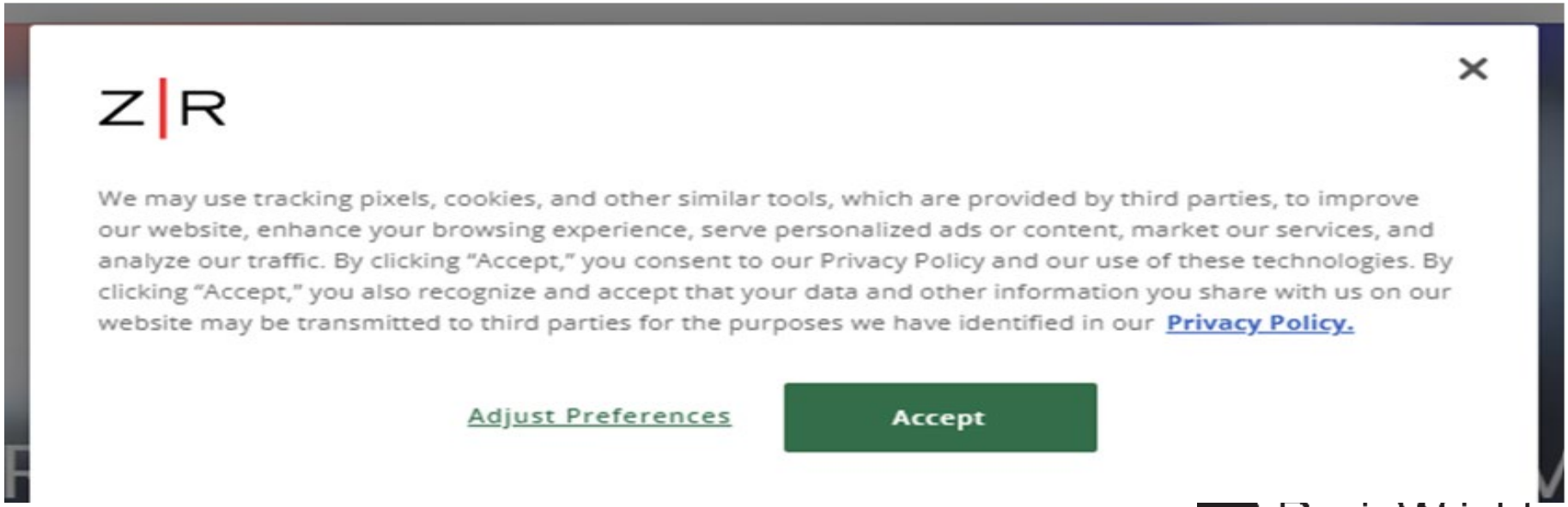

Baker v. SCH – Court of Appeals Limits Holding

Unpublished;	Limited to its facts:	Flagged that WA Legislature Already Addressed These Issues:
• Not precedential, making further review less likely; • Plaintiffs did file motion to publish;	• "[O]ur holding should not be read to definitively construe the application of the term 'private communication' for all cases involving website or internet use. We confine our holding to the facts of this case and decide that the plaintiffs' alleged click-and-search navigation of SCH's public website does not fall within the statutory prohibition of RCW 9.73.030(1)(a)."	• "We acknowledge plaintiffs' concern regarding the privacy of health-related internet activity and privacy concerns related to web-based communications. … [T]he laws in Washington demonstrate a public policy that recognizes there is value in the security of our personal information' • "This includes the Washington My Health My Data Act, chapter 19.373 RCW, that requires 'additional disclosures and consumer consent regarding the collection, sharing, and use of [health data].'

Baker v. SCH – Petition for Review

Plaintiffs sought review of the Court of Appeals' decision re WPA

- Two bases:
  - Contrary to existing WA Supreme Court cases;
  - Substantial issue of public importance.
- Same core themes: broad statute, tech is bad, privacy is important, other states refused to dismiss similar claims;

SCH Opposed:

- Not contrary to any WA Supreme Court case—opinion cites almost every case Plaintiffs rely on;
- No issue of substantial public importance:
  - Unpublished;
  - Limited to its facts;
  - WA Legislature already addressed by MHMD
  - Rule of Lenity Applies

Davis Wright Tremaine LLP

Baker v. SCH – Supreme Court Grants Review (2026)

- Court granted review;
- Supplemental Briefing Filed
- Limited to "Communication" element from court of appeals;
  - If reversed, should go to court of appeals to rule on related elements that we argued;
- Amicus briefs filed by:
  - Washington State Hospital Association & US Chamber of Commerce
  - Interactive Advertising Bureau
  - Both very good.
- Oral Argument Scheduled for May 28, 2026 (Port Townsend)

Questions?

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