which the opinions of abuse were necessarily made, a matter of evaluative opinion and therefore not libelous. The underlying *fact,* namely, the manner in which Berosini is seen to be treating his animals in the videotape, ***628** provides the framework in which the expressed, evaluative opinions of *abuse* must be seen, that is to say, as expressions of pure opinion and not statements of fact. So long as the factual basis for the opinion is readily available, the persons receiving the opinion are in a position to judge for themselves the validity of the opinion. *See Leers v. Green,* 24 N.J. 239, 131 A.2d 781, 787–88 (1957). Finally, whether the rods in question were steel or wood is immaterial; if the rods were in fact wood, saying they were steel cannot be said to defame Berosini in this context.[8]

PART TWO: *THE INVASION OF PRIVACY ACTIONS*

The jury in this case awarded two different species of privacy tort damage awards, each **1278 based on a different aspect of a charged invasion of Berosini's privacy. The first species of privacy tort is "intrusion on seclusion," for which Berosini was awarded $250,000.00 against Gesmundo alone. The second species of invasion of privacy upon which the jury returned a verdict in this case was for the appropriation of Berosini's name or likeness. For commission of this tort the jury awarded Berosini $500,000.00 against PETA and $250,000.00 against Jeanne Roush. For the sake of convenience we will refer to these two torts as the tort of *intrusion* and the tort of *appropriation.*

The law relating to a protectable "right to privacy" is an American invention, developing over a period of approximately the last one hundred years.[9] The law in its present form was conceived almost entirely by Professor William Prosser, who, in a 1960 law review article in the *California Law Review,* expounded that the right of privacy gave rise not to one but to four different tort actions, sometimes called "Prosser's Four Torts of Privacy."[10]

[5] *629 These four torts found their way into the *Restatement*—perhaps because Prosser was the American Law Institute Reporter who drafted the *Restatement* language—and have been adopted, often verbatim, by the vast majority of American jurisdictions.[11] The four species of privacy tort are: 1) unreasonable intrusion upon the seclusion of another; 2) appropriation of the name or likeness of another; 3) unreasonable publicity given to private facts; and 4) publicity unreasonably placing another in a false light before the public.[12]

Nevada has long recognized the existence of the right to privacy.[13] A jurist noted some fifty years ago that "[i]t may be conceded that the doctrine of privacy in general is still suffering the pains of its birth."[14] It is still suffering; accordingly, we undertake in this opinion to offer some guidance on the right of privacy as it is recognized in Nevada, at least with regard to the two specific torts involved in this appeal: the tort of intrusion and the tort of appropriation.

Additionally, we recognize today another tort, a cousin to the "Prosser Four" but not, strictly speaking, a privacy tort. By virtue of statute, NRS 598.980–.988, a fifth, tort must be considered and discussed in connection with the privacy judgments awarded here. This fifth "privacy" tort is the tort of invasion of the *right of publicity.* With this background in mind, let us now proceed to discuss the privacy tort of *intrusion* for which Berosini was awarded damages in this case.

FIRST INVASION OF PRIVACY ACTION: *Intrusion*

> *You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard and, except in darkness, every movement scrutinized.*
>
> *George Orwell*
>
> Georg*1984*

**1279 *630 Berosini claims that one of the Stardust dancers, Ottavio Gesmundo, has intruded upon his "seclusion" backstage, before his act commenced. We support the need for vigilance in preventing unwanted intrusions upon our privacy and the need to protect ourselves against the Orwellian nightmare that our "every movement [be] scrutinized." The question now to be examined is whether Gesmundo's inquiring video camera gives cause for concern over privacy and gives rise to a tort action against Gesmundo for invasion of Berosini's privacy.

Although the problems which the tort of intrusion seeks to remedy are well-recognized, the tort of intrusion has only recently gained the attention of this court. In *M & R Investment Co. v. Mandarino,* 103 Nev. 711, 748 P.2d 488 (1987), we faced the question of whether appellant, "a twenty-two year old man, disguised in dark glasses, a false mustache and slicked down hair, who by virtue of his skill at counting cards, [won] a great deal of money in a short period of time" had stated a cognizable claim for intrusion against the casino personnel who confiscated his

winnings, had him arrested, photographed him, and distributed his photograph to other casinos. *Id.* at 719, 748 P.2d at 493. We answered this question with an emphatic "No," noting that the appellant, so conspicuously attired, could have had no subjective expectation that "casino personnel [would] turn a blind eye to his presence." This court held that even viewing the facts in the light most favorable to the appellant, such an expectation was patently unreasonable and would thus not give rise to a tort action. *Id.* at 719, 748 P.2d at 493.

The *Restatement,* upon which this court has previously relied for guidance in this area,[15] formulates the tort of intrusion in terms of a physical invasion upon the "solitude or seclusion" of another,[16] the rationale being that one should be protected against intrusion by others into one's private "space" or private affairs. To Prosser, these torts were personal injury actions, and he saw as examples of tortious activity the meddling conduct of eavesdroppers, the unpermitted opening of others' mail, and the making of illegal searches and seizures.[17] Simply put, the intrusion tort gives redress for interference with one's "right to be left alone."

[6] To recover for the tort of intrusion, a plaintiff must prove the following elements: 1) an intentional intrusion (physical or otherwise); 2) on the solitude or seclusion of another; 3) that would be highly offensive to a reasonable person.

[7] ***631** In order to have an interest in seclusion or solitude which the law will protect, a plaintiff must show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable. *M & R Investment Co.,* 103 Nev. at 719, 748 P.2d at 493. Thus, not every expectation of privacy and seclusion is protected by the law. "The extent to which seclusion can be protected is severely limited by the protection that must often be accorded to the freedom of action and expression of those who threaten that seclusion of others." 2 Fowler V. Harper, et al., *The Law of Torts,* § 9.6, at 636 (2d ed. 1986). For example, it is no invasion of privacy to photograph a person in a public place; *see, e.g., Gill v. Hearst Publishing Co.,* 40 Cal.2d 224, 253 P.2d 441 (1953); or for the police, acting within their powers, to photograph and fingerprint a suspect. *See, e.g., Norman v. City of Las Vegas,* 64 Nev. 38, 177 P.2d 442 (1947). Bearing this in mind, let us examine Berosini's claimed "right to be left alone" in this case and, particularly, the nature of Berosini's claim to seclusion backstage at the Stardust Hotel.

[8] Berosini's "Invasion of Privacy" claim in his Second Claim for Relief contains no ****1280** factual averments and refers the reader back to paragraphs 1 through 18 of the First Claim for Relief, where one is required to search for some factual basis for Berosini's charging of the intrusion tort. The only factual allegations that appear to have any relation to the intrusion tort are found in paragraph 12 of the first claim, a paragraph that relates only to defendant Gesmundo. (Gesmundo is the only defendant against whom a judgment was entered on the intrusion tort.) Paragraph 12 reads as follows:

> 12. Defendant GESMUNDO unlawfully trespassed onto the Stardust Hotel with a video camera in July, 1989. Video cameras and other recording equipment are strictly prohibited at the Stardust Hotel. Defendant GESMUNDO unlawfully filmed Plaintiff BEROSINI disciplining the orangutans without the Plaintiff's knowledge or consent and just after Defendant GESMUNDO and others agitated the orangutans.

The focus, then, of Berosini's intrusion upon seclusion claim is Gesmundo's having "trespassed onto the Stardust Hotel with a video camera" and having "unlawfully filmed Plaintiff Berosini disciplining the orangutans without the Plaintiff's knowledge or consent." It is of no relevance to the intrusion tort that Gesmundo trespassed onto the Stardust Hotel, and it is of no moment that Gesmundo might have "unlawfully" filmed Berosini, unless at the same time he was violating a justifiable expectation of privacy ***632** on Berosini's part. The issue, then, is whether, when Gesmundo filmed Berosini "disciplining the orangutans without the Plaintiff's knowledge or consent," Gesmundo was intruding on "the solitude or seclusion" of Berosini.

The primary thrust of Berosini's expectation of privacy backstage at the Stardust was that he be left alone with his animals and trainers for a period of time immediately before going on stage. Berosini testified that "as part of his engagement with the Stardust," he demanded that "the animals be left alone prior to going on stage." Throughout his testimony, over and over again, he stresses his need to be alone with his animals before going on stage. Berosini's counsel asked him what his "purpose" was in requiring that he be "secured from the other cast members and people before [he] went on stage." Berosini's answer to this question was: "I have to have the attention ... I have to know how they think. I cannot have them drift away with their mind...."; and, further, "it is very important that before the show I have the orangutans'

attention and I can see what they think before I take him on stage...." Significantly, Berosini testified that his "concern for *privacy* was *based upon the animals* " and that his "main concern is that [he] have no problems going on stage and off stage," that is to say that no one interfere with his animals in any way immediately before going on stage. (Emphasis added.)

Berosini was concerned that backstage personnel not "stare at the orangutans in their faces. The orangutans will interpret [this] as a challenge." It is clear that Berosini's "main concern" was that he be provided with an area backstage in which he could get the animals' undistracted attention before going on stage. He never expressed any concern about backstage personnel merely seeing him or hearing him during these necessary final preparations before going on stage; his only expressed concern was about possible *interference* with his pre-act training procedures and the danger that such interference might create with respect to his control over the animals. Persons who were backstage at the Stardust could hear what was going on when "Berosini [was] disciplining his animals," and, without interfering with Berosini's activities, could, if they wanted to, get a glimpse of what Berosini was doing with his animals as he was going on stage.[18]

What is perhaps most important in defining the breadth of Berosini's expectation of ****1281** privacy is that in his own mind there was nothing wrong or untoward in the manner in which he disciplined the animals, as portrayed on the videotape, and he ***633** expressed no concern about merely being seen or heard carrying out these disciplinary practices. To Berosini all of his disciplinary activities were completely "justified." He had nothing to hide—nothing to be private about. Except to avoid possible distraction of the animals, he had no reason to exclude others from observing or listening to his activities with the animals. Berosini testified that he was not "ashamed of the way that [he] control[led] [his] animals"; and he testified that he "would have done the same thing if people were standing there because if anybody would have been standing there, it was visibl[e]. It was correct. It was proper. It was necessary."

As his testimony indicates, Berosini's "concern for privacy was based upon the animals," and not upon any desire for sight/sound secrecy or privacy or seclusion as such; and he "would have done the same thing if people were standing there." The supposed intruder, Gesmundo, was in a real sense just "standing there." By observing Berosini through the eye of his video camera, he was merely doing what other backstage personnel were also permissibly doing. The camera did not interfere in any way with Berosini's pre-act animal discipline or his claimed interest in being "secured from the other cast members and people before [he] went on stage."[19] Having testified that he would have done the same thing if people were standing there, he can hardly complain about a camera "standing there."

If Berosini's expectation was, as he says it is, freedom from distracting intrusion and interference with his animals and his pre-act disciplinary procedures, then Gesmundo's video "filming" did not invade the scope of this expectation. Gesmundo did not intrude upon Berosini's *expected* seclusion. *See, e.g., Kemp v. Block,* 607 F.Supp. 1262, 1264 (D.Nev.1985) ("[t]his Court finds that the plaintiff knew that other persons could overhear. He, therefore, had no reasonable expectation of privacy"); *Mclain v. Boise Cascade Corp.,* 271 Or. 549, 533 P.2d 343, 346 (1975) ("plaintiff conceded that his activities which were filmed could have been observed by his neighbors or passersby"). For this reason the tort of intrusion cannot be maintained in this case.[20]

[9] ***634** On the question of whether Gesmundo's camera was *highly* offensive to a reasonable person, we first note that this is a question of first impression in this state. As might be expected, "[t]he question of what kinds of conduct will be regarded as a 'highly offensive' intrusion is largely a matter of social conventions and expectations." J. Thomas McCarthy, *The Rights of Publicity and Privacy,* § 5.10(A)(2) (1993). For example, while questions about one's sexual activities would be highly offensive when asked by an employer, they might not be offensive when asked by one's closest friend. *See Phillips v. Smalley Maint. Services,* 435 So.2d 705 (Ala.1983). "While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court in discerning the existence of a cause of action for intrusion." *Miller v. National Broadcasting Co.,* 187 Cal.App.3d 1463, 232 Cal.Rptr. 668, 678 (1986); *see, e.g.,* ****1282** *Lovgren v. Citizens First Nat. Bank,* 126 Ill.2d 411, 128 Ill.Dec. 542, 534 N.E.2d 987 (1989); *Kaiser v. Western R/C Flyers Inc.,* 239 Neb. 624, 477 N.W.2d 557, 562 (1991); *Smith v. Jack Eckerd Corp.,* 101 N.C.App. 566, 400 S.E.2d 99 (1991). A court considering whether a particular action is "highly offensive" should consider the following factors: "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Miller,* 232 Cal.Rptr. at 679; 5 B.E. Witkin, *Summary of California Law, Torts* § 579 at 674 (9th ed. 1988).

Three of these factors are of particular significance here and, we conclude, militate strongly against Berosini's claim that Gesmundo's conduct was highly offensive to a reasonable person. These factors are: the degree of the alleged intrusion, the context in which the actions occurred, and the motive of the supposed intruder. First, we note the nonintrusive nature of the taping process in the instant case. Berosini was concerned with anyone or anything interfering with his animals prior to performance. The camera caused no such interference. Neither Berosini nor his animals were aware of the camera's presence. If Gesmundo had surprised Berosini and his animals with a film crew and had caused a great commotion, we might view this factor differently. *See generally Miller,* 232 Cal.Rptr. 668. On the contrary, it appears from these facts that any colorable privacy claims arose not from the actual presence of the video camera but from the subsequent use to which the video tape was put.

Secondly, as has been discussed fully above, the context in which this allegedly tortious conduct occurred was hardly a ***635** model of what we think of as "privacy." We must remember that the videotaping did not take place in a private bedroom (*see Miller,* 232 Cal.Rptr. at 668), or in a hospital room (*see Estate of Berthiaume v. Pratt,* 365 A.2d 792, 796 (Me.1976)), or in a restroom (*see Harkey v. Abate,* 131 Mich.App. 177, 346 N.W.2d 74 (1983)), or in a young ladies' dressing room (*see Doe by Doe v. B.P.S. Guard Services Inc.,* 945 F.2d 1422 (8th Cir.1991)), or in any other place traditionally associated with a legitimate expectation of privacy. Rather, Gesmundo filmed activities taking place backstage at the Stardust Hotel, an area where Gesmundo had every right to be, and the filming was of a subject that could be seen and heard by any number of persons. This was not, after all, Berosini's dressing room; it was a holding area for his orangutans.

Finally, with regard to Gesmundo's motives, we note that Gesmundo's purpose was not to eavesdrop or to invade into a realm that Berosini claimed for personal seclusion. Gesmundo was merely memorializing on tape what he and others could readily perceive. Unlike the typical *intrusion* claim, Gesmundo was not trying to pry, he was not trying to uncover the covered-up. Although Berosini envisioned Gesmundo to be engaged in a conspiracy with others (as put in the Answering Brief) "to put an end to the use of animals in entertainment," as noted in note 3, *supra,* the conspiracy charges in Berosini's complaint were dismissed. Furthermore, even if Gesmundo was conspiring to put an end to the use of animals in entertainment, this is not the kind of motive that would be considered highly offensive to a reasonable person. Many courts, and Professor Prosser, have found the inquiry into motive or purpose to be dispositive of this particular element of the tort. *See Prosser and Keeton on Torts* § 117 at 856 (W. Page Keeton, ed.; 5th ed. 1984). For example, in *Estate of Berthiaume,* 365 A.2d at 796, the court held that a doctor who photographed a dying patient against his will could be held liable for intrusion, in part because the doctor was not seeking to further the patient's treatment when he photographed him. Similarly, in *Yarbray v. Southern Bell Tel. & Tel. Co.,* 261 Ga. 703, 409 S.E.2d 835 (1991), the court held that an employee who claimed that her employer pressured her regarding her testimony in an employment discrimination suit brought against the company, could not state a claim for intrusion because the employer ****1283** was motivated by his desire to protect the company's interests. *Id.* 409 S.E.2d at 837; *see also Baggs v. Eagle–Picher Industries,* 957 F.2d 268 (6th Cir.1992), *cert. denied,* 506 U.S. 975, 113 S.Ct. 466, 121 L.Ed.2d 374 (1992); *Saldana v. Kelsey–Hayes Co.,* 178 Mich.App. 230, 443 N.W.2d 382 (1989).

While we could reverse Berosini's intrusion upon seclusion judgment solely on the absence of any intrusion upon his actual ***636** privacy expectation, we go on to conclude that even if Berosini had expected complete seclusion from prying eyes and ears, Gesmundo's camera was not "highly offensive to a reasonable person" because of the nonintrusive nature of the taping process, the context in which the taping took place, and Gesmundo's well-intentioned (and in the eyes of some, at least, *laudable*) motive. If Berosini suffered as a result of the videotaping, it was not because of any tortious intrusion, it was because of subsequent events that, if remediable, relate to other kinds of tort actions than the *intrusion* upon seclusion tort.

SECOND INVASION OF PRIVACY ACTION:
Appropriation

[10] [11] We now draw our attention to the other privacy tort pursued by Berosini in this case, namely, the tort of invasion of privacy based upon appropriation of name or likeness. There is considerable confusion in the cases and in the literature regarding this tort, primarily because the difference between the appropriation tort and the right of publicity tort is often obscured. The common law appropriation tort ordinarily involves the unwanted and unpermitted use of the name or likeness of an *ordinary, uncelebrated* person for advertising or other such commercial purposes, although it is possible that the appropriation tort might arise from the misuse of another's name for purposes not involving strictly monetary gain. The right of publicity tort, on the other

hand, involves the appropriation of a *celebrity's* name or identity for commercial purposes.[21] The distinction between these two torts is the interest each seeks to protect. The appropriation tort seeks to protect an individual's personal interest in privacy; the personal injury is measured in terms of the mental anguish that results from the appropriation of an ordinary individual's identity. The right to publicity seeks to protect the *property* interest that a celebrity has in his or her name; the injury is not to personal privacy, it is the economic loss a celebrity suffers when someone else interferes with the property interest that he or she has in his or her name. We consider it critical in deciding this case that recognition be given to the difference between the *personal,* injured-feelings quality involved in the appropriation privacy tort and the *property,* commercial value quality involved in the right of publicity tort.

As said, in the case of a private person, the invasion of privacy resulting from misuse or misappropriation of that person's name ***637** or identity is a personal injury, an injury that is redressable by general damages for the mental anguish and embarrassment suffered by reason of the unwanted public use of the private person's name. When, however, the name of a famous or celebrated person is used unauthorizedly, that person's main concern is not with bruised feelings, but rather, with the commercial loss inherent in the use by another of the celebrated name or identity. The commercial or property interest that celebrities have in the use of their names and identities is protected under what has been termed the "right of publicity."

There is a certain reciprocity between the two kinds of interests, personal and proprietary; and, accordingly, the more the aspects of one tort are present, the less likely are the aspects of the other tort to be present. The more obscure the plaintiffs are, the less commercial value their names have and the more such plaintiffs will be seeking to redress *personal* interests in privacy in a common law appropriation action, and not commercial or *property* interests in their name or likeness as a claimed violation of a right of publicity. The more famous and celebrated ****1284** the plaintiffs, the less injury is likely to be claimed to their privacy interests, their interest in being "left alone," because their names and likenesses already have wide recognition and are not appropriate subjects for invasions of personal privacy. Generally speaking, a private person will be seeking recovery for the appropriation tort, and a celebrity will be recovering for the right of publicity tort. A celebrity, whose identity, by definition, is well known, will not ordinarily be heard to complain of "indignity," mental distress, or other personal injury resulting from the public use of his or her name; and consequently, such a person ordinarily will be suing for invasion of the right of publicity and will not likely be able to prosecute a successful claim under the common law privacy tort, appropriation of name or likeness.

Prosser did not recognize a discrete difference between the two torts that we are now discussing; but as far back as 1953, in the case of *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,* 202 F.2d 866, 868 (2d Cir.1953), Judge Jerome Frank commented:

> [I]n addition to and *independent of* that right to privacy [i.e. the appropriation privacy tort] ... a man has the right in *the publicity value* of his photograph.... This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons ... far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements....

(Emphasis added.)

***638** As discussed by Judge Frank in *Haelan,* the right of publicity refers to a property right in a person's identity. This property right is infringed by the unpermitted use of a person's identity for money-making purposes. This infringement on what is in every sense a property right is, as we have explained, quite different from the other tort action, the personal injury action involved in the appropriation privacy tort.

The distinction between the two kinds of torts being discussed was also put with clarity by Joseph R. Grodin in this way:

> [T]he Haelan case gave protection to persons' commercial interest in their personality independent of their privacy interest.... [C]ourts have confused commercial interests with privacy interests.... *If courts wish to protect both interests to at least some extent, they should do so under separate doctrines, so that limitations appropriate to each interest may be imposed.*

Note, Joseph R. Grodin, *The Right of Publicity: A*

Doctrinal Innovation, 62 Yale L.J. 1123 (1953) (emphasis added), *quoted in* J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 1.7, page 1–34 (1993). "[T]he act of infringement on the Right of Publicity can properly be viewed as a commercial 'tort,' as well as a form of 'unfair competition.' " McCarthy, *supra,* at § 10.02, page 10–6.

[12] Berosini, a public figure and celebrity, has not sued for violation of his *right of publicity.* Berosini has prosecuted a common law *appropriation* tort action in this litigation. Even though he sues under the appropriation tort, it is apparent from Berosini's brief that tort damages for hurt feelings stemming from defendants' commission of the appropriation privacy tort is not what he is really interested in; rather, Berosini is (understandably) only interested in recovery of the "pecuniary gain sought by PETA through the use of Berosini's name and likeness...." (Berosini Brief, p. 76). Berosini claims in his brief that PETA used his photographs and name "to promote national publicity for PETA and to raise money as part of the fund raising campaign." *Id.* The "pecuniary gain" by PETA and its use of Berosini's celebrity for publicity and fund-raising purposes is not, and cannot be, of the personal injury kind of tort represented by the appropriation privacy tort or (as put in Berosini's brief) "within the common law tort of misappropriation of one's name and likeness." If there were a "privacy" tort committed here by PETA, it would necessarily have to be a tort involving the right of publicity and *only* the right of publicity, and *not* the hurt-feelings, personal injury tort of appropriation.

**1285 [13] *639 Nevada has codified the right of publicity tort in NRS 598.980–.988. Nevada provides a statutory remedy in cases of invasion of the right of publicity and for protection against "any commercial use within this state of a living or deceased person's name, voice, signature, photograph or likeness." NRS 598.982. The statute provides a complete and exclusive remedy for right of publicity torts. Berosini does not plead a right of publicity tort, did not request that the jury be instructed on this statutory tort, and did not argue the commission of this tort in his appeal. Berosini, therefore, cannot recover on the "common law" tort, the appropriation privacy tort, for the reasons stated; and he cannot recover under the statutory tort, the right of publicity tort because he has not sought recovery under the statute. The "privacy" tort judgments against PETA and Roush must therefore be reversed.

The judgment of the trial court is reversed in its entirety.

STEPHEN, C.J., and YOUNG and SHEARING, JJ., concur.[22]

All Citations

111 Nev. 615, 895 P.2d 1269, 23 Media L. Rep. 1961

Footnotes

1 After entry of the order limiting the libel action to the two mentioned categories, the defendants sought, through written interrogatories, to have Berosini give more detail as to who did what, and when, with reference to the defamation charges. Berosini did not respond to these questions to defendants' satisfaction, and the district court refused to compel him to do so. The court ruled that Berosini "need not identify each allegedly [sic] defamatory statement" and further ruled that Berosini would be limited in his proof to "those defamatory statements identified in discovery answers or depositions." We read this latter order to refer to the mentioned, already-narrowed two categories. This order did not, by its terms, countermand the previous order limiting Berosini's defamation proof to "the video tape and its distribution" and to unattributed statements that "Berosini regularly abuses his orangutans and has beaten them with steel rods."

The defendants in this case have repeatedly complained that they have not been put on notice as to which defendant is claimed to have made what actionable statements to whom. Defendants cannot be expected to search through scores of depositions and massive discovery materials to guess just what Berosini had in mind with respect to each defendant's supposed defamatory conduct. This problem was mitigated considerably, however, when the trial judge limited the defamation charges to the videotape and to the mentioned charges of regular abuse and use of a steel rod. In his answering brief, Berosini appears to agree that there are only two allowable categories of defamation. In opposition to defendants' charges that he had not adequately informed them concerning the specifics of the defamation claim, Berosini tells us in his brief:

> In the present case Berosini specifically alleged the defamatory tapes and the words said to be actionable, to wit: "... Defendants have stated that Plaintiff BEROSINI regularly abuses his orangutans and has beaten them with steel rods, all of which are false."

Although Berosini may have considered some other conduct by one or another of the defendants as being actionable, in light of the trial judge's limiting order and Berosini's own argument that he did in fact "*specifically* allege the defamatory" items on which he relied, we assume in this appeal that the libel charges are limited to those

covered by the trial judge's order.

2 A statement is defamatory when, "[u]nder any reasonable definition [,] such charges would tend to lower the subject in the estimation of the community and to excite derogatory opinions against him and to hold him up to contempt." *Las Vegas Sun v. Franklin,* 74 Nev. 282, 287, 329 P.2d 867, 869 (1958).

3 Visual accuracy has been conceded and the only possible question is whether the sound was so materially altered as to render the tape *false*. The only modification of the tape was done when the tape was transferred from the VHS format to a three-quarter inch format by a professional video technologist, Alan Kartes. Kartes testified that in the transfer process he enhanced the amateur video effort by turning up the light and the sound so that it would more clearly and accurately represent the subject of the taping. Berosini also claims that taking out the dead time in the manner stated made the tape falsely appear as if the beatings were constant and close together in time. The consecutively-dated tape clearly shows, however, that the episodes are intermittent in nature and not one long "torture session" for the animals. Each episode shows Berosini coming from another backstage area into the curtained area, and there is no way of mistaking this tape for one, prolonged beating. None of the defendants ever said or pretended that Berosini engaged in "marathon" beatings; and there is nothing in the least misleading about the way the tape was put together. The tape merely shows that Berosini did (on at least nine consecutive days) "regularly" beat his animals before they went on stage.

The only other conceivable scenario out of which "falsity" might be claimed with regard to the videotape itself would have to be found in Berosini's argument that he was "set up"—that the animal rights activists were out to get him and that they teased his animals in order to rile them up and so make it necessary for him to be violent with the animals in order to control them. When we address this argument we must bear in mind that even if Berosini's charges were true, it does not mean that the tape itself is in any way false. Berosini can only argue that even though he was in fact violent with his animals, it was necessary to be violent in order to discipline and control them. Even if Berosini had been entrapped into beating his animals by overzealous animal rights activists, this would have no bearing on the truth or falsity of the tape itself. No matter how one interprets what Berosini was shown to be doing on the tape, the fact remains that the tape does truly show Berosini beating the animals—"regularly."

4 Berosini did try to pursue a conspiracy tort action against the defendants for these activities; however, the district court dismissed this action prior to trial.

The trial court also dismissed Berosini's false light invasion privacy action, after verdict and judgment. Berosini has not cross-appealed, so that this tort is not before us. We note also that during the oral argument on this appeal, Berosini's counsel complained that the tape resulted in Berosini's actions being "taken out of context," which goes to the very essence of the now unavailable false light tort. There are cases indicating that the false light invasion of privacy may be committed even when the publication is not defamatory. "[W]hile a false light claim may be defamatory, it need not be." *Machleder v. Diaz,* 801 F.2d 46, 55 (2d Cir.1986), *cert. denied,* 479 U.S. 1088, 107 S.Ct. 1294, 94 L.Ed.2d 150 (1987). "The false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation." *Rinsley v. Brandt,* 700 F.2d 1304, 1307 (10th Cir.1983). Since the tape itself is not false, and since the tape itself is not defamatory, clearly no defamation action can arise out of distribution of the tape. Because the false light tort is not a subject of this appeal, we are not required to decide whether the tort was committed by any of the defendants in this case.

5 Bobby Berosini, Berosini's son, testified that he had seen his father strike the animals with a black rod at times other than those during which Berosini was being filmed by the Gesmundo camera.

6 Some of Berosini's own witnesses also believed that the tapes disclosed untoward behavior on the part of Berosini. For example, Lewis McKeen, Stardust stage manager, said that the tapes "looked like Mr. Berosini was ... hurting the animals." Berosini himself admitted that his conduct on the videotape looks like a "vicious beating." Any viewer of this tape is entitled to the opinion that Berosini "abused," that is to say, used the animals in an improper and wrongful manner. There can be no clear and universally accepted definition of animal abuse, and the line between proper treatment and improper treatment and abuse is indistinct.

7 Berosini filed a motion for leave to file supplemental citation of authority with this court based upon the recent *Posadas* opinion. We have already considered *Posadas* and therefore deny Berosini's motion.

8 Much of the briefing in this case relates to whether the defendants are protected from liability by the First Amendment to the United States Constitution because there is no showing of "actual malice." Defendants in this case claim to be protected by current federal constitutional doctrine which holds that traditional tort rules governing the law of libel are subject to overriding constraints of the First Amendment. We do not reach the question of actual or constitutional malice (although it is extremely clear that Berosini has not proven by clear and convincing evidence that any defendant

made a false or defamatory statement known to be false or with reckless disregard of the truth) because this appeal is easily decided under traditional tort rules and under the Nevada Constitution.

9 The genesis of the right to privacy is traceable to a law review article, Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy,* 4 Harv.L.Rev. 193 (1890); William L. Prosser, *Privacy,* 48 Cal.L.Rev. 383 (1960) (hereinafter "Prosser").

10 Prosser, *supra* note 9.

11 Restatement (Second) of Torts, § 652A, appendix, at 268–69 (1977) (listing the states recognizing the privacy torts); Prosser at 386–88, *supra* note 9.

12 *Restatement* at 376, supra note 11.

13 *See Montesano v. Donrey Media Group,* 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983), *cert. denied,* 466 U.S. 959, 104 S.Ct. 2172, 80 L.Ed.2d 555 (1984) (adopting the Restatement formulation); *M & R Investment Co. v. Mandarino,* 103 Nev. 711, 718–19, 748 P.2d 488, 493 (1987); *Norman v. City of Las Vegas,* 64 Nev. 38, 177 P.2d 442 (1947) (implicitly recognizing an action for invasion of privacy).

14 *Clayman v. Bernstein,* 38 Pa. D & C. 543 (Ct.Common Pleas, Penn, 1940).

15 *See Montesano,* 99 Nev. at 649, 668 P.2d at 1084.

16 *Restatement,* § 652B at 378, *supra* note 11.

17 Prosser at 392, *supra* note 9.

18 The record reveals that a number of people were readily able to see or hear what was going on in Berosini's "private" area.

19 *See* discussion, *supra,* at 1280.

20 We do not find it necessary to discuss the question of reasonability (objective expectation of privacy) of Berosini's privacy interests because, as said, his concern was not with being seen. Nevertheless, we note that Berosini's being a public figure militates against his privacy claim. It is probably not reasonable for a well known, headliner entertainer to expect that his picture will not be taken backstage at his place of performance, even when it is a violation of company rules. Furthermore, we note that there is, generally speaking, a reduced objective expectation of privacy in the workplace. *See, e.g., Baggs v. Eagle–Picher Industries,* 957 F.2d 268 (6th Cir.1992), *cert. denied,* 506 U.S. 975, 113 S.Ct. 466, 121 L.Ed.2d 374 (1992); *Yarbray v. Southern Bell Tel. & Tel. Co.,* 261 Ga. 703, 409 S.E.2d 835 (1991).

21 The right of publicity tort is recognized by statute in Nevada by NRS 598.980–.988.

22 The Honorable Robert E. Rose, then Chief Justice, voluntarily recused himself from participation in the decision of this appeal.

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DOCKETING STATEMENT ATTACHMENT 31

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Joint Petition for Divorce of: Sean R. Abid and Lyudmyla A Abid, Petitioners.	Case No.: D-10-424830-Z Department B

NOTICE OF ENTRY OF ORDER FROM HEARING

TO: ALL PARTIES AND/OR THEIR ATTORNEYS

Please take notice than an Order from Hearing has been entered in the above-entitled matter, a copy of which is attached hereto. I hereby certify that on the above file stamped date, I caused a copy of this **Notice of Entry of Order from Hearing** to be:

☒ E-Served pursuant to NEFCR 9 on 03/01/16, or placed in the folder(s) located in the Clerk's Office of, the following attorneys:

Radford J. Smith, Esquire
2470 St. Rose Pkwy., Suite 206
Henderson, Nevada 89074

John D. Jones, Esquire
10777 W. Twain Avenue, Suite 300
Las Vegas, Nevada 89135

Chryste Domingo
Judicial Executive Assistant
Department B

LINDA MARQUIS
DISTRICT JUDGE
FAMILY DIVISION, DEPT.B
LAS VEGAS, NV 89101-2408

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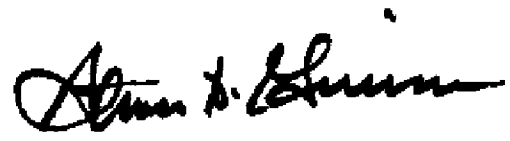

CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

SEAN R. ABID, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	Case No.:	D-10-424830-Z
	Dept. No.:	B

Findings of Fact, Conclusions or Law, and Decision

This matter having come on for evidentiary proceedings on the 11th and 25th day January of 2016, upon Plaintiff, Sean A. Abid's (Dad) request to change custody; Dad being present and represented by John D. Jones ; Defendant Lyudmyla A. Abid (Mom) being present and represented by Radford J. Smith.

The Court having heard the evidence presented, and after taking the matter under advisement, finds and orders as follows:

Findings of Fact

This matter is a post-divorce custody action.

The Parties have one minor child, A.A., born in February 2009.

The Parties last custody order was a stipulated order, filed on September 9, 2014. The Parties stipulated to joint legal custody and joint physical custody.

Dr. Stephanie Holland, licensed psychologist, testified as an expert witness

Non-Trial Disposition:
☐ Other
☐ Dismissed - Want of Prosecution
☐ Involuntary (Statutory) Dismissal
☐ Default Judgment
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Trial Disposition:
☐ Settled/Withdrawn:
☐ Without Judicial Conf/Hrg
☒ With Judicial Conf/Hrg
☐ By ADR
☐ Judgment After Trial Start
☐ Judgment Reached By Trial

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LAS VEGAS, NV 89101

and conducted a child interview of the minor child.

Dr. Holland has conducted 75-100 child interviews in conjunction with the Eighth Judicial District Court, Family Division, since 1999.

Dr. Holland relied upon: four separate interviews with the child; an interview of Mom; an interview with Dad; the child's medical records; email and text messages between the parties; pleadings relative to the instant litigation; and audio recordings made by Dad.

Dr. Holland interviewed the child on four occasions. Mom and Dad were both allowed to bring the child an equal number of times to Dr. Holland's office. Mom brought the child to Dr. Holland's office two times; and Dad brought the child to Dr. Holland's office two times.

The child's behavior and statements were consistent throughout the four interviews.

During the interviews, the child described his father as "sneaky" and "mean." Further, the child indicated that Mom told the child that the child's Dad was "sneaky" and "mean." However, those descriptions were in direct contrast to the child's description of the child's actual experiences with his Dad.

The child's own statements during the four interviews clearly established that Mom was directly and overtly attempting to influence the child's belief system regarding Dad.

The child exhibited significant signs of distress and confusion. Further, the child is internalizing a belief system that is not his own. The child is confused by statements Mom makes to the child about the child's father.

During Mom's interview with Dr. Holland, Mom admitted she told the child not to tell Dad what happens in Mom's home.

Dr. Holland testified that children should be able to speak freely to their parents about the other parent. This type of speech restriction causes confusion and distress in children. It also creates a loyalty bind for children, especially younger children.

The Parties' homes are structured differently. Dad's home is more rigid and Mom's home is unstructured. Mom indicated that child was allowed to play Call of Duty, a video game rated for mature players only, thirty (30) minutes per day. Dad does not allow the child to play Call of Duty.

The child exhibited a preoccupation with the video game Call of Duty throughout the interviews. The child's level of preoccupation with Call of Duty was not consistent with Mom's statement that the child is only allowed to play Call of Duty thirty (30) minutes per day.

Call of Duty, with or without any additional controls, is inappropriate for a five or six year old.

Based on the child's own statements during the interview, the child exhibited a decreased desire to spend time with Dad.

As a direct result of Mom's direct and overt actions, the child is experiencing: confusion; distress; a divided loyalty between his parents; and a decreased desire to spend time with Dad.

Conclusions of Law

A modification from a joint physical custody arrangement is appropriate if it is in the child's best interest. *See Truax, v. Truax*, 110 Nev. 437, (1994). In considering the best interest of the child the District Court shall consider and set forth specific findings concerning several factors, found in the yet to be codified AB 263, section 8., as follows:

a. The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his custody.

b. Any nomination by a parent or a guardian for the child.

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FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

c. Which parent is more likely to allow the child to have frequent associations ***and*** a continuing relationship with the noncustodial parent.

d. The level of conflict between the parents.

e. The ability of the parents to cooperate to meet the needs of the child.

f. The mental and physical health of the parents.

g. The physical, developmental and emotional needs of the child.

h. The nature of the relationship of the child with each parent.

i. The ability of the child to maintain a relationship with any sibling.

j. Any history of parental abuse or neglect of the child or a sibling of the child.

k. Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.

Here, the child is of insufficient age and capacity to form an intelligent preference as to his custody.

Father requests to be designated primary custodian. Mother requests the parties continue as joint physical custodians and that visitation be modified from the last Order, increasing her visitation time with the child.

The parties were previously able to cooperate and allow the child frequent association with the other parent. Mom allowed the child additional time with Dad in the past, especially for sporting events. However, the expert testimony from Dr. Holland indicates that Mom's behavior is impacting the child's continuing relationship with Dad. Specifically, Mom's behavior is creating confusion, distress, and divided loyalty in the child. Mom concedes she is limiting the child's ability to freely speak about events and circumstances at each home.

The level of conflict between the parties is high. The parties are unable to cooperate to meet the needs of the child. Both parties have a difficult time listening and appropriately communicating.

The mental and physical health of both parents is good.

While there was no evidence that the child has special needs, Dr. Holland testified that the child is experiencing confusion and distress because of Mom's actions. Mom has limited insight into the damage she is causing and is unable to recognize and meet the emotional needs of her child.

Each party clearly loves the child and enjoys a special relationship with the child.

The child has a half-sibling who resides full time with Mom and two half-siblings who reside full time with Dad. The child will be able to continue to maintain a relationship with all siblings pursuant to the visitation schedule outlined herein.

There is no history of parental abuse or neglect.

There is no history of domestic violence.

Based upon the foregoing best interest analysis, this Court determines that it is in the child's best interest that Dad be awarded primary physical custody of the minor child.

Child support is calculated utilizing the formulas found in NRS 125B.070 and deviation factors found in NRS 125B.080.

Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that it is in the best interest of the minor child that the parties maintain joint legal custody and that Dad be granted primary physical custody, subject to Mom's specific visitation, commencing on Monday, March 28, 2016, the day school resumes after Spring Break.

LINDA MARQUIS
DISTRICT JUDGE

FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that until Monday, March 28, 2016, the parties shall maintain joint physical custody and the specific visitation schedule outlined in the previous stipulation and order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commencing March 28, 2016, Mom's visitation time with the child shall be defined as follows: every other weekend, Mom shall pick up the child from school on Friday afternoon and return the child to school on Monday morning. On the alternating week, Mom shall pick up the child from school on Thursday afternoon and return the child to school on Friday morning.

If school is not in session, for any reason, the receiving party shall pick up the child. For example, Mom shall pick up from Dad, or directly from a designated child care provider, at the same time school releases. Dad shall pick up from Mom, or directly from a child care provider, at the same time school releases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall continue to utilize their existing holiday schedule. However, during summer break, each parent shall have a two week vacation with the child. Each party shall notify the other parent in writing on or before May 1st of each year of the dates of the two week summer break. If the summer vacation dates conflict, Mom's request shall take precedence in all even years and Dad's request shall take precedence in all odd years.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that 18% of Mom's gross monthly income is $914.04. The presumptive maximum is $749.00 therefore it is in the best interest of the child that Mom's child support obligation be set at $ 749.00 per month beginning April 2016. Such support shall continue until further order of the Court, upon a three year review, or upon substantial change of circumstances. Otherwise, the support shall continue until

the child turns 18, unless the child is still attending high school, then the support shall continue until the child turns 19.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the current support order shall be in effect until April 2016.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Parties shall utilize Our Family Wizard as their exclusive method of communication, absent emergency or exigent circumstances, until further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following provisions are required to be included in this custody and support order:

That the party ordered to pay child support to the other, is HEREBY PUT ON NOTICE that, pursuant to NRS 125.450, a parent responsible for paying child support is subject to NRS 31A.010 through NRS 31A.340, inclusive, and Sections 2 and 3 of Chapter 31A of the Nevada Revised Statutes, regarding the withholding of wages and commissions for the delinquent payment of support. These statutes and provisions require that, if a parent responsible for paying child support is delinquent in paying the support of a child that such person has been ordered to pay, then that person's wages or commissions shall immediately be subject to wage assignment and garnishment, pursuant to the provisions of the above-referenced statutes.

That both parties, and each of them, shall be bound by the provision of NRS 125C.200, as amended by AB No. 263, Section 16:

1. If primary physical custody has been established pursuant to an order, judgment or decree of a court and the custodial parent intends to relocate his or her residence to a place outside of this State or to a place within this State that is at such a distance that would

substantially impair the ability of the other parent to maintain a meaningful relationship with the child, and the custodial parent desires to take the child with him or her, the custodial parent shall, before relocating:

(a) Attempt to obtain the written consent of the noncustodial parent to relocate with the child; and

(b) If the noncustodial parent refuses to give that consent, petition the court for permission to relocate with the child.

2. The court may award reasonable attorney's fees and costs to the custodial parent if the court finds that the noncustodial parent refused to consent to the custodial parent's relocation with the child:

(a) Without having reasonable grounds for such refusal; or

(b) For the purpose of harassing the custodial parent.

3. A parent who relocates with a child pursuant to this section without the written consent of the noncustodial parent or the permission of the court is subject to the provisions of NRS 200.359.

That the parties, and each of them, shall be bound by the provisions of NRS 125.510(6) which state, in pertinent part:

PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR ETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHALBLE AS A CATEGORY D FELONY AS PROVIDED ION NRS 193.130. NRS 200.359 provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child from the jurisdiction of the court

without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished by a category D felony as provided in NRS 193.130.

That, pursuant to NRS 125.510(7) and (8), the terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law are applicable to the parties:

Section 8. If a parent of the child lives in a foreign country or has significant commitments in a foreign country:

a) The parties may agree, and the Court shall include in the order for custody of the child, that the United States is the country of habitual residence of the child for the purpose of applying the terms of the Hague Convention as set forth in Subsection 7.

b) Upon motion of the parties, the Court may order the parent to post a bond if the Court determines that the parent poses an imminent risk of wrongfully removing or concealing the child outside the country of habitual residence. The bond must be in an amount determined by the Court and may be used only to pay for the cost of locating the child and returning him to his habitual residence if the child is wrongfully removed from or concealed outside the country of habitual residence. The fact that a parent has significant commitments in a foreign country does not create a presumption that the parent poses an imminent risk of wrongfully removing or concealing the child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mom's request to modify the current timeshare to allow her to pick up the child after school on her custodial days is DENIED.

LINDA MARQUIS
DISTRICT JUDGE

FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mom's request for sanctions for Dad's failure to provide Mom with child's passport to allow child and Mom to travel to the Ukraine in summer 2015 is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that both parties shall bear their own attorneys' fees and costs.

DATED this 1st day of March, 2016.

DISTRICT COURT JUDGE
LINDA MARQUIS MC

DOCKETING STATEMENT ATTACHMENT 32

NOAS
RADFORD J. SMITH, CHARTERED
RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Telephone: 702-990-6448
Facsimile: 702-990-6456
rsmith@radfordsmith.com
Attorneys for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

SEAN ABID,

Plaintiff,

vs.

LYUDMYLA ABID,

Defendant.

CASE NO.: D-10-424830-Z

DEPT NO.: B

FAMILY DIVISION

NOTICE OF APPEAL

NOTICE is hereby given that Defendant, LYUDMYLA ABID, hereby appeals to the Supreme Court of the State of Nevada for District Court Notice of Entry of Order from Hearing filed on March 1,

. . .

. . .

. . .

. . .

. . .

. . .

2016, a copy of which is attached as **Exhibit "A"** hereto.

Dated this 14th day of March, 2016.

RADFORD J. SMITH, CHARTERED

Garima Varshney

RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Radford J. Smith Chartered ("the Firm"). I am over the age of 18 and not a party to the within action.

I served the foregoing document described as "NOTICE OF APPEAL" on this 4 day of March, 2016, to all interested parties by way of the Eighth Judicial District Court's electronic filing system.

John Jones, Esq.
10777 W. Twain Ave., #300
Las Vegas, Nevada 89135
Attorney for Plaintiff

An employee of Radford J. Smith, Chartered

EXHIBIT "A"

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CLERK OF THE COURT

NEOJ

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Joint Petition for Divorce of: Sean R. Abid and Lyudmyla A Abid, Petitioners.	Case No.: D-10-424830-Z Department B

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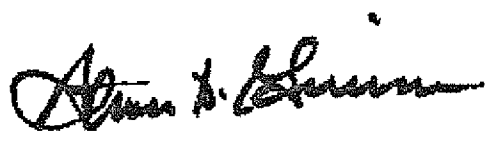

CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

SEAN R. ABID, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	Case No.:	D-10-424830-Z
	Dept. No.:	B

Findings of Fact, Conclusions or Law, and Decision

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and conducted a child interview of the minor child.

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Dr. Holland relied upon: four separate interviews with the child; an interview of Mom; an interview with Dad; the child's medical records; email and text messages between the parties; pleadings relative to the instant litigation; and audio recordings made by Dad.

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Call of Duty, with or without any additional controls, is inappropriate for a five or six year old.

Based on the child's own statements during the interview, the child exhibited a decreased desire to spend time with Dad.

As a direct result of Mom's direct and overt actions, the child is experiencing: confusion; distress; a divided loyalty between his parents; and a decreased desire to spend time with Dad.

Conclusions of Law

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FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

c. Which parent is more likely to allow the child to have frequent associations ***and*** a continuing relationship with the noncustodial parent.

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FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

The level of conflict between the parties is high. The parties are unable to cooperate to meet the needs of the child. Both parties have a difficult time listening and appropriately communicating.

The mental and physical health of both parents is good.

While there was no evidence that the child has special needs, Dr. Holland testified that the child is experiencing confusion and distress because of Mom's actions. Mom has limited insight into the damage she is causing and is unable to recognize and meet the emotional needs of her child.

Each party clearly loves the child and enjoys a special relationship with the child.

The child has a half-sibling who resides full time with Mom and two half-siblings who reside full time with Dad. The child will be able to continue to maintain a relationship with all siblings pursuant to the visitation schedule outlined herein.

There is no history of parental abuse or neglect.

There is no history of domestic violence.

Based upon the foregoing best interest analysis, this Court determines that it is in the child's best interest that Dad be awarded primary physical custody of the minor child.

Child support is calculated utilizing the formulas found in NRS 125B.070 and deviation factors found in NRS 125B.080.

Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that it is in the best interest of the minor child that the parties maintain joint legal custody and that Dad be granted primary physical custody, subject to Mom's specific visitation, commencing on Monday, March 28, 2016, the day school resumes after Spring Break.

LINDA MARQUIS
DISTRICT JUDGE
FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that until Monday, March 28, 2016, the parties shall maintain joint physical custody and the specific visitation schedule outlined in the previous stipulation and order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commencing March 28, 2016, Mom's visitation time with the child shall be defined as follows: every other weekend, Mom shall pick up the child from school on Friday afternoon and return the child to school on Monday morning. On the alternating week, Mom shall pick up the child from school on Thursday afternoon and return the child to school on Friday morning.

If school is not in session, for any reason, the receiving party shall pick up the child. For example, Mom shall pick up from Dad, or directly from a designated child care provider, at the same time school releases. Dad shall pick up from Mom, or directly from a child care provider, at the same time school releases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall continue to utilize their existing holiday schedule. However, during summer break, each parent shall have a two week vacation with the child. Each party shall notify the other parent in writing on or before May 1st of each year of the dates of the two week summer break. If the summer vacation dates conflict, Mom's request shall take precedence in all even years and Dad's request shall take precedence in all odd years.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that 18% of Mom's gross monthly income is $914.04. The presumptive maximum is $749.00 therefore it is in the best interest of the child that Mom's child support obligation be set at $ 749.00 per month beginning April 2016. Such support shall continue until further order of the Court, upon a three year review, or upon substantial change of circumstances. Otherwise, the support shall continue until

the child turns 18, unless the child is still attending high school, then the support shall continue until the child turns 19.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the current support order shall be in effect until April 2016.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Parties shall utilize Our Family Wizard as their exclusive method of communication, absent emergency or exigent circumstances, until further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following provisions are required to be included in this custody and support order:

That the party ordered to pay child support to the other, is HEREBY PUT ON NOTICE that, pursuant to NRS 125.450, a parent responsible for paying child support is subject to NRS 31A.010 through NRS 31A.340, inclusive, and Sections 2 and 3 of Chapter 31A of the Nevada Revised Statutes, regarding the withholding of wages and commissions for the delinquent payment of support. These statutes and provisions require that, if a parent responsible for paying child support is delinquent in paying the support of a child that such person has been ordered to pay, then that person's wages or commissions shall immediately be subject to wage assignment and garnishment, pursuant to the provisions of the above-referenced statutes.

That both parties, and each of them, shall be bound by the provision of NRS 125C.200, as amended by AB No. 263, Section 16:

1. If primary physical custody has been established pursuant to an order, judgment or decree of a court and the custodial parent intends to relocate his or her residence to a place outside of this State or to a place within this State that is at such a distance that would

substantially impair the ability of the other parent to maintain a meaningful relationship with the child, and the custodial parent desires to take the child with him or her, the custodial parent shall, before relocating:

(a) Attempt to obtain the written consent of the noncustodial parent to relocate with the child; and

(b) If the noncustodial parent refuses to give that consent, petition the court for permission to relocate with the child.

2. The court may award reasonable attorney's fees and costs to the custodial parent if the court finds that the noncustodial parent refused to consent to the custodial parent's relocation with the child:

(a) Without having reasonable grounds for such refusal; or

(b) For the purpose of harassing the custodial parent.

3. A parent who relocates with a child pursuant to this section without the written consent of the noncustodial parent or the permission of the court is subject to the provisions of NRS 200.359.

That the parties, and each of them, shall be bound by the provisions of NRS 125.510(6) which state, in pertinent part:

PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR ETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHALBLE AS A CATEGORY D FELONY AS PROVIDED ION NRS 193.130. NRS 200.359 provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child from the jurisdiction of the court

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without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished by a category D felony as provided in NRS 193.130.

That, pursuant to NRS 125.510(7) and (8), the terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law are applicable to the parties:

Section 8. If a parent of the child lives in a foreign country or has significant commitments in a foreign country:

a) The parties may agree, and the Court shall include in the order for custody of the child, that the United States is the country of habitual residence of the child for the purpose of applying the terms of the Hague Convention as set forth in Subsection 7.

b) Upon motion of the parties, the Court may order the parent to post a bond if the Court determines that the parent poses an imminent risk of wrongfully removing or concealing the child outside the country of habitual residence. The bond must be in an amount determined by the Court and may be used only to pay for the cost of locating the child and returning him to his habitual residence if the child is wrongfully removed from or concealed outside the country of habitual residence. The fact that a parent has significant commitments in a foreign country does not create a presumption that the parent poses an imminent risk of wrongfully removing or concealing the child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mom's request to modify the current timeshare to allow her to pick up the child after school on her custodial days is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mom's request for sanctions for Dad's failure to provide Mom with child's passport to allow child and Mom to travel to the Ukraine in summer 2015 is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that both parties shall bear their own attorneys' fees and costs.

DATED this 1st day of March, 2016.

DISTRICT COURT JUDGE
LINDA MARQUIS MC

and was booked there and lodged there. At the time this subject tried to jump out the rear door of the police car, he was handcuffed, his hands in the rear of him, subject also will be filed on for five counts of burglary.' (Dft's Ex. C.)

2 Appellant does question the sufficiency of the evidence to support the verdict, but only on the theory that there was no evidence to prove the confessions were the immediate result of the beatings, and hence no violation of the statute proved.

3 Beyond anything discussed in the opinion, we have the fact that at the time of trial, Pool and his wife had been divorced. It is generally accepted law that such a divorce removes any bar of incompetency, but does not terminate the privilege. Pereira v. United States, 1954, 347 U.S. 1, 6, 74 S.Ct. 358, 98 L.Ed. 435.

4 These included the presumption of innocence, reasonable doubt, color of authority, distinction between personal and individual acts, and the illegal use of power possessed by virtue of office; color of state law; the essential specific wilful intent, the materiality of intent, the credibility of witnesses, etc.

5 We will not consider or comment here on the cause and effect, if any, between the beatings and the confessions occurring within hours thereafter.

6 '* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *' Fed.R.Crim .P. 30.

7 '(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
'(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' Fed.R.Crim.P. 52.

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Foss v. State, 92 Nev. 163 (1976)

92 Nev. 163
Supreme Court of Nevada.

Frank FOSS, Appellant,
v.
The STATE of Nevada, Respondent.

No. 7751. | March 25, 1976.

Defendant was convicted in the Eighth Judicial District Court, Clark County, Howard W. Babcock, J., of first-degree murder and second-degree kidnapping, and he appealed. The Supreme Court, Gunderson, C. J., held that trial court did not err in advising jury that witnesses implicated in the crime had asserted their Fifth Amendment privilege against self-incrimination and that their refusal to testify should not be considered as evidence of defendant's guilt; that statements made by defendant to coconspirator after the killing but prior to disposal of body were admissible under coconspirator exception to hearsay rule; and that statute prohibiting examination of husband or wife as to communications made during marriage did not preclude admission of statements made by defendant to his wife during marriage in presence of third persons.

Affirmed.

West Headnotes (9)

[1] **Criminal Law**
Comments on Evidence or Witnesses

Court did not commit prejudicial error in informing jury that witnesses who were implicated in the crime and called by State had asserted their privilege against self-incrimination and refused to testify and that their refusal to testify should not be considered as evidence of defendant's guilt. U.S.C.A.Const. Amend. 5.

1 Cases that cite this headnote

[2] **Criminal Law**
Taking Oral Testimony in General

Court was not obliged to preclude State from calling witnesses implicated in the crime merely because witnesses said they would assert their Fifth Amendment privilege. U.S.C.A.Const. Amend. 5.

Cases that cite this headnote

[3] **Conspiracy**
Duration

Duration of a conspiracy is not limited to commission of principal crime but can continue during period when coconspirators perform affirmative acts of concealment.

2 Cases that cite this headnote

[4] **Conspiracy**
Particular Crimes

Where murder is committed under circumstances such that body must be disposed of to avoid detection, conspiracy to commit murder persists until disposition is accomplished.

1 Cases that cite this headnote

[5] **Criminal Law**
Acts and Declarations After Commission of Crime But Before Complete Fulfillment of Purpose

Where disposal of body to avoid a detection was integral part of conspiracy, statements made by defendant to coconspirator after the killing but prior to disposal of body were admissible under coconspirator exception to hearsay rule. N.R.S.

51.035(3)(e).

3 Cases that cite this headnote

[6] **Privileged Communications and Confidentiality**
Confidential or Private Character of Communications

Phrase "any communication" in statute prohibiting the examination of a husband or wife as a witness as to any communication made by one to the other during marriage means a confidential communication. N.R.S. 49.295.

2 Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Communications Through or in Presence or Hearing of Others; Communications with Third Parties

Statute prohibiting examination of husband or wife as witness as to any communication made by one to the other during marriage did not prevent wife from testifying to statements made by husband during marriage in presence of third persons. N.R.S. 49.295.

2 Cases that cite this headnote

[8] **Witnesses**
Rebuttal of Evidence of Interest or Bias

Where defense counsel during cross-examination of defendant's wife attempted to show her animus by establishing that she had refused to surrender parental rights to one of their children, State's attempt to rebut inference of animosity on wife's part by asking her whether she had previously testified against defendant was proper redirect examination.

1 Cases that cite this headnote

[9] **Criminal Law**
Necessity of Previous Objection

Denial of motion to strike certain evidence was proper where defendant failed to object to evidence at time it was offered.

Cases that cite this headnote

Attorneys and Law Firms

***164 **689** Horace R. Goff, Public Defender, Carson City, for appellant.

Robert List, Atty. Gen., Carson City, George E. Holt, Dist. Atty., Las Vegas, for respondent.

***165 OPINION**

GUNDERSON, Chief Justice:

Convicted by jury of first degree murder and second degree kidnapping, appellant contends the district court erred by: (1) advising the jury that witnesses implicated in the crime had asserted their Fifth **690 Amendment privilege against self-incrimination, (2) admitting out-of-court statements of a coconspirator, (3) allowing appellant's ex-wife to testify about conversations during marriage, (4) permitting appellant's ex-wife to testify that she previously had testified against appellant and one William Marquette, and (5) denying appellant's motion to strike certain evidence. We reject all contentions.

In February, 1972, appellant's wife, Francine Foss, moved from El Paso, Texas, to Las Vegas, where she commenced divorce proceedings. Shortly thereafter, Francine met the victim, Gordon Brady, who helped her find a job and a place to stay. When appellant discovered Francine's whereabouts, he ventured to Las Vegas to induce her to return. While in Las Vegas, appellant

threatened his wife, and announced that a contract had been issued on Gordon Brady's life. Evidence at trial indicated appellant had hired Dwayne Gunter to kill Brady. On March 2, 1972, the last time Brady was seen alive, Gunter picked him up at his residence.

1. At trial, the State desired to call as witnesses Gunter and Marquette, both of whom had been constantly mentioned throughout the trial. Outside the jury's presence, Gunter and Marquette told the court they refused to testify and, if called, would assert their Fifth Amendment privilege against self-incrimination. The court ruled that the State could properly *166 call the two; however, when they refused to remove their prison clothes, the court instead informed the jury:

'Ladies and Gentlemen of the jury. The State has called a witness, Mr. William Marquette. Mr. Marquette has indicated to the Court that if called to testify he would invoke his Fifth Amendment privilege against self-incrimination. The Court has determined that Mr. Marquette's invocation of the privilege would be proper, and for that reason has excused him from appearing in this proceeding.

'The State has also called Mr. Dwayne Lee Gunter. Mr. Gunter has indicated that he, too, will invoke the Fifth Amendment privilege. Unlike Mr. Marquette, the Court has ruled that Gunter may not invoke the privilege of self-incrimination. But in view of Mr. Gunter's continued refusal, he will not appear as a witness.

'I want you to listen very carefully to this additional admonishment. You are admonished not to consider the refusal of Mr. Marquette and Mr. Gunter to testify as evidence of the guilt or innocence of the defendant.' (Emphasis added).

[1] [2] We do not necessarily approve the wording of this statement. It might have been better, if appellant had requested it, to tell the jury that, through no fault of either the State or the appellant, the witnesses were not available, and then follow with the admonishment not to consider their nonappearance. However, we conclude the court committed no prejudicial error. The court was not obliged to preclude the State from calling Gunter and Marquette merely because they said they would assert their Fifth Amendment privilege. Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963); United States v. Compton, 365 F.2d 1 (6 Cir. 1966). The State's evident purpose was not to prejudice appellant unfairly. Failure either to have Gunter and Marquette testify, or to show they were unavailable, might arguably have left a gap in the State's case. Cf. United States v. Kilpatrick, 477 F.2d 357 (6 Cir. 1973); State v. Cota, 102 Ariz. 416, 432 P.2d 428 (1967), cert. denied, 390 U.S. 1008, 88 S.Ct. 1256, 20 L.Ed.2d 109 (1968). The trial court's admonishment guarded appellant from possible prejudice at least as effectively as permitting the State to call Gunter and Marquette would have done. Cf. Cota v. Eyman, 453 F.2d 691 (9 Cir. 1971), cert. denied, 406 U.S. 949, 92 S.Ct. 2054, 32 L.Ed.2d 338 (1972).

2. Appellant next contends that statements concerning the crime Gunter made to his common law wife, after the killing but prior to disposal of the body, were not admissible under *167 the coconspirator exception to the hearsay rule. NRS 51.035(3) **691 (e).[1] While appellant does not challenge the existence of a conspiracy, he argues that it ended with the killing of Brady rather than continuing through disposal of the body.

[3] [4] [5] The duration of a conspiracy is not limited to the commission of the principal crime, but can continue during the period when coconspirators perform affirmative acts of concealment. Goldsmith v. Sheriff, 85 Nev. 295, 454 P.2d 86 (1969); cf. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); State v. Davis, 528 P.2d 117 (Or.App.1974). '(W)here murder is committed under circumstances such that the body must be disposed of to avoid detection, the conspiracy . . . persists until disposition is accomplished.' Gelosi v. State, 215 Wis. 649, 255 N.W. 893, 895-96 (1934). Here, we believe disposal of the body to avoid detection was an integral part of the conspiracy. Thus, the statements by Gunter to his common law wife were admissible under NRS 51.035(3)(e).

3. The district court permitted appellant's ex-wife, Francine Foss Wilson, to testify against appellant regarding conversations which occurred during their marriage. These conversations took place in the known presence of third persons and consisted of threats against the lives of Francine and Brady. Appellant contends that NRS 49.295 prevented Francine from testifying to any communication, confidential or otherwise.[2]

[6] [7] Appellant's reliance on NRS 49.295 is misplaced. While it is true that NRS 49.295 refers to 'any communication,' we deem this to mean confidential communications. This approach is consistent with our case law construing a similar predecessor *168 statute. Guyette v. State, 84 Nev. 160, 438 P.2d 244 (1968); see also 8 Wigmore, Evidence s 2336 at 651-652 (McNaughton rev. ed. 1961). Because appellant spoke in the known presence of others, there were no confidential communications warranting protection under NRS 49.295.

[8] 4. During cross-examination of Francine Foss Wilson, appellant attempted to show her animus by establishing that he had refused to surrender parental rights to one of

their children. On re-direct, for purposes of rehabilitation, the State asked Francine whether she had previously testified against appellant and Marquette. Appellant contends that this question, coupled with Marquette's refusal to testify, was improper. We believe the State's attempt to rebut any inference of animosity on Francine's part, which might have reflected on her truth and veracity, was proper re-direct examination. State v. Tranmer, 39 Nev. 142, 154 P. 80 (1915); cf. State v. Stevens, 69 Wash.2d 906, 421 P.2d 360 (1967).

[9] 5. Finally, appellant contends that the court erroneously denied his motion to strike certain evidence relating to matters which occurred after Brady's death. At the time the evidence was offered, appellant failed to object. Under these circumstances, the court properly denied his later motion to strike. Barra v. Dumais, 76 Nev. 409, 356 P.2d 124 (1960); State v. Clarke, 48 Nev. 134, 228 P. 582 (1924); cf. Ward v. Daniels, 51 Nev. 125, 269 P. 913 (1928).

Appellant's conviction is affirmed.

BATJER, ZENOFF, MOWBRAY and THOMPSON, JJ., concur.

All Citations

92 Nev. 163, 547 P.2d 688

Footnotes

1 NRS 51.035(3)(e) provides:
"Hearsay' means a statement offered in evidence to prove the truth of the matter asserted unless:
'3. The statement is offered against a party and is:
'(e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.'

2 NRS 49.295 provides in pertinent parts:
'A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent. Neither a husband nor a wife can be examined, during the marriage or afterwards, without the consent of the other, as to any communication made by one to the other during marriage, . . .' (Emphasis added).

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Guyette v. State, 84 Nev. 160 (1968)

84 Nev. 160
Supreme Court of Nevada.

Harold Chester GUYETTE, Appellant,
v.
STATE of Nevada, Respondent.

No. 5360. | Feb. 29, 1968.

Defendant was convicted in the First Judicial District Court, Churchill County, Frank B. Gregory, J., of first-degree murder and he appealed. The Supreme Court, Thompson, C.J., held that where defendant was not advised during interrogations of his right to presence of counsel, either retained or appointed, but his statements were not coerced and the law in effect when interrogations occurred prior to Miranda was complied with and where the most damning statements were volunterred and were not made in response to interrogation, admission of statements at defendant's trial constituted harmless error.

Judgment affirmed.

West Headnotes (9)

[1] **Criminal Law**
⇐Right to counsel

Where defendant was never told during his interrogations that he had right to presence of attorney, either retained or appointed, his privilege against self-incrimination was not fully protected. U.S.C.A.Const. Amend. 5.

Cases that cite this headnote

[2] **Criminal Law**
⇐Form and sufficiency
Criminal Law
⇐Right to counsel

Where defendant was advised of his absolute right to remain silent, that anything he said would be used against him and that he had right to consult with retained counsel prior to interrogation though he was not told of his right to presence of attorney, either retained or appointed, the warnings were sufficient to protect his right to counsel under the Escobedo doctrine. U.S.C.A.Const. Amend. 6.

1 Cases that cite this headnote

[3] **Criminal Law**
⇐Counsel
Criminal Law
⇐Counsel

Where officers during interrogations gave defendant phone book, phone, and left room after he made request to consult with counsel and defendant then chose not to consult with counsel, defendant was not denied his right to counsel and officers could resume questioning without further warnings. U.S.C.A.Const. Amend. 6.

Cases that cite this headnote

[4] **Courts**
⇐In general; retroactive or prospective operation

Where trial court received in evidence statements made by defendant without being told of his right to have counsel, either retained or appointed, present and trial was held after Miranda was decided, though interrogations were held prior to Miranda, admission of the evidence was error. U.S.C.A.Const. Amend. 5.

Cases that cite this headnote

[5] **Criminal Law**
⇐Grounds in general

Automatic reversal occurs in those cases in which substantive due process is denied defendant.

2 Cases that cite this headnote

[6] **Criminal Law**
⇐Acts, admissions, declarations, and confessions of accused

Denial of procedural safeguards of Miranda as to necessity of telling defendant of his right to have counsel, either retained or appointed present may constitute harmless error. U.S.C.A.Const. Amend. 5; N.R.S. 169.110.

2 Cases that cite this headnote

[7] **Criminal Law**
⇐Acts, admissions, declarations, and confessions of accused

Where defendant who was subsequently convicted of murder, was not advised during interrogations of his right to presence of counsel, either retained or appointed, but his statements were not coerced and the law in effect when interrogations occurred prior to Miranda was complied with and where the most damning statements were volunteered and were not made in response to interrogation, admission of statements at defendant's trial constituted harmless error. U.S.C.A.Const. Amend. 5; N.R.S. 169.110.

13 Cases that cite this headnote

[8] **Criminal Law**
⇐Depiction of Injuries or Dead Bodies

Pictures, which were of part of building in which homicides occurred and of bodies where found within building and which were accurate portrayals were admissible at defendant's trial for murder.

2 Cases that cite this headnote

[9] **Privileged Communications and Confidentiality**
⇐Letters and correspondence
Privileged Communications and Confidentiality
⇐Confidential or private character of communications

Letters from defendant, who was subsequently convicted of murder, written to his wife before trial and not folded, sealed in envelope or otherwise arranged to suggest confidentiality were not privileged as being between husband and wife and were admissible at his trial for murder. N.R.S. 48.040.

2 Cases that cite this headnote

Attorneys and Law Firms

***160 **245** James W. Johnson, Jr., James F. Sloan, Reno, for appellant.

Harvey Dickerson, Atty. Gen., Carson City, Dennis E. Evans, Churchill County Dist. Atty., Fallon, for respondent.

***161 OPINION**

THOMPSON, Chief Justice.

A jury convicted Harold Chester Guyette of first degree murder and directed his imprisonment for life without the possibility of parole. Judgment and sentence have been entered upon the verdict. On this appeal he contends that evidence obtained in violation of the Fifth (***162** Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16

L.Ed.2d 694 (1966)) and Sixth (Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)) Amendments was used to convict him. Other claims of error concerning the reception of evidence relevant to the case, but without constitutional implications, also are pressed. We turn first to consider the claims of constitutional error.

1. Guyette was charged with the March 12, 1966, murder of one Dean Briggs, at Briggs' Sav'n Sam's Service Station forty miles north of Fallon, Nevada. Mrs. Briggs, the mother of Dean Briggs, also was found dead. The trial below, however, concerned only the killing of Mr. Briggs. On April 1, 1966, Guyette was arrested at Elkhart, Indiana, pursuant to a city court warrant for failing to appear in court regarding a prior traffic accident. The arresting officers also suspected that he might be the person who, according to an all points bulletin, had committed a double murder near Fallon, Nevada. Guyette has been in custody since his arrest.

The claim that the federal protections of the Fifth and Sixth Amendments were not honored is directed to a series of in-custody interrogations conducted by Indiana and Nevada law officers, and was presented to the trial court in the absence of the jury. The thrust of his contention is that required warnings were not given to assure awareness of constitutional rights. He does not assert that his response to interrogation was coerced or forced from him except to the extent that the failure to fully warn him bears upon that subject. In line with Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and Sims v. Georgia, 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967), the lower court made specific findings. It ruled that the warnings met constitutional standards, and that all statements of the suspect were voluntarily given without coercion, actual or psychological.

All interrogations occurred after the Escobedo decision but before Miranda was handed down. However, the trial itself was post-Miranda. It is within this framework that we must evaluate the legal consequences flowing from the series of interrogations which we shall now summarize.

A. The Indiana interrogations.

1. On the day of arrest, April 1, Guyette was questioned for about one and one half hours concerning the Nevada killings. Before questioning, the officer advised him that he had the right to talk to an attorney if he wished; the right to remain silent; and that anything he said could and would be used in court against him. He was not advised that he had the right to the presence of an attorney, either retained or appointed. The interrogation and responses, however, do not *163 appear in the record before us. The prosecution did not offer that evidence.

2. On the following day, April 2, he was again examined for about one hour. The record does not reflect that warnings were given before questioning. Neither does the record show the questions or responses. It reveals only the fact that interrogation took place.

3. On April 3, the record is the same as the April 2 occurrence, and shows only the fact of interrogation.

**246 4. On April 4, another interrogation occurred. Again, the substance is not disclosed. About 15 minutes before the end of that session the suspect indicated that perhaps he should consult an attorney. He was handed a phone book and left alone with a phone to use. He did not use it. Questioning was resumed. He was not told that he had the right to the presence of an attorney, either retained or appointed.

5. On April 5, Guyette was questioned once more. The trial record does not tell us about that session; only that it happened. It is likewise silent with respect to warnings.

6. The next day, April 6, at still another interrogation, the suspect made an incriminating statement which was received as trial evidence. When asked about the killings in Nevada, Guyette said that he would be willing to admit 'this thing' if his wife would. Before questioning started on this day, he was warned that he had the right to use the phone and consult with a lawyer; the right to remain silent; and that if he did respond, his statements could be used against him. He was not told that he had the right to the presence of an attorney, either retained or appointed.

7. On April 7, Guyette was taken before the court in connection with extradition proceedings. After explanatory remarks by the Judge, guyette waived the appointment of counsel at that time, and also signed a waiver of extradition. While being transported from court back to jail, he volunteered incriminating information to the transporting officer. So far as the trial record shows, there was no questioning at all. The officer's immediate task was to transport, not interrogate. During this trip, Guyette stated, among other things, that he didn't have anything to worry about since they didn't have the gun in Nevada, and that his wife was the only witness and she could not testify against him. These statements were received in evidence at trial.

8. By April 14, the district attorney from Churchill County, Nevada, had arrived at Elkhart, Indiana. He wished to interview Guyette. Before doing so, he told Guyette that anything he said could be used against him;

that he need not *164 say anything and could remain silent; that he had the right to an attorney; that if he wished an attorney the interview would cease. The prisoner was not told that he had the right to the presence of an attorney, either retained or appointed. Guyette said, 'I want to tell you my story.' He did so, and the story he told concerned his trip across Nevada. No mention was made of killing anyone, or that he had been at Briggs' Service Station on March 12. The scene now shifts to Nevada.

B. The Nevada interrogations.

1. On April 19, the sheriff met Guyette at Lovelock, Nevada, and took him by patrol car to the scene of the crime. He there questioned him, asking whether he had ever been there before, and if he had ever seen Mr. and Mrs. Briggs whose photograph was submitted to Guyette for study. He denied ever having been there, and did not recognize the persons in the photo. The record does not show that the sheriff warned Guyette of his rights before inquiring of him.

2. On April 27, at the district attorney's office, Guyette gave a statement which was recorded by longhand, typed, read by Guyette and then signed. The statement is a confession of guilt. In it he related that he got 'an urge to kill, shot the man when he was in the bathroom, got scared, turned around and shot the mother.' The circumstances preceding the giving of the statement are significant. Guyette had been allowed to visit with his wife alone in the district attorney's office. The visit lasted about one-half hour, after which Guyette advised the district attorney that 'he wished to make a statement.' He was told that he need not do so unless he had an attorney present, and that anything he said regarding the case could be used in court against him. Notwithstanding that advice, his confession followed.

3. The defendant testified at the trial. He detailed his trip through Nevada in **247 March mentioning stops and occurrences at various places. He denied the killings and denied being at Briggs' Station on March 12. Much of his tale was corroborated by other witnesses who had seen or spoken to him at those places on the dates specified. In rebuttal, the State offered still another conversation between the accused and an officer which occurred on June 14 while awaiting trial. The officer first asked whether he had been informed of his rights, to which he answered yes. During that conversation Guyette inquired about the state prison, dress, work, whether the prison had a school for barbering, etc., and stated that he was going to plead guilty. The officer told him that he had better contact his attorney, and Guyette replied that it would do no good. *165 Guyette then confessed that he had done some crazy things, 'shoplifting, now murder,' and proceeded to tell the officer how and why he had killed Mr. and Mrs. Briggs.

The foregoing is a fair summary of the evidence offered, and to which the claim of constitutional error is directed.

In evaluating the sufficiency of the warnings given from time to time throughout the many interrogations we must bear in mind that Miranda had not yet been decided. Only Escobedo had been announced. There exist basic differences between the two cases. For example, Escobedo rests squarely upon the Sixth Amendment right to counsel, and Miranda upon the Fifth Amendment privilege against self-incrimination. Escobedo concerns the right to consult with retained counsel prior to interrogation. Miranda, on the other hand, speaks in terms of the presence of counsel, either retained or appointed, in order to protect the privilege against self-incrimination. There are, of course, other differences unrelated to the warning problem now confronting us.

[1] [2] None of the warnings given in this case satisfies Miranda. Guyette was never told that he had the right to the presence of an attorney, either retained or appointed, and to this extent, his privilege against self-incrimination was not fully protected. Notwithstanding this fact, it strikes us that warnings sufficient to protect his Sixth Amendment right to counsel as carefully delineated in Escobedo were given. From the outset, he was advised of his absolute right to remain silent, that anything he said would be used against him, and that he had the right to consult with retained counsel prior to interrogation. Those warnings were repeated from time to time, although not every time he was questioned.

[3] The case at hand is unlike prior cases decided by this court in the wake of Escobedo. In Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965), we ruled that Escobedo was inapposite since the suspect did not request the right to consult with counsel. Here, after three interrogations a request was made and, we think, honored, since the officers gave Guyette a phone book, a phone, and left the room. Guyette chose not to consult. (Cf. White v. State, 82 Nev. 304, 417 P.2d 592 (1966), where such a request was made, and the officer told the suspect that he would be given an attorney eventually. We believed such conduct to be a denial of the suspect's right to counsel.) When Guyette chose not to consult with counsel it was permissible, under the law as it then existed, to resume *166 questioning without further warnings. Troiani v. State, 82 Nev. 357, 418 P.2d 814 (1966). In short, we find nothing in the explicit holding of Escobedo, nor in our construction of that opinion, which would render inadmissible any of the evidence received at trial in this case. The interrogators complied with the law in existence

when the interrogations occurred.

[4] The rub, of course, arises from the fortuitous circumstance that this case went to trial after Miranda was decided, and we must, as directed by Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), apply the Miranda doctrine to our consideration of the matter. Thus, we are compelled to rule that error occurred when the trial court received in evidence the statements of the defendant which **248 do not qualify as volunteered statements. Though this be so, our careful study of the record persuades us that the error was harmless, even within the strict federal standard of harmless error as defined first in Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963), and as further explained by Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We are obliged to state why we deem the error harmless within the context of this case.

[5] Although the High Court has not yet ruled that the doctrine of harmless error may be applied to a Miranda warning violation, the drift of its opinions would suggest that the rule of harmless error may be utilized when any of the new procedural safeguards, as expressed in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); Escobedo v. State of Illinois,378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); and Gilbert v. State of California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), are breached. We say this mainly because the constitutional doctrines of those cases were not given retrospective application, apparently for the reason that a violation may occur without necessarily affecting the fundamental fairness of the trial. Due process in the traditional sense is not necessarily denied the accused. The very integrity of the fact finding process is not necessarily infected by the violation. The reliability of the evidence received is not necessarily suspect. Hence, the rule of 'automatic reversal' does not control appellate disposition.[1]

**249 In Chapman v. State of California, supra, regarding the Griffin doctrine (impermissible comment upon the defendant's failure to *167 testify), the Court acknowledged this distinction between a violation of the procedural safeguards and a breach of substantive due process. It wrote: 'We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.' 386 U.S. at 22, 87 S.Ct. at 827. And in Johnson v. State of New Jersey, supra, the Court wrote: 'Thus while Escobedo and Miranda guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.' 384 U.S. at 730, 86 S.Ct. at 1779.

*168 [6] California has found room for harmless error application when the doctrines of Mapp v. Ohio, supra (see People v. Parham, 60 Cal.2d 378, 384 P.2d 1001, 33 Cal.Rptr. 497 (1963)), and Griffin v. State of California, supra (see In re Gaines, 63 Cal.2d 234, 404 P.2d 473, 45 Cal.Rptr. 865 1965)), have been violated. We have heretofore acknowledged that a violation of the Fourth Amendment proscription against unreasonable searches and seizures may be harmless within a particular factual setting. Dean v. Fogliani, 81 Nev. 541, 407 P.2d 580 (1965); Dean v. Hocker, 84 Nev. 74, 436 P.2d 427 (1968). Cf. Thurlow v. State, 81 Nev. 510, 406 P.2d 918 (1965). We now rule that there is limited room for a state court to consider the rule of harmless error when the procedural safeguards of Miranda are not fully honored.

[7] We turn, then, to articulate why we deem the procedural default (the failure to advise the defendant of his right to the presence of counsel, either retained or appointed) harmless in the context of this case. First, there is not the slightest suggestion that the statements were coerced in any manner whatsoever. The defendant testified that his confession of April 27 was voluntarily given, and did not indicate that any of his other utterances were other than voluntary. Neither at trial nor in this court did his counsel assert that the responses to interrogation were involuntary. The thrust has always been that appropriate protective warnings were not given. It seems to us that the basic test of realiability was met in this case. Second, the law in effect when the interrogations occurred was complied with. Consequently, any concern to deter unlawful police activity is not involved here. Finally, we note that perhaps the most damning evidence (the April 7 admissions and the April 27 confession) was volunteered, not in response to interrogation, and, therefore, untouched by the Miranda doctrine. State v. Billings, 84 Nev. 55, 436 P.2d 212 (1968).

Our ruling on this point comes about by reason of the peculiar circumstances of this case and is not intended to mean that a violation of the procedural safeguards of Miranda will be deemed harmless in every case. Each case must turn upon its own set of circumstances. Here, we are convinced beyond a reasonable doubt that the error did **250 not affect the result. Chapman v. California, supra.[2]

*169 [8] 2. The claims of nonconstitutional error are not worthy of extensive treatment. It is suggested that certain black and white snapshots were inflammatory. The pictures were of a part of the building in which the homicides occurred, and of the bodies where found within the building, and, apparently, were accurate portrayals and admissible. State v. Gambetta, 66 Nev. 317, 208 P.2d 1059 (1949); Morford v. State, 80 Nev. 438, 395 P.2d 861 (1964); Archibald v. State, 77 Nev. 301, 362 P.2d 721 (1961); State v. Holt, 47 Nev. 233, 219 P. 557 (1923).

[9] During rebuttal, the State introduced two letters written by Guyette to his wife before trial. The main contention is that the written communications were privileged and, therefore, not admissible. NRS 48.040.[3] The circumstances do not fall within the preclusion of the statute since the communications apparently were never intended, by either spouse, to be confidential. Neither letter was folded, sealed in an envelope, or otherwise arranged to suggest confidentiality. Guyette handed them to the sheriff for delivery to his wife. They were delivered. Sometime later Mrs. Guyette redelivered them to a deputy. The letters were admissible. Wolfle v. United States, 291 U.S. 754 S.Ct. 279, 78 L.Ed. 617 (1934); State v. Sysinger, 25 S.D. 110, 125 N.W. 879 (1910); People v. Hayes, 140 N.Y. 484, 35 N.E. 951, 23 L.R.A. 830 (1894); McNeill v. State, 117 Ark. 8, 173 S.W. 826, 1200 (1915).

We have considered other minor claims of error. None has substance.

The defendant is an indigent and has been represented throughout by court-appointed counsel. We commend them for their diligent service. The lower court is directed to give *170 them the certificate specified in subsection 4 of NRS 7.260 in order that they be compensated for services on appeal.

The judgment of conviction is affirmed.

COLLINS, ZENOFF, and MOWBRAY, JJ., and O'DONNELL, D.J., concur.

All Citations

84 Nev. 160, 438 P.2d 244

Footnotes

1 Automatic reversal occurs in those cases in which substantive due process is denied the defendant: Example: 1. Coerced confession: Clewis v. State of Texas, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); Davis v. State of North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966); Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); Lynumn v. State of Illinois, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Spano v. People of State of New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).
2. Right to counsel at trial: Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Doughty v. Maxwell, 376 U.S. 202, 84 S.Ct. 702, 11 L.Ed.2d 650 (1964).
3. Right to counsel at time plea is entered assuming no intelligent, knowing waiver: White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Hamilton v. State of Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).
4. Right to impartial judge: Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).
5. Community saturated with prejudicial pretrial publicity: Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Estes v. State of Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); Rideau v. State of Louisiana, 373 U.S. 723, 83 S.Ct. 294, 9 L.Ed.2d 229 (1963); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).
6. Discrimination in jury selection: Whitus v. State of Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958); Patton v. State of Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947); Hill v. State of Texas, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942).
7. Right to confront witnesses and cross-examine through counsel: Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Douglas v. State of Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); Smith v. State of Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), decided January 29.
8. Right to compulsory process: Washington v. State of Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).
9. Prosecution's knowing use of perjured testimony: Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); Napue v. State of Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).
10. Defendant incompetent to stand trial: Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956).
11. Right to impartial jury, etc.: Parker v. Gladden, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966); Turner v. State of Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965).

In the following Nevada cases we automatically set aside the conviction since substantive due process was denied: Krause v. Fogliani, 82 Nev. 459, 421 P.2d 949 (1966), where accused may have been legally incompetent when he pled guilty; Messmore v. Fogliani, 82 Nev. 153, 413 P.2d 306 (1966), where there was a total preclusion of right to confront and cross-examine through counsel, a material witness against the defendant; Bundrant v. Fogliani, 82 Nev. 388, 419 P.2d 293 (1966), and Garnick v. Miller, 81 Nev. 372, 403 P.2d 850 (1965), where there was an insufficient showing that accused knowingly and intelligently waived counsel when guilty plea accepted.

2 NRS 169.110 reads: 'No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant, in respect to a substantial right.'

3 NRS 48.040 reads: 'A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.'

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Exhibit 2

Exhibit 2

Kemp v. Block, 607 F. Supp. 1262 (1985)

607 F.Supp. 1262
United States District Court,
D. Nevada.

Robert Alan KEMP, Plaintiff,
v.
William BLOCK, Defendant.

No. CV–R–82–399–ECR. | April 29, 1985.

A former civilian technician with the Nevada Air National Guard brought suit against a former co-worker, alleging an invasion of privacy by reason of the co-worker's recording of plaintiff's argument with his shop foreman. On defense motion for summary judgment, the District Court, Edward C. Reed, Jr., J., held that plaintiff had no reasonable expectation that his argument with foreman in 29–foot square instrument shop would be private, since the argument took place in loud voices, since the defendant was in a place he had a right to be, since the shop lacked interior walls, and since plaintiff had no right to exclude other persons from entering the shop while the argument ensued; accordingly, plaintiff had no cause of action based either on invasion of privacy or on statute prohibiting the willful interception of certain oral communications.

Motion granted.

See also, D.C., 586 F.Supp. 330.

West Headnotes (5)

[1] **Torts**
Privacy in General

In determining whether plaintiff, in regard to his argument with shop foreman, had a legitimate expectation of privacy, two lines of inquiry were relevant: first, by his conduct, plaintiff must have exhibited an actual (subjective) expectation of privacy, i.e., must have shown that he sought to preserve his conversation as private; and second, it had to be decided whether plaintiff's expectation, viewed objectively, was justifiable under the circumstances, put another way, his expectation of privacy must have been one that society is prepared to recognize as reasonable.

6 Cases that cite this headnote

[2] **Telecommunications**
Acts Constituting Interception or Disclosure
Torts
Particular cases in general

Plaintiff, a civilian technician with the Nevada Air National Guard, had no reasonable expectation that his argument with foreman in 29–foot square instrument shop would be private, since the argument took place in loud voices, since the defendant, a co-worker who recorded the argument, was in a place he had a right to be, since the shop lacked interior walls, and since plaintiff had no right to exclude other persons from entering the shop while the argument ensued; accordingly, plaintiff had no cause of action based either on invasion of privacy or on statute prohibiting the willful interception of certain oral communications. 18 U.S.C.A. §§ 2510 et seq., 2510(2), 2511, 2520.

7 Cases that cite this headnote

[3] **Telecommunications**
Wiretapping in general

Essential elements of the offense of unlawfully intercepting oral communications are: (1) willful interception of an oral communication by a device; (2) the communication was uttered by a person who exhibited an expectation that it would not be intercepted; and (3) the communication was uttered under circumstances that justified the expectation. 18 U.S.C.A. § 2510 et seq.

2 Cases that cite this headnote

[4] **Telecommunications**
Wiretapping in general

In determining whether there has been a violation of statute prohibiting the willful interception of certain oral communications, one test used is to ascertain whether defendant overheard the communication with the naked ear under uncontrived circumstances; if the answer is affirmative, there was no justifiable expectation of privacy. 18 U.S.C.A. § 2510 et seq.

6 Cases that cite this headnote

[5] **Telecommunications**
Wiretapping in general

As regards statute prohibiting the willful interception of certain oral communications, an expectation that an oral communication will not be intercepted is unwarranted where the speaker talks too loudly. 18 U.S.C.A. § 2510 et seq.

2 Cases that cite this headnote

Attorneys and Law Firms

***1263** Lawrence J. Semenza, Reno, Nev., for plaintiff.

Lamond R. Mills, U.S. Atty. by Shirley Smith, Asst., Reno, Nev., for defendant.

MEMORANDUM DECISION AND ORDER

EDWARD C. REED, Jr., District Judge.

The defendant has moved for summary judgment. The respective parties have submitted affidavits, papers, depositions and memoranda of points and authorities. No hearing has been requested.

On February 25, 1982, the plaintiff and the defendant both were electronic integrated systems mechanics, that is, civilian technicians, with the Nevada Air National Guard. As such they were federal employees for the purposes of this litigation. *See* 32 U.S.C. § 709. A loud argument took place between the plaintiff and Mr. Darold Roy, who was his foreman. It occurred in the instrument shop where they both worked. The shop itself was approximately 29 ft. square. It contained clothes lockers for the employees, test benches, desks, equipment lockers, a filing cabinet, a coat rack, stools and chairs. The tallest equipment in the shop were the lockers which, at 6 ft. 6 ins., were about 2 ½ ft. short of the ceiling. The only partition in the shop was 5 ft. 6 ins. in height. Thus, the shop consisted of one room, without any floor-to-ceiling walls, partitions or equipment.

The argument started around 9 A.M. Present in the shop at the time were Mr. Roy, the plaintiff, the defendant, and two other mechanics. The two other mechanics were in and out of the shop during course of the argument, whereas the defendant remained there throughout. Oral disputes between the plaintiff and his foreman, Mr. Roy, had recurred over a period of four months.

The February 25th argument had been going on for a couple of minutes when the defendant, Mr. Block, turned on a cassette recorder that belonged to Mr. Roy. The recorder did not have any sound enhancement capabilities. The defendant placed the recorder on top of a locker, where it recorded the argument. Immediately afterwards, the defendant showed the recorder to the plaintiff and Mr. Roy and disclosed that he had recorded most of the argument. He declared that he had made the recording in order to prove to the plaintiff that he actually did argue. It seems that the plaintiff had persistently denied that his conversations with Mr. Roy amounted to arguments. Mr. Roy took the recorder from the defendant. The tape later was played before employees of the Air National Guard and, at the plaintiff's insistence, during two personnel proceedings. Those proceedings were decided adversely to the plaintiff, and he was terminated from his employment.

The First Claim for Relief in the Amended Complaint is based on invasion of privacy. The Second Claim alleges that the ***1264** clandestine recording constituted a violation of 18 U.S.C. § 2511. That statute makes it a criminal offense willfully to use any electronic, mechanical or other device to intercept an oral communication. 18 U.S.C. § 2510(2) defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2520 authorizes

recovery of civil damages by the person whose oral communication has been intercepted.

Invasion of Privacy

[1] The aspect of privacy here involved is the plaintiff's interest in avoiding disclosure of personal matters, that is, his ability to determine for himself when, how and to what extent information about him is communicated to others. *See Crain v. Krehbiel,* 443 F.Supp. 202, 207 (N.D.Cal.1977); *Thorne v. City of El Segundo,* 726 F.2d 459, 468 (9th Cir.1983). The determination of whether he had a legitimate expectation of privacy involves two lines of inquiry: First, by his conduct, the plaintiff must have exhibited an actual (subjective) expectation of privacy, i.e., he must have shown that he sought to preserve his conversation with Mr. Roy as private. Second, it must be decided whether the plaintiff's expectation, viewed objectively, was justifiable under the circumstances. Put another way, his expectation of privacy must have been one that society is prepared to recognize as reasonable. *See United States v. Nadler,* 698 F.2d 995, 999 (9th Cir.1983); *United States v. Fisch,* 474 F.2d 1071, 1076–1077 (9th Cir.1973); *Ponce v. Craven,* 409 F.2d 621, 625 (9th Cir.1969).

[2] The subjective expectation of privacy may be tested by any outward manifestations by the plaintiff that he expected his discussion with Mr. Roy in the instrument shop to be free from eavesdroppers. A comparison of what precautions he took to safeguard his privacy interest with the precautions he might reasonably have taken, is appropriate. *See Dow Chemical Co. v. United States,* 749 F.2d 307, 312–313 (6th Cir.1984). Nothing was done by the plaintiff in this regard. It seems quite clear that both he and Mr. Roy argued in loud voices. The defendant and the other coworkers who overheard the argument were in a place they had a right to be, namely the instrument shop. Thus, the plaintiff may be deemed to have knowingly exposed the discussion to them. *See Ponce v. Craven, supra* at 625; *United States v. Fisch, supra* at 1077; *United States v. Mankani,* 738 F.2d 538, 543 (2nd Cir.1984); *United States v. Llanes,* 398 F.2d 880, 884 (2nd Cir.1968). The relatively small size of the instrument shop and its lack of interior walls further indicate that an expectation of privacy within it would not be objectively reasonable. *See Dow Chemical Co. v. United States, supra* at 313. Nor did the plaintiff have a right to exclude other persons from entering the shop while the argument ensued. *See United States v. Nadler, supra* at 999. This Court finds that the plaintiff knew that other persons could overhear. He, therefore, had no reasonable expectation of privacy. *United States v. Hall,* 488 F.2d 193, 198 (9th Cir.1973); *see also United States v. Martinez-Miramontes,* 494 F.2d 808, 810 (9th Cir.1974).

Unlawful Interception of Oral Communication

[3] The reasonable expectation of privacy requirement discussed above is equally applicable to the alleged violation by the defendant of 18 U.S.C. § 2510 et seq. The essential elements of the offense are: (1) a willful interception of an oral communication by a device; (2) the communication must have been uttered by a person who exhibited an expectation that it would not be intercepted; and (3) the communication must have been uttered under circumstances that justified the expectation. *United States v. Carroll,* 337 F.Supp. 1260, 1262 (D.D.C.1971).

[4] [5] One of the tests used is to ascertain whether the defendant overheard the communication with the naked ear under uncontrived circumstances. *Id.* at 1263–1264; *see also* ***1265** *Holman v. Central Arkansas Broadcasting Co.,* 610 F.2d 542, 544–545 (8th Cir.1979). If the answer is affirmative, as here, there was no justifiable expectation of privacy. The communication is protected only if the speaker had a subjective expectation of privacy that was objectively reasonable. *United States v. McIntyre,* 582 F.2d 1221, 1223 (9th Cir.1978); *Willamette Subscription Television v. Cawood,* 580 F.Supp. 1164, 1169 (D.Ore.1984); *United States v. Rose,* 669 F.2d 23, 25 (1st Cir.1982). The legislative history of § 2510 notes that an expectation that an oral communication will not be intercepted is unwarranted where the speaker talks too loudly. 1968 U.S.Code Cong. & Ad.News 2112, 2178.

Because the issue of reasonable expectation of privacy is dispositive of both claims for relief, the issue of immunity and the related question of the outer perimeter of the defendant's line of duty need not be addressed.

IT IS, THEREFORE, HEREBY ORDERED that the defendant's motion for summary judgment be GRANTED.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of the defendant dismissing the action, each party to bear his own costs.

All Citations

607 F.Supp. 1262

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Kee v. City of Rowlett, Tex., 247 F.3d 206 (2001)

247 F.3d 206
United States Court of Appeals,
Fifth Circuit.

Darlie KEE; Darin Routier, Plaintiffs–Appellants,
v.
CITY OF ROWLETT, TEXAS; Jimmy Ray Patterson; Chris Frosch; Greg Davis, Assistant District Attorney for Dallas County, Defendants–Appellees.

No. 99–10555. | March 28, 2001. | Rehearing Denied April 24, 2001.

Grandmother and father of two children allegedly murdered by their mother brought action against city, investigating police officers, and district attorney, alleging that placement of electronic surveillance microphone at outdoor grave site service, which intercepted their oral communications and prayers directed toward deceased children, violated their privacy and Fourth Amendment rights as well as the Federal Wiretap Act. Defendants moved for summary judgment. The United States District Court for the Northern District of Texas, Robert B. Maloney, J., granted motion. Appeal was taken. The Court of Appeals, King, Chief Judge, held that grandmother and father did not have subjective expectation of privacy in communications or prayers during service.

Affirmed.

West Headnotes (11)

[1] **Telecommunications**
Purpose

The Federal Wiretap Act has as its dual purpose: (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. 18 U.S.C.A. § 2511(1)(a).

2 Cases that cite this headnote

[2] **Federal Courts**
Summary judgment
Federal Courts
Summary judgment

Court of Appeals reviews a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmovant. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

15 Cases that cite this headnote

[3] **Federal Civil Procedure**
Burden of proof

Party moving for summary judgment bears burden of showing district court that there is an absence of evidence to support the nonmoving party's case; if moving party fails to meet this initial burden, the motion must be denied, regardless of nonmovant's response. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

136 Cases that cite this headnote

[4] **Federal Civil Procedure**
Burden of proof

If party moving for summary judgment meets burden of showing district court that there is an absence of evidence to support the nonmoving party's case, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

284 Cases that cite this headnote

[5] **Federal Civil Procedure**

Materiality and genuineness of fact issue

A dispute over a material fact is "genuine," precluding summary judgment, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

141 Cases that cite this headnote

[6] **Federal Civil Procedure**
Materiality and genuineness of fact issue

The substantive law determines which facts are "material" for summary judgment purposes. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

19 Cases that cite this headnote

[7] **Searches and Seizures**
Expectation of privacy

The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy. U.S.C.A. Const.Amend. 4.

3 Cases that cite this headnote

[8] **Searches and Seizures**
Expectation of privacy

Fourth Amendment analysis embraces two questions: first, whether the individual claiming Fourth Amendment protection, by his conduct, exhibited an actual expectation of privacy, that is, whether he sought to preserve something as private; and second, whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable. U.S.C.A. Const.Amend. 4.

5 Cases that cite this headnote

[9] **Telecommunications**
Persons concerned; consent

In determining whether family members of murdered children had an expectation of privacy under the Fourth Amendment in oral communications and prayers directed toward children at outdoor grave site service, which were intercepted by electronic surveillance microphone, dispositive factors were whether family members exhibited a subjective expectation of privacy that their communications would remain free from governmental intrusion and whether they took normal precautions to maintain privacy. U.S.C.A. Const.Amend. 4.

18 Cases that cite this headnote

[10] **Telecommunications**
Acts Constituting Interception or Disclosure

In evaluating whether a person has a subjective expectation of privacy under the Fourth Amendment in oral communications taking place in publicly accessible spaces, courts consider nonexclusive factors including: (1) volume of communication or conversation; (2) proximity or potential of other individuals to overhear conversation; (3) potential for communications to be reported; (4) affirmative actions taken by speakers to shield their privacy; (5) need for technological enhancements to hear the communications; and (6) place or location of communications as it relates to subjective expectations of individuals who are communicating. U.S.C.A. Const.Amend. 4.

15 Cases that cite this headnote

[11] **Telecommunications**
Persons concerned; consent

Grandmother and father of two murdered children did not have subjective expectation of privacy in their oral communications and prayers directed toward children at outdoor grave site service, and therefore, interception of such communications by placement of electronic surveillance microphone in funeral urn did not violate Fourth Amendment; service was attended by media and other third parties, cemetery was publicly accessible, and no steps were taken to preserve privacy of communications. U.S.C.A. Const.Amend. 4.

7 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Northern District of Texas.

Before KING, Chief Judge, and HIGGINBOTHAM and DUHÉ, Circuit Judges.

Opinion

KING, Chief Judge:

Plaintiffs–Appellants Darlie Kee and Darin Routier appeal the district court's grant of summary judgment in favor of Defendants–Appellees the City of Rowlett, police officers Jimmy Ray Patterson and Chris Frosch, and Assistant District Attorney Greg Davis. The district court held that the placement of an electronic surveillance microphone at an outdoor grave site memorial service, which intercepted Kee and Routier's communications, did not violate constitutional or statutory rights and therefore did not provide a predicate for their claims under 42 U.S.C. § 1983 and 18 U.S.C. § 2511. The district court reasoned that Kee and Routier failed to demonstrate that they possessed a reasonable expectation of privacy regarding their oral communications at the grave site memorial service. For the following reasons, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 14, 1996, Darlie Kee ("Kee") and Darin Routier ("Routier") attended a grave site memorial service for Damon Routier and Devon Routier, two minor children who were murdered on June 6, 1996 in Rowlett, Texas. Kee was the grandmother of the deceased children. Routier was the father of the deceased children. Darlie Routier, the children's mother, was convicted of capital murder for the children's deaths.

Jimmy Ray Patterson and Chris Frosch, police officers in the City of Rowlett (the "City"), were assigned to investigate the murders. As part of the investigation, an electronic surveillance wiretap was placed[1] in a funeral urn in close proximity to the children's graves. The officers did not obtain a judicial warrant or court order, nor did they obtain the family's consent before placing the surveillance device at the grave site. However, the officers did obtain permission from the owners of the cemetery to enter and conduct their surveillance.

The grave site at issue was a privately owned plot of land situated in an outdoor and publicly accessible cemetery. The electronic surveillance device consisted of a *209 microphone planted in an urn, which recorded sounds and conversations at the grave site. The microphone recorded the surrounding sounds of the grave site for approximately fourteen hours. Police also videotaped the activities at the grave site.

Due to the notoriety of the murders and the subsequent investigation, the news media and public were aware of the planned memorial service. News reporters from local television stations and newspapers attended and observed portions of the activity at the grave site. Family members, including Kee and Routier, and other invited guests participated in services, prayers, and conversations at the grave site. The summary judgment evidence fails to detail exactly how many people attended the grave site, who was in attendance, whether there was more than one memorial service during the day, when the media observers were present, and what conversations were recorded.[2]

The existence of the surveillance recordings was first discovered by Kee and Routier during the capital murder trial of Darlie Routier. At the trial, Patterson testified to

the placement of the microphone surveillance device at the grave site. Patterson also testified that the device was placed in the urn beside the grave site "[i]n case someone went up there and made a confession about what happened." Upon learning about the existence of the surveillance recordings, Kee and Routier brought suit against those individuals and entities allegedly involved in the taping of their conversations.

[1] The complaint sought damages, attorneys' fees, and a declaratory judgment against Patterson and Frosch; Greg Davis, the Assistant District Attorney assigned to the case; and the City (collectively, the "defendants"). The focus of the complaint was limited to those communications and prayers directed toward the deceased children. Specifically, Kee and Routier sought damages from Patterson, Frosch, and Davis under 42 U.S.C. § 1983, alleging violations of rights under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures, and alleging violations of the constitutional right to privacy emanating from the general protections of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Kee and Routier also sought damages under 18 U.S.C. §§ 2510–2522[3] for violation of the federal statutory law that prohibits illegally intercepting oral communications[4] without a warrant. Kee and Routier sought damages from the ***210** City under 42 U.S.C. § 1983, alleging that the City failed to properly supervise and train the officers as to the applicable law, and that this failure was a deliberate and intentional act of indifference. Finally, Kee and Routier sought declaratory relief requesting that the actions of the defendants be declared unconstitutional.

In three separate motions, the defendants moved for summary judgment.[5] The district court held that Kee and Routier had not demonstrated that they had a subjective expectation of privacy in their conversations and prayers at the grave site. Further, the district court held that even if Kee and Routier could establish a subjective expectation of privacy, the district court was not prepared to recognize this expectation as objectively reasonable. Finally, the district court found that even if Kee and Routier could demonstrate a subjective and objectively reasonable expectation of privacy, defendants were entitled to qualified immunity on the claims. Because the predicate constitutional violation could not be demonstrated, the district court dismissed all of the constitutional and statutory claims against the defendants.

Kee and Routier timely appeal the grants of summary judgment.

II. STANDARD OF REVIEW

[2] [3] [4] [5] [6] This court reviews a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmovant. *Smith v. Brenoettsy,* 158 F.3d 908, 911 (5th Cir.1998); *see also Tolson v. Avondale Indus., Inc.,* 141 F.3d 604, 608 (5th Cir.1998). "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting FED. R. CIV. P. 56(c)). The moving party bears the burden of showing the district court that there is an absence of evidence to support the nonmoving party's case. *See id.* at 325, 106 S.Ct. 2548. "If the moving party fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response. If the movant does, however, meet this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Tubacex, Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir.1995). "A dispute over a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Smith,* 158 F.3d at 911 (quoting ***211** *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The substantive law determines which facts are material. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505.

III. REASONABLE EXPECTATION OF PRIVACY

The dispositive issue in Kee and Routier's complaint is whether the secret electronic recording of their private prayers and conversations directed at their deceased relatives violated their reasonable expectation of privacy. Their Fourth Amendment and "right to privacy" claims rest on the assumption that they had a constitutionally protected reasonable expectation of privacy regarding their oral communications at the outdoor grave site.[6] Their statutory claims, arising under 18 U.S.C. § 2511, also are predicated on enjoying a reasonable expectation of privacy in these oral communications.[7] In similar fashion, the defendants' motions for summary judgment and defenses of qualified immunity are based on the fact that Kee and Routier cannot demonstrate that they ever possessed a reasonable expectation of privacy at the grave site upon which to base their constitutional and statutory claims. We approach both the constitutional and statutory claims under essentially the same analysis, asking whether Kee and Routier can demonstrate a reasonable

expectation of privacy. Accordingly, our analysis necessarily focuses on this precise question.[8]

A. Reasonable Expectation of Privacy in Oral Communications

[7] [8] "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.' " *California* ***212** *v. Ciraolo,* 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (quoting *Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)); *see also Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979) ("Consistently with *Katz,* this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."). Following the *Katz* standard,[9] "[o]ur Fourth Amendment analysis embraces two questions. First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he [sought] to preserve [something] as private.... Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." *Bond v. United States,* 529 U.S. 334, 338, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000) (citations and internal quotations omitted). Therefore, in order to establish a constitutionally protected reasonable expectation of privacy, Kee and Routier must demonstrate both that they had an actual expectation of privacy, based on a showing that they sought to preserve something as private (which we call a subjective expectation of privacy), and that their expectation of privacy is one that society recognizes as reasonable (which we call an objective expectation of privacy).

The district court relied on *United States v. Cardoza–Hinojosa,* 140 F.3d 610, 615 (5th Cir.1998), to find that Kee and Routier did not demonstrate a subjective expectation of privacy in their public oral communications. *Cardoza–Hinojosa* addressed whether an individual who owned a free-standing shed, which he claimed was used to operate a part-time welding business, had a reasonable expectation of privacy in that structure sufficient to support Fourth Amendment standing to object to the search of the structure. The court effectively focused on the subjective expectation of privacy component of the test and determined that, under the facts of the case, the defendant did not have a subjective expectation of privacy in the shed and, thus, lacked standing to raise a Fourth Amendment challenge.

Despite the differing, non-real property context of the instant case, the district court adopted the five-factor test set out in *Cardoza–Hinojosa* and applied it to the prayers and conversations at the public grave site. The *Cardoza–Hinojosa* factors to determine an expectation of privacy include: (1) "whether the defendant has a [property or] possessory interest in the thing seized or the place searched," (2) "whether he has a right to exclude others from that place," (3) "whether he has exhibited a subjective expectation of privacy that it would remain free from governmental intrusion," (4) "whether he took normal precautions to maintain privacy," and (5) "whether he was legitimately on the premises." *Id.* (quoting *United States v. Ibarra,* 948 F.2d 903, 905 (5th Cir.1991)).[10] While we find these factors informative, we ultimately conclude that they provide an imprecise framework to judge an individual's ***213** subjective expectation of privacy in the context of oral communications.

Our difficulty in applying the *Cardoza–Hinojosa* factors to oral communications is that a subjective expectation of privacy in oral communications may, but does not necessarily, turn on the physical characteristics of the place or property in which the speech takes place. In fact, *Katz* clearly shifts the constitutional protection beyond conceptions based on property to focus on the individual's privacy interests. *See Katz,* 389 U.S. at 351, 88 S.Ct. 507 ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (citations omitted)); *see also United States v. Jackson,* 588 F.2d 1046, 1052 (5th Cir.1979) ("No matter where an individual is, whether in his home, a motel room, or a public park, he is entitled to a 'reasonable' expectation of privacy." (citing *Katz,* 389 U.S. at 359, 88 S.Ct. 507) (Douglas, J., concurring)).

[9] Thus, while appropriate to determine the expectation of privacy in the context of searches of physical real property, the *Cardoza–Hinojosa* factors fail to engage the more difficult questions arising from oral communications, especially those communications that occur in areas accessible to the public. *See Katz,* 389 U.S. at 352, 88 S.Ct. 507 ("[W]hat [Katz] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen."); *see also United States v. Smith,* 978 F.2d 171, 179 (5th Cir.1992) ("Courts should bear in

mind that the issue is not whether it is *conceivable* that someone could eavesdrop on a conversation but whether it is *reasonable* to expect privacy."). To be clear, our concern with the district court's determination is simply one of emphasis; we find that the third and fourth factors, namely whether Kee and Routier "exhibited a subjective expectation of privacy that [their communications] would remain free from governmental intrusion" and whether they "took normal precautions to maintain privacy" are the dispositive considerations in the context of the public conversations and prayers at issue in this case.[11]

[10] In explicating these two factors, we are guided by analogous cases involving the reasonable expectation of privacy afforded to oral communications in the eavesdropping and wiretap contexts. Primarily, courts have looked to considerations such as (1) the volume of the communication or conversation[12]; (2) the ***214** proximity or potential of other individuals to overhear the conversation[13]; (3) the potential for communications to be reported[14]; (4) the affirmative actions taken by the speakers to shield their privacy[15]; (5) the need for technological enhancements to hear the communications[16]; and (6) the place or location of ***215** the oral communications as it relates to the subjective expectations of the individuals who are communicating.[17] We agree that these considerations help us develop, but do not define, a set of nonexclusive factors to evaluate the subjective expectation of privacy in oral communications in publicly accessible spaces.[18] *See O'Connor v. Ortega,* 480 U.S. 709, 718, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (recognizing in the context of work environments that determinations of a "reasonable expectation of privacy must be addressed on a case-by-case basis"); *United States v. Smith,* 978 F.2d 171, 180 (5th Cir.1992) ("Any determination of the reasonableness of an individual's expectation of privacy is necessarily fact intensive."). Having determined a more appropriate framework to analyze the facts before us, we turn to the instant case.

B. The Failure to Demonstrate Sufficient Facts to Establish a Subjective Expectation of Privacy

[11] Under the summary judgment standard, Kee and Routier must demonstrate that a genuine issue of material fact exists as to their reasonable expectation of privacy in their oral communications. "Although we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the ***216** nonmovant, the nonmoving party may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial." *Rushing v. Kansas City Southern Ry. Co.,* 185 F.3d 496, 505 (5th Cir.1999). Applying the nonexclusive framework set out in Part III.A, we find that Kee and Routier have failed to meet this burden, because they have provided insufficient evidence in their affidavits and pleadings to show that they had a subjective expectation of privacy.

In their affidavits, Kee and Routier assert that their "grieving conversations and statements" and "oral prayers and communications to ourselves and our God" should be private and not subject to government wiretaps. These statements, alone, cannot sustain the weight of Kee and Routier's burden in establishing that they had a subjective expectation of privacy. *See Lawrence v. Univ. of Tex. Med. Branch,* 163 F.3d 309, 311–12 (5th Cir.1999) ("[T]he non-moving party must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. Neither unsubstantiated assertions nor conclusory allegations can satisfy the non-moving party's burden." (citations, footnote, and internal quotations omitted)).

For example, Kee and Routier adduced no evidence regarding the context of the communications that they now seek to characterize as private. They do not argue that the prayers were hushed or that their voices were modulated to protect their conversations from "uninvited ears," and they have provided no information about the tone, volume, or audibility of the private communications directed toward the graves. They do not specify which conversations were conducted in a manner inaudible to others and provide no information about who was present and to whom their conversations were directed. As knowledge of these important facts is well within the control of Kee and Routier, the failure to include this information in their affidavits undermines any claim of an expectancy of privacy.

In similar fashion, Kee and Routier do not assert that their oral statements were communicated free from the possibility of eavesdroppers who might have been in close proximity to the grave site. In fact, the defendants have submitted evidence to demonstrate that the grave site services were attended by representatives of the media and that third parties were in close proximity to the grave site. Kee and Routier simply fail to respond to this argument that potentially would eviscerate a subjective expectation of privacy. Furthermore, they provide us with no particularized information regarding their activities vis-à-vis the other people known to be at the cemetery and, thus, fail to provide information necessary to find that they had a subjective expectation of privacy.[19]

Perhaps most damaging to Kee and Routier's argument is that they failed to present evidence demonstrating any affirmative steps taken to preserve their privacy. While it is apparent from their affidavits that they did not expect government agents surreptitiously to be recording their prayers, they also were aware that the service was being conducted in an outdoor setting. Kee and Routier fail to allege that they took any steps to ensure that unwanted individuals were excluded or that they did anything to preserve the private nature of the service. They point to no reasonable safeguards or common- ***217** sense precautions taken to preserve their expectation of privacy.

The strongest argument presented by Kee and Routier is that the surveillance was accomplished through the use of technological enhancements. This is a case in which the information possibly was not audible to the "unaided ear." *See United States v. Jackson,* 588 F.2d 1046, 1052 (5th Cir.1979).[20] This is also a case in which the use of technological enhancements potentially could reveal "intimate details." *See United States v. Ishmael,* 48 F.3d 850, 855 (5th Cir.1995) ("The crucial inquiry, as in any search and seizure analysis, is whether the technology reveals 'intimate details.' " (quoting *Dow Chem. v. United States,* 476 U.S. 227, 238, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986))). Despite these factors, however, for Kee and Routier to meet the burden at the summary judgment stage they must demonstrate more than the fact that technology was used for surveillance purposes. They also must show that a factual question exists as to a violation of their subjective expectation of privacy due to that technology. While this possibility may be increased when technological enhancements such as wiretaps are used, the vague affidavits put forth in support of this contention are insufficient in the case at hand.

Finally, Kee and Routier provide almost no information regarding the physical layout or location of the grave site where the prayers or conversations took place. For example, no information is provided about the privately owned burial plot in relation to the rest of the cemetery. Kee and Routier have presented no information regarding the grave site's proximity to the entrance of the cemetery, or regarding whether the public was prevented from accessing the grave site or whether the grave site was secluded by other graves or natural objects, such as trees or bushes. In contrast, the defendants assert that the conversations took place in the open air of a publicly accessible cemetery and that there were no barriers to prevent individuals, such as the assembled media and onlookers, from observing the activities.[21] Again, Kee and Routier have failed to meet their summary judgment burden to demonstrate that an issue of material fact exists as to whether their subjective expectation of privacy was violated.

Because we agree with the district court that no *subjective* expectation of privacy was established on the facts presented, we affirm the grants of summary judgment. As such, we do not reach the question whether individuals such as Kee or Routier ***218** could have an objectively reasonable expectation of privacy at a grave site burial service under different facts or whether the individual defendants would have qualified immunity in such a situation. Further, because our holding rests on Kee and Routier's failure to demonstrate their subjective expectation of privacy, we do not reach the question whether, in other circumstances, officers would be required to obtain judicial approval for a wiretap pursuant to 18 U.S.C. § 2511.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment in favor of all defendants.

All Citations

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Footnotes

1 There is some discrepancy in the record regarding whether Patterson and Frosch were directly responsible for the actual placing of the wiretap in this location. Both Patterson and Frosch state, in their affidavits submitted in support of their summary judgment motion, that they were aware of the investigation into the Routier children's murder. Both claim, however, that they had circumscribed roles in the direct surveillance activities. In contrast, Kee and Routier allege that Patterson admitted under oath in the state criminal trial of Darlie Kee that he was the lead investigator on the case and that he was involved in planning the surveillance. Furthermore, Kee and Routier point to Frosch's affidavit in which he admitted to obtaining an urn from the cemetery owners, which he understood would be used in the surveillance. Frosch also admitted to discussing the surveillance with the owners of the cemetery.

The district court did not determine the extent of Patterson and Frosch's involvement, finding that even if Patterson and Frosch were involved in the surveillance, no constitutionally significant expectation of privacy was violated. We

proceed in similar fashion.

2 Because the district court stayed discovery until the qualified immunity issues were determined, the factual record is limited.

3 Kee and Routier claimed a violation of 18 U.S.C. § 2511. Section 2511 provides in relevant part: "(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 ... or shall be subject to suit." 18 U.S.C. § 2511(1)(a) (2000).

In general, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 ("Federal Wiretap Act"), "has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Forsyth v. Barr,* 19 F.3d 1527, 1534 (5th Cir.1994) (quoting *Gelbard v. United States,* 408 U.S. 41, 48, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972)).

4 Section 2510 defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." 18 U.S.C. § 2510(2).

5 Patterson and Frosch moved for summary judgment on the ground that Kee and Routier had failed to demonstrate that a constitutional right had been violated. In the alternative, Patterson and Frosch invoked qualified immunity, arguing that no reasonable police officer would have believed that the officers' actions would have violated the constitutional rights of Kee and Routier.

Davis moved for summary judgment on the ground that Kee and Routier could not allege an actionable federal claim against him personally, because they could not directly connect him to supervising or administering the electronic surveillance. Davis also invoked absolute and qualified immunity because he alleged his actions were taken pursuant to his prosecutorial duties.

The City moved for summary judgment on the ground that Kee and Routier could not demonstrate that they had a constitutionally protected reasonable expectation of privacy and that Kee and Routier could not demonstrate that the City maintained a policy, practice, or custom that authorized its police officers to violate the reasonable expectation of privacy of its citizens.

6 Specifically, Kee and Routier's complaint alleges violations of the Fourth and Fourteenth Amendments: "The Fourth and Fourteenth Amendments protect Plaintiffs from Defendants' unlawful search and seizure. The conduct of Defendants infringes upon the Plaintiffs' personal liberty and privacy rights."

In addition, they allege infringement of their right to privacy under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments: "The Constitution of the United States protects the Plaintiffs from the Defendants indiscriminate invasion in both their conduct and in their speech. The rights of Plaintiffs to grieve and mourn the loss [of] their close relatives at a grave site service raises very dear and close personal matters which are private and which involve family relationships and are thus protected. The Plaintiffs had a reasonable expectation of privacy during the private grave site funeral and prayer services for Damon and Devon Routier which was violated, without warrant or court order, by the Defendants' conduct described herein."

7 Kee and Routier's complaint alleges "the conduct of the Defendants as described [in the complaint] constitutes a violation of 18 U.S.C.A. § 2511, et. seq., chapter 119—Wire and Electronic Communications Interception and Interception of Oral Communications as set forth in Title 119 of the United States Code Annotated. The Defendants' conduct as described herein is an unlawful interception and/or disclosure of an oral communication as prohibited by 18 U.S.C.A. § 2511, et. seq." We note that the district court did not specifically address Kee and Routier's § 2511 claims.

8 In the instant case, the Fourth Amendment determination of a reasonable expectation of privacy and the federal wiretap analysis overlap. 18 U.S.C. § 2510(2) protects oral communications "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The legislative history of this section demonstrates that Congress intended this definition of oral communication to parallel the reasonable expectation of privacy test set out in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See* S. REP. NO. 90–1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2178; *United States v. Turner,* 209 F.3d 1198, 1200 (10th Cir.2000); *United States v. McKinnon,* 985 F.2d 525, 527 (11th Cir.1993).

9 *Katz* involved a factual situation in which government agents eavesdropped on conversations in a telephone booth by means of an electronic listening device attached to the top of the booth. *See* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

10 Like *Cardoza–Hinojosa, Ibarra* involved the question whether defendants had standing to contest the search of a physical structure, specifically a house. *See Ibarra,* 948 F.2d at 906.

11 Applying the *Cardoza–Hinojosa* factors to the factual situation in *Katz* demonstrates the appropriateness of this shift in emphasis. For example, Katz had a negligible property or possessory interest in the telephone booth; did not have an enforceable right to exclude others from the property; and while legitimately on the premises, did not gain an expectation of privacy from that position. Instead, the constitutional protections stemmed from the fact that he subjectively expected his conversations to be private and that he took the normal precautions available to him to call from inside a booth.

12 *See, e.g., United States v. Smith,* 978 F.2d 171, 177 (5th Cir.1992) (citing *United States v. Bums,* 624 F.2d 95, 100 (10th Cir.1980), for the proposition that a loud conversation in hotel room that could be heard in adjoining rooms precluded a finding of a reasonable expectation of privacy); *Walker v. Darby,* 911 F.2d 1573, 1579 (11th Cir.1990) (finding a question of fact, sufficient to defeat summary judgment, in whether defendant's conversations were electronically intercepted in a manner that invaded a reasonable expectation of privacy); *United States v. Agapito,* 620 F.2d 324, 329 (2d Cir.1980) (finding that conversations loud enough to be heard by others in an adjoining room to undermine a reasonable expectation of privacy); *Wesley v. WISN Div.—Hearst Corp.,* 806 F.Supp. 812, 814 (E.D.Wis.1992) (finding evidence that plaintiffs talked in "hushed voices" or "ceased speaking altogether, to avoid being overheard" relevant to determine reasonable expectation of privacy); *Kemp v. Block,* 607 F.Supp. 1262, 1264 (D.Nev.1985) (finding no reasonable expectation of privacy because plaintiff argued in a loud voice that could be overheard by coworkers).

13 *See, e.g., In re John Doe Trader Number One,* 894 F.2d 240, 243 (7th Cir.1990) (finding no reasonable expectation of privacy for comments made on the trading floor of the Chicago Mercantile Exchange because of the large number of people present); *Kemp,* 607 F.Supp. at 1264 (finding that the presence of coworkers undermined any reasonable expectation of privacy); *But see Bums,* 624 F.2d at 100 (reasoning that Katz could reasonably assume that "uninvited ears" were not listening ... "because the unimpaired vision that attends use of a transparent phone booth afforded him the reasonable conclusion that no listener was in the vicinity"); *United States v. McIntyre,* 582 F.2d 1221, 1224 (9th Cir.1978) (finding reasonable expectation of privacy in conversations that took place in an office, even though the door to the office was open and coworkers were present).

14 *See, e.g., United States v. White,* 401 U.S. 745, 749, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (finding that individuals take the risk that their conversations will be reported to authorities); *Hoffa v. United States,* 385 U.S. 293, 302, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society." (internal quotations and citations omitted)); *United States v. Longoria,* 177 F.3d 1179, 1183 (10th Cir.1999) (concluding that defendant "had no reasonable expectation that the person in whose presence he conducts conversations will not reveal those conversations to others. He assumed the risk that the informant would reveal his incriminating statements to law enforcement."); *see also John Doe Trader Number One,* 894 F.2d at 243; *McIntyre,* 582 F.2d at 1224.

15 *See, e.g., Katz,* 389 U.S. at 363, n *, 88 S.Ct. 507 (White, J., concurring) ("[A]s the Court emphasizes the petitioner 'sought to exclude the uninvited ear.' "); *Smith,* 978 F.2d at 177 ("While it is true that the right to privacy in a personal conversation is generally a reasonable expectation, the actions of the parties to the conversation may reduce this expectation to the point that it is no longer 'reasonable' "); *see also, e.g., Dorris v. Absher,* 179 F.3d 420, 424 (6th Cir.1999) ("The conversations took place only when no one else was present, and stopped when the telephone was being used or anyone turned onto the gravel road that was the only entrance to the office. The record thus indicates that the employees took great care to ensure that their conversations remained private."); *Kemp,* 607 F.Supp. at 1264 ("The subjective expectation of privacy may be tested by any outward manifestations by the plaintiff that he expected his discussion with Mr. Roy in the instrument shop to be free from eavesdroppers. A comparison of what precautions he took to safeguard his privacy interest with the precautions he might reasonably have taken, is appropriate.").

16 *Compare Jackson,* 588 F.2d at 1051 ("Employing the privacy interest analysis approved in *Katz,* we hold that these appellants had no justifiable expectations of privacy with respect to their motel room conversations which were audible to the unaided ears of the government agents lawfully occupying an adjoining room."); *John Doe Trader Number One,* 894 F.2d at 244 ("The Supreme Court has long held that an agent can record those conversations which he can hear with his unaided ear."), *and Kemp,* 607 F.Supp. at 1264 ("One of the tests used is to ascertain whether the defendant overheard the communication with the naked ear under uncontrived circumstances."), *with Agapito,* 620 F.2d at 330 n. 7 ("The absence of electronic eavesdropping of course is significant. As Justice Brennan has pointed out: There is a qualitative difference between electronic surveillance ... and conventional police stratagems such as eavesdropping." (citations and internal quotations omitted)), *United States v. Eschweiler,* 745 F.2d 435, 437–38 (7th Cir.1984)

(interpreting *Agapito* to "suggest that an undercover agent who uses amplifying equipment to overhear conversations in other rooms that would have been inaudible to his naked ear invades interests protected by the Fourth Amendment"), *and United States v. Mankani,* 738 F.2d 538, 543 (2d Cir.1984) ("[T]he Fourth Amendment protects conversations that cannot be heard except by means of artificial enhancement.").

The Court in *Katz* recognized this tension. On one hand Justice Harlan explained that persons having "conversations in the open could not be protected from being *overheard,*" but that same person holding a conversation in a telephone booth did have a reasonable expectation not to have that conversation electronically "intercepted." *See Katz,* 389 U.S. at 361, 88 S.Ct. 507 (emphasis added).

17 *See, e.g., Minnesota v. Carter,* 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) ("The Fourth Amendment protects people, not places. But the extent to which the Fourth Amendment protects people may depend upon where those people are." (citations and internal quotations omitted)); *Mankani,* 738 F.2d at 542 ("Of course, the fact that people are protected does not mean that place has no bearing on one's reasonable expectation of privacy. Plainly it does. Those who claim their privacy has been unlawfully invaded do not live in a vacuum."); *Burns,* 624 F.2d at 100 ("Legitimate privacy expectations cannot be separated from a conversation's context. Bedroom whispers in the middle of a large house on a large, private tract of land carry quite different expectations of privacy, reasonably speaking, than does a boisterous conversation occurring in a crowded supermarket or subway."); *McIntyre,* 582 F.2d at 1224 (finding "[a] business office need not be sealed to offer its occupant a reasonable degree of privacy"); *see also, e.g., United States v. Harrelson,* 754 F.2d 1153, 1169–70 (5th Cir.1985) (finding no legitimate expectation of privacy for conversations held in a prison setting); *United States v. McKinnon,* 985 F.2d 525, 528 (11th Cir.1993) (holding that defendant did not have a reasonable expectation of privacy for communications initiated in the back seat of a police car).

18 Therefore, as was discussed in oral argument, while two federal judges may have a reasonable expectation of privacy in a hushed conversation on the courthouse steps, they might lose that expectation of privacy if they spoke loudly, if they were surrounded by people who could eavesdrop, if one of the judges reported the conversation to authorities, if either party otherwise took actions that would expose the confidentiality of their communications, or if they failed to take any affirmative steps to shield their privacy.

19 Following the nonexclusive factors set out in Part III.A, we note that there is no allegation that anyone at the grave site service reported the incident to authorities. This consideration is, therefore, irrelevant to our analysis.

20 *See supra* note 16.

21 The fact that the prayers and conversations took place in an outdoor publicly accessible space is a difficult hurdle for Kee and Routier to overcome. While neither party briefed the issue, we note a possible overlap between the "open fields" doctrine, which is well-established in Fourth Amendment jurisprudence and the instant case. However, the open fields doctrine has not been expanded beyond observational searches. *See Husband v. Bryan,* 946 F.2d 27, 29 (5th Cir.1991) ("Neither this court nor the Supreme Court have extended the open fields doctrine to anything beyond observation searches."); *Allinder v. Ohio,* 808 F.2d 1180, 1184 (6th Cir.1987); *but see United States v. Ishmael,* 48 F.3d 850, 855 (5th Cir.1995) (applying open fields doctrine to observation based on thermal imaging technology). We decline to engage the issue without briefing, but simply note that *Katz* supports an argument that the fact of visual observation does not necessarily control the reasonableness of the privacy expected for oral communications. In short, the open fields approach cannot automatically be adopted for use in the oral communications context. The openness of the place where the oral communications are spoken, however, may be a significant factor countenancing against finding a reasonable expectation of privacy.

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People for Ethical Treatment of Animals v. Bobby Berosini, Ltd.,
112 Nev. 615 (1995)

111 Nev. 615
Supreme Court of Nevada.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, a/k/a PETA, a Delaware Non–Profit Corporation; Performing Animal Welfare Society, a/k/a PAWS, a California Non–Profit Corporation; Jeanne Roush, Ottavio Gesmundo, and Pat Derby, Appellants,
v.
BOBBY BEROSINI, LTD., a Nevada Corporation, and Bohumil Berousek, a/k/a Bobby Berosini, Individually, Respondents.

No. 21580. | May 22, 1995.

Animal trainer brought suit against animal rights organizations and individuals alleging defamation and invasion of privacy from showing and distribution of videotape made while trainer prepared animals for show. The Eighth Judicial District Court, Clark County, Myron E. Leavitt, J., entered judgment in favor of animal trainer, and individuals and organizations appealed. The Supreme Court, Springer, J., held that: (1) distributing and showing videotape to public was not false or defamatory; (2) commenting publicly that videotape depicted trainer regularly abusing animals was protected opinion; (3) no tortious intrusion occurred; and (4) animal trainer failed to state claim for tortious appropriation.

Reversed.

See also 110 Nev. 78, 867 P.2d 1121, opinion withdrawn.

West Headnotes (13)

[1] **Libel and Slander**
Nature of Crime and Punishment

Videotape depicting animal trainer disciplining animals backstage immediately before performances was not false statement needed to support defamation claim for making and distributing videotape; tape accurately depicted trainer's conduct.

3 Cases that cite this headnote

[2] **Constitutional Law**
Particular Issues and Applications
Libel and Slander
Nature of Crime and Punishment

Statements that animal trainer regularly abused animals, based on videotape depicting trainer's preparations for show, were opinion statements protected from liability for libel under both State and Federal Constitutions; disputed statements were merely evaluative comments based on known facts. U.S.C.A. Const.Amend. 1; Const. Art. 1, § 9.

7 Cases that cite this headnote

[3] **Evidence**
Evidence Withheld or Falsified

Failure of party to produce evidence on issue peculiarly within that party's own knowledge raises presumption that concealed information is unfavorable.

1 Cases that cite this headnote

[4] **Libel and Slander**
Nature of Crime and Punishment

Statements that rods used by animal trainer to discipline animals were made of steel did not defame animal tamer; even if statement was true, trainer indisputably struck animals with some type of rod, and no particular injury or damages resulted from statements that rod was made out of steel rather than wood.

Cases that cite this headnote

[5] **Torts**
Types of Invasions or Wrongs Recognized

Four species of privacy tort are: unreasonable intrusion upon seclusion of another; intrusion upon name or likeness of another; unreasonable publicity given to private facts; and publicity unreasonably placing another in false light before public.

22 Cases that cite this headnote

[6] **Torts**
Intrusion

To recover for tort of intrusion, plaintiff must prove intentional intrusion on solitude or seclusion of another that would be highly offensive to reasonable person.

28 Cases that cite this headnote

[7] **Torts**
Intrusion

In order to have interest in seclusion or solitude which is protected by tort of intrusion, plaintiff must show that he or she had actual expectation of seclusion or solitude and that expectation was objectively reasonable.

27 Cases that cite this headnote

[8] **Torts**
Particular Cases in General

Animal trainer had no expectation of privacy backstage while preparing animals for performance and could not state invasion of privacy tort claim against worker who videotaped trainer striking animals backstage.

4 Cases that cite this headnote

[9] **Torts**
Particular Cases in General

Videotaping of animal trainer's backstage discipline of animals was not highly offensive as would potentially state invasion of privacy tort claim based on intrusion; videotape did not interfere with animals prior to performance, no significant invasion of privacy occurred, subject being filmed could be seen and heard by number of people, and motive in making videotape was not to eavesdrop or to invade realm that trainer claimed for personal seclusion but was to memorialize on tape what others could readily perceive.

10 Cases that cite this headnote

[10] **Torts**
Conduct or Misappropriation Actionable in General

Common law appropriation tort involves unwanted and unpermitted use of name or likeness of ordinary, uncelebrated person for advertising or other such commercial purposes; "appropriation tort" seeks to protect individual's personal interest in privacy as measured in terms of mental anguish from appropriation.

3 Cases that cite this headnote

[11] **Torts**
Conduct or Misappropriation Actionable in General

Right of "publicity tort" involves appropriation of celebrity's name or identity for commercial purposes; tort seeks to remedy economic loss celebrity suffers when someone else interferes

with property interest in celebrity's name.

4 Cases that cite this headnote

[12] **Torts**
Public Figures

Allegation that animal trainer's name and photographs were used to raise money for animal rights groups failed to state tort claim for appropriation of privacy; animal trainer was public figure and celebrity and was seeking to recover pecuniary gain obtained through use of animal trainer's name and likeness.

2 Cases that cite this headnote

[13] **Torts**
Use of Name, Voice or Likeness; Right to Publicity

Complete and exclusive remedy for right of publicity torts are provided by statutory remedy. N.R.S. 598.980–598.988 (1988).

1 Cases that cite this headnote

Attorneys and Law Firms

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Gewerter & Bohn, Thomas Pitaro, Las Vegas, Lemons, Grundy & Eisenberg, Reno, for respondents.

Susan Quig–Terry, Las Vegas, for amici curiae Humane Soc. of U.S., et al.

OPINION ON REHEARING

On April 14, 1995, this court granted rehearing in the above matter on the basis that an appearance of impropriety might exist with regard to one of the members of the panel which issued our prior opinion, dated January 27, 1994. In granting rehearing the court entered its order that, on rehearing, this matter would be submitted on the record, the pleadings, and the tape recording of the oral argument conducted by the court on April 21, 1992. It was further ordered that District Judge Jack Lehman would be disqualified and that Justice Miriam Shearing would participate on rehearing in the stead of Judge Lehman. Justice Shearing has reviewed the record, the briefs, and the tape recording of the oral argument. Whereupon, the court now issues the following opinion on rehearing.

617 *OPINION

SPRINGER, Justice:

In this litigation respondent Berosini claims that two animal rights organizations, ****1271** People for the Ethical Treatment of Animals (PETA) and Performing Animal Welfare Society (PAWS), and three individuals defamed him and invaded his privacy. Judgment was entered by the trial court on jury verdicts on the libel and invasion of privacy claims in the aggregate amount of $4.2 million. This appeal followed. We conclude that the evidence was insufficient to support the jury's verdict and, accordingly, reverse the judgment.

The two independent claims, libel and invasion of privacy, each involving clearly distinct principles of law, will be discussed in separate sections of this opinion.

618 PART ONE: *THE LIBEL ACTIONS

The word *libel* comes from the Latin *libellus,* "little book." The legal term derives from the practice in ancient Rome of publishing little books or booklets which were

used by one Roman in defaming another. The "little book" in this case takes the form of a videotape which shows world-renowned animal trainer, Bobby Berosini, back-stage before the beginning of his show, shaking and punching his trained orangutans and hitting them with some kind of rod. We conclude that the *libellus* is not libelous.

In a critical pretrial discovery order, the trial court limited Berosini's libel action to two categories, thus:

> 1. "[T]he [video] tape and its distribution and showing to the public."
> 2. "[T]he alleged statements of Defendants quoted in the Amended Complaint," namely, that all or some of the "Defendants had defamed Berosini by stating that Plaintiff Berosini regularly abuses his orangutans and has beaten them with steel rods, all of which is false."[1]

***619** The mentioned pretrial order frames the libel issues in this appeal:

> 1. Were the "defendants," or any of them, liable to Berosini by reason of distributing and showing the mentioned videotape?
>
> 2. Were the "defendants," or any of them, liable to Berosini by reason of their having said either, (a) that Berosini "regularly abuses his orangutans" or (b) that Berosini "has beaten them with steel rods?"

****1272** To create liability for defamation there must be:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 (1965). Based on the absence of (a), a false and defamatory statement, we conclude that the two stated questions must be answered in the negative and that the judgment of the trial court must therefore be reversed.

FIRST LIBEL CLAIM: *"[T]he tape and its distribution and showing to the public."*

[1] It is immediately apparent that the "distribution" and "showing" of this particular "little book" cannot possibly be either false or defamatory.[2] The videotape is not "false" because it is an accurate portrayal of the manner in which Berosini disciplined his animals backstage before performances. The videotape is not defamatory because Berosini and his witnesses take the position that the shaking, punching, and beating that appear on the tape are necessary, appropriate and "justified" for the training, discipline, and control of show animals. If Berosini did not think that the tape showed him doing anything wrong or disgraceful, he should not be heard to complain that the defendants defamed him merely by "showing" the tape.

***620** Appellant Ottavio Gesmundo did the actual taping of Berosini. Gesmundo was a dancer in the Stardust Hotel's "Lido" floor show, at which Berosini's animal act was the principal attraction. Gesmundo claims that he was prompted to videotape Berosini's treatment of the animals because he had become aware of Berosini's conduct with the animals and thought that he would be in a better position to put an end to it if Berosini's actions were permanently recorded on tape. Gesmundo says that he had, on a number of occasions, heard the animals crying out in distress and that he had overheard "thumping noises" coming from the area backstage where the videotaping was eventually done. The area in question was demarked by curtains which kept backstage personnel from entering the staging area where Berosini made last-minute preparations before going on stage. By looking through the worn portions of the curtains, Gesmundo testified that backstage personnel were able to observe the manner in which Berosini disciplined his animals in the mentioned staging area. Berosini's position is that his actions depicted on the tape were a "proper" and "necessary" manner of treating these animals.

However motivated, Gesmundo did decide to record Berosini's treatment of the animals on his eight-millimeter home video recorder. From July 9 through July 16, 1989, Gesmundo placed his video camera in a place that would permit Berosini's actions to be recorded without Berosini's being aware of it. Gesmundo would go home each night and transfer that day's video recording onto a VHS tape. In doing this he would edit out the "dead-time," the time during which Berosini was not within the curtained area preparing to go on stage. The final tape which Gesmundo put together showed nine separate incidents, with the date superimposed on the daily taped images.

All of the members of this court have viewed the tape; and what is shown on the tape is clear and unequivocal: Berosini is shown, immediately before going on stage,

grabbing, slapping, punching and shaking the animals while several handlers hold the animals in position. The tape also shows Berosini striking the animals with a black rod **1273 approximately ten to twelve inches long. Perhaps Berosini has some explanation or justification for this conduct; but, the videotape accurately portrays what he was doing to these animals on at least nine different occasions. Berosini, himself, was forced to admit at trial that there was no visual inaccuracy in the images represented on the tape. Berosini's counsel and Berosini's video expert, Dennis Cooper, also agree to the accuracy of what is portrayed on the tape. There is no credible evidence that Gesmundo altered the tape in any manner that would render the tape, in any sense of the word, *false.* Had Gesmundo in some way been able to take this tape and *621 superimpose false images or sounds, it might be possible to say that he falsified the tape, but there is no evidence this was the case. There was no evidence presented which would support a conclusion that the tape, either visually or auditorily, was, of itself, false.[3]

The tape, of course, has nothing to do with whether Berosini was *justified* in punishing the animals; it just shows that he did in fact punish them. The showing and distributing of this tape was, plainly and simply, only the showing of this *fact.* Berosini could have explained, as he did, that he had to exert violence against the animals in order to discipline them or to get them quieted down or to ensure the audience's safety, but this has nothing to do with the truth or falsity of the tape. The "distribution and showing" of the videotape in no way interferes with Berosini's right to present possible justifications for his actions. As the distributors of the tape had the right to show this *true* tape, so Berosini had the right to explain his actions on the tape. If in fact some of the defendants had intentionally interfered with Berosini's act and had, as Berosini claims, provoked the animals *622 to the point that it was necessary for him to do what he is shown doing on the tape, then, of course, Berosini might have had some tort action other than a libel action, perhaps a conspiracy action, against persons who, he claims, were wrongfully and intentionally interfering with his act.[4]

Unless the tape had been materially altered to portray something different from **1274 what Berosini was actually doing, then defendants have not made a "false" statement about Berosini—they have merely shown to the world how Berosini treated his animals on nine separate occasions,[5] backstage, immediately preceding his act. As the evidence does not support a conclusion that the tape was visually or auditorily "false," we conclude that Berosini presented insufficient evidence to support the jury's verdict with respect to this tape.

SECOND LIBEL CLAIM: "*Berosini regularly abuses his orangutans.*"

[2] Whether the violence portrayed in the videotape is seen as abuse or proper discipline is a matter of wide-ranging difference of opinion among the witnesses in this case and within the public in general. There is no doubt that at the time the tape was first shown in Las Vegas on June 28, 1989, some of the present defendants did comment publicly on the videotape's content. One example is found in Berosini's response to interrogatories, in which he testified:

> *623 Beginning on July 28, 1989, and continuing thereafter, [defendant] Jeane Roush appeared on local television and wrongfully stated that the Plaintiff "abuses" his animals and beats them severely.

The testimony at trial exhibited a very wide spectrum of opinion as to whether Berosini's actions constituted *abuse* or was proper and acceptable disciplinary action. For example, one of Berosini's experts, Kenneth Gould, Ph.D., a professor at Emory University, whose Primate Center provided orangutans for Berosini's use, testified that the beatings portrayed in the videotape "show appropriate and necessary action on his part with regard to discipline of animals under his control." Berosini claimed that extra disciplinary measures were required because certain stage hands and performers had been making "monkey sounds" and were "hissing" and making "giggling sounds." According to Berosini, these taunting sounds (which, incidentally, are not detectable on the tape), agitated the animals and required him to exert additional force on the animals in order to secure the safety of his audiences. Whether it was more prudent for Berosini to have tried to put a stop to the supposed teasing or, as he appears to have done, to escalate his pre-act violence on the animals, is also a matter of opinion; and, again, whether the beatings portrayed in the tape are justified or constitute animal abuse is a matter involving a broad spectrum of opinion, lay and expert.

The animal rights activists all see Berosini's treatment of his animals as cruel and abusive, an *opinion* shared by the defendants in this case. Jane Goodall, Ph.D., Director of the Gombe Stream Research Centre and expert in primate behavior viewed the tape in this manner:

> In this video, I saw the following sequence of events: A door opened and five men, each leading a young orang by one hand, walked along a bare passage towards the

(presumably concealed) camera. With these ten primates was a sixth man, wearing a bow tie. At the end of the passage the whole group stopped. The orangs, still standing upright, appeared quiet and well behaved. I saw no signs of disobedience in **1275 any of them at any time. Yet as they stood there—apparently waiting to go onstage for a performance—the man in the bow tie began to abuse the orangs. Suddenly he would seize one of them by its hair and pull and push it towards and away from him with violent movements. He would slap one of them, or punch it with his fist. Most of the abuse was directed towards the larger orangs. Once he pulled one round to face him, then slapped it hard over the muzzle. Occasionally *624 he hit one of them over the shoulders with a heavy implement, shaped like a conductor's baton.

During these entirely unprovoked assaults the handlers restrained the orangs by both arms, holding them upright. They gave the impression that they were expecting the abuse and positioning their charges in readiness to receive it.

Dr. Goodall was of the opinion that what she saw on the videotape involved "severe psychological cruelty as well as physical abuse," and recommended that the five orangutans depicted in the videotape "be confiscated immediately and placed in the hands of caring and responsible people who could try to cure them of their psychological (and perhaps physical) wounds."

Obviously, there are persons who disagree with Dr. Goodall and who approve of this kind of violence in the training of animals. Berosini, himself, testified that in his opinion it is often necessary to hit an orangutan to keep it under control. Although Berosini may be entitled to hold his own opinion on these matters, he does not claim that the defendants in this case or their experts did not honestly and sincerely hold the contrary opinion that the violence portrayed on the videotape constituted animal cruelty and abuse.[6]

The opinion expressed by any defendants or by any of defendants' witnesses in this case that Berosini's activities, as represented in the videotape, constituted abuse or cruelty falls squarely into a class of opinion described by Prosser and Keeton as "evaluative opinions." *Prosser and Keeton on Torts* 814 (W. Page Keeton, ed.; 5th ed. 1984). An *evaluative* opinion involves a value judgment based on true information disclosed to or known by the public. Evaluative opinions convey the publisher's judgment as to the quality of another's behavior and, as such, it is not a statement of fact. "Under the *Restatement (Second)* virtually all 'evaluative only' opinions would be nonactionable, since they are by definition based on disclosed facts.... The statement that 'Jane Doe did not deserve the Oscar for her movie role because it was a shallow, two-bit, hack performance' is not actionable even in the face of ironclad proof that every other living being who has ever seen the movie loved the performance." *625 Rodney A. Smolla, *Law of Defamation* § 6.05 [2], page 6–20 (1988) (citations omitted). The divergent evaluative opinions expressed in the case now before us are subject to debate. Neither is "right" or "wrong."

In the present case, everyone involved has seen the "movie"; and all the facts upon which opinions were based were "disclosed" in the videotape itself. Those who were of the opinion that Berosini was being abusive to the animals were making an evaluative judgment based on the facts portrayed in the video. All viewers of that video are free to express their opinion on the question of whether they think Berosini was being cruel to those animals, and no one can be successfully sued for expressing such an evaluative opinion—even if it is "wrong." There is no such thing as a false idea or a wrong opinion. *See Nevada Ind. Broadcasting Corp. v. Allen,* **1276 99 Nev. 404, 410, 664 P.2d 337, 341–42 (1983).

We are dealing here with two very strongly held, contrary opinions on how animals should be treated. We agree completely with *amicus,* Nevada State Press Association, Inc., that "[w]ithout taking sides on the activities or the strongly-held beliefs of either party, it is nevertheless clear that open and robust debate on controversial and contested issues of this kind could not long survive a succession of such multi-million dollar judgments."

Finally, the constitutional privilege provided by the Nevada Constitution protects the animal rights activists from defamation liability in this case. Article 1, section 9, of the Nevada Constitution provides that "[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." Citing to the Nevada Constitution, in *Culinary Workers Union v. Eighth Judicial Dist. Court,* 66 Nev. 166, 207 P.2d 990 (1949), this court observed that the "constitutional right to free speech ... embraces every form and manner of dissemination of ideas held by our people." *Id.* at 173, 207 P.2d at 993. "Free speech ... must be given the greatest possible scope and have the least possible restrictions imposed upon it, for it is basic to representative democracy." *Id.* at 173, 207 P.2d at 994 (citations omitted). In *Culinary Workers,* the district court issued a restraining order against peaceful picketing. The Culinary Workers Union sought a writ of prohibition countermanding the restraining order. One of the grounds

asserted by the parties opposed to the Culinary Workers Union's application for the prohibition writ was that the "unfair" sign used on the picket line was untruthful. *Id.* at 176, 207 P.2d at 995 (citations omitted). With regard to the Culinary Workers Union's use of the word "unfair" on picket signs, this court ruled in *Culinary Workers,* that "[s]uch normal statements or claims which in general convey ***626** the idea that a business is ' "unfair" to organized labor' are no more than statements of opinion and are not subject to judicial restraint." *Id.* at 177, 207 P.2d at 995.

Any of the defendants in this case who might have said that Berosini's videotaped beatings were abusive are in a very similar position to the Culinary Workers Union members in *Culinary Workers* who called an employer "unfair." The existence of the undisputed "fact" of the videotaped beatings makes the statements of "defendants" about what is seen on the tape merely evaluative comments based on known facts. "[A] statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection" under the federal constitution, as well as under the Nevada Constitution as interpreted in the *Culinary Workers* case. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20, 110 S.Ct. 2695, 2706, 111 L.Ed.2d 1 (1990). The libel judgment, based on the statement "Berosini regularly abuses his orangutans," therefore, must be reversed on constitutional as well as common law grounds.

THIRD LIBEL CLAIM: *Berosini "has beaten them with steel rods."*

With regard to the allegedly false statements made by defendants that Berosini "has beaten [the orangutans] with steel rods," we have something that comes a little closer to being a statement of fact that might be subject to being characterized as either true or false. The statement that Berosini "has beaten them with ... rods" is obviously a true statement; it is on tape. That he has "beaten them with *steel* rods" is not necessarily true; and, if some defendant did accuse Berosini of using a *steel* rod, then perhaps a false statement of fact has been made about the kind of instrument Berosini used to beat the animals.

[3] Although Berosini says that he used a taped *wooden* rod and admits that he hit the animals from time to time with such a rod, none of these rods was produced by Berosini at the trial. Berosini lost or destroyed whatever kind of rod or rods he is shown on the video tape to be using to hit the animals. The chastening rod was lost somehow after ****1277** this litigation was in progress. Berosini bore the burden below of proving that the statement was false. *Posadas v. City of Reno,* 109 Nev. 448, 453, 851 P.2d 438, 442 (1993).[7] Furthermore, the failure of a party to produce evidence on an issue peculiarly within his own knowledge raises an inference ***627** that the concealed information is unfavorable. *Isola v. Sorani,* 47 Nev. 365, 368, 222 P. 796, 797 (1924); *State of Nevada v. McLane,* 15 Nev. 345, 369 (1880); *see also Nev. Tax. Com. v. Hicks,* 73 Nev. 115, 129, 310 P.2d 852, 859 (1957).

[4] The statement that the rod was steel and was taped with black tape originates with Gesmundo. Two different stage hands told Gesmundo that Berosini was using a steel rod to beat the animals. Gesmundo told a number of animal rights people that the rod was made of steel. Although we view the question of what the rod was made of to be largely immaterial, we did note in watching the video that in the July episode, Berosini dropped whatever kind of rod it was that he had in his hand, and we heard an unmistakable ringing sound that sounded strikingly similar to a *steel* rod being dropped. We certainly do not conclude from our own viewing of the tape that Berosini was lying or that the rod was steel rather than wood, but hearing this sound makes the listener wonder whether the lost rod or rods were what Berosini claimed them to be.

One's saying that the rods with which Berosini is shown striking the animals are *steel* rods is not in itself defamatory. Once we all know (and see on television) that Berosini strikes his animals with some kind of a black rod, it is unlikely that we would change our opinion or have a more "derogatory opinion against him" based on the rods' being steel rather than wood. *See Las Vegas Sun v. Franklin,* 74 Nev. 282, 287, 329 P.2d 867, 869 (1958). We do not have to reach the question as to whether proof is sufficient to prove falsity in this regard, because, true or false, saying that Berosini beats his animals "with steel rods" is not, as a matter of law, defamatory under the circumstances of this case. The composition of the rods is of little moment; if the rods were wooden, saying that they were steel does not defame Berosini.

None of the Berosini witnesses attributed any particular injury or damages to Gesmundo's statements that the rod was made out of steel rather than wood. A libel judgment of the present magnitude, based solely on a charge that defendants falsely accused Berosini of using a tape-wrapped *steel* rod instead of a tape-wrapped *wooden* rod cannot possibly stand.

We conclude that publication of the videotape itself, is not libelous. Any statements made by unspecified defendants to the effect that Berosini "regularly abuses his orangutans" are, given the context of the videotape on

IV. ATTORNEY FEES

There are multiple authorities for this Court to award attorneys' fees. Pursuant to NRS 18.010:

> 1. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law.
> 2. In addition to the cases where an allowance is authorized by specific statute, **the court may make an allowance of attorney's fees to a prevailing party:**
>   a. When he has not recovered more than $20,000; or
>   b. **Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.**
> 3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written motion or with or without presentation of additional evidence.
> 4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

NRS 18.010(2)(b) provides that the court may award attorneys' fees to the prevailing party in such circumstances. Pursuant to NRS 18.010, this Court should liberally construe the provisions of this statute "in favor of awarding attorney's fees in all appropriate situations." Lyuda's obvious attempts to deceive this Court and her failure to consider the relevant authority, demonstrate that an award of attorneys' fees is appropriate. Lyuda's motion is completely frivolous. Moreover, her bad faith throughout these proceedings require that Sean be awarded his attorney fees, now, and once the evidentiary hearing in this matter is concluded.

/ / /

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V. CONCLUSION

Based upon the foregoing, the Court should enter the following orders:

1. Denying Lyuda's motion.
2. Confirming the November 18th recording and the recorded recollection to be admissible.
3. Awarding Sean his attorney fees.
4. Any other relief that this Court deems just and proper.

DATED this 6 day of January, 2016.

BLACK & LOBELLO

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DECLARATION OF SEAN A. ABID IN SUPPORT OF HIS OPPOSITION AND COUNTERMOTION

SEAN A. ABID, having first been duly sworn, deposes and says:

1. I am the Plaintiff in the above-entitled action, and I am competent to testify to the matters stated herein. All such matters are based upon my own personal belief.

2. I am making this Affidavit in Support of my OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTITIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2016, SANCTIONS AND ATTORNEY'S FEES AND COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS.

3. I have reviewed the Opposition and Countermotion being filed on my behalf. I know the contents thereof, and the same is true of my own knowledge, except for those matters therein stated on information and belief and, as to those matters, I believe them to be true.

Signed under pains and penalties of perjury this 6 day of January, 2016.

SEAN R. ABID

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702-869-8801 FAX: 702-869-2669

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 6th day of January, 2016 I served a true and correct copy of the OPPOSITION OF PLAINTIFF, SEAN R. ABID, TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTITIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2016, SANCTIONS AND ATTORNEY'S FEES AND COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid, addressed as follows:

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MOFI

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

SEAN R. ABID,
Plaintiff/Petitioner

v.
LYUDMYLA A. ABID,
Defendant/Respondent

Case No. D424830

Dept. B

MOTION/OPPOSITION FEE INFORMATION SHEET

Notice: Motions and Oppositions filed after entry of a final order issued pursuant to NRS 125, 125B or 125C are subject to the reopen filing fee of $25, unless specifically excluded by NRS 19.0312. Additionally, Motions and Oppositions filed in cases initiated by joint petition may be subject to an additional filing fee of $129 or $57 in accordance with Senate Bill 388 of the 2015 Legislative Session.

Step 1. Select either the $25 or $0 filing fee in the box below.

☑ **$25** The Motion/Opposition being filed with this form is subject to the $25 reopen fee.

-OR-

☐ **$0** The Motion/Opposition being filed with this form is not subject to the $25 reopen fee because:

- ☐ The Motion/Opposition is being filed before a Divorce/Custody Decree has been entered.
- ☐ The Motion/Opposition is being filed solely to adjust the amount of child support established in a final order.
- ☐ The Motion/Opposition is for reconsideration or for a new trial, and is being filed within 10 days after a final judgment or decree was entered. The final order was entered on _____.
- ☐ Other Excluded Motion (must specify) _____.

Step 2. Select the $0, $129 or $57 filing fee in the box below.

☑ **$0** The Motion/Opposition being filed with this form is not subject to the $129 or the $57 fee because:

- ☐ The Motion/Opposition is being filed in a case that was not initiated by joint petition.
- ☑ The party filing the Motion/Opposition previously paid a fee of $129 or $57.

-OR-

☐ **$129** The Motion being filed with this form is subject to the $129 fee because it is a motion to modify, adjust or enforce a final order.

-OR-

☐ **$57** The Motion/Opposition being filing with this form is subject to the $57 fee because it is an opposition to a motion to modify, adjust or enforce a final order, or it is a motion and the opposing party has already paid a fee of $129.

Step 3. Add the filing fees from Step 1 and Step 2.

The total filing fee for the motion/opposition I am filing with this form is:
☐**$0** ☑**$25** ☐**$57** ☐**$82** ☐**$129** ☐**$154**

Party filing Motion/Opposition: Sean R. Abid Date 1/6/16

Signature of Party or Preparer Cheryl Berdell

Exhibit 1

Exhibit 1

Collins v. State, 113 Nev. 1177 (1997)

113 Nev. 1177
Supreme Court of Nevada.

Robert J. COLLINS, Appellant,
v.
The STATE of Nevada, Respondent (Two Cases).

Nos. 27695, 27810. | Oct. 1, 1997.

Defendant was convicted in the Second Judicial District Court, Washoe County, Peter I. Breen, J., of burglary, presenting false information for insurance benefits, conspiracy to provide false information for insurance benefits, and obtaining money by false pretenses, and he appealed. The Supreme Court held that officer had probable cause to arrest defendant.

Affirmed.

West Headnotes (20)

[1] **Arrest**
What constitutes such cause in general

Probable cause for arrest requires that law enforcement official have trustworthy facts and circumstances which would cause person of reasonable caution to believe that it is more likely than not that person will disregard written promise to appear.

Cases that cite this headnote

[2] **Automobiles**
Custodial arrest or less punitive measures

Police officer had probable cause to arrest motorist; motorist's hostility toward officer, his initial refusal to produce his driver's license, evidence of insurance, or registration, and his deliberate crumpling of citation would cause person of reasonable caution to believe that motorist would disregard citation. N.R.S. 484.795, subd. 1.

Cases that cite this headnote

[3] **Automobiles**
Custodial arrest or less punitive measures

Statute providing that law enforcement officers may arrest individual where they have reasonable and probable grounds to believe that person will disregard written promise to appear in court authorizes officer to arrest person after citation has been issued if person repudiates written promise to appear. N.R.S. 484.795, subd. 1.

Cases that cite this headnote

[4] **Searches and Seizures**
Inventory and impoundment; time and place of search

In deciding whether to impound vehicle, question is not what could have been achieved, but whether Fourth Amendment requires such steps. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[5] **Searches and Seizures**
Inventory and impoundment; time and place of search

Police officer did not act unreasonably in having arrestee's car taken to more secure location; car was in unsecured parking lot, there was no evidence that car or its valuables would remain safe, and officer testified that car was in "aisleway," suggesting that it was not in designated parking space.

1 Cases that cite this headnote

[6] **Searches and Seizures**
Inventory and impoundment; time and place of search

Police have duty to inventory contents of impounded automobile to protect against claims of theft and to protect storage bailee against false charges; however, inventory search must not be ruse for general rummaging in order to discover incriminating evidence.

Cases that cite this headnote

[7] **Searches and Seizures**
Inventory or booking search

If search is for purpose of inventory of personal effects and not exploratory, articles found as result of search which supply foundation for reasonable suspicion on part of police are not subject to unlawful search and seizure, and this is so because police are in place where they have right and obligation to be when they find objects of seizure.

Cases that cite this headnote

[8] **Automobiles**
Time and place; impoundment, inventory, or booking

Police officer's request that investigator from another department examine items that officer found during inventory search of arrestee's impounded vehicle to determine if they were, in fact, incriminating did not violate Fourth Amendment's prohibition against unreasonable searches; officer found items when he was in place where he had right and obligation to be. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[9] **Searches and Seizures**
Inventory and impoundment; time and place of search

Police did not exceed scope of inventory search when they read notebook and listened to tape, which were found in arrestee's impounded car.

1 Cases that cite this headnote

[10] **Indictment and Information**
Incompetent or insufficient evidence

Regardless of presentation of inadmissible evidence, indictment will be sustained if there is slightest sufficient legal evidence.

Cases that cite this headnote

[11] **Indictment and Information**
Competency and legality of evidence
Indictment and Information
Particular offenses in general

Although defendant alleged that prosecuting attorney presented prejudicial and inadmissible hearsay statements to grand jury, majority of objected to statements were not hearsay, but, rather, were properly offered as explanations of officers' conduct, and sufficient legal evidence existed to uphold burglary indictment.

Cases that cite this headnote

[12] **Larceny**
Property Subject of Larceny

Proprietary information falls within definition of "personal property" for purposes of larceny offense. N.R.S. 193.021.

1 Cases that cite this headnote

[13] **Larceny**
Property Subject of Larceny

By copying down and recording security access codes to storage unit, defendant deprived company of "property interest," for purposes of larceny offense, because his knowledge of numbers resulted in loss of numbers' value. N.R.S. 193.021.

2 Cases that cite this headnote

[14] **Witnesses**
Competency of Corroborative Evidence

Defendant's wife's testimony that defendant physically abused her was relevant to her credibility, which had been attacked, and, thus, was admissible in prosecution of defendant for insurance fraud and obtaining money by false pretenses.

Cases that cite this headnote

[15] **Witnesses**
Former statements corresponding with testimony

In prosecution of defendant for insurance fraud and obtaining money by false pretenses, hearsay rule was not violated by admission of police officer's testimony that defendant's wife made allegations of physical abuse, as testimony was admissible to address attacks on wife's credibility. N.R.S. 51.035.

Cases that cite this headnote

[16] **Privileged Communications and Confidentiality**
Common interest doctrine; joint clients or joint defense
Privileged Communications and Confidentiality
Agents or employees of attorney or client in general

Attorney-client privilege did not protect statements that defendant made to his wife's former attorney because there was no evidence that defendant was either speaking to attorney as his wife's representative or engaged in joint defense with wife. N.R.S. 49.075, 49.095.

Cases that cite this headnote

[17] **Criminal Law**
Summoning and impaneling jury

Appellate court would not address defendant's claim that trial court improperly restricted subject matter of voir dire, where defendant failed to object to limitation at trial.

Cases that cite this headnote

[18] **Criminal Law**
Special Knowledge as to Subject-Matter

Police officers' testimony was admissible because their opinions were rationally based on what they saw in home and helpful to determine whether house was actually burglarized. N.R.S. 50.265.

3 Cases that cite this headnote

[19] **Criminal Law**
Articles subject of offenses

Figurines which were produced five years after alleged burglary were properly admitted in burglary prosecution, absent evidence indicating that figurines were not in substantially same

condition as when crime was committed.

Cases that cite this headnote

[20] **Criminal Law**
⇐Particular Offenses

Defendant's conviction for obtaining money by false pretenses was compatible with his conviction for insurance fraud, and there was sufficient evidence to support each conviction. N.R.S. 686A.291.

Cases that cite this headnote

Attorneys and Law Firms

**1057 *1177 Dennis E. Widdis; Richard F. Cornell, Reno, for Appellant.

Frankie Sue Del Papa, Attorney General, and Ronda Clifton, Deputy Attorney General, Carson City; Richard A. Gammick, District Attorney, and Terrence P. McCarthy, Deputy District Attorney, Reno, for Respondent.

*1179 ***OPINION***

PER CURIAM:

On September 11, 1989, Jeanne Collins reported to the Washoe County Sheriff's Department that her home had been burglarized. Thereafter, she and her husband, Robert Collins, collected reimbursement for the stolen items from Farmers Insurance Company ("Farmers").

On February 3, 1991, Nevada Highway Patrol ("NHP") Trooper Ken Gager pulled over and ultimately arrested Mr. Collins. A subsequent search of the car revealed, among other things, a spiral notebook and a tape recorder containing secret access codes to a secured storage unit ("The Vault") in Reno, vice grips, a blank key, two-way radios, electronic gear and two rare coins that were ultimately determined to be the subject of the insurance claim lodged with Farmers.

**1058 The next day, Reno Police executed a search warrant for a fine arts locker that Mr. and Mrs. Collins had rented at The Vault. Several of the items seized matched the items reported stolen in September of 1989.

In August 1995, after a jury found Mr. Collins guilty of burglary, the district court sentenced him to four years in the Nevada Department of Prisons. This conviction is the subject of *1180 appeal No. 27695. In September 1995, a different jury convicted Mr. Collins of insurance fraud. The judge sentenced him to six years in prison for presenting false information for insurance benefits, six years for conspiracy to provide false information for insurance benefits, and eight years for obtaining money or property by false pretenses to run concurrently. He was also ordered to pay restitution. These convictions are the subject of appeal No. 27810.

Seizure of evidence from the Collins vehicle and The Vault.

[1] Prior to both trials, the district court denied a pretrial motion to suppress the evidence found in Mr. Collins' car. Mr. Collins argues that the seizure was tainted by numerous instances of police misconduct. He first contends that his arrest was unlawful because the police did not have probable cause to arrest him. Probable cause "requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not" that the person will disregard a written promise to appear. *See Keesee v. State,* 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994). NRS 484.795(1) authorizes a peace officer to arrest an individual who has committed a misdemeanor traffic violation when the officer "has reasonable and probable grounds to believe the person [cited] will disregard a written promise to appear in court."

[2] We conclude that Mr. Collins' hostility toward Trooper Gager, his initial refusal to produce his driver's license, evidence of insurance or registration and his deliberate crumpling of the citation would cause a person of "reasonable caution" to believe that Mr. Collins would disregard the citation. Thus, we conclude that the district court did not err in finding that Trooper Gager had probable cause to arrest Mr. Collins.

[3] Mr. Collins next contends that Trooper Gager's authority to arrest him ceased when he gave Mr. Collins a copy of the citation. NRS 484.795(1) provides that law

enforcement officers may arrest an individual where they have "reasonable and probable grounds to believe that the person will disregard a *written promise* to appear in court." NRS 484.795(1). (Emphasis added.) NRS 484.795 clearly authorizes an officer to arrest a person after a citation has been issued if the person repudiates the written promise to appear. Therefore, we conclude that Mr. Collins' argument lacks merit.

[4] [5] ***1181** Mr. Collins contends that the NHP improperly impounded his car. He argues that Trooper Gager failed to ask him whether he had a preference as to where his car should remain until he could post bail. In deciding whether to impound a vehicle, the question "is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps.... The reasonableness of any particular government action does not necessarily or invariably turn on the existence of alternative or 'less intrusive means.' " *Colorado v. Bertine,* 479 U.S. 367, 374, 107 S.Ct. 738, 742, 93 L.Ed.2d 739 (1987) (quoting *Illinois v. Lafayette,* 462 U.S. 640, 647, 103 S.Ct. 2605, 2610, 77 L.Ed.2d 65 (1983)). Mr. Collins' car was in an unsecured parking lot and no evidence exists that the car or its valuables would remain safe. Mr. Collins' daughter, who was not yet of driving age, was present, and Trooper Gager testified that there were people gathered around the parking area. Further, Trooper Gager testified that the car was in the "aisleway," suggesting that it was not in a designated parking space. Accordingly, we conclude that Trooper Gager did not act unreasonably in having the car taken to a more secure location.

[6] Mr. Collins further argues that the evidence found in his car should have been suppressed because the search of his car was an improper inventory search. The police have a duty to inventory the contents of an automobile to protect against claims of theft ****1059** and to protect the storage bailee against false charges. *Heffley v. State,* 83 Nev. 100, 103, 423 P.2d 666, 668 (1967). However, "an inventory search must not be a ruse for general rummaging in order to discover incriminating evidence." *Florida v. Wells,* 495 U.S. 1, 4, 110 S.Ct. 1632, 1635, 109 L.Ed.2d 1 (1990).

[7] As Trooper Gager conducted the search, he came across items that he thought might be indicative of criminal activity and called a detective to examine the inventoried items.

> If the search is for the purposes of inventory of personal effects and not exploratory, articles found as a result which supply the foundation for a reasonable suspicion on the part of the police are not subject to unlawful search and seizure. This is so because the police are in a place where they have a right and obligation to be, ... when they find the objects of seizure.

Heffley, 83 Nev. at 103, 423 P.2d at 667.

[8] Trooper Gager found the items when he was in a place where he had a right and obligation to be. Thus, we conclude that his ***1182** request that an investigator from another department examine the items to determine if they were, in fact, incriminating did not violate the Fourth Amendment's prohibition against unreasonable searches.

[9] Mr. Collins argues that the police exceeded the scope of a proper inventory search when they read the contents of the spiral notebook and listened to the tape. We conclude that the scope of the inventory search was proper. *See Michigan v. Thomas,* 458 U.S. 259, 102 S.Ct. 3079, 73 L.Ed.2d 750 (1982) (noting that once an inventory search reveals contraband, warrantless search may be properly expanded without showing exigent circumstances); *see also United States v. Arango–Correa,* 851 F.2d 54 (2d Cir.1988) (opening of notebooks during inventory search analogous to permissive inventory of closed container); *State v. Weber,* 163 Wis.2d 116, 471 N.W.2d 187 (1991) (playing unmarked music cassette tape to properly document it on inventory form within scope of proper inventory search).

Mr. Collins argues that the search warrant for The Vault locker was faulty because it was based on evidence found in the car. Because we conclude that Mr. Collins' arrest was lawful, and that the impoundment and inventory search of his car was valid, we conclude that the search warrant to search the locker was valid. Accordingly, the district court did not err by denying the motion to suppress.

Grand jury proceedings.

On appeal from the burglary conviction, Mr. Collins contends that the prosecuting attorney presented prejudicial and inadmissible hearsay statements to the grand jury.

[10] "The grand jury can receive none but legal evidence, and best evidence in degree, to the exclusion of hearsay or secondary evidence." NRS 172.135(2); *Sheriff v. Frank,* 103 Nev. 160, 165, 734 P.2d 1241, 1245 (1987). However, regardless of the presentation of inadmissible evidence, the indictment will be sustained if there is the

slightest sufficient legal evidence. *Robertson v. State,* 84 Nev. 559, 561–62, 445 P.2d 352, 353 (1968).

[11] We conclude that the majority of statements objected to by Mr. Collins were not hearsay but were properly offered as explanations of the officers' conduct. *See Wallach v. State,* 106 Nev. 470, 796 P.2d 224 (1990). We also conclude that sufficient legal evidence exists to uphold the indictment.

1183 *Security codes as personal property.

[12] [13] Mr. Collins argues that security codes are not "personal property" and therefore cannot be the subject of larceny. NRS 205.005–205.980 cross-references the definition of personal property to NRS 193.021. Although NRS 193.021 does not specifically include intangible property in its definition, we conclude that the legislature intended proprietary information to fall within the definition. *See, e.g., Dreiman v. State,* 825 P.2d 758, 761 (Wyo.1992) (" ' "[P]roperty in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal." ' ") (quoting ****1060** *Labberton v. General Casualty Co.,* 53 Wash.2d 180, 332 P.2d 250, 255 (Wash.1958) (quoting *Gasque v. Town of Conway,* 194 S.C. 15, 8 S.E.2d 871 (1940))). We also conclude that by copying down and recording the security access codes, Mr. Collins deprived The Vault of a property interest because his knowledge of the numbers resulted in a loss of the numbers' value.

Other assignments of error.

On appeal from the insurance fraud and obtaining money by false pretenses convictions, Mr. Collins assigns several of the district court's rulings as error and complains that the convictions are inconsistent.

[14] [15] Mr. Collins contends that the district court improperly admitted evidence that Mr. Collins physically abused Mrs. Collins. We disagree. Mrs. Collins' testimony regarding abuse was relevant to her credibility. Nor did the district court violate the hearsay rule in allowing Officer Dreher to testify that Mrs. Collins made allegations of physical abuse to him. His testimony was likewise admissible to address attacks on her credibility. *See* NRS 51.035 (hearsay means a statement offered to prove the truth of the matter asserted).[1] We also hold that the district court did not abuse its discretion in determining that the probative value outweighed the prejudicial effect of the physical abuse evidence. *See Daly v. State,* 99 Nev. 564, 567, 665 P.2d 798, 801 (1983).

[16] Mr. Collins argues that the convictions should be reversed because the district court admitted statements that Mr. Collins made to Mrs. Collins' former attorney, Annabelle Hall, in violation ***1184** of the attorney-client privilege. The privilege does not protect such statements because there is no evidence that Mr. Collins was either speaking to Hall as Mrs. Collins' representative, or engaged in a joint defense with Mrs. Collins. *See* NRS 49.095; NRS 49.075; *Naum v. State,* 630 P.2d 785, 788 (Okla.Ct.App.1981) (holding that there must be evidence the representative is empowered to act for the client upon any advice rendered by counsel); *United States v. Schwimmer,* 892 F.2d 237, 243 (2d Cir.1989), *cert. denied,* 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 31 (1991); *Eisenberg v. Gagnon,* 766 F.2d 770, 787 (3d Cir.1985) (protecting only communications made in the course of an on-going and joint effort to set up a common defense strategy).

Mr. Collins also claims that his statements to Hall should have been suppressed because Hall violated S.C.R. 182 when she spoke to Mr. Collins without first obtaining his attorney's consent. Because there is no evidence that Hall spoke to Mr. Collins about the subject of *his* representation (he initiated the contact and tried to influence Ms. Hall's defense of *Mrs. Collins*), we hold that Hall did not violate S.C.R. 182.

[17] Mr. Collins argues that the case should be reversed because the district court improperly restricted the subject-matter of voir dire. Because Collins failed to object to the limitation at trial, we decline to address this issue. *See McCullough v. State,* 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

[18] Next, Mr. Collins asserts that Officers Eyhardle and Blakeslee improperly gave expert opinions. Neither officer was offered to the court as an expert nor treated as such during examination. Thus, we hold that the witnesses were not testifying as experts. Because the officers' opinions were rationally based on what they saw in the home and helpful to determine whether the house was actually burglarized, the testimony was admissible under NRS 50.265.

[19] Mr. Collins also argues that certain figurines were improperly admitted because they were not produced until five years after the alleged burglary, thus causing chain of custody problems. Because there was no evidence indicating that the figurines were not in "substantially the same condition as when the crime was committed," we hold that they were properly admitted. *See United States v. Dickerson,* 873 F.2d 1181, 1185 (9th Cir.1988).

Mr. Collins contends that the district court erred in admitting certain portions of Mrs. Collins' testimony because it referenced marital **1061 communications. We disagree. All of the testimony at *1185 issue described actions and observations rather than marital communications. *See* NRS 49.295(1)(b); *see also Petition of Fuller,* 63 Nev. 26, 37, 159 P.2d 579, 584 (1945) (holding the fact that transactions took place during marriage is insufficient to show that knowledge of them was derived from communications made by one's spouse).

[20] Finally, Mr. Collins argues that his conviction for obtaining money by false pretenses should be overturned because it is incompatible with his convictions for insurance fraud under NRS 686A.291. We hold that the convictions are compatible and that there is sufficient evidence in the record to support each conviction.

We have thoroughly reviewed all other arguments on appeal and conclude that they are meritless. Accordingly, we affirm both district court judgments.

All Citations

113 Nev. 1177, 946 P.2d 1055

Footnotes

1 Even if Officer Dreher's testimony can be considered inadmissible hearsay, any error in its admittance at trial was harmless because Mrs. Collins testified to the same account.

End of Document

Deutscher v. State, 95 Nev. 669 (1979)

95 Nev. 669
Supreme Court of Nevada.

Henry DEUTSCHER, Appellant,
v.
The STATE of Nevada, Respondent.

No. 10434. | Oct. 18, 1979.

Defendant was convicted before the Eighth Judicial District Court, Clark County, Carl J. Christensen, J., of first-degree murder and robbery without use of a deadly weapon and was given the death sentence, and he appealed. The Supreme Court, Manoukian, J., held that: (1) although defendant, who was arrested in 1977, was held in custody six days before his arraignment, his confession, which was given after two and one-half days of detention, was not required to be excluded as it was otherwise voluntary; (2) error, if any, in prosecutor's closing comment that "He can sit there and not open his mouth" was harmless beyond a reasonable doubt; (3) although police officer's testimony during video interrogation of defendant that on morning of offense defendant's wife had informed officer that she had not seen defendant after he left home the evening before should have been excluded, its admission was harmless error beyond a reasonable doubt in view of other undisputed inculpatory evidence concerning defendant's whereabouts on night in question and overwhelming evidence of guilt; (4) the 1977 sexual assault legislation neither expressly nor impliedly repeals 1977 amendments prescribing the circumstances under which capital penalty may be imposed for first-degree murder; and (5) although in capital penalty phase of homicide prosecution the trial court used preamended term "rape" instead of new phrase "sexual assault," there was no reversible error absent showing that use of such term misled the jury.

Affirmed.

Batjer, J., concurred in result.

Gunderson, J., concurred in result only.

West Headnotes (33)

[1] **Sentencing and Punishment**
Aggravating or mitigating circumstances

Death penalty statute is not impermissibly vague on ground that an aggravating circumstance for imposition of the death penalty is that murder involved torture, depravity of the mind, or mutilation of the victim; in any event, district court meticulously defined terms "torture," "depravity," and "mutilation." N.R.S. 200.033, subd. 8.

16 Cases that cite this headnote

[2] **Statutes**
Presumptions and Construction as to Validity

Statutes are entitled to all presumptions in favor of validity.

Cases that cite this headnote

[3] **Sentencing and Punishment**
Purpose of statute or regulatory provision

Purpose of provision that death penalty statute requiring notice of evidence of additional aggravating circumstances other than those inherent in nature of offense itself is to provide the accused with notice and to insure due process so that he can meet any new evidence which may be presented during the penalty hearing. N.R.S. 175.552.

2 Cases that cite this headnote

[4] **Sentencing and Punishment**
Notice of sentencing factors

Provision of death penalty statute that notice be given before the penalty hearing of any

aggravating circumstance other than the aggravated nature of the offense itself was not offended by admission of challenged evidence relating to aggravating circumstance of sexual assault since evidence was admitted at guilt phase showing the aggravated nature of the crime and sexual assault was germane to the proof of the crime itself and an instruction regarding sexual assault was given at trial; in such case defendant was not required to be independently informed of the intended use of such factor during the sentencing hearing. N.R.S. 175.552, 175.554, subd. 1.

10 Cases that cite this headnote

[5] **Criminal Law**
Requisites and sufficiency of arraignment

Absent a statutorily fixed period of time, a reasonable time is presumed before an arraignment must be conducted. N.R.S. 171.178.

Cases that cite this headnote

[6] **Criminal Law**
Requisites and sufficiency of arraignment

Absent prejudice, mere passage of time between arrest and arraignment does not constitute a deprivation of a defendant's rights. N.R.S. 171.178.

1 Cases that cite this headnote

[7] **Criminal Law**
Particular cases

Although defendant, who was arrested in August of 1977, was held in custody six days before his arraignment, incriminating statement which he gave to the police after two and one-half days of detention was not inadmissible where defendant suffered no prejudice and was constantly advised of his rights and acknowledged that he understood them. N.R.S. 171.178.

Cases that cite this headnote

[8] **Criminal Law**
Requisites and sufficiency of arraignment

When an accused voluntarily waives his right to silence and his right to counsel he concurrently waives his right to be seasonably arraigned. N.R.S. 171.178.

2 Cases that cite this headnote

[9] **Criminal Law**
Necessity of Arraignment and Plea

Primary purpose of arraignment is to inform defendant of his rights. N.R.S. 171.178.

Cases that cite this headnote

[10] **Criminal Law**
Arraignment

Delay in arraignment is not prejudicial when a defendant has already been advised of his rights, was promptly so advised, and voluntarily waived his rights, particularly when the delay is not so flagrant and the record is silent relative to any other irregularities which go to the issue of voluntariness. N.R.S. 171.178.

1 Cases that cite this headnote

[11] **Criminal Law**
Necessity of showing voluntary character

Voluntary nature of a confession is the primary

test for admissibility.

Cases that cite this headnote

[12] **Criminal Law**
Waiver of rights

Evidence, including education, experience and conduct of the accused, as well as credibility of police officers, established that waivers of right to counsel and right to remain silent, as given prior to confession, were voluntary.

Cases that cite this headnote

[13] **Criminal Law**
Particular cases

Postconfession delay in arraignment did not retroactively result in prejudice warranting exclusion of confession, which was otherwise voluntary. N.R.S. 171.178.

1 Cases that cite this headnote

[14] **Arrest**
What constitutes such cause in general

"Probable cause to arrest" exists where the facts and circumstances within the officer's knowledge at time of arrest would warrant a prudent person in entertaining an honest and strong suspicion that the person arrested has committed a crime.

2 Cases that cite this headnote

[15] **Arrest**
Grounds for warrantless arrest in general

Presence or absence of probable cause is determined in light of all the circumstances and can include conduct of the defendant in presence of the arresting officers.

1 Cases that cite this headnote

[16] **Arrest**
Nature and source of information in general

Where defendant was seen leaving bar with victim on morning of crime in a car found close to the scene, sergeant knew defendant resided at a motel which was close to bar and scene of crime, a trail of blood led away from the crime scene to arterial highway on which defendant lived, officer observed a fresh cut on defendant's finger when he approached him at his place of employment on morning of crime and defendant appeared very nervous, cold and clammy, there was probable cause to arrest defendant for murder. N.R.S. 200.010.

1 Cases that cite this headnote

[17] **Criminal Law**
Acts, admissions, declarations, and confessions of accused

Although a comment on failure to respond can be reversible error, the comment must be more than a mere passing reference and an accused must be prejudiced by the remark to mandate reversal.

1 Cases that cite this headnote

[18] **Criminal Law**
Silence

Detective's testimony that defendant didn't answer when asked about origin of red stains on $50 bills found in his possession did not constitute a prohibited reference to Fifth

Amendment right to remain silent since not only was such remark a supplementary comment to answer already given but also considering the vague, passing nature thereof, coupled with trial court's admonishment, no prejudice was shown. U.S.C.A.Const. Amend. 5.

Cases that cite this headnote

[19] **Criminal Law**
⇐Comments on failure of accused to testify

Prosecutor's closing comment that, "[The defendant] testified he then—excuse me. He stated during the video interview" could not be construed as an improper direct reference to defendant's failure to testify; such nondeliberate, self-corrected statement did not constitute a sufficient comment to mandate reversal. U.S.C.A.Const. Amend. 5.

2 Cases that cite this headnote

[20] **Criminal Law**
⇐Comments on Failure of Accused to Testify

Test for determining whether prosecutorial comment constituted prohibited direct reference to failure to testify is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on failure of the accused to respond. U.S.C.A.Const. Amend. 5.

4 Cases that cite this headnote

[21] **Criminal Law**
⇐Comments on failure of accused to testify

Prosecutor's closing comment that "He can sit there and not open his mouth" may have been improper when taken in context of discussion of state's burden of proof, but it became inconsequential since the verdicts were free from doubt. U.S.C.A.Const. Amend. 5.

Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**
⇐Communications through or in presence or hearing of others; communications with third parties

Spousal privilege is intended to protect confidential communications between spouses, not communications between a spouse and third parties. N.R.S. 49.295, subd. 1.

1 Cases that cite this headnote

[23] **Privileged Communications and Confidentiality**
⇐Communications through or in presence or hearing of others; communications with third parties

Spousal privilege cannot be applied to protect communications disclosed by strangers. N.R.S. 49.295, subd. 1.

1 Cases that cite this headnote

[24] **Privileged Communications and Confidentiality**
⇐Communications through or in presence or hearing of others; communications with third parties

Detective's testimony that during video interrogation he informed defendant that he had interviewed latter's wife and that wife had told detective that she had not seen defendant after he went out on evening of offense did not violate the spousal privilege. N.R.S. 49.295, subd. 1.

2 Cases that cite this headnote

[25] **Criminal Law**
⇐Hearsay in General

"Hearsay evidence" is evidence of a statement made other than by a witness while testifying, which testimony is offered to prove the truth of the matter asserted and is inadmissible unless it comes within an exception. N.R.S. 51.035, 51.065.

1 Cases that cite this headnote

[26] **Criminal Law**
⇐Evidence showing intent, motive, or nature of act

Police detective's statements, during videotaped statement, that detective had interviewed defendant's wife on morning of offense and that wife had told detective that she hadn't seen husband after he left home the evening before was multiple hearsay and did not come within exception to the hearsay rule as relevant to setting the scene and establishing the circumstances under which defendant's incriminating statement evolved, and even if purpose of statements was to show surrounding circumstances they were irrelevant and confession should have been admitted without such extraneous matter. N.R.S. 51.035; U.S.C.A.Const. Amend. 5.

Cases that cite this headnote

[27] **Criminal Law**
⇐Hearsay in General

Traditionally, hearsay evidence has been excluded because it is not subject to the usual test to show the credibility of the declarant; lacking is cross-examination to ascertain a declarant's perception, memory and truthfulness. N.R.S. 51.035.

3 Cases that cite this headnote

[28] **Criminal Law**
⇐Hearsay

Although police officer's testimony during video interrogation of defendant that on morning of offense defendant's wife had informed officer that she had not seen defendant after he left home the evening before should have been excluded, its admission was harmless error beyond a reasonable doubt in view of other undisputed inculpatory evidence concerning defendant's whereabouts on night in question and overwhelming evidence of guilt. N.R.S. 51.035, 51.065.

1 Cases that cite this headnote

[29] **Witnesses**
⇐Witness's identity, address, etc.; matters endangering witness

Right to meaningful cross-examination does not include an absolute right for disclosure of a witness' address; rather, a court is to look to the disclosures regarding personal and employment history made by the witness and the extent and nature of the cross-examination. U.S.C.A.Const. Amend. 6.

Cases that cite this headnote

[30] **Criminal Law**
⇐Cross-examination and impeachment

Refusal to permit cross-examination of detective as to his residential address did not infringe on Sixth Amendment right to confront witnesses, especially since detective gave his true name and occupation and fully described his professional involvement with defendant and

was thoroughly cross-examined by defense counsel, who failed to show how disclosure of the address would make cross-examination any more meaningful. U.S.C.A.Const. Amend. 6.

Cases that cite this headnote

[31] **Sentencing and Punishment**
⇐Sufficiency

Evidence in death penalty case was sufficient to establish aggravating circumstances of prior felony conviction involving violence, commission of offense while engaged in attempted sexual assault and that the murder involved torture, depravity of the mind or mutilation. N.R.S. 200.030, subd. 4(a), 200.033, subd. 8.

10 Cases that cite this headnote

[32] **Sentencing and Punishment**
⇐The Death Penalty

The 1977 sexual assault legislation neither expressly nor impliedly repeals 1977 amendments prescribing the circumstances under which capital penalty may be imposed for first-degree murder. N.R.S. 200.030, 218.530.

Cases that cite this headnote

[33] **Sentencing and Punishment**
⇐Harmless and reversible error

Although in capital penalty phase of homicide prosecution the trial court used preamended term "rape" instead of new phrase "sexual assault," there was no reversible error absent showing that use of such term misled the jury as to a matter of law. N.R.S. 200.5011.

Cases that cite this headnote

Attorneys and Law Firms

***669** ****410** Morgan D. Harris, Clark County Public Defender, and Herbert F. Ahlswede, Deputy Public Defender, Las Vegas, for appellant.

Richard H. Bryan, Atty. Gen., Carson City, Robert J. Miller, Dist. Atty. of Clark County, Ray D. Jeffers, Deputy Dist. Atty., Las Vegas, for respondent.

***673 OPINION**

MANOUKIAN, Justice:

This appeal is from felony convictions of first degree murder, NRS 200.010 and 200.030, and robbery without the use of a deadly weapon, NRS 200.380, resulting in a death sentence and a consecutive fifteen-year penalty respectively.

Appellant proffers several bases for reversal contending that (1) Nevada's capital punishment statutes are constitutionally infirm; (2) the trial court erred in instructing the jury that it could consider an aggravating circumstance absent respondent's failure to give statutory notice of the circumstance prior to the penalty hearing; (3) his pre-arraignment inculpatory statements made during detention were improperly admitted; (4) probable cause for the arrest was lacking making inadmissible evidence obtained incident thereto; (5) his fifth amendment right to silence was violated due to witness and prosecutorial misconduct; (6) prejudicial privileged and hearsay evidence should not have been admitted; (7) the trial court erred in its refusal to order a police officer to disclose his home address; (8) the evidence is insufficient to support the sentencing jury's findings of aggravating circumstances as required by NRS 177.055; (9) the trial court was without jurisdiction to proceed with the penalty hearing; and (10) error was committed when the trial court, during the penalty proceeding, ***674** instructed the jury using an obsolete statutory term. We find no reversible error and affirm.

On the morning of August 16, 1977, the body of Darlene Joyce Miller, 37, was discovered on a desert road off North Nellis Boulevard behind Weaver Construction

Company in Las Vegas. Her white 1976 Cadillac with Texas license plates was parked nearby. She was nude except for a blouse and bra that had been pulled open around her shoulders. Her legs were spread apart and there was smeared blood between her upper thighs. She had superficial lacerations and abrasions on her breasts and abdomen which experts testified represented **411 bite marks. Her neck, face and head were severely bruised, bearing extensive abrasive-type injuries. Her head had a large depression skull fracture two and three-fourths inches in diameter caused by a crushing or blunt type object. A trail of dripped blood led from the crime scene to nearby North Nellis Boulevard, an arterial highway.

Sergeant Samolovitch of the Las Vegas Metropolitan Police Department, the officer in charge of the investigation, was informed by another officer that the victim's car had been parked the previous night approximately one-half mile away in front of the Wagon Wheel Bar on Nellis Boulevard. Upon questioning the bar owner, it was determined that the appellant had been seen with the victim in her automobile, leaving the bar at 2:00 a. m. the morning of August 16, 1977. Appellant was also seen in the vicinity of the bar by his former employer at approximately 6:00 a. m. The victim's body was discovered that morning at 6:30 a. m.

Appellant resided at a motel, also on Nellis Boulevard, which was located approximately one-half mile from both the bar and crime scene. After speaking with appellant's wife at the motel, the investigators went to Deutscher's place of employment to question him. Arriving at about 10:00 a. m., Sergeant Samolovitch noticed a ragged, fresh cut on Deutscher's hand and observed that he appeared nervous, cold and clammy. Sergeant Samolovitch advised appellant that he was under arrest for murder and gave him the Miranda warning.[1]

Deutscher was taken to the police station where he was again advised of his rights and signed a rights advisory card. Appellant was then questioned by the police; he admitted being in the victim's car, but initially denied any responsibility for the murder. When Deutscher was asked if he had any money he took out his wallet and removed two fifty dollar bills. The two bills *675 appeared to be stained with blood. When asked how the money became stained, appellant did not respond.

After Deutscher was transported to the Clark County Jail on August 16, he was fingerprinted and also consented in writing to a search in the form of dental impressions. Blood samples and fingernail scrapings were also obtained from him.

During a brief interrogation on August 18, 1977, Deutscher admitted killing the victim, but because he wanted to see his wife before making a full statement, the interview was interrupted and his wife was called. After speaking with his wife, a video taped statement was taken that afternoon with Deutscher, his wife, and several officers present. In this statement, appellant admitted having beaten the victim, describing the crimes in detail.

Appellant had been in custody from 10:00 a.m. Monday, August 16, the date of the offense, until 4:00 p.m. Wednesday, August 18, when the incriminating statement was given. He was arraigned before a magistrate on August 22.

Pertinent evidence at trial included Deutscher's fingerprints in the victim's car, blood of the victim's blood type under the appellant's fingernails, blood at the crime scene of both the victim's and Deutscher's blood type, and identification of the bite marks on the victim as being made by the appellant's teeth. The victim's husband testified that his wife had been carrying two fifty dollar bills, along with other smaller bills in her purse. The two larger bills were not in her purse when the body was found. The appellant's clothes and boots were located by police as a result of his confession, and the size, shape and sole pattern of the boots were consistent with those impressions taken at the crime scene. Deutscher's pants, undershorts, and shirt were stained with human blood.

A forensic pathologist testified as to the extent of injuries which the victim incurred, finding no evidence of recent sexual intercourse. The expert did testify that the victim had been strangled and that all the injuries were inflicted while the victim was still alive with the blow causing the two **412 and three-fourths inch diameter hole to the left side of her head being the last and probable "lethal" injury.

Prior to trial, the state served upon the appellant a Notice of Intent to Seek Death Penalty, setting forth certain aggravating circumstances. These aggravating circumstances did not include the circumstance that the appellant had committed murder in an attempt to commit a sexual assault.

The jury found the appellant guilty of first degree murder and robbery. A penalty hearing was held and the jury was *676 instructed on what they might consider as aggravating and mitigating circumstances in determining the penalty.[2] Over appellant's objection, an instruction was given which provided that the jury could consider the attempt to commit a sexual assault an aggravating

circumstance.

The jury concluded that (1) the murder was committed by appellant who was previously convicted of a felony involving the use or threat of violence to the person of another;[3] (2) the murder was committed while the appellant was engaged in the commission of or an attempt to commit any forcible sexual assault; and (3) the murder involved torture, depravity of mind, or the mutilation of the victim. No mitigating circumstances were designated, the jury simply determining that they did not outweigh the aggravating circumstances.[4]

1. The Death Penalty.

Appellant contends that the death penalty statute is unconstitutionally vague and therefore violative of due process and equal protection as the sentencing procedure permits juries untrammeled discretion in imposing death sentences. See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Nevada's capital punishment law was amended in 1977 with inconsequential revision from the death penalty statutes in Georgia and Florida. Georgia and Florida statutes survived constitutional scrutiny by the United States Supreme Court and satisfied the constitutional deficiencies enunciated in Furman. Gregg v. Georgia, 428 U.S. 153, 196-207, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 251-53, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Confronted by an eighth amendment challenge, we have recently held that Nevada's death penalty statutes (NRS 175.552-.562) are constitutional because they "provide for a consideration of any mitigating factor the defendant may want *677 to present." Bishop v. State, 95 Nev. 511, 597 P.2d 273, 277 (1979). See also Gregg v. Georgia, 428 U.S. at 196-97, 96 S.Ct. 2909; Proffitt v. Florida, 428 U.S. at 257-58, 96 S.Ct. 2960; Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978).

[1] [2] The appellant further contends that the death penalty statute is impermissibly vague because an aggravating circumstance for imposition of the death penalty is that "(t)he murder involved torture, depravity of the mind, or mutilation of the victim." NRS 200.033(8). These claims were not presented for review in Bishop or Shuman ; however, similar aggravating circumstances would provide adequate guidance to the jury. In the instant case, we find the legislative enactment to be plain and intelligible. See Sheriff v. Smith, 91 Nev. 729, 542 P.2d 440 (1975). Moreover, the district court meticulously defined for **413 the sentencing panel, the terms "torture," "depravity," and "mutilation"[5] and the jury was therefore provided adequate guidance for the application of the aggravating circumstances. Gregg v. Georgia, 428 U.S. at 196-97, 96 S.Ct. 2909; Proffitt v. Florida, 428 U.S. at 257-58, 96 S.Ct. 2960. Moreover, it is well settled that statutes are entitled to all presumptions in favor of validity. Cummings v. City of Las Vegas Mun. Corp., 88 Nev. 479, 481, 499 P.2d 650, 652 (1972). We find no error.

***678 2. Sexual Assault as an Aggravating Circumstance.**

The appellant contends that the respondent should have formally notified him, under the provisions of NRS 175.552,[6] that murder committed in the perpetration of a sexual assault would be offered as an aggravating circumstance at the penalty hearing.

[3] [4] We believe that the purpose of the statute is to provide the accused notice and to insure due process so he can meet any new evidence which may be presented during the penalty hearing. Here, evidence was admitted at trial which showed the aggravated nature of the crime committed. The appellant was thus afforded ample notice regarding elements and proof of the offense itself when these were offered during the guilt phase. Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12, 17 (1974). The notice provisions of the statute were plainly not offended by the admission of the challenged evidence relating to the aggravating circumstance as the sexual assault was germane to the proof of the crime itself. Furthermore, an instruction regarding sexual assault was given at trial. The accused need not be independently informed of the intended use of this factor during the sentencing hearing. Hooks v. State, 233 Ga. 149, 210 S.E.2d 668, 670 (1974); Eberheart v. State, 206 S.E.2d at 17; NRS 175.554(1).

3. The Inculpatory Statements Made During Pre-Arraignment Detention.

[5] [6] [7] Appellant next contends that his incriminating statements given to police are inadmissible because, although they were given after his arrest, they preceded his arraignment. Our statutory scheme has long provided that an accused must be taken before a magistrate "without unnecessary delay." NRS 171.178. But while this court has recognized the statutory requirement, we have also held that in the absence of a statutorily-fixed period of time, a reasonable time is presumed *679 before an arraignment must be conducted.[7] **414 Tellis v. Sheriff, 85 Nev. 557, 560, 459 P.2d 364, 365 (1969). And the mere passage of time, in the absence of prejudice to

the defendant, does not constitute a deprivation of a defendant's rights. Id. Appellant was held in custody six days before his arraignment; however, he confessed to the crime after two and one-half days of detention. We find no prejudice as appellant was constantly advised of his rights and acknowledged that he understood them.

In McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1942), and Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), confessions which resulted from an unreasonable pre-arraignment detention were excluded because the confessions resulted from a flagrant disregard of federal procedure. Although we are not bound by these decisions which deal with federal criminal procedure, it is clear that they were intended to avoid the adhesive practices which would spawn from administrative detention without judicial examination. Culombe v. Connecticut, 367 U.S. 568, 584-85, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1960). It has been held, however, that these fears are not valid when an accused, as here, makes a voluntary confession after being fully informed of his Miranda rights. Appellant was informed of his Miranda rights on several occasions prior to his confession, signed a waiver card and acknowledged that he fully understood the import of the waiver. Moreover, the Miranda warning was amplified by the L.V.M.P.D. detectives as follows:

> I advised Mr. Deutscher that he had the right to remain silent; that anything he said could and would be used against him in a court of law; that he had a right to an attorney; if he could not afford one, one would be provided for him free of charge before any questioning.
>
> I also advised him that if he agreed to talk to us, at any ***680** time during that interview he wished to revoke those rights, he had a right also to do that.
>
> Asked him if he understood what I was telling him, that he understood these rights, and he indicated in the affirmative.

Additionally, the several interrogations were of reasonable duration, conducted in a reasonable atmosphere and no irregularities were discernable from the record.

[8] [9] [10] We subscribe to the rule of law which provides that when an accused voluntarily waives his right to silence and his right to counsel, he concurrently waives his right to be seasonably arraigned. United States v. Indian Boy X, 565 F.2d 585, 591 (9th Cir. 1977), Cert. denied, 439 U.S. 841, 99 S.Ct. 131, 58 L.Ed.2d 139 (1978); United States v. Woods, 468 F.2d 1024, 1026 (9th Cir. 1972, Cert. denied, 409 U.S. 1045, 93 S.Ct. 544, 34 L.Ed.2d 496 (1972); Pettyjohn v. United States, 136 U.S.App.D.C. 69, 419 F.2d 651, 655-56 (D.C. Cir. 1969), Cert. denied, 397 U.S. 1058, 90 S.Ct. 1383, 25 L.Ed.2d 676 (1970). The reason for this rule is that the primary purpose of an arraignment is to inform the defendant of his rights. But a delay in arraignment is not prejudicial when a defendant has already been advised of his rights, was promptly so advised, and voluntarily waived those rights. See Pettyjohn v. United States, 136 U.S.App.D.C. at 73-4, 419 F.2d at 655-56. This is particularly so when the delay is not flagrant and the record is silent relative to any other irregularities which go to the issue of voluntariness. Cf. McNabb v. United States, 318 U.S. at 334-38, 63 S.Ct. 608 (in which defendants in a custodial setting, were interrogated for periods of time in discomfort and without counsel and advice ****415** as to the right to counsel; confessions held inadmissible).

[11] [12] [13] Because the voluntary nature of a confession is the primary test for admissibility, State v. Boudreau, 67 Nev. 36, 46, 214 P.3d 135, 141 (1950), we now focus on whether the prearraignment delay affected the voluntariness of appellant's confession. The appellant only feebly challenges voluntariness here. In reviewing the particular circumstances gleaned from the record surrounding the statements and resulting confession, including the education, experience and conduct of the accused, as well as the credibility of the police officers, it is patent that the waivers were voluntary. The subsequent delay in arraignment did not retroactively result in prejudice so that appellant's rights were violated. Morgan v. Sheriff, 92 Nev. 544, 546, 554 P.2d 733, 735 (1976); Brown v. Justice's Court, 83 Nev. 272, 276, 428 P.2d 376, 378 (1967).

***681 4. Probable Cause.**

[14] [15] The challenge by appellant of the existence of probable cause for his arrest is also without merit. Probable cause to arrest exists where the facts and circumstances within the officer's knowledge at the time of arrest would warrant a prudent person in entertaining an honest and strong suspicion that the person arrested has committed a crime. Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949); Gordon v. State, 83 Nev. 177, 179, 426 P.2d 424, 425 (1967); Schnepp v. State, 82 Nev. 257, 260, 415 P.2d 619, 621 (1966). The presence or absence of probable cause is determined in light of all the circumstances and can include conduct of the defendant in the presence of the police officers. A Minor v. State, 91 Nev. 456, 462, 537 P.2d 477, 481 (1975); Schnepp v. State, 82 Nev. at 260, 415 P.2d at 621.

[16] Sergeant Samolovitch testified as to the factual basis upon which his decision to arrest was made: (1) The appellant was seen leaving the Wagon Wheel Bar with the victim the morning of the crime in a car found close to the scene; (2) He knew Deutscher resided at a motel which was close to the bar and the crime scene; (3) A trail of dripped blood led away from the crime scene to Nellis Boulevard; (4) He observed a fresh cut on appellant's finger when he approached him at his place of employment the morning of the crime; and (5) The appellant appeared very nervous, cold, and clammy when he was approached by the officer. It is arguable that each of these circumstances, when taken by themselves, is consistent with innocence. But here, the cumulative suspicion produced by the totality of the circumstances warranted the finding by the lower court of probable cause to arrest. A Minor v. State, 91 Nev. at 462, 537 P.2d at 480; Schnepp v. State, 82 Nev. at 260-61, 415 P.2d at 621.

5. The Defendant's Fifth Amendment Right to Remain Silent.

Appellant claims there were two occasions during the trial where his fifth amendment right to remain silent was violated. He asserts the first error occurred during Detective Levos' testimony concerning the red-stained fifty dollar bills found in appellant's possession upon which the appellant refused to comment. Following timely objection, the jury was admonished to disregard the testimony.

***682** [17] [18] Although a comment on a failure to respond can be reversible error, the comment must be more than a mere passing reference and an accused must be prejudiced by the remark to mandate reversal. Shepp v. State, 87 Nev. 179, 181, 484 P.2d 563, 564 (1971); See Layton v. State, 87 Nev. 598, 600, 491 P.2d 45, 47 (1971). Clearly, this was not a purposeful comment by the prosecutor. Cf. Layton v. State, 87 Nev. at 600, 491 P.2d at 47 (prosecutor made prejudicial comment in closing argument respecting defendant's silence). The comment here was by a witness and was a supplemental comment to the answer already given.[8] Considering the vague, passing ****416** nature of the remark, coupled with the admonishment, no prejudice to the appellant is shown. Layton v. State, 87 Nev. at 600, 491 P.2d at 47; Shepp v. State, 87 Nev. at 181, 484 P.2d at 564.

[19] [20] The second comment occurred during the prosecutor's final argument when he said, "(The defendant) testified he then excuse me. He stated during the video interview . . .. " This vague reference to the appellant's confession cannot be construed as a direct reference to his failure to testify. Layton v. State, 87 Nev. at 600, 491 P.2d at 47. The established test is whether the language was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to (respond)." Knowles v. United States, 224 F.2d 168, 170 (10th Cir. 1955). This non-deliberate, self-corrected statement by the prosecutor does not constitute a sufficient comment to mandate reversal. See Sanchez v. Heggie, 531 F.2d 964 (10th Cir. 1976).

***683** [21] The final remark, which was made during the state's closing argument, was, "He can sit there and not open his mouth." Our review shows that this remark was in the context of a discussion of the state's burden of proof. Even though the remark may be improper when taken in context, it becomes inconsequential when, as here, the verdicts are free from doubt. Dearman v. State, 93 Nev. 364, 369, 566 P.2d 407, 410 (1977). The error, if any, on this record of guilt, is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

6. The Hearsay and Privileged Statements.

Appellant contends that inadmissible evidence was admitted during the jury's hearing of a portion of the video taped statement. The challenged testimony consists of remarks by Detective Levos during the video interrogation regarding comments appellant's wife made to police officers.[9] The appellant asserts that the statements are inadmissible because they are privileged spousal communications, as well as hearsay.

[22] [23] [24] Appellant contends that the officer is placing testimony before the jury indirectly when the wife could not testify against her husband. The spousal privilege,[10] however, is intended to protect confidential communications between spouses, not communications between a spouse and third parties. Foss v. State, 92 Nev. 163, 167-68, 547 P.2d 688, 691 (1976). The privilege cannot be applied to protect communications disclosed, as here, by strangers. State v. Lindley, 11 Or.App. 17, 502 P.2d 390, 392 (1972).

[25] [26] [27] Hearsay evidence is evidence of a statement made other than by a witness ****417** while testifying at the hearing, which is offered to ***684** prove the truth of the matter asserted. NRS 51.035. It is inadmissible unless it comes within an exception. NRS 51.065. Respondent argues that the statements made by the police officer in the video taped interview concerning what appellant's wife had said were not admitted to prove the truth of what the wife had said. Without citing authority, the state

contends that the officer's statements "were merely relevant to setting the scene and establishing the circumstances under which the defendant's incriminating statement evolved. It was the statement of the defendant, and not the officer's statements to the defendant, which was offered into evidence." We cannot agree with the state based on the record before us.

Traditionally, hearsay evidence has been excluded because it is not subject to the usual tests to show the credibility of the declarant. Lacking is cross-examination to ascertain a declarant's perception, memory and truthfulness. Moore v. United States, 429 U.S. 20, 21-22, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976) (per curiam); Donnelly v. United States, 228 U.S. 243, 273, 33 S.Ct. 449, 57 L.Ed. 820 (1913). The same problems are present here as to two declarants. First, it is the officer on a video tape making a statement as to what he was told by appellant's wife. Second, the wife has allegedly made certain statements as to appellant's whereabouts on the night of the murder. Appellant's wife was not subject to cross-examination to discover if she indeed said this or as to her memory. Although the officer could have been questioned as to the accuracy of his recollection, it is apparent he was basing his knowledge of appellant's whereabouts upon what someone else had informed him. This is inadmissible hearsay. Toti Contracting Co. v. A. J. Orlando Contracting Co., 149 Conn. 473, 181 A.2d 594, 596 (1962). Indeed, both of these statements were hearsay. See Archibald v. State, 77 Nev. 301, 307, 362 P.2d 721, 723-24 (1961); Cf. Alexander v. State, 84 Nev. 737, 449 P.2d 153 (1968) (defendant's testimony as to what a friend had said was hearsay). Together, these statements constituted multiple hearsay.

We perceive no hearsay exceptions to what appellant's wife said, let alone what the officer has stated. See NRS 51.065-.375. Additionally, it cannot seriously be argued that the purpose was only to show that the statements were made or conversation had or that they were to show the circumstances of appellant's statements. The officer had even said to the appellant, "Henry, your wife is present in the room. . . . Are you going to make a liar out of her?" If the purpose of these statements was merely to show the surrounding circumstances, we believe they would have been irrelevant. The statements by ***685** appellant himself could have and should have been admitted by themselves.

We must now determine whether the admission of these hearsay statements was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Drummond v. State, 86 Nev. 4, 8-9, 462 P.2d 1012, 1015 (1970); NRS 177.255, 178.598. We note that whether or not appellant's wife did in fact make the statements, there is other uncontradicted evidence placing the appellant at the Wagon Wheel Bar after midnight. Appellant was seen leaving the bar with the victim at approximately 2 a. m. and he was seen near the bar and not far from the murder scene at 6 a. m., shortly before the body of the victim was discovered. In addition, there is overwhelming evidence of appellant's guilt as shown by appellant's possession of two blood-stained fifty dollar bills and testimony by the victim's husband that the victim had two fifty dollar bills on her person before she was killed. The appellant appeared to have been in need of money; he was quite familiar with the scene of the crimes and entire area whereas the victim was not; there were bootmarks at the scene which matched boots appellant had discarded and an expert testified that the bite marks on the victim were made by appellant. Moreover, blood found at the scene matched the blood-type of the appellant and the blood in the fingernail scrapings ***418** taken from appellant was of the same blood type as that of the victim.

[28] All of this is extremely convincing even without regard to appellant's confession or the statement of appellant's wife.[11] While these statements by the wife should have been excluded, we hold that the error was harmless beyond a reasonable doubt as there was other undisputed inculpatory evidence concerning appellant's whereabouts on the night in question, Cf. State v. Rover, 13 Nev. 17, 24-25 (1878) (Beatty, J., concurring) (admission of evidence not harmful where other evidence already established fact), and overwhelming evidence of his guilt. Hendee v. State, 92 Nev. 669, 670, 557 P.2d 275, 276 (1976) (per curiam); Drummond v. State, 86 Nev. 4, 8-9, 462 P.2d 1012, 1015 (1970).

7. The Inquiry into the Detective's Residence.

[29] [30] On cross-examination appellant attempted to ascertain the residential address of Detective Lee. Appellant contends that ***686** the trial court's refusal to order disclosure infringed upon his sixth amendment right to confront witnesses. See Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). In Brown v. State, 94 Nev. 393, 580 P.2d 947 (1978), we held that the accused's right to a meaningful cross-examination does not establish an absolute right for the disclosure of a witness' address, but rather we would look to the disclosures regarding personal and employment history made by the witness and the extent and nature of the cross-examination. Here, as in Brown, it is of importance that the witness is a police officer and not an informer in that the motive and background of the

police officer differs considerably from an informer. United States v. Alston, 460 F.2d 48, 53 (5th Cir. 1972); People v. Pleasant, 69 Mich.App. 322, 244 N.W.2d 464, 466-67 (1976).

Moreover, the witness gave his true name and occupation, and fully described his professional involvement with the appellant. The detective was also thoroughly cross-examined by defense counsel who failed to make a showing how disclosure of the officer's address would make his cross-examination any more meaningful. There is no error.

8. Sufficiency of the Evidence to Support the Death Penalty.

[31] We are required to review imposition of the death penalty pursuant to NRS 177.055 and must consider: "(a) Any errors enumerated by way of appeal; (b) Whether the evidence supports the finding of an aggravating circumstance or circumstances; (c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and (d) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in this state, considering both the crime and the defendant." The appellant concedes that there is sufficient evidence to support the finding of the first aggravating circumstance, a previous felony conviction involving violence. He contends, however, that the other aggravating circumstances are unsupportable and, without their support, the mitigating evidence outweighs the evidence in aggravation. We disagree.

NRS 200.030(4) provides that only one aggravating circumstance is necessary for imposition of the death penalty. There is, however, substantial evidence to support the finding of the other aggravating circumstances. The attempted sexual assault is supported by such evidence as the victim's nearly nude body, the bloodstains on the victim's body and the appellant's undershorts, as well as the bite marks on the victim's abdomen, breasts, and in her vaginal area.

*687 Similarly, there is substantial evidence to support a finding that the murder involved torture, depravity of the mind, or mutilation **419 of the victim. There is extensive evidence demonstrating the heinous, brutal nature of the beating which resulted in the death of Darlene Joyce Miller. Considering both the crime and the defendant, we conclude that the death penalty is not excessive or disproportionate to the penalty imposed in similar cases in this state. E. g., State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946). See Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965). Cf. Briano v. State, 94 Nev. 422, 581 P.2d 5 (1978) (life imprisonment); Pinana v. State, 76 Nev. 274, 352 P.2d 824 (1960) (life imprisonment).

Lastly, appellant contends that "the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor." NRS 177.055(2)(c). The record is devoid of any such evidence.

9. Penalty Hearing Jurisdiction.

[32] Appellant next contends that the trial court was without jurisdiction to conduct the penalty hearing because Chapter 598 of the 1977 statutory amendments, 1977 Nev.Stats. ch. 598, at 1626, repealed the provisions of Chapter 585 of the same amendments, 1977 Nev.Stats. ch. 585, at 1541 (amending NRS 200.030), which prescribed the circumstances under which the capital penalty may be imposed for first degree murder. Both enactments came during the 1977 session, with Chapter 598 passing three days after Chapter 585. There is nothing in the sexual assault legislation which indicates a repeal of the capital punishment law. Indeed, the legislative scheme shows that the two laws are completely separate. Additionally, both laws went into effect simultaneously on July 1, 1977 pursuant to statute. NRS 218.530. Repeals by implication are disfavored. Ronnow v. City of Las Vegas, 57 Nev. 332, 364, 65 P.2d 133, 145 (1937). We decline to find either an express or implied repeal of Chapter 585.

10. Statutory Terms.

[33] Finally, appellant apparently contends that the trial court committed reversible error when it instructed the jury, using the term "rape" instead of the new phrase "sexual assault." On this record, we perceive no error. State v. Murray, 67 Nev. 131, 147-48, 215 P.2d 265, 273-74 (1950). Although the court used the language of the statute before its amendment, ***688** NRS 200.5011 (amended 1977), there is no showing that the use of the term "rape" misled the jury as to a matter of law.

We affirm the convictions of first degree murder and robbery, together with the judgments and sentences of death plus fifteen years.

MOWBRAY, C. J., and THOMPSON, J., concur.

BATJER, Justice, concurring:

I concur in the result.

All Citations

95 Nev. 669, 601 P.2d 407

GUNDERSON, Justice, concurring:
I also concur in the result only.

Footnotes

1 Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

2 In this factual context Nevada law provides that the penalty panel may return verdicts of death, or life with or without the possibility of parole. NRS 200.030(4).

3 The previous felony conviction was for attempted sodomy and assault in the second degree, filed in Suffolk County, New York, October 23, 1968.

4 At the hearings during the penalty phase, the prosecution introduced the testimony of three witnesses. When the state rested, the court inquired of defense counsel whether there were "any mitigation witnesses at this time other than the evidence that was evidenced in the trial?" Counsel replied there were not and rested. The only mitigating factor to which counsel referred in closing was conclusory namely, that the murder was committed while the appellant was under the influence of extreme mental or emotional disturbance. The argument was that the acts were the product of a diseased mind in that they were so brutal.

5 Instruction No. 21:

> The essential elements of murder by means of torture are (1) the act or acts which caused the death must involve a high degree of probability of death, and (2) the defendant must commit such act or acts with the intent to cause cruel pain and suffering for the purpose of revenge, persuasion or for any other sadistic purpose.
>
> The crime of murder by torture does not necessarily require any proof that the defendant intended to kill the deceased nor does it necessarily require any proof that the deceased suffered pain.

Instruction No. 22:

> The condition of mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

Instruction No. 23:

> You are instructed that the term "mutilate" means to cut off or permanently destroy a limb or essential part of the body, or to cut off or alter radically so as to make imperfect.

6 NRS 175.552 provides:

> The state may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, Other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

(Emphasis added.)

7 In 1979, the Nevada Legislature amended NRS 171.178 and provided for a hearing if an arrested person is not brought before a magistrate within seventy-two hours after arrest. At that time, it will be determined whether a defendant May be released if the person "was not brought before a magistrate without unnecessary delay." 1979 Nev.Stats. ch. 589, s 1, at 1191. Although not applicable to this case, the amendment demonstrates that no fixed time is necessarily prejudicial. Additionally, appellant here, fully informed of his rights, confessed within seventy-two hours of his arrest. No other evidence was obtained from appellant prior to the arraignment and subsequent to these statements.

> It is noteworthy that by the time of the trial of this proceeding, Clark County had established the position of intake officer who has the responsibility of assisting an accused detainee by advising him of his various constitutional and legal rights. This includes information as to bail and "anything that would help them to appear in court, and they give them the date of their arraignment when they're to appear in Justice Court, and they fill out this sheet which helps determine if they need an attorney or public defender . . .."

8 The deputy district attorney was questioning Detective Levos regarding his interview of the appellant:

"Q. Did you ask him how the stains got on the two fifty dollar bills?
"A. I did.
"Q. What did you ask him in that regard?
"A. I asked him I said, 'Then where did the stains from on the money come from?'
"He didn't answer me."
Defense counsel made an objection, following which the reference to defendant's silence was stricken and the jury admonished. It should be noted, however, that the appellant previously had stated he waived his rights and was willing to give a statement to the police. He had given a statement responded that he did have money and attempted to explain how he got it. When Detective Levos asked about the stains, the appellant did not answer. Detective Levos' comment at trial was in passing and was a description of all the circumstances. The comment by the police officer here was also not emphasized by the prosecutor.

9 The testimony was:
Henry, I interviewed your wife on the morning of the 16th, and I don't think she was lying to me, but she told me that she hadn't seen you since about 9:30 or 9:45 the night before, when you came home from your mother's. You got a ride home from your mother's, and she went to bed and you went out. She told be that she did not see you since.

10 NRS 49.295(1) provides in pertinent part:
(a) A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent.
(b) Neither a husband nor a wife can be examined, during the marriage or afterwards, without the consent of the other, as to any communication made by one to the other during the marriage.

11 It is significant that the challenged statements here came near the end of the interview after the appellant had given the police virtually all of the inculpatory information.

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Pool v. U.S., 260 F.2d 57 (1958)

260 F.2d 57
United States Court of Appeals Ninth Circuit.

William Cecil POOL, Appellant,
v.
UNITED STATES of America, Appellee.

No. 15865. | Oct. 13, 1958.

Prosecution against defendant, a former chief of police, for, under color of law, depriving two persons of their constitutional rights. The United States District Court for the District of Nevada, John R. Ross, J., entered judgment of conviction and defendant appealed. The Court of Appeals, Barnes, Circuit Judge, held that in view of fact indictment charged defendant not with obtaining confessions by force and violence, but, among other things, with depriving two persons of their constitutional rights with use of force and violence, under color of law, for the purpose of obtaining confessions, statements, or information about an alleged offense, there was no fatal variance between the indictment and the proof, even if it were assumed that the proven force and violence did not result in confessions.

Judgment affirmed.

West Headnotes (11)

[1] **Criminal Law**
Particular Offenses and Prosecutions

In prosecution for, under color of law, depriving a person of his constitutional rights, trial court did not commit reversible error in permitting a state district attorney to testify as to what he told a state grand jury which was presented with the matter, on theory that his advice to them that it was without jurisdiction to indict constituted an evaluation by him that the evidence was sufficient to constitute a crime, but only a misdemeanor, in view of overwhelming evidence of defendant's guilt. 18 U.S.C.A. 242.

Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Communications Through or in Presence or Hearing of Others; Communications with Third Parties

In prosecution for, under color of law, depriving a person of his constitutional rights, trial court did not err in permitting defendant's wife to testify that she heard defendant, who was a chief of police, say to an alleged victim, who had been arrested by the police, that he was 'lying,' and 'come on, we will go for a ride' in view of fact such statements were not confidential, but were made in presence of a third person. 18 U.S.C.A. 242.

Cases that cite this headnote

[3] **Privileged Communications and Confidentiality**
Observations of Acts and Conduct; Independent Knowledge

The privilege of communications between a husband and a wife generally extends only to utterances, and not to acts.

Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Effect of Divorce, Separation, or Death

Generally, a divorce removes any bar of incompetency of one spouse to testify against another spouse, but does not terminate privileged character of communications between them.

Cases that cite this headnote

[5] **Criminal Law**
Introduction of Documentary and Demonstrative Evidence

In criminal prosecution, trial court would not be deemed to have abused its discretion in failing to admit a certain exhibit at the precise time defendant wanted it admitted in view of its ultimate admission after a proper foundation was laid.

Cases that cite this headnote

[6] **Civil Rights**
Prosecutions

In prosecution for, under color of law, depriving a person of his constitutional rights, formula instruction which covered all necessary aspects of the case would not be deemed defective on theory that it failed to explain and name the offense charged. 18 U.S.C.A. § 242.

Cases that cite this headnote

[7] **Civil Rights**
Prosecutions

In prosecution for, under color of law, depriving a person of his constitutional rights, in view of fact indictment charged defendant not with obtaining confessions by force and violence but, among other things, with depriving two persons of their constitutional rights with use of force and violence, under color of law, for the purpose of obtaining confessions, statements, or information about an alleged offense, there was no fatal variance between the indictment and the proof, even if it were assumed that the proven force and violence did not result in confessions. 18 U.S.C.A. § 242.

Cases that cite this headnote

[8] **Civil Rights**
Offenses

In a prosecution for, under color of law, depriving a person of his constitutional rights, through beating him, for the purpose of obtaining a confession, fact that no confession is obtained is immaterial in determining defendant's guilt. 18 U.S.C.A. § 242.

Cases that cite this headnote

[9] **Criminal Law**
Objections in General

It was not incumbent on the Court of Appeals to consider an alleged error in instructions in a criminal prosecution where no objection was at any time made at the trial. Fed.Rules Crim.Proc. rule 30, 18 U.S.C.A.

1 Cases that cite this headnote

[10] **Criminal Law**
Instructions Assuming Facts in General
Criminal Law
Invasion of Province of Jury

In prosecution for, under color of law, depriving a person of his constitutional rights, through act of defendant, who was a chief of police, in beating a suspect, although instruction that if a suspect was taken into custody by defendant under color of law, by reason of position held by defendant, the ordeal to which defendant subjected the suspect constituted a violation of federal statute, was improper in that it assumed a fact in issue, as to whether defendant beat suspect, in view of strong and substantial physical evidence of defendant's guilt, and in view of other proper instructions given, giving of questioned instruction would be deemed harmless error. 18 U.S.C.A. 242; Fed.Rules Crim.Proc. rule 52, 18 U.S.C.A.

Cases that cite this headnote

[11] **Criminal Law**
⇐Discretion of Court as to New Trial
Criminal Law
⇐New Trial

A motion for new trial is addressed to the sound judicial discretion of the trial court, and its action thereon will not be reviewed on appeal except in case of clear abuse of such discretion.

3 Cases that cite this headnote

Attorneys and Law Firms

***58** Morton Galane, Las Vegas, Nev., for appellant.

W. Wilson White, Asst. Atty. Gen., Harold H. Green, D. Robert Owen, Attorneys, Department of Justice, Washington, D.C., Howard W. Babcock, U.S. Atty., Las Vegas, Nev., for appellee.

Before STEPHENS, Chief Judge, and FEE and BARNES, Circuit Judges.

Opinion

BARNES, Circuit Judge.

Appellant, one time Chief of Police of North Las Vegas, Nevada, was indicted on two counts of violating 18 U.S.C. § 242, which reads, in material part:

'Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be * * * imprisoned not more than one year. * * *'

Appellant was convicted by jury verdict on both counts. A motion for new trial was denied by the trial court and appellant was sentenced to one year imprisonment concurrently on each count. He appeals here, 28 U.S.C. § 1291; 18 U.S.C. § 3772, on the following grounds:

I. Errors Charged

A. Errors in Introduction of Evidence

(1) Error in refusing to strike from evidence a 'voluntary statement' of the District Attorney of Clark County.

(2) Error in permitting testimony of appellant's wife (at the time, though later divorced) as to the manner in which appellant talked to a prisoner in her presence, over the objection such communications were privileged.

(3) Error in rejecting and later admitting a prior inconsistent statement of a prosecution witness.

B. Errors in Instructions to the Jury

(1) Failure to instruct the jury so as to explain and name the offense (even though appellant failed to except to the failure).

(2) Material variance between proof and indictment which was raised at end of government's case (but not at end of trial).

***59** (3) The trial court 'amended the indictment' in its charge to the jury (although no objection was made by appellant at the trial).

C. Error in Refusing to Grant New Trial

II. The Indictment

Because of the 'variance' and 'amendment' claimed, it is necessary to consider the form of the respective counts of the indictment.

Count I charged that Pool, as 'Chief of Police,' and his original co-defendant, Clifton (who turned state's evidence at the trial), as 'Captain of Police,' did, on February 27, 1956, in Clark County, Nevada,

'* * * while acting under color of the laws, statutes, ordinances and regulations of the State of Nevada * * * creating the offices and positions aforesaid and prescribing the duties thereof, wilfully subject Ray Lewis Sage, Jr., an inhabitant of the State of West Virginia, to the deprivation of the rights and privileges secured to him and protected by the Fourteenth Amendment to the Constitution of the United States not to be deprived of his liberty without due process of law, to-wit, (1) the right and privilege to be secure in his person while in the custody of anyone acting under the color of the laws of the State of Nevada, (2) the right and privilege to be

immune from force and violence by anyone exercizing the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense, and (3) the right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada;

'That is to say, that at the time and placed aforesaid, the defendants, William Cecil Pool and Edward Ellis Clifton, while acting under color of law as aforesaid, did beat with a flashlight, fists and elbows, and did kick with their feet the said Ray Lewis Sage, Jr., all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid.

'In violation of Section 242, Title 18, United States Code.' [Emphasis and figures in parentheses added.]

The second count charged that on the same date and in the same Clark County, Nevada, acting under the same color of law as Chief of Police, Pool, alone, had deprived Coite Martin Gaither, Jr., an inhabitant of the State of South Carolina, of the same three 'rights and privileges':

'That is to say, that at the time and place aforesaid, the defendant, William Cecil Pool, while acting under color of law as aforesaid, did beat with fists and elbows, and did kick with his feet the said Coite Martin Gaither, Jr., all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid.

'In violation of Section 242, Title 18, United States Code.'

III. The Evidence

Several burglaries of grocery store markets had taken place in and about North Las Vegas, Nevada, prior to February 27, 1956. The principal booty collected by the burglars was slot machines.

In the early morning hours of February 27, 1956, an attempt was made to burglarize the Valley Market. Later that same morning of February 27, 1956, Sage and Gaither, two airmen from a nearby airbase, were taken into custody by North Las Vegas police officers and booked for 'burglary investigation.' Upon being questioned, they denied connection with any of the several recent burglaries in which slot machines had been taken from business establishments

***60** According to Gaither, Chief Pool and Detective Carlson shortly after noon took Gaither for a ride in a police car. He was questioned further about the slot machine burglaries and refused to confess. At all times his hands were handcuffed behind him. The car was driven toward Nellis Air Force Base and off highway 91 onto a gravel road. Gaither testified Pool ordered him from the car, and then struck him in the face. Appellant and Carlson allegedly beat and kicked Gaither a number of times. He was knocked down six or eight times. Various threats were made. After an hour or so the party returned to the North Las Vegas Police Department where Gaither's face was observed to be 'red and flushed.'

Subsequently, Pool interrogated Sage at the Police Station. He then ordered Sage into a police car, and Clifton, Carlson and Pool got in. Sage states he was told to get down on the floor boards by the back seat. He was then not handcuffed. Again the car was allegedly driven three or four miles along the main highway, then off on a gravel side road. Sage was not handcuffed. He was ordered from the car and Clifton struck him first, with fist or elbow, and then continued to strike him with a flashlight '25 to one hundred times on the chest and abdomen' (Carlson estimates 60 to 70 blows with the flashlight). Sage stated he fell to the ground twenty times. Clifton asked him many times, 'Are you ready to talk?' About the middle of this 'interview' Sage says his hands were handcuffed behind him. He was taken to a little gulley. Pool asked him if he was ready to talk and then Clifton thrust a pistol to Sage's temple and said: 'You had better talk.' At one place in his testimony Sage testified Pool kicked him on the chest while he was down; at another place in his testimony he denies this. (Carlson testified Pool kicked Sage several times.) Sage said Clifton stamped on him while he was down.

Sage was taken back to the North Las Vegas station, then to the Henderson jail. There he fainted, and J. B. French, M.D., and Mayor of Henderson, was called to examine Sage. He found a bruised mouth, twelve to fifteen 'long' bruises over his chest and abdomen, and smaller bruises on both wrists and one ankle. These 'long' bruises were three to ten inches in length and an inch or one and one-half inches wide. Possible internal injury was diagnosed; possibly a fractured rib or ruptured spleen. Sage was hospitalized and given medication. Subsequent x-rays disclosed no broken bones and no proof of serious internal injuries.

Hospital records of the 'Rose de Lima Hospital' were in evidence (Pltff's Ex. 7). They disclose that Sage, admitted at 10:05 P.M. on February 27, 1956, 'complains of having been beaten in custody of NLV police.' Two 8 x 10 black and white photographs of Sage were taken by the Clark County Sheriff's Office on February 29, 1956, (Pltff's

Exs. 27, 28) which clearly showed numerous severe bruises on the chest and upper abdomen. On February 30, 1956, (sic) two colored still photographs of Sage were taken by the Clark County Sheriff's Office (Pltff's Ex. 26) which vividly show the bruises.

At 9:45 P.M. on February 27, 1956, before entering the hospital, and shortly after he was first seen by Dr. French in the Henderson jail, the latter interviewed Sage as to the cause of his bruises. The questions and answers were taken down by a stenographer, transcribed, and signed and sworn to by Sage (Dft's Ex. A). The questions and answers were asked and given in the presence of Dr. French, a Dr. Coogan, and Jacqueline W. Williamson, the Notary.

'Q. How did this (marks on chest) occur? A. It occurred when the North Las Vegas Police used the end of a flashlight on me.'

The questions and answers were few in number, but Sage referred to three men 'working on him,' he didn't know for sure who the policemen were; thought the Chief of Police took him in a gulley; referred to the gun at his head, the threats, the handcuffs, the flashlight, etc.

***61** Dr. French testified at the trial. Among other things, he testified there was no sand or gravel on any of Sage's injuries; that only the injury in Sage's left cheek could be considered 'an abrasive burn'; that the bruises he saw could have occurred in jumping from a car only if the person had hit a gate pipe.

Gaither, at about 8:00 P.M. on February 27, 1956, was taken from the Las Vegas jail to the North Las Vegas jail. There he was confronted by officers Pool, Clifton, Carlson, and two of his former associates, Barbara and Frank Ferola, together with a 'sack full of change,' (apparently the money and sack which were the proceeds of one robbery), and 'some papers.' Gaither read 'the papers' and confessed burglaries of the Foodland and Little Giant Markets, and an attempt to burglarize the Valley Market. He told the Chief he would tell him where the slot machines were, and as well, where he had placed the crowbar used to enter the markets. The officers looked for the crowbar, but couldn't find it. They located the slot machines and 'some loose change on the ground.'

Gaither then admitted burglarizing the Buzzens Market and the Lincoln Market, but denied burglarizing the 101 Club, the Rustic Inn and about six other places. Gaither then dictated and signed a confession to the burglaries previously confessed.

On the evening of February 28, 1956, Sage was brought from Henderson to North Las Vegas. He was told of Gaither's confession; he read it, and Sage confessed to his participation in the burglarization of three markets. He signed a written statement to that effect.

Sage was also asked by some police officer to make a statement he had received his bruises by jumping from an auto going fifty miles per hour. He finally agreed, under Clifton and Pool's coaching, to say he fell with a slot machine on his chest. He wrote in his own handwriting and signed a statement to this effect, i.e., that he had not been mistreated by the police, that he had fallen with a slot machine on top of him (Dft's Ex. B).

Both Gaither and Sage pleaded guilty in state court to the burglaries charged against them, and were sentenced to one to fifteen years in the Nevada State prison. Their sentence was commuted to ten months.

The Booking Report on Gaither was filed by the City of North Las Vegas Police at 4:30 P.M. on February 27, 1956, Case A-2309 (Pltff's Ex. 6). Sage was booked at 5:00 P.M., Case #575 (Pltff's Ex. 5). At 8:44 P.M. the Radio Log of the North Las Vegas Police shows officer Carlson (Car 509) inquired: 'What is the name of the 15 (code for prisoner) who needs medical care? Ans. Ray L. Sage.'
At 11:00 P.M., officer Carlson made a supplemental Report in Case A-2309 (sic) (Dft's Ex. C), telling how Sage had attempted to jump from a police auto traveling 50 miles per hour, and was injured.[1]

***62** It should be noted that on Sage's statement (Dft's Ex. B, p. 4, which told of Sage receiving his injuries when the slot machine fell on him) there was added, apparently as an afterthought: 'while en route to Henderson I jumped out of the Police car and did not injure myself.'

On March 3, 1956, Officer Carlson dictated and signed a detailed statement, telling how he had arrested Sage on the morning of February 27, 1956, when he 'noticed one of his arms was skinned and bruised, and he appeared to be of a stiffness nature, or sore nature .' (Dft's Ex. D, p. 1.) Carlson then told how he and Pool took Gaither for a ride in a police car, stopping six blocks off the main highway on a gravel road. Carlson then tells how he and Clifton took Sage in the police car to look for slot machines, and how Sage made an attempt to leap out of the car, but how Clifton held him. At no time does Carlson state Sage fell to the ground, but that he was injured 'while taking the jump.'

Carlson then explained in his statement how Mr. and Mrs. Frank Ferola had produced the stolen quarters, nickels and dimes, and reported to police that Gaither and Sage

had committed the Foodland Market burglary; how Gaither and then Sage had admitted various burglaries; and how Sage had asked to speak to Pool alone and had then voluntarily written and signed his statement exonerating the police. (Dft's Ex. B.)

At the trial, Carlson testified on behalf of the prosecution and described in detail how he and defendant Pool took Gaither for 'the ride' out on the desert, as Gaither had described, and how each had struck the prisoner, knocking him down 'about three times,' and how he, Pool and Clifton had taken Sage for a ride out on the desert as Sage had described; how Clifton had used his five cell flashlight to strike Sage 60 or 70 times; how Pool had kicked Sage in the back and ribs; how Clifton had placed his .45 automatic at Sage's temple; how Carlson himself had threatened Sage with a gun; that Sage had made no attempt to jump from the car; that he (Carlson) had made such a report at Pool's request; that Pool had requested Sage to write his statement (Dft's Ex. B) exonerating the officers and 'contradicting Dr. French'; that Chief Pool 'would put the words in his mouth, what to put on the paper.'

Ramona Wolf, typist and secretary of the Police Department of North Las Vegas, was married to defendant Pool from December 1955 to April 1956. She was asked to testify as to her observations, but was instructed no inquiries of her would be made 'as to any communication, confidential or otherwise * * * had alone with the defendant Wm. Cecil Pool.' She testified defendant Pool and Gaither went out the door of the Police Station together on February 27, 1956, and returned together an hour later. Thereafter she saw Sage, Clifton, Carlson and Pool in a police car in front of the station.

There was other testimony on behalf of the prosecution not particularly relevant here.

Defendant Pool did not take the stand in his own defense. He produced the following witnesses:

(1) Al Ferguson, a Police Commissioner of North Las Vegas, who testified that on the evening of February 28, 1956, he saw Sage making out a report (Dft's Ex. B) in the North Las Vegas station; that he was writing it out alone; that he had seen the marks on Sage's body; that Sage did not complain to him; that on February 28, 1956, he had heard Gaither confess the burglaries when confronted with the large sack of money the Ferolas had delivered to the police.

(2) Billy Richards Leeds, a former fellow officer (from January 13, 1956, to April 30, 1956), who, as Desk Officer, testified Sage did not leave the North Las Vegas Police Station from 9:00 A.M. until 2 or 3:30 in the afternoon when he left for the Henderson jail, and that Sage had not been mistreated. He had seen that Gaither had left the station on February 27, 1956, with Pool and Carlson for about an hour.

(3) Mrs. Phyllis Louise Harrison, operator of the Grande Motel in North Las *63 Vegas, who saw Mr. Sage engage in a fist fight on Sunday night, February 19, 1956.

Co-defendant Clifton had three witnesses briefly testify. Their testimony is here immaterial. Neither defendant took the stand.

It should be noted that there is no attack upon the sufficiency of the evidence to support the jury's verdict that the prisoners were beaten.[2] And indeed, there could be none. Not only was the evidence convincing beyond a reasonable doubt, it was overwhelming, both of the beating and of appellant's participation in it.

The leading case on the subject is Screws v. United States, 1945, 325 U.S. 91, 106, 65 S.Ct. 1031, 89 L.Ed. 1495 . It is similar to Williams v. United States, 1951, 341 U.S. 97, 101, 71 S.Ct. 576, 579, 95 L.Ed. 774, which lays down the rule that:

'* * * where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.'

IV. Discussion of Alleged Evidentiary Errors

As to the alleged errors in the introduction or rejection of evidence, we consider each in turn.

[1] (A) The witness George Dickerson, District Attorney of Clark County, Nevada, called on behalf of defendant Clifton, was subpoenaed to produce the statement of Ray L. Sage, dated February 28, 1956, which had been presented to the Nevada Grand Jury investigating the North Las Vegas Police Department. It was introduced as Defendant's Exhibit B, replacing original Defendant's Exhibit B of which it apparently was a duplicate original.

On cross-examination by counsel for the United States, the following question and answer was given:

'Q. Mr. Dickerson, I believe you testified this morning that you had participated in part in the matter of presentation of this matter to the Clark County grand jury. What did you mean when you said in part? A. I was not

present during any time when the evidence was submitted. I was present outside after the conclusion of the matter. Questions as to the legal problems involved, as to what crimes, if any, could be determined by the grand jury were asked of me, at which time I informed the grand jury that it was without jurisdiction to entertain any action in this regard, in that the evidence adduced constituted at the most a misdemeanor offense; that the grand jury is an arm of the district court and can return an indictment only on matters tried with the district court.' (Tr. p. 271.)

Counsel for Pool then objected in the following language:

'Mr. Watson: I think Mr. Dickerson's legal opinion in the matter of the State law of Nevada in the matter of the grand jury is not proper at all, as being prejudicial and should be stricken.' (Tr. p . 271.)

The court then stated:

'Let me make this very obvious observation. Counsel are not permitted to sit idly by and allow inadmissible matter to go into the record and thereafter gamble on the chance of it being favorable or unfavorable and moving to strike. They are required to make objections to questions asked. Now this Court was aware of it as soon as that question was asked, but you didn't see fit to ***64** make the objection. Objection overruled.'

And after a question and answer:

'At this point, the Court would like to make this observation, in ruling on the motion to strike. I am sure you are not under the impression the Court treats a particular line of testimony, so any time you have objections, you make them.' (Tr. p. 271, 272.)

Apparently appellant urges that the district attorney's statement that the grand jury was without jurisdiction, and 'that the evidence constituted at most a misdemeanor offense,' might have led the jury to infer that the failure of the grand jury to indict was based on its reliance on the district attorney's advice that it was without jurisdiction to indict, or that the district attorney had evaluated the evidence as sufficient to constitute a crime, to-wit: a misdemeanor. We doubt that this Federal jury was at all concerned with what the Nevada Grand Jury had or had not done. 'The evidence in this case was not clear,' says appellant. With this we cannot agree. At the time Mr. Dickerson's answer was made, the defendant, Pool, had rested his case. All his evidence was in. As we have stated above, in our opinion there was overwhelming evidence of defendant's guilt. We find no reversible error and nothing in Dickerson's answer that prevented a fair trial. Other cases cited in which prejudicial statements were made, do not make this statement prejudicial.

[2] (B) Appellant Pool's wife testified she heard Pool say to Gaither, in the course of his interrogation: 'You are lying,' and later, Pool said to Gaither, 'Come on, we will go for a ride.'

Both were statements made by Pool to Gaither, not to Pool's wife. They were made at a time when the husband, the wife, and a third person were present. They were not even asides to the wife in the presence of a third person. There is not the slightest reason to think that Pool was making a confidential communication to his wife, or any communication to her, or that he was concerned in the slightest whether his wife heard it. They were not confidential communications. Pereira v. United States, 1954, 347 U.S. 1, 6, 74 S.Ct. 358, 98 L.Ed. 435; Wolfle v. United States, 1934, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed. 617, affirming 9 Cir., 1933, 64 F.2d 566; Picciurro v. United States, 8 Cir., 1958, 250 F.2d 585; Wigmore, Evidence § 2336 (1940 ed.).

Appellant concedes there is no precedent directly in point in support of his position, and we suggest there exists an extremely good reason therefor.

[3] [4] Appellant raises his point by referring to 'the manner in which appellant talked to a prisoner in her (his wife's) presence.' But no question was asked of the wife concerning the manner in which Pool spoke to Gaither.[3] But if such questions had been asked, 'The privilege, generally, extends only to utterances, and not to acts.' Pereira v. United States, supra, 347 U.S. at page 6, 74 S.Ct. at page 361.

[5] (C) Appellant charges error in the court's refusal to admit defendant's impeaching Exhibit C, and later reversing its ruling and admitting it. Both the rulings are proper. There was first a question as to whether the document offered was the original, and hence the best evidence; or whether it was in the files of the police department and hence an official document. The claim that the court abused its discretion by failing to admit it at the precise time appellant wanted it admitted is without merit, in view of its ultimate admission after a proper foundation had been laid.

***65** V. Discussion of Alleged Errors in Instructions

[6] In instructing the jury, the trial court first read the two counts of the indictment to the jury.

It will be remembered that there were three rights and privileges of which defendant allegedly deprived the two prisoners:

(1) 'The right and privilege to be secure in his person while in custody of anyone acting under color of the laws of Nevada,

(2) 'the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada, or acting under color of its laws, for the purpose of obtaining a confession, statement or information about an alleged offense, and,

(3) 'the right and privilege to be tried for an alleged offense by due process of law * * * and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada.'

The instruction given by the court below covered all necessary aspects of the case.[4]

With one exception, we approve the instructions given as properly and carefully expressing the law. We shall consider that single instruction later.

Appellant urges that:

'* * * in the trial court's summary to the jury, only two elements were defined as requisite to a conviction; (1) whether the prisoners were in custody under color of law and (2) whether the appellant had a specific intent to deprive the prisoners of a Constitutional right .' (Appellant's Brief p. 32.)

Such a statement not only overlooks all the other subjects hereinabove mentioned in note 4, but it carefully overlooks the first part of the 'formula' instruction from which appellant quotes (1) and (2) above. This unquoted portion reads:

'If you find the acts alleged in the indictment to have been committed, then let me summarize the questions you have to determine .'

There then follows the quoted parts (1) and (2) above, and (3)- burden of proof beyond reasonable doubt.

There is no merit in appellant's position on the formula instruction.

[7] Appellant then urges his principal point, that he was charged with obtaining confessions by force and violence and of depriving Sage and Gaither of their day in court. How can this be, says appellant, when the force and violence did not result in confessions and when no trial was necessary because Sage and Gaither pleaded guilty to the burglaries? This, says appellant, amounts to variance between proof and indictment, and caught him by surprise.

It apparently is appellant's position that no matter how badly prisoners may be beaten, if they refuse to confess, their rights have not been violated. It is only, says appellant, when prisoners confess immediately after or during the beating that 18 U.S.C. § 242 has been violated.

We point out that defendant was not charged with obtaining a confession by force and violence, but, among other things, with the use of force and violence, under color of law, 'for the purpose of obtaining a confession, statement, or information about an alleged offense.'

[8] Once we admit, arguendo, that the beatings took place under color of law, there can be no question but that *66 their purpose was to obtain 'a confession, statement or information about an alleged offense.' That no confession was obtained is immaterial.[5] The very language quoted by appellant from Apodaca v. United States, 10 Cir., 1951, 188 F.2d 932, 936, affirms this. Again, the indictments quoted with approval by appellant from United States v. Jackson, 8 Cir., 1956, 235 F.2d 925 and United States v. Walker, 5 Cir., 1954, 216 F.2d 683 (Appellant's Brief p. 40) show that 'the right to be secure' and 'the right not to be assaulted' and 'the right not to be subjected to punishment without due process of law' were properly charged against appellant in each count in this case.

There is but one point worthy of serious consideration in appellant's appeal to this court. At one point, apparently in recapitulation, the trial court said:

'But, as I said, if Sage and Gaither were taken into custody by the defendants, under color of law, by reason of the positions held by the defendants, then the ordeal to which the defendant Pool subjected both Sage and Gaither and the ordeal to which the defendant Clifton subjected Sage at a point near Nellis Air Force Base constituted a violation of the Federal Statute.' (Tr. p. 14.) [Emphasis added.]

This instruction assumes one of the very facts in issue: that Pool did beat Sage and Gaither. Were this the only instruction on this factual issue, we would be faced with a difficult problem: Did the trial court wrongly take a factual issue away from the jury? But the court in other instructions correctly instructed the jury that the question of whether or not the defendant Pool had so conducted himself was a question of fact for their determination. The trial court did so specifically, first in his instructions with respect to the presumption of innocence, and secondly, in the formula instruction hereinbefore quoted.

[9] [10] It should first be noted that the defendant at no time objected or took exception to the instructions as given; nor to any of the three matters now charged as error in connection with the instructions. Appellant recognizes the

general rule that a failure to object deprives the defendant of the right later to challenge the instructions. Fed.R.Crim.P. 30, 18 U.S.C.[6] It is not even incumbent on this court to consider the alleged error when no objection was at any time made at the trial to the instruction now objected to by appellant. White v. United States, 5 Cir., 1952, 200 F.2d 509; Cosenza v. United States, 9 Cir., 1952, 195 F.2d 177.

Of course, this court has the authority, under Rule 52(b)[7] to recognize any error, whether objected to or not, as plain error (as distinguished from harmless error), or as a defect affecting substantial rights.

Upon the evidence here before us, both of the three eyewitnesses and the strong and substantial physical evidence; the instructions that were given; we have no hesitation in ruling that the instruction noted above constituted error which does not affect substantial rights, and hence is harmless error and is to be disregarded.

The very point now before us, i.e., an instruction the language of which assumed *67 the fact of the assault by the defendant on his prisoner, has been ruled on in a similar case (i.e., a prosecution under 18 U.S.C. § 242). In Apodaca v. United States, supra, 188 F.2d at page 937, Judge Bratton said:

'It is further urged that the court erred in its instructions in assuming that the defendants made an assault upon Byrd. No exception was taken to these portions of the instructions. Rule of Criminal Procedure 30, 18 U.S.C. provides among other things that no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection; and Rule 52(b) provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court . The two rules are to be construed together. Construing them in that manner, it is recognized law that ordinarily errors in the charge of the court are not open to review on appeal unless the matter was brought to the attention of the trial court by exception as required by Rule 30, but that notice may be taken of a grave error which amounts to the denial of a fundamental right of the accused even though no exception was taken. Ryles v. United States, 10 Cir., 172 F.2d 72; judgment vacated apparently on other ground, 336 U.S. 949, 69 S.Ct. 882, 93 L.Ed. 1104. No grave error amounting to the denial of a fundamental right is presented here, and therefore the question is not open to review.'

Cf. also United States v. Cioffi, 2 Cir., 1958, 253 F.2d 494, 496; Palmer v. United States, 10 Cir., 1955, 229 F.2d 861; Brown v. United States, 9 Cir., 1955, 222 F.2d 293; Obery v. United States, 1954, 95 U.S.App.D.C. 28, 217 F.2d 860, certiorari denied 349 U.S. 923, 75 S.Ct .665, 99 L.Ed. 1255; Las Vegas Merchant Plumbers Ass'n v. United States, 9 Cir., 1954, 210 F.2d 732, certiorari denied 348 U.S. 817, 75 S.Ct. 29, 99 L.Ed. 645, rehearing denied 348 U.S. 889, 75 S.Ct. 202, 99 L.Ed. 698.

VI. Refusal to Grant New Trial

[11] A motion for a new trial is addressed to the sound judicial discretion of the trial court, and its action thereon will not be reviewed on appeal except in case of clear abuse of such discretion. Steiner v. United States, 9 Cir., 1956, 229 F.2d 745, certiorari denied Pursselley v. U.S., 351 U.S. 953, 76 S.Ct. 845, 100 L.Ed. 1476, rehearing denied 352 U.S. 860, 77 S.Ct. 24, 1 L.Ed.2d 70; Apodaca v. United States, supra, 188 F.2d at page 940; Grover v. United States, 9 Cir., 1950, 183 F.2d 650.

The denial of these motions did not constitute an abuse of discretion.

The judgment is affirmed.

All Citations

260 F.2d 57

Footnotes

1 'At approximately 2:30 P.M., Detective Carlson and Captain Clifton were taking a prisoner Ray Sage to the Henderson City Jail charged with burglary. On the way to Henderson, this subject stated he would show us where two slot machines were, where he had taken out of the 101 Club. He told us to drive east on College to Nellis Blvd. and turn south on Nellis Blvd. towards Boulder Highway. Subject was sitting on the right hand side of the back seat. Captain Clifton sat on the left hand side and Detective Carlson was driving the vehicle. We turned up on College on Nellis, we travelled approximately 1/2 mile when subject opened rear door and attempted to jump out of vehicle. Police car was traveling approximately 50 miles per hour.
Captain Clifton grabbed a hold of subject and tried to hold subject in the police car and while subject was taking the jump, injured his mouth and complained that his side hurt him. Subject appeared to be O.K. en route to Henderson Jail

obtained without Lyuda or Ricky's knowledge or consent;

2. Sanctions against Sean and for an award of attorney's fees and costs for having to bring this Motion pursuant to EDCR 7.60; and

3. For such other and further relief as to the Court may seem proper.

These motions are made and based upon the points and authorities attached hereto, all pleadings and papers on file in this action, and any oral argument or evidence adduced at the time of the hearing of this matter.

DATED this 29th day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
(702) 990-6448
Attorneys for Defendant

NOTICE OF MOTION

TO: SEAN R. ABID, Plaintiff, and

TO: JOHN ABID, ESQ., his attorney:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motions on for hearing before the above-entitled Court on the 10th day of February 2016 9:30 AM, ~~2015,~~ at the hour of _____ or as soon thereafter as counsel may be heard.

DATED this 29th day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada State Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, NV 89074

I.

SEAN SHOULD BE PRECLUDED FROM INTRODUCING ANY RECORDING THAT HE OBTAINED WITHOUT LYUDA AND RICKY'S KNOWLEDGE OR CONSENT

On December 21, 2015 Sean's counsel, Mr. Jones sent Lyuda's counsel, Mr. Smith an email in the above referenced matter that reads:

> It turns out, the hallway conversation in which your client was being instructed by her husband to perjure herself was actually captured on an Iphone voice memo. Initially my client did not think the conversation was audible, but at a high enough volume on quality audio equipment it can be heard. I will be producing the audio recording, and a more accurate transcript than the recorded recollection previously provided, today.

See Email from Mr. Jones to Mr. Smith attached hereto as Exhibit "A."

The "hallway conversation" Mr. Jones refer to has been identified by him as a conversation between Lyuda and her husband, Ricky Marquez while they were seated in the Courthouse waiting for the hearing in the above-entitled case on November 18, 2015. At that hearing, Mr. Jones represented to

the Court and Mr. Smith that Mr. Abid and his wife were not visible to Lyuda and her husband, but instead were seated nearby behind one of the barrier walls in the courthouse separating the seating. Mr. Abid and his wife listened in on the conversation between Lyudmyla and Mr. Marquez without Lyudmyla or Mr. Marquez's knowledge or consent.

Mr. Jones' is troubling in a number of ways. First, the communications between husband and wife are privileged under NRS 49.295(1)(b). Second, and most important, the primary issue in this case has been Sean's surreptitiously placing a recording device in Lyuda's home without her knowledge or consent, or the knowledge or consent of any individuals that reside in the home. Sean has defended his surreptitious recording by asserting a defense under the doctrine of "implied consent" based upon decisions from other jurisdictions. That doctrine has not been adopted by the Nevada Supreme Court or the Nevada legislature, and Sean's attempt to admit an altered copy of the illegally retained recording is currently being reviewed and adjudicated by the Court. In other words, Sean's actions have not been found by the Court to be justified by the defense he has raised.

It bears repeating (this was fully briefed to the Court on numerous instances in this case) that it is illegal in the State of Nevada to surreptitiously record any private conversation without the consent of one of the parties to the conversation. NRS 200.650 reads:

> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

Sean and his wife have admitted that they have surreptitiously recorded a conversation between Lyuda and her husband. The plain definition of a private conversation is one that the parties intend not to be heard by another other than the parties to the conversation. Notably many lawyers and clients

privately discuss matters in the same hallway in which Sean listened in on and recorded the conversation between Lyuda and her husband. Just as one cannot attempt to record the private conversations between counsel and their clients in that hallway, Sean and his wife violated NRS 200.650 when they surreptitiously recorded the conversation between Lyuda and her husband.

Sean cannot justify his behavior in any way. There is no "implied consent" outside of the context of conversations with small children. Moreover, Mr. Jones' act of "enhancing" and now producing the recording is also, in my view, a violation of NRS 200.650 by Mr. Jones. Lyuda's counsel have not and will not be listening to the illegal recording. Even the attempt to listen, record or monitor a private conversation is a violation of law.

For the reasons set forth herein, Lyuda seeks to exclude the recording from the hearing, and requests the Court for a declaration that the exclusion is based upon Sean's blatant violation of NRS 200.650. Lyuda further seeks sanctions against Sean for his blatant submission of illegally obtained evidence to the Court.

II.

TIMELINESS OF MOTION IN LIMINE

EDCR 2.47, applicable to family division matters through EDCR 5.40 reads:

> Unless otherwise provided for in an order of the court, all motions in limine to exclude or admit evidence must be in writing and filed not less than 45 days prior to the date set for trial and must be heard not less than 14 days prior to trial.
>
> (a) The court may refuse to sign orders shortening time and to consider any oral motion in limine and any motion in limine which is not timely filed or noticed.
>
> (b) Motions in limine may not be filed unless an unsworn declaration under penalty of perjury or affidavit of moving counsel is attached to the motion setting forth that after a conference or a good-faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A "conference" requires a personal or telephone conference between or among counsel. Moving counsel must set forth in the declaration/affidavit what attempts to resolve the matter were made, what was resolved, what was not resolved and the reasons therefore. If a personal or telephone conference was not possible, the declaration/affidavit shall set forth the reasons.

The trial in this case has already begun. The Court asked the parties to provide Briefs in this case and continued the Trial to January 11. During that interim period, Mr. Jones produced a recording that clearly illegally obtained in violation of NRS 200.650. Pursuant to EDCR 2.47, Mr. Smith sent a letter to Mr. Jones objecting to the recording but Mr. Jones has not responded. *See* Letter from Mr. Smith to Mr Jones attached hereto as Exhibit "B."

III.

LYUDA'S REQUEST FOR SANCTIONS AND FEES

Under EDCR 7.60, district court may award attorney's fees and sanctions against a party that "unnecessarily multiplies" the proceedings in a case. Sean's attempts to admit an illegal recording has caused Lyuda to incur unnecessary fees and costs. Lyuda seeks an order entering a judgment against Sean and in favor of Lyuda, in a sum equal to all attorney's fees and costs incurred in the prosecution of this motion. If the court is inclined to grant Lyuda's request, she will submit a Memorandum of fees and costs detailing the same.

IV.

CONCLUSION

Based upon the foregoing the court should enter its order as follows:

1. Excluding the recording of court hallway conversation on November 18, 2015 between Lyuda and her husband, RICKY MARQUEZ ("Ricky") that Plaintiff, SEAN R. ABID ("Sean") surreptitiously obtained without Lyuda or Ricky's knowledge or consent;

2. Sanctions against Sean and for an award of attorney's fees and costs for having to bring this Motion pursuant to EDCR 7.60; and

. . .

. . .

3. For such other and further relief as to the Court may seem proper.

DATED this 29th day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada State Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, NV 89074
Attorneys for Defendant

AFFIDAVIT OF GARIMA VARSHNEY, ESQ.

COUNTY OF CLARK)
) ss:
STATE OF NEVADA)

Garima Varshney, Esq., having been duly sworn, deposes and says:

1. I am an attorney for the Defendant, LYUDMYLA ABID, in the above-entitled matter.

2. I make this Affidavit based upon facts within my own knowledge, save and except as to matters alleged upon information and belief and, as to those matters, I believe them to be true.

3. I have reviewed the foregoing Motion and can testify that the facts contained therein are true and correct and to the best of my knowledge. I hereby affirm and restate them as if set forth fully herein.

FURTHER AFFIANT SAYETH NAUGHT.

Garima Varshney
GARIMA VARSHNEY, ESQ.

Subscribed and sworn before me
this 21 day of December, 2015.

NOTARY PUBLIC in and for
said County and State

NOTARY PUBLIC
JOLENE M. HOEFT
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. NOV. 23, 2017
No: 05-100754-1

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Radford J. Smith, Chartered ("the Firm"). I am over the age of 18 and not a party to the within action. I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. Under the Firm's practice, mail is to be deposited with the U.S. Postal Service on the same day as stated below, with postage thereon fully prepaid.

I served the foregoing document described as

MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

on this 21 day of December, 2015, to all interested parties as follows:

☒ BY MAIL: Pursuant To NRCP 5(b), I placed a true copy thereof enclosed in a sealed envelope addressed as follows;

☐ BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below;

☒ BY ELECTRONIC MAIL: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via electronic mail to the electronic mail address shown below;

☐ BY CERTIFIED MAIL: I placed a true copy thereof enclosed in a sealed envelope, return receipt requested, addressed as follows:

John Jones, Esq.
10777 W. Twain Ave., #300
Las Vegas, Nevada 89135

An employee of Radford J. Smith, Chartered

EXHIBIT "A"

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **12/29/2015**
Time Printed: **11:19AM**
Printed By: **GVARSHNEY**

Date **12/21/2015** Time **10:24AM** **12:00AM** Duration **0.00** (hours) Code **Case Related**
Subject **Abid** Staff **Radford J Smith**
Client **John D. Jones** MatterRef **Abid v. Abid** MatterNo **D-10-424830-Z**
From **John Jones <jjones@blacklobellolaw.com>**
To **Radford Smith; Garima Varshney**
CC To **seanabid@gmail.com**
BCC To
Reminders (days before) Follow Done Notify Hide Trigger Private Status

Custom1
Custom2
Custom3
Custom4

It turns out, the hallway conversation in which your client was being instructed by her husband to perjure herself was actually captured on an Iphone voice memo. Initially my client did not think the conversation was audible, but at a high enough volume on quality audio equipment it can be heard. I will be producing the audio recording, and a more accurate transcript than the recorded recollection previously provided, today.

John D. Jones, Esq.

Partner.

Nevada Board Certified Family Law Specialist

<http://www.blacklobellolaw.com/index.aspx> <http://www.facebook.com/BlackLoBello>

10777 West Twain Avenue, Third Floor

Las Vegas, Nevada 89135

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Fax: 702.869.2669

Mobile: 702.523.6966

Visit our improved website at:

www.blacklobellolaw.com <http://blacklobellolawblog.com/>

EXHIBIT "B"

RADFORD J. SMITH, CHARTERED
A Professional Corporation
2470 St. Rose Parkway – Ste. 206
Henderson, Nevada 89074

Telephone: (702) 990-6448
Facsimile: (702) 990-6456
rsmith@radfordsmith.com

Radford J. Smith, Esq.
Garima Varshney, Esq.
Matthew P. Feeley, Esq.
Jolene Hoeft, Paralegal
Kenneth F. Smith, Paralegal
Kimberly A. Medina, Paralegal

VIA EMAIL
John Jones, Esq.
Black & Lobello

December 23, 2015

Re: Abid (Pyankovska) adv. Abid
Case No.

Dear John:

On December 21, 2015 you sent me an email in the above referenced matter that reads:

> It turns out, the hallway conversation in which your client was being instructed by her husband to perjure herself was actually captured on an Iphone voice memo. Initially my client did not think the conversation was audible, but at a high enough volume on quality audio equipment it can be heard. I will be producing the audio recording, and a more accurate transcript than the recorded recollection previously provided, today.

The "hallway conversation" you refer to has been identified by you as a conversation between my client, Lyudmyla Abid Pyankovska and her husband Ricky Marquez while they were seated in the Courthouse waiting for the hearing in the above-entitled case on November 18, 2015. You represented to the Court and me on that date that Mr. Abid and his wife were not visible to my client and her husband, but instead were seated nearby behind one of the barrier walls in the courthouse separating the seating. Mr. Abid and his wife listened in on the conversation between Lyudmyla and Mr. Marquez without Lyudmyla or Mr. Marquez's knowledge or consent.

Your email is troubling in a number of ways. First, the communications between husband and wife are privileged under NRS 49.295(1)(b). Second, and most important, the primary issue in this case has been your client's surreptitiously placing a recording device in my client's home without her knowledge or consent, or the knowledge or consent of any individuals that reside in the home. Your client has defended his surreptitious recording by asserting a defense under the doctrine of "implied consent" based upon decisions from other jurisdictions. That doctrine has not been adopted by the Nevada Supreme Court or the Nevada legislature, and your client's attempt to admit an altered copy of the illegally retained recording is currently being reviewed and adjudicated by Judge Marquis in this case. In other words, your client's actions have not been found by Judge Marquis to be justified by the defense you have raised.

It bears repeating (this was fully briefed to the Court on numerous instances in this case) that it is illegal in the State of Nevada to surreptitiously record any private conversation without the consent of one of the parties to the conversation. NRS 200.650 reads:

> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to,

> monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

Your client and his wife have admitted that they have surreptitiously recorded a conversation between my client and her husband. The plain definition of a private conversation is one that the parties intend not to be heard by another other than the parties to the conversation. I would note that many lawyers and clients privately discuss matters in the same hallway in which your client listened in on and recorded the conversation between my client and her husband. Just as one cannot attempt to record the private conversations between counsel and their clients in that hallway, your client and his wife violated NRS 200.650 when they surreptitiously recorded the conversation between my client and her husband.

I cannot conceive of any way in which your client and his wife can justify their behavior. There is no "implied consent" outside of the context of conversations with small children. Moreover, your act of "enhancing" and now filing the recording is also, in my view, a violation of NRS 200.650 by you. I have not and will not be listening to the illegal recording. Again, even the attempt to listen, record or monitor a private conversation is a violation of law.

I will be moving to exclude the recording from the hearing, and asking for a declaration from the Court that the exclusion is based upon your client's blatant violation of NRS 200.650. I will be further requesting sanctions for the blatant submission of illegally obtained evidence to the Court.

Sincerely,

RADFORD J. SMITH, CHARTERED

Radford J. Smith, Esq.
Board Certified Nevada Family Law Specialist

cc: client

0001

DISTRICT COURT
CLARK COUNTY, NEVADA

SEAN ABID,

Plaintiff,

v.

LYUDMYLA A. ABID,

Defendant.

CASE NO.: D-10-424830-Z
DEPT NO.: B

FAMILY COURT MOTION/OPPOSITION FEE INFORMATION SHEET (NRS 19.0312)

Party Filing Motion/Opposition : ☐ Plaintiff/Petitioner ☒ Defendant/Respondent

MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

Motions and Oppositions to Motions filed after entry of a final order pursuant to NRSS 125, 125Bor 125C are subject to the Re-open filing fee of $25.00, unless specifically excluded (NRS 19.0312)

NOTICE:

If it is determined that a motion or opposition is filed without payment of the appropriate fee, the matter may be taken off the Court's calendar or may remain undecided until payment is made.

Mark correct answer with an "X"

1. No final Decree or Custody Order has been entered. ☐ YES ☒ NO

2. This document is filed soley to adjust the amount of support for a child. No other request is made. ☐ YES ☒ NO

3. This Motion is made for reconsideration or a new trial and is filed within 10 days of the Judge's Order if YES, provide file date of Order:_____ ☐ YES ☒ NO

If you answered YES to any of the questions above, you are not subject to the $25 fee.

Motion/Opposition ☒ IS ☐ IS NOT subject to $25 filing fee

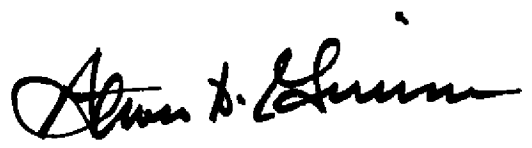
Dated this 29 of December, 2015

Jolene Hoeft
Printed Name of Preparer

Signature of Preparer

DOCKETING STATEMENT ATTACHMENT 27

Electronically Filed
01/05/2016 05:04:19 PM



CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

SEAN R. ABID)
)
Plaintiff,)
)
vs.) CASE NO.: D-10-424830-Z
) DEPT. NO.: B
LYUDMYLA A. ABID,)
)
Defendant.)

Findings of Fact, Conclusions of Law and Decision

This matter was set for an Evidentiary Hearing, pursuant to Plaintiff's Motion to Change Custody.

At the Evidentiary Hearing, the Plaintiff (hereinafter Dad) sought to introduce portions of recorded conversations between Defendant (hereinafter Mom) and the Minor Child. Plaintiff obtained the recording by placing a recording device in the backpack of the minor child just before the minor child travelled to the Defendant's home.

. . . .

LINDA MARQUIS
DISTRICT JUDGE

FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

Findings of Fact

This matter is a post divorce custody action.

The Parties have one minor child, A.A., born in February 2009.

The Parties last custody order was a stipulated order resulting from December 9, 2013, Evidentiary Hearing, and later filed on September 9, 2014.

At the time of the stipulation, Dad was aware that Mom's current husband had a significant criminal background.

In Fall 2014, Dad met with FBI Agents regarding Mom's current husband.

Dad was less than honest, at the Evidentiary Hearing, in his assertion that he does not remember anything discussed during his meeting with FBI Agents.

Dad was concerned about Mom badmouthing Dad to the minor child. Dad believed the Minor Child was frustrated, angry, and defiant due to Mom's continued badmouthing of Dad.

In January 2015, Dad placed a recording device into a plastic box which contained the Minor Child's sight word flash cards. The plastic sight word box was placed into the Minor Child's backpack.

Dad intended to record the communication between Minor Child and Mom while the child was at Mom's residence or in Mom's vehicle. Dad hoped to capture Mom badmouthing Dad to the Minor Child.

Mom, Mom's current husband, and Mom's minor daughter from another relationship live together at Mom's residence.

Mom, Mom's current husband, and Mom's minor daughter from another relationship did not consent to recording.

Mom, Mom's current husband, and Mom's minor daughter from another relationship did not know that the recording device was placed inside the Child's backpack.

The recording device recorded 15 straight hours of audio. The device was equipped with a flash drive that allowed the audio to be uploaded to Dad's computer.

Dad cannot identify the software he utilized to upload the audio files to his home computer.

Dad destroyed portions of audio recording.

Dad destroyed both the recording device and the computer on which audio the recordings were temporarily stored.

Nature of the Recording

The State of Nevada uniquely distinguishes between recording telephone communications and recording private conversations. NRS 200.620 prohibits the recording of telephone conversations without the consent of ***both*** parties to the conversation, unless authorized or ratified by the court. *See also Mclellan v. State*, 124 Nev 263 (2008). Alternatively, NRS 200.650 prohibits the recording of conversations without the consent of ***one*** of the parties engaged in the conversation. *See also State v. Bonds*, 92 Nev. 307 (1976); *Summers v. State,* 102 Nev. 195 (1986).

Here, Dad placed a recording device inside a plastic container, which housed the Minor Child's sight words. The plastic container was kept inside the Minor Child's backpack. Dad testified he placed the recording device in the Minor Child's backpack with the intention of recording conversations between Mom and Minor Child while the Minor Child was at Mom's residence or while the Minor Child was in Mom's vehicle. The Minor Child was unaware that Dad had placed the recording device in the Minor Child's backpack. Mom was unaware that Dad

had placed the recording device in the Minor Child's backpack and, further, Mom did not consent to the recording.

The conversations that were recorded were not communications via telephone, but were communications governed by NRS 200.650. Accordingly, at a minimum either the Minor Child or Mom must have consented to the recording of those conversations.

Vicarious Consent Doctrine

Dad argues that the vicarious consent doctrine should apply in the instant case. The vicarious consent doctrine allows a parent to vicariously consent to recording a communication on behalf of a minor child, if the parent has a good faith belief that it was necessary and in the best interest of the child.

The Nevada Supreme Court and/or Appellate Court have yet to consider this issue. However, many other jurisdictions have considered the admissibility of a recording made by a custodial parent of *telephone communication* between a minor child with a non-custodial parent, while the minor child was in the custodial parent's home under the "home extension exception" and "vicarious consent." *See Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998).

The Seventh, Tenth, and Second Circuits have held that parental interception of their minor child's phone conversations does not violate Title III, if the recording is done from an extension within the home. *See id.* at 607 (*citing Scheib v. Grant*, 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991); *Janecka v. Franklin*, 843 F.2d 110 (2d Cir.1988)). The Sixth Circuit has expressly rejected the home extension exception theory; however, in *Pollock*, the Sixth Circuit affirmed the district court's adoption of the vicarious consent doctrine:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. Such vicarious consent will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d).

Although the Circuit Courts addressing the issue have used different approaches, they are uniform in holding that under certain circumstances a parent may surreptitiously record the telephone conversations of their children without violating Title III.

Some States have also adopted the vicarious consent doctrine. *See Wagner v. Wagner*, 64 F.Supp.2d 895, 896 (D.Minn.1999) ("adopt[ing] the vicarious consent doctrine, finding that as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children in his or her custody, the guardian may vicariously consent to the interception on behalf of the children"); *Campbell v. Price*, 2 F.Supp.2d 1186, 1191 (E.D.Ark.1998) (finding "defendant's good faith concern for his minor child's best interests, may, without liability under [the federal interception of communications act], empower the parent to intercept the child's conversations with her non-custodial parent"); *Thompson v. Dulaney*, 838 F.Supp. 1535, 1544 (D.Utah 1993) (stating "as long as the guardian has a good faith basis that it is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children"); *Lawrence v. Lawrence*, 360 S.W.3d 416 (2010)(holding parent may vicariously consent to record minor child's telephone conversations).

Not all state courts have adopted the vicarious consent doctrine. The Washington Supreme Court declined to adopt the vicarious consent doctrine

where a mother listened to a telephone conversation between her daughter and the daughter's boyfriend in which a criminal act was discussed. *See State v. Christensen*, 153 Wash.2d 186, 102 P.3d 789, 796 (2004). Washington's statute requires all parties to the conversation to consent to the recording. Wash. Rev.Code § 9.73.030. Further, the Washington Supreme Court found its statute extends considerably greater protections to its citizens than do comparable federal statutes and rulings and its "statute, unlike similar statutes in thirty-eight other states, tips the balance in favor of individual privacy." Id. at 795–96.

Nevada, like Washington, extends greater protections to its citizens regarding telephone communications, than do comparable federal statutes and the majority of states, requiring ***both*** parties to consent to recording.

All of the cases discussed above that adopt vicarious consent doctrine involve recording of ***telephone conversations*** by a parent on behalf of a minor child ***in that parent's custody***. In other words, the parent recorded the child's telephone conversations while the child was in that parent's home. Here, the recording device was placed by Dad into Mom's home, without the knowledge and/or consent of Mom.

The West Virginia Supreme Court of Appeals declined to adopt the vicarious consent doctrine under its statute, which only requires one party to consent, when it held a father did not have the authority to consent on behalf of his children to the interception of conversations between his children and their mother. *W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L.*, 192 W.Va. 663, 453 S.E.2d 646, 648 (1994). In *David L.*, the father, who claimed to have given vicarious consent, had the recording device placed in the mother's home, rather than in his own home. *Id.*

In *David L.*, father asserted that he became concerned the minor children were being abused by mother while in mother's custody. Paternal grandmother had access to the mother's home because she babysat the children and placed a voice activated recording device in the children's bedroom in order to record conversations between the minor children and mother. Father obtained the recordings through paternal grandmother. Mother had no knowledge that the recording device had been placed in her home.

This Court previously indicated that it would consider the doctrine of vicarious consent and require Dad to establish first, as a threshold requirement, a good faith basis to record the Minor Child's conversations.

The Court finds that the doctrine of vicarious consent does not extend to the facts presented in this case. As in *David L.*, the facts presented in the instant matter are distinguished from all the cases in which the doctrine of vicarious consent was extended. Vicarious consent may be appropriate in those cases in which there is one party consent required and the recording takes place within the custodial parent's home.

Here, Dad surreptitiously caused a recording device to be placed inside of Mom's home and recorded the conversations between Minor Child and Mom.

Even if the doctrine of vicarious consent did apply to the facts in the instant case, the Court finds that Dad did not meet the threshold good faith basis sufficient to record the communications between Minor Child and Mom.

The Court DENIES the Plaintiff's request to admit portions of the audio recording into evidence.

. . . .

. . . .

. . . .

However, pursuant to NRS 50.285(2) and *Barrett v. Baird*, 908 P.2d 689 (1995), the Court will allow Dr. Holland to testify regarding her expert opinion in this matter which may be based, in part, upon the audio recordings.

DATED this 5th day of January, 2016.

DISTRICT COURT JUDGE
LINDA MARQUIS

LINDA MARQUIS
DISTRICT JUDGE

FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

DOCKETING STATEMENT ATTACHMENT 28

REGISTER OF ACTIONS

CASE NO. D-10-424830-Z

In the Matter of the Joint Petition for Divorce of: Sean R Abid and Lyudmyla A Abid, Petitioners. §

Case Type:	**Divorce - Joint Petition**
Subtype:	**Joint Petition Subject Minor(s)**
Date Filed:	**02/04/2010**
Location:	**Department B**
Cross-Reference Case Number:	**D424830**
Supreme Court No.:	**69995**

PARTY INFORMATION

Petitioner	**Abid, Lyudmyla A** 2167 Montana Pine DR Henderson, NV 89052		**Lead Attorneys** **Radford J Smith, ESQ** *Retained* 702-990-6448(W)
Petitioner	**Abid, Sean R** 2203 Alanhurst DR Henderson, NV 89052	Male 6' 5", 230 lbs	**John D. Jones** *Retained* 702-869-8801(W)
Subject Minor	**Abid, Aleksandr Anton**		

EVENTS & ORDERS OF THE COURT

01/11/2016 **Motion in Limine** (9:00 AM) (Judicial Officer Marquis, Linda)
Motion in Limine to Exclude Recording Plaintiff Surreptiously Obtained Outside Courtroom on November 18, 2015, Sanctions and Attorney's Fees

Minutes
01/11/2016 9:00 AM
- MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON November 18, 205, SANCTIONS AND ATTORNEY'S FEE. Minutes for Motion in Limine minutes in the Non- Jury Trial

01/11/2016 9:00 AM

02/10/2016 9:30 AM

Parties Present
Return to Register of Actions

DOCKETING STATEMENT ATTACHMENT 29

REGISTER OF ACTIONS

CASE NO. D-10-424830-Z

In the Matter of the Joint Petition for Divorce of: Sean R Abid and Lyudmyla A Abid, Petitioners. §§§§§§§

Case Type:	**Divorce - Joint Petition**
Subtype:	**Joint Petition Subject Minor(s)**
Date Filed:	**02/04/2010**
Location:	**Department B**
Cross-Reference Case Number:	**D424830**

PARTY INFORMATION

Petitioner	**Abid, Lyudmyla A** 2167 Montana Pine DR Henderson, NV 89052		**Lead Attorneys** **Radford J Smith, ESQ** *Retained* 702-990-6448(W)
Petitioner	**Abid, Sean R** 2203 Alanhurst DR Henderson, NV 89052	Male 6' 5", 230 lbs	**John D. Jones** *Retained* 702-869-8801(W)
Subject Minor	**Abid, Aleksandr Anton**		

EVENTS & ORDERS OF THE COURT

01/25/2016 **Non-Jury Trial** (9:00 AM) (Judicial Officer Marquis, Linda)

Minutes

01/25/2016 9:00 AM

- Argument and discussion regarding Dr. Holland's testimony and report. Matter trailed to allow the Court to obtain its copy of Dr. Holland's letter dated 6/5/15 and report dated 6/22/15. Matter recalled with all present as before. Mr. Smith moved to exclude Dr. Holland's report. COURT ORDERED, Mr. Smith's oral motion to exclude Dr. Holland's report is DENIED. Testimony and exhibits continued (see worksheet). Mr. Smith moved the Court for a directed denial of Plaintiff's motion to change custody. COURT FURTHER ORDERED, Mr. Smith's request is DENIED. Further testimony and exhibits presented (see worksheet). Closing arguments by counsel. COURT FURTHER ORDERED, matter taken UNDER ADVISEMENT. Court will issue a written decision.

Parties Present
Return to Register of Actions

DOCKETING STATEMENT ATTACHMENT 30

Electronically Filed
01/06/2016 11:53:17 AM

CLERK OF THE COURT

OPPC
BLACK & LOBELLO
John D. Jones
Nevada State Bar No. 6699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
702-869-8801
Fax: 702-869-2669
Email Address: jjones@blacklobellolaw.com
Attorneys for Plaintiff,
SEAN R. ABID

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

SEAN R. ABID, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B **Date of Hearing: February 10, 2016** **Time of Hearing: 9:30 a.m.**

NOTICE: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.

OPPOSITION OF PLAINTIFF, SEAN R. ABID, TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTITIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2016, SANCTIONS AND ATTORNEY'S FEES
AND
COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS

COMES NOW, Plaintiff, SEAN R. ABID ("Sean"), by and through his attorneys of record, John D. Jones and the law firm of BLACK & LOBELLO, and hereby files his OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTITIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER

18, 2016, SANCTIONS AND ATTORNEY'S FEES AND COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS .

DATED this 6th day of January, 2016.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
702-869-8801
Attorneys for Plaintiff,
SEAN R. ABID

NOTICE OF COUNTERMOTION

TO: LYUDMYLA A. ABID, Defendant, and

TO: RADFORD J. SMITH, ESQ., Counsel for Defendant:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS, on for hearing before the above-entitled Court on the **10th day of February, 2016, at 9:30 a.m.** of said day, or as soon thereafter as counsel can be heard in Department B.

DATED this 6th day of January, 2016.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
702-869-8801
Attorneys for Plaintiff,
SEAN R. ABID

I. INTRODUCTION

As with her legal analysis of the recordings of the reprehensible statements made by Lyuda to Sasha, Lyuda once again ignores the clear letter of the law in her attempt to preclude

BLACK & LOBELLO
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
702-869-8801 FAX: 702-869-2669

this Court from considering the overwhelming evidence of Lyuda being coached to perjure herself by her husband.

Lyuda, once again, takes the position that it can't possibly be appropriate or legal without actually considering the law which is directly on point on this issue. From her analysis of the spousal privilege to her lack of analysis of the issue of an objectively reasonable expectation of privacy (or lack thereof), Lyuda's motion is simply put, legally wrong.

More importantly, at what point will Lyuda actually be honest with this Court. This Court is charged with protecting Sasha's best interests. Lyuda has consistently acted contrary to those interests and is more interested now in trying to cover it up than she is in what is best for her son.

Set forth herein is a much more detailed analysis of the statutory and case law on the issues raised by Lyuda which will lead the Court to conclude not only that Lyuda's motion should be denied, but the tape should be admitted and Sean should be awarded his fees.

II. FACTS

On November 18th, Sean and his wife Angie arrived at Family Court at approximately 12:30 pm. As they walked down the hallway in full view of every other person in the hallway, they saw Lyuda and her husband sitting outside of Courtroom 5. Given the contentious nature of this case, they chose not to pass them and sat on the Courtroom 4 side of the balcony door. As Sean and Angie sat there, they began to hear a conversation coming from down the hallway. When they realized it was Lyuda and Ricky talking at an elevated and sometimes agitated level, they turned on their voice memo app on Angie's phone and began to take notes. Those notes were provided to Lyuda's counsel via supplemental disclosure of recorded recollection on November 19, 2015.

After the issue was raised and after Ricky threatened Sean's life in the hallway at approximately 4:05 p.m. on the 18th (as proven by the video recording of the hallway) and after the hearing concluded, Sean attempted to listen to the recording. Initially he believed that the recording had not captured the hallway conversation. Wanting to be sure that the recorded recollection was accurate, Sean later began listening to the audio file at higher volumes and on

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10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
702-869-8801 FAX: 702-869-2669

different devices. He was finally able to make out some of the actual conversation. Some of the conversation that was audible in the hallway and recorded in their notes was not audible on the audio recording. But some was and confirms the accuracy of the recorded recollection.

Even though the tape itself is admissible (as set forth hereinafter), the primary purpose of providing the tape was to ensure that any argument that the recorded recollection was fabricated (Lyuda's denial of the nature and content of her conversation with Ricky) would be defeated. Sean knew of no other way to ensure that Ricky or Lyuda's denial of the truth (Lyuda's modus operandi) would fail.

III. LEGAL ANALYSIS

SPOUSAL PRIVILEGE

Lyuda initially alleges that her conversation with her husband is privileged. She cites NRS 49.295 but fails to provide any applicable case law or analysis.

The privilege prevents Sean's attorney from asking either Lyuda or Ricky what they said to the other. It does not prevent a third party who has heard what either of them said to another from testifying about what was heard. The privilege can only be asserted by the spouse to preclude his or her spouse from revealing communications. It cannot be asserted against a third party witness. What is sad is that Lyuda's attorney knows this. Fortunately for Sasha, this Court knows it.

Simply a review of the notes of decisions printed after NRS 49.295 should have informed Lyuda that there was no legal merit to her assertion. The following notes prove her position to be completely frivolous and worthy of sanctions:

> Letters from defendant, who was subsequently convicted of murder, written to his wife before trial and not folded, sealed in envelope or otherwise arranged to suggest confidentiality were not privileged as being between husband and wife and were admissible at his trial for murder. N.R.S. 48.040. Guyette v. State, 1968, 438 P.2d 244, 84 Nev. 160. Privileged Communications And Confidentiality.70(2) Privileged Communications And Confidentiality 80
>
> Phrase "any communication" in statute prohibiting the examination of a husband or wife as a witness as to any communication made by one to the other during marriage means a confidential communication. N.R.S.

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49.295. Foss v. State, 1976, 547 P.2d 688, 92 Nev. 163. Privileged Communications And Confidentiality 80

In prosecution for, under color of law, depriving a person of his constitutional rights, trial court did not err in permitting defendant's wife to testify that she heard defendant, who was a chief of police, say to an alleged victim, who had been arrested by the police, that he was 'lying,' and 'come on, we will go for a ride' in view of fact such statements were not confidential, but were made in presence of a third person. 18 U.S.C.A. 242. Pool v. U. S., 1958, 260 F.2d 57.Privileged Communications And Confidentiality 81

Spousal privilege cannot be applied to protect communications disclosed by strangers. N.R.S. 49.295, subd. 1. Deutscher v. State, 1979, 601 P.2d 407, 95 Nev. 669, habeas corpus conditionally granted 884 F.2d 1152, vacated 111 S.Ct. 1678, 500 U.S. 901, 114 L.Ed.2d 73, on remand 946 F.2d 1443. Privileged Communications And Confidentiality 81

Statute prohibiting examination of husband or wife as witness as to any communication made by one to the other during marriage did not prevent wife from testifying to statements made by husband during marriage in presence of third persons. N.R.S. 49.295. Foss v. State, 1976, 547 P.2d 688, 92 Nev. 163. Privileged Communications And Confidentiality 81

In prosecution of defendant for insurance fraud and obtaining money by false pretenses, hearsay rule was not violated by admission of police officer's testimony that defendant's wife made allegations of physical abuse, as testimony was admissible to address attacks on wife's credibility. N.R.S. 51.035. Collins v. State, 1997, 946 P.2d 1055, 113 Nev. 1177, rehearing denied. Witnesses 414(2)

Defendant's wife's testimony that defendant physically abused her was relevant to her credibility, which had been attacked, and, thus, was admissible in prosecution of defendant for insurance fraud and obtaining money by false pretenses. Collins v. State, 1997, 946 P.2d 1055, 113 Nev. 1177, rehearing denied. Witnesses 414(1)

The full text of these cases are provided for the convenience of the Court as **Exhibit "1"** hereto.

NRS 200.650

The one thing that Lyuda ignores about this statute is the single most important word; PRIVATE.

A conversation in the hallway of Family Court by all standards of common sense is not private. The conversation was recorded by video cameras and could be heard by anyone walking

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by or sitting nearby. The cases cited above, particularly the Foss case, make it clear that the conversation that was recorded on November 18th between Lyuda and Ricky was not a private conversation.

Basically, the question regarding the word private in NRS 200.650 is whether Lyuda had an objectively reasonable expectation of privacy in the hallway of the Family Court. It is important to note that had Lyuda and Ricky intended their conversation to be private they would have only had to walk a few feet to the balcony of the second floor of Family Court to ensure they would not be heard. The weather that day was cloudy, between 55 and 65 degrees, no rain and winds of only 3 mph. There was no reason, if they wanted their conversation to be private, for them to not simply go outside.

While common sense dictates the results in this instance, this Court is fortunate to have nearly identical facts present in a Nevada case. In Kemp v. Block, 607 F.Supp. 1262 NV. 1985, the US District Court addressed nearly identical facts in which a third party secretly recorded the conversation between two other parties in a public place. The Kemp Court addressed the same allegations as Lyuda has made in her motion as follows:

> ***Invasion of Privacy***
>
> The aspect of privacy here involved is the plaintiff's interest in avoiding disclosure of personal matters, that is, his ability to determine for himself when, how and to what extent information about him is communicated to others. *See Crain v. Krehbiel,* 443 F.Supp. 202, 207 (N.D.Cal.1977); *Thorne v. City of El Segundo,* 726 F.2d 459, 468 (9th Cir.1983). The determination of whether he had a legitimate expectation of privacy involves two lines of inquiry: First, by his conduct, the plaintiff must have exhibited an actual (subjective) expectation of privacy, i.e., he must have shown that he sought to preserve his conversation with Mr. Roy as private. Second, it must be decided whether the plaintiff's expectation, viewed objectively, was justifiable under the circumstances. Put another way, his expectation of privacy must have been one that society is prepared to recognize as reasonable. *See United States v. Nadler,* 698 F.2d 995, 999 (9th Cir.1983); *United States v. Fisch,* 474 F.2d 1071, 1076–1077 (9th Cir.1973); *Ponce v. Craven,* 409 F.2d 621, 625 (9th Cir.1969).
>
> The subjective expectation of privacy may be tested by any outward manifestations by the plaintiff that he expected his discussion with Mr. Roy in the instrument shop to be free from eavesdroppers. A comparison of what precautions he took to safeguard his privacy interest with the

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precautions he might reasonably have taken, is appropriate. *See Dow Chemical Co. v. United States,* 749 F.2d 307, 312–313 (6th Cir.1984). Nothing was done by the plaintiff in this regard. It seems quite clear that both he and Mr. Roy argued in loud voices. The defendant and the other coworkers who overheard the argument were in a place they had a right to be, namely the instrument shop. Thus, the plaintiff may be deemed to have knowingly exposed the discussion to them. *See Ponce v. Craven, supra* at 625; *United States v. Fisch, supra* at 1077; *United States v. Mankani,* 738 F.2d 538, 543 (2nd Cir.1984); *United States v. Llanes,* 398 F.2d 880, 884 (2nd Cir.1968). The relatively small size of the instrument shop and its lack of interior walls further indicate that an expectation of privacy within it would not be objectively reasonable. *See Dow Chemical Co. v. United States, supra* at 313. Nor did the plaintiff have a right to exclude other persons from entering the shop while the argument ensued. *See United States v. Nadler, supra* at 999. This Court finds that the plaintiff knew that other persons could overhear. He, therefore, had no reasonable expectation of privacy. *United States v. Hall,* 488 F.2d 193, 198 (9th Cir.1973); *see also United States v. Martinez-Miramontes,* 494 F.2d 808, 810 (9th Cir.1974).

Unlawful Interception of Oral Communication

The reasonable expectation of privacy requirement discussed above is equally applicable to the alleged violation by the defendant of 18 U.S.C. § 2510 et seq. The essential elements of the offense are: (1) a willful interception of an oral communication by a device; (2) the communication must have been uttered by a person who exhibited an expectation that it would not be intercepted; and (3) the communication must have been uttered under circumstances that justified the expectation. *United States v. Carroll,* 337 F.Supp. 1260, 1262 (D.D.C.1971).

One of the tests used is to ascertain whether the defendant overheard the communication with the naked ear under uncontrived circumstances. *Id.* at 1263–1264; *see also Holman v. Central Arkansas Broadcasting Co.,* 610 F.2d 542, 544–545 (8th Cir.1979). If the answer is affirmative, as here, there was no justifiable expectation of privacy. The communication is protected only if the speaker had a subjective expectation of privacy that was objectively reasonable. *United States v. McIntyre,* 582 F.2d 1221, 1223 (9th Cir.1978); *Willamette Subscription Television v. Cawood,* 580 F.Supp. 1164, 1169 (D.Ore.1984); *United States v. Rose,*669 F.2d 23, 25 (1st Cir.1982). The legislative history of § 2510 notes that an expectation that an oral communication will not be intercepted is unwarranted where the speaker talks too loudly. 1968 U.S.Code Cong. & Ad.News 2112, 2178.

While it is true that this case interprets the Federal statutory counterpart to NRS 200.650, the language and intent of both statutes are identical. Moreover, Kemp v. Block was cited by the

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Nevada Supreme Court in PETA v Bobby Berosini, Ltd. as containing the correct analysis related to the expectation of privacy and privacy itself.

In PETA v. Bobby Berosini, Ltd., 895 P.2d. 1269 (1995), there is a lengthy discussion of the expectation of privacy as it pertains to surreptitiously obtained recordings. In PETA, a stage dancer used a video camera to record the actions of an animal trainer in an enclosed curtained staging area prior to the animals and trainer appearing on stage. The animal trainer sued based upon among other claims a theory of invasion of privacy. The Nevada Supreme Court citing Kemp held that Berosini did not have a reasonable expectation of privacy even in his curtained-off staging area. The stage dancer secretly videotaped the animal trainer abusing his animals. The dancer edited out all dead time on the videotape and published the video. The animal trainer sued for, among other causes of action, invasion of privacy. Both the District Court and Supreme Court accepted into evidence and viewed the edited videotape. After a lengthy discussion of the concept of privacy and private conduct, the Court found no cause of action to lie for invasion/intrusion into the animal trainer's privacy.

The Kemp and PETA (partially overruled on other grounds) cases are attached for the Court's convenience as **Exhibit "2."**

Even cursory research into this area of the law would have revealed that there could be no reasonable expectation of privacy in the Family Court hallway. It is for this reason that the current motion filed by Lyudmila must be determined by the Court to be a frivolous attempt to hide her and Ricky's plans for her to perjure herself in front of the Court. It is time for the Court to recognize Lyuda's bad faith throughout these proceedings.

PUBLIC POLICY.

Lyuda has often argued public policy in support of her attempts to keep the truth from coming out. The law has defeated her arguments at every turn. The real public policy question is whether, in a child custody case that Lyuda has argued was all about her husband Ricky, an audio of Ricky instructing Lyuda to perjure herself and in which she even further impeaches her own credibility should ever be ignored by the Court. Perjury should always be investigated. Even in Family Court.

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apparent upscale lifestyle.

Cases that cite this headnote

Attorneys and Law Firms

*465 Ian F. Gaston of Gaston & Gaston, Mobile, for appellant.

Oliver J. Latour, Jr., Foley, for appellee.

Opinion

PITTMAN, Judge.

This is an appeal from a judgment in a postdivorce proceeding in the Baldwin Circuit Court.

The parties were divorced in the State of Washington on January 8, 1992. Jodie C. Larson ("the mother"), who now resides in Baldwin County, was granted permanent custody of the couple's two minor children. Michael A. Stinson ("the father") presently resides in California.

In November 1996, the Baldwin Circuit Court ("the trial court") found that the father was in debt to the mother in the amount of $9,255.08. On June 1, 2001, the trial court entered a judgment determining that, as of May 25, 2001, the father was $20,000 in arrears in paying child support, day-care expenses, medical bills, and marital debts as required in the parties' divorce judgment.

In the years following the divorce, both parties have filed numerous motions and countermotions. In an attempt to curtail the fighting between the parties and its negative impact upon their minor children, the trial court, in its June 2001 judgment, directed the parties not to speak in a negative fashion about each other. On June 6, 2002, the trial court ordered "without exception that no conversations shall take place with the minor children concerning custody, proceedings, court hearing, child support issues, visitation issues, the payment of medical bills for the children, or any other subject concerning legal issues surrounding these children."

During the summer and fall of 2002, the mother began to believe that the father was violating the court's order during telephone conversations between the father and the parties' oldest child. The mother subsequently began recording those telephone conversations. She also downloaded an electronic-mail message that the father had sent to the oldest child. Based in part upon the content of the telephone conversations and the electronic-mail message, the mother became convinced that the father was trying to undermine her authority as the custodial parent. In May 2002, the mother filed motions to both temporarily and permanently terminate the children's visitation with the father. On June 4, 2002, the father filed his response to the mother's motions to terminate visitation, a motion seeking rule nisi, and a motion to modify custody. On July 10, 2002, the father filed a motion for contempt against the mother and sought an award of attorney fees. On February 27, 2003, the mother filed a motion for contempt against the father for his alleged violation of the court's June 1, 2001, judgment and its June 6, 2002, order; a motion to dismiss the father's petition to modify custody; and a motion seeking a recalculation of child support. On March 5, 2003, the father filed an motion to compel visitation instanter and a motion for an instanter psychological evaluation for the oldest child; the motion for a psychological evaluation was granted on April 11, 2003.

The trial court held an ore tenus hearing on May 12, 2003. The court heard testimony from the oldest child, the mother, the father, the father's current wife, the *466 maternal grandmother, a child therapist, and the oldest child's school headmaster. The trial court also admitted into evidence five audiotapes, an electronic-mail message, psychological reports, and various other exhibits. On June 4, 2003, the trial court entered its judgment. Based upon its findings of fact, the trial court determined (1) that the custody of the parties' minor children would remain with the mother; (2) that the father's monthly child support payment of $257 would not be increased; (3) that the father had incurred a child support arrearage of $13,000, and was thereby ordered to pay an additional $250 per month toward that arrearage; and (4) that, upon the trial court's review of audiotape recordings of conversations between the father and his oldest child, the father was in contempt for violating a previous court order and was ordered to serve 5 days in jail for each determined violation, for a total of 20 days.

The father appeals, raising four issues and several subissues that may be properly restated as presenting the following two questions for review: (1) whether the trial court erred in holding that the audiotape recordings of telephone conversations between the oldest child and the father were properly admissible into evidence; and (2) whether the trial court abused its discretion by increasing the father's arrearage-payment schedule.

The father first argues that the trial court erred when it

determined that five previously recorded telephone conversations could be admitted into evidence. Specifically, the father contends (1) that the recordings violated state and federal wiretapping statutes; (2) that the mother's vicarious consent to the recording of the conversations was unlawful; and (3) that the proper predicate was not made before the trial court admitted the recordings into evidence.

The father argues that the tape recordings of telephone conversations between him and the oldest child violated the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., and Ala.Code 1975, §§ 13A-11-30 and 13A-11-31(a). We note that the facts as to this specific issue are not in dispute. Therefore, the trial court's ruling carries no presumption of correctness, and this court's review is de novo. *Ex parte Graham,* 702 So.2d 1215, 1221 (Ala.1997).

The Electronic Communications Privacy Act of 1986, part of Title III of the Omnibus Crime Control and Safe Streets Act,[1] prohibits the interception of, and introduction into evidence of, telephone communications unless one party to the communications gives consent or a court order is obtained that authorizes the interception and recording of the telephone conversations. 18 U.S.C. §§ 2511 and 2515. However, the Act also contains an extension-telephone exception set out in 18 U.S.C. § 2510. A majority of the federal courts have held that 18 U.S.C. § 2510(5)(a)(i) exempts a parent's use of an extension telephone to audit a minor child's telephone conversation. *E.g., Janecka v. Franklin,* 843 F.2d 110, 111 (2d Cir.1988); *Newcomb v. Ingle,* 944 F.2d 1534, 1536 (10th Cir.1991); *Scheib v. Grant,* 22 F.3d 149, 154 (7th Cir.1994). Those courts have also held that the exemption applies to a custodial parent's use of an extension telephone ***467** to record a child's telephone conversation with the noncustodial parent. The rationale behind these holdings is that a parent's recording of a telephone conversation from an extension telephone is a "distinction without a difference" from the parent's listening to a telephone conversation on an extension telephone. *Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir.1977).

Moreover, some federal courts have also found that the federal statute's one-party consent requirement is satisfied in circumstances whereby consent comes from the parent vicariously on behalf of his or her minor child. *E.g., Pollock v. Pollock,* 154 F.3d 601 (6th Cir.1998); *Thompson v. Dulaney,* 838 F.Supp. 1535, 1544 (D.Utah 1993). In *Pollock,* the court held that the secret recording of a 14-year-old girl's telephone conversations with the noncustodial parent by a custodial parent within the custodial parent's home was permissible if the consenting parent demonstrated "a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child." 154 F.3d at 610. The court stressed that it would be "problematic" for the defense to be limited to children of a certain age "as not all children develop emotionally and intellectually on the same timetable." *Id.*

[1] After *Pollock,* several other federal district and state courts have considered the question, and most have ruled that the custodial parent properly consented vicariously to the recording of their minor child's conversations when the recording was motivated by a genuine concern for the child's welfare. *E.g., Wagner v. Wagner,* 64 F.Supp.2d 895, 896 (D.Minn.1999); *March v. Levine,* 136 F.Supp.2d 831, 849 (M.D.Tenn.2000), aff'd, 249 F.3d 462 (6th Cir.2001); *see also State v. Morrison,* 203 Ariz. 489, 491, 56 P.3d 63, 65 (Ct.App.2002). In light of the fact that the minor child was in the mother's custody at the time of the recording and the recording was accomplished through the use of an extension telephone, we conclude that the recording of the minor child's telephone conversations was proper under the provisions of the Electronic Communications Privacy Act of 1986 as that statute has been interpreted by caselaw. Consequently, we find no violation of 18 U.S.C. § 2510 et seq.

[2] The father also contends that the mother's recording of the minor child's telephone conversations violated Ala.Code 1975, § 13A-11-31(a), which prohibits the use of any device to "eavesdrop" upon a private conversation. As under the federal Electronic Communications Privacy Act of 1986, consent of one or more of the parties is a defense to a charge of violating § 13A-11-31(a), Ala.Code 1975. Commentary to § 13A-11-31; *Alonzo v. State ex rel. Booth,* 283 Ala. 607, 219 So.2d 858, 869 (1969).

In a case of first impression, this court directly addressed the issue of "vicarious consent" in *Silas v. Silas,* 680 So.2d 368, 370 (Ala.Civ.App.1996). In that case, we held that under § 13A-11-31(a), a parent may give "vicarious consent" on behalf of a minor child to the recording of telephone conversations with the other parent where that parent has a good-faith, objectively reasonable basis for believing that the minor child is being "abused, threatened or intimidated" by the other parent. *Silas,* 680 So.2d at 372.

The father asserts that our holding in *Silas* is not applicable because the minor child in *Silas* was incapable of giving consent. Conversely, the father says, the parties' oldest child was capable of giving consent, and the oldest child testified that he believed that the recording of his

telephone conversations amounted to an invasion of privacy. The father further contends *468 that no evidence was presented to the trial court that showed the child was being "abused, threatened, or intimidated." Thus, the father argues that the mother failed to meet the narrow standards espoused in *Silas.*

In *Silas,* the child was 7 years old; the parties' oldest child in this case was 15 years old at the time that the recording began. However, that is a distinction without legal significance; under Alabama law, a person, who is under the age of 19 years, has not yet reached the age of majority so as to have the right to contract or otherwise give legally binding consent. *See* § 26-1-1, Ala.Code 1975. Moreover, notwithstanding the age of the child, a minor child's own ability to consent should not be viewed as "mutually exclusive" of a custodial parent's ability to "vicariously consent" on the child's behalf. *Pollock,* 154 F.3d at 608 (citing *Pollock v. Pollock* 975 F.Supp. 974, 978 n. 2 (W.D.Ky.1997)).

A review of the record reveals that no direct evidence was presented to the trial court that indicated the parties' oldest child was being specifically "abused" or "threatened" by his father, the noncustodial parent. However, we cannot agree with the father that no evidence indicated that the parties' oldest child was not being "intimidated." "Intimidate" is defined in *Merriam-Webster's Collegiate Dictionary* as "to make timid or fearful" or "to compel or deter." *Merriam-Webster's Collegiate Dictionary* at 656 (11th ed.2003). In this case, the mother testified that she believed the father was manipulating the oldest child and undermining her authority.

> "Q. Tell me why you felt it necessary to begin recording telephone conversations between [the father] and his son?
>
> "A. Because of [the child's] behavior, actions and words that he said while he was talking to his father. He would become very upset and he would yell at me. He would tell me he didn't have to listen to me. One particular phone conversation, and this is one that kind of spurred me that I need to find out what he is saying to him, he said, my dad pays you three thousand dollars a month child support, so I should get to talk to him as late as I want."

The mother also testified that the parties' oldest child had been exhibiting significant behavioral problems, and that she had had to file a petition to have him declared a child in need of supervision. The mother testified that the child had tested positive for marijuana; that he had taken her car without her permission and gone "joy-riding" one night; and that his behavior had become so disruptive on one occasion that the police had been telephoned to come out to the home. Testimony also showed that the child had gotten into trouble for "egging" a teacher's house and that his grades were spiraling downward. The following electronic-mail message from the father, which was intercepted by the child's mother and admitted into evidence, shows manipulation on the part of the father over the child:

> "Oh, word of advice, I would never tell you to stop going to school but if you were to tell everyone that you are old enough to stop going as of this coming spring break and told them so now I bet it would have an impact.
>
> "I'd just stop going period until she signs a piece of paper that says she will let you and your brother attend your dad's wedding. [I]f you do that I'll alert the lawyer that there's a problem in the household but you have to stick to it and if they let you go to [M]aui and our wedding then you need to go back to school like nothing happened.
>
> "It's called civil disobedience and it's been known to work."

*469 In light of evidence concerning the child's delinquent behavior and the written and oral communications directed to the child by the father, we conclude that the trial court could properly have determined that the mother had a good-faith basis to believe that the minor child was being "intimidated" by the father; therefore, it was permissible under § 13A-11-31(a), Ala.Code 1975, as interpreted in *Silas,* for the mother to "vicariously consent" on behalf of the child to the recording of his telephone conversations.

In addition, the father also argues that even if the mother could "vicariously consent" to the tape recordings of the telephone conversations between the father and the parties' oldest child, he contends that the mother failed to lay a proper predicate for the admission of the recordings.

[3] [4] [5] Our Supreme Court has recognized two distinct theories that are to be used in determining whether a proper foundation has been laid for the admissibility of photographs and electronic recordings: the "pictorial communication" theory and the "silent witness" theory. *Ex parte Fuller,* 620 So.2d 675, 677 (Ala.1993). Under the "pictorial communication" theory, an individual who was present at the time the recording was made can authenticate that recording by stating that it is consistent with that person's recollection. 620 So.2d at 678. "If there is *no* qualified and competent witness who can testify that

the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question, then the 'silent witness' foundation must be laid." *Id.* In civil cases, under the "silent witness" theory, a foundation is laid by offering evidence as to the following elements: (1) a showing that the device that produced the item was capable of recording what the witness would have seen or heard had the witness been present at the event recorded; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that no changes, additions, or deletions were made; (5) a showing of the manner in which the item was preserved; and (6) an identification of the speakers. 620 So.2d at 677. Under either the "silent witness" theory or the "pictorial communication" theory for laying the foundation for admission of a sound recording, the trial court should listen to the recording in camera and should allow the party opposing admission to thoroughly cross-examine the witness. *Id.* at 679; *see also* 1 Charles W. Gamble, *McElroy's Alabama Evidence* § 123.02 (5th ed.1996).

[6] Our review of the record reveals that the mother produced, in advance, copies of the audiotapes to the father for his listening, examination, inspection, and review. The mother testified that she had recorded the tapes on a device she had bought from a Radio Shack retailer. She testified that she knew how the recording device worked. She denied splicing or falsifying the tape recordings in any way. She testified that she recognized the voices of the father and the parties oldest child on the recorded conversations. In addition, the trial court reviewed the tape recordings in camera and the father's attorney was allowed to thoroughly cross-examine the mother regarding the tape recordings. Accordingly, we conclude that the mother's legal counsel did establish a sufficient predicate for the admission of the audiotape recordings into evidence under the "silent witness" theory set forth in *Fuller*.

[7] Moreover, even if the tape recordings had been improperly admitted into evidence, there was sufficient evidence from which the trial court could have *470 deemed the father to be in contempt. The father admitted that he had spoken with the children about the court proceedings. In addition, the parties' oldest child also testified that the father had spoken with him about "court stuff," although we note that the child stated that the mother had also spoken with him about court proceedings.

[8] [9] The determination of whether a party is in contempt of court rests entirely within the sound discretion of the trial court, and, " 'absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm.' " *Gordon v. Gordon,* 804 So.2d 241, 243 (Ala.Civ.App.2001) (quoting *Stack v. Stack,* 646 So.2d 51, 56 (Ala.Civ.App.1994)). In light of the audiotape evidence, as well as other evidence adduced at trial, we find no abuse of discretion or palpable error on the part of the trial court in this regard.

The father next argues that the trial court abused its discretion when it increased his child support arrearage payments. Specifically, the father contends that no request for modification had been made, that the issue had not been tried by consent, and that no evidence was presented to support the modification.

[10] Our standard of review as to that issue is highly deferential. "Matters related to child support, including subsequent modifications of a child-support order, rest soundly within the trial court's discretion, and will not be disturbed on appeal absent a showing that the ruling is not supported by the evidence and thus is plainly and palpably wrong." *Bowen v. Bowen,* 817 So.2d 717, 718 (Ala.Civ.App.2001).

[11] The record reflects that the mother filed a motion for a child-support recalculation in February 2003. That motion remained pending before the trial court at the time of the ore tenus hearing on May 12, 2003. We note that the trial court has a duty to grant whatever relief is appropriate regardless of whether the party specifically demanded such relief in the party's pleadings. Rule 54(c), Ala.R. Civ. P.; *Johnson v. City of Mobile,* 475 So.2d 517, 519 (Ala.1985).

[12] [13] "The trial court has discretion to set a reasonable arrearage payment schedule commensurate with the parent's ability to pay." *Henderson v. Henderson,* 680 So.2d 373, 375 (Ala.Civ.App.1996). Indeed, this court has held that in cases where a substantial arrearage is owed, the trial court may abuse its discretion if it fails to order a payment toward that arrearage that is large enough to satisfy the debt within a reasonable period of time. *Id.* The father had previously been ordered to pay a sum of $100 per month toward the arrearage. At that rate, it would have taken the father more than a decade to discharge the $13,000 arrearage. The evidence at trial established that the father was disabled, although only partially (i.e., 5%). Even though the trial court did not impute to the father a larger amount of income than he claimed (i.e., $700 per year working for his wife), the trial court did take notice of his apparent upscale lifestyle, noting in its judgment that the father "can afford the 'extras' in life." Testimony

at the hearing also revealed that the father had taken several long plane trips, had wrestled with his boys, was constructing an addition to his home, and had designed award-winning Internet Web sites. Based upon the witnesses' testimony and the evidence presented, the trial court could have concluded that the father had vastly underestimated his income and his ability to earn a living to support the parties' two children. Consequently, we conclude that the *471 trial court did not abuse its discretion by increasing the father's arrearage payment to $250 per month. Based upon the foregoing facts and authorities, the trial court's judgment is due to be affirmed. The mother's request for an award of attorney fees on appeal is granted in the amount of $1,500.

AFFIRMED.

YATES, P.J., and CRAWLEY and THOMPSON, JJ., concur.

MURDOCK, J., concurs in the result, without writing.

Footnotes

1 Title III was enacted in 1968 to protect the privacy of wire and oral communications and to regulate the conditions under which interceptions of such communications would be allowed. The original act prohibited only the intentional interception of wire or oral communications. As other methods of communication became more commonplace, Congress adopted the Electronic Communications and Privacy Act of 1986 to prohibit the intentional interception of electronic communications.

End of Document

Exhibit 7

Exhibit 7

64 F.Supp.2d 895
United States District Court,
D. Minnesota.

Lesa Marie WAGNER and Sandra M. Wagner,
Plaintiffs,
v.
Robert Allen WAGNER, Defendant.

No. 98–1704 (DWF/AJB). | Sept. 16, 1999.

Former wife and daughter brought action against former husband, alleging violations of federal and Minnesota wiretapping statutes. Plaintiffs moved for summary judgment. The District Court, Frank, J., held that: (1) guardian may vicariously consent to interception of telephone communication on behalf of his children as long as guardian has good faith, objectively reasonable belief that interception of conversation is necessary for best interest of children in his custody, and (2) genuine issue of material fact precluded summary judgment.

Motion denied.

West Headnotes (2)

[1] **Telecommunications**
⇐Persons Concerned; Consent

Guardian may vicariously consent to interception of telephone communication on behalf of his children, for purposes of determining guardian's liability under federal and Minnesota wiretapping statutes, as long as guardian has good faith, objectively reasonable belief that interception of conversation is necessary for best interest of children in his custody. 18 U.S.C.A. § 2510 et seq.; M.S.A. § 626A.01 et seq.

9 Cases that cite this headnote

[2] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Genuine issue of material fact as to whether father had good faith, objectively reasonable belief that interception and recording of telephone conversations between children and their mother and elder sister was necessary for children's best interests, precluding summary judgment in action brought by mother and sister against father under federal and Minnesota wiretapping statutes. 18 U.S.C.A. § 2510 et seq.; M.S.A. § 626A.01 et seq.

6 Cases that cite this headnote

Attorneys and Law Firms

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Ellen Dresselhuis, Dresselhuis Law Office, New Hope, MN, for defendant.

MEMORANDUM OPINION AND ORDER

FRANK, District Judge.

Introduction

This action arises under the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510–2521, and its Minnesota counterpart, Minn.Stat. § 626A.01, *et seq.* Two lawsuits were commenced and have been consolidated into the present proceeding. Plaintiff Lesa Wagner sued her former husband, Defendant Robert Wagner, for civil damages, alleging that Robert Wagner taped telephone conversations between Lesa Wagner and their two minor children. Plaintiff Sandra Wagner, the emancipated daughter of Robert and Lesa Wagner, also sued her father, alleging that Robert Wagner also taped telephone conversations between Sandra Wagner and the two minor

children.

The matter is currently before the Court on the Plaintiffs' Motion for Summary Judgment. The Plaintiffs assert that, as Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between the Plaintiffs and the two minor children, there is no issue of material fact and the Plaintiffs are entitled to judgment as a matter of law. Defendant Robert Wagner asserts that he vicariously consented to the interception and *896 recording of the telephone conversations on behalf of the two minor children in his custody.

[1] [2] The Court, addressing an issue that has not yet been resolved by the Eighth Circuit, adopts the vicarious consent doctrine, finding that as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children in his or her custody, the guardian may vicariously consent to the interception on behalf of the children. As there is a factual issue as to whether Defendant Robert Wagner had a good faith, objectively reasonable belief that the interception and recording of the Plaintiffs' telephone conversations with the children was necessary for the children's best interests, the Plaintiffs' Motion for Summary Judgment is denied.

Background

The facts are not in dispute. Robert and Lesa Wagner were married from 1977 until 1998 and have four minor children: J.W. (now 17), C.W. (now 13), and twins A.W. and T.W. (now 11). Their oldest child, Plaintiff Sandra Wagner, had been emancipated prior to the dissolution proceeding.

The dissolution proceeding came on for trial before the Honorable Mary L. Davidson in Hennepin County District Court. In its Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, entered on January 15, 1998, the court made the following findings regarding the determination of custody:

> 1. *Wishes of parents.* .... Respondent [Lesa Wagner] has not shown that she is willing to cooperate with Petitioner [Robert Wagner] in setting schedules for the children. Petitioner's [Robert Wagner's] proposal would allow the children to continue to have both parents substantially participate in their lives.

2. *Preference of children.* The children in this matter are old enough to express their preference for one parent or the other as their custodial parent. However, the children in this matter have been pressured, manipulated and influenced by both parents in regard to their preference for a custodial parent....

....

4. *Intimacy between parent and child.* .... Based on both custody evaluations the children seem to be more intimately attached to the Respondent [Lesa Wagner]. As one evaluator explained, this may be because she is less of a disciplinarian, and there is less structure in her home.... Respondent [Lesa Wagner] is unwilling or unable to see that the children are in need of counseling at this time.

5. *Interactions and interrelationship of children and parents, siblings and any other person.* .... Petitioner [Robert Wagner] has made it clear that he wants Respondent [Lesa Wagner] to be involved in the lives of the children and will encourage a relationship....

....

8. *Mental and physical health of all individuals involved.* The custody evaluator from Hennepin County found that, "[b]eneath the surface of the well-behaved and polite children is a family in crisis", and that, "[t]here is a great deal of emotional strain in the relationships between the parents and the children" ....

....

12. *Disposition of each parent to encourage and permit frequent and continuing contact by the other parent with children.* Testimony was heard regarding several incidents where Respondent [Lesa Wagner] undermined Petitioner's [Robert Wagner's] visitation with the children. She often enticed one or more of the children to stay back with her when they were to have visitation with their father. She has suggested moving out of state permanently, and took the children to Iowa for a period of time *897 without notifying Petitioner [Robert Wagner] of her intentions.

Petitioner [Robert Wagner] suggests that the parties should have close to equal time with the children. There is no evidence that Petitioner [Robert Wagner] has undermined Respondent's [Lesa Wagner's] relationship with the children. Rather, Petitioner [Robert Wagner] has made efforts to ensure that the children will have continued interaction, support and guidance of both parties.

(Def.'s Ex. A, Amended Judgment and Decree, dated January 15, 1998, pp. 3–7.)

The dissolution matter was eventually appealed to the Minnesota Court of Appeals. *Wagner v. Wagner,* 1999 WL 431139 (Minn.Ct.App. June 29, 1999). The Court of Appeals set forth the remaining procedural history of the case as follows:

> [T]he district court initially awarded the parties joint physical custody of all four children. But after hearing the parties' post-trial motions, the district court altered the award to give respondent [Robert Wagner] legal custody of all four children and custody of the twins [A.W. and T.W.], then 9, while appellant [Lesa Wagner] had legal custody of J.W., then 15, and C.W., then 12 Appellant [Lesa Wagner] now seeks sole legal and physical custody of all four children.
>
> The district court acknowledged that split custody is not favored but found it to be in the best interests of these children because (1) appellant [Lesa Wagner] had turned J.W. and C.W. against respondent [Robert Wagner], (2) J.W. and C.W. refused to live with respondent [Robert Wagner], (3) the children assign primarily negative feelings toward one another....

Wagner v. Wagner, 1999 WL 431139 at *1.

The Minnesota Court of Appeals affirmed the district court's rulings. *Wagner v. Wagner,* 1999 WL 431139 at *1.

Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between Plaintiff Lesa Wagner and the twins, and between Plaintiff Sandra Wagner and the twins. It is undisputed that Defendant Robert Wagner used the information obtained in the dissolution proceeding.

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously interfered with his visitation with the two older children in her custody, thereby damaging his ability to maintain a relationship with the children. Defendant Robert Wagner additionally asserts that Plaintiff Lesa Wagner has consistently failed to comply with the court's orders regarding her visitation with the twins:

> Lesa has moved herself and the two older children to Alabama.... Lesa "concealed" the children by keeping her moving actions secretive and not informing me of her whereabouts once she had moved. She never communicated to me in any way that she was leaving to go to Alabama. She never provided her address to me once she did move, and left it to me to find her. Her phone is not listed with the local telephone company there either.
>
> Lesa "took" all the children, including the twins, to Alabama without permission. I specifically gave permission for Lesa to leave with the children, providing she would make suitable provisions for me to have visitation with [J.W. and C.W.] Lesa made no such provision, therefore no permission was granted.
>
> Lesa was allowed an extended visitation with the twins until August 16th at 7:00 p.m. at which time she was to return the children to me at my apartment in Minnesota....
>
> On the 16th at 6:30 p.m. Lesa called to say the kids would not be back at 7:00 p.m. ...
>
> On Monday, Lesa called at 9:30 a.m. to say she couldn't get the children on the flight. She also threatened to go to the local sheriff to have him talk to the children and hear her story because she didn't think she should have to send the children back. She did not call on Tuesday *898 or Wednesday, and there was no answer when I called her.
>
> Given Lesa's dishonesty about the availability of flights and her lack of communication and cooperation regarding keeping her commitments to return the children on the 16th, I decided to drive to Alabama to pick up the children. I have since discovered that, during the time she was to be returning the kids to Minnesota, Lesa took [the twins] to see the elementary school they would go to in Prattville, AL.

(Def.'s Ex. C., Affidavit of Robert Wagner, dated August 26, 1998, ¶ 14 (emphases omitted).)

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously attempted to manipulate the twins' emotions and alienate the children from their father. Robert Wagner alleges that Lesa Wagner "continually is 'coaching' the twins to tell others that they want to live with her." (Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 33.)

Defendant Robert Wagner further asserts that Lesa Wagner participates in conversations between the twins and their sister, Plaintiff Sandra Wagner, and also uses those opportunities to manipulate the twins. Robert Wagner asserts that in a telephone conversation between Plaintiff Sandra Wagner and the twins, Plaintiff Lesa Wagner could be heard in the background coaching Sandra Wagner:

> Then both boys were coached to call 911 if I ever left them alone, even for a few minutes. When the boys asked what would happen? They were told the police would pick them up and they could come live at the house. They were also told to tell the neighbor mother that they want to go live at the house. Furthermore, they were told to tell everybody they meet they want to go live at the (Lesa's) house. At the end of the conversation they were told to "keep this very secret and be sure not to tell dad" ....

(Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 34.)

Discussion

A. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Enterprise Bank v. Magna Bank,* 92 F.3d 743, 747 (8th Cir.1996). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enterprise Bank,* 92 F.3d at 747. However, as the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.' " Fed.R.Civ.P. 1, *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enterprise Bank,* 92 F.3d at 747. The nonmoving party must then demonstrate the existence of specific facts in the record which create a genuine issue for trial. *Krenik v. County of Le Sueur,* 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986); *Krenik,* 47 F.3d at 957.

B. Violation of Wiretapping Statutes

The relevant provisions of the federal wiretapping statute provide as follows:

> 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 *899 intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
>
> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; ...
>
> ....
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of the subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; ...
>
> ....
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C.A. § 2511 (1999).

Recovery of civil damages for violation of the federal wiretapping statute is authorized as follows:

> 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 which engaged in that violation such relief as may be appropriate.

18 U.S.C.A. § 2520(a) (1999).

Minnesota's wiretapping statutes are nearly identical to the federal wiretapping statutes. *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 406 (Minn.Ct.App.1995). Minn.Stat. § 626A.02 similarly provides that any person who intentionally intercepts and discloses any oral communication is subject to civil suit.

C. Vicarious Consent Doctrine

Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability. *Pollock v. Pollock*, 154 F.3d 601, 606 (6th Cir.1998), 18 U.S.C. § 2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C.A. § 2511(2)(d) (1999).

Minn.Stat. § 626A.02, subd. 2(d) contains the same consent exemption.

The Court is now confronted with an issue upon which the Eighth Circuit has not spoken, specifically, whether the exemption permits a custodial parent to "vicariously consent" to the recording of the minor child's telephone conversations.[1]

*900 Although the issue has not been explicitly addressed by the Eighth Circuit, federal courts in other circuits have examined the issue of the vicarious consent doctrine. *See, e.g., Pollock v. Pollock*, 154 F.3d 601 (6th Cir.1998); *Thompson v. Dulaney*, 838 F.Supp. 1535 (D.Utah 1993).

Most recently, the Sixth Circuit analyzed the vicarious exception doctrine in *Pollock*. *Pollock*, 154 F.3d at 607–10. The *Pollock* case, in which a non-custodial parent sued the custodial parent for recording telephone conversations between the non-custodial parent and their 14 year-old child, involved facts substantially similar to those in the present matter. As the Sixth Circuit noted, the basis of the case "occurred in the context of a bitter and protracted child custody dispute," and the custodial parent maintained that the non-custodial father was subjecting the child to emotional abuse and manipulation by pressuring the child regarding custodial matters. *Pollock*, 154 F.3d at 603–04.

After an in-depth analysis of the issue, including a thorough examination of the relevant case law from other jurisdictions, the Sixth Circuit adopted the vicarious consent doctrine and held as follows:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

Pollock, 154 F.3d at 610.

The court held that the issue of material fact as to the defendant's motivation in taping the telephone conversations precluded summary judgment. *Pollock*, 154 F.3d at 612.

In addition, another district court in the Eighth Circuit addressed the vicarious consent doctrine in *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998). In analyzing the issue, the court recognized that the "Eighth Circuit has not addressed whether parents may vicariously consent to the recording of their minor children's conversations" and noted that the court had "uncovered no cases rejecting a vicarious consent argument, and, furthermore, finds persuasive the cases allowing vicarious consent." *Campbell*, 2 F.Supp.2d at 1189. The court thus adopted the vicarious consent doctrine, holding that the custodial parent's "intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child." *Campbell*, 2 F.Supp.2d at 1191. In reaching its decision, the court noted that it "merely applied what it concludes to be the majority law on the subject...." *Campbell*, 2 F.Supp.2d at 1192.

Indeed, the only case in which the court explicitly declined to adopt the vicarious consent doctrine in

connection with Title III was that of *Williams v. Williams* ("*Williams I*"), 229 Mich.App. 318, 581 N.W.2d 777 (1998).[2] In rejecting the doctrine, *901 the Michigan court recognized that it was deviating from the majority. *Williams,* 581 N.W.2d at 780–81. The Sixth Circuit, in *Pollock,* observed of the *Williams* court that, "in declining to adopt the doctrine of vicarious consent, it was departing from the path chosen by all of the other courts that have addressed the issue." *Pollock,* 154 F.3d at 609.

In fact, the Michigan Supreme Court later remanded the *Williams* case back to the Michigan Court of Appeals for reconsideration in light of *Pollock. Williams v. Williams* ("*Williams II*"), 593 N.W.2d 559 (Mich.1999). On remand, the Michigan Court of Appeals reversed its earlier ruling regarding the vicarious liability exception to Title III liability. The court recognized that, "because the Sixth Circuit Court of Appeals has now spoken on the issue and no conflict among the federal courts exists, we are bound to follow the *Pollock* holding on the federal question in the case."[3] *Williams v. Williams* ("*Williams III*"), 603 N.W.2d 114, 1999 WL 692342 (Mich.App. Sept.3, 1999). Accordingly, the only case which had explicitly rejected the vicarious consent exception was subsequently reversed, and its decision was brought into conformity with all other federal decisions that have addressed the issue.

Finally, therefore, as the Court has uncovered no cases explicitly rejecting the vicarious consent doctrine, as there appears to be no conflict among the federal courts, and as the Court finds persuasive the cases adopting the vicarious consent doctrine, the Court determines that the vicarious consent doctrine should apply in the present matter.

Conclusion

This Court adopts the vicarious consent doctrine, which holds that, as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children, the guardian may vicariously consent to the interception on behalf of the children. As there is an issue of fact in the present matter regarding Defendant Robert Wagner's motivations in intercepting and recording telephone conversations between the Plaintiffs and the two minor children in his custody, the Plaintiff's Motion for Summary Judgment must be denied.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Plaintiffs' Motion for Summary Judgment (Doc. Nos.9, 16) is **DENIED.**

Footnotes

1 The Eighth Circuit has previously decided two cases involving facts similar to the present matter. In *Platt v. Platt,* 951 F.2d 159 (8th Cir.1989), a husband sued his estranged wife under Title III for recording his telephone calls with their minor daughter, allegedly to gain advantage in the parties' dissolution proceedings. Similarly, in *Rice v. Rice,* 951 F.2d 942 (8th Cir.1991), the plaintiff sued his former wife under Title III for recording telephone calls between the plaintiff and the parties' children. However, at the time both cases were decided, the federal courts were grappling with the issue of whether Title III applied to interspousal communications, and whether the statute necessarily required that the federal courts become involved in purely domestic conflicts. Consequently, the cases were decided on that basis, and the Eighth Circuit did not reach the issue of the vicarious consent doctrine in *Platt* or *Rice.*

Indeed, the defendant mother in *Platt* had asserted that, as the legal guardian of the minor children she "stood in the place of the minor child and consented to the recording." *Platt,* 951 F.2d at 160. Nevertheless, as explained by the Eighth Circuit, the district court had framed the issue as the extent to which Title III applied to interspousal wiretaps and, in dismissing the case, had declined to address the parties' arguments concerning the application of Title III's consent exemption. *Platt,* 951 F.2d at 160. On appeal, the Eighth Circuit held that, in light of the then-recently decided case of *Kempf v. Kempf,* 868 F.2d 970 (8th Cir.1989) (holding that Title III applies to domestic situations of interspousal wiretapping), the district court had relied on a nonexistent interspousal immunity. *Platt,* 951 F.2d at 160. The Eighth Circuit thus reversed the district court's dismissal and remanded *Platt* for further proceedings, including consideration of the consent issue. *Platt,* 951 F.2d at 161.

2 The case of *West Virginia Dept. of Health and Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), in which the Supreme Court of Appeals of West Virginia discussed and declined to apply the vicarious consent doctrine, is distinguishable from the facts of this case and the aforementioned cases which applied the doctrine. In the West Virginia case, a non-custodial father enlisted his mother to place a tape recorder in the home of his former wife, who had custody of their children, for the purpose of recording conversations between the mother and the children. *David L.,* 453 S.E.2d at 648. The non-custodial father argued that he had parental authority to give the children's consent. *David L.,* 453 S.E.2d at 653. The court acknowledged the holding of *Thompson v. Dulaney, supra,* which had adopted the vicarious consent doctrine, but held that "under the specific facts of the case

before us, we hold a parent has no right on behalf of his or her children to give consent...." *David L.*, 453 S.E.2d at 654. The court explicitly stated, "We do not disagree with the reasoning in *Thompson;* however, we determine the facts of the present case are different from the facts in *Thompson* in two significant respects." *David L.*, 453 S.E.2d at 654. The court noted in distinction that, first, the parent who procured the interception was not the custodial parent; and second, the recordings did not occur in the home of the parent who procured the interception, but rather the tape recorder had been surreptitiously placed in the other parent's home. *David L.*, 453 S.E.2d at 654. The court thus did not explicitly reject the vicarious consent doctrine, but rather declined to apply the doctrine to the circumstances of that case.

3 The Michigan court reaffirmed its ruling regarding the Michigan eavesdropping statute, however, noting that "this Court is not compelled to follow federal precedent or guidelines in interpreting the Michigan eavesdropping statute." *Williams III,* 603 N.W.2d at ——, 1999 WL 692342.

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DOCKETING STATEMENT ATTACHMENT 25

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IN THE FAMILY DIVISION
OF THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

SEAN ABID,

Plaintiff,

v.

LYUDMYLA ABID,

Defendant.

CASE NO.: D-10-424830-Z

DEPT NO.: B

DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF HER OBJECTION TO PLAINTIFF'S REQUEST TO ADMIT PORTIONS OF AUDIO RECORDINGS HE ILLEGALLY OBTAINED, MODIFIED AND WILFULLY DESTROYED TO AVOID CRIMINAL PROSECUTION AND PREVENT DEFENDANT FROM REVIEWING

DATE OF HEARING: N/A
TIME OF HEARING: N/A

COMES NOW Defendant, LYUDMYLA ABID ("Lyuda"), by and through her attorney, RADFORD J. SMITH, ESQ., of the law firm of RADFORD J. SMITH, CHARTERED, and pursuant to EDCR 7.27, and request of the Court, submits the Supplemental Brief and Objection identified above.

. . .

. . .

Defendant's objections are based upon the facts gleaned at the Court's hearings of November 17, 18 and 19, 2015, the following points and authorities, and all pleadings, transcripts and papers filed in this matter.

Dated this 4th day of December, 2015.

RADFORD J. SMITH, CHARTERED

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I.

INTRODUCTION

This case involves Plaintiff Sean Abid's third attempt to modify custody of the parties' now six-year-old son, Sasha. Sean's current motion, and the expert report upon which he relies, are primarily based upon an audio recording he surreptitiously obtained by placing a recording device into Sasha's school backpack that Sean knew would continuously record conversations in Lyuda's home and vehicle. Sean has not produced the entirety of the two recordings he now acknowledges he secretly recorded, because he has destroyed those recordings, the computer that housed them, and the device used to record them. Instead, he has submitted what he claims are selected portions of the recordings that he edited with software that he cannot identify, and that he erased from his computer. Lyuda objects to the admission of the recordings, and objects to the admission of any expert report that utilized the tapes as all or part of its basis.

Further, Sean has requested that he and his wife, Angie Abid, be permitted to testify as to a conversation they allegedly secretly overheard between Lyuda and her husband Ricky Marquez at the

courthouse on the second day of the evidentiary hearing, November 19, 2015. Lyuda objects, and addresses below the privilege preventing the submission of such evidence.

II.

STATEMENT OF FACTS RELEVANT TO DEFENDANT'S OBJECTION TO THE ADMISSION OF TAPED CONVERSATIONS

1. Sean's Admission that he Surreptitiously Recorded Conversations in Lyuda's Home.

On two occasions, January 20, 2015 and January 26, 2015, Sean placed a recording device in the backpack of the parties' son Sasha for the purpose of recording conversations in Lyuda's home. Video Transcript (VT) 11/17/15 at 16:25:00. Sean testified that he understood that Lyuda, her husband Ricky Marquez, and her daughter Irena (from a previous marriage), all resided in the home. VT 11/17/15 at 16:26:38. He further understood that the recording would, for a period of 15 hours, record all conversations of any individual within recording distance of the device in the backpack. VT 11/17/15 at 16:26:04.

Sean acknowledged that he could not control where the backpack would be placed in Lyuda's home. He further acknowledged that the device would record any conversation near the backpack regardless who was involved in that conversation.[1] VT 11/17/15 at 16:25:52.

Sean testified that the device worked as planned on the first occasion, recording for approximately 15 hours in Lyuda's home (and car when she transported Sasha to school). VT 11/17/15 at 15:26:47. He claims, however, that on the second occasion, the device malfunctioned due to a battery issue and only recorded for a few hours. VT 11/17/15 at 16:34:10. When Sasha was back in Sean's custody, Sean retrieved the recording device from Sasha's backpack. VT at 11/17/15 16:27:10.

B. Sean's Admission that He Listened to, Modified, and Destroyed the Original Recordings and Any Complete Copy of Those Recordings

---

[1] Sean predictably claimed that the recording device would only record conversations held close to the backpack. VT 11/17/15 at 16:26:04. That convenient statement cannot be corroborated by any evidence in the record since Sean destroyed both the recording device and the original recording.

Sean testified that he copied the original recording from the device electronically into a computer in his home. VT 11/17/15 16:27:08. He then placed the copied recording into a software program that he downloaded from the Internet that allowed him to modify the recording by parsing it into sections. VT 11/17/15 at 16:28:07. When questioned about the software, Sean could not identify which software he used or how he purchased it, nor was he able to produce a copy of the software because he claims he erased it. VT 11/17/15 at 16:28:20. Sean did not deny, however, that the design of the software he selected was to alter the recording by separating it into any number of sections the operator chose. VT 11/17/15 16:29:00.

Sean did not retain the complete, original recording in any form. He deleted portions of the recording, he did not retain in any form a copy of the other portions of the recordings that he did not submit to the Court, and he did not retain or produce the device that he claims he used for the recording. VT 11/17/15 at 16:29:00-16:35:59. Sean testified that he did not keep the original recording because he trashed the hard drive that contained the information associated with the original recording along with the software. VT 11/17/15 at 16:35:10. Sean testified that he discarded the computer to which he transferred the original recordings. *Id.,* and Transcript of the Deposition of Sean Abid (hereinafter "Abid depo.") page 177. Sean revealed in his deposition that he discarded the computer (thereby forever preventing Lyuda or the Court from examining the full recordings) because he feared Lyuda's attempts to have Sean prosecuted for his illegal recording:

> Q: [By Mr. Smith]: What did you do with the hard drive?
>
> A: [By Sean]: It went in the trash.
>
> Q: Ok. So the hard drive with the data that you removed from the .wav files that you received by recording information in Lyuda's home went in the trash, correct?
>
> A: Yes.

Q: When was that?

A: I don't recall exactly. It was shortly thereafter.

Q: So you got rid of that computer shortly thereafter?

A: Yeah, because I knew that she was more concerned about trying to prosecute me than correct these abysmal things she was saying to my son.

Sean claims that the two sections he parsed and preserved were what he estimated would contain only conversations between Lyuda and Sasha, the only two sections he parsed from the original recording, and testified that he listened to only those two sections. VT at 11/17/15 15:27.58. He claims he only heard conversations between Lyuda and Sasha. VT at 11/17/15 15:28:13.

Moreover, Sean also testified that he in January 2015, he was aware that Nevada law required that he could not record a conversation involving others without one of the participant's consent. *See Sean Abid's Deposition*, pages 147-148. Remarkably, Sean Claims that he was aware of the "one-party" consent doctrine when he overheard two FBI agents discussing the doctrine while Sean was waiting for a meeting with other FBI Agents. Abid depo., pages 150-154. Sean later testified, that although he did not remember, generally, what his meeting with the FBI agents was about, the overheard one-party consent doctrine conversation, for some reason, "stuck" with him. VT 11/17/15 at 15:36:24.

II.

SEAN'S RECORDINGS WERE ILLEGALLY OBTAINED NEVADA LAW, AND THUS THE COURT SHOULD DEEM THEM INADMISSIBLE

Illegally intercepted communications are not admissible. NRS 48.077 reads in relevant part:

> The contents of any communication lawfully intercepted under the laws of the United States or of another jurisdiction before, on or after July 1, 1981, if the interception took place within that jurisdiction, and any evidence derived from such a communication, are admissible in any action or proceeding in a court or before an administrative body of this State, including, without limitation, the Nevada Gaming Commission and the State Gaming Control Board. Matter otherwise privileged under this title does not lose its privileged character by reason of any interception.

Implied in that statute is that communications that are not lawfully intercepted are not admissible. *See, e.g. Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998). It is illegal in the State of Nevada to surreptitiously record any conversation without the consent of one of the parties to the conversation. NRS 200.650 reads:

> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

Here, Sean admits that he surreptitiously attempted to record, and recorded, through the use of an electronic device, private conversations engaged in by the persons in Lyuda's home. Sean further admits that he did not have express consent to do so from any of the members of Lyuda's household. Sean's acts violated NRS 200.650.

Sean argues that he could grant himself "vicarious consent" to tape any conversation in which Sasha was a participant. Sean relies on the analysis in *Pollack v. Pollack,* 154 F.3d 601 (6th Cir. 1998). Sean repeatedly misstates the holding in *Pollack*, the predecessor cases upon which it relies, and the cases that relied upon it. *Pollack* stands for the proposition that a recording by a parent of a ***telephone conversation*** in that parent's home between a child and the other parent is not a violation of federal wiretapping law (Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510-2520) because the recording parent may grant "vicarious consent" for the child where the recording parent has demonstrated a "good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child." *Pollack*, 154 F.3d at 610. ***All*** of the cases upon which the *Pollack* court relied, and all of the cases that have relied upon *Pollack,* address the recording of telephone conversations between a child and the other parent in the home of the parent performing the recording. *See, e.g., Thompson v.*

Delaney, 838 F.Supp 1535, (D. Utah 1993)(parent recording phone calls of children and other parent in recording parent's home); *Silas v. Silas,* 680 So.2d 368, 371 (Ala. App. 1996)(taped phone conversations by father in father's home); *Cacciarelli v. Boniface,* 737 A.2d 1170, 1171 (N.J. Super 1999)(phone conversations taped by father in father's home); *Smith v. Smith,* 923 So.2d 732, 735-736 (1st Cir. 2005)(specifically noting, as an element of the vicarious consent waiver, that the phone conversations were recorded by father in father's home); *Griffin v. Griffin,* 92 A.3d 1144 (Me. 2014)(conversations taped by father in father's home).

None of these cases cited above, nor any other granting a vicarious consent exception, address facts like those in the present case. First, Nevada has not, and cannot, adopt the "vicarious consent" exception to its wiretapping laws underlying the federal and state statutes in issue in the above referenced cases. Unlike Title III, Nevada law requires that all parties to a telephone conversation provide consent. *See,* NRS 200.620; *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998). The vicarious consent provided by one parent under the doctrine cited in *Pollack* and its progeny would not grant a parent in Nevada the ability to record telephone conversations requiring two party consent.

Further, no case has adopted the "vicarious consent" doctrine exception to statutes prohibiting the recording of private conversations where a device was placed randomly in the other party's home. The only case addressing the vicarious consent doctrine in the context of a parent placing a recording device in another parent's home is *West Virginia Department of Health & Human Resources ex rel. Wright v. David L.,* 453 S.E.2d 646 (W. Va. 1994) in which the court rejected the application of the vicarious consent doctrine.

In *David L.*, the father of children ages 3 and 5 caused his mother, the paternal grandmother, to place a voice activated recording device in the children's bedroom at their mother's house while the grandmother was babysitting there. She did so, and the device recorded conversations between

the mother and the children. After listening to the conversations on the tape, the father gave the tapes to his lawyer, who then provided them to child protective services. Child protective services sought and received an order changing custody of the children. The mother challenged the order, claiming that the evidence on the tapes (that included screaming by the children) was illegally obtained under West Virginia and federal law, and was thus inadmissible. The trial court ruled the tapes inadmissible, but certified the question of admissibility for appeal. *David L.,* 453 S.E.2d 646, 648.

Upon appeal, the West Virginia Supreme Court recognized the vicarious consent doctrine, had been adopted in different jurisdictions, citing *Thompson v. Delaney,* 838 F.Supp 1535 (D. Utah 1993) stating:

> We do not disagree with the reasoning in *Thompson*; however, we determine the facts of the present case are different from the facts of in Thompson in two significant respects. First, [in *Thompson*], the children were physically residing with [their mother] at the time the conversations were recorded. Second, the conversations were recorded from a telephone in the house where [the mother] and her children resided. On the other hand, in the present case, first, [the mother], not [the father], was awarded temporary custody of the children during the divorce proceedings. Second, the recordings occurred in [the mother's] house, not [the father's] house, and he had absolutely no dominion or control over [the mother's] house where he procured his mother's assistance to hide the tape recorder.

Davidl L., 453 S.E.2d at 654. [Emphasis supplied]. The court further noted:

> We draw a distinction between the present situation and a situation in which a guardian, who lives with the children and who has a duty to protect the welfare of the children, gives consent on behalf of the children to intercept telephone conversations within the house where the guardian and the children reside.

Id. at 654 n.11 (emphasis added). Accordingly, while the court in *David L.* declined to permit vicarious consent in that particular case.

The distinction drawn in the *David L.* is vitally important in the context of modern divorce cases. The vicarious consent exception as defined in *Pollack* and other wiretapping cases permit the recordation of phone calls between certain individuals into the recording parties' home where the child is residing at the time of the conversation. The recording party is aware who is calling, and the phone conversation is

limited to the targeted individual and the child. The recording of a particular call or series of calls has little chance of invading the privacy of other individuals who did not provide consent to the taping of their conversations, and are not a target of any good faith belief by the parent that they are causing harm to the child.

The protection of private individuals from random invasions through the placement of recording devices is the essence of NRS 200.650. Here, Sean sent a tape recorder into the home that was occupied by Lyuda, her husband Ricky and her daughter Irena. Sean did not testify that he had any reasonable good faith belief that either Ricky or Irena were causing harm to Sasha. Nevertheless, logic informs us that Sean's actions led to the recording of any conversations between Lyuda and Ricky, conversations between Irena and Ricky or Lyuda, and conversations between any individual that came to Lyuda's residence and a member of the household during the time Sean's recording device was in the home. Indeed, complete strangers were subject to Sean's recording because he could not control who the device recorded. The granting of Sean's proposed extension of the vicarious consent doctrine to the surreptitious and random placement of recording devices in the homes of others would means that every individual who lives in a home with a parent and a child that is subject to a custody matter has ***no*** expectation of privacy. That individual would have their most private and intimate declarations, conversations, and expressions subject to recording at the whim of a parent who suspects he or she is being "badmouthed" by the other parent.

Moreover, because even the ***attempt*** to record private conversations of individuals is crime under NRS 200.650, Sean's random placement of a recording device in a backpack he admits could have been placed in any location in the house, and could have recorded any conversation, was a violation of law even if he could grant vicarious consent to one of the members of the household. His explanation, without the provision of one iota of corroborating proof, that he guessed fortunately when dividing the original recordings and only listed to portions of the recordings in which Lyuda was speaking to Sasha defies

belief. Moreover, his modification of the original recordings, his destruction or discarding of the original recordings, the recording device, the software he used to "parse" the recordings, and his discard of those portions of the recording that he parsed out of the original, all suggest purposeful concealment of the evidence Lyuda and the Court would need to test his convenient claims. If that was not sufficient, his claim that he destroyed the computer because Lyuda was "concerned about trying to prosecute" him, is an admission that he destroyed the original recordings to shield his culpability under NRS 200.650. The recordings Sean surreptitiously made at Lyuda's home are illegal, inadmissible, and not subject to any exception recognized by any court.

III.

SEAN HAS NOT DEMONSTRATED A GOOD FAITH REASON FOR RECORDING PRIVATE CONVERSATIONS IN VIOLATION OF NRS 200.650

Even if the Court here expanded the vicarious consent doctrine beyond the recording of phone calls in a parent's home to the random placement of recording devices in the other parent's home, Sean must demonstrate that he acted in good faith. In those jurisdictions that have accepted the vicarious consent doctrine, a party must demonstrate that the purpose for the taping was based upon a good faith reasonable belief that the child was being abused or neglected by the other party. For example, in *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993), the Utah court held that as long as a guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children. *Thompson,* 838 F. Supp. at 1544. The court in *Thompson* stressed that the parent's purpose in intercepting the communications was critical to the application of the vicarious consent doctrine. *Id.,* at 1545, 1548.

In *Pollock v. Pollock,* 154 F.3d 601, 610 (6th Cir. 1998), the court warned of the potential abuse of the "vicarious consent" doctrine: "This doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest.'" *Pollock,* 154 F.3d at 610. *See also, Silas v. Silas*, 680 So. 2d 368, 371-72 (Ala. Civ. App. 1996) (upholding a father's vicarious consent on behalf of his child to recording telephone conversations with the child's mother where he "had a good faith basis that was objectively reasonable for believing that the minor child was being abused, threatened, or intimidated by the mother").

In the present case, Sean did not have a good faith basis to place a recording device in Sasha's backpack. In order to have a good faith belief that Lydua was harming Sasha, Sean must show something more than alleging uncorroborated claims that Sasha told him various negative things. No one has testified to any statements made by Sasha to corroborate Sean's claims. The testimony of Sasha's teachers was that in their experience of him five days per week he showed no signs of being alienated from either parents. He was and is a happy, cooperative, talkative and energetic child who did, and continues to do well in school. He is kind to others and has shown no behaviors that would suggest any type of favoritism toward either parent. Both teachers testified that Sasha did not speak poorly of either parent.

Moreover, Sean, who regularly texted and communicated with Lyuda, could not and did not provide a single email that corroborated any concern that he had about Lyuda speaking to Sasha in December 2014 or January 2015. What was occurring at that time was Lyuda's filing of a motion regarding her assertion (supported by Sean's actions for two months) that her agreement to allow Sean to have Sasha on her days in the afternoon was based upon her work schedule, and Lyuda's request that Sean release Sasha's passport. Sean was continuously baiting Lyuda by accusations of poor parenting (failure to do homework, keeping Sasha up at night, allowing Sasha to play videogames all day, etc.), refusing to provide Sasha's passport, refusing to allow her to exercise the agreed time of pick up the parties had

followed for months (Sean's allegation that he ended the contact because of a conversation he had with Sasha's teacher was denied by the teacher in her testimony), and refusing to return clothes.

Worst of all, the evidence produced at hearing equally supports Lyuda's assertion that Sean's motivation for placing a tape recording device in Lyuda's home was directed at finding evidence of criminal behavior by Lyuda's husband, Ricky Marquez. Sean's behavior of planting the recording device is consistent with his continued attempts (including constant communication with Mr. Marquez's parole officers, and meetings with representatives of the Federal Bureau of Investigation a relatively short time before placing the recording device) to prove his unfounded belief that Ricky Marquez is engaged in criminal activity. Indeed, his testimony at hearing and in his deposition tied his communication with the FBI to his knowledge of Nevada law regarding the recordation of private conversations, and the vicarious consent doctrine:

> Q [By Mr. Smith] What was the basis of the conversation withthe FBI in August of 2014?
>
> A [By Sean Abid] They were asking me questions of what Iknew about Mr. Marquez. And at that time they were talking-- we -- they were just talking, and the subject came up.It had nothing to do with me. That was the first time Iever had heard anything about statutes and recordings,so...
>
> Q Okay. Let me get this straight. In August of 2014 an FBI agent calledyou, correct?
>
> A They -- they made contact with me,yes.
>
> Q How did they have yournumber?
>
> A I don't know.
>
> Q So out of the blue you received a conversation for someone who identified themselves as an FBI agent.
>
> A Uh-huh.
>
> Q Yes?
>
> A Yes.
>
> Q And this was on a telephone call in your home or your cell phone or your wife's cellphone?

A My cell phone.

Q What's your cell phone number?

A 290-7406.

Q 702 area code?

A Yeah.

Q Has that changed since August 2014?

A No.

Q So you received a phone call from an FBI agent on your cellular telephone call – phone in August of 2014?

A Yeah.

Q And in that conversation youdiscussed Mr. Marquez, correct?

A No. I went down to the FBI headquarters, and then I did.

Q Okay. So in that conversation with -- in August of 2014, as you've identified as the basis foryour knowledge about the vicarious consent doctrine, youdidn't discuss Mr. Marquez?

A We didn't discussvicarious consent. All they were talking about, one party. I was just listening. I don't -- that's the only time I'd ever even heard ofthe word, so...

Q You were listening towhom?

A The agents that were talking.

Q Okay. The agents that were talking weretalking to you on your cell phone in August of 2014?

A No. I was down -- I went to the headquarters. I went down there. They invited me downthere.

Q What was the substance of the conversationyou had with FBI agents in August of 2014?

A They were just asking me what I knew about him.

Q Asking what you knew about RickyMarquez?

A Yeah.

Q And what did they tell you about Ricky Marquez?

A They didn't tell me anything.

Q How did they identify themselves?

A As FBI agents. I mean...

Q They said we're so-and-so from the Federal Bureau ofInvestigation?

A Yeah, yeah.

Q And did they tell you why they were calling you?

A One of the persons was a -- you know, incharge of Eastern European crime in -- in Nevada -- in LasVegas.

Q And he indicated that they were--

A She. It was a she.

Q Okay. Did she indicate they were investigating Mr. --

A No, no.

Q Okay. Let me finish my question. Did she indicate that they were investigating Mr. Marquez?

A No.

Q What was her name?

A I don't remember.

Q What was the name of the other individualyou spoke to?

A I don't remember. They were Agents something. I don't remember thenames.

Q Where did you visit -- did you plan duringthat conversation to have a meeting with them?

A Well, they -- they had me come down totheir office.

Q So based on the conversation they had withyou, they directed you to come to their office?

A Uh-huh.

Q Yes?

A Yes.

Q Okay. And when was that meeting?

A August, Septem- -- maybe September 2014,the fall.

Q And it was in that conversation in Augustor September of 2014 with FBI agents at the FBI's officethat you learned of the one-party consent law,correct?

A No. I already knew about it. I just heard them talking about it.

Q In your previous convers- -- inprevious testimony on this record you testified that youlearned information about that issue, the one-party consentlaw, from an FBI -- or from a law enforcement agent. You've identified that person as the FBIagent.

A No, I didn't learn about it. I knew -- I knew we were a one-party state. I knew California's atwo-party state. I knew this already.

Q Did you -- you said that you had overheardthem talking about one-party consent at the--

A I just heard them over -- I heard themtalking about the statute.

Q What statute were they referringto?

A They didn't refer to it by number, but I assume they were referring to200.650.

Q Okay. And that's the one-party consent statute --

A Yeah.

Q -- correct? To your knowledge?

A It is, in fact.

Q Okay. And that's what -- that was the subject of the discussion with the FBI--

A No.

Q -- at the time of the meeting in--

A No.

Q Okay. What was the subject of the discussion?

A They wanted to know what I knew about Mr. Marquez.

Q How did the conversation turn to theone-party consent statute?

A We're waiting -- I'm waiting for the meetingto start. They're talking.

Q And in that meeting while you were present they were talking about the one-party consentstatute.

A Yeah.

Q And then they began to ask you questionsabout Mr. Marquez.

A Then the formal meetingstarted, yeah. There was no more small-talk.

Q Did they ever indicate to you that they'dlike you to take a tape-recording of Mr. Marquez?

A No.

Q Did they ever indicate to you that there was a-- based upon the one-party consent law and thevicarious consent provisions that you could place a tape recorder in a backpack and have Mr. Marquez's conversations overheard?

A Absolutely not.

Q But that's where you got the idea.

A No. I had the idea. I just -- they – they discussed the statute. That's all. I never bothered to look up the statute.

Q What were the agents' names that you spoke toat the FBI?

A I told you I don't know theirnames.

Q Did you have any written communication withthose agents?

A No.

Q Did you provide them anydocuments?

A No.

Q What did you tell them?

A I told them what they -- what they -- whenthey asked me a question, Ianswered it. I don't remember the questions.

Q Do you recall anything that you told theFBI?

A No.

Q As you're sitting here today, not asingle word -- you can't remember one word from that conversation that occurred in -- I think you said September or October of 2014.

A No.

Q Did you have any further contact with theFederal Bureau of Investigation or any investigators, employees or agents of the Federal Bureau ofInvestigation?

A Yes.

Q When was that?

A I don't know. They called me -- at somepoint called me a few othertimes.

Q Who called you?

A I don't remember the agent'sname.

Q Did you keep any notes of your conversationswith the FBI?

A No.

Q Was anyone else present other than the agentsand yourself at thesemeetings?

A Only one meeting. No.

Q At that meeting? At that meeting what did the FBI tell you about Mr. Marquez?

A I don't remember. They don't tell you anything. They ask.

Q How long was themeeting?

A An hour, 45 minutes. A long time ago. Maybe it was a half an hour. I don't know. I spent a lot oftime waiting.

Q Where was themeeting?

A I think it was down there on Lake Mead and-- wherever their headquarters are downthere.

Q Did they show you any material or documentsor other information at the time that you met withthem?

A No. They didn't show me anything.

Q Could you describe themale.

A No. He's -- well, he's a whitemale.

Q How tall?

A I don't know. He was sitting down.

Q What did he -- old? Young?

A I don't know. I'd say somewhere between –I don't know. Less than -- he wasn't old. He was probably somewhere south of 40. I don't know.

Q Color of his hair?

A I don't know. I would not be able torecognize him.

Q And the woman, what did she looklike?

A Wouldn't recognize hereither.

Q Color of herhair?

A I don't know. They were all wearing thesame suits. I don't know. Dark brown.

Q You don'tremember?

A No. I couldn't distinguish her if she walkedby me in the street. I only saw them once.

Q These -- was it the same individuals thatspoke to you in September and you met with in -- or excuse me-- in August and you met with in either September orOctober that contacted youagain?

A Yeah. One of the agents was in theroom.

Q So I take it that the -- one of the agentsthat was in the room contacted you,correct?

A This is true.

Q And was that the female or the maleagent?

A Female.

Q And you don't know hername.

A No.

Q But you knew it then, correct?

A No, not really. I mean I only talked to the people twice, and they're Agent whatever, andso...

Q Well, you indicated that they called yousevera times after the meeting --

A Not several. I told you once.

Q So you had a conversation in August, you hada conversation at their office, and one other phonecall; that's your testimony now?

A The initial phone call, yes. As you said, initial phone call, meeting, follow-up phonecall.

Q And what was the purpose of the follow-upphone call?

A I don't remember. They were -- they asked mea question. I don't remember what it was. It was brief, very brief.

Q What did you discuss withthem?

A I didn't discuss anything. They asked me a question. I gave them the answer.

Q And you don't recall --

A No.

Q -- anything you told them?

A No, I don't recall anything.

Q And when you were at their offices, they never gave you a card; is that correct?

A Yes. But I don't have it, but they did.

Q They gave you a card with their names on it?

A No. One -- one person gave me their card, not multiple.

Q The female or the male?

A I think it was the female.

Q And you don't have that card any longer, correct?

A No.

Q Weren't you curious as to why FBI agents were calling you in regard to Mr. Marquez?

A Not really.

Q Never even came up as to why they were calling you? You said you had all this concern about Mr. Marquez and his activity.

A Well, I just -- I learned something in the process. They don't tell you anything. You can ask them a million questions. They don't tell you anything.

Q Did you ask them a million questions? Did you ask them any questions about why you were there?

A They just said they wanted information, but they told me they weren't going to tell me. They make it very clear when they interview you that they're not telling you shit.

Q That wasn't my question. My question is did you ask any questions during these interviews?

A It was one interview, and they told me I couldn't, so I didn't.

Q So they started with the conversation with you can't ask us any questions, or words to that effect, correct?

A No. Just don't try and get information, we can't give you anything, we're not going to tell you anything.

See, Sean Abid's Deposition Pages, 133 – 160.[2]

Sean's testimony about the FBI was only believable in two ways – he had multiple contacts with the FBI in the months leading to his placing a recording device in Lyuda and Ricky's home, and he became aware of the vicarious consent doctrine through members of the FBI. His change in testimony at trial trying to limit his contact to the FBI to two occasions after he testified in his deposition to multiple contacts, his doubtful story as to how the FBI advised him of the vicarious consent doctrine, his destruction of all evidence of the complete recordings, his inability to remember any detail of his conversation with FBI agents except that they worked in the Eastern European Crime Division, and his obsession with Ricky Marquez demonstrate that his recording was either at the behest of the FBI or designed to gather evidence for the FBI.

Sean has not demonstrated by a preponderance of the evidence that he had a good faith reason to randomly place a recording device in Lydua's home. His attempt to record others (which attempt should be implied by his testimony that he understood the recording device would record anyone standing near the backpack) was and is a crime.

IV.

THE COURT SHOULD FIND THAT THE RECORDING AND TRANSCRIPT SEAN HAS PROFFERED ARE INADMISSIBLE BECAUSE THEY HAVE BEEN ALTERED, ARE NOT THE COMPLETE RECORDING, AND BECAUSE SEAN HAS IN BAD FAITH DESTROYED THE ORIGINAL RECORDING AND COPIES OF THE COMPLETE RECORDING

As addressed above, Sean has destroyed or discarded the original recording, discarded or destroyed the portions of the recording he parsed out of it, failed to produce or identify the software he used to parse

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[2] References and quotes of Sean's deposition evidencing his hatred and obsession with Mr. Marquez are set forth in detail in Defendant's Pre-Trial Memorandum, and are incorporated herein. *See,* Defendant's Pretrial Memorandum, pages 9-37.

the recording, and has destroyed or discarded both the recording device and the computer and hard drive that held a copy of the original recordings. Sean's apparent contention that the segregation and destruction of a large portion of the recording is not a modification of the recording defies reason. Sean modified, altered, and destroyed the original recordings. All that are left are selected digital recordings that he altered with software he cannot identify or produce.

A. Factors Commonly Used to Determine the Admissibility of Recordings Include Finding the Tape Inadmissible if the Tape has Been Altered

Nevada has yet to adopt a clear standard for the admission of a sound recording into evidence. Other jurisdictions have rules of evidence or have developed criteria to ensure that only reliable and complete recordings are admitted into evidence. Some jurisdictions have held those proffering recordings to a higher standard of evidence. For example, in *People v Ely,* 503 N.E.2d 532 (NY App.1986), the court identified the New York rule that the predicate for admission of tape recordings in evidence was clear and convincing evidence that the tapes were genuine and had not been altered. *Id.* at 522. In that case, an expert witness examined the tapes and found gaps in the recordings that suggested alteration. The court held the tapes inadmissible even though the recorded individual had acknowledged his voice on the recording. *Id.* at 525. In addressing what a party could do to support his claim of authenticity, the court provided a laundry list of common methods used:

> The necessary foundation may be provided in a number of different ways. Testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered or of a witness to the conversation or to its recording, such as the machine operator, to the same effect are two well-recognized ways. Testimony of a participant in the conversation together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either is a third available method.
>
> A fourth, chain of custody, though not a requirement as to tape recordings is also an available method. It requires, in addition to evidence concerning the making of the tapes and identification of the speakers, that within reasonable limits those who have handled the tape from its making to its production in court "'identify it and testify to its custody and unchanged condition'"

People v. Ely, 503 N.E.2d at 527-528 [Citations omitted]. Here, Sean cannot meet any of the basic criteria identified in *Ely* even if the Court here only applied a preponderance standard. Sean cannot testify that the recording is complete or accurate reproduction of conversation, or that it has not be altered. No participant in the conversation will testify to the tapes completeness or accuracy, and is precluded from doing so by Sean's destruction of the underlying recordings. Further, because of the destruction of portions of the recording, and destruction of the original recording, the destruction of the recording device, and the destruction of the software Sean used to parse the tape, Lyuda cannot have an expert examine the original recordings, or a complete recording. Finally, no one can testify to the "unchanged" condition of the recording.

Generally recognized criteria in the federal circuits include the determination that the recording was not altered. *See, e.g. United States v. King,* 587 F.2d 956 (9th Cir. 1978)(Proper foundation for the admission of a sound recording includes "that changes, additions or deletions have not been made to the recording"), *quoting United States v. McKeever,* 169 F. Supp 426 (S.D.N.Y 1958). Here, Sean cannot meet the basic criteria recognized by nearly every court addressing the admissibility of tape recordings because he admittedly altered the recording, then trashed or destroyed the hard drive with the original recordings.

VI.

CONCLUSION

Under Sean's view of the law, any parent that alleges, with any basis whatsoever, that a parent has "bad mouthed" him or her to the other parent, has the right to place a random recording device into the home of the other parent. Such a rule would allow a level of spying and an erosion of privacy that the legislators that enacted NRS 200.650 could not have possibly anticipated. The Court, however, need never get to the issue of vicarious consent simply by finding that Sean, by his own admission, cannot produce

the original or unmodified copy of the surreptitious recordings he admits to having taken in January, 2015 in Lyuda's home. Even if the Court were to apply the doctrine, Sean has failed to show an "objective, good faith" reason for the recording.

Therefore, based on the foregoing, Lyuda requests that the Court enter its order denying Sean's request to submit into evidence the recordings addressed above.

Dated this 4th day of December, 2015.

RADFORD J. SMITH, CHARTERED

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Radford J. Smith Chartered ("the Firm"). I am over the age of 18 and not a party to the within action.

I served the foregoing document described as "DEFENDANT'S SUPPLEMENTAL BRIEF IN OPPOSITION OF PLAINTIFF'S REQUEST TO THE ADMISSION OF ILLEGALLY OBTAINED EVIDENCE AND PRIVILEGED MARITAL COMMUNICATIONS" on this 4th day of December 2015, to all interested parties by way of the Eighth Judicial District Court's electronic filing system.

John Jones, Esq.
10777 W. Twain Ave., #300
Las Vegas, Nevada 89135

_____
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DISTRICT COURT
CLARK COUNTY, NEVADA

SEAN R. ABID,

Plaintiff,

v.

LYUDMYLA A. ABID,

Defendant.

CASE NO.: D-10-424830-Z
DEPT NO.: B

FAMILY DIVISION

NOTICE: PURSUANT TO EDCR 5.25(b) YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.

MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

DATE OF HEARING: February 10, 2016
TIME OF HEARING: 9:30 AM

COMES NOW, Defendant, LYUDMYLA A. ABID ("Lyuda"), by and through her attorneys of record, Radford J. Smith, Esq. and Garima Varshney, Esq., of the Radford J. Smith, Chartered, and hereby files her Motion, and requests that the court find and order as follows:

1. Excluding the recording of court hallway conversation on November 18, 2015 between Lyuda and her husband, RICKY MARQUEZ ("Ricky") that Plaintiff, SEAN R. ABID ("Sean") surreptitiously

203 Ariz. 489
Court of Appeals of Arizona, Division 1.

STATE of Arizona, Appellee,
v.
Bruce Alan MORRISON, Appellant.

No. 1 CA–CR 01–0789. | Oct. 22, 2002. | As Amended Nov. 19, 2002. | Review Denied March 18, 2003

Defendant was convicted in the Superior Court, Maricopa County, Cause No. CR 00-017293, Joseph B. Heilman, J., sexual abuse, molestation of child, sexual conduct with minor, and attempted sexual conduct with minor. Defendant appealed. The Court of Appeals, Philip Hall, J., held that mother had good faith belief that it was necessary and in best interest of child to consent on child's behalf to recording of telephone conversations.

Affirmed.

Attorneys and Law Firms

**63 *489 Janet Napolitano, Attorney General by Randall M. Howe, Chief Counsel, Criminal Appeals Section, Diane M. Ramsey, Assistant Attorney General and Ginger Jarvis, Assistant Attorney General, Phoenix, Attorneys for Appellee.

Blumberg & Associates by Bruce E. Blumberg, Phoenix, Attorneys for Appellant.

OPINION

HALL, Judge.

¶ 1 Bruce Alan Morrison ("defendant") appeals his convictions and sentences for two **64 *490 counts of sexual abuse, one count of molestation of a child, four counts of sexual conduct with a minor, and one count of attempted sexual conduct with a minor. The issue presented in this opinion[1] is whether the audiotape of a telephone conversation between defendant and victim G,[2] made by G's mother without defendant's or G's consent, was admissible under Arizona Revised Statutes ("A.R.S.") section 13–3005 (1988) and 18 U.S.C. § 2511 (1996).

BACKGROUND

¶ 2 The material facts are undisputed. When G was fourteen years old, her mother read passages in her diary containing sexual language and descriptions with references to defendant who was thirty-five years old. Concerned for G's well-being, G's mother asked her boyfriend to install a tape recorder in her home that automatically recorded all telephone calls to determine what, if anything, was going on between defendant and G. Without defendant's or G's knowledge, the tape recorder recorded their sexually explicit conversation.

¶ 3 Defendant filed a motion to suppress the audiotape of the conversation because it was recorded without his or G's consent. Relying on *Pollock v. Pollock,* 975 F.Supp. 974 (W.D.Ky.1997),[3] the trial court determined that G's mother vicariously consented to the recording on G's behalf and denied defendant's motion.

ANALYSIS

[1] ¶ 4 Defendant argues that the trial court erred by denying his motion to suppress the audiotape of the sexually explicit telephone conversation between himself and G because it was made without his or her consent in violation of A.R.S. § 13–3005 and 18 U.S.C. § 2511 and was, therefore, inadmissible. Because this issue presents a question of statutory interpretation, our review is de novo. *Gray v. Irwin,* 195 Ariz. 273, 275, ¶ 7, 987 P.2d 759, 761 (App.1999).

¶ 5 Both A.R.S. § 13–3005 and 18 U.S.C. § 2511 criminalize the unlawful interception of wire, electronic, and oral communications, but neither provides for the exclusion of evidence obtained unlawfully. The federal constitution likewise does not require exclusion of the audiotape in this case because there was no state action. *See Colorado v. Connelly,* 479 U.S. 157, 166, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.").

¶ 6 However, 18 U.S.C. § 2511 is part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18

U.S.C. §§ 2510 through 2522 ("Title III"), which contains a statute that mandates exclusion of the contents of any intercepted wire communication in any trial before any court, including state courts,[4] "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (2000). Federal cases addressing whether parents may record telephone conversations of their minor children without violating Title III discuss two general theories that permit parents to surreptitiously record the phone conversations of their minor children—the "home extension exception" and "vicarious consent." *See Pollock v. Pollock,* 154 F.3d 601 (6th Cir.1998).

¶ 7 The Seventh, Tenth, and Second Circuits have held that parental interception of their minor child's phone conversations does not violate Title III if the recording is done from an extension within the home. *Id.* at 607 (citing **65 *491 *Scheib v. Grant,* 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle,* 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin,* 843 F.2d 110 (2d Cir.1988)). The Sixth Circuit has expressly rejected the home extension exception theory;[5] however, in *Pollock,* the Sixth Circuit affirmed the district court's adoption of the vicarious consent doctrine:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. Such vicarious consent will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d).[6]

Id. at 610 (internal citation omitted). Therefore, although the Circuit Courts addressing the issue have used different approaches, they are uniform in holding that under certain circumstances a parent may surreptitiously record the telephone conversations of their children without violating Title III.[7]

[2] ¶ 8 We find the reasoning behind vicarious consent as explained in *Pollock* persuasive. If the parent has a good faith, objectively reasonable basis for believing that the recording of a child's telephone conversations is necessary and in the best interest of the minor, the guardian may vicariously consent on behalf of the child to the recording without violating Title III. "We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well-being." *Id.* (quoting *Scheib,* 22 F.3d at 154).

CONCLUSION

¶ 9 Defendant concedes that G's mother had a good faith, objectively reasonable basis for believing it was necessary and in the best interest of her minor daughter to vicariously consent to the taping of the telephone conversation. Because the recording of the conversation was lawful pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d), 18 U.S.C. § 2515 does not prohibit its use as evidence.

¶ 10 Therefore, for the reasons stated in this Opinion and the Memorandum Decision, we affirm defendant's convictions and sentences.

CONCURRING: JON W. THOMPSON, Presiding Judge, and EDWARD C. VOSS, Judge.

Parallel Citations

56 P.3d 63, 385 Ariz. Adv. Rep. 3, 387 Ariz. Adv. Rep. 12

Footnotes

1 Defendant raises seven issues on appeal. We address the remaining six issues in a separate Memorandum Decision. *See* Ariz.R.Crim.P. 31.26.

2 G is one of two minor victims. To protect her privacy, we use only the first letter of her first name.

3 The trial court cited the district court opinion. The matter was subsequently affirmed in part and reversed in part in *Pollock v. Pollock,* 154 F.3d 601 (6th Cir.1998).

4 We do not discuss whether Congress has the authority to promulgate evidentiary rules binding on the states because the issue was not raised by either party. *See Clouse ex rel. Clouse v. State,* 199 Ariz. 196, 203 n. 14, 16 P.3d 757, 764 (2001) ("court[s]

traditionally do [ ] not address issues not presented by the parties").

5 The home extension exception is based on 18 U.S.C. § 2510(5)(a)(i) (1996), which exempts from Title III "any telephone or telegraph instrument, equipment or facility, or any component thereof ... being used by the subscriber or user in the ordinary course of its business ...."

6 "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception ...." *See also* A.R.S. § 13–3012(9) (1997) (exempting from A.R.S. § 13–3005 any interception "effected with the consent of a party to the communication or a person who is present during the communication").

7 The Ninth Circuit has not addressed this issue.

Exhibit 3

Exhibit 3

154 F.3d 601
United States Court of Appeals,
Sixth Circuit.

Samuel B. POLLOCK Jr. and Laura Pollock,
Plaintiffs–Appellants,
v.
Sandra T. POLLOCK, Oliver H. Barber, and Luann C. Glidewell, Defendants–Appellees.

No. 97–5803. | Argued April 24, 1998. | Decided Sept. 1, 1998. | Rehearing and Suggestion for Rehearing En Banc Denied Oct. 16, 1998.

Father of minor daughter and his wife sued mother and her attorneys, alleging violations of federal wiretapping statute and seeking damages and injunctive relief. The United States District Court for the Western District of Kentucky, Charles R. Simpson, III, Chief Judge, 975 F.Supp. 974, entered summary judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, McCalla, District Judge, addressing an issue of first impression, held that: (1) as long as guardian has good faith belief that **recording** is in child's best interests, guardian may **vicariously consent** on behalf of the child to the **recording** of child's telephone conversations, but (2) genuine issue of material fact as to whether mother was motivated by concern for child's best interests when she **vicariously consented** to tape **recording** of child's telephone conversations precluded summary judgment.

Affirmed in part and reversed in part.

West Headnotes (6)

[1] **Child Custody**
Right to Control Child in General

As long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may **vicariously consent** on behalf of the child to the **recording**; such **vicarious consent** will be exempt from liability under federal wiretapping statute, pursuant to the consent exception. 18 U.S.C.A. § 2511(2)(d).

38 Cases that cite this headnote

[2] **Federal Civil Procedure**
Wiretapping and Electronic Surveillance, Cases Involving

Evidence raised genuine issue of material fact as to whether mother was genuinely motivated by concern for her minor child's best interests when she **vicariously consented** to tape **recording** of child's telephone conversations with child's father and father's wife precluded summary judgment in father's action against mother under federal wiretapping statute; taping began soon after mother discovered that father had hired attorney to represent daughter in ongoing domestic dispute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

34 Cases that cite this headnote

[3] **Federal Civil Procedure**
Form and Requisites

An unsworn affidavit cannot be used to support or oppose a motion for summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

21 Cases that cite this headnote

[4] **Federal Civil Procedure**
Form and Requisites

Unsworn affidavits which contained declarations that they were made under penalty of perjury and were signed and dated could be considered when ruling on summary judgment motion. 28 U.S.C.A. § 1746.

36 Cases that cite this headnote

[5] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Evidence raised genuine issues of material fact as to whether mother knew that **recording** of child's telephone conversations with child's father and father's wife was potentially illegal precluded summary judgement in father's action under federal wiretapping statute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

12 Cases that cite this headnote

[6] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Whether mother's attorneys knew, or should have known, that tape **recorded** conversations of mother's minor child came from an unlawful wiretap when they disclosed contents of the conversations during course of their representation of mother precluded summary judgement in action under federal wiretapping statute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

9 Cases that cite this headnote

Attorneys and Law Firms

***602** Samuel Manly (argued and briefed), Louisville, KY, for Plaintiffs–Appellants.

Allen K. Gailor (argued and briefed), Louisville, KY, for Defendants–Appellees.

Before: BATCHELDER and COLE, Circuit Judges; McCALLA, District Judge.*

OPINION

McCALLA, District Judge.

Plaintiffs Samuel and Laura Pollock appeal the judgment of the district court granting Defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56.[1] Plaintiffs brought an action against Defendants, alleging that Defendants violated the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2521 ("Title III"), when Defendant Sandra Pollock tape-**recorded** conversations between her ex-husband, Plaintiff Samuel Pollock, and their minor daughter Courtney, and between Plaintiff Samuel Pollock's current wife, Plaintiff Laura Pollock, and Courtney. On appeal, we must determine: (1) whether the statutory consent exception contained in 18 U.S.C. § 2511(2)(d) of the federal wiretapping statute permits a parent to "**vicariously consent**" to **recording** a telephone conversation on behalf of a minor child in that parent's custody, without the ***603** actual consent of the child; and (2) if "**vicarious consent**" does qualify for the consent exception, **3 whether questions of material fact precluding summary judgment exist as to whether Defendant Sandra Pollock's **recording** of her minor daughter's phone conversations with the child's father and step-mother was motivated by concern for the child's best interest. The district court concluded that "**vicarious consent**" to **recording** a telephone conversation, by a parent on behalf of a minor child in that parent's custody, qualifies for the statutory consent exception, and found that no questions of material fact existed as to Defendant Sandra Pollock's motivation in **recording** the conversations. Accordingly, the district court granted summary judgment for Defendants. For the reasons set forth below, we **AFFIRM IN PART** and **REVERSE IN PART** the judgment of the district court.

I.

Samuel Pollock ("Samuel") and his current wife, Laura Pollock ("Laura"), are Plaintiffs–Appellants in this matter. Samuel's former wife, Sandra Pollock ("Sandra"), and her attorneys, Oliver Barber ("Barber") and Luann Glidewell ("Glidewell"), are Defendants–Appellees. Samuel and Sandra were married in 1977, and had three children: Courtney Pollock, born April 24, 1981; Robert Pollock, born May 24, 1984; and Ian Pollock, born July 8, 1987. Samuel and Sandra separated in 1992, after Sandra discovered that Samuel had been having an extramarital affair. Joint Appendix ("J.A.") at 127. Their divorce

became final in 1993, and the final divorce decree granted Sandra custody of all three children.

After the divorce, Samuel married Laura. In 1995, during the pendency of an appeal from the Jefferson County Circuit Court's property and support decrees, Sandra taped certain telephone conversations between Courtney and Samuel, and between Courtney and Laura. It is undisputed that Courtney, Samuel, and Laura did not consent to the **recording** of these conversations. Rather, Sandra argues that she "**vicariously consented**" to the **recording** on behalf of Courtney, a minor child in her custody, because she was concerned that Samuel was emotionally abusing Courtney.

**4 **5 A.

Careful consideration of the complete **record** in this matter is essential to the determination of the issues before us. As we conduct our analysis, it is important to be cognizant of the fact that the tape **recordings** by Sandra Pollock that form the basis of this lawsuit occurred in the context of a bitter and protracted child custody dispute. Accordingly, we begin with a summary of the events leading up to, and relating to, the tape-**recording** of the conversations by Sandra Pollock.

In May of 1994, Sandra learned that a telephone conversation between herself and her daughter Courtney had been tape-**recorded**.[2] Sandra contends that Courtney told her that Samuel and Laura had tape-**recorded** the telephone call, but that Courtney would not give any further details. J.A. at 102. Laura and Courtney contend that Courtney told Sandra that *Courtney* had **recorded** a conversation with her mother from her father's home, with Samuel and Laura's knowledge and consent. J.A. at 157, 160. Laura concedes that on April 10, 1994, "Courtney tape-**recorded** a telephone conversation with Sandra with my knowledge and consent and with the knowledge and consent of my husband, Sam."[3] J.A. at 157.

Sandra contends that Samuel was very upset about losing custody of the children, especially Courtney.[4] J.A. at 101. According *604 to Sandra's affidavit, during the divorce proceedings, and even after Jefferson County Circuit Court Judge Geoffrey P. Morris confirmed Sandra's custody of the **6 children in April of 1994,[5] she "believed that Courtney was being subject to emotional and psychological pressure by Samuel and Samuel's wife, Laura, whereby Samuel was trying to get Courtney to do whatever she could to convince [Sandra] to let Courtney primarily live with Samuel." J.A. at 102. During this process, Sandra contends that she "noticed a gradual change in Courtney which included what [Sandra] felt was a[sic] excessive or compulsive desire to be with her father and corresponding deteriorating relationship with [Sandra]." *Id.* According to Sandra, she "could not determine merely from talking with or observing Courtney how far this desire of Courtney extended but [Sandra] believed, at the minimum, the psychological and emotional pressure which she believed was being put upon Courtney by Samuel was detrimental to Courtney and perhaps rose to the state of abuse or emotional harm or injury." *Id.*

According to Sandra, it was this concern for Courtney, who was fourteen years old at the time, that caused her to place a tape **recorder** on her extension telephone in her bedroom to monitor the telephone activity at her house. J.A. at 102–03. Sandra maintains that her only motivation in doing this was "concern for her child's well being." *Id.* The monitoring began in May of 1995, and lasted only a few weeks. During the course of the monitoring, Sandra heard a conversation between Courtney and Laura "which greatly alarmed and frightened" her and "gave [her] immediate concern for the safety and well being of 3 other individuals and confirmed to [her] the abuse and emotional injury and harm she suspected Courtney was being subjected to." J.A. at 103. The **7 substance of that conversation, according to Laura,[6] was the following:

> In late May of 1995, Courtney called me up one night when Sam was not at home, and was upset and complaining of Judge Morris's decision to require her to live with Sandra. Courtney began, as is not unusual for a teenager to do, to let off steam, even to the point of remarking—*in obvious jest and with no semblance of seriousness*—that she would like to kill "the two of them," referring to Oliver Barber and Luann Glidewell [Sandra's attorneys]. In equal jest, I joined in her sentiments, adding Judge Morris to the "hit list."
>
> J.A. at 157 (emphasis in original). According to Laura, neither she, nor Courtney, took this conversation seriously, "as is obvious to anyone who would listen to the tape **recording**."[7] *Id.*

Because Sandra was disturbed by this conversation, she reported it to her attorney, Oliver Barber. J.A. at 103. After learning of the conversation's contents, Sandra alleges that Barber felt compelled by Ky.Rev.Stat. Ann. § 620.030,[8] to report the conversation to the Crimes Against Children Unit ("CACU"), a joint task force operated by the Louisville Division of Police and Jefferson County Police Department. **8 *Id.* Barber had Sandra's permission to report the conversation. *Id.* Sandra ceased monitoring after she reported this conversation to Barber.

Id. Subsequent to this, Courtney discovered the rest of the *605 tapes in her mother's bathroom cabinet and gave them to Samuel and Laura.

The CACU then disclosed the contents of the tape containing the above conversation to Judge Morris, who had presided over Samuel and Sandra's divorce and subsequent custody disputes. A transcript of the conversation was made a part of the official **record** in the case, and Judge Morris recused himself.

According to Samuel and Laura, Sandra was not motivated by concern for Courtney when she **recorded** the phone conversations. Instead, they contend that Sandra was angry that Courtney had taped a conversation between herself and Sandra with Samuel and Laura's consent, and "wanted to return the favor by taping Courtney's conversations with Sam and [Laura]." J.A. at 155–56. Laura further contends that immediately before the **recording** began, Sandra discovered Courtney's diary, in which Courtney had **recorded** that she was being represented by counsel (hired by her father Samuel), Rebecca Ward, incident to the then on-going dispute as to Courtney's custody. J.A. at 156. Before discovering the diary, Sandra was unaware that Courtney had her own attorney. *Id.* Rather than being motivated by concern for Courtney's welfare, Laura contends that "Sandra's predominant motive in eavesdropping on the children's calls was to overhear Courtney's confidential, attorney-client conversations with her lawyer." *Id.*

In addition, Courtney's declaration states: "I believe my mother started **recording** calls when she discovered my diary entries which said that I was being represented by my own attorney, Becky Ward. At about the same time, someone had reported my mother to the authorities for possible abuse and neglect of me and my brothers." J.A. at 159–60. As to the state of her relationship with her mother, or any deterioration thereof, Courtney states: "I simply do not get along well with my mother, and do get along well with my father and **9 stepmother. I was not happy at all living with my mother, and so told Judge Morris when he interviewed me....The decision which Judge Morris made, against my wishes, to require me to live with my mother led to the further deterioration of my relationship with her." J.A. at 159. Finally, Courtney alleges that "[her] relationship with [her] mother was not helped by [Sandra] dating a man only a few years older than [Courtney] was, who had been convicted of a crime." *Id.*[9]

Samuel and Laura filed their amended complaint on January 16, 1996. Counts 1–5 of the amended complaint allege that Sandra violated 18 U.S.C. § 2511(1)(a) by intentionally intercepting telephonic communications between two parties without either party's consent. Counts 6–11 allege that Sandra, Barber, and Glidewell violated 18 U.S.C. § 2511(1)(b)-(d) by intentionally using and disclosing the contents of these communications to third parties. Samuel and Laura also allege a violation of their right to privacy under Kentucky common law. In response to the complaint, Defendants filed a motion to dismiss, which the district court construed as a motion for summary judgment. On May 22, 1997, the district court granted summary judgment for Defendants, finding that Sandra had **vicariously consented** to the **recording** of the phone calls, and thus qualified for the consent exception found in 18 U.S.C. § 2511(2)(d). Because the court found that Sandra's interceptions of the phone conversations were not unlawful, the district court granted summary judgment as to the claims against Sandra, Barber, and Glidewell for distribution and use of the tapes. Finally, as all of the federal claims were dismissed before trial, the court dismissed the pendent state claims as well. Plaintiffs Samuel and Laura then filed this appeal.

**10 **11 II.

We review a district court's grant of summary judgment *de novo. City Management Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 250 (6th Cir.1994). Accordingly, we must consider all facts and inferences drawn therefrom in the light most favorable to the nonmoving *606 party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir.1987).

III.

Plaintiffs allege that Sandra and her attorneys violated Title III when: (1) Sandra taped conversations between Courtney and Plaintiffs; (2) Sandra disclosed these conversations to her attorneys; and (3) Sandra and her attorneys disclosed these conversations to the CACU. As set forth above, there appears to be no dispute that Sandra intentionally intercepted the phone calls or that Defendants intentionally disclosed the contents thereof.[10] Instead, this case raises two principal questions. First, whether a parent, motivated by concern for the welfare of his or her child, can "**vicariously consent**" to tape-**recording** the calls of a minor child, when the child

has not consented to the **recording**. If we answer this question in **12 the negative, judgment must be entered for Plaintiffs, and our inquiry ends there. If, however, **vicarious consent** does qualify for the consent exception to the wiretap statute, we must then address the second question: whether questions of fact precluding summary judgment exist as to Sandra's motivation in **recording** the telephone calls at issue in this case.

A.

Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability.[11] The question of whether a parent can "**vicariously consent**" to the **recording** of her minor child's phone calls, however, is a question of first impression in all of the federal circuits.[12] **13 Indeed, while other circuits have addressed cases raising similar issues, these have all been decided on different grounds, as will be discussed below. The only federal courts to directly address the concept of **vicarious consent** thus far have been a district court in Utah, *607 *Thompson v. Dulaney,* 838 F.Supp. 1535 (D.Utah 1993), a district court in Arkansas, *Campbell v. Price,* 2 F.Supp.2d 1186 (E.D.Ark.1998), and the district court in this case, *Pollock v. Pollock,* 975 F.Supp. 974 (W.D.Ky.1997).

B.

As a threshold matter, we note that Seventh, Tenth, and Second Circuits have decided cases with facts similar to those of this case on different grounds, holding that parental wiretapping without the consent of the minor child does not violate Title III because the **recording** was done from an extension phone within the home. *Scheib v. Grant,* 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle,* 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin,* 843 F.2d 110 (2d Cir.1988); *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir.1977). The "extension telephone" exemption, also known as the "ordinary course of business exemption," is set forth in 18 U.S.C. § 2510(5)(a)(i), which expressly exempts from the coverage of Title III "any telephone or telegraph instrument, equipment or facility or any component thereof ... being used by the subscriber or user in the ordinary course of its business...."

From this language, the Seventh, Tenth, and Second Circuits have held that the § 2510(5)(a)(i) exemption was intended to cover tape **recorders** attached to extension phones in the home. In *Scheib,* the Seventh Circuit stated:

> **14 The language of § 2510(5)(a)(i) juxtaposes the terms "subscriber" and "user" with the phrase "in the ordinary course of business." Although the latter phrase might be used to distinguish commercial from personal life, in the context presented here, it must be read in conjunction with the terms "subscriber" and "user." These terms certainly do not have exclusively market-oriented connotations. Reading this extension phone exemption as a whole, then, it is no lexical stretch to read this language as applying to a "subscriber's" conduct—or "business"—in raising his or her children.

Scheib, 22 F.3d at 154.

In 1995, however, this Court expressly rejected the line of cases holding that the extension exemption extended to the home in *United States v. Murdock,* 63 F.3d 1391 (6th Cir.1995).[13] Instead, this Court held that the statute did not permit the sort of extension phone **recordings** at issue in this case. *Murdock,* 63 F.3d at 1396 ("[W]e conclude that the **recording** mechanism (a tape **recorder** connected to extension phones in Mrs. Murdock's home) does not qualify for the telephone extension (or business extension) exemption."). The Court further noted that "spying on one's spouse does not constitute use of an extension phone in the ordinary course of business." *Id.* at 1400.[14]

Accordingly, this Court's rejection of the "extension exemption" in these types of cases dictates that the cases **15 discussed above, though cited by both parties, are not persuasive as to the issue of **vicarious consent**.

C.

The district court in the instant case held that Sandra's "**vicarious consent**" to the taping of Courtney's phone calls qualified for the consent exemption under § 2511(2)(d). Accordingly, the court held that Sandra did not violate Title III. The court based this decision on the reasoning found in *Thompson v. Dulaney,* 838 F.Supp. 1535 (D.Utah 1993), and *Silas v. Silas,* 680 So.2d 368 (Ala.Civ.App.1996).

The district court in *Thompson* was the first court to address the authority of a parent to **vicariously consent** to the taping of phone conversations on behalf of minor children. In *Thompson,* a mother, who had custody of her

three and five-year-old children, *608 **recorded** conversations between the children and their father (her ex-husband) from a telephone in her home. 838 F.Supp. at 1537. The court held:

> [A]s long as the guardian has a *good faith basis* that it is *objectively reasonable* for believing that it is *necessary* to consent on behalf of her minor children to the taping of phone conversations, **vicarious consent** will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.

Id. at 1544 (emphasis added). The court noted that, while it was not announcing a *per se* rule approving of **vicarious consent** in all circumstances, "the holding of [*Thompson*] is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father." *Id.* at 1544 n. 8.

An obvious distinction between this case and *Thompson,* however, is the age of the children for whom the parents **vicariously consented**. In *Thompson,* the children were three and five years old, and the court noted that a factor in its decision was that the children were minors who "lack[ed] **16 both the capacity to [legally] consent and the ability to give actual consent." *Id.* at 1543. The district court in the instant case, in which Courtney was fourteen years old at the time of the **recording**, addressed this point in a footnote, stating:

> Not withstanding this distinction [as to the age of the children], *Thompson* is helpful to our determination here, and we are not inclined to view Courtney's own ability to actually consent as mutually exclusive with her mother's ability to **vicariously consent** on her behalf.

Pollock v. Pollock, 975 F.Supp. 974, 978 n. 2 (W.D.Ky.1997).

The only other federal case to address the doctrine of **vicarious consent** is also the most recent case to analyze this issue. In *Campbell v. Price,* 2 F.Supp.2d 1186 (E.D.Ark.1998), a father, who had custody of his twelve-year-old daughter, tape-**recorded** conversations between the child and her mother because the father observed that his daughter "would cry and become upset after talking with her mother on the phone," and he was concerned that the mother was emotionally abusing the child. 2 F.Supp.2d at 1187. The child's mother then brought an action against the child's father, alleging that he violated 18 U.S.C. § 2511 by intentionally intercepting and **recording** conversations between herself and her minor daughter. *Id.* at 1188. The court, noting that "[it] uncovered no cases rejecting the **vicarious consent** argument," and "find[ing] persuasive the cases allowing **vicarious consent**," adopted the concept of **vicarious consent** and granted summary judgment for the father. *Id.* at 1189. In support of its decision, the court cited *Thompson* and the district court's opinion in the instant case, and noted that these cases "clearly stand for the proposition that a defendant's good faith concern for his minor child's best interests, may, without liability under Title III, empower the parent to intercept the child's conversations with the non-custodial parent." *Id.* at 1191.

In addition, two state courts have recently addressed the issue of **vicarious consent** by a parent on behalf of a minor **17 child under the applicable state's version of the federal wiretap act, *Silas v. Silas,* 680 So.2d 368 (Ala.Civ.App.1996) and *State v. Diaz,* 308 N.J.Super. 504, 706 A.2d 264 (1998), and two state courts have addressed the issue under both the state and federal statutes, *Williams v. Williams,* 229 Mich.App. 318, 581 N.W.2d 777 (1998) and *West Virginia Dep't of Health & Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994).

In *Silas,*[15] the court held that a father had authority to consent on behalf of his seven-year-old son to taping phone conversations with the child's mother, pursuant to Alabama's version of the federal wiretap statute.[16] The court did, however, make the test *609 for valid **vicarious consent** more stringent than the one set forth in *Thompson,* in that it specifically required the parent to have a "good faith basis that it is objectively reasonable to believe that the minor child is being *abused, threatened, or intimidated by the other parent,*" *Silas,* 680 So.2d at 371 (emphasis added), as opposed to the *Thompson* court's requirement of "a good faith basis that is objectively reasonable for believing that it is necessary ... [and] in the best interests of the [child]." 838 F.Supp. at 1544. The district court in the instant case adopted the test as set forth in *Thompson. Pollock,* 975 F.Supp. at 978.

In *State v. Diaz,* 308 N.J.Super. 504, 706 A.2d 264 (1998), the court held that parents could **vicariously consent** on behalf of their five-month-old infant to **recording** a nanny abusing the child on videotape, under

New Jersey's version of the **18 federal wiretap act. The Court in *Diaz* noted that the New Jersey statute was modeled after the federal statute, and cited *Thompson* and the district court's opinion in this case in support of its holding that the state statute incorporates the theory of **vicarious consent**. *Diaz,* at 514–15, 706 A.2d 264.

Finally, two state courts have addressed this issue under both the federal and state wiretap statutes. The Court of Appeals of Michigan is the only court that has evaluated the concept of **vicarious consent** and declined to adopt it. In *Williams v. Williams,* 229 Mich.App. 318, 581 N.W.2d 777 (1998), a divorced father tape-**recorded** conversations between his five-year-old son and the child's mother. The *Williams* court reversed the lower court's grant of summary judgment for the father, holding that the "language [of Title III] gives us no indication that Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf and tape **record** telephone conversations between the child and a third party." 581 N.W.2d 777, 780. The court noted, however, that in declining to adopt the doctrine of **vicarious consent**, it was departing from the path chosen by all of the other courts that have addressed this issue. *Williams,* 581 N.W.2d 777, 781 ("[W]e nonetheless recognize that several courts in other jurisdictions have analyzed this precise issue....In general, these courts have been willing to extend the consent exception in the federal wiretapping act to include **vicarious consent** by a parent on behalf of his or her minor child to intercepting and using communications with a third party where such action is in the child's best interests.").

In the final case to address this issue, *West Virginia Dep't of Health & Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), the court discussed the concept of **vicarious consent** under both Title III and the West Virginia statute. The facts of *David L.* are distinguishable from the facts in the instant case. In *David L.,* the court held that a father violated Title III when he **recorded** conversations between his children and their mother (his ex-wife) via a tape **recorder** secretly **19 installed *in the mother's home.*[17] 453 S.E.2d at 648. The father, David L., argued that, under the state's version of the wiretap statute, he had authority to **vicariously consent** to the taping on behalf of his children. *Id.* at 653. The court rejected this argument and held that "under the specific facts of the case before us, ... a parent has no right on behalf of his or her children to give consent under W. Va.Code § 62–1D–3(c)(2) or 18 U.S.C. § 2511(2)(d), to have the children's conversations with the other parent **recorded** while the children are in the other parent's house." *Id.* at 654. In so holding, however, the court discussed *Thompson* and stated:

> *We do not disagree with the reasoning in Thompson;* however, we determine the facts of the present case are different from the facts of in *Thompson* in two significant respects. First, [in *Thompson*], the children were physically residing with [their mother] at the time the conversations were **recorded**. Second, the conversations were **recorded** from a telephone in the house where [the mother] and her children resided. On the other hand, in the present case, first, [the mother], not [the father], was awarded temporary custody of the *610 children during the divorce proceedings. Second, the **recordings** occurred in [the mother's] house, not [the father's] house, and he had absolutely no dominion or control over [the mother's] house where he procured his mother's assistance to hide the tape **recorder**.
> *Id.* (emphasis added). The court further noted:
>
> > We draw a distinction between the present situation and a situation in which a guardian, *who lives with the children and who has a duty to protect the welfare of the children,* gives consent on behalf of the children to intercept telephone conversations *within the house where the guardian and the children reside.*
>
> **20 **21 *Id.* at 654 n. 11 (emphasis added). Accordingly, while the court in *David L.* declined to permit **vicarious consent** in that particular case, it appears from the above language that the court did not oppose the concept of **vicarious consent** to a parental wiretap in all cases.

D.

[11] After this review of the relevant case law, we conclude that although the child in this case is older than the children in the cases discussed above in which the doctrine of **vicarious consent** has been adopted, we agree with the district court's adoption of the doctrine, provided that a clear emphasis is put on the need for the "consenting" parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. Accordingly, we adopt the standard set forth by the district court in *Thompson* and hold that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to

consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may **vicariously consent** on behalf of the child to the **recording**. *See Thompson,* 838 F.Supp. at 1544. Such **vicarious consent** will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d).

We stress that while this doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: "I was doing it in his/her best interest," there are situations, such as verbal, emotional, or sexual abuse by the other parent, that make such a doctrine necessary to protect the child from harm. It is clear that this is especially true in the case of children who are very young. It would be problematic, however, for the Court to attempt to limit the application of the doctrine to children of a certain age, as not all children develop emotionally and intellectually on the same timetable, and we decline to do so.

Moreover, support for adopting the doctrine is found in the decisions of the Seventh, Tenth, and Second Circuits which ****22** have permitted parental taping of minor children's conversations in situations similar to this one on the "extension exemption" ground. *Scheib v. Grant,* 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle,* 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin,* 843 F.2d 110 (2d Cir.1988); *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir.1977). Thus, while these cases address the question from a different perspective than the instant case, the end result—that these kinds of wiretaps should be permitted in certain instances—supports adoption of the doctrine. *See Scheib,* 22 F.3d at 154 ("We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for **recording** their minor child's phone conversations out of concern for that child's well-being.").[18] Accordingly, the district court's adoption of the concept of **vicarious consent** is **AFFIRMED**.

IV.

[2] We turn next to the question of whether questions of material fact exist as to Sandra's motivation and purpose in taping the telephone conversations at issue that would preclude summary judgment for the Defendants. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to ***611** any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," *id.* at 323, 106 S.Ct. 2548, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. *Emmons v. McLaughlin,* 874 F.2d 351, 353 (6th Cir.1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden–Alimak, Inc.,* 799 F.2d 1128, 1133 (6th Cir.1986).

****23** When confronted with a properly supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52, 106 S.Ct. 2505.

A.

The district court found that no question of material fact existed as to whether Sandra was motivated by genuine concern for her child's best interest, and granted summary judgment for Defendants. We disagree. Upon a *de novo* review of the **record**, it appears that questions of fact precluding summary judgment exist as to whether Sandra had a good faith basis that was objectively reasonable for believing it was necessary to consent on behalf of her minor child to the taping of these conversations.

As set forth above, both Laura and Courtney submitted declarations asserting that Sandra was motivated by something other than concern for her child's welfare. The allegations that Sandra was taping the phone conversations to gain access to Courtney's attorney-client communication with her lawyer, combined with the fact that the taping began soon after Sandra found the diary in which Courtney stated that her father had hired a lawyer to represent her, without Sandra's knowledge or consent, create a question of material fact as to Sandra's motives. J.A. at 155–56. Moreover, Courtney's allegations in her declaration that the deterioration in her relationship with her mother was caused by the fact that she did not get

along with her mother, and by her mother's relationship with a convicted felon "only a few years older than [Courtney]," rather than by anything done by her father, **24 further contribute to our determination that questions of material fact exist. J.A. 159–60.[19]

[3] [4] The district court did not directly address any of the statements contained in Laura's and Courtney's declarations.[20] In *612 granting summary judgment for Defendants, the district court stated:

> We find no ... countervailing evidence offered by the plaintiffs that would eviscerate Sandra's **vicarious consent** defense here and preclude summary judgment. Sandra's affidavit clearly supports her claim that she acted to protect the welfare of her children in taping the conversations at issue.... [P]laintiffs have offered no evidence tending to suggest that the **vicarious consent** defense is inappropriate here or that Sandra's "child **25 welfare" contention is pretextual. The plaintiffs cannot simply point to the tension and bitterness among the parties and expect the court to leap to the conclusion that Sandra's motives in taping were improper.[21]

Pollock v. Pollock, 975 F.Supp. 974, 979 (W.D.Ky.1997). In support of the decision to grant summary judgment, the district court cited *Silas* and *Scheib,* in which summary judgment was granted in favor of the taping parent. The facts in these two cases, however, were quite different than those in the instant case. In *Silas,* the father asserted that he began taping conversations between his seven-year-old son and the child's mother after "observing several instances when the minor child became extremely upset and began to cry during the telephone conversations." *Silas v. Silas,* 680 So.2d 368, 371 (Ala.Civ.App.1996). In *Scheib,*[22] the father who taped his eleven year old child's phone conversations stated that "on more than one occasion, [the child] became upset after speaking with his mother." *Scheib v. Grant,* 22 F.3d 149, 150 (7th Cir.1994).[23] In contrast, here Sandra states only that she "noticed a gradual change in Courtney which included what [Sandra] felt was a[sic] excessive or compulsive desire to be **26 with her father and corresponding deteriorating relationship with [Sandra]." J.A. at 102.

In *Thompson,* the district court, after approving of the doctrine of **vicarious consent**, declined to grant summary judgment because there was conflicting evidence as to what the mother's "purpose" was in intercepting the conversations. *Thompson v. Dulaney,* 838 F.Supp. 1535, 1545 (D.Utah 1993). Given the conflicting evidence offered by the parties, we find that there is a dispute as to material facts, making this case inappropriate for summary judgment. Thus, as in *Thompson,* while the doctrine of **vicarious consent** is properly adopted, there are questions of material fact as to Sandra's motivation in taping the conversations, and this issue should be submitted to a jury.

B.

If the jury determines that Sandra did properly consent on behalf of her minor child because she had a good faith, objectively reasonable belief that such consent was necessary and in the best interest of the child, judgment must be entered for Defendants as to the use and disclosure claims against Sandra, Barber, and Glidewell because the taping of the conversations would not, therefore, have been illegal. In order to state a claim for use or disclosure in violation of Title III, the communication at issue must be the product of an illegal wiretap. 18 U.S.C. § 2511(1)(c)-(d). If, however, the jury determines that Sandra was motivated by something other than concern for her child, it will have to evaluate the use and disclosure *613 claims and determine whether Sandra and her lawyers "knew or should have known" that the communication was the product of an illegal wiretap. *Id.*

[5] There are also questions of fact as to whether Sandra and her attorneys knew that the wiretap itself was potentially illegal. Sandra claims that she did not know the wiretap was **27 potentially illegal,[24] and that as soon as she learned it was, she stopped taping. J.A. at 102–04. Plaintiffs contend that they have a tape (one of Sandra's tapes provided to them by Courtney) on which Sandra has a discussion with another adult woman in which "Sandra goes to great lengths to explain to the other woman that her conversation with Sandra is being tape **recorded**. Sandra says herself that she is so advising the other woman because Sandra believes it is illegal to tape **record** telephone conversations without the knowledge of the other person whose call is being **recorded**." J.A. at 154–55.

[6] As to Sandra's attorneys, Barber and Glidewell, it appears undisputed that these Defendants did use or disclose the contents of these conversations during the course of their representation of Sandra. Whether they knew, or should have known, that the material came from an unlawful wiretap, however, is a question of fact for the jury.[25] *See Thompson,* 838 F.Supp. at 1548 (declining to grant summary judgment as to father's use and disclosure claims against mother's attorneys and stating: "Whether [the attorneys] knew the material came from an unlawful wiretap, ... is a question of fact which this Court may not

decide.").

Accordingly, the district court's grant of summary judgment is **REVERSED**, and this case is **REMANDED** for a trial on the disputed issues in this case in accordance with this opinion.

CONCLUSION

In summary, we **AFFIRM** the district court's adoption of the doctrine of **vicarious consent** as set forth above, ****28 REVERSE** the district court's grant of summary judgment, and **REMAND** this matter for trial.

Parallel Citations

1998 Fed.App. 0271P

Footnotes

* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

1 Defendants' motion was styled as a motion to dismiss Plaintiffs' amended complaint pursuant to Fed.R.Civ.P. 12(b)(6). Because both parties' briefs included, and relied upon, extraneous material, the district court construed Defendants' motion as a motion for summary judgment. *See* Fed.R.Civ.P. 12(b).

2 It is unclear whether Courtney told Sandra that one conversation, or multiple conversations, had been **recorded**.

3 Although this incident may or may not be a contributing factor to Sandra's later taping of Courtney's conversations with Samuel and Laura, it is not the taping incident at issue in this case.

4 The **record** contains copies of two settlement letters from Samuel's attorney in which he offers to drop this lawsuit in exchange for joint custody of Courtney, with Courtney residing with him. J.A. at 146–51.

5 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law note that Judge Morris interviewed Courtney and she expressed that she preferred to stay with her father, rather than her mother. J.A. at 113. Even so, Judge Morris found that Sandra should retain custody of Courtney. On May 13, 1995, Judge Morris issued Amended Findings of Fact and Conclusions of Law, again confirming his prior grant of custody of Courtney to Sandra, over Courtney's and Samuel's objections. J.A. at 128.

6 A transcript of the actual conversation is not included in the **record**, and Sandra does not discuss the contents of the conversation in her affidavit. Accordingly, the only sources regarding this conversation are the declarations submitted by Laura and Courtney, which describe the conversation as set forth above.

7 The Court was not provided with a copy of the tape.

8 Ky.Rev.Stat. Ann. § 620.030 provides:

> (1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky state police....

9 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law make reference to a Mr. Kevin Downs as follows: "The relationship [Sandra] has established with a convicted felon (Mr. Kevin Downs) and her visits to see Mr. Downs while in jail has required this Court to order [Sandra] not to allow the children to have any contact with Mr. Downs." J.A. at 113.

10 Title 18 U.S.C. § 2511(1) provides that a claim under Title III can be made against any person who:

> (a) intentionally intercepts ... the contents of any wire, oral, or electronic communication; ...
> (c) intentionally discloses ... to any person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
> (d) intentionally uses ... the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection....

11 Title 18 U.S.C. § 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such intereception....

12 We note that although it can be argued, from a policy perspective, that the federal courts should stay out of these kinds of domestic disputes, that option has been foreclosed by the decisions of this Court and numerous other federal courts. In one of the earliest cases to address the issue of domestic wiretaps in a case involving interspousal wiretapping, *Simpson v. Simpson,* 490 F.2d 803, 805 (5th Cir.1974), *cert. denied,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974), the Fifth Circuit stated, "The naked language of Title III, by virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a result, one extending into areas normally left to states, those of the marital home and domestic conflicts." While the Fifth Circuit has not overruled that decision, it has been severely criticized by a number of other circuits, beginning with this Court in *United States v. Jones,* 542 F.2d 661, 673 (6th Cir.1976) (holding that "the plain language of § 2511 and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps"). *See also Heggy v. Heggy,* 944 F.2d 1537, 1539 (10th Cir.1991) (holding that "Title III does apply to interspousal wiretapping within the home"), *cert. denied,* 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992); *Kempf v. Kempf,* 868 F.2d 970, 973 (8th Cir.1989) (holding that "the conduct of a spouse in wiretapping the telephone communications of the other spouse within the marital home falls within [Title III's] purview"); *Pritchard v. Pritchard,* 732 F.2d 372, 374 (4th Cir.1984) (stating that there is "no legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping").

13 In *Murdock,* the defendant had been convicted after the district court admitted into evidence incriminating tape-**recordings** made by his estranged wife.

14 In *State v. Shaw,* 103 N.C.App. 268, 404 S.E.2d 887 (1991), the North Carolina Court of Appeals held that a mother who **recorded** her son's telephone conversation regarding an upcoming drug deal, from a telephone extension in her home using a microcassette **recorder,** violated Title III. ("There was no evidence before the trial court that the mother used a microcassette **recorder** 'in the ordinary course of business.' ") *Shaw,* 404 S.E.2d at 889.

15 The district court in this case also relied upon *Silas* in support of its decision.

16 The *Silas* court also addressed the question of parental wiretaps under Title III and held, in accordance with the circuits discussed *supra,* that the father's actions were exempt under the "extension exemption." 680 So.2d at 370. As set forth above, that exemption is not available as a basis for the decision in this case. *United States v. Murdock,* 63 F.3d 1391 (6th Cir.1995).

17 The children's paternal grandmother installed the tape **recorder** in the children's bedroom, pursuant to her son's request, when she was in the mother's home babysitting the children.

18 The child in *Scheib* was eleven years old. 22 F.3d at 150.

19 In addition, Courtney alleges that at about the same time that Sandra began taping the phone conversations, "someone had reported [Sandra] to the authorities for possible abuse and neglect of me and my brothers." J.A. at 160. Reading all inferences of fact in favor of Plaintiffs, as we must do on Defendants' motion for summary judgment, we note that such an allegation against her could provide further motive for Sandra to embark on a mission to "gather dirt" on Samuel in the context of their battle for custody of the children.

20 Defendants acknowledge that the district court did not directly address Laura and Courtney's allegations. In doing so, however, Defendants make much of the fact that the declarations were "unsworn affidavits." An unsworn affidavit cannot be used to support or oppose a motion for summary judgment. *See Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 968–69 (6th Cir.1991) ("the unsworn statements of the two employees ... must be disregarded because a court may not consider unsworn statements when ruling on a motion for summary judgment"). However, a statutory exception to this rule exists which permits an unsworn declaration to substitute for a conventional affidavit if the statement contained in the declaration is made under penalty of perjury, certified as true and correct, dated, and signed. 28 U.S.C. § 1746; *see also Williams v. Browman,* 981 F.2d 901, 904 (6th Cir.1992). Both Laura's and Courtney's declarations contain the statement: "I declare, under penalty of perjury, that the foregoing is true and correct," and both declarations are signed and dated. J.A. at 157, 160. Accordingly, we must consider these declarations when deciding this appeal.

21 Similarly, we cannot simply look to Sandra's poor relationship with her daughter and "leap to the conclusion" that Samuel was the cause of the deterioration of that relationship.

22 As discussed above, in *Scheib,* the Seventh Circuit permitted parental wiretapping on the "extension exemption" ground.

23 We note that summary judgment was also granted for the defendants in *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998), which was decided subsequent to the district court's opinion in this case. As in *Silas* and *Scheib*, the taping parent in *Campbell*, the child's father, offered evidence to substantiate his claim that the **recording** of the child's phone conversations was motivated by legitimate concern that the child's relationship with her mother was potentially abusive. *Id.* at 150–51. The child's father submitted an affidavit stating that "his daughter would cry and become upset after talking with her mother on the telephone, that she would 'mope around' and 'go into her room and just sit there' and that she was 'not willing to talk about what was wrong with her.' " *Id.*

24 However, Sandra does concede, as she must, that Courtney was unaware of, and did not consent to, the taping.

25 The **record** does not contain any affidavits from Barber and Glidewell as to what they knew, or did not know, about the **recording**.

End of Document

Exhibit 4

Exhibit 4

360 S.W.3d 416
Court of Appeals of Tennessee,
Eastern Section, at Knoxville.

Chris LAWRENCE
v.
Leigh Ann LAWRENCE.

No. E2010–00395–COA–R3–CV. | Nov. 8, 2010 Session. | Nov. 29, 2010. | Permission to Appeal Denied bySupreme Court April 13, 2011.

Synopsis
Background: Father brought action against mother seeking damages for, among other things, wiretapping, arising out of mother secretly tape recording their two-and-one-half-year-old daughter's telephone conversation with father during course of divorce and custody dispute. The Circuit Court, Knox County, Dale C. Workman, J., entered partial summary judgment in favor of mother. Father appealed.

[Holding:] The Court of Appeals, Charles D. Susano, Jr., J., held that mother had the right to vicariously consent, within meaning of wiretapping statute, to interception of child's telephone conversation with father, precluding mother's liability.

Affirmed; case remanded.

West Headnotes (3)

[1] **Parent and Child**
⇐Compromise, settlement, waiver, and release
Telecommunications
⇐Persons concerned; consent

Mother had the right to vicariously consent, within meaning of wiretapping statute, to intercepting, recording, and disclosing two-and-one-half-year-old child's telephone conversation with father during the course of a divorce and custody dispute, precluding mother's liability. West's T.C.A. § 39–13–601(b)(5).

2 Cases that cite this headnote

[2] **Parent and Child**
⇐Care, Custody, and Control of Child; Child Raising

Child-rearing autonomy encompasses unrestricted control of a two-and-one-half–year–old child's access to the telephone, including to whom the child speaks and when the child speaks and under what conditions the child speaks.

Cases that cite this headnote

[3] **Infants**
⇐Validity

Society's concern for minors may be constitutionally reflected in statutes to account for: (1) minors' peculiar vulnerabilities and their need for concern, sympathy, and paternal attention; (2) minors' inability to make sound judgments about their own conduct; and (3) the courts' deference to the guiding role of parents.

Cases that cite this headnote

Attorneys and Law Firms

*416 W. Andrew Fox, Knoxville, Tennessee, for the appellant, Chris Lawrence.

R. Deno Cole, Knoxville, Tennessee, for the appellee, Leigh Ann Lawrence.

OPINION

CHARLES D. SUSANO, JR., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

CHARLES D. SUSANO, JR.

Leigh Ann Lawrence ("Mother") secretly tape recorded her 2 1/2–year–old daughter's telephone conversation with the child's father, Chris Lawrence ("Father"), during the course of a divorce and custody *417 dispute. After the divorce was concluded, Father filed a complaint against Mother seeking damages for, among other things, wiretapping in violation of Tenn.Code Ann. § 39–13–601 (2006). Father filed a motion for partial summary judgment which the trial court denied upon finding that "[n]o set of facts would create liability under § 39–13–601 et seq. for [Mother's] interception of [Father's] communication with his daughter." The court then entered partial summary judgment in favor of Mother and certified the judgment as final. Father appeals. We affirm.

I.

The parties agree that the following facts are undisputed:

> [Mother] secretly recorded a phone conversation between [Father] and his daughter.
>
> [Mother's] recording actions were intentional.
>
> [Mother's] recording was made without [Father's] knowledge or consent.
>
> [Mother] was not a party to the conversation between [Father] and his daughter that [Mother] recorded.
>
> [Mother] recorded the conversation sometime in late May or early June of 2007.
>
> The parties' child was approximately 2 1/2 years old at the time of the recording, and had no capacity to provide consent to the recording of the conversation between the child and [Father].
>
> Regardless of whether the parties' child had the capacity to provide consent, the child had no knowledge of the recording device, and to make the recording, [Mother] stationed herself at a phone other than the phone being used by the parties' daughter to speak with [Father], to not alert the child to the fact that [Mother] was holding a tape recorder, because the child would have wanted to sing into the tape recorder or play with it.
>
> [Mother] disclosed the recording to a third party, a psychologist ... who was conducting a custody evaluation in connection with the parties' divorce.
>
> The parties were going through a divorce proceeding in 2007.

The above facts are taken verbatim from Father's "[Tenn. R. Civ. P.] 56.03 Statement of Material Facts." Mother filed her own statement of facts which the parties have addressed in the following stipulation filed in this Court:

> [Father] filed a Motion for Partial Summary Judgment on May 29, 2009.
>
> [Mother] waived the 30–day provision under TRCP 56, to allow [Father's] motion to be heard on June 26, 2009.
>
> The trial court entertained [Father's] motion on June 26, 2009.
>
> The trial court made its pronouncement relating to [Father's] motion on June 26, 2009.
>
> [Mother] filed her Motion for Partial Summary Judgment on June 29, 2009.
>
> The trial court has never entertained a hearing on [Mother's] motion; however the parties stipulated, pursuant to the Order entered February 1, 2010 ..., that [Mother's] Motion for Partial Summary Judgment should be granted, in light of the trial court's findings that [Father's] invasion of privacy claim was non-justiciable.
>
> [Mother] stated "Additional Material Facts" in her June 22, 2009 response to [Father's] ... Statement of Material Facts, in order to raise the defense of the vicarious consent doctrine and create a question of fact as to whether she had a good faith, objectively reasonable basis for believing it was necessary and in the best interests of the parties' minor child to consent on behalf of her to the taping *418 of a conversation with [Father] and the minor child.
>
> The parties stipulate that these Additional Material Fact statements sworn to by [Mother], as part of [Mother's] Motion for Partial Summary Judgment, were not

operative in the granting of [Mother's] Motion for Partial Summary Judgment.

The parties stipulate that if the court construes the law in such a way that the Additional Material Fact statements sworn to by [Mother] would become operative, then the case should be returned to the trial court to allow [Father] an opportunity to demonstrate that a genuine issue of material fact exists with respect to these statements.

The trial court stated its reasons for granting partial summary judgment in favor of Mother as follows:

The Tennessee wiretapping act found at § 39–13–601 et seq. does not abrogate a parent's constitutionally protected common law right and duty to protect the welfare of his or her child. This act is overbroad in its application to the set of circumstances involving parents and their children's telephone conversations. Therefore, this court finds that a parent has an unrestricted right to vicariously consent to the interception and recording of any phone conversation between a child and any other person, including another parent.

The parties agree that the Court's ruling renders Count 1 of [Father's] Complaint non-justiciable. No set of facts would create liability under § 39–13–601 et seq. for [Mother's] interception of [Father's] communication with his daughter. Therefore [Mother's] Motion for Partial Summary Judgment, filed on June 29, 2009, should be granted.

(Paragraph numbering omitted.) As we have stated, the trial court certified the judgment as final pursuant to Tenn. R. Civ. P. 54.02.[1]

II.

Father has appealed. The single issue he raises is

> [w]hether the Trial Court ... erred by denying summary judgment to [Father] and granting summary judgment to [Mother], when he found that no set of facts would create liability under the Tennessee wiretapping statute, TCA § 39–13–601 et seq., for [Mother's] actions of eavesdropping and taping [Father's] phone conversation with their 2 1/2–year–old daughter.

III.

[1] We are called upon to construe the term "consent" as it is used in Tenn.Code Ann. § 39–13–601 to determine whether Mother had an "unrestricted right to vicariously consent" to the interception of her daughter's telephone conversation. Issues of statutory construction are issues of law, *419 which we review *de novo* without a presumption of correctness as to the trial court's construction. *Leab v. S & H Mining Co.*, 76 S.W.3d 344, 348 (Tenn.2002). A trial court's determination that no set of facts can be proven which will afford relief is equivalent to dismissal for failure to state a claim and is also reviewed *de novo. Trau–Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696–697 (Tenn.2002).

IV.

Before we look at the exact statutory language at issue, it will be helpful to have some context for the language we will be examining; Tenn.Code Ann. § 39–13–601 identifies prohibited conduct, § 602 sets forth the criminal penalty for the prohibited conduct, and § 603 provides a private right of action to "any aggrieved person whose wire, oral or electronic communication is intentionally intercepted, disclosed or used in violation of § 39–13–601 ..." The pertinent part of § 39–13–601 reads as follows:

(a)(1) Except as otherwise specifically provided in §§ 39–13–601—39–13–603 ... a person commits an offense who:

(A) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

* * *

(C) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection (a);

* * *

(2) A violation of subdivision (a)(1) shall be punished as provided in § 39–13–602 and shall be subject to suit as provided in § 39–13–603.

(b)....

* * *

(5) *It is lawful* under §§ 39–13–601—39–13–603 and title 40, chapter 6, part 3 *for a person* not acting under color of law *to intercept a wire, oral, or electronic communication,* where the person is a party to the communication or *where one of the parties to the communication has given prior consent to the interception,* unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the state of Tennessee.

* * *

(Emphasis added.) The word "consent" is not defined in Tenn.Code Ann. § 39–13–601.

The parties agree that this is an issue of first impression in Tennessee. The lack of a definition and the obvious inability of a 2 1/2–year–old child to consent to a phone call or the recording of same convinces us that the statute is ambiguous and therefore subject to interpretation. *See State v. Spencer,* 737 N.W.2d 124, 129 (Iowa 2007)("Iowa's legislative policy ordinarily requires a parent's or guardian's input. With this in mind, we find ... the word "consent" as used in [Iowa's wiretapping statute] is ambiguous when applied to minors."). We have a duty to construe the term in such a way to avoid any constitutional conflict if it is susceptible to such a construction. *Jordan v. Knox County,* 213 S.W.3d 751, 780 (Tenn.2007).

The parties agree that parents have a fundamental constitutional right to make decisions concerning the care, custody and control of their children. *See Hawk v. Hawk,* 855 S.W.2d 573, 577–79 (Tenn.1993). In fact, the right of a parent to ***420** make decisions for a child without state interference is bounded only by "the state's authority as *parens patriae* ... to prevent serious harm to a child." *Id.* at 580. The Tennessee Supreme Court has held that

> [t]he relations which exist between parent and child are sacred ones.... The right to the society of the child exists in its parents; the right to rear it, to its custody, to its tutorage, the shaping of its destiny, and all of the consequences that naturally follow from the relationship are inherently in the natural parents.
>
> ...

Hawk, 855 S.W.2d at 578 (quoting *In re Knott,* 138 Tenn. 349, 355, 197 S.W. 1097, 1098 (1917)). A parent has a right to "childrearing autonomy" unless and until a showing is made of "a substantial danger of harm to the child." *Id.* at 579.

[2] It is readily apparent to us that "childrearing autonomy" encompasses control of a 2 1/2–year–old child's access to the telephone, including to whom the child speaks and when the child speaks and under what conditions the child speaks. We are also inclined to agree with the trial court that as to a 2 1/2–year–old, this right is "unrestricted." We are not, by this opinion, painting a bright line as to age. *See Cardwell v. Bechtol,* 724 S.W.2d 739, 744–45 (Tenn.1987)(recognizing "varying degrees of maturity" and that normally a child under age seven has no capacity to consent). Since 2 1/2 is obviously an age at which a child is too young to give consent, we see no need to determine a bright line rule in this case.

It is true, as Father argues, that divorce proceedings necessarily interject the government into the realm of "the parents' constitutionally protected fundamental liberty interest in the care and custody of their children." *Tuetken v. Tuetken,* 320 S.W.3d 262, 272 (Tenn.2010)(*quoting Lee v. Lee,* 66 S.W.3d 837, 847 (Tenn.Ct.App.2001)). Father therefore argues that the parental bill of rights codified at Tenn.Code Ann. § 36–6–101(a)(3) (Supp.2009) reflects a policy decision by the legislature that limits Mother's rights to make decisions for the child. Father relies specifically on the "right to unimpeded telephone conversations with the child at least twice a week at reasonable times and for reasonable durations." *Id.* We note that the divorce court retains the ability to deny the listed rights "when the court finds it not to be in the best interests of the affected child." *Id.*

We believe Father focuses on the wrong question. The question is not whether the court with divorce jurisdiction can allocate rights between litigating parents. Clearly it can. It can enforce its decrees in any number of ways, including contempt and sanctions. *See Hannahan v. Hannahan,* 247 S.W.3d 625, 628 (Tenn.Ct.App.2007)("Husband was obligated to comply with the terms of the April 5, 2006 order which he signed, and we find no error in the trial court's decree holding him in contempt for his failure to do so."); *see also* Tenn. R. Civ. P. 69.

The pertinent question in this case is whether the legislature intended to subject a parent to criminal penalties and money damages for eavesdropping, from another telephone, on a 2 1/2–year–old child's telephone conversation without the child's knowledge. For the

reasons we have already identified, we do not believe the legislature intended to invade the parent-child relationship. Further, we do not believe that the legislature intended to impose criminal penalties and money damages with respect to a telephone conversation between a parent and a 2 1/2–year–old child during the pendency of a divorce proceeding. Accordingly, we hold that, as ***421** a matter of law, Mother had the right to consent, as that term is used in Tenn.Code Ann. § 39–13–601, vicariously to intercepting, recording and disclosing the child's conversation with Father.

Our holding is in accord with the *result* produced under a variety of tests in other jurisdictions. The leading case under the federal wiretapping statute is *Pollock v. Pollock,* 154 F.3d 601 (6th Cir.1998). In *Pollock,* a mother recorded her 14–year–old daughter's conversation with her stepmother. *Id.* at 604. The court recognized that several other federal circuits had held that parental wiretapping without the consent of a minor child did not violate the federal law because it was done from an extension phone as part of "the ordinary course of business" of raising children. *Id.* at 607. The Sixth Circuit could not follow that same path because it had, in another case, rejected the proposition that recording from an extension phone was part of the "ordinary course of business." *Id.* Instead, the court held that "as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording." *Id.* at 610. The court adopted the objective test because of concern that a parent might abuse the doctrine of vicarious consent by falsely claiming to act in the best interest of the child. Also, the court rejected the idea of "limit[ing] the application of the doctrine to children of a certain age," but recognized the greatest need for vicarious consent is "in the case of children who are very young." *Id.*

A recent state case that took a broad look at the law in various jurisdictions and allowed parental recording of a child's conversation is *Spencer,* 737 N.W.2d 124. *Spencer* involved the criminal prosecution of a teacher for sexual exploitation of his 13–year–old female student. Part of the evidence against him was a tape recording the student's father had made without the child's knowledge. The case came before Iowa's Supreme Court on appeal from the criminal court's suppression of the evidence as a violation of Iowa's wiretapping law. *Id.* at 126. The Supreme Court, after surveying the cases from other jurisdictions, reversed the suppression and held that the father had the ability to vicariously consent for the child. *Id.* at 132.

[3] Although the *Spencer* Court imposed some restrictions on the ability to vicariously consent that we have not imposed by our holding, its analysis is consistent with our result in several important respects. First, it recognized that "[s]ociety's concern for minors may be constitutionally reflected in ... statutes to account for: (1) minors' peculiar vulnerabilities and their need for concern, sympathy, and paternal attention; (2) minors' inability to make sound judgments about their own conduct; and (3) our deference to the guiding role of parents." *Id.* at 132. We agree. Second, it recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* We have articulated that same right under the Tennessee Constitution. Third, it recognized that "the minor's age ... is also an important factor in considering whether a parent or guardian can vicariously consent for the minor child." *Id.* at 131. We believe that in the case of a 2 1/2–year–old, the right to vicariously consent exists as a matter of law.

V.

To the extent that non-Tennessee cases cited by us go beyond our holding in this case, we do not find it necessary to state our approval or disapproval of those portions ***422** of the other jurisdictions' holdings that go beyond our own.

VI.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Chris Lawrence. This case is remanded, pursuant to applicable law, for collection of costs assessed by the trial court.

Footnotes

1 The pertinent text of Rule 54.02 is as follows:

> When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court, whether at law or in equity, may direct the entry of a final judgment

> as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

From statements in the briefs, it appears that the other counts in the complaint were non-suited. However, we have not found an order of dismissal in the record nor do we see an order of dismissal listed in the docket sheet that is part of the record. Therefore, we rely on the order of certification to provide finality to the judgment.

End of Document

Exhibit 5

Exhibit 5

923 So.2d 732
Court of Appeal of Louisiana,
First Circuit.

Markus Lee SMITH
v.
Michaelle Lea SMITH.

No. 2004 CU 2168. | Sept. 28, 2005.

Synopsis
Background: Ex-wife appealed from decision of the Twenty–First Judicial District Court, Parish of Livingston, Trial Court Number 71,057, Ernest G. Drake, Jr., J., modifying the parties' custodial arrangement from joint custody, with ex-wife designated as the domiciliary parent of the minor child, to sole custody in favor of ex-husband.

Holdings: The Court of Appeal, Welch, J., held that:

[1] ex-husband had a good faith, objectively reasonable basis for believing that it was necessary and in child's best interest for ex-husband to consent, on behalf of child, to the interception of child's conversations with ex-wife; and

[2] modification of custody was warranted.

Affirmed.

McClendon, J., filed concurring opinion.

West Headnotes (14)

[1] **Child Custody**
⇐Interference with custody rights
Telecommunications
⇐Persons concerned; consent

In context of child custody modification action, ex-husband had a good faith, objectively reasonable basis for believing that it was necessary and in child's best interest for ex-husband to consent, on behalf of child, to the interception of child's conversations with ex-wife, and, thus, ex-husband's actions fell under consent exception set forth in wiretapping statute, and therefore, the wiretapped conversation did not violate the statute; child was residing equally with ex-husband and ex-wife, child was residing with ex-husband at time wiretapped conversation was recorded, and ex-husband wiretapped telephone because of his concern that ex-wife was alienating him from child. LSA–R.S. 15:1303(C)(4).

Cases that cite this headnote

[2] **Telecommunications**
⇐Persons concerned; consent

Although law generally prohibits the interception of wire or oral communications, an exception is made where the interceptor is a party to the communication or where one of the parties consents to the interception. LSA–R.S. 15:1303(C)(4, 5).

Cases that cite this headnote

[3] **Telecommunications**
⇐Persons concerned; consent

Vicarious consent doctrine is applicable to the consent exception set forth in wiretapping statute when the parent has a good faith, objectively reasonable basis to believe that it is necessary and in the child's best interest to consent on behalf of child to the taping of child's telephone conversations. LSA–R.S. 15:1303.

4 Cases that cite this headnote

[4] **Child Custody**
⇐Interference with custody rights

Telecommunications
⇐Persons concerned; consent

Since the law provides that the paramount consideration in any determination of child custody is the best interest of the child, in the context of a child custody modification proceeding, a parent, who is in his own home, should be able to consent to the interception of the child's communications with the other parent, if the parent has a good faith, objectively reasonable basis to believe that such consent to the interception is necessary and in the best interest of the child.

1 Cases that cite this headnote

[5] **Telecommunications**
⇐Persons concerned; consent

Since the law provides that minors do not have the capacity to consent to juridical acts, such as marriage, contracts, matrimonial agreements, and likewise vests parents with the authority to protect their children, to make all decisions affecting their minor children and to administer their minor children's estates, it follows that a parent should have the right to consent, on behalf of a child lacking legal capacity to consent, to an interception of the child's communications, particularly if it is in the child's best interest.

1 Cases that cite this headnote

[6] **Appeal and Error**
⇐Rulings on admissibility of evidence in general
Trial
⇐Admission of evidence in general

Generally, the trial court is granted broad discretion on its evidentiary rulings, and its determinations will not be disturbed on appeal absent a clear abuse of that discretion.

7 Cases that cite this headnote

[7] **Evidence**
⇐Determination of question of competency
Evidence
⇐Testimony of Experts

The trial court has great discretion in determining the qualifications of experts and the effect and weight to be given to expert testimony.

Cases that cite this headnote

[8] **Appeal and Error**
⇐Competency of witness

Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, an appellate court will not reject the testimony of an expert or find reversible error.

Cases that cite this headnote

[9] **Evidence**
⇐Medical testimony

Since wiretapped conversation between ex-wife and child did not violate wiretapping statute and, thus, was admissible into evidence, doctor could testify and render an expert opinion in child custody action based on that conversation. LSA–R.S. 15:1303.

Cases that cite this headnote

[10] **Costs**
⇐Nature and Grounds of Right
Telecommunications
⇐Persons concerned; consent

Sanctions were not warranted against

ex-husband in child custody modification action, since ex-husband's actions in wiretapping conversation between ex-wife and child fell under consent exception set forth in wiretapping statute. LSA–R.S. 15:1303.

Cases that cite this headnote

[11] **Child Custody**
⇐Joint custody

Modification of parties' custodial arrangement from joint custody, with ex-wife designated as the domiciliary parent of the child, to sole custody in favor of ex-husband was warranted because it was in child's best interest; during telephone conversation with child, ex-wife criticized the child for being honest with doctor who conducted psychological custody evaluation, told the child that she had hurt ex-wife with the things that child had told doctor, and that, since the evaluation was not in ex-wife's favor, ex-wife and child needed to strategize to salvage the situation.

Cases that cite this headnote

[12] **Child Custody**
⇐Dependency on particular facts

Every child custody case must be viewed in light of its own particular set of facts and circumstances.

Cases that cite this headnote

[13] **Child Custody**
⇐Welfare and best interest of child

Paramount consideration in any determination of child custody is the best interest of the child.

Cases that cite this headnote

[14] **Child Custody**
⇐Discretion
Child Custody
⇐Questions of Fact and Findings of Court

Trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances, and accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown.

Cases that cite this headnote

Attorneys and Law Firms

*734 Charlotte A. Pugh, Angela D. Sibley, Denham Springs, for Plaintiff—Appellee Markus Lee Smith.

Frank Ferrara, Walker, for Defendant—Appellant Michaelle Lea Smith.

Before: WHIPPLE, McCLENDON, and WELCH, JJ.

Opinion

WELCH, J.

**2 In this child custody dispute, the mother, Michaelle Lea Smith (now "Duncan"), appeals a judgment modifying the parties' custodial arrangement from joint custody, with Michaelle Duncan designated as the domiciliary parent of the minor child, to sole custody in favor of the father, Markus Lee Smith, subject to supervised visitation by Michaelle Duncan with the minor child. Based on the record before us, we find no abuse of the trial court's discretion and therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The parties in this matter, Markus Smith and Michaelle Duncan, were married to one another on July 27, 1992,

and had one child prior to their marriage. The parties separated on April 19, 1994, and on April 20, 1994, a petition for divorce was filed. A judgment of divorce was subsequently rendered and signed on January 13, 1995. During the pendency of the divorce proceedings, the parties entered into a stipulated judgment, which among other things, awarded the parties joint custody of their minor child, with each party having physical custody of and being designated as domiciliary parent of the minor child on an alternating weekly basis, subject to modifications of the custodial periods for holidays and birthdays.

Thereafter, pursuant to a stipulated judgment rendered and signed on April 17, 2000, the parties modified their custodial *735 arrangement to provide that the parties would continue to share joint custody of the minor child, and that Michaelle Duncan would be designated as the child's domiciliary parent, subject to reasonable and specific visitation by Markus Smith, consisting of three weekends per month, Father's Day, Markus Smith's birthday, and other holiday visitation as agreed on by the parties.

On November 7, 2002, Michaelle Duncan filed a rule to show cause requesting that her award of child support be increased, that Markus Smith's **3 regular visitation schedule be modified from three weekends per month to alternating weekends, and that his summer visitation be set with specificity.

Markus Smith responded by filing a reconventional demand requesting a modification of custody and a recalculation of child support in accordance with any modification of custody. Specifically, with regard to the modification of custody, Markus Smith requested that he be awarded custody and be designated as the domiciliary parent of the child, subject to reasonable visitation by Michaelle Duncan. Alternatively, he requested that neither party be designated as the domiciliary parent of the minor child and that the parties share equal physical custody of the child on an alternating weekly basis.

Thereafter, the parties stipulated to (and, therefore, the trial court ordered) a psychological custody evaluation to be performed by Dr. Alicia Pellegrin, a clinical psychologist selected by the parties. On July 11, 2003, Dr. Pellegrin issued a written report regarding the custody evaluation. In this report, Dr. Pellegrin made the following recommendations pertaining to custody: that the parties continue to share joint custody of the minor child; that there be no designation of domiciliary parent, and that the child spend equal time (alternating weeks and holidays) with both families; that the child go to Markus Smith's home after school (even during Michaelle Duncan's week) as Markus Smith was better equipped to assist the child with her homework; that the child remain in counseling with Markus Smith and his new wife (the child's step-mother) to aid the child in adjusting to her new and "blended family;" that the child receive individual counseling to aid her in adjusting to her parents' divorce and the present custody battle; that Michaelle Duncan cease placing obstacles in the way of the relationship between the child and Markus Smith, and if she continued to do so, the custodial arrangement be modified by designating Markus Smith as the domiciliary parent; and that both parties cease placing the child in the middle of their disputes. **4 According to an interim consent judgment rendered on July 21, 2003, the parties agreed to abide by all of these recommendations set forth in Dr. Pellegrin's report.

Thereafter, on August 19, 2003, Dr. Pellegrin wrote a letter to the trial judge changing her recommendation to immediately awarding sole custody in favor of Markus Smith, with Michaelle Duncan being granted supervised visitation. According to the letter, Dr. Pellegrin changed her recommendation based on the contents of a taped telephone conversation between Michaelle Duncan and the child, which occurred after the parties received the custody evaluation. This conversation was intercepted and tape-recorded by Markus Smith (in his home), without Michaelle Duncan's knowledge or consent and without the child's knowledge or consent (hereinafter referred to as "the wiretapped conversation"). Based on Dr. Pellegrin's letter, Markus Smith sought an *736 *ex-parte* sole custody award; however, his request was deferred to a hearing.

When Michaelle Duncan learned that Markus Smith had been intercepting and tape-recording the telephone conversations between her and the child without their knowledge or consent (which she contends was an action in violation of La. R.S. 15:1303 or an illegal wiretap), Michaelle Duncan sought orders: (1) compelling Markus Smith to produce copies of all tape-recorded conversations between her and the child; (2) prohibiting Markus Smith from using the tapes (or the contents thereof) as evidence at any trial or hearing in accordance with La. R.S. 15:1307; (3) disqualifying and removing Dr. Pellegrin as a witness of the court, on the basis that her opinion was tainted by the alleged illegal wiretapped conversation; (4) sanctioning Markus Smith for his alleged illegal behavior by ordering him to pay costs and attorney fees; (5) prohibiting Markus Smith from further intercepting or tape-recording conversations between her and the child without their consent; and (6) awarding her custody of the child due to Markus Smith's alleged illegal

behavior. On March 1, 2004, after a contradictory hearing **5 on Michaelle Duncan's requests, the trial court rendered judgment ordering Markus Smith to produce copies of all tape-recorded conversations between her and the child, denying the remainder of Michaelle Duncan's requests, and setting all pending custody issues for a trial on the merits to be held on March 15, 2004. Michaelle Duncan sought a supervisory writ of review with this Court of the trial court's ruling, which was denied on July 23, 2004, on the basis that the trial court's rulings in this regard could be reviewed on an appeal of the judgment from the March 15, 2004 custody trial.[1]

The custody trial was held on March 15, 2004. After the introduction of evidence, the trial court rendered judgment, that among other things, awarded Markus Smith sole custody of the minor child, awarded Michaelle Duncan supervised visitation to occur on every other weekend and on holidays, and ordered Michaelle Duncan to obtain counseling with a qualified therapist, who was to be recommended by Dr. Pellegrin and who would be able to make recommendations to the court in the future concerning modifications of Michaelle Duncan's visitation schedule. The trial court signed a written judgment to this effect on May 3, 2004, and it is from this judgment that Michaelle Duncan has appealed.

ASSIGNMENTS OF ERROR

In Michaelle Duncan's appeal, she raises three assignments of error, all of which pertain to the wiretapped conversation. These assignments of error are that the trial court erred in ruling that the wiretapped conversation was admissible in evidence because she alleges it was intercepted in violation of La. R.S. 15:1303, and hence inadmissible according to La. R.S. 15:1307; that the trial court erred in refusing to remove or disqualify Dr. Pellegrin as an expert, since she reviewed and rendered an opinion based on that allegedly illegal wiretapped conversation; and that the trial court erred in refusing to sanction Markus Smith for his alleged **6 violation of La. R.S. 15:1303. The resolution of all of these assignments of error depends on the determination of whether the interception and tape-recording of the wiretapped conversation *737 by Markus Smith was a violation of La. R.S. 15:1303.

LOUISIANA'S WIRETAPPING STATUTE

[1] Louisiana Revised Statute 15:1303 (the "wiretapping statute") provides, in pertinent part, as follows:

> A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:
>
> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> (2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication when:
>
> (a) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
>
> (b) Such device transmits communications by radio or interferes with the transmission of such communication;
>
> (3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection; or
>
> (4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.
>
> B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor.
>
> * * *
>
> C. (3) It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. Such a person acting under color of law is authorized to possess equipment used under such circumstances.

> **7 4) It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

[2] Thus, although Louisiana law generally prohibits the interception of wire or oral communications, an exception is made where the interceptor is a party to the communication or where one of the parties consents to the interception (the "consent exception"). La. R.S. 15:1303(C)(4) and (5).

In this case, it is undisputed that the interceptor, Markus Smith was not a party to the wiretapped conversation, and that Michaelle Duncan, a party to the wiretapped conversation did not consent to its interception. However, Markus Smith contends that he consented to the interception and tape-recording of the wiretapped conversation on behalf of his child, while the child was in his home, and hence, his *738 action fell under the consent exception to the wiretapping statute.

Although the issue of allegedly illegal wiretaps and/or secretly recorded telephone conversations have been mentioned and discussed in the jurisprudence of our state,[2] these cases have never specifically resolved the issue of whether a parent may consent to the interception of an oral, wire, or electronic communication on behalf of his or her minor child. However, there is jurisprudence from the federal courts and from the appellate courts of other states that resolve this issue in favor of allowing a parent to consent on behalf of the child under certain circumstances, referred to as the "vicarious consent" doctrine. Although these federal cases and cases from other states are not binding on this court because those cases review the issue of vicarious consent pursuant to the consent exception set forth in 18 U.S.C. § 2511(2)(c) & (d), which is contained in **8 the federal wiretapping statute, 18 U.S.C. § 2511, and the consent exceptions set forth in the wiretapping statutes from the respective states in which those courts were situated, these cases are persuasive in determining whether a vicarious consent doctrine should be applied to the consent exception set forth in Louisiana's wiretapping statute in some certain, limited situations.

In *Thompson v. Dulaney,* 838 F.Supp. 1535, 1544 (D.Utah 1993), a federal district court determined that "as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her [or his] statutory mandate to act in the best interests of the children." In reaching this determination, the court noted that the Utah Supreme Court had declared that the rights associated with being a parent were fundamental and basic rights, and therefore, a parent should be afforded wide latitude in making decisions for his or her children. The court further noted that Utah statutory law gave parents the right to consent to legal action on behalf of a minor child in situations, such as marriage, medical treatment, and contraception, and that it also gave the custodial parent the right to make decisions on behalf of her children. Thus, the parental right to consent on behalf of a minor child, who lacks legal capacity to consent, was a necessary parental right. *Id.* However, the federal district court made it clear that its holding was "very narrow and limited to the particular facts of the case" (i.e., the minor children's relationship with their guardian was allegedly being undermined by the other parent), and was "by no means intended to establish a sweeping precedent regarding vicarious consent under any and all circumstances." *Thompson*, 838 F.Supp. at 1544 n. 8.

In *Pollock v. Pollock,* 154 F.3d 601, 610 (6th Cir.1998), a federal appellate court adopted the standard set forth by the federal district court in *Thompson* and **9 held "that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording." Like the court in *Thompson*, the *Pollock* court stressed that the *739 vicarious consent "doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest,' ' but rather should be limited to "situations, such as verbal, emotional, or sexual abuse by the other parent" wherein it is necessary for the parent to protect a child from harm. *Pollock,* 154 F.3d at 610.

In *Campbell v. Price,* 2 F.Supp.2d 1186, 1191 (E.D.Ark.1998), a federal district court, in noting that Arkansas state law imposed a duty on a parent to protect his or her minor child from abuse or harm and provided that a parent must consent for the child in certain situations, such as marriage, and non-emergency medical treatment, found that a parent may vicariously consent to the interception of a child's conversations with the other parent if the parent has an objective "good faith belief

that, to advance the child's best interests, it was necessary to consent on behalf of his [or her] minor child".

In *Silas v. Silas,* 680 So.2d 368, 371 (Ala.Civ.App.1996) a state appellate court adopted the reasoning of *Thompson*, and held "that there may be limited instances where a parent may give vicarious consent on behalf of a minor child to the taping of telephone conversations where that parent has a good faith basis that is objectively reasonable for believing that the minor child is being abused, threatened, or intimidated by the other parent."

In *West Virginia Dep't of Health & Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), a state appellate court found that a father had violated the federal wiretapping statute when the father recorded conversations **10 between his children and their mother (his ex-wife) by virtue of a tape recorder secretly installed in the mother's home. Under the particular facts of the case, the state appellate court declined to find that the father could vicariously consent to the recording of the conversation; however, the court was not opposed to the concept of vicarious consent in a situation where a guardian, who lives with the children and who has a duty to protect the welfare of the children, consents on behalf of the children to intercept telephone conversations within the house where the guardian and the children reside. *West Virginia DHHR*, 453 S.E.2d 654 & n. 11.

We note that *West Virginia DHHR*, is clearly factually distinguishable from the case before this court. In this case, the child was residing equally with both Michaelle Duncan and Markus Smith on an alternating weekly basis, the child was residing with Markus Smith at the time the wiretapped conversation was recorded, and the conversation was recorded from a telephone in the house where Markus Smith and the child were residing. In *West Virginia DHHR*, the mother had been awarded custody and the father tape-recorded conversations between the child and the mother in the mother's home—not his own home. Thus, the father could not vicariously consent to the interception of the child's communications at the mother's home. This is an important difference.

Lastly, the only court that addressed the issue of vicarious consent and then declined to follow it was *Williams v. Williams,* 237 Mich.App. 426, 603 N.W.2d 114 (1999), wherein a state appellate court determined that, while controlling federal jurisprudence (*Pollock*) required it to consider the vicarious consent exception with regard to any violation of the federal wiretapping statute, there was no indication that its own state legislature intended to create such an exception to its state eavesdropping statute (wiretapping statute), and accordingly declined to extend such an exception under state law.

*740 [3] After thoroughly reviewing the facts, reasoning, and holdings of these cases, **11 we find *Thompson*, *Pollock*, *Campbell*, and *Silas*, persuasive authority with regard to whether, under certain circumstances, a parent should be able to vicariously consent on behalf of his or her minor child to an interception of a communication for several reasons. First, the federal wiretapping statute (18 U.S.C. § 2511 et seq.) is not only very similar to Louisiana's wiretapping statute, but it also contains a consent exception like that of Louisiana. Since all of the federal courts that have reviewed this issue have determined that the vicarious consent doctrine is applicable to the consent exceptions set forth in the federal wiretapping statute (when the parent has a good faith, objectively reasonable basis to believe that it is necessary and in the child's best interest), then this same doctrine should be applicable to the consent exception set forth in the Louisiana wiretapping statute, under the same, limited circumstances.

[4] Second, the standard set forth by these cases, which authorize a parent to vicariously consent on behalf of the child to an interception of the child's communications with the other parent (or a third party), is clearly limited to situations where a parent has good faith concern that such consent in necessary and in his or her minor child's best interest. Since Louisiana law provides that the paramount consideration in any determination of child custody is the best interest of the child,[3] we see no reason why, in the context of a child custody proceeding, a parent, who is in his or her own home, should not be able to consent to the interception of the child's communications with the other parent, if the parent has a good faith, objectively reasonable basis to believe that such consent to the interception is necessary and in the best interest of the child.

[5] Third, since Louisiana law provides that minors do not have the capacity to consent to juridical acts, such as marriage, contracts, matrimonial agreements, and likewise vests parents with the authority to protect their children, to make all **12 decisions affecting their minor children and to administer their minor children's estates,[4] it follows that a parent should have the right to consent, on behalf of a child lacking legal capacity to consent, to an interception of the child's communications, particularly if it is in the child's best interest.

In support of Michaelle Duncan's argument that Markus Smith's actions were illegal and that he could not consent on behalf of the child, Michaelle Duncan cites *Glazner v. Glazner,* 347 F.3d 1212 (11th Cir.2003). However, we do

not find this case to be persuasive authority in this regard, as the issue in *Glazner* pertained to inter-spousal wiretapping, which is "qualitatively different from a custodial parent tapping a minor child's conversations within the family home." *Newcomb v. Ingle,* 944 F.2d 1534, 1535–36 (10th Cir.1991), *cert. denied,* 502 U.S. 1044, 112 S.Ct. 903, 116 L.Ed.2d 804 (1992).

According to the record in this case, the parties were having problems with their custodial arrangement, and therefore, they agreed to the psychological custody evaluation to help them address these problems. Specifically, Markus Smith's desire to participate in the custody evaluation was due to concerns he had with regard to Michaelle *741 Duncan. He felt that Michaelle Duncan was constantly alienating him from their child, creating problems with visitation, and refusing to cooperate or consult with him regarding decisions affecting the child. These concerns were confirmed in the interview of Michaelle Duncan conducted by Dr. Pellegrin as part of the evaluation, as Michaelle Duncan was unable to identify any strengths that Markus Smith had as a parent, and admitted to telling the child everything about the custody battle, to giving Markus Smith information about the minor child only if he requested, to refusing to tell Markus Smith when she took the child to the doctor, and to withdrawing the minor child from the private school the child was enrolled in without consulting or discussing the matter with Markus **13 Smith (who had been paying the private school tuition). According to the custody evaluation and the testimony of Dr. Pellegrin, Michaelle Duncan's behavior was having such detrimental effect on the minor child, that she specifically stated that Michaelle Duncan had to cease such behavior and allow Markus Smith to maintain a positive relationship with the child, and if not, she recommended a modification of custody.

According to Markus Smith, it was this past detrimental behavior, as noted in the evaluation, that caused him shortly thereafter to install the tape recording device on his telephone, because he still had concerns that Michaelle Duncan would not refrain from this conduct, despite Dr. Pellegrin's recommendation. Thereafter, Markus Smith discovered the wiretapped conversation at issue that occurred between the child and Michaelle Duncan.

During this conversation, Michaelle Duncan criticized the child for being honest with Dr. Pellegrin, told the child that she had hurt her (Michaelle Duncan) with the things that she told Dr. Pellegrin, and that since the evaluation was not in her favor, they (Michaelle Duncan and the child) needed to strategize to salvage the situation. Michaelle Duncan recommended that the child not be honest in court, purposefully fail school to make Markus Smith look bad (since Markus Smith was going to be the one overseeing the child's studies, because Dr. Pellegrin believed he was more capable of assisting with her homework and studies), told the child to keep a log of every argument that occurred at Markus Smith's home as well as every punishment (so that the information could be used in court), and instructed the child to take pictures of Markus Smith's house whenever it was messy (so that the pictures could be used in court to show Markus Smith was unfit and kept a messy house).

Upon hearing this conversation, Markus Smith stated that he be became very concerned about the psychological damage that Michaelle Duncan was causing the **14 child in the child's conversations with her mother, and therefore, he brought the tape to Dr. Pellegrin. After Dr. Pellegrin reviewed the tape, she opined that the child was clearly being subjected to severe emotional abuse by Michaelle Duncan, in that Michaelle Duncan was clearly alienating the child from her father, encouraging the child to spy on her father and family, and asking her to perform poorly in school. This testimony was not contradicted by Michaelle Duncan or by any other evidence.

Therefore, based on the foregoing, we find that Markus Smith had a good faith, objectively reasonable basis for believing that it was necessary and in the child's best interest for him to consent, on behalf of the child, to the interception of the child's conversations with her mother. Consequently, we find that Markus Smith's actions fell under the consent exception *742 set forth in La. R.S. 15:1303(C)(4), and therefore, the wiretapped conversation was not a violation of La. R.S. 15:1303.

ADMISSIBILITY OF THE WIRETAPPED CONVERSATION

[6] Generally, the trial court is granted broad discretion on its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. *Turner v. Ostrowe,* 2001–1935 (La.App. 1st Cir.9/27/02), 828 So.2d 1212, 1216, *writ denied,* 2002–2940 (La.2/7/03), 836 So.2d 107. Except as otherwise provided by law, all relevant evidence is admissible. La. C.E. art. 402.

Michaelle Duncan contends that the wiretapped conversation was intercepted in violation of La. R.S. 15:1303, and was hence, inadmissible evidence under La. R.S. 15:1307.

Louisiana Revised Statute 15:1307(A) provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of **15 the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this Chapter.

Accordingly, in order to be excluded from evidence under this statute, the wiretapped conversation must have been obtained in violation of La. R.S. 15:1303. Because we have already determined that Markus Smith's actions were not in violation of La. R.S. 15:1303, we find no abuse of the trial court's discretion in admitting the wiretapped conversation into evidence at the custody hearing. Accordingly, we find no merit in this assignment of error.

EXPERT TESTIMONY

[7] [8] [9] The trial court has great discretion in determining the qualifications of experts and the effect and weight to be given to expert testimony. Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, an appellate court will not reject the testimony of an expert or find reversible error. *Belle Pass Terminal, Inc. v. Jolin, Inc.,* 92–1544 (La.App. 1st Cir.3/11/94), 634 So.2d 466, 477, *writ denied,* 94–0906 (La.6/17/94), 638 So.2d 1094.

Michaelle Duncan contends that the trial court erred in allowing Dr. Pellegrin to testify and in refusing to remove or disqualify Dr. Pellegrin as an expert, since she reviewed and rendered an opinion based on that allegedly illegal wiretapped conversation. Again having found that Markus Smith's actions were not in violation of La. R.S. 15:1303, and that the wiretapped conversation was admissible into evidence, we find no abuse of the trial court's discretion in allowing Dr. Pellegrin to testify and render an opinion in this matter based on that conversation. Accordingly, we find no merit in this assignment of error.

SANCTIONS

[10] Michaelle Duncan further contends that the trial court erred in not sanctioning Markus Smith for his alleged violation of La. R.S. 15:1303 by ordering him to pay reasonable attorney fees and costs of the proceedings. However, in **16 order to impose sanctions against Markus Smith under La. R.S. 15:1303(B), his actions must have been in violation of La. R.S. 15:1303. Again having found that Markus Smith's actions were not in violation of La. R.S. 15:1303, we find no error in the trial court's refusal to impose sanctions *743 on Markus Smith. Accordingly, we find no merit in this assignment of error.

CUSTODY

[11] Lastly, Michaelle Duncan has appealed the judgment awarding sole custody to Markus Smith and awarding her supervised visitation (which would be subject to modification after she obtains counseling), contending that this erroneous custody award arose from the erroneous ruling with regard to the wiretapped conversation.

[12] [13] [14] Every child custody case must be viewed in light of its own particular set of facts and circumstances. *Major v. Major,* 2002–2131 (La.App. 1st Cir.2/14/03), 849 So.2d 547, 550; *Gill v. Dufrene,* 97–0777 (La.App. 1st Cir.12/29/97), 706 So.2d 518, 521. The paramount consideration in any determination of child custody is the best interest of the child. *Evans v. Lungrin,* 97–0541, 97–0577 (La.2/6/98), 708 So.2d 731, 738; La. C.C. art. 131. Thus, the trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. *Major,* 849 So.2d at 550.

Louisiana Civil Code article 134 enumerates twelve non-exclusive factors relevant in determining the best interest of the child, which may include:

> (1) The love, affection, and other emotional ties between each party and the child.

(2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.

**17 3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.

(4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.

(5) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(6) The moral fitness of each party, insofar as it affects the welfare of the child.

(7) The mental and physical health of each party.

(8) The home, school, and community history of the child.

(9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

(11) The distance between the respective residences of the parties.

(12) The responsibility for the care and rearing of the child previously exercised by each party.

In modifying the parties' custodial arrangement in this case, the trial court clearly scrutinized the evidence and considered all of the above factors. The court heard testimony from Markus Smith, Michaelle Duncan, Dr. Pellegrin, the child's schoolteachers, a personal friend of Markus Smith, and Markus Smith's new wife. Additionally, the trial court considered the contents of the wiretapped conversation. After weighing all of the evidence, the trial court apparently concluded that an award of sole custody to the father was shown by clear and convincing evidence to serve the best interest of the *744 minor child.[5] In light of the evidence contained in this record and the trial court's broad discretion in making custody determinations, we do not find that the trial court abused its discretion in awarding custody to Markus Smith.

**18 CONCLUSION

Accordingly, the May 3, 2004 judgment of the trial court is affirmed. All costs of this appeal are assessed to the appellant, Michaelle Duncan.

AFFIRMED.

McCLENDON, J., concurs and assigns reasons.

**1 McCLENDON, J., concurs.

I respectfully concur with the result reached by the majority under the specific and limited facts of this particular case.

Parallel Citations

2004-2168 (La.App. 1 Cir. 9/28/05)

Footnotes

1 *See Markus Lee Smith v. Michaelle Lea Smith Duncan,* 2004–CW–1172, unpublished writ action.

2 *See Shields v. Shields,* 520 So.2d 416 (La.1988); *Benson v. Benson,* 597 So.2d 601, 603 (La.App. 5th Cir.), *writ denied,* 600 So.2d 627 (La.1992); *Briscoe v. Briscoe,* 25,955 (La.App. 2nd Cir.8/17/94), 641 So.2d 999, 1002–07; and *Brown v. Brown,* 39,060 (La.App. 2nd Cir.7/21/04), 877 So.2d 1228, 1235.

3 *See Evans v. Lungrin,* 97–0541, 97–0577 (La.2/6/98), 708 So.2d 731, 738; La. C.C. art. 131.

4 *See* La. C.C. arts. 28, 216, 221, 223, 235, 1918, and 2333; La. Ch.C. art. 1545; and La. R.S. 9:335.

5 *See* La. C.C. art. 132.

End of Document

Exhibit 6

Exhibit 6

893 So.2d 462
Court of Civil Appeals of Alabama.

Michael A. STINSON
v.
Jodie C. LARSON.

2020918. | March 19, 2004. | Certiorari Denied June 11, 2004Alabama Supreme Court 1031041.

Synopsis
Background: Mother moved to temporarily and permanently terminate children's visitation with father, based on her belief that father was trying to undermine her authority as custodial parent in violation of previous court order. The Baldwin Circuit Court, No. DR-1996-430.1, Carmen Bosch, J., found father in contempt of court and increased father's arrearage-payment schedule. Father appealed.

Holdings: The Court of Civil Appeals, Pittman, J., held that:

[1] mother's recording of minor child's telephone conversations with out-of-state father was proper under the Electronic Communications Privacy Act;

[2] recordings of minor child's telephone conversations with father were admissible under Alabama eavesdropping law;

[3] proper foundation under the "silent witness" theory was laid for admission of recordings;

[4] trial court did not abuse its discretion in finding that father was in contempt of court for undermining mother's authority as custodial parent; and

[5] trial court did not abuse its discretion by increasing father's child support arrearage payment from $100 to $250 per month.

Affirmed.

Murdock, J., concurred in the result.

West Headnotes (13)

[1] **Telecommunications**
⚖Persons Concerned; Consent

Former wife's recording of minor child's telephone conversations with out-of-state former husband was proper under the Electronic Communications Privacy Act, for purposes of determining whether recordings were admissible in contempt proceeding regarding whether former husband was trying to undermine former wife's authority as custodial parent in violation of previous court order, where minor child was in former wife's custody at the time of the recording, and recording was accomplished through the use of an extension telephone. 18 U.S.C.A. § 2510 et seq.

1 Cases that cite this headnote

[2] **Child Custody**
⚖Admissibility
Telecommunications
⚖Evidence

For purposes of determining whether recordings made by mother of minor child's telephone conversations with father were admissible under Alabama eavesdropping law in contempt proceeding against father for undermining mother's authority as custodial parent in violation of previous court order, evidence supported determination that mother had a good faith basis to believe that minor child was being intimidated by father; under Alabama law, a parent could give vicarious consent on behalf of a minor child to the recording of telephone conversations with the other parent when that parent had a good faith, objective reasonable basis for believing child was being intimidated, child was 15 years old and had not reached age of consent, and there was evidence that child was exhibiting significant behavioral problems and that child would become very upset at his mother and tell her he did not have to listen to her after talking to his father. Code 1975, §§ 13A-11-31(a), 26-1-1.

1 Cases that cite this headnote

[3] **Evidence**
⇐Photographs and Other Pictures; Sound Records and Pictures

Under the "pictorial communication" theory, an individual who was present at the time an electronic recording was made can authenticate that recording by stating that it is consistent with that person's recollection.

Cases that cite this headnote

[4] **Evidence**
⇐Photographs and Other Pictures; Sound Records and Pictures

In civil cases, under the "silent witness" theory, a foundation is laid for an electronic recording by offering evidence as to the following elements: (1) a showing that the device that produced the item was capable of recording what the witness would have seen or heard had the witness been present at the event recorded; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that no changes, additions, or deletions were made; (5) a showing of the manner in which the item was preserved; and (6) an identification of the speakers.

Cases that cite this headnote

[5] **Evidence**
⇐Determination of Question of Admissibility

Under either the "silent witness" theory or the "pictorial communication" theory for laying the foundation for admission of a sound recording, the trial court should listen to the recording in camera and should allow the party opposing admission to thoroughly cross-examine the witness.

Cases that cite this headnote

[6] **Evidence**
⇐Photographs and Other Pictures; Sound Records and Pictures

Proper foundation under the "silent witness" theory was laid for admission of recordings made by mother of minor child's telephone conversations with father, in contempt proceeding against father for undermining mother's authority as custodial parent in violation of previous court order, where mother produced, in advance, copies of audiotapes to father for his listening, examination, inspection, and review, mother testified that she had recorded the tapes on a device she bought from a retailer, mother testified that she knew how the recording device worked, mother denied splicing or falsifying the recordings in any way, mother testified that she recognized the voices of father and parties' child on the recorded conversations, trial court reviewed the tape recordings in camera, and father's attorney was allowed to thoroughly cross-examine mother regarding the recordings.

Cases that cite this headnote

[7] **Child Custody**
⇐Harmless Error

Even if tape recordings made by mother of minor child's telephone conversations with father had been improperly admitted into evidence, in contempt proceeding against father for undermining mother's authority as custodial parent in violation of previous court order, there was sufficient evidence from which trial court could have deemed father to be in contempt, where father admitted he had spoken to parties' children about court proceedings between the parties, and minor child testified he had spoken to his father about "court stuff."

Cases that cite this headnote

[8] **Contempt**
⇐Discretion of Court
Contempt
⇐Review

The determination of whether a party is in contempt of court rests entirely within the sound discretion of the trial court, and, absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, Court of Appeals will affirm.

Cases that cite this headnote

[9] **Child Custody**
⇐Weight and Sufficiency

Trial court did not abuse its discretion in finding that father was in contempt of court for undermining mother's authority as custodial parent in violation of previous court order; there was evidence that one of parties' minor children was exhibiting significant behavioral problems, minor child yelled at mother and said that he did not have to listen to her after talking to father on telephone, e-mail from father to minor child encouraged minor child to engage in "civil disobedience," and mother submitted tape recordings of minor child's telephone conversations with father.

Cases that cite this headnote

[10] **Child Support**
⇐Discretion
Child Support
⇐Discretion
Child Support
⇐Discretion
Child Support
⇐Modification

Matters related to child support, including subsequent modifications of a child-support order, rest soundly within the trial court's discretion, and will not be disturbed on appeal absent a showing that the ruling is not supported by the evidence, and, thus, is plainly and palpably wrong.

Cases that cite this headnote

[11] **Judgment**
⇐Prayer for Relief in General

A trial court has a duty to grant whatever relief is appropriate regardless of whether the party specifically demanded such relief in the party's pleadings. Rules Civ.Proc., Rule 54(c).

Cases that cite this headnote

[12] **Child Support**
⇐Judgment and Order

The trial court has discretion to set a reasonable child support arrearage payment schedule commensurate with the parent's ability to pay.

1 Cases that cite this headnote

[13] **Child Support**
⇐Judgment and Order

Trial court did not abuse its discretion by increasing father's child support arrearage payment from $100 to $250 per month, though father claimed he earned only $700 per year working for his wife and was partially disabled, where father was more than $13,000 in arrears, had been able to take several long plane trips, wrestled with his sons, was constructing an addition to his home, had designed award-winning Internet Web sites, and had an

Q: Now, just so it's clear for the court, did you place the recording device in Sasha's backpack at the behest of the Federal Bureau of Investigation?

A: Absolutely not. I was only interested in providing this court with the information necessary to make a decision in Sasha's best interest, because I believe wholeheartedly that the things that I heard are the very things that Sasha was also repeating to me.

Q: Did you provide any portion of the tapes to the FBI?

A: No

Q: Did you place the recorder in Sasha's backpack to record anything having to do with Ricky Marquez?

A: No

Q: Now, you were asked questions yesterday that kind of went back and forth across the line of December 2013. I wanted the court to understand exactly how many times you contacted any of the authorities associated with Ricky Marquez's probation or parole after the stipulation of December 2013. And when I say you contacted, I mean you actually initiated the contact.

A: I just had the one conversation with Elizabeth Olson and the meeting with the FBI and one follow-up phone call.

13:50:05

Q: Did you request the meeting with the FBI or did they?

A: They did. I did not request that meeting.

Q: So as far as you actually initiating contact with any member of the authorities, after the stipulation, it would be limited to the call to Ms. Olson and the follow-up call to the FBI after the meeting?

A: They called me, I didn't call them, in fact, so...

Q: Ok, so I want it to be crystal clear. As far as you making any contact with any type of authority associated with Ricky Marquez and his prosecution and parole or probation, it was one call, after the stipulation up until the time that we filed this action?

A: Correct

Q: When you were asked about your deposition testimony involving 200 friends, or some phrase along those lines, discussions about Mr. Marquez and his past, was that something that frequently happened after the stipulation?

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A: Not as frequently as before. When I first found out, I was shocked, I talked to a lot of people, and I just didn't know what to think or...I just process it with a lot of friends, a lot of family. That's waned over time, but the uh, initially it was such a shock. I mean, the biggest shock being that that person's a part of my child's life, and trying to deal with that on some level, which also, which you'll probably get into later, is why I started going to therapy in July of 2013.

Sean contacted Ricky's probation officer once. Sean was called by the FBI once. While Sean's uncontroverted testimony that placing the device had nothing to do with Ricky Marquez was sufficient to eliminate the Ricky Marquez Red Herring, a review of the entirety of the intentionally misleading cross examination of Sean when compared to the facts, should lay this issue to rest for the Court.

Even though Sean's testimony regarding the effects of Lyuda's alienation of Sasha from his father, more than met the burden of good faith, the text messages that Lyuda, herself, moved into evidence proved that during the relevant timeframe, from October until January when the device was placed, there was a good faith reason to place the recording device. While Lyuda tried to point to good co-parenting prior to October, the fact that things were once more cordial and escalated significantly over the fall/winter of 2014 establishes Sean's reasoning as being in good faith. Sean reasoned, based upon Sasha's statements and demeanor the source of which, according to Sasha, was Lyuda, that if Lyuda was willing to write texts, as she did, which she knew could become evidence, what she must be telling Sasha in private was even worse. Over that span of time, the texts contained in Exhibits H and I reveal the following.

1. Lyuda accusing Sean of not feeding Sasha after school simply based upon his request to take him to dinner on her time.

2. Lyuda accusing Sean of not providing Sasha proper clothes.

3. Lyuda accusing Sean of not bathing Sasha.

4. Lyuda accusing Sean of Stealing Sasha's belt.

5. Attempts by Sean to co-parent regarding bed time and similar issues met with threats of her attorney.

6. Lyuda, amazingly, accusing Sean of parent alienation because he was working on Sasha's sight words with him and following the Court order regarding time share.

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7. Lyuda threatening Sean and the school superintendent's jobs for corruption simply because Sean was following the Court ordered time share.

8. Sean's attempts at co-parenting regarding extra-curricular activities that Sasha loves are met with claims of harassment and threats of attorney involvement.

With regard to the text messages, Sean testified as fillows:

Q: On October 17th, what was this text about?

A: It was about that conference that I'd had with Ms. Abacherle, his Kindergarten teacher. And uh, when I met with her, she gave me some information that showed me where he placed relative to other students. She exchanged information with me about his progress in all areas, and the information that she gave me, very clearly, very succinctly that I recall, was that he was behind other students in his class, other Kindergarten students at Twitchell Elementary School. And to me, as someone who is very concerned about that area of my child's life, I wanted to correct it and I felt like...we had actually had a phone conversation on this day where I was reaching out to her for help.

Judge: To the defendant?

A: Ya, to the defendant, to reach out to her for help, as to how we could correct this because I felt like I was doing everything I could and if we were doing it together we could certainly get him caught up. I felt really concerned that he was below and I just...it's my duty. I'd never forgive myself if he was behind the pack and I didn't do something. So that was my first attempt at helping.

Q: Looking at the rest of that page, is there a response from Lyuda on the 17th of October?

A: No

Q: Was there a response from Lyuda between October 17th and 20th?

A: No

Q: Ok, now, on October 20th, there is a series of text messages from you to Lyuda. Can you tell me what those and the photos in them are?

A: Well, I didn't get any response, as you just described as you went through those emails, so I thought I'd try a different approach. And so I thought I'd just give her some specific activities, flashcards, worksheets that she could try with him. So that's what I did in the top two texts, and you can see that she replied that she got it. Then the text at 10:04 a.m. on October 20th, I'm telling her that if we are committed to practicing with him each day, I think we'll get him up to a level that he needs to be at. That's where my

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head was at. That's all I cared about. And then on the bottom, when Ms. Abacherli was talking about that kids should know their alphabet when it's October, almost November. He didn't know his alphabet. So this was a crisis situation to me.

14:01:22

Q: Text message October 28 at 2:59 p.m. Do you see that one?

A: Yes

Q: This was another text message regarding what?

A: He was just falling asleep and whining. It had become a pattern. If you notice the date, it was a day that he had been returning from her house. And so I'm just asking her...keeping him up late is hurting his ability to learn. Because it was. If we didn't stop this path we were on, he didn't know his alphabet in almost November, so I'm pleading with her. You're his mother, you can do what you want, but it's having an affect on him. I was trying to say it diplomatically without getting her upset.

Q: Now, looking at her response, she states that he got sick and my question is did you give him a jacket in the morning? Have you ever not sent your son to school properly clothed?

A: I always send him to school properly clothed.

Q: I mean, you work in the school district, right? You understand those concepts?

A: He has lots of jackets. I'm not that forgetful.

Q: And then the next line she talks to you about the fact that, she's alleging that you don't even bathe him at your house?

A: Ya

Q: Do you give your son baths during your custodial time?

A: Ya ya. Just to elaborate a little bit, not only do I do the same thing, he comes home and he eats his snack, we do the homework, we do sightwords, whatever the school stuff is. When we're done, we go in the backyard and play sports. After that, we spend some family time, eat dinner, and he takes a bath at 7 o'clock, and usually with his little brother. So, I mean, I take a shower every day, so I don't understand the concept that I wouldn't bathe my child. And I don't even understand how that's constructive. It's definitely not in the spirit of co-parenting. This kind of text that I'm getting here, it's just an accusation. Anyway, I'm sorry, I'm rambling.

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14:04:36

Q: What is the issue that you are trying to resolve with her?

A: When he would talk to us about his life, he would tell us that he watches a lot of videos, that that's how he spends his time. And so we would just ask him, in a general way you know, how was your night? And he'd tell us what he did. He'd be candid at that time and say I was watching videos, I was up late, or whatever.

Q: Now, you tell her that Sasha tells you that she tells him not to tell you that he watches videos. Do you see that?

A: Ya

Q: What is her response at 3:44 p.m.?

A: That was the first day, I was out in the backyard playing baseball with him, and he had said that. I just wanted to ask her about that in a way that wouldn't make her upset. But the bottom line is if you are asking him to keep secrets from me, I wouldn't be Ok with that.

Q: Ya, ok but what is her response?

A: I will see my attorney. God as my witness, I tried to give you a chance. I will pick Sasha up in 5 minutes. That is the initial text, from that point, that started the litigation.

Q: In your response then, to her saying she'll pick up Sasha in 5 minutes, what is that photograph that you sent her?

A: That's a picture of him knocked out at 4:07.

Q: Ok, and then the following text from you to her?

A: He just woke up, but we didn't have time to finish. There was, we were doing 120 words every day and that took time. Plus, there wasn't homework every day, but just the sight words alone and reading two of those little Reading A-Z books took a good hour. And I want to teach him that we get the job done every day. We finish the work, and so I need until 5:30 to do it.

14:08:10

Q: Starting with Monday, November 17, 3:34 p.m., there's a text from Lyuda asking to let Sasha outside. Do you see that?

A: Yes

Q: What was your response?

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A: We're not done yet. And that had a certain significance because, if you're doing sight words with your kid every day, you can tell if someone else is doing it without asking, because they learn the words so slowly at this age, so I had concern that if I don't finish this, I'm so committed, and I know these sight words will give him the basis for reading, that whether it's sight words or doing homework, we're going to finish it. And it's also teaching him about structure and discipline and so...it wasn't done, and I felt like I wasn't doing it to be difficult, I was doing it for my son.

14:11:18

Q: There's a text message at 15:42 from Lyuda saying bring him to me. What is your response?

A: My friend Anthony was in town from Orlando and Sasha was playing with his sons so I asked her if we could take Sasha out to dinner with us.

Q: And what was her response?

A: She assumed because I was asking to take him with us to dinner that I hadn't fed him. That I had starved him until 5:30, when in fact we do the same thing every day. He ate when he got home from school. But she's assuming and very imperial saying you must have not fed him, that's disgusting.

Q: The following day, she texts you to let Sasha out at 4:21 p.m. What is your response?

A: You can pick him up at 5:30. Because...just based on these types of responses that I'm receiving, they are not logical, they are not kind, they are not in the spirit of co-parenting...I can't even reason with somebody like that. So why would I...we can't negotiate if you are going to accuse me of not feeding my kid. Or I'm stealing clothes as it says. The best thing for Sasha, let's not have any disputes out in the driveway. Let's just do what the order says.

Q: November 21st 15:26

A: This is a common theme, it happens all the time. It happens to this day. I get a text where are his clothes? I'm stealing his clothes. First of all, why would I steal his clothes? They don't fit me. I don't understand. He wears a uniform. So it wouldn't even be any different. And it's part of the badmouthing, the message that I'm stealing, I'm a thief, because you know she's saying this to him. Daddy steals stuff. Daddy doesn't buy you clothes, and the things Daddy does buy you are cheap.

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14:16:58

Q: At 7:53, there is a text from you about Little League sign-ups. What is her response?

A: That, um, you can do it on your days. I'm going to sign him up for Jiu Jitsu on my days, and the court will adjust visitation to restore my mother's rights. She was informed before that we were practicing and Sasha had been telling her that we'd been practicing.

14:17:56

A: Baseball is something that's associated with me. Baseball is dad. I played college sports, and so anything that's a team sport is devalued because that's me, that's what this text message is. That's dad. Anything I love, that's not encouraged. No matter how civil...when I look at what I wrote there, where is the vitriol in what I've written in any of this stuff? They are pleadings.

14:35:58

Q: After you get a response to you do baseball on your days, what was your response to Lyuda?

A: I was pleading with her. We just had so much time in preparing for baseball and she knew it. She knew this was something we do every day. Teaching baseball to a five year old is somewhat challenging. And so I just knew, if she's not going to bring him, you can't go to practice one day and not the next and miss games. That defeats the purpose of being on a team and being committed. As a coach, I would want people to be there every day, on time, never miss anything, so I was really frustrated. And I'm just basically pleading with her, please let's put it aside. Let him play baseball.

Q: And then what does she tell you that she's already done?

A: Her response was that she's already paid her lawyer. I can't even ask her simple things without her accusing me of harassing her. How am I harassing her? We don't speak outside of text messages, so how am I harassing her? She can't separate what is me and what is for Sasha. This is all for Sasha. I'm not out there doing it for me. I'm not doing sight words for me. I'm doing it for Sasha. But she can't separate that.

14:39:16

Q: At 7:57, you text Lyuda about the Call of Duty issue. What did you provide her in that text message?

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A: I provided a website that discussed a review of the game and which ages it was appropriate for. It included a discussion about pros/cons of kids of various ages playing this game. The consensus was that this is not a game designed for a five year old. He was 5 at the time. And of course, the tenor of the time was, she had just filed a motion, so I'm telling her, you're asking for more time, but then you give him this game that's for teenagers. He's five years old. I felt I was very fair and diplomatic considering I find out that he's been playing it for hours. He was excited about it. First time I found out about it at the bus stop, he's telling me that he's playing this game, and I told him that I don't think that's a good idea. I went home and investigated the game, discussed it with my wife, and told Sasha that we aren't playing this game at our house, and I am going to reach out to your mom to talk to her about this. I couldn't believe, I just don't understand putting your child in front of that game.

Q: Now, she responds the way she responds, then you explain to her what you know. What did you specifically tell her?

A: I said you bought this for him at Christmastime. I'm just asking you to do some research before you plop your kid in front of it, unsupervised.

Q: And what's the final part that you say?

A: And the secrets. To me, this is a big part of the alienation and the badmouthing. You keep secrets from me, that means I'm not important enough to have information shared with me. This continues to this day. He's afraid to talk to me about anything.

Q: And then when you address the issue of asking her not to tell him to keep secrets from you, who do you get a response from there?

A: Um, Ricky interjects himself into the conversation and tells me, see you in court. Now, I don't know what spirit of co-parenting this is in, but I come with a very reasonable request as a parent. You are coming with an M-17, whatever, game with this child. I'm asking you, hey take a look at this website, you basically tell me to .... no...and then you put your husband on who says see you in court. I don't know if that's a threat or how that's constructive, but I'm supposed to be afraid now? I took it as a threat. I felt like this is so disheartening. I can't even ask her about anything, whether it's baseball, whether it's can we have dinner with a friend, I'm met with you're stealing clothes, you don't feed him, you're keeping secrets, I just...at this point I'm so frustrated. On top of that, I'm hearing the things from my son as well at this point, non-stop.

Q: And that interruption of your attempt to have a dialogue with Lyuda was a few days before you placed the recording device, is that right?

A: Correct

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Amazingly, even though Lyuda has repeatedly claimed that Sean won't let her participate in homework, the texts reveal just the opposite. The texts reveal a parent asking the other parent to help their son and providing additional work for her to work on with Sasha. Obviously the texts prove that Lyuda has no credibility.

Probably the most conclusive evidence, other than Sean's testimony, was one of the final text exchanges prior to the placement of the recording device (Exhibit I, Bates 251). Sean, having become more and more concerned about Sasha's exposure to adult content in the form of Call of Duty and other video games attempted to co-parent with Lyuda. Sean texted Lyuda a link to an article on the damage such games can cause when played at too young of an age. Lyuda, even though she knew that Sasha was playing the game in her home, responded by accusing Sean of exposing Sasha to the game. When Sean responded that her allegation was not true he received the following response **from Lyuda's Husband**:

> **Hey Shawn this is Ricky Lyuda's husband could you please stop writing my wife enough now just leave her alone will see you in court**
>
> **Would appreciate it!!**

Sean, taking the high road, and even trying to co-parent with a person he allegedly hates and is obsessed with, responded as follows:

> **I simply want to make sure Lyuda understands the damage this game can inflict on young minds. That's what co-parenting is about. This isn't about Lyuda....this is about what is best for Sasha. End of story. Good night.**

Ricky, not Lyuda, responded as follows:

> **Like I said would appreciate if you would stop writing my wife...no need for good nights...just stop writing unless emergency regarding Sasha**

Now, the alleged victim of Sean's harassment, is cutting off co-parenting communication between Sean and Lyuda over an issue that this Court has already found to be compelling. A few days later, based upon the totality of the foregoing evidence, Sean, in good faith, and solely to protect his son, placed a recording device in Sasha's backpack.

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II. LEGAL ANALYSIS

A. The Recordings In Question Are Absolutely Legal.

Rather than recognize the horrific nature of her manipulations and alienations, Lyuda will argue that the recordings should not be considered by the Court. Whereas the Court has already determined that the recordings would certainly be considered by Dr. Holland, fortunately, the current status of the law is that this Court can consider the recordings directly. NRS 200.650 states as follows:

> **200.650. Unauthorized, surreptitious intrusion of privacy by listening device prohibited**
> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

The key aspect of the statute is that of consent. Case law recognizes the ability of a parent to consent to recording on behalf of a child. In Pollock v. Pollock, the 6th Circuit Court of Appeals address the issue of "vicarious consent" by summarizing the status of the law as follows:

> Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability. The question of whether a parent can "vicariously consent" to the recording of her minor child's phone calls, however, is a question of first impression in all of the federal circuits. Indeed, while other circuits have addressed cases raising similar issues, these have all been decided on different grounds, as will be discussed below. The only federal courts to directly address the concept of vicarious consent thus far have been a district court in Utah, Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), a district court in Arkansas, Campbell v. Price, 2 F.Supp.2d 1186 (E.D.Ark.1998), and the district court in this case, Pollock v. Pollock, 975 F.Supp. 974 (W.D.Ky.1997).
>
> ....
>
> The district court in the instant case held that Sandra's "vicarious consent" to the taping of Courtney's phone calls qualified for the consent exemption under § 2511(2)(d). Accordingly, the court held that Sandra did not violate Title III. The court based this decision on the reasoning found in

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Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), and Silas v. Silas, 680 So.2d 368 (Ala.Civ.App.1996).

The district court in Thompson was the first court to address the authority of a parent to vicariously consent to the taping of phone conversations on behalf of minor children. In *Thompson,* a mother, who had custody of her three and five-year-old children, recorded conversations between the children and their father (her ex-husband) from a telephone in her home. 838 F.Supp. at 1537. The court held:

[A]s long as the guardian has a *good faith basis* that it is *objectively reasonable* for believing that it is *necessary* to consent on behalf of her minor children to the taping of phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.

Id. at 1544 (emphasis added). The court noted that, while it was not announcing a *per se* rule approving of vicarious consent in all circumstances, "the holding of [*Thompson*] is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father." Id. at 1544 n. 8.

An obvious distinction between this case and *Thompson,* however, is the age of the children for whom the parents vicariously consented. In *Thompson,* the children were three and five years old, and the court noted that a factor in its decision was that the children were minors who "lack[ed] both the capacity to [legally] consent and the ability to give actual consent." Id. at 1543. The district court in the instant case, in which Courtney was fourteen years old at the time of the recording, addressed this point in a footnote, stating:

Not withstanding this distinction [as to the age of the children], *Thompson* is helpful to our determination here, and we are not inclined to view Courtney's own ability to actually consent as mutually exclusive with her mother's ability to vicariously consent on her behalf. (emphasis added)

Pollack is just one of many authorities recognizing the vicarious consent doctrine. (See **Exhibit "1"**) It was based upon this well-established authority that the Court found that provided Sean could meet the burden of good faith basis that was objectively reasonable for believing that it is necessary to consent on behalf of Sasha, the tapes would be admitted into evidence. As Sean testified, it was "his duty to protect him." Sean recognized the mandate that a parent has to act in the best interests of their child and acted reasonably. His explanation of when he hoped to capture evidence of Lyuda's abuse, establishes conclusively that he acted reasonably to protect his son. The contents of the tape are truly the best evidence that his actions

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were both in good faith and reasonable.

B. <u>Nothing Precludes a Court Appointed Expert from Considering the Recordings, Even if they were Illegal.</u>

Even though, based upon the overwhelming evidence presented at trial thus far, the tape should necessarily be directly received into evidence, the issue of whether or not an expert can rely on potentially inadmissible information is really quite a simple one. Far more simple than Defendant is making it out to be.

NRS 50.285 states as follows:

> 50.285 Opinions: Experts.
>
> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
> 2. **<u>If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence</u>**.
>
> (emphasis added)

It was based upon this statute that the Court already decided the issue of Dr. Holland receiving the tapes. While Dr. Holland has not yet testified regarding the types of things upon which experts in her field routinely rely, this Court brings its own experiences to each case. It has likely reviewed expert reports which have been accepted into evidence which contain references to the following:

1. Hearsay statements of witnesses.
2. Hearsay documents.
3. Private investigator reports which contain questionably obtained material.
4. Questionably legal GPS data from surreptitiously placed GPS trackers.
5. Legally or illegally obtained telephone recordings.
6. Selectively chosen voice mail messages (discussed further hereinafter)
7. Secretly made recordings of interactions between the parties or their children.
8. Unauthenticated documents and photos.

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9. Information that predated the last custody order which would be barred from admission by Nevada law.

10. Evidence obtained as a result of breaking into a spouse or ex spouse's home.

The list of potentially excludable evidence routinely relied upon by experts, particularly in child custody cases, is vast and certainly greater than the foregoing. More importantly, there is no case authority that would exclude a court-appointed expert from testifying solely because she considered inadmissible evidence. In fact, the Nevada Supreme Court has conclusively held that even if the testimony of the expert is on the ultimate issue (such as negligence, or in this case, best interests) the expert can rely on evidence that is absolutely inadmissible. In Barrett v. Baird 908 P2d 689 (1995), the Nevada Supreme Court held as follows:

> *Barrett* first claims that the screening panel statute denies her right to a jury trial because jurors will overvalue the weight of the panel's decision without knowing that the panel's decision relies on evidence that would be inadmissible at trial. This claim lacks merit. In *Jain v. McFarland,* 109 Nev. 465, 472, 851 P.2d 450, 455 (1993), this court held that the screening panel process "is not a full trial on the merits and should not be represented as such." Indeed, NRS 41A.069, which sets out jury instructions that a jury are to be given when panel findings are introduced at trial, clearly indicates that the panel's recommendation is, in effect, "an expert opinion which is to be evaluated by the jury in the same manner as it would evaluate any other expert opinion." *Comiskey v. Arlen,* 55 A.D.2d 304, 390 N.Y.S.2d 122, 126 (1976), *aff'd* 43 N.Y.2d 696, 401 N.Y.S.2d 200, 372 N.E.2d 34 (1977). In Nevada, as in most jurisdictions, experts may rely on evidence that is otherwise inadmissible at a trial even when testifying before a jury as to an ultimate issue such as negligence.[6] NRS 41A.100, 50.285, 50.295. A jury is free to accept or reject that expert's opinion. Therefore, the fact that the screening panel's decision is introduced to the jury does not infringe on the jury's fact-finding duty even though the panel decision is based on otherwise inadmissible evidence.

Barrett v. Baird, 111 Nev. 1496, 1502-03, 908 P.2d 689, 694-95 (1995) overruled on other issues by Lioce v. Cohen, 122 Nev. 1377, 149 P.3d 916 (2006) overruled by Lioce v. Cohen, 124 Nev. 1, 174 P.3d 970 (2008)

In Barrett, even though Statutes exist to control the dissemination of data from a medical-legal screening panel in a medical malpractice case because panels rely on evidence which is not admissible in a trial, an expert could base its opinion on the panel's conclusions. Clearly, there is no bar to Dr. Holland considering the recordings.

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C. Lyuda's Spoliation Red Herring

Initially, Lyuda argued that because the original tape was not available, the tape should be excluded. NRS 52.245, however allows for the admissibility of a duplicate. Lyuda has made no claim that the recordings produced were not authentic and there is no evidence to support a contention that allowing a duplicate, which is routine in family Court in nearly every trial, would be unfair. As such, this is yet another attempt to basically "make stuff up" in order to distract the Court from the best interests of Sasha.

Lyuda has now argued that because Sean discarded portions of the tape, that somehow that impacts the admissibility of the tapes which were retained. THERE IS NO NEVADA AUTHORITY TO SUPPORT SUCH A CONTENTION. While the legal authority that contradicts this position will be discussed hereinafter, a simple analogy, which appeals to common sense rather than rhetoric and vitriol might assist the Court in disregarding Lyuda's attempt to mislead the Court. Lyuda's position would mean that if one parent left 100 voicemails on the phone of the other parent evidencing perfect co-parenting and 2 voicemails that evidenced alienation, and the 100 voicemails were deleted and the 2 voicemails preserved, that somehow the 2 voicemails would be inadmissible. Obviously this is not the case and there is no authority for such a position.

Moreover, the cases cited by Lyuda in her Pre-Trial Memo do not support the exclusion of Sean's properly obtained evidence. In fact, there is not a single Nevada case that stands for the proposition that even if evidence was intentionally or negligently destroyed that such an act could ever result in other evidence being excluded. The only result of spoliation is either a presumption that the destroyed evidence was negative for the spoliator or an inference that it was. No cases result in the exclusion of other evidence.

The primary case cited by Lyuda is Bass-Davis v. Bass, 122 Nev. 442 (2006). The Court in Bass held as follows:

> When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced. Other courts have determined that willful or intentional spoliation of evidence requires the intent to harm another party through the destruction

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> and not simply the intent to destroy evidence. We agree. Thus, before a rebuttable presumption that willfully suppressed evidence was adverse to the destroying party applies, the party seeking the presumption's benefit has the burden of demonstrating that the evidence was destroyed with intent to harm. When such evidence is produced, the presumption that the evidence was adverse applies, and the burden of proof shifts to the party who destroyed the evidence. To rebut the presumption, the destroying party must then prove, by a preponderance of the evidence, that the destroyed evidence was not unfavorable. If not rebutted, the fact-finder then presumes that the evidence was adverse to the destroying party.
>
> Unlike a rebuttable presumption, an inference has been defined as "[a] logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts." Although an inference may give rise to a rebuttable presumption in appropriate cases, an inference simply allows the trier of fact to determine, based on other evidence, that a fact exists. An inference is permissible, not required, and it does not shift the burden of proof.
>
> As the rebuttable presumption in NRS 47.250(3) applies only when evidence is willfully suppressed, it should not be applied when evidence is negligently lost or destroyed, without the intent to harm another party. Instead, an inference should be permitted. As recognized by the Maryland Court of Special Appeals, "[a]n intentional or willful destruction of the evidence could support a presumption unfavorable to the [destroyer]; however, the mere inability to produce the [evidence] would support an adverse inference rather than a presumption."

Bass-Davis v. Davis, 122 Nev. 442, 448-49, 134 P.3d 103, 106-07 (2006)

This case discusses the only two possible remedies for spoliation, a presumption, or an inference. No other remedy, such as the exclusion of other relevant evidence, could ever be available to Lyuda, even if Sean intentionally discarded the other portions of the recording. Moreover, Sean's uncontroverted testimony established that he did not act in bad faith in discarding the irrelevant recordings and he certainly did not do so with the intent to harm Lyuda. Even if the Court found spoliation, and even if it concluded that and inference or even a presumption existed that the discarded recordings favored Lyuda's case, the recordings preserved would remain unaffected by such a ruling. Moreover, the extreme and disturbing nature of the preserved recordings would outweigh any such presumption or inference to such an exponential degree that it would not matter.

Finally, even though Lyuda, with every breath asks the Court to ignore Sasha's best interests, the Nevada Supreme Court has made it clear that the best interests of a child are far more important than mere discovery abuses. Although Sean has committed no such abuses, in Blanco v. Blanco the Nevada Supreme Court held as follows:

> With regard to child custody and child support, we determine that a case-concluding discovery sanction is simply not permissible. These child custody matters must be decided on their merits. It is well established that when deciding child custody, the sole consideration of the court is the child's best interest. NRS 125.480; *Sims v. Sims,* 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

Blanco v. Blanco, 129 Nev. Adv. Op. 77, 311 P.3d 1170, 1174 (2013)

The Court went on to hold as follows:

> In other contexts, we have held that a court may not use a change of custody as a sword to punish parental misconduct, such as refusal to obey lawful court orders, because the child's best interest is paramount in such custody decisions. *See Sims,* 109 Nev. at 1149, 865 P.2d at 330; *see also Dagher v. Dagher,* 103 Nev. 26, 28, 731 P.2d 1329, 1330 (1987). Moreover, child custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children. *See Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *see also Price v. Dunn,* 106 Nev. 100, 105, 787 P.2d 785, 788 (1990) (stating that the policy in favor of deciding cases on their merits is heightened in domestic relations matters), *disagreed with on other grounds by NC–DSH, Inc. v. Garner,* 125 Nev. 647, 651 n. 3, 218 P.3d 853, 857 n. 3 (2009). Other courts have similarly held that before rendering a default judgment on child custody and support issues as a discovery sanction, the lower court must conduct an evidentiary hearing or consider other evidence in the record as to the child's best interest. *See Fenton v. Webb,* 705 N.W.2d 323, 327 (Iowa Ct.App.2005); *Wright v. Wright,* 941 P.2d 646, 652 (Utah Ct.App.1997).

Blanco v. Blanco, 129 Nev. Adv. Op. 77, 311 P.3d 1170, 1175 (2013)

Basically, even if this Court were to fall for Lyuda's spoliation Red Herring regarding the discarded recordings, it could never ignore the best interests of Sasha. It could never ignore the preserved recordings. Even the worst possible discovery sanction could not allow Lyuda prevent the truth from coming out. Truth which will necessarily result in the Court concluding that a change in custody is in Sasha's best interests.

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III. CONCLUSION

With every breath she has taken since the villainy preserved on the recordings was exposed, Lyuda has done nothing but obfuscate and attempt to prevent the Court from considering the truth and what lies in Sasha's best interests. She has tried to distract this Court by saying things like this can't possibly be permissible while ignoring statutes and case law which not only support, but require the admission of the tapes. Based upon the foregoing analysis, even if this was a close legal call for the Court, which it is not, the best interests of Sasha would necessarily be the tie-breaker. The truth coming out about the types of things that Lyuda says to Sasha, truth that Lyuda spontaneously admitted to at the very first hearing (although she tried to blame it on Sean as always) is necessarily in Sasha's best interests. Interestingly, most of the authority supporting the vicarious consent doctrine, uses as its rationale the existence of a parent acting in his child's best interests. As the Court considers this issue, it must necessarily conclude that only one parent has acted in Sasha's best interests. Sean placed the recording device for a very short period of time after an escalation in Sasha's statements to him and demeanor and after a temporally corresponding escalation in Lyuda's own behavior as evidenced in the text messages. While any one example could satisfy the good faith requirement of the vicarious consent doctrine, the totality of all of the evidence put Sean in a position that if he did not act, he would be in a position of failing to protect his son and ignoring the mandate to act in his best interests discussed in the Pollack case analyzed above.

Based upon the foregoing authorities and overwhelming evidence adduced at trial, the Court should make the following findings of fact, conclusions of law, and orders:

1. Sean had a good faith basis to conclude that he needed to consent to the recordings on behalf of his son, based upon his testimony regarding the statements made by Sasha and based upon the text messages from Lyuda and her husband from October of 2014 to January of 2015.
2. Sean's conclusion that he must consent on behalf of Sasha was objectively reasonable based upon his testimony regarding the statements made by Sasha and based upon the text messages from Lyuda and her husband from October of 2014

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to January of 2015.

3. That Sean did not place the recording device for any other purpose other than Sasha's best interests.

4. That consistent with the Court's prior ruling, based upon the multiple authorities submitted by Sean, the vicarious consent doctrine applies to the recordings and as such, they are admissible and shall be received into evidence.

5. That even if the Court excluded the recordings, they would have been properly reviewed and considered by Dr. Holland as the Court appointed expert pursuant to NRS 50.285 and the holding in Barrett v Baird.

6. That Dr. Holland shall be allowed to testify about the entirety of her report and her report will be admitted and received into evidence in its entirety.

7. That there is no evidence that Sean intentionally spoliated evidence.

8. That even if the Court concluded that evidence was spoliated, there is no legal authority that would allow the Court to disregard evidence that was in fact preserved.

9. That even if the Court concluded that evidence was spoliated, any inference that the lost evidence would have favored Lyuda would be outweighed by the relevance of the recordings on the issue of best interests.

10. That even if the Court found that evidence was intentionally spoliated, Blanco v. Blanco requires the Court to determine custody on the merits with the sole consideration being the best interests of the child.

11. That the fact that the recordings offered are duplicates is of no consequence pursuant to NRS 52.245 due to the fact that no question has been raised as to the authenticity, in fact, Lyuda admitted to her voice being on the recordings at the initial hearing in this matter. Moreover nothing about admitting a duplicate recording would be unfair.

///

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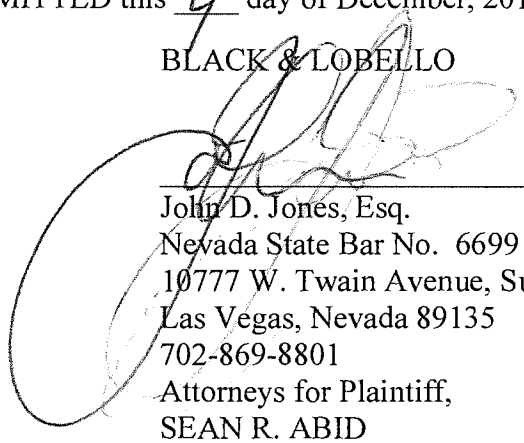
12. Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED THAT the recordings are admitted for any purpose and can be played in open Court and discussed by and form a basis for the opinions of the Court appointed expert, Dr. Stephanie Holland

RESPECTFULLY SUBMITTED this 4 day of December, 2015.

BLACK & LOBELLO



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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2015, a true and correct copy of **PLAINTIFF'S BRIEF REGARDING RECORDINGS,** was served upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid, addressed as follows:

Radford J. Smith, Esq.
Radford Smith Chtd.
2470 St. Rose Pkwy. Suite 206
Henderson, NV 89074
Attorney for Defendant
Lyudmyla Abid

Cheryl Berdall
an Employee of BLACK & LOBELLO

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Exhibit 1

Exhibit 1

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03/16/2015 09:00:56 AM

CLERK OF THE COURT

MISC
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Email Address: jjones@blacklobellolaw.com
Attorneys for Plaintiff,
SEAN R. ABID

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

SEAN R. ABID, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B **Date of Hearing: March 18, 2015** **Time of Hearing: 10:00 a.m.**

SUBMISSION OF AUTHORITIES

Comes now Defendant, SEAN R. ABID ("Sean"), by and through his attorneys of record, John D. Jones, and the law firm of BLACK & LOBELLO, hereby submits the following authorities in support of his DECLARATION OF SEAN ABID IN SUPPORT OF HIS COUNTERMOTION TO CHANGE CUSTODY.

1. Thompson v. Delaney, 838 F.Supp. 1535 (1993);
2. State v. Morrison, 203 Ariz. 489 (2002);
3. Pollock v. Pollock, 154 F.3d 601 (1998);
4. Lawrence v. Lawrence, 360 S.W.3d 416 (2010);
5. Smith v. Smith, 923 So.2d 732 (2005);
6. Stinson v. Larson, 893 So.2d 462 (2004); and

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7. Wagner v. Wagner, 64 F.Supp.2d 895 (1999).

DATED this 16 day of March, 2015.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
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Attorneys for Plaintiff,
SEAN R. ABID

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of March, 2015 a true and correct copy of the SUBMISSION OF AUTHORITIES upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid, addressed as follows:

Michael Balabon, Esq.
Balabon Law Office
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Attorney for Defendant,
Lyudmila A. Abid

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Exhibit 1

Exhibit 1

838 F.Supp. 1535
United States District Court, D. Utah, Central Division.

James THOMPSON, Plaintiff,
v.
Denise DULANEY; Elsie Dulaney; Phil Dulaney; Dale Brounstein; Russ Sardo; Robert Moody; and Jerry Kobelin, Defendants.

No. 90–CV–676–B. | Dec. 1, 1993.

Divorced husband brought action against former wife, wife's parents, and wife's experts and attorneys at custody hearing, for violations of federal wiretapping statutes, based upon wife's taping of husband's telephone conversations with their children. After remand, 970 F.2d 744, the District Court, Brimmer, J., sitting by designation, held that: (1) wife could consent to taping on behalf of children; (2) triable issues existed regarding wife's purpose in **recording** conversations; (3) husband did not have unlawful wiretapping or use and disclosure claims against wife's parents; but (4) genuine issues of material fact existed regarding use and disclosure claims against experts and attorneys.

Ordered accordingly.

West Headnotes (18)

[1] **Federal Civil Procedure**
⇐Materiality and genuineness of fact issue

Ultimate determination regarding genuineness of issue of fact is whether reasonable minds could differ as to import of evidence; if they cannot, then there is no genuine issue of fact, and summary judgment is proper. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[2] **Federal Civil Procedure**
⇐Ascertaining existence of fact issue

Trial court's role on motion for summary judgment is limited to determining existence vel non of genuine issue of material fact, and nothing more; court does not assess credibility or probative weight of evidence that established existence of genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[3] **Federal Civil Procedure**
⇐Burden of proof

Party moving for summary judgment has initial burden of producing evidence that is admissible as to content, not form, identifying those portions of **record**, including pleadings and any material obtained during discovery, that demonstrate absence of any genuine issue of material fact; if movant meets its burden of production, then burden of production shifts to nonmoving party, which may not rest upon mere allocations or denials of his pleadings to avoid summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[4] **Telecommunications**
⇐Persons concerned; consent

Federal wiretapping statutes apply to cases of interspousal wiretapping within marital home. 18 U.S.C.A. §§ 2510–2520.

Cases that cite this headnote

[5] **Telecommunications**
⇐Acts Constituting Interception or Disclosure

For plaintiff to prevail on use or disclosure

claim under federal wiretapping statutes, plaintiff must prove that defendant knew or should have known that information was product of illegal wiretap, and that defendant had knowledge of facts and circumstances surrounding interception so that he knew or should have known that interception was prohibited under wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[6] **Telecommunications**
⇐Persons concerned; consent

Divorced wife who voluntarily taped former husband's conversations with their children had intent required for federal wiretapping violation, even if she did not act with bad purpose or in disregard of law. 18 U.S.C.A. § 2520(a).

10 Cases that cite this headnote

[7] **Telecommunications**
⇐Persons liable; immunity

Divorced wife's alleged good faith reliance on advice of attorneys in taping former husband's conversations with their children was not defense to husband's claim under federal wiretapping statutes. 18 U.S.C.A. § 2520(a, d).

Cases that cite this headnote

[8] **Federal Civil Procedure**
⇐Affirmative Defense or Avoidance

Divorced wife's failure to raise consent as affirmative defense to former husband's illegal wiretapping claims did not give rise to waiver of defense, though it would have been more prudent for wife to err on side of raising consent as affirmative defense, where it was hard to discern any possible prejudice to husband from wife's failure. Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.; 18 U.S.C.A. § 2511(2)(d).

Cases that cite this headnote

[9] **Telecommunications**
⇐Persons liable; immunity

As long as guardian has good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to taping of telephone conversations, **vicarious consent** will be permissible, and will serve as defense to claim under federal wiretapping statutes, in order for guardian to fulfill her statutory mandate to act in best interest of children. 18 U.S.C.A. § 2511(2)(d).

29 Cases that cite this headnote

[10] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding divorced wife's purpose in intercepting former husband's communications with their children precluded summary judgment on husband's illegal wiretapping claim based upon defense that wife **vicariously consented** on behalf of children. 18 U.S.C.A. § 2511(2)(d).

2 Cases that cite this headnote

[11] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Divorced husband's conclusory statement that former wife admitted to him that her parents were involved in taping husband's conversations with children was insufficient to create genuine issues of material fact precluding summary judgment on husband's illegal wiretapping claim

against wife's parents. 18 U.S.C.A. § 2520(a); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[12] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding expert's involvement in and knowledge of tape **recordings** precluded summary judgment on divorced husband's claim that former wife and expert conspired to engage in illegal wiretapping, where husband alleged that expert specifically requested wife to gather wiretap evidence for expert's use at custody hearing, and that expert admitted that wife taped and transcribed conversations for him, and that he reviewed them and discussed them with others. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[13] **Telecommunications**
⇐Acts Constituting Interception or Disclosure

Proof of knowledge that information came from wiretap is, without more, insufficient to make out prima facie plan for use and disclosure liability under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[14] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issue of material fact as to whether divorced wife knew that wiretap, used to tape former husband's conversations with children, was illegal precluded summary judgment, pursuant to defense that wife **vicariously consented** on behalf of children, on former husband's use and disclosure liability claim under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

13 Cases that cite this headnote

[15] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Divorced husband's conclusory assertion that former wife's parents disclosed contents of illegally intercepted communications did not create genuine issue of material fact precluding summary judgment on husband's claim against parents for use and disclosure liability under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[16] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding whether wife's experts had knowledge that material supplied to them in connection with custody proceeding came from illegal wiretap precluded summary judgment on husband's use and disclosure claims against experts under federal wiretapping statutes. 18 U.S.C.A. § 2520(a); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[17] **Telecommunications**
⇐Acts Constituting Interception or Disclosure

Reading document or listening to tape amounts to "use" of those items within meaning of federal wiretapping statutes. 18 U.S.C.A. §

2520(a).

9 Cases that cite this headnote

[18] **Federal Civil Procedure**
Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding whether wife's attorneys at divorce proceedings and custody hearing had knowledge that material came from illegal wiretap precluded summary judgment on husband's use and disclosure claims under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

Attorneys and Law Firms

*1537 James Thompson, pro se.

Roger P. Christensen, Lynn S. Davies, Salt Lake City, UT, Thomas S. Taylor, Provo, UT, for defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

BRIMMER, District Judge.*

The above-entitled matter having come before the Court upon Defendants' Motions for Summary Judgment, and the Court having reviewed the materials on file herein, having heard argument from the parties, and being fully advised in the premises, FINDS and ORDERS as follows:

Factual Background

In 1989, defendant Denise Dulaney and her husband James Thompson obtained a divorce in Utah state court. During subsequent custody proceedings, Denise Dulaney attempted to introduce transcripts of several phone conversations she had **recorded** with a wiretap between Thompson and the couple's then three and five year old children, who lived with Dulaney. In 1988, when these conversations were **recorded**, divorce proceedings between Dulaney and Thompson had commenced and Dulaney and the children were living with Dulaney's parents, Phil and Elsie Dulaney, in Oregon.

Prior to trial, Thompson filed a motion in limine to exclude the transcripts of the wiretapped conversations from the custody proceeding. The motion was not granted,[1] and the transcripts were introduced. At the custody hearing, the court determined that both Thompson and Dulaney were fit to be named guardian of the children, but nonetheless awarded Denise Dulaney custody.

In 1990, Thompson initiated the present suit against the seven above-named defendants,[2] alleging violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510– *1538 2520 (1968 & West Supp.1993) ("Title III"),[3] conspiracies to violate Title III, and numerous state law claims, both statutory and common law. He sought several million dollars in compensatory and punitive damages.

Procedural Background

After discovery commenced, the parties filed cross-motions for summary judgment, and this Court heard oral argument on those motions on May 3, 1991. In an order dated May 29, 1991, this Court, relying on *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir.1977), concluded that this case was outside the purview of Title III since it was a "purely domestic conflict," *id.* at 679, and judgment was entered for all the defendants on Thompson's claims. Given the Court's disposition on the sole federal cause of action, there was no longer a basis for the exercise of subject matter jurisdiction over the pendent state law claims, and they were dismissed accordingly.

Thompson appealed the Court's ruling on summary judgment to the Tenth Circuit, which, on July 23, 1992, issued an order affirming in part and reversing in part this Court's order granting summary judgment. *See Thompson v. Dulaney,* 970 F.2d 744 (10th Cir.1992). The appeals court remanded the case to this Court for further proceedings.

This Court has subject matter jurisdiction over the federal cause of action pursuant to 28 U.S.C. § 1331 (1988) and 18 U.S.C. §§ 2510–2520 (1968 & West Supp.1993), over the state-law claims by way of supplemental jurisdiction under 28 U.S.C. § 1367(a) (West Supp.1993), venue is proper in this Court under 28 U.S.C. § 1391 (West Supp.1993), and no objections have been raised to this Court's assertion of personal jurisdiction over the defendants.

Standard of Review

A. *The Requirements of Rule 56(c)*

Pursuant to Rule 56(c), a trial court hearing a motion for summary judgment is simply required to determine if there are any "genuine issues of material fact," and whether the moving party is entitled to "judgment as a matter of law." FED.R.CIV.P. 56(c). In deciding a summary judgment motion, the Court must therefore make two separate inquiries. First, are the facts in dispute "material" facts, and if so, does the dispute over these material fact create any "genuine" issues for trial.

In determining materiality, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also Carey v. United States Postal Service*, 812 F.2d 621, 623 (10th Cir.1987). Factual disputes over collateral matters will therefore not preclude the entry of summary judgment. *See Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510 (citation omitted).

[1] If the Court concludes that the fact in dispute is a "material" fact, then the Court must determine whether the issue is a "genuine" issue of fact that must be resolved by a jury. This requires a court to assess whether the evidence presented is such "that a reasonable jury could return a verdict for the nonmoving party." *Id.* This inquiry focuses on the sufficiency of the evidence as well as its weight. In the absence of "any significant probative evidence tending to support the complaint," *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968), summary judgment is warranted. The Supreme Court has noted that assessing whether an issue is genuine under Rule 56(c) is similar to standard used for deciding a motion for a judgment as a matter of law, formerly known as a directed verdict, under Rule 50(a). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (citation omitted). The primary difference between a Rule 56(c) motion and a Rule 50(a) motion is procedural; the former is based on documentary evidence while the latter is ***1539** based on evidence admitted at trial. *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 745, 103 S.Ct. 2161, 2171, 76 L.Ed.2d 277 (1983). Thus, it is apparent that the ultimate determination is whether reasonable minds could differ as to the import of the evidence; if they cannot, then there is no "genuine" issue of fact and summary judgment is proper.

This approach to ruling on a motion for a directed verdict, adopted in the summary judgment context, represents a repudiation of what had been known as the "scintilla of evidence" standard. Under that standard, the production of any evidence, without regard to its probative value, which created an issue of fact, required a trial judge to deny a motion for a directed verdict and let the jury decide. *See Anderson*, 477 U.S. at 251, 106 S.Ct. at 2511 (adopting several old Supreme Court precedents on the standard for a directed verdict in the summary judgment context) (citations omitted).

[2] The trial court's role is limited to determining the existence *vel non* of a genuine issue of material fact, and nothing more. The Court does not assess the credibility or the probative weight of the evidence that established the existence of the genuine issue of material fact. The determination that a true factual dispute exists means, *ipso facto*, that summary judgment may not be entered "as a matter of law," and the case must therefore be submitted to a jury.

B. *The Burdens of Proof*

[3] The initial burden of production under Rule 56(c) is on the moving party. That party must make a sufficient "showing" to the trial court that there is an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 322–24, 106 S.Ct. at 2552–53. The movant satisfies its burden by producing evidence that is admissible as to content, not form, identifying those portions of the **record**, including the pleadings and any material obtained during discovery, that demonstrate the absence of any genuine issues of material fact. *Id.* at 323–24, 106 S.Ct. at 2552–53.

If the movant meets its burden of production, then the burden of production shifts to the nonmoving party. That

party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510 (emphasis added). The nonmoving party is now put to their proof; they must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986) (citations omitted). They must make a "sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 25; *Carey,* 812 F.2d at 623. They must demonstrate to the Court's satisfaction that the "evidence presents a sufficient disagreement to require submission to a jury." *Id.* at 623. In making this determination, the trial court must "examine the factual record and [draw all] reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Dorrance v. McCarthy,* 957 F.2d 761, 762 (10th Cir.1992) (quoting *Abercrombie v. City of Catoosa,* 896 F.2d 1228, 1230 (10th Cir.1990)).

The Court will now apply these legal standards to the facts of the case before it.

Discussion

A. *The Tenth Circuit's Order on Remand*

1. *Rulings on Summary Judgment*

In its order on remand, the Tenth Circuit affirmed in part and reversed in part the grant of summary judgment. The appellate court specifically took the time to discuss and interpret Title III and to delineate what was necessary to establish a *prima facie* cause of action under that statute in an effort to provide this Court, and other courts, with guidance under this little-used statute. *See Thompson,* 970 F.2d at 749–50.

The opinion of the Court of Appeals can be broken down into three separate rulings: one on the conspiracy claims, one on the unlawful wiretapping claims, and one on the use or disclosure claims.

*1540 The grant of summary judgment on Thompson's claims that Phil and Elsie Dulaney conspired to violate Title III, and that Denise Dulaney's expert witnesses and her attorneys also conspired to violate Title III, was affirmed on appeal. *See id.* at 749. The appellate court did, however, state that there were factual issues as to whether Denise Dulaney and Russ Sardo engaged in a conspiracy to violate Title III and remanded for a determination of that issue. *Id.* at 749–50.

The Court of Appeals reversed and remanded Thompson's unlawful wiretapping claims against Phil, Elsie and Denise Dulaney. *Id.*

Finally, the appellate court reversed and remanded Thompson's use or disclosure claims against all seven defendants. *Id.*

2. *The Tenth Circuit's Interpretation of Title III*

As noted above, the Court of Appeals took the time to render an interpretation of Title III in an effort to provide this Court with controlling legal standards to apply in this case. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 2511(1)(a)–(d), provides in relevant part:

> (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, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication....;
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> .....
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).[4]

[4] In this Court's May 1991 order granting the defendants' motions for summary judgment, this Court was faced with an issue of first impression in the Tenth Circuit regarding the applicability of Title III to cases of interspousal wiretapping.[5] Although three other circuits had ruled that Title III did apply to interspousal wiretapping, *see Kempf v. Kempf,* 868 F.2d 970, 973 (8th Cir.1989); *Pritchard v. Pritchard,* 732 F.2d 372, 274 (4th Cir.1984); *United States v. Jones,* 542 F.2d 661, 673 (6th Cir.1976), two circuits had ruled that interspousal wiretapping was beyond the reach of Title III. *See Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir.1977); *Simpson v. Simpson,* 490 F.2d 803, 810 (5th Cir.), *cert. denied,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974) (adopting the reasoning of *Anonymous*). This Court adopted the "minority" view of the Second and Fifth Circuits that Title III was inapplicable to interspousal wiretapping, which provided the basis for granting summary judgment to the defendants.

***1541** While Thompson's appeal was pending in this matter, the Tenth Circuit issued two opinions within a period of five weeks that essentially dictated the result in Thompson's appeal.

Newcomb was decided in late August, 1991. That case involved a minor child who sued his custodial parents under Title III for intercepting his telephone conversations. While the Tenth Circuit noted that there was a split in the circuits over the question of whether Title III extended to so-called interspousal wiretapping, *see id.* at 1535 n. 3, the court avoided that question, concluding that interspousal wiretapping was "qualitatively different from a custodial parent tapping a minor child's conversation within the family home." *Id.* at 1535–36.

Five weeks later, the Tenth Circuit was squarely confronted with the issue left open in *Newcomb.* In *Heggy v. Heggy,* 944 F.2d 1537 (10th Cir.), *cert. denied,* 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992), which was decided in early October, 1991, the Tenth Circuit adopted the "majority" view taken by the Fourth, Sixth and Eighth Circuits, concluding that Title III did provide a remedy for interspousal wiretapping within the marital home. *Id.* at 1539. In its opinion in *Heggy,* the Tenth Circuit specifically rejected and criticized the conclusion reached in *Simpson* and *Anonymous,* which were the cases that this Court relied on in granting the defendants' motions for summary judgment.

Heggy, which was decided after this Court's May 1991 ruling, justified reversal of this Court's order granting summary judgment for the defendants. In *Thompson v. Dulaney,* 970 F.2d 744 (10th Cir.1992), the Court of Appeals relied on *Heggy* in reversing in part this Court's order granting summary judgment. The Court explained that in *Heggy,* it elected to follow the majority view because the words "any person" in the statute were a "clear and unambiguous" dictate that compelled the result that "[t]here exists no interspousal exception to Title III liability." *Thompson,* 970 F.2d at 748.

While the language of the statute compelled this result, the court also pointed out that the statute established certain limits on the actionability of interspousal wiretapping in a particular case. First, the statute requires proof of actual intent on the part of the intercepting spouse, thereby excluding what the court called "inadvertent interceptions." *Id.* Second, the court noted that 18 U.S.C. § 2511(2) enumerated specific exceptions that would often relieve the actor of liability, the most notable of which was the "consent" exception, *see* 18 U.S.C. § 2511(2)(d). Finally, the court pointed out that liability under Title III premised on the wrongful use or disclosure of information obtained from a wiretap requires an even "greater degree of knowledge on the part of the defendant." *Thompson,* 970 F.2d at 749. In addition to proving that the use or disclosure was done intentionally, a defendant "must be shown to have been aware of the factual circumstances that would violate the statute." *Id.*

Thus, to establish use or disclosure liability, it is insufficient to prove only that the defendant knew that the information was the product of a wiretap. The reason for this is that not all wiretaps are illegal *per se.* As discussed above, § 2511(2) specifically lists exceptions to the general prohibition against wiretaps. It is apparent that the intent of Congress was only to deter the use or disclosure of information *illegally obtained* in violation of Title III, and not all wiretap evidence. It would not further the purposes underlying the prohibition against the use or disclosure of such information to punish people who use or disclose information known to have been obtained from a wiretap if, in fact, that wiretap was consented to or otherwise lawfully obtained.

[5] Therefore, in order for a plaintiff to prevail on a use or disclosure claim, the plaintiff must prove: (1) that the defendant "knew or should have known" that the information was the product of an illegal wiretap, and (2) that the defendant had knowledge of the facts and circumstances surrounding the interception so that he "knew or should have known" that the interception was prohibited under Title III. *See id.*

This will often require the plaintiff to prove that the

defendant had notice that *1542 neither party consented to the wiretap, since consent would negate the requirement that the party had knowledge that the wiretap was an illegal one. Mere knowledge that the information allegedly used or disclosed came from a wiretap is insufficient unless additional circumstantial proof is introduced that would enable an inference to be drawn that the defendant knew or should have known that the wiretap was an illegal one under Title III.

With these principles in mind, the Court will now turn to the merits of the contentions.

B. *Application to this Case*

1. *The Unlawful Wiretapping Claims*

a. *Denise Dulaney*

After expounding on what is required to state a claim under the various aspects of Title III, the appellate court concluded that this case should be remanded for a determination of whether any factual issues existed regarding the conduct of Denise, Phil and Elsie Dulaney with respect to Title III. As discussed above, establishing a violation of 18 U.S.C. § 2511(1)(a) for intercepting an electronic communication requires proof of actual intent on the part of the intercepting spouse, Denise Dulaney.

i. *Intent*

[6] Denise Dulaney's argument is that she did not act with the requisite state of mind in this case. In support of her contention, she first argues that she **recorded** these conversations because she was concerned that Thompson may have been trying to undermine the childrens' relationship with her. In essence, she argues that she taped the conversations because she was acting in the best interests of her children. She also argues that she did so in reliance on the advice of her attorneys that her actions were legal, and after consulting with Thompson.

Thompson alleges that Denise Dulaney admitted that the **recordings** were "innocuous," but that she still continued to tape the conversations. As a result, he contends that she intended to tape the **recordings**. This Court agrees.

The critical issue on this point is the definition of intent. Denise Dulaney argues that her acts were not performed with a bad purpose, or with a specific disregard of the law, and that they were not without justifiable excuse. This Court is not persuaded.

In *United States v. Townsend,* 987 F.2d 927 (2d Cir.1993), the Second Circuit set forth a suggested jury instruction on the intent element of Title III. The Court stated that the defendant must be shown to have acted "deliberately and purposefully; that is, defendant's act must have been the product of defendant's conscious objective *rather than the product of a mistake or an accident.*" *Id.* at 930 (emphasis added).

The Court is aware that *Townsend* was a criminal prosecution. Nonetheless, this Court is convinced that this definition of intent is consistent with the view taken by the Tenth Circuit in *Thompson.* In *Thompson,* the court stated that the wording of the statute "requires that interceptions be intentional before liability attaches, thereby excluding liability for *inadvertent* interceptions." *Thompson,* 970 F.2d at 748 (emphasis added). Thus, the focus of the Tenth Circuit, like the Second Circuit, is on the issue of the deliberateness of the act, or, stated another way, whether the actor intended to intercept the communication or whether it happened inadvertently. Thus, Dulaney's *motive,* whether she acted with a bad purpose or in disregard of the law, is not the issue. *See* S.REP. No. 99–541, 99th Cong., 2d Sess. 23 (Oct. 17, 1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577–79 ("The term 'intentional' is not meant to connote the existence of a motive."). As a result, this Court concludes that the proper focus is on the volitional nature of the *act* of intercepting the communication. Since Denise Dulaney does not contest the fact that she did voluntarily tape **record** these conversations, the Court concludes that she had the requisite intent as a matter of law.

[7] Denise Dulaney's second argument is that she relied, in good faith, on the advice of her attorneys in taping the conversations. This contention has been flatly rejected by the Tenth Circuit. In *Heggy,* the Tenth Circuit specifically rejected the defense of *1543 "good faith reliance on a mistake of law" for two reasons. First, § 2520(d) expressly provides for a good faith defense in a limited number of circumstances, such as reliance on a warrant or subpoena; good faith reliance on mistake of law is not listed, and thereby deemed not to be a defense. Second, the Court stated that "[t]he law's reluctance to allow testimony concerning subjective belief after the fact reflects an obvious concern with the reliability of such testimony." *Heggy,* 944 F.2d at 1542. Thus, this evidence

cannot be considered probative in determining whether to grant summary judgment.

ii. *The Defense of Consent*

Even though Thompson may have stated a claim against Denise Dulaney under Title III with respect to intentional wiretapping, the statute expressly provides several defenses to these claims. One specific defense is § 2511(2)(d), which provides a safe harbor from Title III liability

> where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

In this case, Denise Dulaney alleges that she gave **vicarious consent**, on behalf of her minor children, to tape the conversations.

It is clear from the case law that Congress intended the consent exception to be interpreted broadly. *See Griggs–Ryan v. Smith,* 904 F.2d 112, 116 (1st Cir.1990) (citing *United States v. Amen,* 831 F.2d 373, 378 (2d Cir.1987)). Some courts interpreting the consent exception have drawn a distinction between whether a party had the legal capacity to consent and whether they actually consented.[6] *See United States v. King,* 536 F.Supp. 253 (C.D.Cal.1982).

In *King,* the party who allegedly consented to the wiretapping was an adult with legal capacity to consent. The district court concluded that, for purposes of the consent exception to Title III, the "only issue under the statute is a factual one: did the individual 'voluntarily' consent?" *Id.* at 268 (citations omitted); *see also Luna v. State of Oklahoma,* 815 P.2d 1197, 1199–1200 (Okla.Crim.App.1991) (finding that a seventeen-year old, who lacked legal capacity to consent, nonetheless "freely and voluntarily consented" to wearing a wiretap). While this Court is inclined to agree with the analysis of consent in *King* and *Luna,* which focus on actual consent, those cases would not be controlling here since this case involves minor children who lack *both* the capacity to consent and the ability to give actual consent.

[8] The children in this case were ages three and five. They clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent, either express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent. Thus, this case presents a unique legal question of first impression on the authority of a guardian to **vicariously consent** to the taping of phone conversations on behalf of minor children who are both incapable of consenting and who cannot consent in fact. Denise Dulaney asserts that in this situation, "the parent as legal guardian must have the ability to give actual consent for the child." Thompson vehemently contests this proposition.[7]

***1544** Denise Dulaney's argument is four-fold. First, she argues that the Utah Supreme Court has declared that the rights associated with being a parent are fundamental and basic rights and therefore, she should be afforded wide latitude in making decisions for her children. *See In re J.P.,* 648 P.2d 1364, 1372–74 (Utah 1982) (citing various state and federal constitutional provisions). Second, she bolsters this argument by noting that Utah statutory law gives parents the right to consent to legal action on behalf of a minor child in other situations, such as for marriage, medical treatment and contraception. Third, she argues that as the legal guardian of the children, Utah law allows her to make decisions on behalf of her children. Thus, the argument goes, the parental right to consent on behalf of minor children who lack legal capacity to consent and who cannot give actual consent, is a necessary parental right. In addition, she argues that the decision in *Newcomb* lends support to her argument. While this is a close and difficult question, this Court is persuaded that, on the specific facts of this case, **vicarious consent** is permissible under both *Newcomb* and applicable Utah law.

Utah law clearly vests the legal custodian of a minor child with certain rights to act on behalf of that minor child. While UTAH CODE ANN. § 78–3a–2(13) (1958) enumerates certain rights that the guardian has vis-a-vis the minor child, the statute does not, by its own terms, purport to be all-inclusive. In addition, § 78–3a–2(14)(b) states that a guardian is responsible for, *inter alia,* protecting the minor child. Denise Dulaney argues that if she is unable to **vicariously consent** for her minor children, then she is deprived of her ability to protect them. This Court believes that this case presents the paradigm example of why **vicarious consent** is necessary.

[9] Denise Dulaney argued that she **recorded** the conversations with Thompson because he allegedly was interfering with her relationship with the children to whom she was awarded custody. In this case, or perhaps a

more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, **vicarious consent** is necessary to enable the guardian to protect the children from further harassment in the future. Thus, as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, **vicarious consent** will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.[8]

***1545** [10] The consent exception, however, contains an express limitation stating that if the communication is intercepted "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State," 18 U.S.C. § 2511(2)(d) (West Supp.1993),[9] then the defense of consent is inapplicable for public policy reasons which are readily apparent. Here, Thompson alleges that the interceptions amounted to criminal and civil violations of Utah law, and as a result, the consent exception is inapplicable.

Utah recognizes the crime of "communication abuse." UTAH CODE ANN. § 76–9–403(1)(a) (1953). A person is guilty of this crime, which is a misdemeanor, if he "[i]ntercepts, without the consent of the sender or receiver, a message by telephone ..." This statute would appear to fall within the scope of the limitation on consent. The Court has concluded, however, that whether Thompson can rely on this limitation on the consent exception requires a factual resolution of what Denise Dulaney's "purpose" was in intercepting the communication. As noted above, she asserts it was to protect the children; Thompson submitted contrary evidence on this issue alleging that Denise Dulaney continued taping the conversations several months after she concluded that the conversations were in fact "innocuous." Thus, the viability of the consent defense is contingent on a resolution of her purpose in intercepting these communications.

In sum, this Court concludes that Denise Dulaney did in fact intentionally **record** the phone conversations between Thompson and their children. She asserts the defense of consent, and while this Court concluded that she could **vicariously consent** for the children as a matter of law, there are factual issues as to whether she did in fact give such consent, and if so, whether it was "prior" consent, as required by the statute. Finally, Thompson has argued that the limitation in § 2511(2)(d) removes the defense of consent from this case. The Court concluded that while Utah law does criminalize[10] Denise Dulaney's conduct, there is a fact question as to what her "purpose" was in intercepting the conversations.

b. *The Unlawful Wiretapping Claims Against Phil and Elsie Dulaney*

[11] Thompson allegations with respect to his unlawful wiretapping claim against Denise Dulaney's parents, Phil and Elsie Dulaney, are wholly conclusory. He simply alleges that they "agreed" to gather wiretapped evidence against him, and that they intercepted his conversations and procured Denise Dulaney to intercept them.

As to Thompson's first contention regarding their "agreement," the court of appeals affirmed this Court's initial grant of summary judgment with respect to Thompson's conspiracy claim. *Thompson,* 970 F.2d at 749. The appeals court noted that Phil and Elsie Dulaney's "ownership of their home and telephone and their conduct in hiring lawyers and experts for Denise Dulaney's custody suit" did not state a claim for conspiracy, and thus affirmed summary judgment on that claim.

As to plaintiff's claim of unlawful wiretapping, it is well-established that in opposing a motion for summary judgment, a party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510 (emphasis added). The nonmoving party must produce proof in support of its assertion that there are genuine issues of material fact for trial. Thompson has failed to make this showing with respect to his unlawful wiretapping claims against Phil and Elsie Dulaney.

***1546** The only possible allegation to support these claims is Thompson's claim that on February 11, 1989, Denise Dulaney admitted to him that her parents were involved in taping the conversations. Thompson has, however, failed to provide any affirmative evidence other than his own conclusory statements in support of this contention. Moreover, at his deposition, he admitted that all he knew about Mr. and Mrs. Dulaney was that the tapings occurred in their house with their equipment, and that they hired experts and attorneys for Denise Dulaney. He admits that this is the full extent of his knowledge regarding the involvement of Phil and Elsie Dulaney. As a result, this Court concludes that he has failed to meet his burden of demonstrating that there are any factual issues for trial, and summary judgment will therefore be entered for Mr. and Mrs. Dulaney on Thompson's unlawful wiretapping claim.

2. *The Conspiracy Claim*

[12] The Tenth Circuit concluded that there was a question of fact as to whether Denise Dulaney and one of her expert witnesses, Dr. Russ Sardo, engaged in a conspiracy to violate Title III. Thompson alleges that Dr. Sardo specifically requested that Denise Dulaney gather wiretapped evidence for his use at the custody hearing. He also alleges that Dr. Sardo admitted that Denise taped and transcribed the conversations for him, and that he reviewed them and discussed them with other defendants.

Dr. Sardo vigorously contests these allegations. He denies that he conspired with Denise Dulaney to tape the conversations at issue; he denies any participation in any form relative to the taping of these conversations; he further denies that the tapes, which he admits he reviewed, were created in violation of the law; and finally, he denies that he disclosed the contents to anyone other than when he testified in court.

The Court concludes that there are conflicting factual allegations here as to Dr. Sardo's involvement in, and knowledge of, the tape recordings at issue here. As a result, summary judgment on the conspiracy claim must be denied.

3. *The Use or Disclosure Claims*

a. *In General*

[13] As discussed above at length, in order to set forth a *prima facie* claim for use and disclosure liability under Title III, a defendant must know that the information used or disclosed was the result of an illegal wiretap. Proof of knowledge that the information came from a wiretap is, without more, insufficient to make out a *prima facie* claim. The Tenth Circuit clearly stated that unless circumstantial evidence is introduced which would allow an inference that the defendant knew or should have known that the wiretap was illegal under Title III, which will often require the plaintiff to prove that no consent was ever given, then summary judgment is appropriate. The Court will now apply these principles to the particular circumstances of each defendant.

b. *Application to this Case*

i. *Denise Dulaney*

[14] Denise Dulaney has not contested the issue of whether the information obtained came from a wiretap. She has also not challenged Thompson's claim that she did in fact disclose this information to her attorneys, Moody and Kobelin, as well as her expert witnesses, Drs. Sardo and Brounstein. She has, however, asserted that consent is a valid defense. Thus, there is a factual issue of whether she, acting on behalf of the minor children, *knew* that the wiretap itself was illegal. Therefore, summary judgment is unwarranted on this claim.

ii. *Phil and Elsie Dulaney*

[15] In Thompson's opposition to summary judgment, he makes the conclusory statement that Phil and Elsie Dulaney "disclosed to other Defendants and others the contents of the intercepted communications." Thompson's affidavit opposing summary judgment does not, however, contain any factual allegations as to Phil and Elsie Dulaney and his claim of unlawful disclosure. It bears repeating that a party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510 *1547 (emphasis added). The nonmoving party must produce proof in support of its assertion that there are genuine issues of material fact for trial. While Thompson is not resting on his pleadings *per se,* a conclusory assertion in his affidavit that Phil and Elsie Dulaney disclosed this information, does not provide this Court with any additional guidance as to what, if any, material disputes of fact exist. In their motion for summary judgment, the Dulaneys argue precisely this point: that Thompson has failed to identify the factual basis for these claims.[11] This Court agrees, and concludes that Phil and Elsie Dulaney are entitled to judgment as a matter of law on Thompson's disclosure claims.

iii. *Drs. Dale Brounstein and Russ Sardo*

[16] Dr. Brounstein sets forth three arguments in support of his motion for summary judgment on Thompson's use or disclosure claims. First, he argues that he never "used" the communications as the term is employed in the statute. Second, he argues that he had no knowledge that

the information came from a wiretap. Third, he argues that he certainly had no knowledge of the facts and circumstances surrounding the interception of the communication that would enable an inference to be drawn that he knew the wiretap was illegal. He does not, however, dispute the fact that he did read the transcripts.

Likewise, Dr. Sardo argues that he did not know that the information that he read came from a wiretap, and further, that he had no knowledge of any facts that would enable an inference to be drawn that he knew that the wiretap was illegal.

In his opposition, Thompson argues that both Brounstein and Sardo used the contents of these wiretapped conversations in formulating their expert opinions, and that they also discussed these conversations with Denise Dulaney and other defendants, presumably Kobelin and Moody.

[17] As to Dr. Brounstein's first contention in regards to the "use" requirement, the Court is not persuaded by the innovative argument that the term "use," as utilized in the statute, is an active, rather than a passive term, and therefore, Congress did not intend for reading or listening to constitute "use." This Court thinks that it strains logic to conclude that reading a document or listening to a tape does not amount to "use" of those items.

As to remaining elements regarding knowledge that the information came from an illegal wiretap, neither of these defendants denies the fact that they did in fact listen to the **recordings** and/or read the transcripts of these conversations.[12] In supplemental pleadings filed by counsel for Dr. Brounstein, he argues that at the custody hearing, Brounstein did not rely on the **recorded** conversations in formulating his opinion that Thompson was an unfit parent.

The Court is somewhat perplexed by this argument since it is essentially contending that there was no "disclosure" of the contents of these communications, while nonetheless admitting "use." This does not help the defendant's position. Use or disclosure liability is disjunctive; liability attaches for one or the other, and while proof of both use and disclosure is sufficient, it is certainly not necessary. *See* 28 U.S.C. § 2511(1)(b)–(d) (1988).[13]

***1548** As to the elements regarding knowledge that the material came from an illegal wiretap, the Court concludes that there are questions of fact regarding these elements. Thompson submitted evidence, discussed above, which alleges that Sardo specifically requested that Denise Dulaney gather wiretapped evidence for his personal use. As to defendant Brounstein, Thompson submitted evidence that would support an inference that Brounstein knew, or at least should have known, that the information came from a wiretap. Therefore, the Court concludes that summary judgment is inappropriate on these claims.

iv. *Jerry Kobelin and Robert Moody*

[18] Kobelin and Moody were Denise Dulaney's attorneys at the custody hearing and were involved in the divorce proceedings as well. Once again, for reasons that are similar to those set forth above with respect to Drs. Sardo and Brounstein, the Court concludes that there are genuine issues of fact over the knowledge elements of the use or disclosure claims of Thompson. The affidavits of these defendants and Thompson are in conflict. It appears undisputed that these defendants did use or disclose these conversations during the course of their representation of Denise Dulaney. Whether they knew that the material came from an unlawful wiretap, however, is a question of fact which this Court may not decide. Therefore, summary judgment is unwarranted on these use or disclosure claims as well.

THEREFORE, it is,

ORDERED that Defendant Denise Dulaney's Motion for Summary Judgment on the illegal wiretapping claim be, and the same hereby is, **DENIED.** It is further

ORDERED that Defendants Phil and Elsie Dulaney's Motion for Summary Judgment on the illegal wiretapping claim be, and the same hereby are, **GRANTED.** It is further

ORDERED that Defendants Phil and Elsie Dulaney's Motion for Summary Judgment on the use or disclosure claims be, and the same hereby are, **GRANTED.** It is further

ORDERED that Defendant Dale Brounstein's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.** It is further

ORDERED that Defendant Russ Sardo's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.** It is further

ORDERED that Defendant Russ Sardo's Motion for Summary Judgment on the conspiracy claim with Denise

Dulaney be, and the same hereby is, **DENIED.** It is further

ORDERED that Defendant Robert Moody's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.** It is further

ORDERED that Defendant Jerry Kobelin's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.**

Parallel Citations

139 A.L.R. Fed. 765

Footnotes

* United States District Judge for the District of Wyoming, sitting by designation.

1 It is unclear from the record whether the state court actually denied Thompson's motion or whether it was simply never ruled on one way or the other. The critical fact, which is that the contents of the transcripts were introduced at the hearing, is undisputed.

2 The defendants in this matter are Denise Dulaney, Thompson's ex-wife; Elsie and Phil Dulaney, Denise's parents; Drs. Dale Brounstein and Russ Sardo, Denise's expert witnesses at the custody hearing; and Robert Moody and Jerry Kobelin, Denise's attorneys.

3 18 U.S.C. § 2520(a) (1968), which is part of the Omnibus Crime Control and Safe Streets Act of 1968, explicitly creates a civil cause of action for "any person" whose electronic communications are "intercepted, disclosed, or intentionally used in violation of [the other sections of Title III]."

4 The initial version of Title III required the plaintiff to prove only "willfulness" on the part of the defendant. The 1986 amendments to this statute modified the mental state required to establish a violation to proof of actual intent. "We proceed under the statute as in effect at the time of the alleged violation." *Newcomb v. Ingle,* 944 F.2d 1534, 1535 n. 2 (10th Cir.), *cert. denied.* 502 U.S. 1044, 112 S.Ct. 903, 116 L.Ed.2d 804 (1992). Thus, since the conduct in question occurred in 1988, the proper *mens rea* is actual intent.

5 It should be pointed out that the term "interspousal wiretapping" is misleading. The term is used as a shorthand description for electronic surveillance by one spouse against the other spouse. As one court noted, the phrase is incorrect because "[Denise Dulaney], of course, was not talking to herself on the telephone." *Kratz v. Kratz,* 477 F.Supp. 463, 468 n. 10 (E.D.Pa.1979).

6 For purposes of this analysis, the phrase "actual consent" includes both express and implied consent. Implied consent is, of course, true consent, or "consent in fact," which is inferred from the surrounding circumstances. It is quite different from the legal fiction known as constructive consent. *See Smith,* 904 F.2d at 116–17.

7 In addition to contesting the consent issue on the merits, Thompson makes the conclusory assertion that Denise Dulaney's failure to raise consent as an affirmative defense in her answer constitutes waiver of that defense. *See Renfro v. City of Emporia, Kansas,* 948 F.2d 1529, 1539 (10th Cir.1991), *cert. dismissed,* 503 U.S. 915, 112 S.Ct. 1310, 117 L.Ed.2d 510 (1992). This Court is not persuaded by the plaintiff's waiver argument.

The problem with this waiver argument is that it assumes the truth of the question before the Court, which is whether consent is in fact an affirmative defense under Rule 8(c). The only way that it could be an affirmative defense is if it fell within the nebulous catch-all of "any other matter constituting an avoidance or affirmative defense," FED.R.CIV.P. 8(c), since it is not one of the nineteen specifically enumerated affirmative defenses. Thus, this Court is left with the task of determining whether consent under 18 U.S.C. § 2511(2)(d) should be considered an affirmative defense.

Rule 8(c) makes no attempt to elaborate what other matters constitute an affirmative defense. Courts have, therefore, been left to determine this issue and "some working principles" for determining what constitutes an affirmative defense under the catch-all have been formulated. *See* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1990) (collecting authority). Relevant considerations include whether the allegation is likely to take the opposite party by surprise, whether the opposite party had notice of this defense, and whether the defense arises by logical inference from the allegations of plaintiff's complaint.

This Court concludes that Denise Dulaney's failure to plead consent under this statute does not constitute a waiver of that defense. While it would have been more prudent for Dulaney to err on the side of raising consent as an affirmative defense, it is hard to discern any possible prejudice to the defendant from this failure at this stage of the proceedings. Indeed, he has not alleged any in his opposition to motion for summary judgment.

Finally, the Court notes that "the liberal amendment of pleadings philosophy expressed in Rule 15 can be used by the parties and the court to correct a failure to plead affirmatively when the omission is brought to light." 5 CHARLES A. WRIGHT &

ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1990). In light of the lack of prejudice to the plaintiff, the Court concludes that the defense has not been waived.

8 The Court wishes to emphasize a point that should already be apparent. The holding in this case is very narrow and limited to the particular facts of this case. It is by no means intended to establish a sweeping precedent regarding **vicarious consent** under any and all circumstances. The holding of this case is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father. Under these limited circumstances, the Court concludes that **vicarious consent** is permissible.

9 Thompson also vigorously argued in his brief that if the communication is intercepted for the purpose of "committing any other injurious act," then consent is unavailable. What he failed to recognize is that while this used to be a valid criterion for limiting the applicability of the consent defense, Congress amended the statute in 1986, as part of the same amendments changing the *mens rea* requirement from "willful" to "intentional." The 1986 amendments specifically eliminated the "injurious act" limitation on the consent exception and it is therefore no longer a relevant concern.

10 Thompson asserted that Denise Dulaney's conduct also amounted to an invasion of privacy tort. This Court is unable to find any statutes that make Denise Dulaney's conduct tortious.

11 The probable reason that he has failed to allege any facts in support of this contention was revealed during his deposition, where Thompson stated that he was relying on hearsay and speculation in support of this claim, and has no firsthand knowledge.

12 In Dr. Sardo's affidavit, he clearly states "I listened to the tape" that Denise Dulaney brought him. In Dr. Brounstein's affidavit, he states that "I listened to a tape of one conversation between Thompson and his children."

13 In other words, "use," as the term is used in the statute, does not require the defendant to "rely" on the information at a later date. "Use" means exactly what it says: to use. The statute does not limit use to certain types of use, or require actual reliance. Thus, by acknowledging that he did in fact listen to a **recording**, Brounstein has basically conceded the first element necessary to establish liability. Of course, the plaintiff will still have to prove the more difficult elements which are that the defendant knew that the information came from a wiretap that was illegally established.

End of Document

Exhibit 2

Exhibit 2