

APPENDIX IV

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121 F.3d 715 (Table)

121 F.3d 715 (Table), 1997 WL 414380 (9th Cir.(Cal.))

Unpublished Disposition

(Cite as: 121 F.3d 715, 1997 WL 414380 (9th Cir.(Cal.)))

Briefs and Other Related Documents

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
Michael DUNLAP, Plaintiff-Appellant-Cross-Appellee,

v.

COUNTY of Inyo, Defendant-Appellee-Cross-Appellant,

and

Paul S. RUDDER; Don R. Pritchard; Michael D. Nash; Jack N. Goodrich; Dan L.

Lucas; Jamery Ray; C. Brent Wallace, Defendants-Appellees.

Nos. 96-15207, 96-15294, 96-15915.

Submitted June 10, 1997.

Decided July 23, 1997.

Appeal from the United States District Court for the Eastern District of California, No. CV-93-05544-OWW; [Oliver W. Wanger](#), District Judge, Presiding.

Before: [REINHARDT](#), T.G. NELSON, and [HAWKINS](#), Circuit Judges.

MEMORANDUM [\[FN*\]](#)

[FN*](#) This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by [Ninth Circuit Rule 36-3](#).

****1** As the parties are familiar with the facts and proceedings, we recite them only as necessary to an understanding of this disposition.

In October 1992, defendants Donald Pritchard and Michael Nash, deputy sheriffs for Inyo County, California, listened in on and taped a telephone conversation between plaintiff Michael Dunlap, the Inyo County Undersheriff, and his friend Thaddeus Taylor. Nash had been the dispatcher on duty, and Pritchard entered the dispatch room to relieve Nash

during a break. In the chain of events that followed the taping, Dunlap and Nash contacted Jack Goodrich, Dan Lucas, and Jamery Ray, their colleagues at the sheriff's office, as well as an attorney, Paul Rudder. Dunlap learned of the taping several months later and filed a claim with Inyo County ("the County") in March 1993. In May 1993, Rudder prepared a press release and spoke with reporters concerning the taped conversation.

Nash and Pritchard were able to tape Dunlap's conversation because it took place on line four at the sheriff's office, and line four was the line used to monitor inmate phone calls and to patch telephone callers to police radios. As a result, line four was subject to monitoring on a speaker in the sheriff's office dispatch room. Though the parties dispute precisely what transpired on October 30, 1992, the end result was that Pritchard and Nash taped approximately five minutes of the conversation between Dunlap and Taylor. At some point during the taping, Sheriff Alan George came to the dispatch room, at which time Nash turned down the volume on line four, and Pritchard stopped the tape recorder. Nash and Pritchard did not tell the sheriff about the tape.

Dunlap filed his complaint in this case in August 1993. Trial commenced in April 1995 for violations of state and federal wiretapping laws. This appeal followed that jury trial. Though the jury found for Dunlap, the district court entered judgment for defendants Nash, Pritchard, Goodrich, Lucas, Ray, Rudder, and the County on all claims. We reverse in part, affirm in part, and remand for a new trial.

Entry of Judgment for Defendants on the Federal Claims was Improper

The district court, finding an irreconcilable inconsistency in the jury verdict, rejected the concept of granting a new trial and entered judgment for defendants on the federal claims. We hold that the district court's entry of judgment was error, and we remand for a new trial.

Federal wiretapping law (also known as "Title III") prohibits the interception of a "wire communication," as well as the unauthorized disclosure or use of an intercepted communication. [18 U.S.C. § 2511\(1\)](#). Title III includes several relevant exceptions to liability: (1) when an interception occurs on equipment "furnished ... by a provider of wire or

Unpublished Disposition**(Cite as: 121 F.3d 715, 1997 WL 414380 (9th Cir.(Cal.))**)

electronic communication service ... [and] used ... in the ordinary course of business;" and (2) when the interception occurs "by an investigative or law enforcement officer in the ordinary course of his duties," *id.* § 2510(5)(a)(i) & (ii). We believe that the inconsistent verdicts, coupled with disputed issues of fact, preclude the district court from holding for defendants as a matter of law. We discuss the various defendants below.

The Officer Defendants and the County of Inyo

****2** The district court entered judgment for the County and the officer defendants after determining that the jury's special verdict contained an irreconcilable inconsistency. This was error. We agree with the district court that the verdict was inconsistent, but we do not believe that entry of judgment for these defendants was the appropriate course of action.

The district court, by relying on the jury's response to special verdict number one and disregarding the jury's contrary responses in subsequent special verdict interrogatories, failed to "search for a reasonable way to read the verdicts as expressing a coherent view of the case." *Toner v. Lederle Labs.*, 828 F.2d 510, 512 (9th Cir.1987). Instead, the district court interpreted interrogatory number one as a factual finding that established a law enforcement exception to the federal wiretapping laws. See 18 U.S.C. § 2510(5)(a)(ii). At a bare minimum, the evidence at trial established that deputies Nash and Pritchard concealed their taping from Sheriff George and did not report the conversation to anyone with authority to investigate what they contended was a crime.

On the record before us, the jury's response to question number one is difficult to reconcile with the subsequent responses. At the same time, the evidence is very much in conflict on the question of the existence and applicability of exceptions to Title III liability. Accordingly, it was error for the district court to enter judgment for defendants; rather, the court should have ordered a new trial on the federal wiretapping claims. See *Toner*, 828 F.2d at 512 (new trial is appropriate remedy where verdicts are irreconcilable). [\[FN1\]](#)

[\[FN1\]](#). As a postscript, we note that the district court correctly held that counsel for the County conceded the issue of course and scope of employment during closing

argument. See *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir.1991). The jury, however, returned a contrary verdict on this issue, finding that Nash, Pritchard, Goodrich, and Lucas did not act in the course and scope of their employment. Given this difficult inconsistency, we believe that the County should remain a defendant, and the parties can retry the issue of course and scope.

Defendant Paul Rudder

At the close of Dunlap's case in chief, the district court granted judgment as a matter of law ("JMOL") in favor of Rudder on the federal wiretapping claims. The district court found that Dunlap had not presented evidence sufficient to establish use or disclosure liability for Rudder under 18 U.S.C. 2511. We disagree.

According to evidence presented at trial, Rudder learned of the tape when Goodrich, Ray, and Lucas came to him for legal advice, concerned that they might have done something wrong. Rudder knew the circumstances under which Nash and Pritchard made the recording, as well as the details of the telephone system at the sheriff's office, and was familiar with the relevant California and federal wiretapping laws. After Dunlap filed a claim with the County, Rudder spoke freely with reporters concerning the tape and prepared and issued a press release that discussed the contents of the recording.

It is clear to us that Rudder both "used" and "disclosed" the contents of the illegal recording. See 18 U.S.C. § 2511(1). Moreover, Rudder's certainty that the contents of the tape were not confidential was decidedly misplaced. The district court should not have granted JMOL in favor of Rudder on the federal claims, and Rudder should remain a defendant to these claims for the new trial.

Entry of Judgment as a Matter of Law for Defendants
on the State Claims was
Improper

****3** The district court entered JMOL for defendants on Dunlap's state claims on the ground that the evidence did not support the verdict. The district court rejected the claim that the conversation was confidential and interpreted the jury's response to question number one as finding that Nash and Pritchard acted in the ordinary course of their duties as law enforcement officers. The district court

Unpublished Disposition**(Cite as: 121 F.3d 715, 1997 WL 414380 (9th Cir.(Cal.))**

ignored or rejected the jury's explicit finding, in question number five, that Nash and Pritchard *did not* monitor Dunlap's conversation "in the ordinary course of performance of law enforcement duties for a law enforcement purpose."

As explained above, (1) the actions of Nash and Pritchard when Sheriff George entered the dispatch room and (2) their subsequent behavior regarding the recorded conversation cast serious doubt on any claim that they were performing a law enforcement function when they monitored and recorded Dunlap's conversation. In addition, Dunlap's knowledge of the monitoring of line four was the subject of conflicting evidence at trial. It was error for the district court to grant JMOL to defendants on the state wiretapping claims.

A grant of JMOL is proper where the evidence, construed in the light most favorable to the nonmoving party (*i.e.*, Dunlap), permits only one reasonable conclusion, and that conclusion is contrary to the jury verdict. [Acosta v. City & County of San Francisco](#), 83 F.3d 1143, 1145 (9th Cir.1996). The district court erred in finding that the evidence in the instant case permitted only one reasonable conclusion with respect to the state wiretapping claims.

We disagree with the district court that the evidence "conclusively established" that continuous monitoring of telephone calls occurred over line four and that the "intended purpose, function and design of line 4 was to continuously broadcast all communications on that line" To the contrary, we believe that, notwithstanding that line four was susceptible of monitoring, a reasonable person could have an expectation of privacy for conversations conducted over line four. The capability of monitoring does not create implied consent to any monitoring that occurs. Cellular telephones and electronic mail are both technologies of questionable privacy, but we nonetheless reasonably expect privacy in our cell phone calls and email messages.

Moreover, the evidence concerning Dunlap's knowledge of the monitoring was highly disputed. In fact, the evidence was so equivocal that the jury returned a finding for Dunlap on this point, determining that Dunlap *did* have an objectively reasonable expectation that his phone conversation over line four was confidential. At trial, the parties presented conflicting evidence on the extent to which employees monitored line four and on Dunlap's

knowledge of this monitoring. The evidence permits more than one conclusion, and the district court erred in granting JMOL to defendants.

The District Court Properly Ordered a New Trial on the State Claims

****4** Pursuant to [Rule 50 of the Federal Rules of Civil Procedure](#), the district court in granting JMOL also ruled on a Rule 59 motion for new trial, granting Dunlap a new trial "in the event this judgment is reversed." We review for abuse of discretion the grant of a new trial. [Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus.](#), 84 F.3d 1186, 1192 (9th Cir.1996). We affirm the new trial grant.

As previously explained, we disagree with the district court's conclusions on Dunlap's expectation of privacy and the intent of Nash and Pritchard in intercepting the conversation. At the same time, we agree that the jury returned inconsistent verdicts. In attempting to make sense of the verdicts, the district court simply discarded certain of the jury's findings while accepting the jury's answer to question number one. We find no reason to prefer question one, an inartfully worded, compound question, to the other interrogatories. Dunlap presented sufficient evidence to raise triable issues on the state law claims, and we hold that the only acceptable way to resolve the inconsistency in the jury verdict is to order a new trial.

Moreover, the district court did not abuse its discretion in finding the damages award to be excessive. At trial, Dunlap's counsel withdrew any claim for damages arising out of Dunlap's loss of employment at the County of Inyo. At oral argument before us, counsel for Dunlap indicated that he withdrew the claim for special damages as a trial strategy. Accordingly, the district court's finding that the \$500,000 damages award was excessive was not an abuse of discretion. We therefore hold that retrial is necessary.

On remand, however, only Nash and Pritchard should remain as defendants to the claims brought under California law. [California Penal Code § 632](#), unlike federal law, does not recognize liability for "use" or "disclosure," but only for the act of interception. [FN2] [Section 632](#) imposes liability on "[e]very person who ... intentionally and wilfully ... eavesdrops upon or records [a] confidential communication." [Cal. Pen.Code § 632\(a\)](#). No cause of action exists against defendants who merely

Unpublished Disposition**(Cite as: 121 F.3d 715, 1997 WL 414380 (9th Cir.(Cal.)))**

use a recording made in violation of [§ 632](#). See [Warden v. Kahn, 160 Cal.Rptr. 471 \(Ct.App.1971\)](#).

[FN2](#). In contrast, [California Penal Code § 631](#) does impose use and disclosure liability. [Section 631](#) prohibits intentional taps or unauthorized connections (*i.e.*, some sort of electronic eavesdropping), and Dunlap's counsel agreed at trial that no such tap or connection occurred in this case.

We affirm the district court's grant of a new trial, and remand the matter for retrial of the state claims against Nash and Pritchard only.

The District Court Properly Granted Judgment as a
Matter of Law to Jamery Ray
on All Claims

Defendant Ray was not present for and did not participate in the taping of Dunlap's conversation; under California law, he cannot be liable for a violation of [Penal Code § 632](#). Thus, the district court properly granted JMOL in favor of Ray on the state claims.

Dunlap also failed to establish Ray's liability under the federal wiretapping laws. Ray, it appears, was possibly the only defendant who, upon learning of the tape recorded conversation, acted with a level head. Ray's instructions to Nash and Pritchard--do not play the tape for anyone, take the tape to a superior, and seek legal advice--do not amount to use or disclosure of the contents of the tape for purposes of federal wiretapping law. The district court therefore correctly entered JMOL in favor of Ray on the federal claims as well.

Conclusion

****5** We conclude that the district court erred in entering judgment in favor of defendants on the federal wiretapping claims. With the exception of defendant Ray, the district court should not have granted JMOL in favor of defendants on the state wiretapping claims. The district court properly ordered a new trial on the state claims, and we believe a new trial is necessary on the federal claims as well.

We REVERSE the entry of judgment for defendants Nash, Pritchard, Lucas, Goodrich, and Rudder on the federal claims, REVERSE the grant of JMOL to defendants on the state claims and to Rudder on the federal claims, AFFIRM the grant of JMOL to Ray on all claims, AFFIRM the grant of a new trial, and

REMAND the matter for a new trial on the federal claims against Nash, Pritchard, Lucas, Goodrich, and Rudder, and on the state claims against Nash and Pritchard only. [\[FN3\]](#) Costs are awarded to plaintiff.

[FN3](#). Given our resolution of this appeal, it is clear that the district court did not abuse its discretion in denying the County's motion for attorneys fees.

121 F.3d 715 (Table), 1997 WL 414380 (9th Cir.(Cal.)), Unpublished Disposition

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- 1996 WL 33499721 (Appellate Brief) Brief of Appellees (Nov. 04, 1996)Original Image of this Document (PDF)

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