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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYUDMYLA PYANKOVSKA, personally and mother and next friend of [redacted], a minor child, and as mother and next friend of [redacted] a minor child,

Plaintiff-Appellant,

and

RICKY MARQUEZ,

Plaintiff,

v.

SEAN ABID; JOHN JONES,

Defendants-Appellees,

and

ANGELA ABID,

Defendant.

No. 20-16294

D.C. No. 2:16-cv-02942-JCM-BNW

OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted November 10, 2022
Pasadena, California

Filed April 18, 2023

Before: Mary H. Murguia, Chief Judge, and Barrington D. Parker* and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Parker

COUNSEL

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Alex Ghibaudo (argued), Alex B. Ghibaudo PC, Las Vegas, Nevada, for Defendant-Appellee Sean Abid.

OPINION

PARKER, Circuit Judge:

In December 2016, Lyudmyla Pyankovska sued her ex-husband, Sean Abid, and his attorney, John Jones, in the United States Court for the District of Nevada alleging federal and state wiretap violations as well as various state common law claims. She

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* The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

alleged that during a bitter child custody proceeding in Nevada state court, her ex-husband had secretly recorded conversations between her and their child, and that Jones had filed selectively edited transcripts of the illegally recorded conversations on the court's public docket. She sought statutory damages as well as other relief. The district court granted Jones's Rule 12(b)(6) motion to dismiss the claims against him, concluding that Jones's conduct involved First Amendment petitioning activity, which is protected by the *Noerr-Pennington* doctrine.[1]

The district court allowed Pyankovska's claims against Abid to go forward. As discovery proceeded, the district court concluded that Abid's responses to various discovery requests were knowingly inaccurate and that he had proceeded in bad faith. The district court ultimately entered default judgment against him and proceeded to an assessment of damages. The court awarded Pyankovska $10,000 in statutory damages under the Federal Wiretap Act but did not award punitive damages or litigation costs, nor did it discuss or award other categories of damages ostensibly available on her Nevada common-law claims.

On appeal, Pyankovska argues that when dismissing her claims against Jones, the district court erroneously applied *Noerr-Pennington* and miscalculated

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[1] The *Noerr-Pennington* doctrine, derived from two Supreme Court cases, requires courts to construe ambiguous statutes to avoid burdening petitioning activity protected by the First Amendment. *See United States v. Koziol*, 993 F.3d 1160, 1171 (9th Cir. 2021).

damages. We agree and we reverse. We conclude that filing illegally obtained evidence on a public court docket is conduct not immunized under *Noerr-Pennington*. We also hold that the district court incorrectly computed statutory damages and failed to adequately address other categories of damages to which Pyankovska might be entitled.

I.

At the center of this case is a highly acrimonious family law dispute. Pyankovska and Abid divorced in 2010 and the Nevada state court awarded them joint legal and physical custody of their child. Their relationship continued to deteriorate and in 2015, Pyankovska filed a motion for contempt of court against Abid to modify their custody arrangement and for various other relief. While the motion was pending, Abid inserted a recording device into their child's backpack and surreptitiously recorded around twenty hours of private conversations between the child and Pyankovska in her home and car. Neither Pyankovska nor the child knew that Abid was recording their conversations. After obtaining the recordings, Abid used software to edit and transcribe the recordings that he deemed useful in the custody dispute and destroyed the original recordings.

Abid gave the transcripts of the recordings to his family-law attorney, Jones. Jones submitted the transcripts to the state court on the public docket as exhibits to Abid's declaration in support of his

countermotion to modify the custody arrangement. Pyankovska objected to the public disclosure of the transcripts, arguing that they had been illegally obtained and could not be publicly disclosed. Jones, on the other hand, argued that the submissions were lawful because Abid was able to consent to the recordings on behalf of his minor child under the vicarious-consent doctrine, a species of "consent" he argued was an exception to the otherwise broad ban under federal and Nevada law on the disclosure and use of illegally obtained wiretap communications.[2]

The state court concluded that the vicarious-consent doctrine did not apply because the recordings occurred in Pyankovska's home and Abid neither had physical custody nor a good-faith basis for asserting vicarious consent. Although the state court held that the recordings could not be used as independent evidence, the court allowed the recordings to be provided to a psychologist appointed by the court to assist it in resolving the custody motion. The psychologist, relying in part on the transcripts, concluded that Pyankovska's behavior was "creating confusion, distress, and divided loyalty in the child." *Abid v. Abid*, 406 P.3d 476, 478 (2017) (internal quotation omitted). After considering the psychologist's testimony and other evidence, the court awarded Abid primary physical custody of the child. *Id.* at 772.

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[2] Under the vicarious-consent doctrine, a parent with physical custody of a child may record conversations to which the child is a party. *See*, *e.g.*, *Pollock v. Pollock*, 154 F.3d 601, 607 (6th Cir. 1998).

Pyankovska appealed to the Nevada Supreme Court, where Abid again prevailed. The court acknowledged that "[b]ecause neither the child nor the mother consented to this recording, the father's actions likely violated NRS 200.650, which prohibits the surreptitious recording of nonconsenting individuals' private conversations." *Id.* at 477. The Nevada Supreme Court, however, concluded that the controlling question was "whether the [state] court abused its discretion by providing the recordings to a psychologist appointed by the court to evaluate the child's welfare." *Id.* On this issue, the Nevada Supreme Court held that the state court "did not abuse its discretion in providing the recordings to the expert because reviewing them furthered the expert's evaluation of the child's relationship with his parents and aided the [state] court's determination as to the child's best interest." *Id.* at 481-82.

The Nevada Supreme Court clarified that it was expressing no opinion as to the legality of Abid's conduct. *Id.* at 479. The court reasoned that, even if the recordings were obtained illegally, any alleged illegality did not render them per se inadmissible in a child custody proceeding where the paramount concern was the "best interests" of the child. *Id.* The court specified that "we by no means condone [Abid's] actions. Rather, we have determined that the potential deterrent effect of ignoring [Abid's] evidence is outweighed by the State's overwhelming interest in promoting and protecting the best interests of its children." *Id.* (internal quotation omitted).

At that point, Pyankovska asked the Nevada Supreme Court to seal the transcripts and to require the state trial court to do the same. The court granted the motion to seal the documents on its docket but ruled that Pyankovska must request the trial court to seal the materials on its docket. Pyankovska filed a motion to do so, but while it was pending, Abid uploaded the motion to seal and the illegally obtained transcripts to public Facebook pages. There, Abid called Pyankovska "a bully child abuser" who should not "be able to hide behind a [motion to] seal," and the posts were widely disseminated, viewed, and commented upon.

In December 2016, Pyankovska sued Abid and Jones in the District of Nevada alleging violations of the Federal Wiretap Act, the Nevada statutory analogue, and asserting various other Nevada common-law claims. Jones moved under Rule 12(b)(6) to dismiss the complaint, contending that his conduct was protected by the vicarious-consent doctrine and that he had a good faith belief in the legality of this conduct. The district court granted the motion on other grounds.

First, the district court held that the vicarious-consent doctrine did not apply because Abid did not have actual custody over the son at the time the recordings were made as required by the doctrine. Second, the court held that none of Jones's arguments involving good faith reliance on legal authority applied to Jones's submission of the transcript. The court reasoned that "[i]f the court were to adopt defendant's reading of the good faith reliance language, then any

time a defendant alleges a belief that his conduct did not violate the Wiretap Act, he obtains a complete defense to liability." *Pyankovska v. Abid*, No. 2-16-CV-2942, 2017 WL 5505037, at *4 (D. Nev. Nov. 16, 2017) ("*Abid* I"). Finally, the court held that any state litigation privilege to submit the illegal transcripts did not trump Jones's federal obligations under the Wiretap Act.

Despite these conclusions, the district court found that Jones's conduct was protected by the *Noerr-Pennington* doctrine. The court reasoned, tersely, that because "Jones' complained-of conduct consisted solely of judicial advocacy that is protected by the First Amendment, he cannot be held liable under the Wiretap Act or under plaintiff's other theories of liability." *Id.* at *5.

The district court, however, allowed Pyankovska's claims against Abid to proceed. During discovery, the district court found that Abid had provided inaccurate responses to discovery requests. Despite the court granting Abid opportunities to supplement his responses, Abid continued to "disregard . . . obligations" and "flouted the rules and procedures of th[e] court." *Pyankovska v. Abid*, No. 2-16-CV-2942, 2019 WL 6609690, at *5 (D. Nev. Dec. 5, 2019) ("*Abid* II"). Accordingly, the court concluded that Abid's "conduct in discovery ha[d] been baseless and in bad faith" and entered a default judgment under Federal Rule of Civil Procedure 37(b) against him on all Pyankovska's claims. *Id.*

Pyankovska submitted an accounting of her actual damages claiming $3,125 in medical expenses and $1,413 in legal expenses. She also sought statutory damages under the Federal Wiretap Act as well as punitive damages. Abid did not submit declarations or any other evidence in opposition to Pyankovska's showing.

The district court awarded $10,000 in statutory damages. *Pyankovska v. Abid*, No. 2-16-CV-2942, 2020 WL 569877, at *4 (D. Nev. Feb. 5, 2020) ("*Abid* III"). Pyankovska moved to alter or amend the judgment arguing that the court miscalculated statutory damages and should have awarded punitive and litigation costs under the Wiretap Act and compensatory and punitive damages on her common law claims. The district court summarily denied the motion, holding that it had "considered all the arguments and accounting of the parties in making its determination." *Pyankovska v. Abid*, No. 2-16-CV-2942, 2020 WL 13536217, at *1 (D. Nev. June 24, 2020) ("*Abid* IV").

This appeal followed.

We review de novo the district court's dismissal of the complaint under Rule 12(b)(6). *Judd v. Weinstein*, 967 F.3d 952, 955 (9th Cir. 2020). We construe "as true all well-pleaded allegations of material fact and construe those facts in the light most favorable to the non-moving party." *Id.*

II.

A.

The Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, prohibits the intentional interception, disclosure, or use of any oral communication without the consent of at least one party to the conversation:

> (1) Except as otherwise specifically provided in the chapter any person who — . . . (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. § 2511(1)(c)-(d). Under the Federal Act, "intercept" is defined as the "acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). The Federal Act further provides that "no part of the contents of [any illegally intercepted] communication and no evidence derived

therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court. . . ." 18 U.S.C. § 2515. The Federal Act authorizes a civil action for "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter." 18 U.S.C. § 2520(a).[3]

There are two statutory exceptions. First, is court authorization. This exception is not at issue in this case. 18 U.S.C. §§ 2511(2)(e), 2516-18. The second is consent, where a communication may lawfully be intercepted by a party to the communication or when at least one party to the communication has given prior consent. 18 U.S.C. § 2511(2)(c)-(d). The Federal Act requires that to be liable, a person who discloses the contents of recordings, must "know or have reason to know" the communication was obtained in violation of the Act—that is, without consent or court-ordered authorization. 18 U.S.C. § 2511(1)(c)-(d).

Jones plainly "used" and "disclosed" the intercepted communications when he filed the transcripts on the public docket in state court. 18 U.S.C. § 2511(1)(c)-(d). Thus, the text of these provisions establish that Jones violated the Federal Act unless he is excused by some exculpatory doctrine. On appeal, Jones essentially makes three contentions. First, he argues that because Abid had consent to make the recordings under the vicarious-consent doctrine, he did

[3] The Nevada Wiretap Act, patterned on the Federal Act, similarly prohibits the interception or disclosure of any wire, oral or electronic communication. Nev. Rev. Stat. §§ 200.610-.690; *see id.* § 200.650 (allowing for civil recovery).

not "have reason to know" that the recordings were illegal. Second, Jones argues that, under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), his posting of the transcripts constituted conduct protected by the First Amendment. Third, Jones argues that he is immunized from liability by the *Noerr-Pennington* doctrine. The district court disagreed with the first two contentions but agreed with the third.

B.

The vicarious-consent doctrine is not the law of Nevada or this Circuit. Patching together authority from other jurisdictions, we take the doctrine to mean that a parent who has physical custody of a child may consent to the recording of conversations on behalf of minor children, so long as the recording parent believes that doing so is in the best interest of the child. *See Pollock v. Pollock*, 154 F.3d 601, 609 (6th Cir. 1998). In *West Virginia Department of Health & Human Resources v. David L*, a case involving similar facts, the West Virginia Supreme Court held that a father violated the Federal Wiretap Act when he recorded conversations between his children and their mother (his ex-wife) with a tape recorder secretly installed in the mother's home. 453 S.E.2d 646, 654 (W. Va. 1994). The court stressed that the dispositive factor was that the recording occurred in the mother's house and that the father had "absolutely no dominion or control" over the mother's house. *Id.* Here, the district court similarly held that the doctrine did not apply because Abid did

not have custody over the child at the time the recordings were made. We agree.

C.

Next, Jones argues that his conduct is protected under *Bartnicki*. There, the Supreme Court carved out a narrow First Amendment exception to the Federal Wiretap Act. *Bartnicki* involved a recorded cellphone conversation during a contentious, very public, collective-bargaining negotiation between a teacher's union and a local school board. An unidentified person recorded a cell phone conversation between the chief negotiator and the union president concerning the status of negotiations. 532 U.S. at 517-19. Petitioners alleged that the head of a local organization opposed to the union's demands, obtained the recording, and disclosed it to members of the school board and representatives of the media. *Id.* at 519. Members of the media then obtained and disclosed the intercepted conversations to the public. *Id.*

The Supreme Court held that while the disclosures violated federal and state wiretap statutes, the individuals were protected by the First Amendment. *Id.* at 535. The Court reasoned that, "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance. . . . One of the costs associated with participation in public affairs is an attendant loss of privacy." *Id.* at 534. In reaching its conclusion, the Court placed significance on the public nature of the intercepted

communications, noting that the union negotiations were "contentious" and were the subject of intense media attention. *Id.* at 518.

The conversations between Pyankovska and the child occurred in the most private of spaces—their home and car—and exclusively concerned intimate relations between a child and his parents. While the conversations may have been important within the family-court context to determine custody arrangements, they were matters of no public importance and consequently involved none of the First Amendment concerns that were dispositive in *Bartnicki.* For these reasons, we conclude that *Bartnicki* does not apply.

D.

The district court held, without elaboration, that the *Noerr-Pennington* doctrine immunized Jones from liability because Jones's "introduction of evidence into the state court case constitutes protected First Amendment activity." *Abid* I, 2017 WL 5505037, at *4. We disagree.

The *Noerr-Pennington* doctrine derives from the First Amendment's guarantee of "the right of the people . . . to petition the government for a redress of grievances." U.S. Const. amend. I. The doctrine originally arose in the antitrust context from the Supreme Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In *Noerr*, trucking companies sued railroad

companies alleging that the railroads' lobbying efforts to influence legislation regulating trucking violated the Sherman Act. 365 U.S. at 129. The Supreme Court held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136. The Supreme Court observed that construing the Sherman Act to reach such petitioning conduct "would raise important constitutional questions," and "we cannot . . . lightly impute to Congress an intent to invade . . . freedoms" protected by the Bill of Rights. *Id.* at 138. *Pennington* extended *Noerr*'s immunity to antitrust lobbying activities directed toward executive branch officials. 381 U.S. at 669-70. The Supreme Court has since applied this doctrine outside the antitrust field. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 930 (9th Cir. 2006) (citing *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002)).

This Circuit has therefore explained that *Noerr-Pennington* "ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000). This protection rests on the premise that Congress does not intend the statutes it promulgates to infringe on the First Amendment when other interpretations of the language it selected are possible. The doctrine is, among other things, a rule of statutory construction that requires courts to ask

whether the statute at issue may be construed to avoid burdening conduct protected by the First Amendment. *See Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1139 (9th Cir. 2013); *Sosa*, 437 F.3d at 931 & n.5.

In this Circuit, there is a three-step test to determine whether conduct that allegedly violates a statute is immunized from liability. Under the test, the court asks: "(1) whether the lawsuit imposes a burden on petitioning rights," "(2) whether the alleged activities constitute protected petitioning activity," in other words, "neither the Petition Clause nor the *Noerr-Pennington* doctrine protects sham petitions," and "(3) whether the statute at issue may be construed to [avoid] that burden. If the answer at each step is 'yes,' then a defendant's conduct is immunized under *Noerr-Pennington*." *B&G Foods N. Am., Inc. v. Embry*, 29 F.4th 527, 535 (9th Cir. 2022); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009).

The district court erred in holding that *Noerr-Pennington* immunized Jones from liability. Jones's arguments face insurmountable hurdles under step one. First, Pyankovska's lawsuit seeks to hold Jones liable in damages for disclosing illegally intercepted communications in the state court custody proceedings. But Jones does not credibly argue that a successful damages action in federal court imposes an unconstitutional "burden" on the state court litigation. The illegally obtained communications found their way into state court where the evidence was reviewed by the court-appointed psychologist and by the court and

Abid prevailed: he won the custody litigation. In light of Abid's victory, it is hard for Jones credibly to argue that the litigation of the custody motion was "burdened."

Second, *Noerr-Pennington* "[i]mmunity . . . applies only to what may fairly be described as petitions. . . ." *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180 1184 (9th Cir. 2005). We have explained that "[a] complaint, an answer, a counterclaim and other assorted documents and pleadings, in which plaintiffs or defendants make representations and present arguments to support their request that the court do or not do something, can be described as petitions without doing violence to the concept." *Id.* Under this definition, Jones and Abid were entitled to participate and did participate in petitioning activity. But once they were in court, they were obligated to play by the rules applicable to all litigants. Federal and state rules limit in enumerable ways what litigants can say and do. In federal courts, the Federal Rules of Civil Procedure and Evidence, page limitations, limitations on oral argument time, sanctions under Rule 11 of the Federal Rules Civil Procedure, as well as rulings by the court excluding testimony before and during trial do just that. The sections of the Federal Act that prohibit the disclosure of evidence obtained in violation of the Federal Act and provide that "no part of the contents of [any illegally intercepted] communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before

any court" are similar restrictions that apply in both state and federal courts. 18 U.S.C. § 2515.[4]

Jones and Abid's right to petition in a case with no public significance does not grant Jones immunity from the penalties prescribed by Congress for those who violate the Wiretap Act. Once they were in state court, Jones and Abid were not at liberty to set their own rules. Jones was free to file and argue the custody motion—i.e., to petition—but he was not free to support that motion with illegal evidence. *Sosa*, 437 F.3d at 933. In other words, because Jones had no petitioning "right" to use the transcripts in the first place, requiring him to face the consequences specified by Congress for those who violated the law is not a cognizable "burden" on any conduct he was lawfully entitled to participate in. For these reasons, Jones fails at step one and *Noerr-Pennington* cannot protect him from liability.

Accordingly, we need not analyze steps two and three.[5] In any event, it is worth emphasizing that the

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[4] *See Gelbard v. United States*, 408 U.S. 41, 51 (1972) (stating that the Federal Wiretap Act functions as a civil exclusionary rule, denying the perpetrator of a Wiretap Act violation "the fruits of his unlawful actions in all civil and criminal proceedings").

[5] For example, at step three, we ask whether the Wiretap Act "may be construed to [avoid] *that burden*" on petitioning activity. *Embry*, 29 F.4th at 535 (emphasis added). As we have said, complying with laws and rules of general application to litigants in court imposes no legally cognizable burden on Jones's conduct that is protected by the First Amendment's Petition Clause, so there is no work for *Noerr-Pennington* and the canon of constitutional avoidance to do.

Wiretap Act unambiguously applies to Jones's conduct. *See Embry*, 29 F.4th at 540 (expressly foreclosing *Noerr-Pennington* immunity where "the statute clearly provides otherwise") (quoting *Sosa.*, 437 F.3d at 931). The Wiretap Act prohibits in no uncertain terms the interception, disclosure, or use in court of oral communications obtained in violation of the Act. *See* 18 U.S.C. § 2511(1)(c)-(d). The prohibitions in the Nevada Act are similarly clear. *See* Nev. Res. Stat. §§ 200.620-.690. Here, Abid intercepted communications without consent in violation of the Wiretap Act, and Jones used and disclosed those illegally obtained, selectively edited communications by attaching them as exhibits to a motion in state court.

The legislative history of the Wiretap Act makes clear that Congress intended it to apply to domestic relations disputes. Congress knew that divorcing spouses were increasingly using electronic surveillance techniques to gain advantage in marital disputes and, when drafting the Act, viewed interceptions in this context as an area of particular concern. *United States v. Jones*, 542 F.2d 661, 666-69 (6th Cir. 1976). Senator Hruska, one of the bill's co-sponsors, announced that the Wiretap Act would impose a "broad prohibition on private use of electronic surveillance, particularly in domestic relations" cases. *Id.* at 669 (citing S. Rep. No. 90-1097, at 151 (1968)). As the prohibitory provisions in these Acts are pellucid, not ambiguous, we readily conclude that Jones violated the Acts.

For these reasons we vacate the judgment of the district court insofar as it applied *Noerr-Pennington* and remand for further proceedings at which Jones's other contentions in mitigation or defense may receive further consideration as the district court deems appropriate.

III.

A district court's award of damages is reviewed for an abuse of discretion. *Caudle v. Bristow Optical* Co., 224 F.3d 1014, 1023 (9th Cir. 2000), *as amended on denial of reh'g* (Nov. 2, 2000). A denial of litigation costs is also reviewed for an abuse of discretion. *See Ass'n of Mex.-Am. Educators v. State of California*, 231 F.3d 572, 592 (9th Cir. 2000). "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted).

A.

The district court awarded Pyankovska $10,000 in statutory damages. It reasoned that "[t]he statute in this case instructs the court to award the greater of plaintiff's actual damages incurred as a result of the violation or $10,000" and found that "[b]ecause plaintiff's actual damages of $4,589 are less than" $10,000, Pyankovska was owed $10,000 to compensate her for Abid's violation of the Wiretap Act. *Abid* III, 2020 WL

569877, at *4. The district court did not address Pyankovska's arguments on her state law claims. Instead, in response to Pyankovska's motion to alter or amend the judgment, the district court stated concisely that "plaintiff claims that the court did not consider her arguments regarding compensatory and punitive damages on her state law claims. . . . This court considered all the arguments and accounting of the parties in making its determination on damages." *Abid* IV, 2020 WL 13536217, at *1. On appeal, Pyankovska challenges the statutory damages award as incorrectly calculated and the state law damages as inadequate.

Violations of the Wiretap Act provides for a "civil action" in favor of any person whose oral communication "is intercepted, disclosed, or intentionally used in violation of this chapter." 18 U.S.C. § 2520(a); *see* Nev. Rev. Stat. § 200.690 (similar). "Appropriate relief" in a federal civil case includes equitable relief, damages, punitive damages, and reasonable attorney's fees and "other litigation costs." 18 U.S.C. § 2520(b). The Wiretap Act provides that "the court may assess as damages whichever is the greater of (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2); *see also* Nev. Rev. Stat. § 200.690(1)(b) (similar). We have held that "the statutory-damages provision clarifies that violations are remedied on a per-day basis, not a per-occurrence basis. . . . And were a single violation to extend over

multiple days, the number of assessments would be based on the number of days the violation continued." *Bliss v. CoreCivic, Inc.*, 978 F.3d 1144, 1149 (9th Cir. 2020).

Abid argues that the statutory damages award was proper as the court "may" award statutory damages and therefore gives courts discretion not to award statutory damages at all. But the district court erred in failing to consider whether Abid violated the statute for more than 100 days, which would render the amount greater than $10,000.

The district court concluded that "[b]ecause plaintiff's actual damages of $4,589 are less than the statutory damages authorized by 18 U.S.C. § 2520(c)(1), the court awards plaintiff statutory damages in the amount of $10,000 to compensate her for defendant's violation of the Wiretap Act." *Abid* III, 2020 WL 569877, at *4. However, as Pyankovska correctly notes, once the district court decided that statutory damages *should* be awarded, it was bound by the statutory text, which permits the court to award $10,000 only when that award would be greater than both "the sum of the actual damages suffered by the plaintiff and any profits made by the violator" *and* "$100 a day for each day of violation." 18 U.S.C. § 2520(c)(2)(A)-(B). The $10,000 liquidated damages amount under § 2520(c)(2)(B) is designed to compensate a claimant for all of a defendant's violations under the Act, unless that defendant has violated the Act on more than 100 separate days, in which case compensation is $100 for each such day.

See Smoot v. United Transp. Union, 246 F.3d 633, 646 (6th Cir. 2001).

Here, Pyankovska contends that Abid violated the Wiretap Act over at least 707 days by (1) intercepting Pyankovska's conversations with the child using a recording device, (2) disclosing contents of the recordings in a declaration submitted to the state court, and (3) disclosing and intentionally using the transcripts by posting them and leaving them available on various public Facebook groups for approximately two years. And if Pyankovska is correct, 707 days of violations would mean a statutory damage award of $70,700, not $10,000. *See* 18 U.S.C. § 2520(c)(2). The district court erred in its analysis of the statutory damages award, and we remand so that the district court may revisit its calculations.

The district court also appears to have conflated punitive damages and litigation costs and discussed those awards as actual damages suffered. In addition to statutory damages, the Wiretap Act allows for punitive damages "in appropriate cases," 18 U.S.C. § 2520(b)(2), and "reasonable attorney's fee and other litigation costs reasonably incurred," 18 U.S.C. § 2520(b)(3). To receive punitive damages, a plaintiff "must show that [the] defendant[ ] acted wantonly, recklessly, or maliciously." *Jacobson v. Rose*, 592 F.2d 515, 520 (9th Cir. 1978). Here, the court appeared to recognize that Abid "deliberately violated the Wiretap Act for personal gain" and referred to "defendant's flagrant violation of her privacy" but then concluded that these factors counseled only towards an award of

$10,000 in statutory damages. *Abid* III, 2020 WL 569877, at *4. While it was within the court's discretion to decide whether to award punitive damages and attorney's fees, we remand so that the district court can provide more clarity as to the appropriateness of punitive damages and attorney's fees.

B.

Pyankovska argues that the district court further erred by ignoring her damages request on her Nevada invasion-of-privacy and infliction-of-emotional-distress claims, though these claims were part of the default judgment entered against Abid. *See United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 918-19 (9th Cir. 1998) (finding that the district court abused its discretion in failing to make any findings and to state its reasoning). In the district court's order on Pyankovska's motion to amend a judgment, the court simply stated that "plaintiff claims that the court did not consider her arguments regarding compensatory and punitive damages on her state law claims. This court considered all the arguments and accounting of the parties in making its determination on damages." *Abid* IV, 2020 WL 13536217, at *1. Abid argues that the district court considered Pyankovska's evidence but was simply not convinced.

The district court did not address Pyankovska's invasion-of-privacy and infliction-of-emotional-distress claims nor did it discuss the evidence she submitted in support of these claims. The court's discussion of

damages associated with the state common law claims is relegated to a very brief comment in response to Pyankovska's motion to amend the judgment. We therefore remand to afford the district court the opportunity to provide additional explanation concerning Pyankovska's eligibility for compensatory and punitive damages on the Nevada common-law claims.

CONCLUSION

For these reasons, we **VACATE** and **REMAND** for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

LYUDMYLA PYANKOVSKA, Plaintiff(s), v. SEAN ABID, et al., Defendant(s).	Case No. 2:16-CV-2942 JCM (PAL) ORDER (Filed Nov. 16, 2017)

Presently before the court is defendant John Jones' motion to dismiss. (ECF No. 29). Defendants Sean Abid and Angela Abid filed joinders to defendant Jones' motion. (ECF Nos. 42, 43). Plaintiff Lyudmyla Pyankovska, who represents herself *pro se*, filed a response (ECF No. 40), to which defendant Jones replied (ECF No. 45).

Also before the court is plaintiff's motion for leave to file an amended complaint. (ECF No. 41). Defendant Jones filed a response (ECF No. 53), to which defendant Sean Abid joined (ECF No. 55). Plaintiff thereafter filed a reply. (ECF No. 56).

Also before the court is plaintiff's "motion to take judicial notice." (ECF No. 26). Defendants Sean Abid and Angela Abid filed responses (ECF Nos. 27, 28), to which plaintiff replied (ECF No. 35).

Also before the court is defendant Jones' "motion to disregard." (ECF No. 58). Plaintiff has not filed a response, and the time for doing so has since passed.

I. Facts

Plaintiff and defendant Sean Abid are former spouses who got divorced on February 17, 2010. (ECF No. 1). Pursuant to the divorce decree, the parties agreed to joint legal and physical custody of [redacted] (hereinafter "[redacted]"), their minor child. *Id.*

On or about January 9, 2015, plaintiff filed a motion for contempt of court against defendant Sean Abid. *Id.* Sometime thereafter, defendant Sean Abid inserted a recording device into [redacted]'s school backpack with the intent of intercepting communications between [redacted], plaintiff, and plaintiff's husband. *Id.* The device recorded multiple conversations between [redacted] and plaintiff. *Id.* Defendant Sean Abid brought digital copies of these conversations to his lawyer, defendant Jones, as well as transcribed portions of the recordings in typewritten form. *Id.*

Plaintiff first discovered the existence of the recordings on February 4, 2015, when defendant Jones introduced them as exhibits to a countermotion to modify primary custody. *Id.* Throughout the course of litigation, plaintiff discovered that defendant Sean Abid had deleted portions of the recordings and erased the software that he used to edit the recordings. *Id.* The court subsequently authorized defendants to give

copies of the recordings and transcripts to expert witness Dr. Holland to prepare for an interview of [redacted]. *Id.*

The court ultimately ruled that the introduction of the recordings as independent evidence would violate NRS 200.650, as defendant Sean Abid's procurement of such recordings did not meet the requirements for the "vicarious consent doctrine." *Id.* However, the court ruled the recordings admissible as a basis for the testimony and report of Dr. Holland. *Id.*

II. Legal Standard

a. Motion to dismiss under 12(b)(6)

A court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

"Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief

that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 678-79. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice *Id.* at 678.

Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678.

Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiffs claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed *post-Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

> First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim

> may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.

Id.

b. Motion for leave to file an amended complaint

Federal Rule of Civil Procedure 15(a) provides that "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). The United States Supreme Court has interpreted Rule 15(a) and confirmed the liberal standard district courts must apply when granting such leave. In *Foman v. Davis*, the Supreme Court explained:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

371 U.S. 178, 182 (1962).

Further, Rule 15(a)(1)(B) provides that "[a] party may amend its pleading once as a matter of course within 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b) . . . whichever is earlier." Fed. R. Civ. P. 15(a)(1)(B). Local Rule 151(a) states that "the moving party shall attach the proposed amended pleading to any motion to amend. . . ." LR 15-1(a).

III. Discussion

a. Motion to dismiss

Defendant's motion to dismiss accurately states that plaintiff Pyankovska, who represents herself *pro se*, cannot serve as counsel for the other litigants. Further, defendant's motion accurately states that plaintiff's federal anti-stalking claim fails as a matter of law. As plaintiff acknowledges these defects in her motion to amend her complaint (ECF No. 41), the court will not address the issues further. The court will dismiss all plaintiffs except for Lyudmyla Pyankovska and will dismiss plaintiff's anti-stalking claim.

i. Wiretap Act claim

Defendant Jones' motion to dismiss plaintiff's Wiretap Act claim is based primarily on three strands of argument: a lack of scienter[1] functions as a complete

[1] Stated another way, defendant asserts that a "good faith belief" that one's conduct did not violate the act is sufficient to negate liability.

bar to Wiretap Act liability; defendant's actions qualify for the litigation privilege; and defendant's actions (and those of Mr. Abid) are privileged under the First Amendment right to petition the government. Plaintiff responds that the litigation privilege is not a valid defense to violations of the Wiretap Act.

18 U.S.C. § 2511 creates a federal cause of action in cases where a party intercepts, discloses, or uses the contents of certain protected communications:

> (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 . . .
> >
> > (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;
> >
> > (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 subject to suit as provided in subsection (5).

18 U.S.C. § 2511. Subsection 5 creates a federal cause of action. *Id.* The private right of action stems from 18 U.S.C. § 2520, subsection a.

A. Vicarious consent

As defendant's pleadings with this court place significant reliance upon the theory of "vicarious consent," the court will first address whether the doctrine applies in this circumstance.

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 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.

Defendant argues that § 2511(2)(d) renders defendant Abid's conduct in taping conversations between [redacted] and plaintiff lawful through the doctrine of "vicarious consent." The doctrine allows a parent to consent to conduct on behalf of a child if consent is in the best interest of the child. *Pollock v. Pollock*, 154 F.3d 601, 610-11 (6th Cir. 1998). The parent must have a

good faith and objectively reasonable belief that consent is in the child's best interest. *Id.*

The court in *Pollock* conducted an extensive review of the case law up to that point on vicarious consent by one parent to record their child's conversation with the other parent, and noted that courts tended to focus on the following factors: the age of the children, the location of the recording, the type of alleged harm the other parent was inflicting upon the child, and whether the "consenting" parent had custody over the child. *Id.* at 607-610 (citing *Thompson v. Dulaney*, 838 F.Supp. 1535 (D. Utah 1993); *Silas v. Silas*, 680 So.2d 368 (Ala. Civ. App. 1996); *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998); *State v. Diaz*, 308 N.J. Super. 504, 706 A.2d 264 (1998); *Williams v. Williams*, 229 Mich. App. 318, 581 N.W.2d 777 (1998); *West Virginia Dep't of Health & Human Resources v. David L.*, 192 W.Va. 663, 453 S.E.2d 646 (1994)).

Here, defendant Sean Abid placed a recording device in [redacted]'s backpack without [redacted]'s consent with the purpose of proving that plaintiff was making disparaging comments to [redacted] regarding defendant. Defendant Abid thereafter recorded, transcribed, and distributed portions of conversations between [redacted] and plaintiff that occurred in plaintiff's home without the consent of either party. And although Sean Abid had partial custody over [redacted], he did not have custody over [redacted] at the time the recordings were made. The doctrine of various consent does not make 18 U.S.C. 2511(2)(d) applicable on these facts.

B. Scienter and good faith reliance

Defendant's scienter and good faith arguments regarding the statute miss the mark. Under 18 U.S.C. § 2520, "a good faith reliance on . . . a court warrant or order . . . or a statutory authorization . . . is a complete defense against any civil or criminal action brought under this chapter or any other law." Defendant cites this language as standing for the proposition that if someone believes their conduct does not violate the statute, then they cannot be held liable under the statute.

Here, the term "statutory authorization" does not mean that defendant's belief that the statute authorized him to intercept a communication serves as a defense. Rather, it means that a party's reliance on a separate statute authorizing conduct that otherwise violates the Wiretap Act serves as a complete defense. If the court were to adopt defendant's reading of the good faith reliance language, then any time a defendant alleges a belief that his conduct did not violate the Wiretap Act, he obtains a complete defense to liability. This is an unreasonable reading of the Wiretap Act.

C. Litigation privilege

The litigation privilege does not, in the context of Wiretap Act claims, serve as a complete bar to liability.[2] In *Babb v. Eagleton*, 616 F. Supp. 2d 1195 (N.D.

[2] Neither party presented the court with controlling or persuasive federal authority discussing litigation privilege in the context of the Wiretap Act.

Okla. 2007), the court held that a "litigation privilege" does not create absolute immunity from Title III liability. *Id.* at 1207. The court based its holding on three separate but connected reasons: cases applying the litigation privilege applied it to state law claims, not federal claims; Tenth Circuit precedent "seems to forbid applying 'state law or policy' as a defense to Title III liability;" and other "courts have allowed Title III claims to proceed against attorneys even when the attorney used the intercepted communication during the course of judicial proceedings." *Id.*

This court agrees with the holding and reasoning of *Babb*, and will not apply a litigation privilege to absolutely immunize defendant from Title III liability. *See id.*

D. First Amendment

"The Noerr-Pennington doctrine ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) (citing *Prof Real Estate Invs., Inc. v Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) ("*PREI*"). In *White*, the court considered whether filing a lawsuit constituted protected activity. *Id.* at 1231. The court concluded that "a lawsuit is unprotected only if it is a 'sham'—*i.e.*, 'objectively baseless in the sense that no reasonable litigant

could realistically expect success on the merits.' *Id.* (citing *PREI*, 508 U.S. at 60).

Here, defendant Jones' introduction of evidence into the state court case constitutes protected First Amendment activity. Although the *White* court discussed Noerr-Pennington protection in the context of the right to bring suit, the court holds that its protection extends to the right to introduce evidence so long as introduction of such evidence is not "objectively baseless in the sense that no reasonable litigant could realistically expect [admissibility]." *See* 227 F.3d at 1231. Here, defendant Jones conduct deserves First Amendment protection as he introduced relevant evidence to the state court proceedings and offered a good faith argument for admissibility. *See id.*

ii. Summary

Plaintiff's complaint fails to state a claim against defendant Jones upon which relief can be granted. As defendant Jones' complained-of conduct consisted solely of judicial advocacy that is protected by the First Amendment, he cannot be held liable under the Wiretap Act or under plaintiff's other theories of liability. *See* White, 227 F.3d at 1231. However, the same cannot be said of defendant Sean Abid, who plaintiff alleges actively participated in the interception of oral communications of third parties.[3] Plaintiff's complaint

[3] Defendant Jones' motion draws attention to the contrast between his conduct and defendant Sean Abid's. *See* (ECF No. 29 at 5) ("Attorney Jones was made aware of, and provided, portions

states claims against defendant Sean Abid upon which relief can be granted. Therefore, the court will grant defendant's motion to dismiss as to the claims against defendant Jones but will allow the claims against defendant Sean Abid to proceed. *See Twombly*, 550 U.S. at 570.

b. Motion for leave to file an amended complaint

Plaintiff requests leave to amend her complaint for the purpose of curing certain deficiencies articulated in defendant's motion to dismiss. Plaintiff also seeks "to clarify the factual allegations and causes of actions [sic]." (ECF No. 41). Defendant Jones argues that amendment would be futile as plaintiff's complaint fails to state claims upon which relief can be granted and because plaintiff's amendments introduce claims upon which relief cannot be granted. (ECF No. 53).

As an initial matter, plaintiff is not entitled to amend her complaint as a matter of right. Defendant Sean Abid filed a responsive pleading on January 10, 2017, and defendant Jones filed a motion to dismiss on January 10, 2017. As plaintiff did not file her motion to amend until April 7, 2017, she is not entitled to amend her complaint as a matter of right. Fed. R. Civ. P. 15(a)(1). Therefore, plaintiff can amend her complaint only with leave of the court. Fed. R. Civ. P. 15(a)(2).

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of the recordings *only after they had been made*.") (emphasis in original).

The court will grant plaintiff leave to file an amended complaint. Amendment should be freely granted unless futile, *Foman v. Davis*, 371 U.S. 178, 182 (1962), and *pro se* pleadings are to be construed liberally, *Erickson v. Pardus*, 551 U.S. 89 (2007). Although her amended complaint suffers from deficiencies articulated in defendant Jones' motion to dismiss, plaintiff's amended complaint improves upon her original filing and adds cognizable causes of action. Further, the only defendant to file a response to plaintiff's request, defendant Jones, will be dismissed from the action. Therefore, leave to amend is appropriate in this case. *See Foman*, 371 U.S. at 182.

c. Motion to disregard

Defendant Jones filed a motion to disregard portions of plaintiff's reply in support of her motion for leave to file an amended complaint. As the reply contains impermissible argument that does not relate to the motion for leave, the court will grant defendant's motion to disregard.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to dismiss (ECF No. 29) be, and the same hereby is, GRANTED, consistent with the foregoing.

IT IS FURTHER ORDERED that all plaintiffs except for Lyudmyla Pyankovska be, and the same hereby are, dismissed from the instant action.

IT IS FURTHER ORDERED that plaintiff's claims against defendant Jones be, and the same hereby are, DISMISSED.

IT IS FURTHER ORDERED that plaintiff's motion to amend (ECF No. 41) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff's "motion to take judicial notice" (ECF No. 26) be, and the same hereby is, DENIED.

IT IS FURTHER ORDERED that defendant's "motion to disregard" (ECF No. 58) be, and the same hereby is, GRANTED.

DATED November 16, 2017.

/s/ James C. Mahan
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

LYUDMYLA PYANKOVSKA, Plaintiff(s), v. SEAN ABID, et al., Defendant(s).	Case No. 2:16-CV-2942 JCM (BNW) ORDER (Filed Feb. 5, 2020)

Presently before the court is the matter of *Pyankovska et al v. Abid et al*, case no. 2:16-cv-02942-JCM-BNW, for the determination of damages.

I. Background

On December 5, 2019, this court granted plaintiff's motion to strike defendant's answer and for entry of default judgment. (ECF No. 123). In that order, the court instructed Lyudmyla Pyankovska ("plaintiff") to file an accounting of her damages, with competent evidence proving the amount of those damages. *Id.*

Plaintiff filed her declaration and evidence on December 25, 2019, (ECF No. 124) along with declarations of Ricky Marquez (ECF No. 125), [redacted] (ECF No. 126), and Svetlana Mundson (ECF No. 127). After a brief extension (ECF Nos 133; 134), plaintiff filed Dr. Nicolas Ponzo's declaration (ECF No. 135).

The court instructed Sean Abid ("defendant") to file his response within 14 days of plaintiff's accounting. (ECF No. 123). Defendant moved to extend time, which the court granted. (ECF Nos. 136; 137). Now before the court is defendant's second motion to extend time (ECF No. 138) and his response to plaintiff's accounting (ECF No. 139).

II. Legal Standard

"The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) (citing *Pope v. United States*, 323 U.S. 1, 12 (1944); *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974)). Indeed, Fed. R. Civ. P. 8(b)(6) provides that "[a]n allegation—**other than one relating to the amount of damages**—is admitted if a responsive pleading is required and the allegation is not denied." Fed. R. Civ. P. 8 (emphasis added).

Thus, damages must be proven. This requirement is born out by Rule 55, governing default judgment, which provides as follows:

> In all other cases, the party must apply to the court for a default judgment. . . . If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—

> preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:
>
> (A) conduct an accounting;
>
> **(B) determine the amount of damages;**
>
> (C) establish the truth of any allegation by evidence; or
>
> (D) investigate any other matter.

Fed. R. Ci. P. 55(b)(2) (emphasis added).

III, Discussion

As an initial matter, the court grants defendant's second motion to extend time. (ECF No. 138). On January 24, defendant requested an additional 3 days to file his response because his counsel was ill and bedridden for several days. *Id.* Defendant filed his response three days later, on January 27. (ECF No. 139). Good cause appearing, the court grants defendant's motion and now considers plaintiff's accounting and defendant's response.

Defendant argues that the *Rooker-Feldman* doctrine bars this court from awarding plaintiff several of her requested categories of damages: Radford Smith's attorney fees, Dr. Holland's expert fees, and child support payments. "The *Rooker-Feldman* doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by 'state-court losers' challenging 'state-court judgments rendered before the

district court proceedings commenced.'" *Lance v. Dennis*, 546 U.S. 459, 460 (2006) (quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005)). Put plainly, "lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." *Id.* at 463.

"*Rooker-Feldman* may also apply where the parties do not directly contest the merits of a state court decision, as the doctrine 'prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a *de facto* appeal from a state court judgment.'" *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008) (quoting *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004) (citing *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003))).

> A federal action constitutes such a de facto appeal where "claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules." In such circumstances, "the district court is in essence being called upon to review the state court decision."

Id. (internal citations omitted).

But, because the Supreme Court has repeatedly and purposefully narrowed the purview of *Rooker-Feldman*, defendant hangs his hat on a dying doctrine. *See Skinner v. Switzer*, 562 U.S. 521, 531—33 (2011) (reaffirming the limited scope of the *Rooker-Feldman*

doctrine); *Lance*, 546 U.S. 459, (2006); *Exxon Mobil Corp.*, 544 U.S. 280; *see also* Samuel Bray, *Rooker Feldman (1923-2006)*, 9 Green Bag 2d 317.

Indeed, the Ninth Circuit has held that "[a] suit brought in federal district court is a 'de facto appeal' forbidden by *Rooker-Feldman* when 'a federal plaintiff **asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision**.'" *Carmona v. Carmona*, 603 F.3d 1041, 1050 (9th Cir. 2010) (quoting *Noel v. Hall*, 341 F.3d 1148, 1162–64 (9th Cir. 2003)) (emphasis added); *see also Johnson v. De Grandy*, 512 U.S. 997, 1005–06 (9th Cir. 1994) (noting that *Rooker-Feldman* does not apply to claims that have not yet been litigated). "In contrast, if a federal plaintiff asserts as a legal wrong an allegedly illegal *act or omission by an adverse party, Rooker-Feldman* does not bar jurisdiction." *Vasquez v. Rackauckas*, 734 F.3d 1025, 1036 (9th Cir. 2013) (quoting *Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013)) (internal quotation marks omitted) (emphasis in original).

Here, plaintiff is prosecuting a case predicated entirely on defendant's illegal act: placing a recording device in his minor son's backpack with the intent to surreptitiously record plaintiff. (ECF No. 81). Although some of plaintiff's damages stem from the state court's decision, plaintiff does not challenge that decision—or the corresponding judgment—as erroneous. Accordingly, the court finds that it has jurisdiction to award damages incurred as a result of the underlying state court action.

Although the court has jurisdiction to award such damages, it does not necessarily follow that it ought to. The court now considers whether plaintiff is entitled to recover her requested damages under the Wiretap Act.

The Wiretap Act authorizes the court to assess as damages the greater of either "the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation;" or "statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2). Thus, the court must compute the actual damages that plaintiff suffered as a result of defendant's actions.

Plaintiff requests five categories of damages in her accounting: medical expenses, prescription costs, state court legal fees, child support, and costs of the instant suit. (ECF No. 124 at 10-12). First, plaintiff seeks to recover $3,125 in medical expenses incurred when attending therapy sessions with Dr. Ponzo. *Id.* at 10. Plaintiff also seeks to recover $30 spent for prescription medication. *Id.* at 11. Next, she argues that she should be awarded $87,493 in legal costs she expended in the underlying state court custody action. *Id.* She further believes that she should recover $42,683 for past child support payments and $62,916 for future child support payments that plaintiff has and will pay to defendant as a result of the state court's order. *Id.* Finally, plaintiff requests $1,434 in legal costs associated with prosecuting the instant action.

First, the court declines to award plaintiff state court legal fees—including attorney fees and Dr. Holland's expert fees—or the child support payments. While defendant's surreptitious recording may have been an actual cause of the outcome in the state court proceeding, it was not a proximate cause. To the contrary, the state court entered its findings of fact on March 1, 2016. (*See* ECF No. 139 at 3-5). The state court did not address the issue of whether the recording was illegal. Nor did the findings of fact even mention the recording. The findings of fact were predicated almost entirely with the testimony and report of Dr. Holland, which was predicated on her interviews with the parties' son. *Id.*

Although the surreptitious recording may have spurred the interviews, the recordings did not demonstrate that the parties' son "exhibited a preoccupation with the video game Call of Duty throughout the interviews" or that "Call of Duty, with or without any additional controls, is inappropriate for a five or six year old." *Id.* at 4-5. Further, Dr. Holland testified as an expert and explained "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." *Id.* at 4. The court concluded that "[a]s a direct result of [plaintiff'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 [defendant]." *Id.*

This testimony and the court's findings of fact supported the state court award of custody, attorney fees, and expert fees. Accordingly, the court finds that the state court award of custody, attorney fees, and expert fees were not incurred "as a result of the violation" of the Wiretap Act.

The court turns to the fees plaintiff incurred prosecuting this case, the money spent on therapy as a result of the violation of her privacy, and the prescription medications. Even taking the averments in plaintiff's accounting at face value, this amount totals $4,589: $1,434 in fees and costs prosecuting this action; $3,125 in therapy costs with Dr. Ponzo; and $30 in prescription medication. (ECF No. 124). The statute in this case instructs the court to award the greater of plaintiff's actual damages incurred as a result of the violation or $10,000. *See* 18 U.S.C. § 2520(c)(2).

Defendant perfunctorily argues that this court has discretion to award no fees under 18 U.S.C. § 2520(c)(2). (ECF No. 16at 11–12). To support this argument, defendant cites to a single case from the Eastern District of Michigan, which noted as follows:

> Factors that may be considered include whether the plaintiff suffered financial harm, the extent to which a violation occurred and unlawfully intercepted signals were disclosed, whether the defendant had a legitimate reason for his or her actions, whether the defendant profited from his or her acts, and whether

> an award of damages would serve a legitimate purpose.

Directv, Inc. v. Guzzi, 308 F. Supp. 2d 788, 790 (E.D. Mich. 2004).

The court finds that these factors favor an award of $10,000 in statutory damages. First, plaintiff suffered financial harm bringing and prosecuting this lawsuit and seeking therapy. Further, although not specifically articulated by the Eastern District of Michigan, plaintiff suffered mental and emotional harm from defendant's flagrant violation of her privacy. That harm also deserved recompense. Next, defendant deliberately violated the Wiretap Act for personal gain, although defendant cloaks his actions as an attempt "to gather evidence of parental alienation and pathogenic parenting[.]" (ECF No. 16 at 11). As a result of his surreptitious recording just before a custody hearing, defendant now has primary custody of the parties' son and receives child support payments from plaintiff.

Most egregiously, defendant makes the bold claim that "the disclosure of those recordings was limited to the proceedings below, which are sealed." *Id.* at 11–12. However, the court previously noted that defendant posted the transcripts of his recording on the "NEVADA COURT WATCHERS" Facebook page in May 2019. (ECF No. 114–1).[1] Defendant then contends that "[a]ny other alleged dissemination was made in furtherance of the exercise of legitimate first amendment

[1] Defendant also posted a copy of plaintiff's motion for protective order on the Facebook page. (ECF No. 114–1).

rights to speech, if any were made at all." (ECF No. 16 at 12). In the same breath as he defends his First Amendment rights, defendant summarily dismisses the importance of plaintiff's right to privacy. Thus, the court finds that a $10,000 award for plaintiff serves the legitimate purpose of dissuading defendant from violating plaintiff's right to privacy in the future.

Because plaintiff's actual damages of $4,589 are less than the statutory damages authorized by 18 U.S.C. § 2520(c)(1), the court awards plaintiff statutory damages in the amount of $10,000 to compensate her for defendant's violation of the Wiretap Act.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to extend time (ECF No. 138) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff is awarded $10,000 in statutory damages.

The clerk is instructed to enter default judgment in favor of plaintiff and close the case accordingly.

DATED February 5, 2020.

/s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LYUDMYLA PYANKOVSKA

Plaintiff,

v.

SEAN ABID, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

Case Number: 2:16-CV-2942 JCM (BNW)

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__X__ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED
that default judgment is hereby entered in favor of Plaintiff. Plaintiff is awarded $10,000.00 in statutory damages.

February 5, 2020
Date

DEBRA K. KEMPI
Clerk

[SEAL] /s/ J. Matott
Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

LYUDMYLA ABID,
Appellant,
vs.
SEAN ABID,
Respondent.

No. 69995

(Filed Dec. 7, 2017)

Appeal from a district court order modifying child custody. Eighth Judicial District Court, Family Court Division, Clark County; Linda Marquis, Judge.

Affirmed.

Radford J. Smith, Chartered, and Radford J. Smith, Kimberly A. Medina, and Garima Varshney, Henderson, for Appellant.

Black & LoBello and John D. Jones, Las Vegas, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, STIGLICH, J.:

In this child custody proceeding, a father surreptitiously recorded his child and ex-wife's conversations by hiding a recording device in the child's backpack. Because neither the child nor the mother consented to this recording, the father's actions likely violated NRS

200.650, which prohibits the surreptitious recording of nonconsenting individuals' private conversations. The question presented is whether the district court abused its discretion by providing the recordings to a psychologist appointed by the court to evaluate the child's welfare. We hold that the district court properly exercised its discretion in determining that the recordings would assist the expert in forming her opinion. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Sean and Lyudmyla Abid divorced in 2010. Their stipulated divorce decree awarded them joint legal and joint physical custody of their one-year old child. In 2015, Sean moved to modify those terms to get primary physical custody.

On at least two separate occasions, Sean placed a recording device in the child's backpack as the child traveled to Lyudmyla's home. The child and Lyudmyla were unaware of the device, and neither consented to Sean recording their conversations. Sean then edited the recordings, removed what he claims to be irrelevant material, and destroyed the originals. Claiming that the recordings demonstrated Lyudmyla's attempts to manipulate the child, Sean moved to admit them into evidence in the custody proceeding. Lyudmyla objected on grounds that Sean violated NRS 200.650 in recording her and the child's private conversations.

The district court found that Sean likely violated NRS 200.650 and denied Sean's motion to admit the

recordings into evidence. Nonetheless, the court provided the recordings to a psychologist, Dr. Holland, whom the court had appointed to interview and evaluate the child. The court permitted Dr. Holland to consider the recordings as she formulated her opinions.

At the evidentiary hearing, Dr. Holland testified that Lyudmyla's behavior was "creating confusion, distress, and divided loyalty" in the child. She based her opinion in part on the recordings, as well as interviews with the child, Sean, and Lyudmyla, email and text communications between Sean and Lyudmyla, and the parties' pleadings.

After considering Dr. Holland's testimony and other evidence presented, the district court found that, "[a]s a direct result of [Lyudmyla'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 [Sean]." Consequently, the court determined it was in the child's best interest that Sean be awarded primary physical custody. Lyudmyla appeals from that order.

DISCUSSION

Lyudmyla argues that the district court abused its discretion by allowing Dr. Holland to consider evidence that Sean obtained in violation of NRS 200.650. We disagree. Even assuming that Sean violated NRS

200.650 in producing the recordings,[1] the court did not abuse its discretion in providing them to Dr. Holland.

An expert witness in a child custody proceeding may consider evidence obtained in violation of NRS 200.650

Lyudmyla argues that Dr. Holland cannot consider evidence obtained in violation of NRS 200.650, because NRS 50.285(2) allows experts to consider inadmissible evidence only if the evidence is "of a type reasonably relied upon by experts," and psychologists do not normally rely upon recordings that are produced illegally.

We review a district court's evidentiary decision for an abuse of discretion, but, to the extent the decision "rests on a legal interpretation of the evidence code," we review that legal interpretation de novo. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012) (internal quotation marks omitted). Here, we review for an abuse of discretion the district court's decisions to provide the recordings to Dr. Holland and to deny Sean's motion to admit. But we review the court's legal conclusions concerning admissibility de novo.

NRS 200.650 prohibits "intru[sions] upon the privacy of other persons by surreptitiously . . . recording . . . any private conversation engaged in by the other persons . . . unless authorized to do so by one of the persons engaging in the conversation." Sean does not dispute that he surreptitiously placed a recording device in the child's backpack without the child's or

[1] We express no opinion as to the legality of Sean's actions.

Lyudmyla's consent. Despite finding that Sean violated NRS 200.650 in producing the recordings, the district court provided them to Dr. Holland to consider in forming her opinion.

NRS 50.285(2) allows expert witnesses to consider inadmissible evidence so long as it is "of a type reasonably relied upon by experts in forming opinions or inferences upon the subject." We reject Lyudmyla's argument because it shifts NRS 50.285(2)'s focus on the "type" of evidence at issue to the manner in which the evidence was procured. There is no doubt that Sean's evidence—a contemporaneous recording of a parent's unfiltered interactions with a child—is the type of evidence a psychologist would consider in forming an opinion as to the child's welfare. *See*, *e.g.*, *In re Marriage of Karonis*, 693 N.E.2d 1282, 1286 (Ill. App. Ct. 1998) ("Reviewing the [allegedly illegally acquired] tapes materially advanced the [expert witness]'s ability to determine and defend the child's best interests here."). Under NRS 50.285(2), then, Dr. Holland was permitted to consider Sean's recordings.

Of course, NRS 50.285(2) cannot permit what another statute prohibits. But we find no such prohibition in our statutory scheme. While NRS 179.505(1) authorizes a criminal defendant to move to suppress illegal recordings, we find no analogous provision in the civil context. Unlike the analogous federal wiretap law,[2]

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[2] 18 U.S.C. § 2515 (2012): "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

NRS 200.650 is silent regarding evidence and admissibility. *See* NRS 200.690(1) (enforcing NRS 200.650 exclusively with criminal prosecution and civil damages). We will not read a broad suppression rule into NRS 200.650, especially when our Legislature has proven in the criminal context that it knows how to write one. Prohibiting Dr. Holland from considering this evidence would be conflating criminality with inadmissibility, which is left to the sound discretion of the court. *See* NRS 48.025; NRS 48.035.

Furthermore, prohibiting Dr. Holland from considering this evidence would do little to effectuate NRS 200.650's express purpose of protecting an individual's privacy because, in this context, the expert is already inquiring into private details of the relationship between parent and child. NRS 200.650's prohibition against "disclos[ing]" the contents of illegal recordings cannot reasonably be read to prohibit a court-appointed expert from considering such evidence in a child custody case, wherein the "[c]hild's best interest is paramount." *Bluestein v. Bluestein*, 131 Nev., Adv. Op. 14, 345 P.3d 1044, 1048 (2015); *see also* NRS 125C.0045(2).

Nor does our caselaw support Lyudmyla's position. This court has only once addressed the proper remedy in a civil action when a litigant attempts to use illegally acquired evidence to gain a litigation advantage. In *Lane v. Allstate Insurance Co.*, Lane illegally recorded phone conversations in violation of NRS 200.620

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evidence *in any trial, hearing, or other proceeding. . . .*" (emphasis added).

to obtain evidence to support tort and contract claims against his former employer.[3] 114 Nev. 1176, 1177, 969 P.2d 938, 939 (1998). The district court sanctioned Lane by dismissing his complaint. *Id.* On appeal, this court held that dismissal was too extreme a litigation sanction and instead sanctioned Lane by prohibiting him from using the information contained within the recordings "in any fashion." *Id.* at 1181 n.4, 969 P.2d at 941 n.4. In sanctioning Lane, however, this court did not create a bright line rule that illegally obtained evidence cannot be used in civil proceedings; rather, we held that suppressing Lane's evidence was an appropriate sanction in that particular case. *Id.* at 1181, 969 P.2d at 941.

However, a child custody proceeding is readily distinguishable from *Lane.* Whereas *Lane* was a civil suit for damages, a child custody proceeding is no "mere adversary proceeding between plaintiff and defendant." *Munson v. Munson*, 166 P.2d 268, 271 (Cal. 1946). Here, the interests of a nonlitigant child are at stake. Prohibiting an expert from considering evidence punishes that child by hindering the expert's inquiry into the child's best interests. It is sanctioning the child for the alleged crime of his parent.

In affirming the lower court's decision, we by no means condone Sean's actions. Rather, we have determined that the potential deterrent effect of ignoring

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[3] We note that, whereas Lane's telephonic recordings implicated NRS 200.620, Sean's in-person recordings implicated NRS 200.650. For purposes of this opinion, however, this is a distinction without a difference.

Sean's evidence is outweighed by the State's "overwhelming interest in promoting and protecting the best interests of its children," *Rogers v. Williams*, 633 A.2d 747, 749 (Del. Fam. Ct 1993). We note that there are numerous ways to deter parents in Sean's position without risking harm to an innocent minor. *See id.* at 748 (rejecting the argument "that by admitting evidence that was obtained illegally, the Court is giving its approval to lawlessness"). Sean could be prosecuted for committing what amounts to a category D felony. *See* NRS 200.690(1)(a); *cf. Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."). NRS 200.690(1)(b) creates a private right of action for Sean's ex-wife and child to sue for Sean's intrusion into their privacy. The court can fashion a litigation sanction, such as a fine, that does not affect the child's interests. *See*, *e.g., Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (holding that courts have "inherent equitable powers" to sanction parties for "litigation abuses") (internal quotation marks omitted), Finally, and perhaps most importantly, potential spies in Sean's position may be deterred by the simple fact that a parent's lawless invasion into his child's and ex-wife's privacy reflects poorly on his parental judgment and may be factored into the court's decision when determining child custody.[4]

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[4] This statement does not affect our holding in *Sims v. Sims* "that a court may not use changes of custody as a sword to punish parental misconduct." 109 Nev. 1146, 1149, 865 P.2d 328, 330

There is no per se rule that evidence obtained illegally is inadmissible in a child custody proceeding

A premise of Lyudmyla's argument is that illegally obtained evidence is inadmissible in a child custody proceeding. That premise is unfounded—there is no per se rule of inadmissibility in this context, and we decline to adopt one. A district court has discretion in a child custody proceeding to determine whether to admit evidence obtained in violation of NRS 200.650.

Unless a statute prohibits the admission of relevant evidence, it is presumed admissible. NRS 48.025(1). As analyzed above, NRS 200.650 contains no language to rebut that presumption. A per se rule of inadmissibility would sweep broader than the exclusionary rule in the criminal context,[5] and it would be particularly inappropriate here because a district court "needs to consider as much relevant evidence as possible when deciding child custody." *Rogers*, 633 A.2d at 749 (admitting allegedly illegally obtained evidence in a child

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(1993). But *Sims* does not prevent a court from considering how a parent's conduct reflects on their judgment.

[5] NRS 179.505 permits an aggrieved party in a criminal proceeding to move to suppress illegally intercepted recordings; it does not render such recordings per se inadmissible. *Cf. Utah v. Strieff, U.S.*, 136 S. Ct. 2056, 2059 (2016) (creating the attenuation exception to the exclusionary rule); *United States v. Patane*, 542 U.S. 630, 642 (2004) (holding that the exclusionary rule does not apply to physical evidence obtained as a result of questioning that violated *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Harris v. New York*, 401 U.S. 222, 226 (1971) (allowing evidence obtained in violation of *Miranda* to be admitted for impeachment purposes); *Walder v. United States*, 347 U.S. 62, 65 (1954) (same for evidence obtained in violation of the Fourth Amendment).

custody proceeding); *accord Munson*, 166 P.2d at 271 ("[T]he controlling rights are those of the minor child and of the state in the child's welfare."); *Lee v. Lee*, 967 S.W.2d 82, 85 (Mo. Ct. App. 1998) ("Even evidence obtained fraudulently, wrongfully, or illegally is admissible.").

This presumption of admissibility dates back to the common law, wherein admissibility was not affected by the illegal means used to acquire evidence. *See*, *e.g.*, *Terrano v. State*, 59 Nev. 247, 256, 91 P.2d 67, 70 (1939), *overruled in part by Whitley v. State*, 79 Nev. 406, 412 n.5, 386 P.2d 93, 96 n.5 (1963). While *Mapp v. Ohio* altered this common law rule by excluding evidence illegally acquired by the government in criminal cases, 367 U.S. 643 (1961), *Mapp*'s exclusionary rule does not extend to evidence illegally acquired by a *private individual* in a *civil case.* In *Sackler v. Sackler*, for example, a husband trespassed into his wife's home to obtain evidence relevant to a divorce proceeding. 203 N.E.2d 481, 482 (N.Y. 1964). The New York Court of Appeals rejected the wife's argument that *Mapp* rendered the illegally acquired evidence inadmissible because *Mapp*'s exclusionary rule was meant to deter governmental intrusions; absent a governmental invasion, suppressing evidence would frustrate courts' search for truth. *Id.* at 483 ("[J]udicial rules of evidence .were never meant to be used as an indirect method of punishment of trespassers and other lawless intruders." (internal quotation marks omitted)). Thus, the husband's illegally acquired evidence was admissible. *Id.*

Similarly, in the related child abuse/neglect context, courts routinely hold that evidence obtained in violation of the Fourth Amendment is admissible because "the substantial social cost of ignoring children's safety" exceeds "the minimal additional deterrence achieved by applying the exclusionary rule." *In re W.L.P.*, 202 P.3d 167, 173 (Or. 2009); *accord In re Mary S.*, 230 Cal. Rptr. 726, 728 (Ct. App. 1986) ("[T]he potential harm to children in allowing them to remain in an unhealthy environment outweighs any deterrent effect which would result from suppressing evidence unlawfully seized." (internal quotation marks omitted)); *In re Diane P.*, 494 N.Y.S.2d 881, 884 (App. Div. 1985) ("[T]he State's overwhelming interest in protecting and promoting the best interests and safety of minors in a child protective proceeding far outweighs the rule's deterrent value."); *State ex rel. A.R. v. C.R.*, 982 P.2d 73, 79 (Utah 1999) ("Whatever deterrent effect there might be is far outweighed by the need to provide for the safety and health of children in peril.").

A per se rule of inadmissibility would force the district court to close its eyes to relevant evidence and possibly place or leave a child in a dangerous living situation. In this instance, the illegally acquired recordings contained no dispositive evidence—they reflected at most one parent's attempt to alienate the child from the other parent. More concerning, however, would be a scenario in which an illegally obtained recording contains evidence of physical or sexual abuse of a child. Categorically excluding such evidence would clearly be

against the best interests of the minor and, therefore, in contravention of NRS 125C.0045(2).

Thus, because the recordings' alleged illegality did not render them inadmissible, the court had "broad discretion" in performing its evidentiary gatekeeping function to rule on their admissibility. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005) (internal quotation marks omitted). To the extent that the district court excluded Sean's recordings based on its belief that the law *required* exclusion of illegally obtained evidence, that ruling was erroneous. Even so, that error would be harmless because it did not affect the court's decision to award Sean primary custody. *See* NRCP 61.

The district court did not otherwise abuse its discretion in awarding Sean primary custody

Lyudmyla presented two additional arguments on appeal: (1) that the district court abused its discretion by misinterpreting and relying on Dr. Holland's opinion and interviews with the child, and (2) that the district court ordered the change in custody simply to punish Lyudmyla, in violation of *Sims*, 109 Nev. at 1149, 865 P.2d at 330.

After a careful review of the record, we find these claims to be without merit. The district court properly exercised its discretion in weighing the evidence presented over the course of the two-and-one-half day evidentiary hearing. The district court's factual findings

support its determination as to the child's best interest.

CONCLUSION

In a child custody setting, the "[c]hild's best interest is paramount." *Bluestein*, 131 Nev., Adv. Op. 14, 345 P.3d at 1048. The court's duty to determine the best interests of a nonlitigant child must outweigh the policy interest in deterring illegal conduct between parent litigants. Accordingly, the district court did not abuse its discretion in providing the recordings to the expert because reviewing them furthered the expert's evaluation of the child's relationship with his parents and aided the district court's determination as to the child's best interest. Accordingly, we affirm.

/s/ Stiglich, J.
Stiglich

We concur:

/s/ Cherry, C.J.
Cherry

/s/ Gibbons, J.
Gibbons

/s/ Hardesty, J.
Hardesty

/s/ Parraguirre, J.
Parraguirre

/s/ Pickering, J.
Pickering

DOUGLAS, J., concurring:

I concur with the majority in result only.

/s/ Douglas, J.
Douglas

D-10-424830-Z

DISTRICT COURT
CLARK COUNTY, NEVADA

Divorce - Joint Petition COURT MINUTES July 16, 2015

D-10-424830-Z
In the Matter of the Joint Petition for Divorce of:
Sean R Abid and Lyudmyla A Abid, Petitioners.

July 16, 2015 9:00 AM All Pending Motions

HEARD BY: Marquis, Linda
COURTROOM: Courtroom 07

COURT CLERK: Kathleen Boyle

PARTIES:

[redacted], Subject Minor, not present
Lyudmyla Abid, Petitioner, present
Sean Abid, Petitioner, not present

Michael Balabon, Attorney, present
John Jones, Attorney, present

JOURNAL ENTRIES

- DEFENDANT'S OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION REGARDING SUMMER VISITATION SCHEDULE AND COUNTERMOTION TO STRIKE PLAINTIFF'S PLEADINGS, TO SUPPRESS THE ALLEGED CONTENTS OF THE UNLAWFULLY OBTAINED RECORDING, TO STRIKE THE LETTER FROM DR. HOLLAND AND FOR SANCTIONS AND ATTORNEY FEES . . . HEARING:

ARGUMENT OF COUNSEL RE: ADMISSIBILITY OF DR. HOLLAND'S REPORT

Mr. Balabon asked whether Plaintiff intended to introduce the tape into evidence in these proceedings, and if so, was he going to attempt to produce the flash drive which contained an edited version of the tape, or was he going to produce the original.

The Court said its understanding of the facts was that Plaintiff had placed a recording device in the minor child's backpack, and the minor child had gone for his regularly scheduled visitation to Defendant's residence. During the course of the visitation the recording device remained in the child's backpack and recorded for approximately three (3) days, picking up sounds or conversations between numerous people who were in the home, including the child. When the child returned to Plaintiffs residence he took the recording, which was not made at the suggestion, consent, or upon the advice of Mr. Jones, it only came to the attention of Mr. Jones after the recording had taken place, and at some point Plaintiff erased or destroyed portions of the tape or the recording, which did not include the child, so if the child was engaged in a conversation, the conversation was kept, if the child was not included in a conversation the conversation was erased or destroyed. The destruction of the recording was not u on the advice, suggestion, or consent of Mr. Jones, who was only made aware of the destruction after it had taken place. The portion of the recording which was provided to Defendant is the entirety of what remains. Mr. Jones agreed

these were the facts. Mr. Balabon said he agreed all of the portions remaining were produced.

Mr. Jones said he had not decided whether or not to admit the tape into evidence.

The Court said it was going to treat Defendant's Motion and Mr. Balabon's argument as a Motion in Limine. The Court believed Mr. Balabon was asking the Court not to admit the recording at trial, and to strike any reference to the recording, or any quote from the recording from all of the pleadings ever filed in this case, and strike the portions of the recording from Dr. Holland's Report, and to not allow Dr. Holland to testify at the time of trial because she was tainted by the recording.

Mr. Balabon said he was requesting a ruling from the Court as to the legality of the tape, and as to whether or not the Court was applying the Implied Consent Doctrine to the Statute, and a ruling as to whether or not Plaintiff had satisfied his burden for admissibility, if the Court did adopt the Doctrine.

Argument by Mr. Balabon.

Response by Mr. Jones.

Argument by Mr. Balabon.

As to the facts the Court is FINDING this date in considering the Motion in Limine, at a certain point in time Plaintiff contacted Defendant regarding the minor child's exposure to violent video games, after which time Plaintiff concedes he placed a recording device in

the minor child's backpack resulting in conversations being recorded while the minor child was with the Defendant. Defendant believes there were three (3) consecutive days of recording. Plaintiff maintains he deleted portions of the audio recording. Plaintiff field a Motion for a Change of Custody and relied in part on those recorded conversations. The Court reiterated Mr. Jones was in no way a participant in the recording, did not advise Plaintiff to make those recordings, and did not know about the recordings until after the fact, and did not know portions of the recordings had been deleted until after the fact. The Court previously ordered a child interview through Dr. Holland, and Dr. Holland reviewed numerous documents in preparation for her interview, including a transcript of a portion of the audio recordings, and portions of the actual audio recordings. Plaintiff turned over a digital recording of all of the remaining portions of the recording. Defendant moved today to strike portions of the pleadings that discuss or incorporate the recordings, strike Dr. Holland's report, strike Dr. Holland from the witness list, not allow her to testify, and deny admission of the audio recording at any time during the Evidentiary Hearing in this matter.

The Court FINDS this is a recording by a recording device as defined in NRS 200.650, and as such it is a one party consent, which does not fall under the wire communication definition. While Plaintiff has not yet sought to introduce the audio recording or any portion of the audio recording into evidence, the Court is inclined to adopt the Vicarious Doctrine; therefore, Mr.

Jones needs to prove much more than he is able to via a Motion in Limine. Dr. Holland's report does not deal with the recording, the vast majority, and her biggest area of concern, and the Court's biggest area of concern in this case continues to be, and originated with, the child's exposure and preoccupation with violent video games. The Court will strike portions of Dr. Holland's report which deal with the audio recording; however, the Court FURTHER FINDS Dr. Holland has not been tainted so badly from exposure to that recording that she is unable to testify at the trial, since the vast majority of her report deals with issues wholly separate to the recording, and should the parties stipulate to the introduction of her report in lieu of her live testimony, the Court will strike the portions of the report dealing with the audio recording; however, should the parties not stipulate to the introduction of her report, the Court will allow Dr. Holland to testify, and the Court will allow the Defendant to ask Dr. Holland questions as to her reliance upon the audio recording as part of her ultimate expert opinion, if the Defendant wants to. Plaintiff will not be allowed to question Dr. Holland regarding the audio recording, unless Defendant opens the door.

COURT ORDERED, the following:

1. With regard to the school issue, the matter will be dealt with at trial, once the custody issue has been resolved.

2. The defense may retain their own expert, who does not need to rely on the audio recording. However, if the

defense does not have the money to employ an expert with Dr. Holland's credentials, a forty-five (45) minute routine interview can be conducted at the Family Mediation Center, PROVIDED the Family Mediation Center has the ability to record the interview, so it can be reviewed. The Court FINDS NRS 50.285 applies and experts can rely upon inadmissible information to make their determination.

The Court further explained its ruling in this matter with regard to the admissibility of the audio recording at trial.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYUDMYLA PYANKOVSKA, personally and mother and next friend of [redacted], a minor child, and as mother and next friend of [redacted] a minor child, Plaintiff-Appellant, and RICKY MARQUEZ, Plaintiff, v. SEAN ABID; JOHN JONES, Defendants-Appellees, and ANGELA ABID, Defendant.	No. 20-16294 D.C. No. 2:16-cv-02942-JCM-BNW District of Nevada, Las Vegas ORDER (Filed Jul. 3, 2023)

Before: MURGUIA, Chief Judge, and PARKER* and LEE, Circuit Judges.

* The Honorable Barrington D. Parker, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED (Doc. 69).

Appellee's motion to file supplemental brief is DENIED as moot (Doc. 71).

PRO SE
Pyankovska Lyudmya,
2167 Montana Pine Drive
Henderson, NV 89052
702-208-0633
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UNITED STATES DISTRICT COURT OF NEVADA
DISTRICT OF NEVADA

LYUDMYLA PYANKOVSKA (ABID),PERSONALLY, AND AS MOTHER AND NEXT FRIEND OF [redacted], A MINOR CHILD, AND AS MOTHER AND NEXT FRIEND OF [redacted] A MINOR CHILD, AND RICKY MARQUEZ. Plaintiff; vs. SEAN ABID, ANGELA ABID, JOHN JONES. Defendant,	Case No.: **COMPLAINT AND DEMAND FOR JURY TRIAL** **2:16-cv-02942-JCM-CWH** (Filed Dec. 20, 2016)

COME NOW the Plaintiffs, and for their cause of action against the Defendants, state and allege as follows:

PERSONAL JURISDICTION AND VENUE

1. Plaintiff LYUDMYLA PYANKOVSICA (hereinafter "LYUDA") is a resident of Clark, County, Nevada.

2. Plaintiff [redacted] (hereinafter "[redacted]") is a minor child, is the son of LYUDA, and is a resident of Clark, County, Nevada.

3. Plaintiff [redacted] (hereinafter "[redacted]") is a minor child, is the daughter of LYUDA, and is a resident of Clark, County, Nevada.

4. Plaintiff RICKY MARQUEZ (hereinafter "RICKY") is a resident of Clark, County, Nevada.

5. Defendant SEAN ABID (hereinafter "SEAN ABID") is a resident of Clark, County, Nevada.

6. Defendant ANGELA ABID (hereinafter "ANGELA ABID") is a resident of Clark, County, Nevada.

7. Defendant JOHN JONES (hereinafter "JONES") is an attorney licensed to practice law in Nevada and, on information and belief, is resident of Clark, County, Nevada. At all times relevant to this action, JONES was employed as an attorney with, and was a partner of BLACK AND LO BELLO LLC.

8. Venue is proper because the Defendants reside in the State of Nevada and/or the events upon which Plaintiff's cause of action are based occurred in the State of Nevada.

9. Jurisdiction is proper pursuant to 28 U.S.C. §§ 1331 and 1367(a) as this action arises under 18 U.S.C.A. § 2510 et seq. as more fully appears hereinafter. Plaintiffs invoke the pendent jurisdiction of this Court to hear and decide claims arising out of state law.

GENERAL ALLEGATIONS

10. LYUDA and. SEAN ABID are former spouses who were divorced on or about February 17, 2010 in the Eighth Judicial District court of Nevada in the case captioned *Sean R Abid v. Lyudmyla A. Abid.*, Case No. D424830.

11. The divorce decree entered between LYUDA and SEAN ABID on February 17, 2010. Under the stipulated Decree, the parties agreed to joint legal and physical custody of their minor child [redacted].

12. On or above January 9, 2015, LYUDA filed a "Motion for Contempt of Court" against SEAN ABID, to modify order regarding timeshare, for the appointment of Parenting Coordinator, to compel production of minor child's passport.

13. At a time unknown to the Plaintiffs, SEAN ABID inserted a recording device inside [redacted]'S school backpack and secretly intercepted communications between or among [redacted] and the other Plaintiffs set forth herein and/or between or among those Plaintiffs themselves (without [redacted]'S participation or knowledge).

14. SEAN ABID intercepted said communications without the knowledge or consent of the Plaintiffs constituting: an invasion of Plaintiff's privacy, including trespassing into the Plaintiffs' seclusion, and public disclosure of private facts; and a violation of the federal Wiretap Act and Nevada's wiretapping statute.

15. SEAN ABID knew by placing the recording device inside school backpack it would record conversations to which they would not otherwise be privy and that [redacted] took school backpack every time he went to LYUDA'S home on her custodial days.

16. On information and belief, after couple weeks of recordings, SEAN ABID brought the recordings to the attention of JONES in an effort to present evidence in the aforementioned custody case. On information and belief, the recordings were presented to JONES in a digital format using FLASH DRIVE data storage discs. The Plaintiffs cannot determine what conversations or recordings, if any, were edited or removed from FLASH DRIVE before they were presented to JONES. On information and belief, SEAN ABID also presented transcribed and edited portions of the recordings to JONES in typewritten form.

17. LYUDA first discovered the existence of the recordings on or about February 4, 2015 by Countermotion filed February 4, 2015. SEAN ABID moved to modify primary custody. He based his motion entirely upon an audio recordings that he surreptitiously obtained. JONES filed together with Countermotion to change custody, Declaration of SEAN ABID, in support

of his countermotion to change custody. By filing Declaration SEAN ABID disseminated as part of it to court the transcription of edited tapes of private conversations recorded at LYUDA'S home and vehicle on January 20, 21, and January 26, 2015.

18. Over LYUDA'S continued objections, by minute order entered on March 24, 2015 the Honorable Linda Marquis permitted SEAN ABID to provide the surreptitiously obtained and selectively altered recordings and transcripts to Dr. Stephanie Holland who conducted a court ordered child interview in the case. Honorable Linda Marquis stated that Court will make a determination as to the admissibility of the audio recordings and/or transcripts of the audio recordings, in the event either party moves for its admission. Dr. Holland's report included a transcription of the tape and numerous references to the tape. The contents of the tape formed the basis of the questions she asked in her interview of [redacted]. Interview with the minor child was not audio or video recorded. Prior to issuing her report, and based upon the content of the tape recordings, Dr. Holland made findings and a recommendations(in form of a letter to the Court)that the Court modify the stipulated summer visitation set forth in the parties' Decree of Divorce.

19. On July 16, 2015 court held hearing on issue of LYUDA's objections to the admission of the tapes, the use of the tapes by Dr. Holland, admission of the Dr. Holland report that relied on tapes and SEAN ABID'S defense of "vicarious consent doctrine". The district court acknowledged that the tapes on their face

were violation of NRS 200.650, but that it would permit the admission and use of the tapes if SEAN ABID could meet the elements of the "vicarious consent doctrine".

20. During the litigation, SEAN ABID did not produce the entirely of the two recordings that he secretly recorded, and he later acknowledged that he destroyed and/or altered selected portions of the recordings, he trashed the computer that housed them, he trashed device used to record them. Instead he submitted, what he admitted were selected portions of the recordings that he edited with software the he could not identify, and that he erased from his computer.

21. On November 17, 18 and 19, 2015 the district court held an evidentiary hearing on the issue if SEAN ABID could meet the element of the "vicarious consent doctrine". By Findings of Fact, Conclusions of Law and Decision entered on January 5, 2016, Judge Marquis concluded that SEAN ABID'S testimony was not credible, and SEAN ABID did not have good faith to place the recording device into LYUDA's home. The Court found that the doctrine of vicarious consent does not extend to the facts presented in this case, and that SEAN ABID surreptitiously caused a recording device to be placed inside LYUDA's home. The Court denied SEAN ABID's request to admit any portion of the audio recordings into evidence. **Remarkably, in that order the district court indicated that content of the illegally obtained tapes would be admissible as a basis for the testimony and report of Dr. Holland.**

22. Before the evidentiary hearing on November 18, 2016, ANGELA ARID was hiding behind the column in court hallway and was recording private conversations with her cell phone between LYUDA and RICKY MARQUIS. Those conversations were private and were not for public. ANGELA ARID was testifying about content of those recordings claiming that RICKY MARQUIS was teaching LYUDA how to commit perjury.

23 .At further evidentiary hearing on January 11, 2016 the Court admitted the testimony of ANGELA ARID about recorded private conversation between husbands RICKY MARQUIS with his wife LYUDA in court's hallway. That testimony was hearsay and was straight lie and slander.

24. At further evidentiary hearing on January 25, 2016 the Court admitted the report of Dr. Holland, containing a transcription of the altered tapes, and permitted her testimony regarding the tape recordings and their content. LYUDA objected at those hearings.

25. By Findings of Fact, Conclusions of Law, and Decision entered on March 1, 2016 the Court entered into an Order granting SEAN ABID's Motion that he be granted primary physical custody of [redacted]. **The Court solely relied upon Dr. Holland's testimony and report** to form the basis of its order changing custody. Pleadings with transcripts of illegally obtained tapes **are not stricken**, Dr. Holland's report that relied on tapes **is not stricken**.

26. LYUDA is ordered to pay child support in amount of $749 a month. Before that change SEAN ABID was paying to LYUDA child support in amount $164 a month.

27. On July 14 2016 four months after final decree was entered, court ordered. LYUDA to pay for all DR. HOLLAND fees. Order was a modification of final decree while case is under appeal.

28. On March 17, 2016 LYUDA filed Appeal in Nevada Supreme Court, case #69995. SEAN ABID filed motion to disseminate Dr. HOLLAND' s report to Nevada Supreme Court for review.

I. VIOLATION OF 18 U.S.C.A. §2510 ET SEQ. ("WIRETAP ACT").

29. Plaintiffs restate and re-allege paragraphs I through 28 above.

30. Defendants, and each of them, engaged in one or more of the following acts in violation of federal law: (a) Defendants intentionally intercepted, endeavored to intercept, or procured other persons to intercept or endeavor to intercept oral communications; (b) Defendants intentionally disclosed, or endeavored to disclose, to other persons the contents of oral 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 above-referenced law; and/or (c) Defendants intentionally used, or endeavored to use, the contents of oral

communication, knowing or having reason to know that the information was obtained through the interception of wire, oral, or electronic communication in violation of the above-referenced law.

31. As a result of Defendant's conduct, each Plaintiff is entitled to damages and other relief against each Defendant as set forth in 18 U.S.C.A. §2520, including statutory damages of Ten Thousand Dollars ($10,000.00), punitive damages, and reasonable attorney's fees and other litigation costs reasonably incurred.

II. Invasion of Privacy and Conspiracy to Commit Invasion of Privacy.

32. Plaintiffs restate and re-allege paragraphs 1 through 31 above.

33. Plaintiffs had an objectively reasonable expectation of seclusion and solitude in their private homes or vehicles and in the conversations that may take place therein. The conversations among the Plaintiffs were private, and Plaintiffs had a right to keep the content of such conversations private. In addition, the Defendants disclosed private and potentially embarrassing facts to the public that were of no legitimate concern to the public.

34. Plaintiffs had an objectively reasonable expectation of seclusion and solitude in court hallway and in the conversations that may take place. The conversations among the Plaintiffs were private and

Plaintiffs had right to keep the content of such conversation private. Defendants disclosed untrue facts by testimony to the court based on recordings that were never produced to Plaintiffs or court.

35. Defendants, and each of them, combined to accomplish by their concerted action an intrusion upon the Plaintiffs in their place of seclusion by their conduct as described herein.

36. The intrusion upon the Plaintiffs in their respective places of seclusion as described herein would be highly offensive to a reasonable person.

III. VIOLATION OF NEV. REV. STAT. §200.650 ET SEQ.

37. Plaintiffs restate and re-allege paragraphs 1 through 36 above.

38. Defendant's conduct violated Nev. Rev. Stat. §200.650.

39. As a result of Defendant's conduct, each Plaintiff is entitled to damages and other relief against each Defendants as set forth in Nev. Rev. Stat.§200.690 including $100 per day of violation but not less than $1,000, punitive damages and reasonable cost incurred in action including reasonable attorney's fees.

IV. VIOLATION OF 18.U.S.C.A. 62261A ET SEQ.

40. Plaintiffs restate and re-allege paragraphs 1 through 39 above.

41. Defendants, and each of them engaged in one or more of the following act in violation of federal law: (1)travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that (b) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person.

WHERFORE, Plaintiffs LYUDMYLA A PYANKOVSKA, RICKY R MARQUEZ, MYNA S NEZHURBIDA and [redacted] request that this Court:

A. Award punitive damages against the Defendants, and each of them, jointly and severally;

B. Award statutory damages for federal and state claims for each Plaintiff against each Defendant in the amount of $500,000 total, or to be determined at trial;

C. Award general damages for harm to the Plaintiff s interest in privacy in an amount to be determined at trial;

D. Award special damages in an amount to be determined at trial;

E. Award the cost of this action and action in Eight Judicial Court, including attorney's

fees, to Plaintiffs; expert's Stephanie Holland fees and

F. Award such other relief as the Court may deem just and equitable.

JURY DEMAND AND DESIGNATION OF PLACE OF TRIAL

Plaintiffs hereby demand trial by jury on all issues and designate the United States District Court sitting in Las Vegas, Nevada, as the place of trial.

Dated this 20 of December, 2016

/s/ [Illegible]

[Civil Cover Sheet Omitted]

STATUTES

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 18 U.S.C. 2510 provides in pertinent part:

> **Definitions**
>
> As used in this chapter—
>
> (1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;
>
> (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation,

but such term does not include any electronic communication; * * *

3. 18 U.S.C. 2511 provides in pertinent part:

Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter [18 U. S. C . 2510-2520] 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; [or]

* * *

(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)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.

* * *

(5)(a)(iii)

(ii) In an action under this subsection—

(A) if the violation of this chapter is a first offense for the person under paragraph (a) of subsection (4) and such person has not been found liable in a civil action under section 2520 of this title, the Federal Government shall be entitled to appropriate injunctive relief; and

(B) if the violation of this chapter is a second or subsequent offense under paragraph (a) of subsection (4) or such person has been found liable in any prior civil action under section 2520, the person shall be subject to a mandatory $500 civil fine.

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), and shall impose a civil fine of not less than $500 for each violation of such an injunction.

4. 18 U.S.C. 2515 provides:

Prohibition of use as evidence of intercepted wire or oral communications

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 the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

5. 18 U.S.C. 2520 provides:

Recovery of civil damages authorized

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

(b) **Relief.**—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) **Computation of damages**.—(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater

of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) **Defense.**—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) **Limitation**.—A civil action under this section may not be commenced later than two years after the date upon which the claimant

first has a reasonable opportunity to discover the violation.