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1998 John Marshall National Moot Court Competition in Information Technology and Privacy Law: Brief for the Respondent, 17 J. Marshall J. Computer & Info. L. 689 (1999)

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MOOT COURT COMPETITION

BENCH MEMORANDUM

WHETHER THE MONITORING AND RECORDING OF A VOICE MAIL MESSAGE CONSTITUTES A VIOLATION OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OR AN INVASION OF PRIVACY

by GEORGE B. TRUBOW, MARK HERRICK, & LAURA MCFARLAND-TAYLOR†

June Harper	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 98-513
	)	
Magnum Corporation,	)	
	)	
Defendant-Appellees.	)	

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I. INTRODUCTION

This is an appeal from a decision of the First District Court of Appeals in case number 98-01-0104, affirming the Howard County Circuit Court's award of judgment in favor of defendant in the case, *June Harper v. Magnum Corporation* The lower court granted summary judgment in favor of the defendant-appellee.

The issues in this case are whether the monitoring and recording of a voice mail message in the work environment constitutes a violation of the Electronic Communications Privacy Act ("ECPA") or an invasion of privacy.

II. STATEMENT OF THE CASE

The pleadings reveal the following facts, which are not in dispute: John Harper is an employee of Magnum Corporation, which is incorporated as a for-profit corporation in the State of Marshall. The company provides an internal digital telephone system with voice mail, which activates after four rings and records up to thirty minutes of voice mail. The employees themselves record the greeting, which instructs the caller, whether the call originates from inside or outside the company's system, on how to reach someone for immediate assistance or to leave a voice mail message for the person called. John Harper's message was similar to others within the company and stated as follows:

"Hello, you've reached John Harper's voice mail. I'm away from my desk but you can leave a message for me after the beep. If you need help now, punch 7 for an operator."

In order for employees to gain access to their voice mail messages, they must dial into the system and enter their personal passwords. They do not have to be sitting at their own desk; they can also call from another location from within the company and enter their password and retrieve their messages. The system is also designed to allow employees to forward their messages to anyone else within the company with or without a forwarding message.

When voice mail was given to all employees Magnum Corporation announced a policy of monitoring all telephone calls for business purposes. This decision was made pursuant to the advice of counsel. The following is the policy as it was implemented:

> Employees are to use the Magnum Corporation telephones for company business. Employee phone conversations will be randomly monitored by the Chief Information Officer ("CIO") to determine whether telephone service is abused and business calls are handled properly. We will not monitor personal calls, but only a limited amount of use for personal matters will be permitted as deemed reasonable by the CIO. The CIO will initially caution an employee who has violated company

phone policy but will take no further action unless the employee's conduct is repeated or constitutes a threat to person or property.[1]

The CIO for Magnum is Harriet Stowe. She is in charge of all of the company's information systems. It is common knowledge among the employees at Magnum that Stowe has been very busy with the computer network and that telephone calls have not been monitored on a random basis for more than a year.

June Harper is John Harper's younger sister and the two of them have a very close relationship. On many occasions, June goes to her brother for advice on personal matters. June called John at work on the morning of April 2, 1997, to tell him the events of the evening before. John was not at his desk and June heard his voice mail greeting, so she left him a message.

The night before, June had a date with Randy Morton, a supervisor at Magnum Corporation, whom John had introduced to her. Randy came over to June's apartment and brought with him "Sapphire Gin" and tonic and suggested they have some drinks before going out to dinner. June did not have a problem with this, so she and Randy had a few drinks. Randy then became forward and began to kiss and fondle June in many erotic ways. June was shocked, did not reciprocate, and protested against any further action. She was finally able to convince Randy to leave her apartment, thus avoiding any further assault. June spent the rest of the evening very upset and bothered by the encounter. She called John the next morning and left the following message:

> Hi, John it's June. Sorry to bother you at work but I've had an experience that has really freaked me out and I need some advice on how to handle this situation. I was too upset to go to work so please call me at home as soon as you can. You remember introducing me to Randy Morton, the supervisor that works in your department? Well, we had a date last night – the first one, and. . .

June then described in some detail the events of that evening. She explained how Randy had kissed her and the parts of her body, including breasts and other very sensitive areas, which had been touched offensively. She also stated that Randy was bragging how the girls in his department don't object to his style of kissing and petting. June then hung up and waited for John to return her call.

That same day, April 2, 1997, Harriet Stowe was attempting to reach John Harper. She called his desk and he was not there so she listened to his voice mail greeting and was going to leave him a message to get back in touch with her. However, the system would not allow her to leave a message for him; it said, "We're sorry, but this person's mail box is full. Please call later." Stowe knew that John was in the office

1. Magnum Corp. Handbook – Employee Policy at 5 (1997).

that day and was curious as to how he could have a full mail box when it holds up to 30 minutes worth of messages. Stowe decided to dial into John's voice mailbox and using her monitor's password she was able to get in and listen to the message left by June to John.

Stowe listened to the entire message. Concerned about Morton's conduct, she tape recorded the message on her own recorder and set up a meeting with the company's personnel director, its general counsel, and the Chief Operating Officer. She went to this meeting and played the tape for them, but the group declined to take action with regards to Morton and nothing further was discussed. However, a few days later the word spread throughout the company as to the message and its contents and several people made some sarcastic comments to John about June. All the participants at the April 2, 1997 meeting deny having ever disclosed any of the information.

June Harper brought suit under the ECPA as well as under the common law torts of intrusion upon seclusion and publication of private fact. She claimed that when Harriet Stowe, CIO of Magnum Corporation, monitored the voice mail message of John Harper, June Harper's brother, and recorded the message, it was a violation of the ECPA and her privacy. The message she left for her brother contained personal and sensitive information about an alleged sexual attack on her by another employee of Magnum Corporation, Randy Morton. She filed her suit pursuant to § 2707 of the ECPA, which allows a civil action for a violation of the ECPA.[2] She also alleged two common law torts. First, intrusion upon seclusion, which is when one intentionally intrudes upon the solitude or seclusion of another or her private affairs or concerns.[3] Second, public disclosure of private facts, which is when one gives publicity to something concerning the private life of another that a reasonable person would find highly offensive and there is no legitimate concern to the public.[4]

Magnum Corporation contends that no privacy violation occurred because §. 2511(2)(d)[5] of the ECPA gives an employer permission to monitor a wire, oral, or electronic communication where one of the parties to the communication has given prior consent to such interception. Magnum Corporation also contends that such consent was given because all employees agreed to the company's announced policy of monitoring telephone calls for business purposes.

The trial court held that § 2511(2)(d) of the ECPA permits employers to monitor employee telephone calls, and therefore, the plaintiff had no

2. 18 U.S.C. § 2707 (West 1994).
3. RESTATEMENT (SECOND) OF TORTS § 652B (1976).
4. RESTATEMENT (SECOND) OF TORTS § 652D (1976).
5. 18 U.S.C. § 2511(2)(d).

cause of action under the ECPA. The court also struck down the complaint in relation to the two common law tort claims. The court held that when the plaintiff left the recorded message, she had no expectation of privacy in that message. Even if there was a level of privacy to be expected, there was not a sufficient number of people to whom the information was published, so the publication of private fact failed as well.

The First District Court of Appeals upheld the lower court's decision, agreeing that § 2511(2)(d) of the ECPA permits monitoring of calls by an employer, thus, the plaintiff had no cause of action. The second and third counts alleged wrongdoing under the privacy torts of "intrusion upon seclusion" and "publication of private fact." The Court of Appeals affirmed the lower court's finding that "intrusion upon seclusion" was not violated because the plaintiff agreed to leave a recorded telephone message and had no expectation of privacy. The Court of Appeals also agreed with the lower court's finding that there had been insufficient publicity given to the information at issue to constitute a violation of the branch of the privacy tort known as "publication of private fact."

III. ISSUES PRESENTED

A. Whether the Court of Appeals correctly held that Plaintiff failed to establish a cause of action under the Electronic Communications Privacy Act.

B. Whether the Court of Appeals correctly held that Plaintiff failed to establish a cause of action for the torts of intrusion upon seclusion and publication of private fact.

IV. BACKGROUND

A. Cause of Action Under Electronic Communications Privacy Act

The ECPA amends Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and the federal wiretap law (which protects against the unauthorized interception of electronic communications).[6] Given the changes in computer and telecommunications technology, the amendment was needed to update and clarify federal privacy protection.[7] In 1984, the Attorney General was asked if the federal wiretap law covered interceptions of electronic mail and computer-to-computer communications.[8] The Criminal Division of the Justice Department responded: "Federal law protects electronic communications against unauthorized

6. S. REP. No. 99-541, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555.

7. *Id.*

8. *Id.* at 6-7.

acquisition only where a reasonable expectation of privacy exists."[9] This response prompted the Subcommittee on Patents, Copyrights and Trademarks to hold hearings during the 98th Congress on this issue. Those meetings and discussions included the Department of Justice and private groups who were "interested in promoting communications privacy, while protecting legitimate law enforcement needs and promoting technological innovation,"[10] and culminated in the drafting of the ECPA.

The ECPA protects individual privacy rights in oral or wire communications, which means any oral transfer of communications by the aid of wire, cable or other like connection.[11] "Oral communication means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception."[12]

Magnum Corporation contends that the listening to and recording of voice mail messages does not violate the ECPA or any privacy right the plaintiff may claim under the ECPA. Magnum will likely argue that the lower court decision should be upheld because the ECPA is not applicable when there has been consent. Magnum will also claim that § 2511 does not cover voice mail messages because these are already recorded messages and, thus, there is no interception.[13] However, § 2701, chapter 121, of the ECPA prohibits "unlawful access to stored communications."[14]

June Harper will argue that the lower court's decision must be overturned because Magnum has violated her rights under the ECPA by listening to and recording the voice mail message she left for John Harper. She will claim that she did not give consent to the monitoring of her message. She will also claim that because John had not yet heard the message, there was an "interception" of the communication. However, even if § 2511 of the ECPA does not apply to voice mail messages, June will claim she has a cause of action under § 2707 of the ECPA, which covers unlawful access to stored communications.[15]

1. *Consent*

Under 18 U.S.C. § 2511(2)(d), knowledge of the capability of monitoring alone cannot be considered implied consent.[16] In *Watkins v. L.M. Berry & Company*, the issue was monitoring of a personal telephone

9. *Id.* at 6.
10. *Id.*
11. 18 U.S.C. § 2511 (1) (b) (I).
12. *Id.*
13. 18 U.S.C. § 2511.
14. 18 U.S.C. § 2701.
15. *See* 18 U.S.C. §§ 2511, 2707.
16. Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983).

call.[17] The employer notified all employees that their telephone calls would be monitored for training purposes.[18] The employees could make personal calls; all calls would be monitored only long enough to determine if they were business or personal.[19] The plaintiff, while at work and on her lunch hour, received a personal telephone call from a friend regarding a job interview the plaintiff had been on the night before; Watkins and her friend discussed the job interview and Watkins expressed a strong interest in the job.[20] Unbeknownst to Watkins, the defendant-employer was monitoring the call.[21] Defendant-employer argued that Watkins had consented to the monitoring of her calls, thus she had no cause of action under the ECPA.[22]

The *Watkins* court discusses 'consent' at length.[23] The *Watkins* court limited consent, holding that "consent within the meaning of § 2511(2)(d) is not necessarily an all or nothing proposition; it can be limited."[24] The court further stated that:

> Watkins did not actually consent to interception of this particular call. Furthermore, she did not consent to a policy of general monitoring. She consented to a policy of monitoring sales call but not personal calls. This consent included the inadvertent interception of a personal call, but only for as long as necessary to determine the nature of the call. So, if [defendant's] interception went beyond the point necessary to determine the nature of the call, it went beyond the scope of Watkins' actual consent.[25]

Arguably, John Harper did give consent to the monitoring of business telephone calls. The policy that Magnum put in place, however, only discusses monitoring of telephone calls, not voice mail messages.[26] Even if the conversation at issue was actually an intercepted telephone call, it was a personal call, and John Harper did not consent to the monitoring of personal telephone calls. He consented to the monitoring of business calls.[27] As stated in *Watkins*, "if [the] interception went beyond the point necessary to determine the nature of the call, it went beyond the scope of [his] actual consent."[28]

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17. *Watkins*, 704 F.2d at 577.
18. *Id.* at 579.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 580.
23. *Id.* at 580–81 (quoting 18 U.S.C. § 2511(2)(d)).
24. *Id.* at 582.
25. *Id.*
26. *See supra* note 1 and accompanying text.
27. *See id.*
28. *Watkins*, 704 F.2d at 581.

The policy announced by Magnum gave all of its employees notice that Magnum would monitor telephone calls for the purpose of ensuring that customer calls were handled appropriately.[29] This is well within Magnum's authority under § 2511(2)(a).[30] All employees agreed to this policy as set out by Magnum.[31] The agreement provided consent to have calls monitored.

Magnum argues that the business extension exemption also applies. The *Watkins* court stated: "the general rule seems to be that if the intercepted call was a business call, then . . . monitoring of it was in the ordinary course of business."[32] However, the *Watkins* court went on to say, "[I]f it was a personal call, the monitoring was probably, but not certainly, *not* in the ordinary course of business."[33] As long as a legitimate business connection is demonstrated, "the business extension exemption represents 'circumstances under which non-consensual interception' is not violative of § 2511(1)(b)."[34] The question is whether the interception of this call was in the ordinary course of business.[35] "The phrase 'in the ordinary course of business' cannot be expanded to mean anything that interests a company."[36]

Section 2511 states that any person who intentionally intercepts, uses or discloses 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 shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).[37] However, § 2511 goes on to state exceptions to this rule.[38] Section 2511(2)(a) states that:

> it shall not be unlawful . . . for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, . . . to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service . . . ."[39]

Section 2511(2)(d) states that "[I]t shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire,

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29. *See supra* note 25.
30. 18 U.S.C. § 2511(2)(a)(i).
31. *See supra* note 25.
32. *Watkins*, 704 F.2d at 582 (citing Briggs v. American Air Filter Co., 630 F.2d 414 (5th Cir. 1980)).
33. *Id.*
34. *Id.* at 581 (quoting *Briggs*, 630 F.2d at 419).
35. *Id.* at 582.
36. *Id.*
37. 18 U.S.C. § 2511.
38. *Id.*
39. 18 U.S.C. § 2511(2)(a)(i).

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. . . ."[40]

The policy announced by Magnum gave all of its employees notice that Magnum would monitor telephone calls for the purpose of ensuring that customer calls were handled appropriately.[41] All employees agreed to this policy as set out by Magnum. This is well within Magnum's authority under § 2511(2)(a).[42] Since the policy states that only telephone calls will be monitored, June Harper will most likely argue that no consent was given for the monitoring of voice mail, and that in any event, her brother John gave consent, but she did not. Magnum will have to address both of these issues.

First, Magnum will likely argue that while the policy of the company was to monitor telephone calls, this also included voice mail messages, as they are related to business. Magnum will argue that the interpretation of the phase "in the ordinary course of business," as established in *Watkins* must be followed here.[43] Voice mail messages are an important and integral part of maintaining company professionalism. Magnum wants to ensure that all telephone calls to customers are returned promptly. When an individual's voice mail is full and he is known to be in the office, as occurred in this case, then Magnum can question whether the employee is following up customer calls promptly. Magnum can argue that the consent given by all employees to have their telephone conversations monitored included consent to monitor voice mail messages. Magnum can also argue that because June Harper's message was related to the possible criminal activity of a supervisor employed by Magnum, the call related to "the ordinary course of [its] business."[44]

However, the court in *Watkins* stated that business exceptions were to be narrowly construed.[45] "Consent . . . is not to be cavalierly implied. . . . [§ 2511] expresses a strong purpose to protect individual privacy by strictly limiting the occasions on which interception may lawfully take place."[46] Given the wording of Magnum's policy, which never mentions voice mail, and specifically exempts personal calls from monitoring, June Harper will argue that the lower court's reading of the business exception in § 2511 is too broad.

Second, Magnum will argue that the consent given by John Harper was enough under § 2511(2)(d) of the ECPA, which only requires one

40. 18 U.S.C. § 2511(2)(d).
41. *See supra* note 25.
42. *See* 18 U.S.C. §2511(2)(a).
43. *Watkins*, 704 F.2d at 582.
44. *Id.*
45. *Id.* at 582-83.
46. *Id.* at 581.

party to the conversation to give consent.[47] In *Payne v. Norwest Corporation*,[48] the court held that § 2511(2)(d) provides an explicit exception to the general rule prohibiting the interception of telephone conversations where one of the parties to the conversation consents to the interception.[49] In the *Payne* case, a bank employee was terminated for insubordination and he sued the bank for wrongful discharge,[50] alleging discrimination based on age, disability, race and sex.[51] The bank counter-sued the employee for violation of the ECPA, alleging he had recorded, with a hand-held tape recorder, messages left on his voice mail, and that he had recorded telephone conversations with bank customers and a bank employee without the consent of the other party to the conversation.[52] The court acknowledged that § 2511 (2)(d) allows the interception of a phone conversation where one party to the conversation consents, and the interception lacks harmful intent.[53] The court recognized that "it is the use of the interception with intent to harm rather than the fact of interception that is critical to liability."[54] The purpose of the interception must not be criminally or tortiously motivated.[55] Based on this case, Magnum can argue that John Harper's consent to the monitoring of telephone calls is sufficient, and consent by June is not required. Also, Magnum can argue that there was no criminal or tortious motivation when Stowe checked the voice mail. She simply did it to find out why John Harper's box was full when she knew he was in the office. She wanted to ensure that he was returning customer telephone calls in a timely and professional manner. When Stowe decided to record the voice mail and take it to her superiors, it was done solely because of her concern regarding the company employee, Randy Morton. She was not acting with criminal or tortious intent in monitoring and recording the voice mail message.

B. *Interception*

Magnum will argue that the lower court's decision should be upheld because no interception occurred here. The court in *Payne* held that an interception requires involvement in the initial communication and a re-

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47. *See* 18 U.S.C. § 2511(2)(d).

48. Payne v. Norwest Corp., 911 F. Supp. 1299 (D. Mont. 1995).

49. *Id.* at 1303 (citing Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1066 (5th Cir.1985)).

50. *Id.* at 1302.

51. *Id.* at 1303.

52. *Id.* at 1304 (citing Boddie v. American Broad. Cos., Inc., 881 F.2d 267, 270 (6th Cir. 1989)).

53. *Id.* at 1304.

54. *Id.* at 1303 (citing United States v. Turk, 526 F.2d 654, 658 n.3 (5th Cir. 1976)).

55. *Id.*

cording of that initial communication at the time the communication occurs.[56] Here, Stowe recorded a stored voice mail message and, therefore, there is no interception because the initial communication had already taken place. Magnum will simply argue that § 2511 of the ECPA does not apply to stored communications, such as voice mail, and, therefore, the lower court's decision should be upheld. The common definition of intercept is: "to interrupt the progress of the acquisition of a wire, oral or electronic communication while the communication is being transmitted."[57]

In *United States v. Moriarty*, the defendant was charged with illegal wiretapping and unlawful access to voice mail; this action was brought for a report and recommendation on defendant's motion for dismissal and consolidation of count two (illegal wiretapping) and count three (unlawful access to voice mail) of the complaint.[58] The defendant claimed that count two and three of the indictment had parallel elements under the ECPA, thus, they violated the Double Jeopardy Clause of the Fifth Amendment, and should be consolidated.[59] The government conceded that the defendant's acts "did not include intercepting or accessing information while in transmission."[60] The court agreed that the defendant had not violated § 2511 of the ECPA by his actions of accessing stored voice mail.[61] The court held, *inter alia*, that the recording of a voice mail message does not fall under § 2511 of the ECPA, because the recording does not occur during the actual transmission of the communication.[62] The court stated that there might be a claim under § 2701, because that section deals with accessing stored information, which is what a voice mail is.[63]

June Harper will argue that the voice mail message was not business related, and that under § 2511 there was no exception that would allow Magnum to monitor personal voice mail messages. June will also argue that Stowe did "intercept" her voice mail message—John had not received the message June had left before Stowe accessed it, thus, Stowe intercepted her voice mail message.

In the *Watkins* case, the court held that "a personal call may not be intercepted in the ordinary course of business under the exemption in § 2511(5)(a)(i), except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or

56. *Id.* at 1303.
57. *See* 18 U.S.C. §2511.
58. United States v. Moriarty, 962 F. Supp. 217 (D. Mass. 1997).
59. *Id.*
60. *Id.* at 221.
61. *Id.*
62. *Id.* at 220.
63. *Id.*

not.[64] In other words, a personal call may be intercepted in the ordinary course of business to determine its nature but never its contents."[65] The *Watkins* court found that the policy set in place by defendant company limited the company's ability to monitor personal calls: ". . . [Defendant] was justified in listening to that portion of the call which indicated that it was not a business call; beyond that, she was not."[66]

Magnum will most likely make two arguments in response to this. First, that the voice mail message, while personal in what was discussed, was business related because it specifically named and dealt with the conduct of a supervisor within the company.

Second, whether or not the message was personal is not of importance as long as the motivation behind the monitoring and recording of the message was not criminal or tortious. Magnum agrees that some of the content of the message was very personal for June Harper, but there was a business purpose as well. Even if the court decided that there was no business purpose, there still is no criminal or tortious intent by Harriet Stowe.

In *Bohach v. City of Reno*, the plaintiffs were police officers who sent messages to one another and to one other member of their department.[67] The defendant had access to and retrieved the messages and after learning of their contents, initiated an internal affairs investigation.[68] The court granted the planitiffs' request for a temporary restraining order; after a hearing, the restraining order was dissolved and the court refused to issue a preliminary injunction.[69] The plaintiffs' sought an interlocutory appeal of that decision, asking that the preliminary injunction be granted under Federal Rule of Civil Procedure 62 (c).[70] The court denied the plaintiffs' motion and allowed the City to proceed with its investigation.[71] The court asked, "how any 'interception,' as the word is usually understood, could be thought to have occurred here. After all, no computer or phone lines have been tapped, no conversations picked up by hidden microphones . . . ."[72] The court went on to state:

> An 'electronic communication,' by definition, cannot be 'intercepted' when it is in 'electronic storage,' because only 'communications' can be 'intercepted,' and . . . the 'electronic storage' of an 'electronic communication' is by definition not part of the communication. The treatment of

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64. *Watkins*, 704 F.2d at 583.
65. *Id.*
66. *Id.* at 584.
67. Bohach v. City of Reno, 932 F. Supp. 1232 (D. Nev. 1996).
68. *Id.* at 1233.
69. *Id.*
70. *Id.*
71. *Id.* at 1237.
72. *Id.* at 1236.

messages in 'electronic storage' is governed by [Secs.] 2701-11, not by the restrictions on 'interception' set out at [Secs.] 2501-22.[73]

For the reasons stated above, Magnum can argue that no violation of § 2511 of the ECPA occurred. All employees consented to have their telephone calls monitored. Consent is only required by one party to the communication, thus consent by June Harper herself is not necessary under § 2511.

C. *Stored Communications*

Section 2701 of the ECPA prohibits the unauthorized accessing of wire or electronic communications once stored.[74] June Harper's complaint does not specifically address a violation of § 2701. However, § 2707 of the ECPA allows for a civil action to be brought for violation of Chapter 121 of the ECPA.[75] Therefore, June Harper could argue that under § 2707 of the ECPA, she is entitled to recover from Magnum for violation of § 2701, whichever the court holds is appropriate for the damages she has allegedly suffered.

Magnum could argue that since June Harper did not raise the issue of § 2701 in her initial complaint she has waived her right to now raise the issue. Even though this is a notice pleading, Magnum will argue that Harper should have to raise each of the sections she was bringing suit under. To do otherwise would not allow Magnum the opportunity to properly prepare for this lawsuit.

June Harper will argue that notice pleading allows her some flexibility in her pleadings.[76] Because § 2707 allows a plaintiff to bring a civil action under any of the sections under the ECPA, Harper will argue that 2707 acts as an umbrella covering Sections 2701 and 2511, therefore there is no requirement to specifically plead § 2701 and the court has discretion to allow the matter to proceed under any section of the ECPA.

Magnum is the "provider"[77] of the electronic communications service at issue in this case. They have supplied the telephones, the system and "provide those users with 'the ability to send or receive' electronic com-

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73. *Id.*

74. 18 U.S.C. §2701.

75. *See* 18 U.S.C. §2707 (a).

> Any provider of electronic communication service, subscriber, or other person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate. *Id.*

76. FED. R. CIV. P. 15(b),(c).

77. *See Bohach*, 932 F. Supp. at 1236. "The City is the 'provider' of the 'electronic communications service' at issue here: the Reno Police Department's terminals, computer and software, and the pagers it issues to its personnel, are, after all, what provide those users with 'the ability to send or receive' electronic communications." *Id.*

munications."[78] As the *Bohach* court said, ". . . § 2701(c)(1) allows service providers to do as they wish when it comes to accessing communications in electronic storage. Because the City is the provider of the 'service,' neither it nor its employees can be liable under [§] 2701."[79]

D. *Cause of Action Under Invasion of Privacy*

Samuel D. Warren and Louis D. Brandeis authored *The Right to Privacy*, in 1890.[80] Over 100 years have passed and it remains one of the most notable articles on privacy. The article examined technology and its effects on the right to privacy: "It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."[81] Warren and Brandeis stated that "recent inventions and business methods call attention to the next step . . . securing to the individual . . . the right 'to be let alone'."[82] They warned that, "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops'."[83] In so writing, "they were very aware that new technology jeopardized the dignity and personality of the individual."[84]

Professor Prosser[85] classified the right to privacy into four branches of torts: intrusion upon seclusion, appropriation of name or likeness, public disclosure of private facts, and publicity placing person in false light.[86] The general principle of the invasion of privacy tort is to provide a remedy against "one who invades the right of privacy of another [to] be subject to liability for the resulting harm to the interests of the other."[87] In this case, June Harper alleged intrusion upon seclusion[88] and public

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78. *Id.*

79. *Id.*

80. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

81. *Id.*; *see also* George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U. L. REV. 521, 522 (1990) (commenting that it was Warren and Brandeis who first worried about the effects of technology upon the enjoyment of privacy).

82. *See* Warren & Brandeis, *supra* note 80, at 195.

83. *Id.*

84. *See* Warren & Brandeis, *supra* note 80, at 195.

85. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

86. RESTATEMENT (SECOND) OF TORTS § 652B,C,D,E (1977).

87. RESTATEMENT (SECOND) OF TORTS § 652A (1977). The right of privacy has been defined as the right to be let alone. Each of the four branches involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others. The restatement specifically says "nothing in this Chapter is intended to exclude the possibility of future developments in the tort law privacy." *Id.*

88. RESTATEMENT (SECOND) OF TORTS § 652A(2) (1977). "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private

disclosure of private facts.[89]

1. *Intrusion Upon Seclusion*

Intrusion upon seclusion occurs when one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns. A party is subject to liability for this invasion if the intrusion would be highly offensive to a reasonable person.[90] Intrusion issues arise in employment situations when an employer uses various surveillance methods to monitor employees' behavior in the workplace.[91] The intrusion must be into private affairs.[92] When presented with an intrusion into seclusion issue, a court will measure the degree of intrusion into the employee's privacy against the employer's need to maintain an effective workforce.[93] The intrusion must be intentional, which avoids a strict liability standard.[94] "Using such mechanical devices as an X-ray, camera, audio taping device, as well as hearing or overseeing private matters intentionally and without permission to intrude upon seclusion, may be actionable."[95]

June Harper will argue that Harriet Stowe, and, thus, Magnum, intruded upon her seclusion when: (1) Stowe listened to John Harper's voice mail longer than necessary to determine the message was personal and concerned June's private affairs and concerns, and (2) Stowe recorded the message June left for John on her own recorder. Given the

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affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.*

89. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. *Id.*

90. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

> This form of invasion of privacy is not dependent upon publication, but consists solely of an intentional interference with an individual's interest in solitude or seclusion. Examples given of this type of intrusion are: 'investigation or examination into private concerns, as by opening one's private and personal mail, searching the individuals safe or wallet, examining one's private bank account, or compelling an individual by a forged court order to permit inspection of his personal documents.

Id.

91. GEORGE B. TRUBOW, PRIVACY LAW AND PRACTICE VOL. 1 § 9.06 (1987) [hereafter TRUBOW].

92. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977).

93. *See* Cort v. Bristol-Myers Co., 431 N.E.2d 908 (Mass. 1982); *accord* Eddy v. Brown, 715 P.2d 74 (Okla. 1986); *see also* TRUBOW, *supra* note 91.

94. *See* TRUBOW, *supra* note 91. "To walk into an office where a subordinate or coworker is disrobing (without reason to believe such is occurring) would not constitute an *intentional* intrusion on seclusion. In short a negligent invasion of privacy is not envisioned by the Restatement for the intrusion tort." *Id.*

95. *Id.*

nature of the contents of the message, the intrusion would be highly offensive to a reasonable person. Magnum will argue that Stowe had a legitimate business reason for listening to the message.

In *Lovgren v. Citizens First National Bank*[96] the Illinois Supreme Court addressed the issue of intrusion upon seclusion. The issue presented was whether an advertisement in a newspaper which claimed that the owner of farmland was selling his property, without the owner's knowledge or consent, constituted an invasion of the owner's privacy.[97] The owner of the farmland brought a cause of action against the bank, debtor, for violating his privacy under the tort of intrusion upon seclusion.[98] The plaintiff obtained a second mortgage on his farm from the defendant and as time passed the plaintiff was unable to make his mortgage payments and subsequently, many at the bank were encouraging the plaintiff to sell his farm.[99] The plaintiff refused to sell and requested additional time to pay his obligations, but a few months later ads were placed in the local newspapers and handbills were passed out stating that the plaintiffs farm was to be sold at a public auction.[100] No such sale had ever been scheduled and the advertisements were done without the plaintiffs knowledge or consent.[101] As a result, the plaintiff filed suit against the defendant and alleged, as damages, that he had suffered mental anguish and also that it was practically impossible to obtain refinancing of his mortgage loan.[102]

In this case, the court recognized the importance of privacy as a necessary human value and also stated that there are circumstances under which it should enjoy the protection of law.[103] The court held that there must be a highly offensive prying into the physical boundaries or affairs of another person.[104] The distinction was made that this tort was not based on publication or publicity, but rather the offensive prying into the private domain of another.[105] Examples given by the court included invading someone's home, an illegal search of someone's shopping bag in a store, eavesdropping by wiretapping, peering into the windows of a private home, and persistent unwanted telephone calls.[106] Ultimately, the

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96. Lovgren v. Citizens First Nat'l Bank of Princeton, 534 N.E.2d 987 (Ill. 1989).

97. *Id.* at 987.

98. *Id.*

99. *Id.* at 988.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* "We recognize the right to privacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law." *Id.*

104. *Id.* at 989.

105. *Id.*

106. *Id.*

court held that there was not an intrusion upon seclusion because the defendants' act of publication caused the harm, not offensive prying.[107] However, the court recognized that the plaintiff might have a cause of action under the tort of public disclosure of private facts.[108]

2. *Public Disclosure of Private Facts*

Public disclosure of private facts occurs when one gives publicity to a matter concerning the private life of another to a third party, and the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public.[109] Typically, in the employment setting, an employee alleges that the employer has disclosed medical or psychological data, or performance-related information to a third party.[110] "The publicity tort requires: (1) a public disclosure, (2) of private facts, and (3) the disclosure of which is offensive and objectionable to the person of ordinary sensibilities."[111] Mere publication of the information is not enough; *publicity* of the information is the essential element.[112] "Truth is *not* a defense to a publicity tort action."[113] In *Beard v. Akzona*, an employee brought suit against her former employer for an invasion of privacy from the disclosure of contents of wiretapped telephone communications.[114] The court stated that the issue was whether the information obtained through the wiretap was publicized.[115] "Courts have held that disclosure of private facts . . . to a small group of co-workers[116] or management personnel,[117] or to 'the community of employees of staff meetings'[118] is insufficient to constitute publicity."[119] "The public disclosure, in order to be actionable, must be of private facts to which the public has no legitimate concern."[120] The private facts publicized must 'be highly offensive to a reasonable person.'[121]

June Harper will argue that Magnum invaded her privacy by giving publicity to her private life. After Stowe recorded June's message, she

107. *Id.*
108. *Id.*
109. RESTATEMENT (SECOND) OF TORTS § 652D (1977).
110. *See* TRUBOW, *supra* note 91.
111. RESTATEMENT (SECOND) OF TORTS § 652D (1977).
112. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977) (emphasis added).
113. International Union v. Garner, 601 F. Supp. 187 (M.D. Tenn. 1985).
114. Beard v. Akzona, Inc., 517 F. Supp.128 (E.D. Tenn. 1981).
115. *Id.*
116. *Eddy*, 715 P.2d at 78; Dzierwa v. Michigan Oil Co., 393 N.W.2d 610 (Mich. Ct. App. 1986).
117. *Beard*, 517 F. Supp. at 133.
118. Wells v. Thomas, 569 F. Supp. 426, 437 (E.D. Pa. 1983).
119. *See* TRUBOW, *supra* note 91.
120. *Id.*
121. *Id.*

played it for three other employees of Magnum: the company's personnel director, its general counsel and the Chief Operating Officer. Shortly after that meeting, word of the contents of June's message spread throughout Magnum. John Harper was subjected to sarcastic comments regarding his sister. June's message was highly personal and the spreading of its contents among Magnum employees was highly offensive to a reasonable person. The content of the message was not of legitimate concern to Magnum's employees. Even if the allegations against Randy Morton were of concern to some of Magnum's employees, particularly the three that Stowe played the tape for, those employees had a duty to keep the contents from being revealed to the rest of Magnum's employees.

BRIEF FOR THE PETITIONER

No. 98-513

IN THE
SUPREME COURT OF THE
STATE OF MARSHALL

JUNE HARPER,
Plaintiff-Appellant,
v.
MAGNUM CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE FIRST DISTRICT
COURT OF APPEALS FOR THE STATE OF MARSHALL

BRIEF FOR PLAINTIFF-APPELLANT

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QUESTIONS PRESENTED

I. WHETHER THE FIRST DISTRICT COURT OF APPEALS FOR THE STATE OF MARSHALL INCORRECTLY HELD THAT JUNE HARPER FAILED TO ESTABLISH A CAUSE OF ACTION UNDER THE ELECTRONIC COMMUNICATIONS PRIVACY ACT.

II. WHETHER THE FIRST DISTRICT COURT OF APPEALS FOR THE STATE OF MARSHALL INCORRECTLY HELD THAT JUNE HARPER FAILED TO ESTABLISH A CAUSE OF ACTION FOR TORTIOUS INVASION OF PRIVACY.

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OPINIONS AND JUDGMENTS BELOW

The Opinion and Order of the Howard County Circuit Court granting Magnum Corporation's Motion for Summary Judgment and holding that June Harper failed to establish a cause of action under the Electronic Communications Privacy Act or for tortious invasion of privacy is unreported. The Opinion and Order of the First District Court of Appeals for the State of Marshall, affirming the Circuit Court's opinion on all claims, is contained in the Record on Appeal at pages 1-7, but is unreported.

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted pursuant to § 1020(2) of the Rules for the Seventeenth Annual John Marshall National Moot Court Competition in Information and Privacy Law.

STATUTORY AND RESTATEMENT PROVISIONS

The relevant provisions of the Electronic Communications Privacy Act of 1986 (Electronic Comm. Privacy Act of 1986, Pub L. No. 99-508, 100 Stat. 1848 (codified as amended in various sections of Title 18 of the U.S. Code) and the Restatement of Torts (RESTATEMENT (SECOND) OF TORTS §§ 652A, 652B, and 652D (1977)) are set forth in Appendices A and B, respectively.

STATEMENT OF THE CASE

June Harper seeks redress for an intrusion into her personal life. Harper challenges Magnum Corporation's interception of a voice mail message that she believed only her brother would hear. Her goal is to enforce a basic right that underlies this country's fundamental structure—the right to keep one's personal life private.

On the evening of April 1, 1997, June Harper ("June") was sexually assaulted by Randy Morton, an employee of Magnum Corporation ("Magnum"). (R. at 4.) June had been introduced to Morton by her brother John Harper ("John"), (R. at 3.) who is also an employee of Magnum. (R. at 1.) On the evening of April 1st, June and Morton planned to have their first date. (R. at 3.) Morton arrived at June's apartment, consumed several alcoholic beverages, and became intoxicated. (R. at 4.) Morton then started to forcibly kiss June, grope at her breasts, and probe other intimate portions of her body in a highly offensive manner. (R. at 4.) After repeated attempts, June was able to terminate this agonizing encounter by convincing Morton to leave her apartment. (R. at 4.)

June became distraught over the assault and, the next morning, called her brother at work seeking his advice. (R. at 4.) June enjoyed a close relationship with her brother and often went to him for guidance. (R. at 3.) On this occasion, however, June was unable to speak with John because he was away from his desk. (R. at 4.) Instead, June left a voice mail message for John that recounted the details of the assault. (R. at 4.) June also described how Morton talked about similar conduct with other women, including female co-workers. (R. at 4-5.)

June Harper's claim concerns a monitoring policy announced by Magnum four years before she left the message for her brother. (R. at 2.) The policy was posted in the employee lounge and stated that, although personal calls would not be monitored, Harriet Stowe, Magnum's Chief Information Officer ("CIO"), would randomly monitor business telephone calls to determine whether the telephone service was being abused or if calls were being properly handled. (R. at 2-3.) The policy does not indicate that voice mail would be monitored. Only telephone calls are included within the policy. (R. at 3.) In addition to her monitoring duties, Stowe is in charge of Magnum's information system, which includes voice mail. (R. at 1, 3.)

To access the voice mail system, an employee must dial the system and enter a personal password. (R. at 3.) The employee can then listen to or forward messages. (R. at 3.) When someone calls into the voice mail system, either from within or outside Magnum, the caller receives a recorded greeting with instructions on how to use the system, but no warning that the message may be monitored. (R. at 1-2.)

Despite its policy, Stowe rarely monitored telephone calls. (R. at 3.) Magnum's employees were aware that Stowe had not monitored phone calls for more than a year, and, in fact, no employee received a warning notice for violating telephone privileges. (R. at 3.) On April 1st, however, Stowe decided that it was time to use the policy. (R. at 5.)

After June Harper left the message for her brother, Stowe attempted to call John Harper. (R. at 5.) Upon reaching Mr. Harper's voice mail,

Stowe received a message indicating that it was full. (R. at 5.) Stowe became curious and accessed John's voice mail by using her monitor's password. (R. at 5.) Stowe not only listened to John Harper's messages, but she tape-recorded June's message with her own recorder as well. (R. at 5.)

Stowe replayed June's message for Magnum's personnel director, its general counsel, and the Chief Operating Officer. (R. at 5.) After discussing Morton's conduct, the group decided not to discipline Morton. (R. at 5.) Although the group denies disclosing the contents of June's message, Magnum employees became aware of both the call and its contents. (R. at 5.) Some employees even made insulting remarks about June Harper to her brother. (R. at 5.)

In August 1997, June Harper filed suit in the Howard County Circuit Court seeking damages on three counts. First, Harper alleged that Magnum violated the Electronic Communications Privacy Act (Electronic Comm. Privacy Act of 1986, Pub L. No. 99-508, 100 Stat. 1848 (codified as amended in various sections of Title 18 of the U.S. Code) ("ECPA" or "Act") by accessing the voice mail message left for her brother. (R. at 6.) The second and third counts sought damages for invasion of privacy by intrusion into seclusion and publication of private fact. (R. at 6.)

Magnum filed a Motion for Summary Judgment, which was granted by the Circuit Court. (R. at 1.) The Circuit Court held that, under the ECPA, Magnum was entitled to monitor employee voice mail. (R. at 6.) Additionally, the court determined that the privacy claims failed because June could not have an expectation of privacy in a voice mail message, and even if there was private information involved, there was insufficient publication of that information. (R. at 6.)

June Harper appealed the Circuit Court's decision to the First District Court of Appeals for the State of Marshall. (R. at 1.) The Court of Appeals affirmed the Circuit Court's decision and stated that when the conduct of a supervisory employee is the subject of a call, the ECPA permits the employer to monitor that call. (R. at 6-7.) The court further concluded that Harper's invasion of privacy claims failed because she consented to leaving a voice mail message and there was insufficient publication of private fact because the contents of her message were only disclosed to Magnum employees. (R. at 7.)

On June 15, 1998, this Court granted June Harper leave to appeal the decision of the Appellate Court. The Order Granting Leave to Appeal states that the issues to be addressed are whether June Harper failed to establish causes of action for a violation of the ECPA or for tortious invasion of privacy.

SUMMARY OF THE ARGUMENT

I. THE ELECTRONIC COMMUNICATIONS PRIVACY ACT

The Court of Appeals erred in affirming the decision of the Circuit Court, which held that Magnum was entitled to summary judgment because June Harper failed to establish a cause of action under the ECPA. The ECPA provides for a civil cause of action against any entity that intentionally accesses a stored communication without consent. (Electronic Comm. Privacy Act of 1986, Pub L. No. 99-508, 100 Stat. 1848 (codified as amended in various sections of Title 18 of the U.S. Code). Because Magnum's act of accessing and listening to the contents of June Harper's voice mail message violated the ECPA's elements, the Appellate Court's decision upholding summary judgment should be reversed.

In drafting the ECPA, Congress intended to protect a broad category of stored communications, including voice mail messages. When Harriet Stowe used her monitor's password to gain entry to John Harper's voice mail messages, she intentionally accessed a stored communication. This access further violated the ECPA because Magnum failed to obtain any consent, express or implied, to listen to June Harper's personal voice mail message left for her brother.

A decision reversing the Appellate Court is also appropriate because Magnum did not have a legitimate business interest in monitoring June Harper's voice mail message. June Harper's message related to a personal matter that did not affect Magnum. Although June Harper's message discussed a Magnum employee, it did not discuss an employee acting on behalf of Magnum. Accordingly, the Appellate Court's decision should be reversed and remanded to the Circuit Court for a trial on the merits.

II. INVASION OF PRIVACY

The Court of Appeals was incorrect in holding that June Harper did not establish a cause of action for invasion of privacy. The invasion of privacy torts will render Magnum liable to June Harper if it intruded upon her seclusion or publicized her private facts. By listening to the contents of June's personal voice mail message and broadcasting the details of that message to its employees, Magnum has violated June Harper's privacy in a most egregious manner.

June Harper's message contained a description of an unwanted sexual encounter. These are the types of intimate facts that, if discovered, would cause a reasonable person to become offended. June Harper left a voice mail message with the expectation that her brother would be the only person to hear its contents. When Magnum entered John Harper's

voice mail and retrieved June's message, it intruded upon a place where June Harper secluded her private facts.

Magnum also disregarded June Harper's privacy by publicizing the contents of her message to its employees absent a privilege to do so. June's message centered on a highly personal incident that did not concern Magnum or its employees. When Magnum took this information and conveyed it to others, it became liable for an invasion of privacy by the publication of private facts. Thus, this Court should reverse and remand the Appellate Court's decision to the Circuit Court for a trial on the merits.

ARGUMENT

I. THE ELECTRONIC COMMUNICATIONS PRIVACY ACT BARS MAGNUM FROM ACCESSING, WITHOUT CONSENT, THE CONTENTS OF A STORED VOICE MAIL MESSAGE THAT PERTAIN SOLELY TO A PERSONAL MATTER OUTSIDE THE SCOPE OF MAGNUM'S BUSINESS.

The Court of Appeals erred in upholding summary judgment for Magnum. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A party is entitled to judgment as a matter of law when the non-moving party has failed to establish an essential element to the case. *Celotex*, 477 U.S. at 323. The facts presented by June Harper are not in dispute. (R. at 1.) A dispute does exist, however, as to whether the lower court correctly applied the ECPA to these facts. When the facts are properly analyzed, the only logical conclusion is that Magnum violated the ECPA and summary judgment was inappropriate as a matter of law.

The ECPA forbids any person or entity from accessing, without consent, a stored wire or electronic communication. 18 U.S.C. § 2701(a)(2) (1998). Both the plain language and legislative history of the Act indicate Congress's intent to protect the privacy of voice mail messages. *See* S. Rep. No. 99-541, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. at 3555, 3557. Although the ECPA permits routine business monitoring, Magnum had no legitimate business interest in June Harper's message. The message was nothing more than an account of a highly personal incident. When Magnum intentionally retrieved this message from John Harper's voice mail, without either John or June Harper's consent, it violated the ECPA. The decision of the Court of Appeals, therefore, should be reversed and remanded to the Circuit Court for a trial on the merits.

II. THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE ECPA'S PLAIN LANGUAGE AND LEGISLATIVE HISTORY SAFEGUARD PRIVACY INTERESTS IN VOICE MAIL MESSAGES.

The ECPA provides for civil causes of action against any person or entity that "intentionally exceeds an authorization . . . and thereby obtains . . . access to a wire or electronic communication while it is in electronic storage. . . ." 18 U.S.C. § 2701(a)(2) (1998). *See also* 18 U.S.C. § 2707(a) (1998). "Electronic storage" is defined as "any temporary, intermediate storage of a wire or electronic communication incidental to the . . . transmission. . . ." 18 U.S.C. § 2510 (17) (a) (1998). The plain language of these provisions indicates that Congress cast a broad net to encompass a wide array of stored communications. *See generally* Robert W. Kastenmeier et al., *Communications Privacy: A Legislative Perspective*, 1989 WIS. L. REV. 715, 728 (1989). The lower court failed to properly interpret the breadth of the ECPA's protections.

In cases of statutory interpretation, courts must first assume that the plain meaning of the statute's language accurately expresses the legislative purpose. *Hughey v. United States*, 495 U.S. 411, 415 (1990); *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). When Magnum entered John Harper's voice mail and listened to June Harper's private message, it illegally accessed a stored communication under the plain meaning of the ECPA. Any assertion by Magnum that voice mail is not protected ignores Congress's intent as evidenced in the ECPA's definitions.

Voice mail messages are wire communications in electronic storage. Michael S. Leib, *E-Mail and the Wiretap Laws: Why Congress Should Add Electronic Communication to Title III's Statutory Exclusionary Rule and Expressly Reject a "Good Faith" Exception*, 34 HARV. J. ON LEGIS. 393, 407-08 n.102 (1997). The process of leaving a voice mail message begins as a telephone call, which is recognized as a "wire communication." *See United States v. Hall*, 488 F.2d 193, 197 (9th Cir. 1973). *See also* 18 U.S.C. § 2510(1) (1998) (defining "wire communication."). The call reaches the voice mail system and the caller leaves an audible message. STEPHEN A. CASWELL, E-MAIL 191 (1st ed. 1988). The message then remains in electronic storage until retrieved by the recipient. *Id.*

Magnum's voice mail system operates in this exact manner. (R. at 1-2.) When June Harper left a message for her brother, her act of calling and leaving a message fulfilled the statutory definitions for "wire communication" and "electronic storage" provided by the ECPA. Also, § 2701 is designed to guard a broad class of stored wire and electronic communications termed "electronic mails." H.R. Rep. No. 99-647, at 22 (1986). Voice mail messages are included within this term. *Id.* Congress's intent to protect voice mail under the ECPA must be accorded great weight

in interpreting the Act's provisions. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). The lower court ignored this basic principle of statutory construction when it held that June Harper's message was not protected under the plain meaning of the ECPA.

If the Act's language is construed as ambiguous, this Court must look to legislative history to determine the correct application of the ECPA. *See United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989); *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941). When the ECPA's legislative history is examined, it is apparent that the definitions in the Act were formulated to reach existing and future telecommunications, although specific technologies are not named. *See* S. Rep. No. 99-541, at 3 (1986), reprinted in 1986 U.S.C.C.A.N. at 3555, 3557. Without these broad statutory definitions, new technological developments pose a severe threat to individual privacy. *Cf.* George J. Church, *Newt's Day of Deliverance But an Intercepted Cellular Call Gives Him and the Democrats More Ethical Problems*, TIME, Jan. 20, 1997, at 30; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

The ECPA's legislative history, and the logical interpretation of that history, addresses the possibility that the right to keep one's words private will be eroded as new technological devices surpass existing protections. 132 Cong. Rec. S14449 (daily ed. Oct. 1, 1986) (statement of Sen. Leahy); 132 Cong. Rec. H4046 (daily ed. June 23, 1986) (statement of Rep. Kastenmeir). If the right to privacy is to remain a bulwark for individual freedom, then "continual and increasing use of such devices [to intrude upon privacy] . . . cannot be tolerated in a free and civilized society." *Miller v. National Broad. Co.*, 232 Cal. Rptr. 668, 679 n.7 (Cal. Ct. App. 1986). *See also Afro-American Pub. Co. v. Jaffe,* 366 F.2d 649, 653 (D.C. Cir. 1966). The legislative history of the ECPA defends privacy from technological advances and thus, is the only valid method of interpreting the Act. Derek D. Wood, Comment, *The Emergence of Cellular and Cordless Telephones and the Resulting Effect on the Tension between Privacy and Wiretapping*, 33 GONZ. L. REV. 377, 393-94 (1998).

The plain language of the ECPA and its legislative history compel the conclusion that the Act barred Magnum's access of June Harper's voice mail message. The Court of Appeals, therefore, erroneously determined that June Harper's message was not protected from Magnum's intrusion into her privacy. Because of Magnum's blatant violation of the ECPA, June Harper should be permitted to seek redress in a trial on the merits.

III. MAGNUM'S ACCESSING, RECORDING, AND LISTENING TO THE CONTENTS OF JUNE HARPER'S VOICE MAIL MESSAGE VIOLATED § 2701 OF THE ECPA BECAUSE IT WAS AN INTENTIONAL ACCESS OF A STORED COMMUNICATION WITHOUT CONSENT.

Section 2701 of the ECPA permits a court to hold Magnum liable to June Harper if it (1) intentionally accessed a stored wire or electronic communication (2) without consent. 18 U.S.C. § 2701(a) (1998); *United States v. Moriarty*, No. 96-30055-FHF, 1997 U.S. Dist. LEXIS 6678, at *4 (D. Mass. Apr. 3, 1997). When Stowe used her monitor's password to obtain the contents of June Harper's stored voice mail message, without the consent of June or John Harper, she violated the ECPA. (R. at 5.)

June Harper's mere act of leaving a voice mail message on Magnum's system did not provide consent, express or implied, to have her personal message accessed by Magnum. Magnum's monitoring policy acknowledged that it did not have blanket consent to monitor personal telephone calls. (R. at 3.) Magnum ignored its own policy when it intentionally accessed and tape-recorded June Harper's message. By doing this, Magnum deprived June Harper of "'the most comprehensive of rights and the right most valued by civilized [people],' namely 'the right to be let alone.'" *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967).

A. MAGNUM'S ACT OF DIALING INTO JOHN HARPER'S VOICE MAIL TO MONITOR AND RECORD JUNE HARPER'S MESSAGE IS AN INTENTIONAL ACCESS OF A STORED COMMUNICATION.

The first element of § 2701 requires that a party intentionally access a stored wire or electronic communication. 18 U.S.C. § 2701(a) (1998). Magnum intended to access a stored communication when it took positive steps to enter John Harper's voice mail and listen to June's message. By reversing the Court of Appeals, this Court will assure that June Harper's rights to her private words and thoughts remain inviolable.

To prove intent under the ECPA, it is necessary to show that Magnum took affirmative steps to obtain the contents of June Harper's voice mail message. *Wesley College v. Pitts*, 974 F. Supp. 375, 381 (D. Del. 1997). The court in *Wesley College* stated that affirmative behavior is present, for example, if someone purposefully enters an e-mail account to read messages. *Id.* at 382. The process of entering an e-mail account is no different from Magnum's access of June Harper's voice mail message.

Harriet Stowe used her monitor's password to access and listen to John Harper's voice mail messages. (R. at 5.) This conduct is hardly

inadvertent. It comprises a series of affirmative steps to access a stored communication that violates the ECPA. *Wesley College*, 974 F. Supp. at 382. *See also Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 816 F. Supp. 432, 442-43 (W.D. Tex. 1993), *aff'd*, 36 F.3d 457 (5th Cir. 1994). Moreover, it is not required to show that Magnum intended to specifically access June Harper's message, it is enough to show that it intended to access a stored communication. *Cf. U.S. v. Reyes*, 922 F. Supp. 818, 837 (S.D.N.Y. 1996). Magnum had this intent when it entered John Harper's voice mail.

In *Reyes,* the defendant was indicted for drug trafficking based on evidence obtained through a search warrant. *Id.* at 821. During the search, agents seized a pager and retrieved numbers from its memory. *Id.* at 834-35. Although the agents were not looking for a particular number, the court held that their actions were illegal under § 2701. *Id.* at 837. In in rendering its decision, the court in *Reyes* looked to the plain language of the ECPA, which requires only the intentional access of a stored communication, without regard to the intent to access a specific message. *Id. See also* 18 U.S.C. § 2701(a) (1998).

Similar to the agents' motives in *Reyes*, Magnum's lack of intent to specifically access June Harper's message is irrelevant. The only relevant consideration is that Magnum intentionally accessed a stored communication when it entered John Harper's voice mail and listened to June's message. Because of this intentional access, Magnum's conduct meets the statutory requirements for liability under section 2701 of the ECPA. 18 U.S.C. § 2701(a) (1998).

The ECPA does not permit unrestrained exploration into the private messages of any person. Magnum disregarded the ECPA when it broke into John Harper's voice mail and stole June's intimate thoughts and words by listening to and tape-recording her message. Magnum must be held liable for this violation.

B. MAGNUM VIOLATED THE ECPA BECAUSE JUNE HARPER'S ACT OF LEAVING A VOICE MAIL MESSAGE ON MAGNUM'S SYSTEM DOES NOT INDICATE EXPRESS OR IMPLIED CONSENT TO HAVE HER MESSAGE ACCESSED BY ANY PARTY OTHER THAN ITS INTENDED RECIPIENT.

When Magnum retrieved June Harper's voice mail message without her consent, it became liable under the ECPA. Further, June Harper's mere act of leaving a voice mail message on Magnum's system did not give Magnum implied consent to listen to her message. Magnum, however, seeks to create consent by passing a magic wand over June Harper's actions in an attempt to legitimize its violation of the ECPA.

Under the ECPA, Magnum was required to obtain consent before it could legally access June Harper's message. 18 U.S.C. § 2701(a)(1) (1998). Sufficient consent stems from the express assent of one party to a communication to have the communication overheard. *U.S. v. Harpel*, 493 F.2d 346, 349 (10th Cir. 1974) (citing *Rathbun v. U.S.*, 355 U.S. 107, 111 (1957). June Harper called Magnum to leave a message for her brother, (R. at 4.) not Harriet Stowe or other Magnum employees. Accordingly, only June and John Harper are capable of extending to Magnum consent to intercept the transmission of electronic communications. *See Harpel*, 493 F.2d at 349. Neither June nor John Harper gave Magnum consent.

Furthermore, consent cannot be implied from June Harper's act of leaving a message on Magnum's voice mail system. Although June Harper left a message for a Magnum employee, the message was personal, not business related. Magnum understood that it did not have blanket consent to monitor all communications when it exempted personal calls from its policy. (R. at 3.) Stowe, however, ignored Magnum's policy by listening to and tape-recording a message that was clearly personal. The instant Stowe realized June Harper's message was personal, she was obligated to cease listening. *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 584 (11th Cir. 1983).

The Eleventh Circuit, in *Watkins*, held that intercepting a personal call is legal if the purpose of the interception is to determine the call's nature, but not its content. *Id.* at 582. In fact, an employer must "cease listening as soon as she [has] determined that the call [is] personal. . . ." *Id.* at 584. The first words of June Harper's message were, "[s]orry to bother you at work but I've had an experience that has really freaked me out and I need some advice on how to handle the situation." (R. at 4.) It was immediately apparent that the message was personal and had no relation to Magnum. At that point, Stowe was required to cease listening to the message. *Watkins*, 704 F.2d at 584. Her irreverence for Magnum's policy and the ECPA, if not common decency, resulted in a violation of the ECPA. In addition, because June Harper was not aware that Magnum could monitor her message, stretching the interpretation of her actions in an attempt to construct implied consent becomes unfathomable. *Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992); *Campiti v. Walonis*, 611 F.2d 387, 396 (1st Cir. 1979).

In *Deal*, the court refused to hold that consent could be implied from the mere existence of a monitoring policy. *Deal*, 980 F.2d at 1157. The defendants argued that the plaintiff had impliedly consented to tape-recording when she was informed that all calls might be monitored. *Id.* at 1156-57. The court rejected this argument and held that, without more, an employee's knowledge that monitoring capability exists is insufficient to create consent. *Id.* at 1157 (citing *Watkins*, 704 F.2d at 581). Because

June Harper had no knowledge of Magnum's monitoring policy, the circumstances in the instant case are more compelling than those in *Deal.*

Even with the acknowledgment that it is possible, yet difficult, to imply blanket consent from an employee, it is virtually impossible to imply consent from a non-employee such as June Harper. Jonathan A. Segal, *The Perils of High Tech Talk,* HRMAGAZINE, June 1, 1997, at 159. The Record does not indicate that June Harper knew that Magnum had the right to monitor all messages left on their system. The monitoring policy was posted in the employee lounge and no warning prompt disclosing the monitoring policy was played when a caller reached the voice mail system. (R. at 1-2.) Moreover, by its own terms, Magnum's policy applies only to telephone calls, not voice mail messages. (R. at 2-3.) The policy language negates any inference that Magnum could obtain June's implied consent. *Deal v. Spears,* 980 F.2d 1153, 1157 (8th Cir. 1992); *Watkins v. L.M. Berry & Co.,* 704 F.2d 577, 581 (11th Cir. 1983); *Jandak v. Village of Brookfield,* 520 F. Supp. 815, 820 (N.D. Ill. 1981).

Magnum failed to obtain any consent before it accessed June Harper's voice mail message. "Consent under [the ECPA] is not to be cavalierly implied[,]" but this is exactly what Magnum sought to do by attempting to interpret Jane Harper's action as a manifestation of consent. *Watkins,* 704 F.2d at 581. Magnum failed to satisfy the ECPA's consent element and, therefore, summary judgment was inappropriate.

IV. CONTRARY TO THE CIRCUIT COURT'S OPINION, § 2511 OF THE ECPA DID NOT PERMIT MAGNUM TO MONITOR JUNE HARPER'S VOICE MAIL MESSAGE BECAUSE THE MESSAGE WAS RELATED TO A PERSONAL MATTER THAT DID NOT AFFECT MAGNUM'S BUSINESS OPERATIONS.

This Court should not be persuaded by the Circuit Court's interpretation of the ECPA in this instance and its facile conclusion that "the ECPA permit[s] employers to monitor employee telephone calls." (R. at 6.) While Magnum may monitor telephone calls for legitimate business purposes, it must not monitor personal messages that do not impact Magnum's business. *Epps v. St. Mary's Hosp. of Athens, Inc.,* 802 F.2d 412, 416 (11th Cir. 1986). *See also* Thomas R. Greenberg, Comment, *E-Mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute,* 44 AM. U. L. REV. 219, 249 (1994). Because June Harper's message had no relationship to its business, Magnum lacked authority to access and tape-record the message.

Section 2511 of the ECPA permits monitoring if it is "in the normal course of . . . employment . . . [and] is a necessary incident to the rendition of . . . [the] service or to the protection of the rights or property of the provider. . . ." 18 U.S.C. § 2511(2)(a)(i) (1998). In interpreting § 2511,

the courts have allowed monitoring only under specific situations that directly relate to the business of the monitoring entity. *See, e.g., Briggs v. Am. Air Filter Co.*, 630 F.2d 414, 420 (5th Cir. 1980); *James v. Newspaper Agency Corp.*, 591 F.2d 579, 581 (10th Cir. 1979). The circumstances surrounding Magnum's access of June Harper's message do not fit within any recognized business purpose.

In *Briggs*, an employer began listening to employee telephone calls when a supervisor suspected that confidential business information was being disclosed. *Briggs*, 630 F.2d at 416. In discussing the employee's ECPA claim, the court held that this form of monitoring was permissible because the employer had a legitimate interest in protecting its proprietary information. *Id.* at 420. *See also James*, 591 F.2d at 581. Unlike the employer in *Briggs*, Magnum did not have a legitimate business interest in the content of June Harper's voice mail message. Indeed, no such purpose was alleged in the Record. The content of June Harper's voice mail message was an account of a sexual assault, (R. at 4-5.) an activity undoubtedly outside the scope of Magnum's business. The fact that June Harper's personal message discussed one of Magnum's supervisory personnel is irrelevant.

The Eleventh Circuit in *Epps*, declined to hold that under § 2511, a business could monitor personal calls that include discussions of supervisory personnel. *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412, 416-17 (11th Cir. 1986). The court reasoned that although a call may be personal, its content must directly relate to supervisory personnel acting on behalf of the employer. *Id.* at 417. June Harper's message did not discuss Morton in his official capacity as a Magnum supervisor. Rather, the message related a brief description of Morton's improper personal behavior with Ms. Harper.

The effect of the lower court's decision would expand the scope of an employer's legitimate interests to include intercepting transmissions that include complete details of any personal voice mail message. "Such a broad reading [of section 2511] 'flouts the words of the statute and establishes an exemption that is without basis in the legislative history' of title III." *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582 (11th Cir. 1983) (quoting *Campiti v. Walonis*, 611 F.2d 387, 392 (1st Cir. 1979). Magnum realized it did not have an interest in June Harper's incident with Morton when it decided not to punish Morton. (R. at 5.) Magnum is now attempting to turn back the hands of time to find a legitimate business interest that did not exist when it violated June Harper's privacy.

The lower court incorrectly held that Magnum's access of June Harper's message complied with the ECPA. A legitimate business interest encompasses only those situations that directly affect Magnum's business. Any effort to expand this interest into a big-brother-like omnipresence grants Magnum a power over each of its employees' personal

life. This Court is therefore urged to hold that June Harper's personal voice mail message is protected by the ECPA and to remand this cause of action to the Circuit Court for a trial on the merits.

V. THE COURT OF APPEALS INCORRECTLY HELD THAT MAGNUM DID NOT INTRUDE UPON JUNE HARPER'S SECLUSION OR PUBLICIZE HER PRIVATE FACTS WHEN IT ACCESSED THE CONTENTS OF A PRIVATE MESSAGE AND DISCLOSED THAT INFORMATION TO ITS EMPLOYEES.

The Court of Appeals erred in upholding summary judgment for Magnum on June Harper's invasion of privacy claims. The Marshall courts, in adopting the Restatement of Torts, (R. at 5.) have recognized that a right to privacy is violated by an unreasonable intrusion upon an individual's seclusion ("intrusion tort"), or by unreasonable publicity given to a person's private life ("publication tort"). RESTATEMENT (SECOND) OF TORTS §§ 652B & 652D (1977). Magnum flagrantly interfered with June Harper's privacy when it accessed and publicized the contents of her message to its employees.

To hold Magnum liable under these tortious acts, June Harper must show that (1) the information obtained is private or personal, and (2) the intrusion or publication is highly offensive to a reasonable person. *Id.* Additionally, the tort of intrusion requires an invasion into private affairs. *Id.* § 652B (1977). The tort of publication also requires the unreasonable publicity of private facts. *Id.* § 652D (1977). June Harper's message involved the intensely personal details of an unprovoked sexual encounter. When Magnum listened to, tape-recorded, and conveyed the details of this message to its employees, it engaged in tortious interference with rights protecting an individual from intrusive and publicizing acts.

Additionally, the Court of Appeals erred in concluding that June Harper could not claim an invasion of privacy because she consented to leaving a voice mail message. (R. at 7.) Unlike June Harper's ECPA claim, consent is not an element of either the intrusion or publication torts. Even if consent was relevant to June Harper's tort claims, she did not consent to the invasive abuse of Magnum's monitoring policy. The mere act of leaving a message on Magnum's voice mail system, without more, is an inadequate basis for consent. *See, e.g., Deal v. Spears,* 980 F.2d 1153, 1157 (8th Cir. 1992). The decision of the lower court, therefore, should be reversed and remanded to the Circuit Court for a trial on the merits.

A. June Harper's Voice Mail Message Contained Private Information that would Cause a Reasonable Person to Become Highly Offended if it was Discovered

The first element of both the intrusion and publication torts requires an intrusion into, or disclosure of a private fact that would cause a reasonable person to become offended. RESTATEMENT (SECOND) OF TORTS §§ 652A, 652D (1977); *see also Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1993); *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 682 (Tex. 1976). The contents of June Harper's voice mail message related to an unwanted sexual encounter that caused her great distress. When Magnum listened to, tape-recorded, and replayed June Harper's message, it uncovered and disseminated the type of embarrassing information that any person would seek to keep private. Because of Magnum's disregard for June Harper's privacy, she should be permitted to seek redress from Magnum.

The cornerstone of the right to privacy is the ability to seclude the details of private life from unwanted eyes and ears. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 215 (1890). No segment of life is more private than rights pertaining to sexual relations. *See Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990). Courts have regarded this as the utmost private aspect of human life that should be protected from unwarranted and unnecessary intrusion. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). When the contents of June's message are examined, it is undeniable that Magnum trampled upon June Harper's privacy.

June Harper's message contained the lurid details of a sexual assault. (R. at 4.) The most embarrassing and humiliating sexual encounters are those that are forced upon an unwilling victim. *See* Anne E. Goldfeld et al., *The Physical and Psychological Sequelae of Torture: Symptomatology and Diagnosis*, 259 JAMA 2725, 2728 (1988); MARIE M. FORTUNE, SEXUAL VIOLENCE: THE UNMENTIONABLE SIN 148 (1st ed. 1983). In fact, a majority of sexual assaults are never reported because of the humiliation associated with them. *See* Federal Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reports* 107 (1991). Disclosure of June Harper's encounter with Morton is precisely the type of humiliating information that causes a reasonable person to become offended.

The second element of these privacy torts requires that the intrusion into private facts must be offensive. RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1977). In determining offensiveness, the context and circumstances surrounding the intrusion are viewed in light of social conventions. *Kuhn v. Account Control Tech. Inc.*, 865 F. Supp. 1443, 1449

(D. Nev. 1994); *Miller v. National Broad. Co.*, 232 Cal. Rptr. 668, 679 (Ct. App. 1987). When Magnum invaded June Harper's private sphere and relayed the details of her life to its employees, it violated June's privacy rights at an extremely delicate moment.

In *Miller*, a television reporting crew entered the plaintiff's apartment and videotaped paramedics attempting to revive the plaintiff from a fatal heart attack. *Id.* at 670. In discussing invasion of privacy, the court held that the camera crew's actions were highly offensive. *Id.* at 679. The court based its finding on the time of the intrusion and the plaintiff's extremely vulnerable position. *Id.* By videotaping the plaintiff during a heart attack, the "crew displayed . . . a cavalier disregard for ordinary citizens' rights of privacy . . . [and] considered such rights of no particular importance." *Id.*

Similar to the camera crew in *Miller*, Magnum invaded June Harper's privacy at an extremely vulnerable time. June Harper was attempting to seek counseling for a sexual assault. (R. at 4.) Magnum intruded upon June Harper's mental anguish by listening to the contents of her message. Magnum's intrusion into this episode of June Harper's life would be, therefore, highly offensive to any reasonable person.

When the lower court failed to recognize the inherent offensiveness of Magnum's conduct by reasoning that June Harper did not have an expectation of privacy in a voice mail message left on Magnum's system, (R. at 6) it allowed an unreasonable and unwarranted intrusion of June Harper's privacy. The United States Supreme Court has recognized that individuals have the right to keep conversations, which may be easily accessed by others, private. *See Katz v. United States,* 389 U.S. 347, 353 (1967). The same justifications behind the Court's reasoning are equally applicable to June Harper's voice mail message.

In *Katz*, the Court held that the wiretap of a public telephone booth violates an individual's expectation of privacy. *Id.* Although the telephone booth may be in a public place, any person using the booth seeks to exclude uninvited listeners and, therefore, retains an expectation of privacy. *Id.* at 351-52. When Magnum listened to, and relayed the details of June Harper's voice mail message, it was no different than a privacy violation resulting from a wiretap of a public telephone.

"Just as the Fourth Amendment has expanded to protect citizens from government intrusions . . . [that are] not reasonably expected, so should tort law protect citizens from other citizens." *Pearson v. Dodd*, 410 F.2d 701, 704 (D.C. Cir. 1969) (footnotes omitted). June Harper left a message for her brother with the expectation that her message would not become public knowledge. When Magnum listened this personal message, it disregarded June Harper's expectation of privacy in a man-

ner that would not be condoned under the Fourth Amendment, and that should not be condoned by the civil law of Marshall.

Intrusions into an individual's sexual relations are so indecent and offensive that it is a degradation of humanity not to permit redress. *Roach v. Harper*, 105 S.E.2d 564, 566 (W. Va. 1958). The Court of Appeals, however, decided that Magnum's foray into June Harper's personal life was not offensive enough to warrant redress. This Court should not allow our most sacred principles to be further comprised and, therefore, the decision of the lower court must be reversed.

B. When Magnum Listened to the Sensitive Details of June Harper's Voice Mail Message, It Physically Intruded into a Place Where June Harper had Secluded herself and Her Private Affairs.

June Harper left a voice mail message for her brother that recounted the emotionally sensitive details of a sexual assault. When Magnum listened to this message, it interfered with June Harper's interest in the solitude and seclusion of her private affairs. *See* Restatement (Second) of Torts § 652B cmt. a (1977); *see also Frankel v. Warwick Hotel,* 881 F. Supp. 183, 187 (E.D. Pa. 1995). Magnum's acts constitute precisely the type of monitoring that Warren and Brandeis were fearful of, in their landmark article, when they declared that "numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops." *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

A physical trespass to the person is not necessary for liability under the intrusion tort. *Pearson*, 410 F.2d at 704. Rather, the use of one's "senses with or without mechanical aids, to oversee or overhear" another's private affairs is adequate. Restatement (Second) of Torts § 652B cmt. b (1977); *see also* William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 390 (1960). When Magnum accessed June Harper's message and listened to its entire contents, it fulfilled the Restatement's requirements. Moreover, to hold Magnum liable, it is not necessary that it communicated this information to others. *See Fowler v. Southern Bell Tel. & Tel. Co.,* 343 F.2d 150, 156 (5th Cir. 1965). In June Harper's case it was sufficient that intimate information was improperly obtained. *See Pearson*, 410 F.2d at 704.

Just as the absence of a physical trespass to the person does not save Magnum from liability, neither would a lack of publication, if, in fact, it had not occurred. *See Fowler*, 343 F.2d at 156. A person's privacy is invaded even when the information is not heard by anyone other than the immediate transgressor. *Id.* at 155; *see also McDaniel v. Atlanta Coca-Cola Bottling Co.*, 2 S.E.2d 810, 817 (Ga. Ct. App. 1939). Publication may aggravate the situation, "but the individual's right to privacy is

invaded and violated nevertheless in the original act of intrusion." *McDaniel*, 2 S.E.2d at 817.

In *Fowler*, the Fifth Circuit rejected a claim that publication was a prerequisite for an intrusion upon seclusion. 343 F.2d at 155. While disclosure must be present to violate the publication tort, it is not an element of the intrusion tort. *Hamberger v. Eastman*, 206 A.2d 239, 241 (N.H. 1965). Magnum entered John Harper's voice mail and listened to June's message. (R. at 5.) At that moment, even if it had never disclosed the contents of that message, Magnum became liable to June Harper for intruding upon her seclusion. *See McDaniel*, 2 S.E.2d at 817.

Full protection of an individual's right to seclusion is imperative in today's technocratic world where privacy is threatened "by a deplorable eruption of . . . mechanical and electronic devices [used] for snooping." *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649, 653 (D.C. Cir. 1966). June Harper left a personal voice mail message intended for her brother. (R. at 4.) When Magnum listened to this message and learned of the intimate details of her encounter with Morton, it destroyed her anonymity, intruded upon her most intimate activities, and exposed her personal characteristics to the public eye. *See Dietemann v. Time, Inc.*, 449 F.2d 245, 248 (9th Cir. 1971). At that moment, June Harper lost control of her personal affairs and the right to seclude her private life. Because Magnum violated June Harper's privacy, she should be permitted to seek redress in a trial on the merits.

C. Magnum's Disclosure of the Contents of June Harpers Message to its Employees, Absent a Privilege to do so, Constituted an Actionable Invasion of Privacy under the Publication of Private Fact Tort.

The lower court incorrectly held that Magnum did not publicize the contents of June Harper's message. The unique element of this tort requires the publication of personal facts that do not legitimately concern the public. *See Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1993); Restatement (Second) of Torts § 652D (1977). June Harper's message was personal. Because of the nature of this message, Magnum had no legitimate interest that would justify a privilege to disclose its contents. When Magnum conveyed the details of this message, it inappropriately opened June Harper's life to the unbridled scrutiny of its employees.

1. *By disclosing the contents of June Harper's message to its employees, Magnum publicized June Harper's private facts.*

When Harriet Stowe replayed June Harper's message to Magnum's disciplinary committee, (R. at 5) she unnecessarily disclosed the intimate details of the message. This disclosure rendered Magnum liable to

June Harper even if it made no further disclosures. The committee members, however, took this information and allowed other employees to become aware of June Harper's situation. (R. at 5.) Magnum's unnecessary disclosures violated the publication tort and, therefore, Magnum was improperly granted summary judgment.

The publication tort is violated when an entity commandeers private information and disseminates it to the public. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975). It is not necessary that the personal information be broadcast to the general public. *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990). Rather, liability depends on whether it is substantially certain that the disclosure will become public knowledge without regard to the number of people that are privy to the publication. *Id.* at 903; *see also Beaumont v. Brown*, 257 N.W.2d 522, 529 (Mich. 1977). When Magnum permitted the contents of June Harper's message to leak to its employees, it became substantially certain that June's private information became public knowledge.

In *Beaumont*, an employee filed a claim for publication of private fact after his employer sent a letter containing disparaging personal facts about the employee to the Army Reserves. *Id.* at 523-24. The Michigan Supreme Court held that this was sufficient publication even though the information was not disclosed to the general public. *Id.* at 532. Rather, interfering with a person's interest in keeping private facts from being publicly disclosed is determinative. *Id.* Magnum interfered with this exact interest when the contents of June Harper's message mysteriously entered the stream of Magnum employees.

June Harper's voice mail message relayed the details of an unwanted sexual encounter between two people acting outside Magnum's authority. (R. at 4.) The details of this message contain the type of private facts that can cause humiliation if they are made known to a small group of people. *See Survey: Most Women Victims Know Assailants*, ORLANDO SENTINEL, Jan. 31, 1994, at A4. June Harper did not broadcast her sexual assault to the world. Instead, she left a message for one person—her brother. (R. at 4.) When Magnum expanded the circle of people with knowledge of the assault, it invaded June Harper's privacy and must be held liable for its actions.

The right of privacy requires that people should be protected from unwarranted publicity concerning their private lives. *Harris v. Easton Publ'g Co.*, 483 A.2d 1377, 1388 (Pa. Super. Ct. 1984); *see also Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 767 (Ct. App. 1983). The intimate facts of June Harper's message are the type of which were meant to be protected. Magnum's publication of these facts interfered with June Harper's privacy and revealed "the embarrassing, the shameful, the tabooed[ ] truths about" June Harper. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1230 (7th Cir. 1993).

2. *Magnum was not Privileged to Publicize June Harper's Private Facts because the Information was Improperly Obtained and Communicated to People with no Legitimate Interest in the Message.*

Magnum is responsible for its invasion of June Harper's privacy. It may not absolve itself by claiming that it was privileged to disclose the contents of June Harper's voice mail message. The assertion of any potential privilege is nothing more than a smoke screen because Magnum abused its authority in publicizing June Harper's message.

Under narrow circumstances similar to those in defamation law, an employer privilege exists for an invasion of privacy caused by publication. *See Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 92 (Tex. App. 1997); RESTATEMENT (SECOND) OF TORTS § 613(2) (1977). Magnum did not articulate this affirmative defense and should be barred from doing so at this stage of litigation. This Court, however, does have the power to address the privilege issue if it determines that this affirmative defense has, in fact, been tried by either express or implied consent of the parties. *See Systems, Inc. v. Bridge Elec. Co.*, 335 F.2d 465, 466-67 (3d Cir. 1964); *Blue Spruce Co. v. E.H. Parent*, 365 A.2d 797, 802 (Me. 1976). If privilege is examined, June Harper must prevail because Magnum exceeded the limits of this defense.

A conditional privilege exists for violations of a publication tort involving employer communications if the following conditions are satisfied: (1) there is an interest to be upheld; (2) the statement is limited in its scope to that purpose; and (3) the publication is in a proper manner and to proper parties only. *Welch v. Chicago Tribune Co.*, 340 N.E.2d 539, 543 (Ill. App. Ct. 1975); *Brown v. First Nat'l Bank of Mason City*, 193 N.W.2d 547, 552-53 (Iowa 1972). Magnum disclosed the full details of June Harper's message to Magnum employees with no legitimate interest in the message contents. Accordingly, Magnum must not be permitted to hide behind the shield of privilege.

To assert an employer privilege, Magnum must show a legitimate interest in the subject matter and that the publication was effectuated in good faith. *See Young v. Jackson*, 572 So. 2d 378, 385 (Miss. 1990). June Harper's message did state that Morton may have engaged in improper conduct with his fellow employees. (R. at 4-5.) Even if this Court finds that Magnum had a right to listen to the entire message in an effort to combat potential workplace sexual harassment, the excessive manner in which it publicized June's message surpassed the limits of employer privilege. *See Bratt v. International Bus. Mach. Corp.*, 467 N.E.2d 126, 131 (Mass. 1984).

Magnum's publication was excessive because it communicated the contents of June Harper's message to employees with no interest in disci-

plining Morton. *See Zinda v. Louisiana-Pac. Corp.*, 409 N.W.2d 436, 439 (Wis. Ct. App. 1987); *Staheli v. Smith*, 548 So. 2d 1299, 1305-06 (Miss. 1989). In *Zinda*, an employer published the details of an employee's termination in a company newsletter. *Zinda*, 409 N.W.2d at 438. In discussing the employer's privilege defense, the court held that the employer lost its privilege by publicizing private information to a wide group of people that were not necessary to the accomplishment of the purpose behind the disclosure. *Id.* at 439; *see also Benson v. Hall*, 339 So. 2d 570, 573 (Miss. 1976); RESTATEMENT (SECOND) OF TORTS § 604 cmt. a (1977). Although disclosure to the disciplinary committee may have been necessary, no other employee within Magnum had a legitimate interest in June Harper's message.

If Morton sexually harassed his co-workers, then he should be disciplined. The only employees at Magnum capable of disciplining Morton were the members of the disciplinary committee. Magnum, however, disclosed the contents of June Harper's message to employees that were not members of the disciplinary committee. (R. at 5.) These non-committee member employees, in turn, exposed June's name and the specific details of the assault, neither of which were relevant to any Magnum employee. *See* Frank B. Harty & Thomas W. Foley, *Employment Torts: Emerging Areas of Employer Liability*, 39 DRAKE L. REV. 3, 59 (1989). Magnum, therefore, abused whatever slight privilege it may have had.

The employer privilege does not permit the rampant or unrestrained dissemination of a private fact. Magnum ignored this principle when it disclosed the full details of June Harper's voice mail message to individuals with no interest in the message. Magnum's employees then used this information for their own shameful amusement by joking about June Harper's distress. (R. at 5.) Accordingly, the Court of Appeals erred in upholding summary judgment for Magnum.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant June Harper respectfully requests this Court to reverse and remand the decision of the First District Court of Appeals for the State of Marshall for all counts of Plaintiff-Appellant's claim to be heard in a trial on the merits.

Respectfully submitted,

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BRIEF FOR THE RESPONDENT

No. 98-513

IN THE SUPREME COURT OF
THE STATE OF MARSHALL

JUNE HARPER
Plaintiff-Appellant,
v.
MAGNUM CORP.,
Defendant-Appellee.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF MARSHALL

BRIEF FOR THE DEFENDANT-APPELLEES

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QUESTIONS PRESENTED

1. Was Magnum Corporation authorized to access the voice mail of one of its' employees under the Electronic Communications Privacy Act?
2. Did Magnum Corporation, in accessing and playing petitioner's voice mail message, respect petitioner's right to privacy?

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OPINIONS BELOW

Howard County's Circuit Court awarded summary judgment to Magnum Corporation. Unreported opinion. The First District Court of Appeals for the State of Marshall affirmed summary judgment for Magnum Corporation. Transcript of Record at 1-7 [hereinafter Record]; *Harper v. Magnum Corp.*, No. 98-01-0104 (1st Cir. *argued*, May 13, 1998) (unreported opinion).

STATEMENT OF JURISDICTION

A formal statement of jurisdiction has been omitted in accordance with § 1020(2) of the 1998 Rules of the John Marshall National Moot Court Competition in Information Technology and Privacy Law.

STATUTORY PROVISIONS INVOLVED

Statutory provisions relevant to the case at hand are as follows: 18 U.S.C. §§ 2510-11, 2520, 2701-02, 2707, 2711; 21 U.S.C. § 495h(b)(1)(f); 47 U.S.C. § 605; WIS. STAT. § 111.36 (1997); P.R. LAWS ANN. tit. 29, § 155; 1997 R.I. PUB. LAWS 118(2)(c).

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

This action was brought originally in August 1997 in Howard County Circuit Court. (R. at 1, 6.) That court granted respondent's motion for summary judgment on all three causes of action against it: damages sought under § 2707 of the Electronic Communications Privacy Act ("ECPA"), invasion of privacy by intrusion into seclusion, and invasion of privacy by publication of private facts. (R. at 1, 6.)

The circuit court held that § 2511(2)(d) of the ECPA did allow employers to monitor employee phone calls and that petitioner had no cause of action under § 2707. (R. at 1, 6.)

Regarding the privacy claims, the court granted summary judgment to the respondent for two key reasons. (R. at 6.) First, by leaving a recorded message, petitioner had no reasonable expectation of privacy. (R. at 6-7.) Also, the publication involved was insufficient to support any claim on the count regarding publication of private facts. (R. at 7.)

Petitioner appealed this decision to the Court of Appeals of the State of Marshall, First District. The appeals court upheld the decision of the lower court, agreeing with and expanding on its reasoning. (R. at 7.)

The appeals court agreed that employer monitoring of calls is permitted under the ECPA, but questioned whether voice mail is even covered under that act. (R. at 1.) Furthermore, the appeals court found that petitioner consented to leave a recorded telephone message and, therefore, cannot claim intrusion into seclusion. (R. at 1, 6.) Also, the publication of private facts was insufficient for a cause of action under the Restatement (Second) of Torts. (R. at 6.) Only other employees of the company heard of the call and the appeals court did not find that to be sufficient "publication." (R. at 7.) It is from this decision that petitioner appeals.

B. STATEMENT OF FACTS

Magnum Corporation ("Magnum") is a corporation in the State of Marshall. (R. at 7.) Magnum provides an internal telephone system that includes voice mail capabilities that allow callers to leave messages for its employees. (R. at 7.) Either an automated message or one recorded

by the individual employee instructs callers on the method of getting immediate assistance or instructs them to leave a message. (R. at 1.)

Magnum's telephone system allows employees to access voice mail with a password, either from their own telephone within the company or from another internal telephone. (R. at 1.) Any message can be forwarded to any other telephone extension in the company. (R. at 1-2.)

The company adopted the common practice of monitoring its telephone system for business purposes. (R. at 2.) In order to inform all employees of the random monitoring practice, Magnum posted a notice detailing the policy in its employee lounge. (R. at 2.) The notice began with the declaration that Magnum telephones are to be used for company business. (R. at 2.) It then details how the Chief Information Officer ("CIO") would randomly monitor calls for two reasons: to ensure that telephone service was not being abused and to ensure that business calls were being handled correctly. (R. at 2.) Personal calls are allowed on a very limited basis; the amount of personal calls considered reasonable is determined by the CIO. (R. at 2.) Employees abusing the system would initially be cautioned, and further action would be taken only in the event that there was a threat to person or property or if the employee's conduct did not change. (R. at 3.)

John Harper ("Harper") is a Magnum employee and petitioner's brother. (R. at 3.) On April 2, 1997, Harriet Stowe, the CIO of Magnum, placed a call to Harper. (R. at 3.) His voice mailbox was full. (R. at 1.) Knowing that mailboxes hold up to 30 minutes of messages and that Harper was not on vacation, Stowe accessed his mailbox to ascertain the reason for this backlog. (R. at 5.) One of the messages on Harper's voice mail came from petitioner, his sister June. (R. at 5.) Stowe heard early on in this message that petitioner was very upset and that there was a problem with Randy Morton, a supervisor who also works for Magnum. (R. at 4.) The message contained details of how Morton had been extremely sexually aggressive toward petitioner on a date the previous evening. (R. at 4.) Petitioner also repeated in the message a statement made by Morton that "girls in [Morton's] department don't object to his style of kissing and petting." (R. at 4.) Concerned about this behavior by a Magnum employee, Stowe recorded this message on to a tape recorder. (R. at 5.)

Stowe then held a meeting with Magnum executives, the personnel director, the general counsel and the Chief Operating Officer, to determine what, if any, action Magnum should take regarding Morton's conduct. (R. at 5.) She played petitioner's message in this closed meeting and, after a discussion, the group decided to take no further action. (R. at 5.)

All of the officers present at that meeting deny telling anyone about the call or the closed meeting in which they discussed it. (R. at 5.) Over the course of the next week, some other employees discovered that petitioner made such a call to her brother. (R. at 5.) Certain employees commented on the call to petitioner's brother, although it remains unclear how these employees learned of the call's contents. (R. at 5.)

SUMMARY OF ARGUMENT

Summary judgment in favor of respondent, Magnum Corporation, should be affirmed. The Electronic Communications Privacy Act allows Magnum, as a provider of an electronic communications service, to authorize access to the telephone system and voice mail under § 2701(c)(1). Magnum did authorize its CIO to monitor all aspects of the telephone system, including the voice mail boxes. In accessing petitioner's message, Stowe did not exceed her authorization from Magnum and, therefore, did not violate § 2701(a)(2). Furthermore, the ECPA does not address the use of any information gathered with authorization.

In addition to Magnum's authorization, Stowe is also protected under Title I of the ECPA. Under the ECPA's definitions, Stowe did not intercept petitioner's message because any interception must be made at the same time as the transmission of the communication. Also, any interception must include the use of a "device" to acquire the communication. Here, Stowe used her extension telephone to access the voice mail and the telephone is not considered a device under the ECPA.

Finally, § 2511(2)(d) permits employers to implement monitoring of telephone systems. Thus, petitioner's claim must fail under the ECPA.

Summary judgment must also be affirmed on petitioner's claims of invasion of privacy. Petitioner's claim for intrusion into seclusion lacks the requisite intentional prying into private affairs. Also, in the event an intrusion did occur, it was absolutely privileged.

Magnum is not liable under the final claim of publication of private facts because re-playing petitioner's message for three Magnum executives does not meet the minimum publication necessary under the tort. Furthermore, Magnum would not be liable for any publication that resulted from eavesdropping on the part of other Magnum employees.

Finally, Magnum was both absolutely and conditionally privileged to publish petitioner's message in the context of a closed meeting. Thus, the court of appeals decision correctly held that Magnum did not violate petitioner's right to privacy.

ARGUMENT

I. THE COURT OF APPEALS DECISION SHOULD BE AFFIRMED BECAUSE TITLE II OF THE ECPA PERMITS MAGNUM'S ACTIONS

Petitioner sued Magnum pursuant to Title II of the Electronic Communication Privacy Act ("ECPA"). Section 2707 provides a civil cause of action for people "aggrieved by any violation of this chapter [18 U.S.C. § 2701 *et. seq.*]." 18 U.S.C. § 2707(a). The chapter proscribes, *inter alia*, "(1) intentionally access[ing] without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceed[ing] an authorization to access that facility and thereby obtain[ing] . . . a wire or electronic communication while it is in electronic storage . . . ." Voice mail messages are considered wire communications in electronic storage. *United States v. Smith,* 155 F.3d 1051 (9th Cir. 1998); *United States v. Moriarty,* 962 F. Supp. 217, 218 (D. Mass. 1997). Thus, this section controls Stowe's accessing Harper's voice mail.

A. Section 2701 Does Not Prohibit Stowe from Accessing Harper's Voice Mail Because Magnum Is Permitted To Authorize Stowe To Monitor The Phone System

Authorized access to an electronic storage facility is not prohibited by the ECPA. *See* 18 U.S.C. §§ 2701(a),(c). Magnum, therefore, cannot be liable for violation of Title II if Stowe's actions were authorized.

1. *Magnum May Authorize Access To The Voice Mail System Pursuant To § 2701(c)(1)*

The ECPA specifically exempts "conduct authorized—(1) by the person or entity providing a wire or electronic communication service." 18 U.S.C. § 2701(c). An electronic communication service is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. §§ 2510(15), 2711 (adopting § 2510 as the applicable definitions for this chapter).

Magnum provides its employees with internal digital equipment that allows its employees to send and receive wire communications in the form of telephone calls and voice mail. (R. at 1.) Under 18 U.S.C. § 2510(15), Magnum is a provider of an electronic communication service. *See* 18 U.S.C. § 2510(15); *See also Bohach v. City of Reno,* 932 F. Supp. 1232, 1236 (D. Nev. 1996) (holding that city was provider of internal electronic communication service). As a result, Magnum is permitted to authorize access to its facilities. *See* 18 U.S.C. § 2701(a)(1). In fact, it would be paradoxical to hold otherwise. *See State Wide Photocopy Corp. v. Tokai Fin. Servs., Inc.,* 909 F. Supp. 137, 145 (S.D.N.Y. 1995) (stating

that provider of communication service must be authorized to access itself).

2. *Magnum Authorized Stowe To Access The Voice Mail System*

Stowe was authorized by Magnum to access all employee voice mail boxes. She is responsible for the proper functioning of Magnum's information systems, including the telephone and voice mail system. (R. at 3.) One of her specific duties, detailed in the posted telephone monitoring policy, is to monitor the telephone system. (R. at 2-3.) Additionally, she was given a monitor's password that allows her to access any employee's voice mail box. (R. at 5.) It would be illogical for Magnum to give Stowe responsibility for the voice mail system and a monitor's password, but not authorize her to access the system. Thus, Stowe's actions were not unauthorized as required for liability under § 2701(a)(1).

3. *Stowe Did Not Violate § 2701(a)(2) Because She Did Not Exceed Her Authorization To Access The Voice Mail System*

Section 2701 prohibits a person from exceeding their authorization to access a communication in electronic storage. *See* 18 U.S.C. § 2701(a)(2). Stowe's actions, however, were well within the parameters of Magnum's authorization. The record does not indicate any express limit placed on her authorization. (R. at 2-3.) In addition, Magnum authorized Stowe to access the telephone system for exactly the type of situation at issue in this case. When she discovered that Harper's voice mail box was full, she had a responsibility to investigate. Several problems could have caused the system to play the "mailbox is full" system error message: the system might not have been working properly; Harper might not have been returning business calls and deleting the messages; or Harper might have been abusing Magnum's personal telephone call policy by receiving excessive personal voice mails. Any of these problems would require Stowe's immediate attention. *See* section I.A.2., *supra*. In fact, Magnum authorized Stowe to access the voice mail system to the extent necessary to complete her duties as CIO of the company. Stowe performed her duties when she accessed Harper's voice mail box to investigate the system error message.

Thus, because Stowe had direct authorization from Magnum when she accessed Harper's voice mail box, she did not exceed that authorization. In addition, as the entity providing the communication system, Magnum was permitted to authorize Stowe's access. Stowe, therefore, did not violate § 2701, and summary judgment for Magnum was proper.

4. *The ECPA Does Not Limit The Use Of Information That Has Been Accessed With Authorization*

Nowhere in § 2701 is the copying or use of stored information obtained by authorized access prohibited. *See* 18 U.S.C. § 2701(a) (prohibiting only unauthorized access and exceeding authorization to access). Because the access is authorized, the statute does not prevent Stowe from listening to, recording or otherwise using the message. *See Educational Testing Serv. v. Stanley H. Kaplan Educ. Ctr., Ltd.,* 965 F. Supp. 731, 740 (D. Md. 1997). In that case, Kaplan employees were authorized to take a computerized version of the Graduate Record Examination. *Id.* at 732. Educational Testing Service later sued Kaplan for violations of § 2701 because Kaplan's employees had memorized, copied and disclosed the questions on the exam. *Id.* at 740. The court held that unauthorized use of information was not prohibited if the access to the information was authorized. *Id.* ("the Stored Communications Act applies [when a] trespasser gains access. . . not [when] the trespasser uses the information in an unauthorized way."); *See also State Wide Photocopy,* 909 F. Supp. at 145 ("It appears that the ECPA was primarily designed to provide a cause of action against computer hackers, (i.e., electronic trespassers)."). Stowe was authorized to access the voice mail system, and her subsequent tape recording of the message did not exceed her authority.

The ECPA only prohibits disclosure of the contents of a stored communication by a "person or entity providing [the] . . . service to the public." 18 U.S.C. § 2702(a). Magnum provides the voice mail system exclusively to its employees; not to the public. Employees are able to access the system from Magnum telephones, but not from an outside telephone. (R. at 2.) Thus, only people with regular access to Magnum's telephones can use the system. Magnum is not a provider to the public, and, therefore, cannot be found liable for allegedly disclosing the contents of petitioner's message.

II. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE MAGNUM'S ACTIONS ARE PROTECTED BY TITLE I OF THE ECPA

Petitioner sought damages pursuant to the stored communications provisions of the ECPA. (R. at 6.) That section does not allow damages for the interception of communications. 18 U.S.C. §§ 2707, 2701; *See also* 18 U.S.C. § 2520 (providing a cause of action for people aggrieved by a violation of prohibitions against intercepting communications). The courts below, however, addressed the "interception" provisions of Title I of the ECPA and held that the ECPA "permits monitoring of calls by an employer." (R. at 6.) Specifically, they held that § 2511(2)(d), which ex-

empts communications intercepted with one party's consent, allows Magnum's monitoring of Harper's voice mail. (R. at 6.)

Here, Stowe did not "intercept" a wire communication. If this Court believes that the message was intercepted, however, Magnum still is not liable, because Harper consented to the interception.

A. STOWE DID NOT "INTERCEPT" A WIRE COMMUNICATION.

The ECPA defines "intercept" as the "acquisition of the contents of any wire . . . communication through use of any electronic, mechanical or other device." 18 U.S.C. § 2510(4). Courts have held that this definition requires a contemporaneous acquisition of the communication. *See United States v. Turk,* 526 F.2d 654, 658 (5th Cir. 1976); *Moriarty,* 962 F. Supp. 217, 220-21 (D. Mass. 1997). In addition, the legislative history of the ECPA supports this interpretation. Finally, interception would have inconsistent meanings within the statute if this Court deletes the contemporaneous acquisition requirement.

1. *An interception must be made contemporaneously with transmission of the communication.*

Assuming all of petitioner's allegations are true, she still does not fulfill the requirements of § 2511. Stowe did not intercept any wire communication because that interception must be made contemporaneously with the transmission of the communication. *See Moriarty,* 962 F. Supp. at 217, 220-21; *Payne v. Norwest Corp.,* 911 F. Supp. 1299, 1303 (D. Mont. 1995), *rev'd in part on other grounds,* 113 F.3d 1079 (9th Cir. 1997). Petitioner's message was already recorded to the voice mail system, and was no longer in transit; therefore, it was not intercepted.

2. *Contemporaneous acquisition traditionally was required.*

The Omnibus Crime Control and Safe Streets Act of 1968 prohibited interception of telephone calls. Prior to that, the Federal Communications Act prohibited the same conduct. *See* Communications Act of 1934, 47 U.S.C. § 605 (1934) (amended 1968); *See also Von Lusch v. C & P Tel. Co.,* 457 F. Supp. 814, 820 (D. Md. 1978) (stating that section 605 restricted interception of telephone calls prior to its amendment in 1968). Courts held that, under both acts, an interception was the contemporaneous acquisition of a communication. *See Goldman v. United States,* 316 U.S. 129, 134 (1942), *overruled in part on other grounds by Katz v. United States,* 389 U.S. 347 (1967); *United States v. Turk,* 526 F.2d 654 (5th Cir. 1976). This Court should construe § 2511 similarly.

3. *Legislative history also supports a contemporaneous acquisition requirement.*

It is particularly appropriate to resort to the legislative history when analyzing an act as difficult to interpret as the ECPA. "[W]hen interpreting a statute as complex as the Wiretap Act, which is famous (if not infamous) for its lack of clarity, [ ] we consider it appropriate to note the legislative history for confirmation of our understanding of Congress' intent." *Steve Jackson Games, Inc. v. United States Secret Service,* 36 F.3d 457, 462 (5th Cir. 1994), *citing Forsyth v. Barr,* 19 F.3d 1527, 1542-43 (5th Cir. 1994) (holding that an interception requires contemporaneous acquisition); *See also Moriarty,* 962 F. Supp. at 221.

The ECPA amended the definition of intercept to include acquisition of electronic communications. *See* S. REP. No. 99-541, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3567. When amending the definition, however, Congress did not intend to change the meaning of intercept in any other way. *Id.* "The definition of 'intercept' under current law is retained with respect to wire and oral communications except that the term 'or other' is inserted after 'aural.'" *Id.* At the time of the amendment, the law required a contemporaneous acquisition. *See Goldman,* 316 U.S. at 134; *Turk,* 526 F.2d at 658. An interception, therefore still requires a contemporaneous acquisition.

Further, without a contemporaneous acquisition requirement for interceptions, Title I (interceptions) and Title II (accessing stored communications) would punish the same activities. "We find no indication in either the Act or its legislative history that Congress intended for conduct that is clearly prohibited by Title II to furnish the basis for a civil remedy under Title I as well." *Steve Jackson Games,* 36 F.3d at 462; *See Moriarty,* 962 F. Supp. 217 (holding that it violates double jeopardy to indict a defendant under both §§ 2511 and 2701 for accessing a voice mail). Yet, petitioner is asking this Court to rule that there is no distinction between intercepting wire communications and accessing such communications when they are in storage, thus making Magnum's conduct subject to both Title I and Title II.

4. *Deleting this contemporaneous requirement would lead to anomalous results.*

Electronic communication cases consistently require a contemporaneous acquisition for an interception. *See, e.g., Smith,* 155 F. 3d 1051 (9th Cir. 1998), 1998 U.S. App. LEXIS 20750 at *17-18 (distinguishing electronic communication from wire communication cases). Interpreting the interception of a wire communication to include acquiring stored communications would violate the well established rule of statutory construction that a term should be construed consistently throughout a statute.

See Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 568 (1995). The ECPA uses one sentence to prohibit interceptions of any wire, oral or electronic communication. 18 U.S.C. § 2511(1)(a). Interpreted this way, a single use of the word "intercept" means to acquire contemporaneously, during transmission, and it means to acquire at any time. This Court should not construe the ECPA in a way that makes the same word have inconsistent meanings in the same sentence.

The definition of wire communication in no way mandates this dual interpretation of intercept. The fact that wire communication is defined to include electronic storage of such communication need not change the definition of the verbs to which it might be subject. *See* 18 U.S.C. § 2510(1). A wire communication still is a wire communication even when it is in electronic storage, but it simply cannot be intercepted while it is in storage.

5. *Stowe did not use a "device" to acquire the communication.*

As noted above, an interception requires the use of an "electronic, mechanical, or other device." 18 U.S.C. § 2510(4). The definition of device excludes "any telephone . . . (i) furnished . . . by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business . . . ." 18 U.S.C. § 2510(5)(a). This restrictive definition is commonly referred to as the extension telephone exception. *See, e.g., Berry v. Funk*, 146 F.3d 1003, 1009 (D.C. Cir. 1998).

6. *A telephone used in the ordinary course of business is not a "device" as defined by the ECPA.*

The device required by the definition of intercept does not include a telephone furnished to provide connection to the voice mail facilities and used in the ordinary course of business. 18 U.S.C. § 2510(5)(a); *Williams v. Poulos*, 11 F.3d 271, 280 (1st Cir. 1993); *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 582 (11th Cir. 1983). Stowe used the telephone extension in her office to listen to Harper's voice mail message. (R. at 5.) The telephones were provided to allow Stowe, and other employees, to make phone calls and access the voice mail system. (R. at 1.)

When determining whether an interception is in the ordinary course of business, some courts focus on the employer's business interest in the monitoring policy. *See, e.g., United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974). *But See Williams*, 11 F.3d at 280 (holding that courts need not inquire whether a legitimate business interest supports the policy). Magnum has a legitimate business interest in its monitoring policy. Magnum's policy is designed to prevent excessive personal use of the telephones and ensure business calls are handled appropriately. (R. at 2-3.) These are legitimate business justifications for monitoring. *See,*

e.g., Watkins, 704 F.2d at 582 (stating that monitoring of business calls is justifiable as ordinary course of business); *Simmons v. Southwestern Bell Tel. Co.,* 452 F. Supp. 392, 396 (W.D. Okla. 1978), aff'd, 611 F.2d 342 (10th Cir. 1979) (holding that limiting personal use of business telephones is a legitimate business interest).

Other courts distinguish between business and personal content in the telephone call. *See, e.g., Watkins,* 704 F. Supp. at 582. Whether a conversation is personal depends, in part, on whether the employer has a legal interest in the contents. *Id.* In *Watkins,* the defendant employer intercepted a telephone call about plaintiff's recent job interview. *Id.* The court held that the defendant's curiosity about the plaintiff's future employment plans did not give them a legal interest in those plans. *Id.* The interception of the plaintiff's telephone call, therefore, was not in the ordinary course of business. *Id.* at 583-84.

In contrast, petitioner's message did implicate a legal interest of Magnum. Stowe had a legal duty to act on petitioner's statements that Morton assaulted her and bragged about his sexual activity with women in his department. *See, e.g.,* Wis. Stat. § 111.36 (1997); *See also* section III.A.3., *infra.* Thus, petitioner's call was not entirely personal. As CIO, Stowe is responsible for, among other things, maintenance of the telephone and voice mail facilities. (R. at 3.) As such, she used the telephone in her office in the ordinary course of Magnum's business. She did not use a device as defined by the ECPA, and therefore did not intercept a communication.

7. *The tape recorder was not used to acquire the communication.*

Stowe listened to petitioner's message once from her extension telephone before she tape recorded the message. (R. at 5.) Thus, she had already acquired the contents of the communication prior to using the tape recorder. The tape recorder was not used to acquire the communication, and therefore cannot be a device under the statute. *See Epps v. Saint Mary's Hosp. of Athens, Inc.,* 802 F.2d 412, 415 (11th Cir. 1986) (holding that recording equipment was not the intercepting device). Cf. *Deal v. Spears,* 980 F.2d 1153, 1157-58 (8th Cir. 1992).

In *Deal,* the Eighth Circuit used a "but for" test to determine which equipment was the intercepting device. 980 F.2d at 1157-58. In that case, the defendants connected a recording device to an extension telephone line. *Id.* at 1155. That device automatically recorded all conversations on that telephone line for approximately 6 weeks. *Id.* The defendants were not able to listen to all of the calls at the time they were made, in part because the plaintiff would have heard them pick up the extension telephone. *Id.* at 1158. The court concluded that the defendants would not have acquired the communications but for the use of the

recording device and, therefore, the recorder was the intercepting device. *Id.*

In contrast, Stowe had already listened to the communication. The tape recorder was not connected to the telephone line, and therefore was not used to initially acquire the contents of the message. The tape recorder merely made a better record of what Stowe had already heard through the extension telephone. Additionally, replaying a communication that has already been acquired is not a "new and distinct interception." *Turk,* 526 F.2d at 659. Thus, Stowe did not use a device to acquire the contents of the communication.

Stowe's acquisition of Harper's voice mail message was not an interception within the meaning of § 2511. She did not acquire the communication contemporaneously as required by case law and the legislative history. She also did not use a device as required by § 2510(4). Magnum, therefore, cannot be held liable under § 2511 for Stowe's actions, and summary judgment was proper.

B. Even If The Message Were Intercepted, § 2511 Allows Employers To Monitor Their Phone Systems.

It is not unlawful for a third party to intercept a communication if one of the parties has consented to the interception. 18 U.S.C. § 2511(2)(d). This exception has been interpreted to allow employers to monitor their employees' telephone calls. *See, e.g., Berry v. Funk,* 146 F.3d 1003, 1010-11 (D.C. Cir. 1998).

Petitioner consented to the recording of the voice mail message, by her action of leaving a message. *See Payne v. Norwest Corp.,* 911 F. Supp. 1299, 1303 (D. Mont. 1995). Indeed, her intent was to record a message. Additionally, Harper consented to have his telephone monitored and Stowe did not exceed that authorization.

1. *Harper impliedly consented to have his telephone and voice mail monitored by continuing to use Magnum's telephone system after receiving notice of potential monitoring.*

Consent to employer monitoring of communications need not be express; it can be implied from the circumstances. *See Berry,* 146 F.3d at 1011; *Deal,* 980 F.2d at 1157. Consent is implied when the employees know how communications are monitored and that their calls are subject to monitoring. *See Williams,* 11 F.3d at 281 (consent not implied where Chief Executive Officer was not informed that subordinates would intercept and record his telephone calls). The main inquiry is whether employees had sufficient notice of the monitoring. *See Berry,* 146 F.3d at 1011.

In *Berry*, the plaintiffs did not have sufficient notice that their calls would be monitored. *Id.* The plaintiffs knew the Operations Center switchboard operators could stay on the line to take notes or perform other functions after a call had been connected. *Id.* at 1005. The Operations Center, however, had a written policy against monitoring telephone calls unless the parties specifically requested the operator to stay on the line. *Id.* at 1011. The court concluded that the policy against unrequested monitoring negated the notice of monitoring capabilities. *Id.* Thus, consent was not implied. *Id.* Similarly, knowledge that a telephone is capable of being monitored is insufficient to imply consent. *See Deal,* 980 F.2d at 1157 (finding consent not implied where plaintiff was not informed that calls would be monitored; rather she was told that defendants might start monitoring).

Magnum, however, has an well-announced policy of monitoring telephone calls. (R. at 2-3.) By its terms, the policy applies to all employees, including Harper. (R. at 2-3.) The purpose of the program, and the manner of its implementation, were common knowledge among Magnum employees. (R. at 3.) Harper used Magnum's telephones after he had sufficient notice of the monitoring policy, and thereby implied his consent to have his telephone calls monitored.

C. Stowe's Access Of Harper's Voice Mail Box Fully Complied With Magnum's Monitoring Policy And, Thus, Did Not Exceed Harper's Consent.

Although the ECPA does not require a legitimate business purpose for consensual monitoring of a telephone, Magnum does have a valid purpose for monitoring. *See* 18 U.S.C. § 2511(2)(d); *Williams,* 11 F.3d at 280 (stating that the statute does not "direct courts to conduct an inquiry into whether a 'legitimate business purpose' for monitoring exists . . . .").

Magnum's policy states that monitoring is to prevent excessive personal use of the telephone and ensure business calls are handled properly. (R. at 2-3.) As discussed in section I.A.3., *supra*, Stowe was required to access Harper's voice mail box to fulfill her responsibilities for system maintenance and the telephone usage policy.

When Stowe investigated Harper's full voice mail box, she had to listen to the messages for a reasonable time to determine why the mail box was full. At the beginning of petitioner's message, she complained of Randy Morton's actions of the previous night. (R. at 4.) She reminded Harper (and thus informed Stowe) that Morton was a supervisor at Magnum. (R. at 4.) Petitioner then complained of actions that constitute criminal sexual assault, *See, e,g.,* Model Penal Code § 213.4 (1962), and stated that he bragged that the women in his department do not complain about "his style of kissing and petting." (R. at 4-5.) Thus, Stowe

heard from the beginning that they had criminal and possible sexual harassment issues with one of Magnum's supervisors. Stowe certainly had a business purpose to investigate Magnum's responsibilities in such a situation.

The ECPA allows employers to monitor their employees' telephone calls. Harper impliedly consented to having his phone and voice mail monitored. Stowe's monitoring was within Magnum's telephone monitoring policy. Thus, Magnum did not violate § 2511, and the order granting summary judgment should be affirmed.

III. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER FAILED TO ESTABLISH A CAUSE OF ACTION FOR INVASION OF PRIVACY.

Petitioner's claim that Magnum violated her right to privacy fails because of the limits imposed on such a claim in the Restatement (Second) of Torts.

"[T]he Fourth Amendment can not be translated into a general constitutional right to privacy. That Amendment protects individual privacy concerns against certain kinds of governmental intrusion, but its protections go no further, and often have nothing to do with privacy at all." *Katz v. United States,* 389 U.S. 347, 350 (1967). The protection of a person's general right to privacy is, like the protection of his property and of his very life, left largely to the law of the individual states. *Id.*

The State of Marshall generally recognizes the Restatement (Second) of Torts ("Restatement"). (R. at 6.) Potential liability resulting from the invasion of privacy is discussed in section 652. RESTATEMENT (SECOND) OF TORTS § 652 (1981). (*See* Appendix).

A. PETITIONER DOES NOT ESTABLISH A CAUSE OF ACTION BECAUSE HER CLAIM OF INTRUSION DOES NOT INCLUDE AN INTENTIONAL PRYING INTO HER PRIVATE AFFAIRS OR A HIGHLY OFFENSIVE INTRUSION.

In order to have a successful claim for intrusion into seclusion, petitioner must show that the CIO intentionally pried into her privacy and that the intrusion was highly offensive. *See* RESTATEMENT (SECOND) OF TORTS § 652(b).

The type of situation that would be protected is defined in the Restatement, section 652(b). (*See* Appendix).

Intrusion into seclusion does not depend upon any publicity given to the person whose interest is invaded. *See Harkey v. Abate,* 346 N.W.2d 74, 76 (Mich. App. 1983); *Beard v. Akzona, Inc.,* 517 F. Supp. 128, 132 (E.D. Tenn. 1981), RESTATEMENT (SECOND) OF TORTS § 652(b) cmt a.

The factors in an action for intrusion into seclusion are as follows: "First, something in the nature of an intentional interference in the solitude or seclusion of a person's physical being, or prying into his private affairs or concerns, and second, that the intrusion would be highly offensive to a reasonable person." *Fields v. Atchison, Topeka, & Santa Fe R.R. Co.*, 985 F. Supp. 1308, 1312 (D. Kan. 1997), *Op. withdrawn in part on other grounds*, 5 F. Supp. 2d 1160 (D. Kan. 1998), *citing Werner v. Kliewer*, 710 P.2d 1250, 1255 (Kan. 1985).

"[T]here must be something in the nature of prying or intrusion. . ." *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 378 (Utah App. 1997), *citing* W. PAGE KEETON ET AL., Prosser and Keeton on the Law of Torts, § 117 at 854-55 (5th ed. 1984).

Magnum concedes that the active and intentional recording of dialogue placed on a private individual's residential answering machine or voice mail would constitute an "intrusion." However, the recording of material voluntarily placed on a voice mail system intended for company use is not encompassed within Restatement section 652(b). Furthermore, the CIO's conduct is not "highly offensive" by the standards of a reasonable person.

1. *The CIO did not intentionally pry into the private affairs of petitioner.*

Petitioner must prove that Magnum's CIO, Harriet Stowe, actively imposed herself into petitioner's affairs and that petitioner was *See*king to avoid exposure. *See* RESTATEMENT (SECOND) OF TORTS § 652(b). The tort is rooted in the case of *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d. Cir. 1940), where a young math prodigy, after graduating from Harvard at the age of sixteen, developed a distaste for public life. *Id.* at 807. As a result, he took a job as a clerk and attempted to conceal his identity. *Id.* The defendant investigated his life and published an article entitled *Where Are They Now?* disclosing the plaintiff's whereabouts and current activities. The plaintiff brought an action against the magazine for invasion of privacy. The court stated "[u]nder the strict standards of scrutiny suggested by these authors, Plaintiff's right of privacy has been invaded." *Id.* at 809.

The Supreme Court of the United States examined the tort of intrusion into seclusion in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In *Ortega*, a physician at a public hospital was accused of sexual harassment. *Id.* at 712. Hospital supervisors chose to investigate these and other charges by conducting a search of his office and desk. *Id.* at 713. The results of the search were used at a hearing on the allegations. *Id.* Ortega then brought an action alleging an invasion of privacy. *Id.* at 714.

The Court initially noted that its holding stemmed from fourth amendment protection and was limited to searches and seizures by government employers and supervisors of government employees. *Id.* The Court balanced the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace and noted that an employee may avoid exposing personal belongings simply by leaving them at home. *Id.* at 725.

Ortega is limited to searches by government supervisors of government employees. because the protection stems from the Fourth Amendment. *Id.* at 709. The Fourth Amendment, however does not apply to searches of employees by supervisors in the private sector. *Katz,* 389 U.S. at 350. Private corporations such as Magnum are not subject to the same level of scrutiny as public entities. The *Ortega* Court noted that a private employee's expectation may be reduced by actual office practices. *Ortega,* 480 U.S. at 714.

Even if this Court were to apply the same level of scrutiny as the *Ortega* Court, petitioner's claim could not succeed. Under the *Ortega* test, the two factors to be weighed are petitioner's expectation of privacy and employer's interest. Petitioner's expectation that her message, left on Magnum's voice mail system alleging sexual misconduct of a Magnum employee, would not be monitored by a Magnum supervisor must be balanced with Magnum's need to provide for the efficient operation of the workplace and to provide an environment free from the threat of sexual harassment. As such, Magnum's supervision passes the *Ortega* test.

The right of protection against intrusion into seclusion embodies situations where the defendant actively intruded on the plaintiff in his home, or in an arena bearing a similar expectation of privacy. *See Socialist Worker's Party v. Attorney Gen. of the U.S.,* 642 F. Supp. 1357, 1420 (S.D.N.Y. 1986) (reasoning that the FBI's surreptitious entrance and burglary of plaintiff organization amounted to such an intrusion); *Huskey v. National Broad. Co., Inc.,* 632 F. Supp. 1282, 1288 (N.D. Ill. 1986) (reasoning that the filming of a prisoner's private activities amounted to nothing more than morbid and sensational prying, thus amounting to such an intrusion); *BM of Central Ark. v. Bemmel,* 623 S.W.2d 518, 519-20 (Ark. 1981) (holding that a debtor's repeated and persistent phone calls to plaintiff amounted to such an intrusion). The common thread among these cases is the active intrusion into a realm wherein one holds an absolute expectation of privacy.

The CIO did not actively intrude into the private life of the petitioner. Stowe's conduct took place wholly within the Magnum office, and within her business duties of monitoring the telephone system to see "whether telephone service is abused and business calls are handled properly." (R. at 3.) As such, she did not commit an "intrusion" under Restatement section 652(b).

2. *Even if this Court holds that the CIO did intrude upon the private affairs of petitioner, such intrusion was not highly offensive.*

To establish a cause of action under the Restatement, the matter publicized must be offensive and objectionable to a reasonable man of ordinary sensibilities. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 397 (1960). In *Harkey*, the defendant installed see-through panels in the ceiling of the women's restroom at a roller-skating rink, allowing for the observation of the interior. 346 N.W.2d at 74. The court characterized the alleged misconduct as the "unreasonable intrusion upon the seclusion of another." *Id.* The appellate court affirmed the trial court's grant of summary judgment, and found the defendant's alleged conduct to be highly offensive." *Id.* at 77.

The highly offensive intrusion in *Harkey* had no purpose other than to humiliate and degrade the people involved. *Id.* Here, Stowe happened upon a voice mail in the course of business and encountered a potentially dangerous situation. (R. at 5.) Although petitioner may have felt slight embarrassment over her encounter with Morton, the fact that Stowe found this information and took action can not be reasonably termed "highly offensive." In weighing the danger of sexual attacks by a supervisor against any discomfort petitioner may have felt in learning that Stowe heard her message, such conduct could not be "highly offensive."

3. *Even if this Court holds that an unreasonable intrusion into seclusion took place, such intrusion was absolutely privileged.*

The employer's asserted interest in recording telephone calls "must be balanced against the degree of intrusion resulting from the employer's methods to obtain the information." *Ali v. Douglas Cable Communications,* 929 F. Supp. 1362, 1392 (D. Kan 1996), *citing Pulla v. Amoco Oil Co.,* 882 F. Supp. 836, 867 (S.D. Iowa 1994). Monitoring employee telephone calls does not automatically amount to an unreasonable intrusion into seclusion. *Ali,* 929 F. Supp. at 1382. Routine monitoring of business calls lawfully serves to protect the business interest of the employer. *Id.* Monitors are usually allowed approximately three minutes to determine whether a call is of business or personal nature. *See Watkins,* 704 F.2d at 585.

However, once a supervisor is aware than an employee is engaging in misconduct, either inside or outside their scope of employment, the supervisor's company can be liable for such misconduct if she fails to take immediate action. *See* RESTATEMENT (SECOND) OF TORTS § 317.

Several jurisdictions mandate that if an employer has reason to believe that sexual harassment is occurring in the workplace, they have a legal duty to address the situation. *See* WIS. STAT. § 111.36 (1997) (sexual harassment established when employer permits sexual harassment

to create an offensive work environment); P.R. LAWS ANN. TIT. 29, §155F (1995) (employer held liable for sexual harassment of employees if supervisor knows or should have known of conduct and did not take immediate action); *See also* 1997 R.I. PUB. LAWS 118(2)(c); 21 U.S.C. § 495h(6)(1)(f); Mass Ann. Laws ch. 151B § 3A(6)(2)(e).

Intrusions that are mandated by law are absolutely privileged. RESTATEMENT (SECOND) OF TORTS §§ 592(a), 652. Stowe lawfully monitored petitioner's call to determine whether the call was of a business or personal nature. During the call, petitioner immediately announced that she had been sexually assaulted and harassed by a Magnum employee. From that moment on, the CIO was bound by law to continue listening to the call, in an effort to decide what actions she needed to take. As such, Stowe's intrusion was absolutely privileged.

B. THE CIO'S CONDUCT IN PLAYING THE MESSAGE TO THREE MAGNUM EXECUTIVES IS NOT ENOUGH TO ESTABLISH THE PUBLICITY NECESSARY IN THE TORT OF PUBLICITY GIVEN TO PRIVATE FACTS.

The tort action for unreasonable publicity given to aspects of an individual's private life is described in Restatement (Second) Torts, Section 652(d). The matter publicized must be "of the kind that (a) would be highly offensive to a reasonable person; and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652(d). (*See* Appendix).

There must be substantial publicity given to the facts in order to create a cause of action.

> [D]isclosure of the public facts must be a public disclosure, and not a private one. There must be, in other words, publicity. It is an invasion of the right to publish in a newspaper that the plaintiff does not pay his debts, but, . . . it . . . is no invasion to communicate the fact to the plaintiff's employer. . ., or to even a small group.
>
> Prosser, *Privacy*, 48 CAL. L. REV. at 394.

1. *No "publicity" took place because the information was presented to only three company executives, all of whom had a legitimate interest in the contents of the message.*

Any claim under section 652(d) "requires that the defendants give 'publicity' to a matter concerning the plaintiff." *Fields,* 985 F. Supp. at 1312), *citing Ali,* 929 F. Supp. at 1381, *citing Froelich v. Adair,* 516 P.2d 993 (Kan. 1973). The scope of the publicity must be fairly large: "Publicity means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Fields,* 985 F. Supp. at 1312, *citing* RESTATEMENT (SECOND) OF TORTS § 652(d) cmt a.

There is no invasion of privacy if the private matter is communicated to "*a single person or even to a small group of persons.*" *Id.* (emphasis added).

This tort is designed to prohibit publication of private facts in the media. *See Times Mirror Co. v. Superior Ct. (Doe),* 198 Cal. App. 3d 1420, 1432 (1988) (affirming trial court's denial of defendant's motion for summary judgment where a newspaper published the name of a murder victim's roommate when reporting that she had found the body); *Evans v. Dayton Newspapers,* 566 N.E.2d 704, 707 (Ohio App. 1989) (reasoning that the publication of plaintiff's mugshot without consent could be such unwarranted publicity). The CIO directly presented the relevant information to only three other individuals. (R. at 5.) All of these individuals were management level employees- the Chief Operations Officer, General Counsel and the Personnel Director. (R. at 5.) As such, there was no "publicity" within the meaning of section 652(d).

An employer's duty to address the threat of sexual harassment in the workplace stems from Restatement (Second) of Torts section 317. *See Fields v. Cummins Fed. Employees Credit Union,* 540 N.E.2d 631, 636 (Ind. App. 1989) ("Cummins"); (*See* Appendix). Section 319 imposes a duty on an employer to control the activities of an employee within or outside the scope of his employment. RESTATEMENT (SECOND) OF TORTS § 319.

As stated earlier, Marshall is favorable to the Restatement (Second) of Torts. (R. at 6.) Under the current restatement, vicarious liability is governed by section 219, a more current version of section 317. "An employer is liable when [sexual harassment] is attributable to the employer's own negligence." *Burlington Indus., Inc. v. Ellerth,* 118 S. Ct. 2257, 2267 (1998).

In *Cummins,* plaintiff alleged that the supervisor knew of the conduct that amounted to sexual harassment. 540 N.E.2d at 632. Looking to Restatement section 317, comment c, the court stated that the company can expose themselves to liability if they retain employees after receiving knowledge of potential misconduct. *Id.* at 636.

Here, Stowe received direct knowledge of misconduct and could be liable for not acting on that knowledge. (R. at 6.)

In *Beard,* the plaintiff had filed for divorce from her husband, but the two still lived together. 517 F. Supp. at 130. The former husband and wife were both employed by the defendant. *Id.* The plaintiff's husband became suspicious that the plaintiff was having an affair with a man who worked at the same office. *Id.* The husband tapped his telephone lines and recorded conversations between his former wife and the fellow employee. *Id.* The CEO listened to the tapes, along with one other manager, and discussed the contents of the tapes with three other

managers. *Id.* at 131. As a result of the information gathered, both the plaintiff and the man with whom she was allegedly having an affair were terminated. *Id.* In evaluating the claim for publicity of private matters, the court stated:

Benning disclosed the information contained in the tapes to only five individuals. . . all of these individuals were management employees of the defendant corporation, and all had some job related connection to at least one of the parties involved. We hold that plaintiff has not shown the extent of publicity necessary to give rise to liability for invasion of her privacy.

Id. at 133. *The situation here is substantially the same as in Beard where only indispensable parties were included in the disclosure.*

2. *Magnum is not responsible for any publication beyond the meeting, because any Magnum employee who eavesdropped on the closed executive meeting acted outside the course and scope of his employment.*

None of Magnum's employees who attended the meeting disclosed the contents. (R. at 5.) Petitioner may assert that another employee must have eavesdropped upon the meeting, in order for news of the meeting to be circulated among several employees at the office. Such conduct is not actionable against Magnum.

Magnum concedes that a company can be vicariously liable for the torts of its employees provided that such conduct is within the scope of the employee's duties, or the company knew, or should have known, of such conduct. RESTATEMENT (SECOND) OF TORTS § 317. Neither requirement is satisfied here.

Eavesdropping can include the direct overhearing of private conversations. *See* A.M. Swarthout, *Eavesdropping as Violating Right of Privacy*, 11 A.L.R. 3d 1296, 1297 (1967). Such conduct, however, is not within the scope of the employee's duties. Furthermore, because the meeting was only intended to involve the four executives, Magnum did know, nor should have known that any eavesdropping was taking place.

3. *Such publicity was absolutely privileged even in the event this Court finds unreasonable publicity of private facts.*

Publication of private matters is protected by the same absolute privileges that apply to defamation. RESTATEMENT (SECOND) OF TORTS § 652(f). In justifying absolute privileges to publication, "Warren and Brandeis though that the action for invasion must be subject to any privilege which would justify the publication of libel and slander, reasoning that that which is true should be no less privileged than that which is false." Prosser, *Privacy*, 48 CAL. L. REV. at 421. These privileges in-

clude, but are not limited to, publications required by law and publications made to protect the interests of others.

The Restatement states that "one who is required by law to publish defamatory matter is absolutely privileged to publish it." RESTATEMENT (SECOND) OF TORTS § 592(a). State and federal laws mandate the reporting of potential sexual harassment in the workplace. Stowe's publication, therefore, was absolutely privileged. An employer has a legal duty to take immediate action to curb sexual harassment in the workplace if they know or should have known that such conduct was occurring. *See Cummins,* 540 N.E.2d at 636.

In *Davis v. Monsanto Co.*, an employee sought the counseling services offered by his employer to address personal problems. 627 F. Supp. 418, 419 (S.D. W. Va. 1986). The counselor concluded that the employee posed a threat to others and informed a company supervisor. *Id.* The issue was discussed among several supervisors and union representatives. *Id.* at 420. The court recognized that the employer was bound by law to take actions to make the workplace safe. *Id.* at 422. For this reason, the court held that the publicity was absolutely privileged.

Similarly, Stowe possessed information that compelled a legal duty to create a safe environment in the workplace. She was required by law to disclose the contents of the message to the individuals who could effectively render the work place safe from sexual harassment. Thus, her communications were absolutely privileged.

4. *Stowe was also conditionally privileged to publicize the subject matter of the message in order to protect each party's interest.*

All of the conditional privileges available as defenses to a charge of defamation function as defenses to a charge of invasion of privacy. *See* RESTATEMENT (SECOND) OF TORTS § 652(f).

a. *Stowe's publication was conditionally privileged as a protection of her own interest.*

A publication is conditionally privileged when the publisher has a correct or reasonable belief that an important interest of his or hers is affected and the recipient's knowledge of the matter will be of lawful service in the protection of the interest. *See* RESTATEMENT (SECOND) OF TORTS § 594, (*See* Appendix). "The qualified privilege enables principled employees to report actual or suspected misconduct without fear of legal liability." *Feggan v. Billington,* 677 A.2d 771, 776 (N.J. Super. 1996).

In *Foley v. Polaroid Corp.*, an employee was accused of committing rape at work. 508 N.E.2d 72, 74 (Mass. 1987). The defendant executive learned of the information and discussed the event with other managers. *Id.* In denying plaintiff's defamation claim, the court held that the de-

fendant's interest in disclosing information regarding an employee's fitness to perform his duties made the disclosure conditionally privileged. *Id.* at 79.

Similarly, Stowe's duties to her company revolve around acting in the company's best interest. Magnum was potentially jeopardized by Morton's actions that were described in petitioner's message. Furthermore, had the company been held liable in a sexual harassment suit because of her failure to act on the information contained in the message, Stowe's job would also be in jeopardy. As such, her communication was conditionally privileged.

b. Stowe's publication was conditionally privileged as a protection of the recipient's interest.

The Restatement explains that a publication is conditionally privileged provided that the information affects a sufficiently important interest of the recipient and the publication is within generally recognized standards of decent conduct. RESTATEMENT (SECOND) OF TORTS § 595. (*See* Appendix).

5. *Each of the recipients had a sufficient interest at stake.*

Each of the individuals to whom Stowe publicized the matter had a legitimate interest at stake. Private employers can be held liable for employees that commit sexual harassment. *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 63 (1986). Sexual harassment is a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). *Meritor,* 477 U.S. at 63; *See also Faragher v. City of Boca Raton,* 118 S. Ct. 2275, 280 (1998). An employer can be vicariously liable for sexual harassment by one of its supervisors if the employer knew or should have known of the conduct and failed to stop it. *See Burlington,* 118 S. Ct. at 2267. Employer liability resulting from an employee's sexual harassment is not dependent on a showing of psychological harm to the victim. *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 22, (1993). Nor does the absence of adverse job consequences preclude employer liability. *Burlington,* 118 S. Ct. at 2271.

Thus, in light of the increased employer exposure resulting from the effort to eliminate sexual harassment, the Chief Operating Officer has a legitimate interest in the subject matter of the message. Personnel directors are responsible for investigating charges of sexual harassment. *See Faragher,* 118 S. Ct. 2275; *Gunnell v. Utah Valley State College,* 152 F.3d 1253 (10th Cir. 1998). The Legal Counsel is the most competent individual to determine legal dangers and potential remedies. Each of the employees to whom Stowe published the matter had a legitimate in-

terest in the subject matter. Thus, the publication was conditionally privileged.

a. Stowe's action clearly falls within generally accepted standards of decent conduct.

The standards of decent conduct are determined by examining whether the publication is made in response to a request, and whether a relationship exists between the parties. RESTATEMENT (SECOND) OF TORTS § 595(2).

As an executive, Stowe is responsible for workplace efficiency and safety. She has a duty to act if she discovers any threat to that safety. Furthermore, Stowe is a co-manager, with all of the people to whom she published the information. Because of her responsibility to report misconduct and her professional relationship with Magnum supervisors, Stowe's actions are clearly within generally accepted standards of decent conduct.

b. Stowe's publication was conditionally privileged as a legitimate effort to address problems of sexual harassment.

When the circumstances lead one person that shares a common interest to correctly or reasonably believe that there is information that another sharing the common interest is entitled to know, the publication of that interest is conditionally privileged. RESTATEMENT (SECOND) OF TORTS § 596, (*See* Appendix).

In *Daywalt v. Montgomery Hosp.*, an employee sued a hospital for publicizing to hospital employees information of the plaintiff's alleged tampering with her time card. 573 A.2d 1116 (Pa. Super. 1990). The court held that the publication was conditionally privileged because supervisors have a common interest in knowing of any employee misconduct. *Id.* at 1119.

The executives at Magnum also share this common interest of learning of any employee misconduct.

In *Miller v. Minority Bhd. of Fire Protection*, a fire captain drafted a complaint concerning problems he felt resulted from the increase in minority firefighters. 463 N.W.2d 690, 691 (Wis. App. 1990). He left the draft with the employee time cards. *Id.* Later, he learned that the draft had been circulated in an effort to expose the captain's prejudice. *Id.* The fire captain sued several individuals and organizations who had sent out letters asking that his commission be rescinded due to racial bias. *Id.* at 691. Reversing the lower court's denial of defendant's motion for summary judgement, the court held that all of the publishers shared a common interest in making the workplace free of racial bias. *Id.* at 690.

Here, Stowe and the other executives had the common interest of providing a workplace free of sexual harassment:

"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Meritor, 477 U.S. at 67, *citing Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

Magnum's supervisors share a similar interest in making the workplace free of sexual harassment. As such, any discussion of the contents of the message was conditionally privileged as the protection of this common interest.

CONCLUSION

For the foregoing reasons, Magnum Corporation requests that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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