

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

SHEILA QUILLEN, ET AL.,)

Plaintiffs,)

v.)

ANTHONY WAYNE QUILLEN,)

Defendant.)

Case No. 2:02CV00085

OPINION AND ORDER

By: James P. Jones

United States District Judge

Henry S. Keuling-Stout, Keuling-Stout, P.C., Big Stone Gap, Virginia, for Plaintiffs; Timothy W. McAfee, McAfee Law Firm, P.C., Norton, Virginia, for Defendant.

In this action seeking damages for the illegal interception, disclosure and use of telephone communications, I deny the parties' cross motions for summary judgment and send the case on for jury trial.

I

In her Complaint, the plaintiff, Sheila Quillen, alleged that the defendant, Anthony Wayne Quillen, her former husband, had intercepted, disclosed and used her telephone conversations in violation of 18 U.S.C.A. § 2511 (West 2000). In an Amended Complaint, Mrs. Quillen's mother, Nina Brickey, was added as a plaintiff

on the ground that she was talking to her daughter in certain of the intercepted conversations. After discovery, both sides have filed cross motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. The motions have been briefed and argued and are ripe for decision.

The facts as set forth in the summary judgment record are as follows.¹

Mrs. Quillen claims that in January 2001 she learned through a co-worker of her husband that her husband had been inquiring about how to “tap a telephone.” Sometime later she learned through the same source that her husband had said that “he had done it” and that the tap was on their home telephone. Over a year later, on March 13, 2002, during a hearing in state court in a divorce action between Mr. and Mrs. Quillen, Mr. Quillen’s then-attorney, Daisy Compton, introduced transcripts of conversations between Mrs. Quillen and her mother and her aunt that Mr. Quillen had intercepted and recorded. Although the presiding judge allowed the transcripts to be admitted, they apparently had no effect on any decisions made in the case, which were favorable to Mrs. Quillen.

Mr. Quillen admits that he intercepted and recorded the conversations with a device that he purchased at Radio Shack. He worked the night shift and would

¹ The parties have submitted transcripts of their discovery depositions. In addition, Mrs. Quillen has submitted an affidavit.

activate the device before he left for work. He would listen to the tape the next day when his wife was working and either keep or erase the previous night's recorded conversations. He admits that he operated the device each night he worked between January 15 and February 15, 2001. He taped the conversations because he suspected that his wife was having an affair.²

Mr. Quillen contends that he did not authorize his attorney to introduce the transcripts of the taped calls at the court hearing.³ He testified that he had not known that it was illegal to intercept telephone conversations, but he did realize it would "bother" someone to have their private conversations intercepted.

In his summary judgment motion, Mr. Quillen, while admitting the violation of law, contends that monetary damages are not justified under the circumstances of the case and should be refused. In her motion for summary judgment, Mrs. Quillen argues that since the violations are admitted, the court should enter judgment in favor of each plaintiff for the minimum amount of statutory damages, along with reasonable attorney's fees.

² Mr. Quillen contends the conversations confirmed his suspicions, because his wife discussed a person named "David" with a friend and with her mother. Mrs. Quillen says that the "David" she discussed is her cousin.

³ The record does not reflect what relevance, if any, the conversations had to the subject matter of the court hearing. The transcripts are not part of the summary judgment record.

II

Federal law creates a private civil cause of action for any person whose electronic communications have been illegally intercepted or disclosed. In addition to injunctive relief and attorney's fees, "the court may assess as damages whichever is the greater of—(A) the sum of the actual damages suffered by the plaintiff . . . as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000." 18 U.S.C.A. § 2520(c)(2) (West 2000). It is established in this circuit that the court in its discretion may refuse to award statutory damages where the violation of law is de minimus. *See Nalley v. Nalley*, 53 F.3d 649, 653-54 (4th Cir. 1995).

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Even though the violation of law is admitted in this case, I find that there are genuine issues of material fact as to damages that can only be resolved at trial. While

the plaintiffs did not incur any out-of-pocket loss, they claim that they have suffered mental anguish from the invasion of their privacy. The extent of that harm cannot be adequately determined without an opportunity to observe the witnesses and judge their credibility. Moreover, there is no domestic relations exception to the law, *see Nalley*, 53 F.3d at 653, and I am unable to say on this record that the defendant's conduct was de minimus. The secret telephone recording occurred over a month-long period, involved numerous conversations, may have been entirely without justification, and allegedly caused considerable emotional distress. *See Goodspeed v. Harman*, 39 F. Supp. 2d 787, 791-95 (N.D. Tex. 1999) (discussing factors to be considered in determining whether the court should exercise its discretion to refuse damages under § 2520(c)).

Moreover, the plaintiffs filed a timely demand for a jury trial in this case. *See* Fed. R. Civ. P. 38(b). Section 2520(c) refers to “the court” assessing damages, which language normally means the judge and not the jury. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 346 (1998) (construing section 504(c) of the Copyright Act of 1976). However, regardless of congressional intent, the Seventh Amendment⁴ requires the availability of a jury if the federal statutory action “involves

⁴ “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the

rights and remedies of the sort typically enforced in an action at law.” *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (requiring jury trial in action for damages for alleged housing discrimination under Title VIII of Civil Rights Act of 1969). An action for damages usually sounds in law rather than equity. *See Feltner*, 523 U.S. at 352. Although § 2520(c) provides for statutory damages as an alternative to actual damages, “an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.” *Id.*

The primary question under the Seventh Amendment is whether the claim at issue “was tried at law at the time [the amendment was adopted] or is at least analogous to one that was.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). An action for damages under § 2520(c) is analogous to a traditional tort claim seeking redress for personal harm and thus is triable by a jury as a matter of right.

Just as I cannot decide on this record that no damages should be awarded, neither can I determine that statutory damages must be imposed. Since the issues of damages are appropriately to be determined by a jury, the cross motions for summary judgment will be denied. *See Patterson v. Coughlin*, 905 F.2d 564, 570 (2d Cir. 1990) (“The evaluation of the injury suffered by a plaintiff, unless damages have been

common law.” U.S. Const. amend. VII.

liquidated or otherwise stipulated, is normally a question of fact to be decided by the factfinder after trial, not a matter for summary judgment.”).

III

The defendant has also moved in limine to exclude any evidence of the introduction of the transcripts of the telephone calls in the divorce proceedings. However, I find that the use of the intercepted calls is relevant to any award of damages.⁵ The defendant may be liable for the acts of his agent that occurred in the scope of the lawyer’s employment, even if not expressly authorized by the defendant. While defamatory statements made during the course of judicial proceedings are not actionable, this is not a defamation case.⁶

⁵ However, there is no double counting of statutory damages for both interception and use of telephone conversations. *See Desilets v. Wal-Mart Stores, Inc.*, 171 F.3d 711, 716 (1st Cir. 1999) (“[W]hile a plausible argument can be made that providing separate minimum damage awards for each *type* of violation would better serve the Act’s purposes, that is an argument that must be presented to Congress.”).

⁶ Although the Fourth Circuit appears to have held that the use of taped conversations in a judicial proceeding to impeach a witness is not a violation of § 2511, *see Culbertson v. Culbertson*, 143 F.3d 825, 828 (4th Cir. 1998), there is no evidence of the purpose for the introduction of the transcripts in this case.

IV

For the foregoing reasons, it is **ORDERED** as follows:

1. The Motions for Summary Judgment (Doc. Nos. 18, 19) are denied;
2. The Motion in Limine (Doc. No. 23) is denied; and
3. The defendant's Motion Pursuant to FRCP 14 (Doc. No. 24) is granted

and the defendant is granted leave to file a third-party complaint, provided such complaint is filed within 20 days of the date of entry of this Order.

ENTER: May 29, 2003

United States District Judge