

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ANITA ALBERTI,)
)
) **PLAINTIFF**)
)
 v.)
)
 NANCY HEWSON,)
 SERGEANT EVERETT SMITH,)
 CHIEF DAVID MILES,)
 THE TOWN OF FRYEBURG,)
 CHRISTOPHER BERNARDIN,)
 JEFFERY KNIKKERS AND)
 DEBBRA THOMPSON,)
)
) **DEFENDANTS**)

CIVIL No. 96-299-P-H

ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Anita Alberti has sued her neighbor, Nancy Hewson, and the Town of Fryeburg, Police Chief David Miles and Police Sergeant Everett Smith for listening to and recording, through use of a radio scanner, Alberti's cordless telephone calls. Alberti has sued for violation of state and federal communications interception statutes (Counts I and II), intentional and negligent infliction of emotional distress (Counts III and IV) and invasion of her common law right to privacy (Count V). She also seeks punitive damages against neighbor Hewson on Counts III and V.

The defendants have moved for summary judgment. Their motions are **GRANTED IN PART** and **DENIED IN PART** as follows.

I. NEIGHBOR HEWSON’S MOTION FOR SUMMARY JUDGMENT

A. Maine’s Interception of Wire and Oral Communications Statute, 15 M.R.S.A. §§ 709-12 (1964 & Supp. 1996)

The parties dispute whether cordless telephone calls are covered by the Maine statute, a question that the Maine Law Court has never addressed. The statute makes it an offense for “[a]ny person” to “willfully intercept[], attempt[] to intercept or procure[] any other person to intercept or attempt to intercept, any wire or oral communication[.]” *Id.* § 710(1). “Wire communication” is defined as “any communication made *in whole or in part* through the use of facilities for transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception.” *Id.* § 709(7) (emphasis added). While communication by cordless telephone does not transpire entirely by wire or cable, it certainly does so “in part.” Between the “point of origin” (the handset that is spoken into) and the “point of reception” (the call recipient’s telephone), telephone wires connect the base units to the telephone lines. Therefore, the plain meaning of the statute covers communication by cordless telephones, even though part of the communication is carried by radio waves. Summary judgment to Hewson on Count I is **DENIED**.

B. Federal Wire and Electronic Communications Interception and Interception of Oral Communications Statute, 18 U.S.C. §§ 2510-21 (1994 & Supp. 1996)

Hewson argues that interception of cordless telephone communications are excluded from the federal statute because the statute does not prohibit interception of “an electronic communication made through an electronic communication system that is configured so that

such electronic communication is readily accessible to the general public[.]” Id. § 2511(2)(g)(i), and that the radio portions of cordless telephone calls are readily accessible to the general public. But that phrase is a term of art under the statute. “[R]eadily accessible to the general public . . . with respect to a radio communication” means a communication that “is not . . . transmitted over a communication system provided by a common carrier[.]” Id. § 2510(16)(D). The telephone company obviously is a common carrier of telephone communications, including those by cordless telephone.

In addition, the statute originally excluded from coverage “the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit[.]” Id. § 2510(1), (12)(A). In 1994, Congress deleted the exclusions of cordless telephone communications, see Pub. L. No. 103-414, Title II, §§ 202(a), 203, 108 Stat. 4290, 4291, thereby demonstrating its clear intent that such communications are now covered. This intent is also supported by the legislative history. The House Report to the bill that changed the statute states: “The protections of the Electronic Communications Privacy Act of 1986 are extended to cordless phones and certain data communications transmitted by radio.” H. Rep. No. 103-827, at 10 (1994), reprinted in 1994 U.S.C.C.A.N. 3489, 3490. Summary judgment to Hewson on Count II is accordingly **DENIED**.

C. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress, the state common law claim asserted in Count III, requires conduct that is “so ‘extreme and outrageous’ as to exceed ‘all possible bounds of decency’ and [that] must be regarded as ‘atrocious, and utterly intolerable in a

civilized community[.]” Vicnire v. Ford Motor Credit Co., 401 A.2d 148, 154 (Me. 1979) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). According to the Restatement (Second) of Torts:

It is for the Court to determine, in the first instance, whether the defendant’s conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

Restatement (Second) of Torts § 46 cmt. h. Certainly the recently enacted federal and state statutes reflect a legislative judgment that conduct like Hewson’s should cease. But I conclude that this late twentieth century version of eavesdropping and gossiping, although reprehensible, does not meet the stringent standard of being “atrocious and utterly intolerable in a civilized community.” (Indeed, Hewson’s conduct was not even covered by the federal statute until 1994. See supra Part (I)(B)). Summary judgment to Hewson on Count III is accordingly **GRANTED**.

D. Negligent Infliction of Emotional Distress

Summary judgment is **DENIED** on Count IV, negligent infliction of emotional distress. Hewson argues that as a mere neighbor she owed no duty of care to Alberti. “A plaintiff who fails to prove that the defendant violated a duty of care owed to the plaintiff cannot recover, whether the damage is emotional, physical, or economic.” Devine v. Roche Biomedical Lab., 637 A.2d 441, 447 (Me. 1994) (citing Cameron v. Pepin, 610 A.2d 279, 281 (Me. 1992)). But Hewson was more than a mere neighbor who failed to prevent harm to Alberti. Instead,

she actively intervened in Alberti's affairs and thereby assumed a duty not to behave negligently. The requirement that a duty be breached to maintain an action in negligence, moreover, does not mean that there must be an underlying separate tort from the tort of negligent infliction of emotional distress. Gammon v. Osteopathic Hosp. of Maine, Inc., 534 A.2d 1282 (Me. 1987), expanded the scope of negligent infliction of emotional distress claims by eliminating the "more or less arbitrary requirements" that the plaintiff make "a showing of physical impact, objective manifestation, underlying or accompanying tort, or special circumstances." Id. at 1283. Gammon adopts a general foreseeability approach: "A defendant is bound to foresee psychic harm only when such harm reasonably could be expected to befall the ordinarily sensitive person." Id. at 1285.

E. Invasion of Privacy

The issue for invasion of privacy is the electronic eavesdropping and the use of binoculars to peer into Alberti's house. Maine follows the Restatement (Second) of Torts approach to invasion of privacy. See Nelson v. Times, 373 A.2d 1221, 1223 (Me. 1977). The Restatement covers intrusions that are "physical[] or otherwise." Restatement § 652B. Comment b to section 652B makes clear that the invasion "may be by physical intrusion," but "may also be by the use of the defendant's senses, with or without mechanical aids[.]" Id. cmt. b. There is perplexing language in Nelson, quoted again in Loe v. Town of Thomaston, 600 A.2d 1090, 1093 (Me. 1991), and relied upon by Hewson that a complaint

must allege a *physical* intrusion.¹ That statement is directly contrary to the Restatement black letter principle, commentary and illustrations (stating that an invasion occurs through the use of binoculars or a wiretap) and does not appear to have been the focus of the Law Court’s decision, for in each case the plaintiff’s privacy in a home was not even involved. I conclude that the Law Court did not intend to make a *physical* trespass the *sine qua non* of an invasion of privacy claim. See Muratore v. M/S Scotia Prince, 656 F. Supp. 471, 483 & n.19 (D. Me. 1987) (interpreting Maine as requiring “a physical intrusion, *or at least an intrusion into a physical realm that is uniquely the plaintiff’s*” and referring to binoculars and wiretapping (emphasis added)), modified on other grounds, 845 F.2d 347 (1st Cir. 1988). Summary judgment on Count V is **DENIED**.

F. Punitive Damages

Hewson has moved for summary judgment on Alberti’s claims for punitive damages on Counts III and V. Since I have granted summary judgment on Count III, I consider only Count V, invasion of privacy. “[P]unitive damages are available based upon tortious conduct only if the defendant acted with malice.” Tuttle v. Raymond, 494 A.2d 1353, 1361 (Me. 1985).

Malice may be express, “where the defendant’s tortious conduct is motivated by ill will toward the plaintiff.” Id. In the light most favorable to Alberti, Alberti’s evidence of ill will is that Hewson said she did not like the activities she observed at Alberti’s house,

¹ “[A] complaint should minimally allege a physical intrusion upon premises occupied privately by a plaintiff for purposes of seclusion.” Nelson, 373 A.2d at 1223.

admitted to calling the police about Alberti more than ten times over the years and said she was not on speaking terms with Alberti. See Hewson Dep. at 7-11.²

Malice may also be implied, “where deliberate conduct . . . is so outrageous that malice toward a person injured as a result of the conduct can be implied.” Tuttle, 494 A.2d at 1361. Reckless disregard of the circumstances is not enough. See id. at 1361-62. Alberti’s evidence of implied malice is that Hewson listened to Alberti’s telephone conversations through her radio scanner, reported the nature of the conversations to the police, provided information to the police on how to pick up the conversations on a scanner, recorded conversations even after reporting to the police, and used binoculars to look into Alberti’s home. Pl.’s Am. Stmt. Mat. Facts ¶¶ 5-10. (There is also evidence of the absence of malice, since Hewson offered at one time to assist Alberti in supervising her son. Hewson Dep. at 11.)

To recover punitive damages, the plaintiff must demonstrate malice by “clear and convincing” evidence. See Tuttle, 494 A.2d at 1363. On this record, I conclude that there is a question for the jury. Summary judgment is accordingly **DENIED** to the defendant Hewson on the issue of punitive damages.

² Hewson’s evidence puts a different, more favorable (to her) interpretation on all of these.

**II. MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS
TOWN OF FRYEBURG, POLICE CHIEF MILES AND
POLICE SERGEANT SMITH**

A. State Law Claims (Counts I, III, IV & V)

(1) Town of Fryeburg

(a) Maine Statute

Summary judgment for the Town of Fryeburg on Count I, the state statutory claim for communications interception, see 15 M.R.S.A. §§ 709-12, is **DENIED**. Section 711 of the statute provides for a civil recovery from “any person” who violates the statute, and section 709(6) defines “person” to include “a state or political subdivision of a state.” Governmental immunity under the Maine Tort Claims Act, see 14 M.R.S.A. § 8103(1), therefore does not apply to this statutory claim.

(b) State Common Law Claims

Summary judgment for the Town of Fryeburg is **GRANTED** on Counts III, IV and V, the state common law claims, based on governmental immunity under the Maine Tort Claims Act, see 14 M.R.S.A. § 8103(1). By participating in the Maine Municipal Association Pool, a municipality does not waive immunity under 14 M.R.S.A. § 8116. See McPherson v. Auger, 842 F. Supp 25, 28 (D. Me. 1994). The protection afforded by the pool covers only those specific situations where there is no governmental immunity under the Act, as defined in 14 M.R.S.A. § 8104-A. See Poulin Aff. ¶ 4.

(2) Police Chief Miles and Police Sergeant Smith

(a) Maine Statute

With respect to Count I, I have already discussed the application of 15 M.R.S.A. §§ 709-12 to a cordless telephone conversation as a “wire communication.” See supra Part (I)(A). The defendants Smith and Miles provide a different argument: that a radio scanner is not an “intercepting device” under the statute. Again, the Law Court has not had the occasion to address this issue.

“Intercepting device” is defined broadly as “any device or apparatus which can be used to intercept a wire or oral communication[.]” 15 M.R.S.A. § 709(3). The plain meaning of this language seems to cover radio scanners, even though they may be widely available and also have legal uses (such as picking up police activity broadcast on radio waves). Additionally, the language in the Maine statute mirrors the language in the federal statute, which was enacted in 1968, Pub. L. No. 90-351, Title III, § 802, 82 Stat. 212, five years prior to enactment of the state statute, 1973 Me. Laws ch. 561. (The federal statute said at that time, “‘electronic, mechanical, or other device’ means any device or apparatus which can be used to intercept a wire or oral communication[.]” 18 U.S.C. § 2510(5) (1968)).³ In Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979), the First Circuit applied the language of the federal statute to extension telephones: “The purpose of the statute is to prohibit the secret monitoring of wire communications. Its application should not turn on the type of

³ Congress substituted “wire, oral or electronic communication” for “wire or oral communication” in 1986. Pub. L. No. 99-508, Title I, § 101(a), (c)(1)(A), (4), 100 Stat. 1848, 1851.

equipment that is used, but whether the privacy of telephone conversations has been invaded in a manner offensive to the words and intent of the Act.” *Id.* at 392. If an ordinary telephone extension is covered by such language, certainly a scanner is likewise covered.

The defendants argue that the legislature could not possibly intend an ordinary radio scanner to be an “intercepting device,” because then another part of the statute would make possession of a scanner a crime. The statute does make it a crime to possess “any device . . . designed or commonly used for intercepting wire or oral communications[.]” 15 M.R.S.A. § 710 (5). But whether a radio scanner is “designed or commonly used for intercepting” is a separate issue from the one before me. While this Order finds that using a radio scanner intentionally to intercept a protected communication can violate section 710(1) of the statute, simply possessing a scanner does not necessarily violate section 710(5), because scanners may not be “designed or commonly used for intercepting wire or oral communications.” Specifically, they may be “designed or commonly used for” listening to police and other radio broadcasts, although they may be misused at times to intercept private telephone conversations. In short, the statute can make it a crime to misuse a radio scanner to eavesdrop on private telephone conversations, while not making it a crime to possess a device that happens to be capable of this misuse. Summary judgment on Count I is accordingly **DENIED** to Sergeant Smith.

Summary judgment on Count I is **GRANTED**, however, to Chief Miles. There is no evidence in the record that Chief Miles engaged in intercepting and recording Alberti’s communications. Alberti responds that Chief Miles and the Town of Fryeburg have yet to

object to or respond to long overdue interrogatories that may provide such evidence. See Pl.'s Am. Mem. of Law in Opp'n to Defs.' Mot. Summ. J. at 5 n.3, 13-14. However, discovery is now closed and Alberti had the opportunity under Fed. R. Civ. P. 37(a) to apply for an order compelling discovery and under Fed. R. Civ. P. 56(f) to file an affidavit explaining why the record lacks sufficient facts to sustain her burden to demonstrate a genuine issue of material fact for trial. She filed no such motion or affidavit. Accordingly, I take the record as it stands.

(b) State Common Law Claims

Summary judgment based on discretionary function immunity, see 14 M.R.S.A. § 8111(1)(C), is **GRANTED** to Chief Miles and Sergeant Smith on Counts III, IV and V. Section 8111(1) states:

[E]mployees of governmental entities shall be absolutely immune from personal civil liability for the following:

. . . .

(C) Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused[.]

Id. On this record, Alberti has no evidence about what Chief Miles did except that he assigned the investigation to Sergeant Smith. Assignment of an investigation to a junior officer is well within the Chief's discretion. Summary judgment based on discretionary function immunity for Chief Miles is **GRANTED**.

The analysis for Sergeant Smith is slightly more complicated. He did engage in the electronic eavesdropping and recording. The evidence on the record is that before the

eavesdropping and recording an Assistant District Attorney told Sergeant Smith that “he did not know of any reason why [Smith] could not tape these conversations [and] would check into it” Smith Aff. ¶ 4.⁴ Sergeant Smith then proceeded to eavesdrop without awaiting the follow-up answer.

Discretionary function immunity extends to officers’ conduct except when they act so egregiously as to “clearly exceed[], as a matter of law, the scope of any discretion [they] could have possessed in [their] official capacity” Polley v. Atwell, 581 A.2d 410, 414 (Me. 1990). Although it might have been safer to await a definitive answer from the Assistant District Attorney, Sergeant Smith’s conduct under the limited advice he received did not clearly exceed the scope of his discretion as a police investigator. Summary judgment is therefore **GRANTED** to Sergeant Smith on Count V, invasion of privacy.

Under Counts III and IV, Alberti offers additional evidence (I do not consider the allegations in her Complaint, but only her deposition testimony and affidavit under this summary judgment motion), namely, that Sergeant Smith encouraged or permitted her to make inquiries on her own concerning the theft of money from her house, declined to pursue certain investigative leads that she requested him to pursue and failed to act quickly enough. Although the verbal interchanges with Alberti, if they happened as she characterizes them, were highly unprofessional, Sergeant Smith’s conduct in permitting her to pursue the matter

⁴ Alberti challenges the credibility of Sergeant Smith on this score, but she has not provided any contrary evidence (*e.g.*, an affidavit of the Assistant District Attorney). A challenge to credibility is not enough to withstand summary judgment. See, e.g., Moreau v. Local Union No. 247, Int’l Bhd. of Firemen and Oilers, AFL-CIO, 851 F.2d 516, 519-20 (1st Cir. 1988) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

and in deciding what to do and what not to do on the investigation are quintessential discretionary activities by a police officer. That conclusion extends even to Alberti's assertion that Sergeant Smith's conduct here "entrapped" her, for the issue of when facilitating a crime becomes entrapment is a fine line to delineate even for lawyers. Accordingly, summary judgment is **GRANTED** to Sergeant Smith on Counts III and IV.

B. Federal Law Claim (Count II)

Alberti has stated that she is not asserting any claim under 42 U.S.C. § 1983. See Pl.'s Am. Mem. of Law in Opp'n to Defs.' Mot. Summ. J. at 1. The defendants seem to argue nevertheless that qualified immunity protects them from all federal claims, even those asserted under the Federal Wire and Electronic Communications Interception Act, see Reply Mem. at 1-3. But Campiti ruled specifically that the qualified immunity defense (available under § 1983, see, e.g., Anderson v. Creighton, 483 U.S. 635 (1987), or in a Bivens action, see, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982)), is not an available defense under this statute. See Campiti, 611 F.2d at 394-95.⁵

The defendants argue alternatively that they fit under the Federal Wire and Electronic Communications Interception Act's separate affirmative defense of good faith. See 18

⁵ When Campiti was decided, the statutory defense was worded as follows: "A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law." 18 U.S.C. § 2520 (1968), amended by Pub. L. No. 99-508, Title I, § 103, 100 Stat. 1854 (1986) (codified at 18 U.S.C. § 2520(d)). The statutory defense that applies to the case at hand (quoted in the text of this Order) is more specific but not materially different. The analysis for the purposes of this argument is the same.

U.S.C. § 2520(d). The statute allows for a good faith defense only where there is “A good faith reliance on—”:

- (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;
- (2) a request of an investigative or law enforcement officer under section 2518(7) of this title [outlining the procedures for lawful intercepting]; or
- (3) a good faith determination that section 2511(3) of this title [addressing entities “providing electronic communication service to the public”] permitted the conduct complained of[.]

Id. Subsection (1) is the only defense that might possibly apply to the facts in this case. However, there was no “court warrant or order” or “grand jury subpoena” here. Additionally, Sergeant Smith could not have been relying on a “legislative” or “statutory authorization,” because the statute in effect at the time did not authorize interception of cordless telephone communications. See discussion supra Part (I)(B). Under Campiti, the subjective belief of the officer is irrelevant. Campiti, 611 F.2d at 394-95. Summary judgment is accordingly **DENIED** to Sergeant Smith on Count II.

Because the Wire and Electronic Communications Interception Act provides for relief against “the person or entity who engaged in” the interception, disclosure, or intentional use of a communication in violation of the statute, 18 U.S.C. § 2520(a), and defines “person” to include “any State or political subdivision thereof,” id. § 2510(6), the Town of Fryeburg may be implicated under Count II through the actions of its employee, Sergeant Smith. The section 1983 limitations on respondeat superior liability do not apply here given the statutory

language of “entity” liability. Summary judgment is accordingly **DENIED** to the Town of Fryeburg on Count II.

Summary judgment to Chief Miles, however, is **GRANTED** on Count II. As stated, see supra Part (II)(A)(2)(a), Alberti has not applied for an order compelling discovery under Fed. R. Civ. P. 37(a) or submitted an affidavit under Fed. R. Civ. P. 56(f). Accordingly, I must consider the record as it stands. Alberti does not have facts sufficient to bring to trial Chief Miles’s involvement in or liability for the interception of Alberti’s conversations.

C. Punitive Damages

The defendants Chief Miles, Sergeant Smith and the Town of Fryeburg have presented arguments for summary judgment on the issue of punitive damages. However, the Complaint does not assert punitive damages, other than against the defendant Hewson on Counts III and V. Additionally, Alberti does not address these defendants’ punitive damages argument in her response memorandum, indicating that punitive damages are not being pressed. Accordingly, no ruling is necessary on this part of the motion by the defendants Chief Miles, Sergeant Smith and the Town of Fryeburg.

III. CONCLUSION

Remaining in the case are Counts I and II (Maine and federal statutes) against the defendants Hewson, Smith and the Town of Fryeburg, and Counts IV and V (negligent infliction of emotional distress and invasion of privacy, together with punitive damages on the latter) against the defendant Hewson.

SO ORDERED.

DATED THIS 22ND DAY OF JULY, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE