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IN THE
COURT OF APPEALS OF INDIANA

Brian Young, Sandy Young, Tim Corbett, Dave Wells, Steve Richmond, Sheldon Scott, James Taylor, and Scott Hanley,

Appellants-Intervenors,

v.

South Bend Common Council,

Appellee-Plaintiff,

v.

South Bend City Administration,

Appellee-Defendant

June 30, 2022

Court of Appeals Case No. 21A-MI-1049

Appeal from the St. Joseph Superior Court

The Honorable Steven L. Hostetler, Judge

Trial Court Cause No. 71D07-1209-MI-159

Crone, Judge.

Case Summary

[1] Brian Young, Sandy Young, Tim Corbett, Dave Wells, and Steve Richmond (the Original Intervenors), along with Sheldon Scott, James Taylor, and Scott Hanley (the New Intervenors) (collectively the Intervenors), appeal the trial court's dismissal of their claims for declaratory and injunctive relief alleging violations of the Federal Wiretap Act and the Indiana Wiretap Act. The Intervenors raised their claims in a lawsuit originally filed by the South Bend Common Council (the Council) to compel the enforcement of a subpoena issued to the South Bend City Administration (the City) to produce recordings of phone calls made at the South Bend Police Department (the Department) to which the Intervenors allegedly were parties. We affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History[1]

[2] In 1998, the Department installed a "server-based" recording system to record calls on some, but not all, of its phone lines. Appellants' App. Vol. 6 at 113. "Once a particular phone line was wired into the recording system, the recording system would record everything it 'heard' on that line regardless of who was speaking on the line, the content of the conversation, or the time of day of the conversation." *Id.* at 113-14. "Anything so recorded would be stored on the recording system's hard drive and would be downloaded automatically

[1] Below, we have replaced the trial court's references to "the Administration" with "the City" and "the South Bend Police Department" with "the Department."

to a disk for backup and storage purposes." *Id*. at 114. The recording system was maintained by the Department's communications director, Karen DePaepe, who also maintained a list of the recorded lines.

[3] No written policies or procedures were adopted regarding the recording of the Department's phone lines. The communications center lines (including 911 calls) and the front desk lines were recorded, regardless of user, as a matter of routine. Tom Fautz became the Department's chief in 2002. Fautz told DePaepe that his approach to the phone lines of individual administrative officers would be to start and stop recording them only upon an officer's request and not to record anyone without their knowledge, based on his belief that "they have an expectation of privacy with their own assigned line." Appellants' App. Vol. 5 at 20.

[4] In 2004, Rick Bishop was promoted to captain of the Department's investigative division and was assigned the phone number at issue in this case, Line 6031. In 2005, Bishop wanted to have his line recorded to facilitate the investigation of a person who was making harassing phone calls to the Department. Bishop spoke with DePaepe, who confirmed that his line was not currently being recorded and told him that he had to route his request through Fautz, which he did. Pursuant to Bishop's request, Line 6031 was wired into the Department's recording system and "was recorded from that time on." *Id*. at 116. In 2007, Bishop was promoted to division chief, and he asked to have Line 6031 transferred to his new office, which it was. By that point, Bishop had forgotten that his line was still being recorded. That same year, Darryl Boykins

became the Department's chief, and he followed Fautz's protocols regarding the recording of the Department's phone lines.

[5] In February 2010, Steve Richmond was promoted from captain of the Department's investigative division to division chief, replacing Bishop. Bishop transferred to the homicide unit and did not take Line 6031 with him. Richmond wanted to retain his existing phone number, so he asked Boykins' administrative assistant, Barbara Holleman, to transfer that line to his new office. Holleman did so, and she also transferred Line 6031 to the then-vacant captain's office. In March 2010, Brian Young was promoted to captain, moved into that office, and began using Line 6031. At that time, neither Holleman nor Young was aware that Young's line was being recorded.

[6] Sometime around January 2011, while troubleshooting the recording system, DePaepe listened to a recording from Line 6031, which she believed was Richmond's line, and recognized Young's voice. At some point, DePaepe began listening to recordings of that line "to investigate something that [she] had heard that bothered [her]" that she believed to be "illegal." Appellants' App. Vol. 6 at 38, 40. Sometime around the beginning of March 2011, DePaepe informed Boykins about the content of those conversations and "stated to him that [she] would leave this in his hands." *Id.* at 40. Boykins allowed the recording of Young's phone calls to continue so that he could "look into" DePaepe's allegations of wrongdoing. Appellants' App. Vol. 5 at 102. During this time, Young allegedly placed calls to and/or received calls from the other Original Intervenors (his wife Sandy and fellow Department officers Corbett,

Wells, and Richmond), as well as the New Intervenors (fellow Department officers Scott, Taylor, and Hanley). Young did not become aware that his line was being recorded until October 2011. He immediately asked to have the recording stopped, but his request went unheeded.

[7] In December 2011, Boykins asked DePaepe to "find" certain recordings of Young's phone conversations. Appellants' App. Vol. 6 at 61. In January 2012, DePaepe gave Boykins audio cassette tapes of conversations recorded on eight dates: February 4, April 5, June 3, June 6, June 16, June 27, July 14, and July 15, 2011. Young became aware that the recording of his line had continued after October 2011 and that Boykins possessed recordings of his phone calls. Young had conversations with Boykins that caused him to feel "intimidated[.]" Appellants' App. Vol. 5 at 238-39. Federal and state investigations into the recordings ensued. In March 2012, South Bend's mayor issued a news release that mentioned the recordings and announced that Boykins had been demoted and DePaepe had been fired.

[8] In August 2012, the Council issued a legislative subpoena to the City that requested the following items: "Copies of any and all tapes and/or digital recordings related to the Mayor's news release of March 29 and March 30, 2012 regarding the demotion of former Police Chief Darryl Boykins; as well as the tapes and/or digital recordings cited by the Mayor in the termination of

Communications Director DePaepe." Appellants' App. Vol. 9 at 174.[2] Later that month, the City filed a complaint for declaratory judgment against the Council and the Original Intervenors in the U.S. District Court for the Northern District of Indiana, seeking a determination of whether disclosure of the recordings would violate the Federal Wiretap Act (Case 475).

[9] In September 2012, the Council started the instant litigation by filing a motion with the trial court to compel compliance with its subpoena. Later that month, the Original Intervenors filed a complaint in the U.S. District Court for the Northern District of Indiana (Case 532). As amended, the caption of the three-count complaint named the following defendants: "The City of South Bend, Acting through its Police Department," Boykins in his individual and official capacities, DePaepe, and DePaepe's attorney, Scott Duerring. Appellants' App. Vol. 2 at 181 (capitalization altered). Although the caption did not specifically name the Council as a defendant, the Council was listed as one of the parties in the body of the complaint. *See id*. at 183 ("11. The City of South Bend is a government unit located in St. Joseph County, Indiana. It operates the South Bend Police Department. 12. The South Bend Common Counsel [sic] is the legislative body of South Bend.").

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[2] *See* Ind. Code § 36-4-6-21 (providing in pertinent part that a city's "legislative body may investigate … the departments, officers, and employees of the city[,] … is entitled to access to all records pertaining to the investigation[,] and … may compel the attendance of witnesses and the production of evidence by subpoena and attachment served and executed in the county in which the city is located").

[10] In count 1, the Original Intervenors requested damages for violations of the Federal Wiretap Act and the Indiana Wiretap Act, negligence, defamation, invasion of privacy, and intentional infliction of emotional distress allegedly committed by Boykins, DePaepe, and Duerring, and they asserted that the City was vicariously liable for Boykins' and DePaepe's acts and omissions and was negligent in training and supervising them. In count 2, the Original Intervenors asked for a declaratory judgment that the defendants' interception, disclosure, and/or use of their phone conversations violated both the Federal Wiretap Act and the Indiana Wiretap Act and that the Council's subpoena was "void and of no effect" to the extent that it sought the production of conversations recorded in violation of the Federal Wiretap Act. *Id*. at 189. And in count 3, the Original Intervenors asked that the defendants be permanently enjoined "from disclosing or using any of [their] recorded communications, whether pursuant to a Subpoena issued by the Council or otherwise." *Id*.

[11] By way of background, we note that, broadly speaking, both the Federal Wiretap Act and the Indiana Wiretap Act prohibit and impose civil and criminal penalties for the unauthorized intentional interception, use, or disclosure of various communications. 18 U.S.C. §§ 2511, 2520; Ind. Code §§ 35-33.5-5-4, -5. Neither Act applies to intercepted communications in which at least one of the parties has consented to the interception. *See* 18 U.S.C. § 2511(2)(c) ("It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the

communication has given prior consent to such interception."); Ind. Code § 35-31.5-2-176 ("'Interception', for purposes of IC 35-33.5, means the intentional recording or acquisition of the contents of an electronic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article.").[3]

[12] One exception to the Federal Wiretap Act is the ordinary course of business exception, which "provides, in pertinent part, that 'an investigative or law enforcement officer in the ordinary course of his duties' may 'intercept a wire, oral, or electronic communication' through an 'electronic, mechanical, or other device.'" *Packer v. State*, 800 N.E.2d 574, 579 (Ind. Ct. App. 2003) (quoting 18 U.S.C. § 2510(5)(a)(ii)), *trans. denied* (2004).[4] "But a communication is not viewed as having been recorded in the 'ordinary course' of an officer's duties if it is done to further a particular investigation or target a particular individual." *Narducci v. Vill. of Bellwood*, 444 F. Supp. 2d 924, 936 (N.D. Ill. 2006) (citing *Amati v. City of Woodstock*, 176 F.3d 952, 955-56 (7th Cir. 1999), *cert. denied*), *aff'd sub nom. Narducci v. Moore*, 572 F.3d 313 (7th Cir. 2009). "Instead, it must be part of a 'routine noninvestigative recording' of communications." *Id*.

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[3] When the recordings at issue were made, this provision was codified as Indiana Code Section 35-33.5-1-5.

[4] For purposes of the Federal Wiretap Act, an "investigative or law enforcement officer" means "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses[.]" 18 U.S.C. § 2510(7). There is no dispute that DePaepe is not an investigative or law enforcement officer for purposes of the Act.

(quoting *Amati*, 176 F.3d at 955). "For example, the routine taping of all calls into and out of a police station or the taping of all prison inmates' calls has commonly been held to come within that exception." *Id*. (citing *Amati*, 176 F.3d at 955, and *United States v. Feekes*, 879 F.2d 1562, 1565-66 (7th Cir. 1989)). The foregoing concepts are discussed in the trial court's orders excerpted below.

[13] In October 2012, the trial court stayed its proceedings pending the outcome of the two federal lawsuits, which eventually were consolidated. Later that month, the City filed a response to the Council's motion to compel, stating that it did not dispute the Council's statutory authority to issue the subpoena, "but that it would not produce the recordings to the Council absent a court determination that it would not violate the law by doing so." Appellants' App. Vol. 2 at 121.

[14] In November 2013, the Original Intervenors and the City executed a "Release and Settlement Agreement" in Case 532 that reads in pertinent part as follows:

> A. On October 25, 2012, the Plaintiffs [i.e., the Original Intervenors] filed an Amended Complaint against the City and Boykins in the Federal District Court for [the] Northern District of Indiana for alleged violations of the Federal Wiretap Act, the Indiana Wiretap Act as well as common law claims for negligence, defamation, invasion of privacy and intentional infliction of emotional distress. The claims arose from disputes related to the conduct of former Police Chief Darryl Boykins and former Director of Communications Karen DePaepe in allegedly capturing and recording conversations on the telephone line of Brian Young ("the Recordings") and disseminating the Recordings of the Plaintiffs and other conduct by the Parties surrounding the Recordings (the "Disputes").

B. On November 2, 2012 Boykins filed a Counterclaim against the Plaintiffs for fraud, defamation, intentional interference with contract/employment and intentional infliction of emotional distress arising from the same Disputes.

C. The Parties now desire that the Disputes which now exist, had previously existed or may have existed between them regarding the Recordings and/or alleged use of Recordings (which Disputes have been the subject of the respective lawsuits described above and are now collectively referred to as the "Lawsuits") be immediately settled and that the Parties be spared the trouble and expense of further litigation.…

NOW, THEREFORE, in consideration of the matters set forth, the terms of this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties further agree as follows:

1. Settlement. In exchange for complete releases related to the Disputes and dismissals with prejudice of the Lawsuits that each Party has initiated (described more fully below), the Parties hereby agree as follows:

> A. The City will pay to Tim Corbett, Steve Richmond, David Wells, Brian Young and Sandy Young the total sum of $500,000.00 made payable to each Plaintiff and to Pfeifer, Morgan & Stesiak.
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> B. The Parties acknowledge that the Recordings and the tape cassettes (the "Cassettes") which contain portions of the Recordings and which were made by Karen DePaepe and given to Darryl Boykins remain the subject of a subpoena by the Common Council of South Bend (the "Subpoena"). *The Plaintiffs will continue to pursue their declaratory judgment action seeking to quash the Subpoena.* The City will comply with any ruling on the validity of the

> subpoena. However, if the Plaintiffs prevail, the City will deliver the Cassettes to legal counsel for the Plaintiffs.
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> ….
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> D. The Parties will file a Stipulation of Dismissal with Prejudice for the Lawsuits with the Court on a date mutually agreed upon by the Parties.
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> ….
>
> 2. Release. Upon the filing of the dismissal called for above, the Parties … hereby RELEASE and FOREVER DISCHARGE each other Party … from any and all rights, claims, demands, damages, actions, causes of action, judgments, or liabilities of whatever nature, whether known or unknown, disclosed or undisclosed, that each Party had, now has, or may have had arising out of, related to, or connected with the Disputes and the Lawsuits in which each Party made claims. This Release is meant to be construed as broadly and comprehensively as possible. Additionally, Plaintiffs are not releasing claims against DePaepe and Duerring.
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> ….
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> 10. Negotiated Agreement/Construction: [T]his Agreement is the result of negotiations among the Parties. Counsel of record for each party have reviewed and drafted its contents together. Thus, the Parties expressly agree that no party shall be deemed to be the drafter of this Agreement. The language of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any party.

Id. at 145-49 (emphasis added) (underlining omitted).

[15] In December 2013, "pursuant to the settlement reached between the parties," the Original Intervenors, the City, and Boykins filed a stipulation of dismissal with prejudice of the Original Intervenors' claims against the City and Boykins in his official capacity in Case 532. *Id.* at 192. In April 2014, the district court granted the stipulated dismissal over DePaepe's objection.[5]

[16] In January 2015, the Council issued a second subpoena to the City requesting all digital recordings of Young's phone line from February 2010 through February 4, 2011. The City filed a response stating "that it would produce responsive information subject to certain objections." *Id.* at 121. Pursuant to Indiana Trial Rule 24, the Original Intervenors filed a motion to intervene as of right in the litigation between the Council and the City in this case, claiming "a privacy interest in the tapes and/or digital recordings, which allegedly contain recordings of [their] private phone conversations that were tapped into without [their] consent[,]" and asserting that "[t]he existing parties in this action do not adequately represent [their] interest in these tapes and/or digital recordings" and that "[t]he disposition of this matter without [their representation] will impair [their] interest in these tapes and/or digital recordings." *Id.* at 108-09. The trial court granted the motion over the Council's objection.

[17] Meanwhile, Case 475 went to bench trial in August 2014. DePaepe testified that on February 4, 2011, while troubleshooting the recording system, she heard

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[5] Ultimately, the Original Intervenors, DePaepe, and Duerring also filed a stipulated notice of dismissal of the claims involving those parties.

a recording of Young's voice from Line 6031, "which she believed had previously belonged to Richmond." *City of S. Bend v. S. Bend Common Council*, No. 3:12-CV-475 JVB, 2015 WL 13658504, at *2 (N.D. Ind. Jan. 14, 2015), *vacated by City of S. Bend v. S. Bend Common Council*, 865 F.3d 889 (7th Cir. 2017). In its decision, the district court concluded that the recordings made on Young's line on or before February 4, 2011, did not violate the Federal Wiretap Act because "[h]is line was recorded accidentally[,]" and that the Act did not prohibit disclosure of those recordings. *Id*. at *2, *4 (citing, inter alia, *United States v. Dorfman*, 690 F.2d 1230 (7th Cir. 1982)). The court also concluded that the recordings made on Young's line after February 4, 2011, were intentional and that the Act's ordinary course of business exception did not apply because the "Department does not customarily record all lines" and "Boykins chose to continue recording the line to gather more information related to the conversations reported by DePaepe"; thus, those recordings violated the Act and were "prohibited from disclosure." *Id*. at *3, *4 (citing, inter alia, *Amati*, 176 F.3d at 956).

[18] In August 2017, the U.S. Court of Appeals for the Seventh Circuit vacated the district court's judgment, holding that the City's lawsuit against the Council was not justiciable in federal court. *See City of S. Bend*, 865 F.3d at 892-93 ("[A] city's legislative and executive branches are not distinct juridical entities; they are part of a single government.… A suit by one whole branch of the federal government against another is not possible; a suit by the executive branch of a city versus the legislative branch is equally improper.… If any court is to resolve

a dispute between the legislative and executive branches of a unit of state or local government, a state court is the right forum."). Writing for the court, Judge Easterbrook remanded with instructions to dismiss the City's complaint in Case 475, noting that the trial court was now "free to resolve the underlying dispute on its own, without regard to the vacated federal judgment." *Id*. at 894. Judge Easterbrook also questioned the district court's treatment of "the intent element [of the Federal Wiretap Act] as related to knowledge of whose voice would be heard rather than knowledge of which line would be recorded[,]" noting that the court "did not explain why the statutory word 'intentionally' refers to the identities of the parties to a call." *Id*. at 891-92.

[19] One week later, the Council filed a motion with the trial court to lift the stay that was imposed back in 2012. In September 2017, pursuant to Indiana Trial Rule 22, the City filed a motion for leave to interplead the subpoenaed recordings to the trial court under seal. Later that month, the Original Intervenors filed with the trial court a complaint for declaratory judgment alleging that "the cassette tapes of the recordings at issue were illegally obtained under the Indiana Wiretap Act" and that the Original Intervenors, "along [with] every other person that was recorded on the tapes, have an equitable interest in the tapes being permanently sealed and prevented from being published or disseminated." Appellants' App. Vol. 2 at 129-30. The trial court denied the City's interpleader motion, noting that Trial Rule 22(A) states that a defendant "may obtain … interpleader by way of cross-claim or counterclaim[,]" and granting the City an opportunity to seek "interpleader

relief by way of a cross-claim or counterclaim in this case." Appellants' App. Vol. 2 at 132-33.

[20] In October 2017, the trial court granted the Council's motion to lift the stay and set deadlines for various filings. Two weeks later, the City filed a counterclaim and cross-claim for interpleader against the Council and the Original Intervenors. The City alleged that "[b]y reason of the actual and potential adverse and conflicting claims of the Council and Intervenors, the City is, or may be, exposed to double or multiple liabilities regarding the Recordings and Tapes"; that "[u]ntil this Court determines the proper legal status of the Recordings and Tapes, the City cannot safely determine the proper course of action to satisfy the competing claims of the Council and [Original] Intervenors"; and that the City was

> ready, willing and able to deposit the Recordings and Tapes with this Court, or as the Court otherwise directs, as full compliance with the Council's subpoenas, to be dealt with as determined by further order of the Court, to the extent such Recordings or Tapes are potentially responsive and relevant to the Council's subpoena or subpoenas.

Id. at 244.

[21] That same day, the Council filed a motion to dismiss the Original Intervenors' declaratory judgment complaint pursuant to Indiana Trial Rule 12(B)(1), asserting that the trial court lacked "subject matter jurisdiction to issue the decree and injunction sought by [the Original Intervenors] because [they] have released and forever discharged their rights and claims related to the recordings

at issue." *Id*. at 138. Both the Original Intervenors and the City objected to the Council's motion. After a hearing, the trial court granted the Council's motion to dismiss, ruling that the Original Intervenors were precluded from seeking declaratory relief in this case because Case 532 had been dismissed with prejudice. The court further noted,

> Deciding that the [Original] Intervenors' Complaint should be dismissed does not end the analysis. As mentioned above, the [Original] Intervenors are also parties to this lawsuit because they were named as counterclaim defendants in the City's Counterclaim[, which] seeks interpleader authority and injunctive relief against the [Original] Intervenors.
>
> There is nothing in the Settlement Agreement that would prohibit the City from seeking such relief. In fact, Federal Case No. 475, the case in which the City sought declaratory relief in federal court, was never dismissed on the merits and proceeded to trial with the participation of the [Original] Intervenors. That would clearly indicate that the parties to the Settlement Agreement intended that the [Original] Intervenors would be allowed to participate in an equitable proceeding initiated by the City.
>
> In light of this Order, it would seem that the City might want to amend its pleadings to expressly seek in this case the kind of equitable relief it was seeking in Federal Case No. 475. If so, the Court hereby grants the City thirty (30) days following the date of this Order to so amend. But even if the City does not supplement its pleadings in that respect, the [Original] Intervenors remain parties to this lawsuit as counterclaim defendants.

Jan. 29, 2018 Order at 10-11.

[22] In February 2018, the New Intervenors filed a motion to intervene that is substantially similar to the Original Intervenors' motion. The City indicated that it had no objection to the motion and that it would not be amending its interpleader claims to add a declaratory judgment claim. The Council objected to the motion and also filed a motion to dismiss the City's interpleader claims. In March 2018, the trial court granted the New Intervenors' motion to intervene.

[23] The New Intervenors then filed a complaint for declaratory judgment, in which they claimed a privacy interest in "the tapes and/or digital recordings that are the subject of the [Council's] Motion to Compel[,]" which "allegedly contain recordings of [their] private phone conversations with" Young, asserted violations of the federal and state wiretap acts and constitutions, and requested a "decree that there can be no further disseminating of the phone call recordings at issue" as well as a "permanent injunction preventing any future dissemination." Appellants' App. Vol. 3 at 35, 37. The City filed an answer and affirmative defenses to the complaint, as well as a counterclaim and cross-claim for interpleader adding the New Intervenors as defendants.

[24] In May 2018, the City filed a motion for summary judgment on its interpleader claims. After a hearing, the trial court granted the City's motion "to the extent that it seeks leave to interplead the Recordings" and discharged the City "from further financial liability arising from complying with the Council's subpoenas concerning the Recordings," subject to the City "preserv[ing], releas[ing],

publish[ing], destroy[ing] and/or disseminat[ing]" the recordings only as directed by the court. *Id*. at 128, 129.

[25] In October 2018, the New Intervenors filed a motion for summary judgment requesting both a declaratory judgment "that the recordings and tapes were illegally obtained" under the Indiana Wiretap Act and an order to destroy them. *Id*. at 149. The Council filed a response in opposition to the motion. After a hearing, the trial court entered partial summary judgment for the Council as to recordings made before the so-called "Discovery Date," i.e., the yet-to-be-determined date that "a conscious decision was made to continue recording the telephone line into Young's office"; the court ruled that "[s]ince the Recordings made prior to the Discovery Date were not intentional, they do not fall under the protection of the Indiana Wiretap Act. Thus, the production of those Recordings would not violate the Act as a matter of law." Apr. 22, 2019 Order at 9-11. The trial court rejected the Council's assertion that the Discovery Date was February 4, 2011, and stated that "the date that is determinative is in January of 2011[,]" when, according to the parties' stipulations, DePaepe discovered that Young's line was being recorded. *Id*. at 10.[6]

[26] The court also entered partial summary judgment as to certain parties' consent to the recording of calls made on or after the Discovery Date:

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[6] The stipulations are based on a pretrial order in Case 475. As mentioned above, DePaepe testified at trial that she discovered that Young's line was being recorded on February 4, 2011.

> a. There is no genuine issue of material fact as to whether any person granted express consent to the recording of their calls on line 6031 during the period of time in question. No express consent was given by anyone as a matter of law.
>
> b. There is no genuine issue of material fact as to whether persons who are not current or former[] officers or employees of the Department gave implied consent to the recording of their calls on line 6031 during the period of time in question. No implied consent was given by any such non-officers or non-employees as a matter of law.
>
> c. There remains a genuine issue of material fact as to whether persons who are current or former officers or employees of the Department, including Brian Young, granted implied consent to the recording of their calls on line 6031 during the period of time in question.
>
> d. In the event and to the extent that it is hereafter determined that one or more … current or former officers or employees of the Department did grant implied consent to the recording of their calls on line 6031 during the period of time in question, said calls for which implied consent was granted would not be covered by the Indiana Wiretap Act as a matter of law.

Id. at 18-19.

[27] In September 2019, the New Intervenors filed a second motion for summary judgment requesting both a declaratory judgment that the recordings of Young's "phone line and the copies and tapes made therefrom violated the Federal Wiretap Act" and an order to destroy them. Appellants' App. Vol. 4 at 95. The Council filed a response in opposition to the motion. After a hearing, the trial court issued an order that reads in pertinent part as follows:

As recognized and discussed in the First Summary Judgment Motion Order, the Recordings [i.e., the audio recordings in the City's possession] fall into two categories. The first category consists of those of the Recordings made before the date the Department made a deliberate decision to continue recording calls using [Line 6031]. In the First Summary Judgment Motion Order, the Court referred to a "Discovery Date," and that term will continue to be used in this Order. The critical date is February 4, 2011. That is the date Police Department employee, Karen DePaepe, first listened to a recording made that same day from Line 6031.

There is another critical date, being the date approximately two weeks later (or perhaps as late as early March) when former Chief of Police Darryl Boykins was told about the troubling recording Karen DePaepe had heard. On that date, Chief Boykins was asked by DePaepe for instruction as to stopping the practice of recording Line 6031. Chief Boykins gave no such instruction and did nothing to stop the recording. Therefore, the recording process continued. Cassette tapes were thereafter made of certain calls recorded after Chief Boykins decided not to discontinue the practice of recording calls using Line 6031.

The second category consists of those of the Recordings made after former Chief Boykins decided that the recordings should continue. DePaepe testified that on February 4, 2011, she listened to a call recorded that day and heard something she thought may be illegal. It took her a couple of weeks to disclose that information to Chief Boykins. Ms. DePaepe invited Chief Boykins to instruct her to stop the recording process. He did not do so. Again, by failing to stop the recording process, Chief Boykins, in effect, decided that the practice of recording Line 6031 should continue.

In the First Summary Judgment Motion Order, the Court ruled that the Recordings made before the Discovery Date were unintentional as a matter of law. Thus, those pre-Discovery Date

> Recordings, including the one made on February 4, 2011, are not covered by the Indiana Wiretap Act, and that Act does not prevent production of the pre-Discovery Date Recordings to the Council. The Court ruled in the First Summary Judgment Motion Order that there remained a genuine issue of material fact that precluded the entry of a summary judgment as to those of the Recordings made after … February 4, 2011. Specifically, the factual issue that remains under the Indiana Wiretap Act is whether or not police department officers and employees gave implied consent to the recording of their telephone conversations conducted on Line 6031.
>
> ….
>
> Because inadvertent recordings are "interceptions" and are governed by the [Federal Wiretap] Act, the Recordings may not be disclosed unless there is an exclusion or exception that applies. Thus, even though inadvertent recordings do not give rise to civil or criminal liability, their inadvertence is not a license for disclosure under the [Federal Wiretap] Act.[7]
>
> This distinction is particularly noteworthy as the Court ruled in the First Summary Judgment Motion Order that the pre-Discovery Date Recordings were unintentional as a matter of law. That issue was outcome determinative in applying the Indiana Wiretap Act to the pre-Discovery Date Recordings. Because such recordings were not intentional, the Indiana [Wiretap] Act does not protect them from disclosure.
>
> That is not the case under the Federal Wiretap Act. Under that statute, none of the Recordings, intentional or unintentional, may be disclosed or produced, unless there is another exception

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[7] In holding that the Federal Wiretap Act does not permit the disclosure of unintentional recordings, the trial court implicitly disagreed with the district court's interpretation of *Dorfman*, 690 F.2d 1230, in Case 475. We express no opinion on this issue.

or exclusion that applies. There are two such other exceptions or exclusions to consider. The first is the ordinary course of business exclusion for police officers and police agencies. The second is whether the recording of the call was consented to by at least one of the persons on the call.

….

The Council is correct in contending that the Recordings made on or before February 4, 2011, fall within the ordinary course of business exception. Those Recordings made after February 4, 2011, until Chief Boykins was told about the troubling call of February 4, 2011, also fall within the ordinary course of business exclusion.

The designated and uncontroverted evidence establishes there were legitimate law enforcement reasons for the Department to record some of its phone lines. That all of the lines were not recorded does not change the legitimate ordinary course of business purpose of the lines that were recorded. Further, that it was forgotten that Line 6031 was being recorded does not change that recording that line was a legitimate practice for ordinary law enforcement purposes.

….

…. When Chief Boykins decided to continue the act of recording Line 6031, he did so for the purpose of an investigation. At that time Chief Boykins cut off the ordinary course of business exclusion as of the time of that decision.

We do not know the exact date Chief Boykins was told the calls on Line 6031 were being recorded. But we know it was no later than the end of March of 2011. The next Recording made after February 4, 2011, which was later copied on a cassette, was recorded in April of 2011. Therefore, the date of Chief Boykins' decision to continue the recording process does not have to be

determined exactly. It was after the recording made on February 4, 2011, so that recording fits within the ordinary course of business exclusion. For the reasons discussed in the following section, the recording made in April of 2011, as well as all of the Recordings made thereafter, are outside the ordinary course of business exception.

….

The only other remaining possible basis to exclude the Recordings made after the Discovery Date from coverage of the Federal [Wiretap] Act is that at least one of the parties to the communication consented to the recording. As determined in the First Summary Judgment Motion Order, as a matter of law no one expressly consented to recording of the calls on Line 6031.

But consent does not have to be express. It can be implied. Whether or not there was implied consent by officers and employees of the Department is the same unresolved issue, to be decided in the same way, as exists under the Indiana Wiretap Act ….

….

…. A Recording made after Chief Boykins decided to conduct an investigation is outside the scope of the Federal [Wiretap] Act if, and only if, at least one of the persons on the call is a current or former officer or employee of the Department who gave his or her implied consent to having his or her calls on Line 6031 recorded.

….

Having carefully considered (but not weighing) the designated evidence, as well as the Federal Wiretap Act, the Court hereby orders as follows:

A. [A] partial summary judgment is hereby entered in favor of the Council as to Recordings made on or prior to the "Discovery Date." Those Recordings are not covered by the Federal Wiretap Act, and therefore, as a matter of law, that Act does not prohibit production or publication of such Recordings.

B. As the First Summary Judgment Motion Order … found that the Recordings made on or prior to the Discovery Date were not covered by the Indiana Wiretap Act, all issues raised with respect to such Recordings have now been adjudicated. All Recordings of conversations that occurred on or before February 4, 2011, are subject to production by the City to the Council.

C. The Court must clarify the First Summary Judgment Motion Order as to the "Discovery Date." The relevant date for all purposes is the date Chief Boykins decided to continue the recording. In other words, it is the date Chief Boykins learned that calls on Line 6031 were being recorded, not the earlier date Ms. DePaepe discovered the recordings. The date of the Boykins decision to record is after February 4, 2011. Therefore, the Recording made on February 4, 2011, is not covered by either the Federal Wiretap Act or the Indiana Wiretap Act. As it appears that none of the Recordings in question were made between February 4 and the beginning of April, 2011, the date of February 4, 2011, can appropriately be used as the "Discovery Date" for purposes of this Order, as well as for the First Summary Judgment Motion Order.

D. The Federal Wiretap Act carves out an exception where at least one person involved in the communication consented to the recording. As found in the First Summary Judgment Motion Order, there is no genuine issue of material fact as to whether persons who were not current or former officers or employees of the Department gave express or implied consent to the recording of calls on Line 6031 during the period of time in question. No implied consent was given by any such non-officers or non-employees as a matter of law. However, there remains a genuine

> issue of material fact as to whether persons who are current or former officers or employees of the Department, including Brian Young, granted implied consent to the recording of calls on Line 6031 after February 4, 2011.
>
> E. In the event, and to the extent, that it is hereafter determined that one or more current or former officers or employees of the Department did grant implied consent to the recording of their calls on Line 6031 during the period of time in question (after February 4, 2011), said calls for which implied consent was granted are not protected by the Federal Wiretap Act as a matter of law. However, in the event, and to the extent, that it is hereafter determined that one or more current or former officers or employees of the Department did not grant implied consent to the recording of their calls on Line 6031 during the period of time in question, said calls for which implied consent was not granted would be covered by the Federal Wiretap Act as a matter of law, and such calls will not [be] subject to production or publication.

Feb. 3, 2020 Order at 4-17. Ultimately, a trial before an advisory jury was set for May 2021.

[28] On April 9, 2021, the Council filed a motion to modify its subpoena that reads in pertinent part as follows:

> 4. The City's response to the motion to compel leads to the conclusion that only "tapes" are responsive to the [Council's] subpoena.
>
> 5. The only "tapes" that have been discovered to exist throughout the long history of this case are certain audio cassette tapes recorded by Karen DePaepe from digital recordings. It is believed that Ms. DePaepe made five (5) audio cassette tapes for eight (8) digital recordings that occurred between February 4, 2011 and July 15, 2011.

> 6. Based on the information learned through discovery and at the prior trial in Federal Court, the [Council] believes that the only material complying with the subpoena are the five (5) audio tape cassettes.
>
> 7. In order to limit the scope of the issues to be presented at trial, the [Council] moves to modify its prior subpoena to include only the five (5) audio tape cassettes recorded by Karen DePaepe.

Appellants' App. Vol. 9 at 175. The trial court granted the motion without objection.

[29] Later that month, the Council filed a motion to bifurcate the trial, with the first phase to be used to determine whether the New Intervenors had standing to object to the City's production of the tapes. Both the Original Intervenors and the New Intervenors objected to the motion. After a hearing, the trial court granted the motion, ruling that there was "no need to present evidence on the standing of the Original Intervenors" because they had "no standing as a matter of law" due to the court's granting of summary judgment for the City on its interpleader cross-claim. May 4, 2021 Order at 4.

[30] The first phase of the trial was held on May 6. The Council offered into evidence the New Intervenors' answers to the Council's request for admissions, in which they admitted that they had no personal knowledge that their voices were contained on the tapes at issue. The Council also offered the testimony of DePaepe, who described her familiarity with the tapes and the voices of certain

intervenors and stated that neither Taylor, Hanley, Scott, Corbett, nor Richmond was a party to any of the calls on the tapes. Tr. Vol. 2 at 143.

[31] Thereafter, the trial court issued an order in which it found that by virtue of its order granting the Council's unopposed motion to modify its subpoena, "the only items being subpoenaed by the Council, and therefore the only items that are the subject of this lawsuit, are nine telephone conversations contained on five audio cassette tapes ('the Tapes')." May 10, 2021 Order at 2. The court further found that "[t]he evidence as to standing was clearly and essentially uncontroverted[,]" i.e., that none of the New Intervenors was a party to any of the calls on the tapes, and thus none would "suffer any injury whatsoever if the Tapes are released by the City to the Council in compliance with the subpoena." *Id*. at 6. The court also found that neither Corbett nor Richmond was a party to any of the calls on the tapes. The court dismissed the New Intervenors for lack of standing pursuant to Indiana Trial Rule 12(B)(6) and noted,

> With such dismissal, there is no longer any party to this lawsuit contesting the production of the Tapes by the City to the Council. The subpoena must be enforced as to the Tapes.
>
> It should be noted that the judgment entered by this Order is a "no decision" in certain respects. It is a victory for the Council, to be sure. But because it is essentially a victory by "forfeit"—meaning that the Tapes must be produced only because there was no opposition by anyone with standing—there has not been a judicial determination of whether the Recordings [i.e., the larger set of digital recordings of which the Tapes are a subset] were made legally or illegally. There has similarly been no judicial

> determination as to whether or not the Tapes, once they are produced to the Council, may legally be listened to, disseminated or published in any way. It is, as the Intervening Officers point out, an incomplete outcome. But the Court has no other choice. Courts cannot issue binding rulings on such substantive issues where only one side to the litigation has standing. They simply have no jurisdiction to do so.

Id. at 9-10. The court vacated the remainder of the trial, entered a final judgment in favor of the Council, and ordered the City to comply with the subpoena, subject to a stay pending appeal. The Original Intervenors and the New Intervenors each initiated an appeal in due course.

Discussion and Decision

Section 1 – The trial court erred in dismissing the Original Intervenors' declaratory judgment complaint for lack of subject matter jurisdiction.

[32] We first address the Original Intervenors' argument that the trial court erred in dismissing their declaratory judgment complaint for lack of subject matter jurisdiction. Under the Uniform Declaratory Judgment Act, "Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Ind. Code § 34-14-1-1. Any person "whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." Ind. Code § 34-14-1-2. The

purpose of the Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." Ind. Code § 34-14-1-12.

[33] "The Indiana Supreme Court has held that '[s]ubject matter jurisdiction is the power to hear and determine cases of the general class to which any particular proceeding belongs.'" *Runkle v. Runkle*, 916 N.E.2d 184, 189 (Ind. Ct. App. 2009) (quoting *K.S. v. State*, 849 N.E.2d 538, 540 (Ind. 2006)), *trans. denied* (2010). A party's legal capacity to prosecute its claim does not affect the trial court's jurisdiction over the subject matter. *Id*. Thus, we do not view the Council's motion to dismiss as one for lack of subject matter jurisdiction. *See id*. (concluding that motion to dismiss plaintiff's claims as "barred by the doctrine of res judicata/collateral estoppel" did not implicate subject matter jurisdiction). The Council's motion and its reply in support of its motion both included evidentiary exhibits outside the pleadings that the trial court considered, so we will review the motion to dismiss as a motion for summary judgment. *Id*. at 189-90.

[34] "Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 190 (citing Ind. Trial Rule 56(C)). "All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant." *Id*. "Our review of a summary judgment motion is limited to those materials designated to the trial court. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court." *Id*. (citation

omitted). "The trial court's findings and conclusions on summary judgment facilitate our review but are not binding on appeal." *Johnson v. City of Mich. City*, 172 N.E.3d 355, 358 (Ind. Ct. App. 2021), *trans. denied* (2022). We conduct our review de novo. *Wilkes v. Celadon Grp., Inc.*, 177 N.E.3d 786, 789 (Ind. 2021).

[35] As stated above, the trial court determined that the Original Intervenors are precluded from seeking declaratory relief in this case based on the premise that Case 532 had been dismissed with prejudice. The disposition of this issue turns on the legal effect of the language of the Release and Settlement Agreement between the Original Intervenors and the City. "Settlement agreements are governed by principles of contract law." *State v. Koorsen*, 181 N.E.3d 327, 333 (Ind. Ct. App. 2021), *trans. denied* (2022). "The first rule in the interpretation of contracts is to give meaning and effect to the intention of the parties as expressed in the language of the contract." *Stech v. Panel Mart, Inc.*, 434 N.E.2d 97, 100 (Ind. Ct. App. 1982). "In ascertaining the intention of the parties, a court must construe the instrument as a whole, giving effect to every portion, if possible." *Id*. "Courts should interpret a contract so as to harmonize its provisions, rather than place them in conflict. We will make all attempts to construe the language of a contract so as not to render any words, phrases, or terms ineffective or meaningless." *Southard v. Keltner Prop. Grp., LLC*, 150 N.E.3d 256, 265 (Ind. Ct. App. 2020) (citation omitted), *trans. denied*. "If the language of the contract is unambiguous and the intent of the parties is discernible from the written contract, the court must give effect to the terms of the contract." *Hilbert v. Conseco Servs., L.L.C.*, 836 N.E.2d 1001, 1008 (Ind. Ct.

App. 2005), *trans. denied* (2006), *cert. denied*. "We review the construction of contract terms de novo." *Hughes v. First Am. Title Ins. Co.*, 167 N.E.3d 765, 768 (Ind. Ct. App. 2021), *trans. denied*.

[36] The Original Intervenors argue that "[t]he only reasonable interpretation" of the Release and Settlement Agreement is that they and the City had agreed that they

> would receive a monetary settlement for past injury caused by the recordings and tapes and that [they] could, and would, prevent future injury or damages by pursuing their equitable claims to prevent future production and publication of the tapes and recordings. This interpretation harmonizes the various terms of the agreement and gives meaning to each.

Appellants' Br. at 31.

[37] We agree with this interpretation. The Release and Settlement Agreement unambiguously covers only past or then-existing actual or hypothetical claims between the City and the Original Intervenors regarding the recording of the latter's phone conversations and the use of the recordings, and it unambiguously does not cover claims regarding any future production or publication of the tapes or recordings that might result from the enforcement of the Council's subpoena. The parties specifically acknowledged and agreed that the Original Intervenors would "continue to pursue their declaratory judgment action seeking to quash the Subpoena[,]" Appellants' App. Vol. 2 at 146, i.e., that they would seek to prevent future production or publication of the tapes or recordings, which they did by filing a motion to intervene and then a complaint

for declaratory judgment in this case.[8] The parties also specifically acknowledged and agreed that the City would "comply with any ruling on the validity of the Subpoena." *Id*. Based on the foregoing, we conclude that the Council was not entitled to summary judgment on the Original Intervenors' declaratory judgment complaint. Therefore, we reverse and remand for further proceedings on the issues raised in that complaint, which challenges the legality of *all* the interpled recordings.

Section 2 – The Original Intervenors' argument regarding their dismissal as interpleader defendants is essentially moot.

[38] The Original Intervenors also argue that the trial court erred in dismissing them as interpleader defendants, claiming that they "had an equitable interest in obtaining declaratory judgment and preventing the disclosure of the tapes made from recordings of their conversations." Appellants' Br. at 35. Because our holding in Section 1 reinstates the Original Intervenors' declaratory and equitable claims, this argument is essentially moot.[9]

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[8] The Council argues that "there cannot be a continuation of something that did not exist." Appellee's Br. at 18. Although perhaps inartfully worded, the intent of the Original Intervenors to reserve their right to seek to prevent future production or publication of the tapes or recordings is crystal clear. Consequently, we disagree with the Council's assertion that the stipulated dismissal entered pursuant to the Release and Settlement Agreement is res judicata as to claims regarding any future production or publication of the tapes or recordings.

[9] That being said, we note that the Original Intervenors have not appealed the trial court's summary judgment ruling for the City on its interpleader claims and that the City expressly declined to seek a declaratory judgment regarding the legality of the tapes.

Section 3 – The trial court erred in limiting the New Intervenors' litigation to the cassette tapes.

[39] The New Intervenors do not specifically challenge the trial court's ruling that they have no standing to challenge the production of the cassette tapes pursuant to the Council's subpoena because they were not parties to any of the conversations on those tapes. But they do assert that the court erred in terminating the litigation at this point, given that they challenged the legality of *all* the interpled recordings, some of which allegedly contain conversations to which they *were* parties. We agree with this assertion. *See Panos v. Perchez*, 546 N.E.2d 1253, 1254-55 (Ind. Ct. App. 1989) (providing that "[a]n intervenor is treated as if he were an original party and has equal standing with the original parties[,]" and that although "[a]n intervenor is not permitted to relitigate matters already determined in the case," he "is not precluded from litigating other issues or claims not already determined by the trial court."); *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116 (9th Cir. 2005) (stating that party to intercepted communication has standing to challenge wiretap under Federal Wiretap Act) (citing 18 U.S.C. §§ 2518(10)(a) and 2510(11)), *amended on reh'g on other grounds*, 437 F.3d 854 (2006). Therefore, we reverse and remand for further proceedings on the issues still in play for the New Intervenors, which we address in the next section.

Section 4 – Remand is appropriate for development of a factual record and a final determination of the legality of all the interpled recordings.

[40] As the trial court correctly acknowledged in its most recent order, thanks to the convoluted procedural path that this case has taken, "there has not been a [final] judicial determination of whether the Recordings were made legally or illegally." May 10, 2021 Order at 9. The trial court's factual findings in its interlocutory summary judgment orders are not binding, *Johnson*, 172 N.E.3d at 358, so a factual record must be developed on remand, including as to what DePaepe, Boykins, and others in the Department knew about the recording of Young's phone line and when they knew it, whether actually or constructively.[10] The New Intervenors point out that in its second summary judgment order, the trial court essentially disregarded the parties' stipulation that DePaepe discovered that Young's line was being recorded sometime in January 2011, before she made the February 4 cassette tape. This stipulation is inconsistent with DePaepe's testimony in the district court trial, which ultimately came to naught, and the resolution of this discrepancy must be left to the trier of fact.

[10] The Intervenors assert that the Department "knew all along that line 6031 … was being recorded in that the Chief of Police was annually provided with a list of all recorded lines to review or modify[,]" Appellants' Br. at 37, but they provide no citation to their ten-volume appendix to support this claim. Moreover, this assertion contradicts the New Intervenors' assertion on summary judgment that "[n]o one was aware when Young took over his new office that his line was recorded." Appellants' App. Vol. 3 at 136.

[41] The New Intervenors do not specifically challenge the trial court's legal rulings on intent and consent and the application of the Indiana Wiretap Act in the first summary judgment order, so we summarily affirm them, except to the extent that they are contingent upon a final determination of the Discovery Date. As for the second summary judgment order regarding the Federal Wiretap Act, the New Intervenors do not specifically challenge the trial court's legal rulings on intent and consent and the applicability of the ordinary course of business exception, so we summarily affirm those as well, except to the extent that they are contingent upon a final determination of when Boykins learned that Young's line was being recorded; that date may be relevant to determining the legality of some of the interpled recordings that were not copied to cassette tape, the dates of which are currently unknown. At this point, we observe that the Original Intervenors have not yet had an opportunity to litigate any of the factual or legal issues raised in their complaint with respect to any of the interpled recordings.

[42] In conclusion, despite this dispute having traversed numerous judicial proceedings in both state and federal courts for almost a decade, the fundamental question of whether any or all of these recordings constitute a violation of either state or federal wiretap laws has never been resolved. Unless the parties reach an amicable resolution as to the tapes sought by the Council as well as the tapes covered by both the Original Intervenors' and the New Intervenors' declaratory judgment actions, that question must be answered in order to resolve this case.

[43] Affirmed in part, reversed in part, and remanded.

May, J., and Brown, J., concur.