NOT FOR PUBLICATION

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES BRIAN KLEISER; ADVANCED ELECTRICAL CONCEPTS, INC., DBA Mr. Electric of Clark County, Plaintiffs-Appellants, v. BENJAMIN CHAVEZ; et al., Defendants-Appellees.	No. 21-36029 D.C. No. 3:20-cv-06079-BJR MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted October 17, 2022
Seattle, Washington

Before: TALLMAN, R. NELSON, and FORREST, Circuit Judges.
Concurrence by Judge R. NELSON.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3. In a contemporaneously filed published opinion we address an issue of first impression—whether the Supreme Court's Opinion in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) extinguishes the private search exception to the Fourth Amendment for GPS location information. We hold it does not. We assume the parties are familiar with the facts and address the remaining issue before us here.

The Washington State Privacy Act. Mr. Electric argues that the Government "recorded" the email, telephone communications, and location information it had been provided when it saved the records to a computer in violation of the Washington State Privacy Act. A violation of the Act requires "(1) a private communication transmitted by a device, which was (2) intercepted or recorded by use of (3) a device designed to record and/or transmit (4) without the consent of all parties to the private communication." *State v. Roden*, 321 P.3d 1183, 1186 (Wash. 2014) (internal citation omitted).

We agree with the district court that *Kearney v. Kearney* is instructive. 974 P.2d 872 (Wash. Ct. App. 1999), *review denied*, 989 P.2d 1137 (Wash. 1999). In *Kearney*, the mother in a divorce proceeding recorded conversations between her husband and their children and provided them to the children's guardian ad litem who in turn (1) provided them to the children's psychological evaluator and (2) filed transcripts with the court. *Id*. at 873. The husband sued the guardian, the psychological evaluator, and the mother's attorney for violating the Act. *Id*. at 873–74. The trial court granted the defendants' motion to dismiss finding no violation of the Act under this set of facts.

Mr. Electric attempts to distinguish *Kearney* because "the 1999 *Kearney* court was not faced with the same technological landscape present today." This argument is unavailing. Mr. Electric points to no Washington case that finds a violation of the

Act on the facts alleged. And while technology changes, and the technology in question today is different, the facts in *Kearney* and the instant appeal overlap to a degree that the holding in *Kearney* still applies to new technologies like those implicated in this case. Summary judgment was properly granted on the government's cross-motion for summary judgment on this claim.

AFFIRMED.

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James Kleiser, et al v. Benjamin Chavez, et al, No. 21-36029

R. NELSON, Circuit Judge, concurring:

I concur with the majority's conclusion that the district court properly granted the Department's cross-motion for summary judgment on Mr. Electric's Washington State Privacy Act claim.

I disagree with the majority that *Kearney v. Kearney* resolves the issue. Maj. at 2–3; 974 P.2d 872 (Wash. Ct. App. 1999), *review denied*, 989 P.2d 1137 (Wash. 1999). In *Kearney*, the plaintiff only alleged that the defendants had divulged communications that a non-defendant had recorded. 974 P.2d at 873–74. *Kearney* recognized that the Washington State Privacy Act does not impose liability for divulging the contents of private communications transmitted by telephone,[1] but only for intercepting or recording those communications. *Id*. at 876; RCW 9.73.030. Here, Mr. Electric alleges the Department recorded its communications without consent by saving previously recorded communications provided to it by Mr. Electric employees to a Department computer. *See* Maj. Op. at 2. If saving communications to a computer counts as "recording" within the meaning of the Washington State Privacy Act, then defendants will be liable. *Kearney* does not answer that question.

[1] The statute also applies to communications transmitted by other devices. RCW 9.73.030(1)(a).

Mr. Electric makes a colorable argument that saving communications to a computer is recording them within the meaning of the statute. *See Record*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/record (last visited Nov. 18, 2022) ("[T]o cause (sound, visual images, data, etc.) to be registered on something (such as a disc or magnetic tape) in reproducible form"). But that activity is not what the statute captures. The initial recording or interception of a communication is covered by the statute. But the later copying of that conversation by others after its contents have been shared with them is not. And the Department's actions here fall on the "subsequent copying" side of the line.

Analogizing our facts to *Kearney*, it would be as if the psychological evaluator did not just divulge a transcript of the recorded communication to the court, but also saved the transcript to her computer. Although *Kearney* did not consider those facts, it seems unlikely that this minor action would have brought the plaintiff's claim within the scope of the statute. In my view, *Kearney* supports only the proposition that an original interception or recording of a communication is covered by the statute, not subsequent copying of that recording.

Applying that rule to this case, the district court's ruling for the Department on its cross-motion for summary judgment on Mr. Electric's Washington State Privacy Act claim was still proper, so I would affirm.