JOHN C. WINGRAVE	*	**NO. 2003-C-0335**
		C/W
VERSUS	*	**NO. 2003-C-0336**
		C/W
KEVIN HEBERT, ET AL.	*	**NO. 2003-C-0372**
		COURT OF APPEAL
	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

*** * * * * * ***

ON APPLICATIONS FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-17291, DIVISION "D"
Honorable Lloyd J. Medley, Judge
* * * * * *

JOAN BERNARD ARMSTRONG

JUDGE
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris, Sr. and Judge Edwin A. Lombard)

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REVERSED IN PART AND REMANDED.

STATEMENT OF THE CASE

This is an action for damages for alleged violation of the Louisiana Electronic Surveillance Act, La. R.S. 15:1301 et seq. In these consolidated writ applications, defendants-relators Donna Boehmer, Duane Abadie and Whitney National Bank ("Whitney") seek supervisory review of the trial court's judgment granting plaintiff, John C. Wingrave, II's motion for partial summary judgment. The trial court ruled that the tape recording of a private conversation between plaintiff and a co-worker by the defendant Kevin M. Hebert was illegal. Defendant-relator Whitney also seeks supervisory review of the trial court's denying its motion for summary judgment on the issue that plaintiff's action is preempted by the National Bank Act. Plaintiff seeks supervisory review of the trial court's denying his motion to reconsider a prior judgment ordering him to produce the illegal audiotape and/or transcriptions.

Plaintiff, a former Whitney vice-president and branch manager, filed his petition on October 25, 1999, naming as defendants Kevin M. Hebert, Donna Boehmer and Duane Abadie. Boehmer and Abadie were officers of Whitney. At some point Whitney and a third Whitney officer, Paul Bergeron, were added as defendants. Plaintiff alleged in his original petition that on September 23, 1999, while at home, he received a telephone call from Holly Haag, a fellow Whitney branch manager. During the conversation plaintiff made some comments concerning both his supervisor, defendant Boehmer, and Ms. Haag's ex-fiancé, defendant Hebert. Unbeknownst to plaintiff or Ms. Haag, Hebert had surreptitiously taped their conversation. Two days later Hebert notified Ms. Haag that he had taped the conversation and that he intended to blackmail her and to have plaintiff fired from his position at Whitney. Hebert subsequently disclosed the content of the conversation to defendant Boehmer. Boehmer notified her supervisor, defendant Abadie, of the content of the conversation. Plaintiff was suspended on September 27, 1999. On September 29, 1999, plaintiff was terminated by defendant Bergeron, Whitney's director of human resources, after being told that defendant Abadie had disclosed to Whitney the content of the taped conversation.

In Kevin Hebert's April 2, 2001 deposition, he admitted that he

tapped Holly Haag's telephone and recorded the conversation at issue. He claimed he did not know it was illegal, and said he did not consult with anyone before tapping the phone.

Boehmer, Abadie, Bergeron and Whitney moved for summary judgment on January 18, 2002. On January 23, 2002, Boehmer and Abadie filed a motion to compel the plaintiff to produce the audiotape recording (and/or transcription thereof) of the alleged telephone conversation forming the basis of plaintiff's action. On August 1, 2002, plaintiff filed an opposition to that motion to compel combined with a motion for partial summary judgment declaring that the audiotape was obtained in violation of the Louisiana Electronic Surveillance Act.

After a hearing on the motion to compel production of the tape, the trial court ordered plaintiff to produce the tape. Plaintiff then filed a motion for reconsideration. Following a hearing on all the matters, including plaintiff's motion for reconsideration, the trial court denied the motion for summary judgment filed by Boehmer, Abadie, Bergeron and Whitney; granting plaintiff's motion for summary judgment decreeing that the audiotape was illegal; and denied plaintiff's motion for reconsideration of the earlier grant of Boehmer and Abadie's motion to compel plaintiff to produce the audiotape. The trial court also denied Whitney's motion for

summary judgment on the issue that plaintiff's action is preempted by the National Bank Act. These consolidated writ applications followed.

DISCUSSION

Appellate courts review the grant or denial of a motion for summary judgment de novo. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, p. 7 (La. 2/29/00), 755 So. 2d 226, 230. A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. Smith v. Our Lady of the Lake Hosp., Inc., 93-2512, p. 27 (La. 7/5/94), 639 So. 2d 730, 751. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. Id.

La. C.C.P. art. 966(C)(2) provides that where, as in the instant case, the party moving for summary judgment will not bear the burden of proof at

trial, his burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. Id.

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by La. C.C.P. art. 969. La. C.C.P. art. 966(A)(2). Summary judgments are favored, and the summary judgment procedure shall be construed to accomplish those ends. Id. Nevertheless, despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion and all doubt must be resolved in the opponent's favor. Willis v. Medders, 2000-2507, p. 2 (La. 12/08/00), 775 So.2d 1049, 1050. A court cannot make credibility determinations on a motion for summary judgment, and must assume that all of the affiants are credible. See Independent Fire Insurance Co. v. Sunbeam Corp., 99-2181, p. 16, 755 So.2d at 236.

The electronic eavesdropping statute at issue, La. R.S. 15:1303, provides:

> A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:
>
> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> (2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication when:
>
> (a) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
>
> (b) Such device transmits communications by radio or interferes with the transmission of such communication;
>
> (3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection; or
>
> (4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.
>
> B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor.
>
> C. (1) It shall not be unlawful under this Chapter for an operator of a switchboard, or any officer, employee, or agent of any communications common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; however, such communications common carriers shall not utilize service observing or random monitoring, except for mechanical or service quality control checks.

(2) It shall not be unlawful under this Chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of Chapter 5 of Title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(3) It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral 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. Such a person acting under color of law is authorized to possess equipment used under such circumstances.

(4) It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

(5) It shall not be unlawful under this Chapter:

(a) For the ultimate receiver of wire or electronic communication, or an investigative or law enforcement officer to use a pen register or trap and trace device as provided in Part III of this Chapter.

(b) For a provider of electronic communication services to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, or another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

(c) To use a device which captures the incoming electronic or other impulses which identify the numbers of an instrument from which a wire communication was transmitted.

(6) A person or entity providing electronic communication services to the public shall not intentionally divulge the contents of any communication while in

> transmission of that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient except:
>
> (a) As otherwise authorized by federal or state law.
>
> (b) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination.
>
> (c) Any electronic communication inadvertently obtained by the service provider and which appears to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.
>
> D. Upon receipt of the information or evidence sought by the interception, the interception shall cease.

La. R.S. 15:1312 provides a civil cause of action for any person whose wire or oral communication is intercepted, disclosed, or used in violation of the wiretap statute, against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use such communication.

The first issue presented to us in these consolidated writ applications is whether the trial court erred in granting plaintiff's motion for summary judgment and finding that the audiotape was illegal. Defendants Donna Boehmer, Duane Abadie and Whitney present a slew of arguments. One is dispositive. Defendants argue that the issue of the illegality of the interception was unsuitable for resolution by summary judgment because it put at issue the state of mind of the interceptor, Kevin Hebert. At issue in this part of defendants' argument is the term "willfully." La. R.S. 15:1303

(1)(a) states that it is illegal for one to "[w]illfully. . . intercept any wire or oral communication." In his opposition, plaintiff argues that the trial court did not find that Kevin Hebert acted "willfully" when he intercepted the communication between plaintiff and Holly Haag, but that the court declared the tape illegal because it did not comply with the Louisiana wiretap act provisions that provide for the procedure to lawfully intercept a communication.

During the hearing on plaintiff's motion for summary judgment, the trial court stated that Kevin Hebert's interception of the conversation was willful, rejecting the argument by counsel for defendants Boehmer and Abadie that Hebert had "to willfully know that it's a violation of the law." Thus, the trial court essentially interpreted the term "willfully" to mean that if you consciously tap the telephone of another, you have done so "willfully". Therefore, the trial court did find that Hebert acted willfully and based its conclusion that the tape was illegal on that finding.

Plaintiff submits that the only legal interception of a wire communication is pursuant to the authorization provisions of La. R.S. 13:1308 and La. R.S. 15:1310, and interceptions specifically deemed not unlawful under La. R.S. 15:1303(C)(3)-(4). He submits that any other interception is "illegal." La. R.S. 15:1308 provides that, on application by a

district attorney and an officer of the state police, a judge may grant an order in conformity with La. R.S. 15:1310 approving the interception of a wire or oral communication by such officer. La. R.S. 15:1308(B) provides that the failure of the district attorney to obtain the approval for the interception of the communication "shall constitute cause for the attorney general to institute, prosecute, or intervene in a criminal action or proceeding as authorized by law." La. R.S. 15:1310 simply provides a procedure for intercepting oral or wire communications pursuant to La. R.S. 15:1308. La. R.S. 15:1303(C)(3)-(4) sets forth exceptions in which it is not unlawful to intercept, disclose, use, etc.

In Keller v. Aymond, 98-843 (La. App. 3 Cir. 12/23/98), 722 So. 2d 1224, cited by plaintiff, the court did say that the Louisiana Electronic Surveillance Act "provides generally that it is unlawful to intercept, disclose, or use wire or oral communications unless authorized to do so under color of law and with the consent of at least one of the parties to the communication." 98-843, p. 5, 722 So. 2d at 1227. However, the court in Keller cited no authority for this proposition. As the court in Keller noted, "[n]o Louisiana jurisprudence has interpreted the substance of the Louisiana Act." 98-843, p. 6, 722 So. 2d at 1227. The court then went on to state that the substance of the Louisiana wiretap act was fashioned after its federal

counterpart, and that "federal law is instructive in the areas where the provisional language coincides." Id.

Plaintiff's argument is that unless the interception is permitted under the act, it is illegal. However, insofar as Kevin Hebert, a non-law enforcement/government person is concerned, the only prohibition upon simply intercepting a

communication is contained in La. R.S. 15:1303(A)(1), which makes it a crime for a person to "willfully" intercept a communication. Absent proof that Hebert "willfully" intercepted the wire communication, it cannot be said that the tape is "illegal."

The term "willfully" is not defined in La. R.S. 15:1302, which defines terms used in Louisiana's Electronic Surveillance Act. It can be noted that the federal counterpart to La. R.S. 15:1303, 18 U.S.C. 2511, was amended in 1986 to substitute the term "intentionally" for "willfully."

The federal jurisprudence has interpreted the term "willfully," as used in the federal wiretap statute, to mean that the actor must have known he was violating the law or acted in reckless disregard of whether or not his conduct was unlawful. In Citron v. Citron, 722 F.2d 14 (2 Cir. 1983), the plaintiff and his wife were going through a divorce. The defendant-wife, Dr. Citron,

tapped Mr. Citron's telephone in hopes of recording information to help her obtain custody of their adopted children. Mr. Citron subsequently sued Dr. Citron for civil damages for violating 18 U.S.C. § 2511(1)(a) of the federal wiretap statute. At that time, 18 U.S.C. § 2511(1)(a) was identical to La. R.S. 15:1303(1)(a)—both prohibited a person from "willfully" intercepting wire communications, etc. At the close of the case, Dr. Citron moved to dismiss on the ground, inter alia, that Mr. Citron had failed to introduce any evidence showing that Dr. Citron had acted "willfully" within the meaning of 18 U.S.C. § 2511. The trial court denied the motion and submitted the case to the jury on special verdicts. Responding to questions in the special verdicts, the jury found that Dr. Citron had intercepted and recorded Mr. Citron's calls, but found that in doing so Dr. Citron "neither knew she was violating the law nor acted in reckless disregard of whether or not her conduct was unlawful." Dr. Citron thereafter renewed her motion to dismiss, arguing that the special verdict findings conclusively established that she had not acted "willfully" and, therefore, she had not violated 18 U.S.C. § 2511. The trial court initially denied the motion, but upon reconsideration granted it, dismissing Mr. Citron's complaint.

Mr. Citron appealed, contending that in a civil action under the federal wiretap statute required less need be shown to establish willfulness than in a

criminal prosecution. The appellate court disagreed, and in disposing of the matter discussed the meaning of the term “willfully” as follows:

> The word "willfully" generally denotes either an intentional violation or a reckless disregard of a known legal duty. In United States v. Murdock, 290 U.S. 389, 394-95, 54 S.Ct. 223, 225-26, 78 L.Ed. 381 (1933), the Court stated:
>
> > The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act. (citations omitted).
>
> See also United States v. Pomponio, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976); Goodman v. Heublein, Inc., 645 F.2d 127, 131 (2d Cir.1981). Courts do recognize, of course, that the word willfully may be afforded a different meaning if required by a particular statutory scheme in which it appears. See, e.g., United States v. Dixon, 536 F.2d 1388, 1397 (2d Cir.1976) (lesser showing may be required for purposes of § 32(a) of the Securities Exchange Act). But no special context is presented by the wiretapping statute. The citation to Murdock in the Senate Report accompanying Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the wiretapping statutes), makes it clear that congress employed the term "willfully" to denote at least a voluntary, intentional violation of, and perhaps also a reckless disregard of, a known legal duty, see S.Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.Code Cong. & Ad.News 2112, 2181; but, as applied to Fiona's conduct, both of these standards were excluded by the jury's special verdict.
>
> Further, the author of the model wiretapping statute, upon which Title III was based, also cited United States v. Murdock for the definition of "willfully", and observed that "[t]

> his [definition] seems only just in light of the technical character of the Act." See Blakey & Hancock, A Proposed Electronic Surveillance Control Act, 43 Notre Dame Law. 657, 666 n. 19 (1968). Nothing in the statute or in its legislative history suggests that congress intended different standards of willfulness to be applied in the civil and criminal contexts. Nor does it seem logical that the same term, "willfully", in the same statute, § 2511, should have any different meaning when applied directly to a criminal violation than when the same violation is incorporated by reference to establish civil liability.

722 F.2d at 16.

In Malouche v. JH Management Co. Inc., 839 F.2d 1024 (4 Cir. 1988), a terminated employee sued his former employer in a civil action under the federal wiretap statute, alleging that the employer had wiretapped the plaintiff's telephone at the hotel the plaintiff managed. At the conclusion of the plaintiff's case, the employer moved for a directed verdict, which was granted by the district court. As in Citron, the plaintiff in Malouche appealed on the ground that the district court had erred in requiring him to show willfulness in order to establish civil liability under the federal wiretap statute. The court, with retired U.S. Supreme Court Associate Justice Lewis Powell, sitting by designation, writing, rejected that argument, quoting at length from Citron. The court next addressed whether, applying the correct interpretation of "willfully," the district court had properly granted the employer's motion for a directed verdict. The court noted that the record contained no evidence as to several issues, including "whether [the

employer] had knowledge that the device was being used to tap [Malouche's] telephone in violation of its legal duty." (emphasis in original).

In Farroni v. Farroni, 862 F.2d 109 (6 Cir. 1988), a case which, like Citron, supra, involved one spouse secretly taping the other spouse's conversations with third parties, the court followed Citron and Malouche, supra as to the issue of whether the telephone-tapping spouse had acted "willfully" under 18 U.S.C. § 2511 of the federal wiretap statute.

In Keller, the court held that criminal willfulness is not a requirement for recovery of civil damages under the Louisiana wiretap act for "secondary" disclosures and publication of previously intercepted communications under La. R.S. 15:1307. The court specifically declined to follow federal jurisprudence as to the criminal willfulness requirement based on differences in the federal wiretap act's civil damage provision, 18 U.S.C § 2520, that requires an "intentional use," unlike its Louisiana counterpart. The issue in the instant writ application as to whether the tape is "illegal" concerns the interception of the tape, not the use. Further, Keller also involved a claim under La. R.S. 15:1307 of the Louisiana wiretap act against a newspaper, which has no counterpart in the federal wiretap act. La. R.S. 15:1307 is not applicable in the instant case.

Citron and Malouche interpret claims for civil damages pursuant to 18

U.S.C. § 2520 prior to an amendment adding the term "intentionally," the term relied upon by the court in Keller to distinguish the claim under the Louisiana wiretap act's civil damage provision, La. R.S. 15:1312. 18 U.S.C. § 2520, as interpreted in those cases, provided for a cause of action for civil damages for any person whose communication was "intercepted, disclosed, or used in violation of this chapter." As the court noted in Malouche, the only standard of liability for the interception of wire or oral communications in the federal wiretap statute is "willfully intercepts," as set forth in 18 U.S.C. § 2511(1)(a). Just as under the federal wiretap act, the only standard of liability under the Louisiana wiretap act for the interception of wire or oral communications by a non-law enforcement/government person such as Kevin Hebert is "willfully intercept," as set forth in La. R.S. 15:1303(1)(a). There are no Louisiana cases contrary to Citron and Malouche.

In the instant case, the transcript of the hearing on the plaintiffs motion for summary judgment makes it clear that the trial court applied an incorrect interpretation of the term "willfully" as used in Louisiana's wiretap statute, which is identical in pertinent part to the pre-1986 federal wiretap statute. When counsel for defendants argued that Kevin Hebert had to willfully know that it was a violation of the law to tap the telephone, the trial court stated: "I disagree." Under Citron, to prevail on his motion for

summary judgment, plaintiff had to prove that in placing the wiretap on the telephone, Kevin Hebert knew he was violating the law or acted with careless disregard of whether or not it was unlawful.

Kevin Hebert stated in his deposition that he did not know tapping Holly Haag's telephone was illegal, nor did he consult with anyone as to whether it was illegal. It is clear from both Citron and Malouche that careless disregard as to the legality of tapping someone's telephone cannot be presumed simply because of the surreptitious nature of such activity. There is a genuine issue of material fact as to whether Kevin Hebert knew he was violating the law or acted with careless disregard of whether or not it was unlawful. Therefore, the trial court erred in granting summary judgment and finding that the tape recording was illegal—the tape itself would only be illegal if it was procured by Hebert willfully intercepting the telephone conversation in violation of La. R.S. 15:1303(1)(a).

The second issue presented to us in these consolidated writ applications is whether the trial court erred in denying Whitney's motion for summary judgment on the issue that plaintiff's action is preempted by the National Bank Act, 12 U.S.C. § 21 et seq. Whitney argues that under the National Bank Act, a properly registered national bank has the power to dismiss officers "at pleasure." On March 30, 2000, the U. S. District Court

for the Eastern District of Louisiana rejected the attempt by defendants Donna Boehmer and Duane Abadie to remove this case to federal court based on federal question jurisdiction—preemption by the National Bank Act—stating:

> Since, on its face, Plaintiff's Complaint sets forth only state law claims the Defendants argue that the "complete preemption" exception to the well-pleaded complaint rule applies and creates federal question jurisdiction. See Defs.' Mem. in Opp'n at 9. As the Supreme Court recognized in Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318, (1987), occasionally "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." ' However, the fact that a federal law potentially provides a defense to a state law cause of action or may in some other way be applicable to the plaintiff's complaint is insufficient to establish subject matter jurisdiction. See Hart, 199 F.3d at 244. As the Fifth Circuit recently held in Hart, "to give rise to federal question jurisdiction, a court must find complete preemption." Id.; See also Franchise Tax Bd. v. Laborers Vacation Trust, 463 U.S. 1, 23-24, 103 S.Ct. 2841, 2853, 77 L.Ed.2d 420 (1983).
>
> The U.S. Supreme Court has found complete preemption in only three areas: (1) ERISA claims, (2) claims concerning Indian tribal land, and (3) claims brought under the Labor Management Relations Act. See Watson v. First Union National Bank of South Carolina, 837 F.Supp. 146 (D.S.C.1993) The National Bank Act has never been viewed as a complete preemption statute. See Booth v. Old National Bank, 900 F.Supp. 836, 841 (N.D.W.Va.1995). Although not a complete preemption statute, several courts have been willing to find that the National Bank Act does preempt certain limited claims such as usury or breach of contract. See Watson v. First Union National Bank of South Carolina, 837 F.Supp. 146, 149 (D.S.C.1993); see also Wells Fargo Bank v. San Francisco, 53 Cal.3d 1082, 282 Cal.Rptr. 841, 811 P.2d 1025 (1991) (holding

> that "it has been established for almost a century that § 24 preempts all state law causes of action by a bank officer for breach of an employment agreement").
>
> Plaintiff filed this suit in the Civil District Court for the Parish of Orleans alleging violation of the Louisiana Electronic Surveillance Act. The Act "regulate[s] and define[s] the lawful use of electronic surveillance devices and monitoring between private persons." Benoit v. Roche, 657 So.2d 574, 576 (La.App. 3 Cir.1995). In order to protect individuals from unlawful invasions of privacy the Act authorizes a civil damages cause of action. See id. If a plaintiff establishes that his wire or oral communications have been unlawfully intercepted, disclosed, or used in violation of the Act, he can recover actual damages, punitive damages, attorney's fees, and costs. See id. (citing La.R.S. 15:1312). Since this is neither a case of usury nor breach of contract **the National Bank Act does not preempt the Plaintiff's claims** and thus this Court lacks the requisite subject matter jurisdiction. (emphasis added).

Wingrave v. Hebert, 2000 WL 341060 (E.D. La. 2000), p. 2.

Whitney argues that this decision is not res judicata as to the issue of preemption, that this court can still find that plaintiff's action is preempted by the National Bank Act. Whitney focuses on plaintiff's damage claims, characterizing his action as a disguised suit for wrongful termination, and submitting that such an action is preempted by the National Bank Act and is dispositive of plaintiff's claim.

The U.S. District Court's decision is dispositive of the issue. The district court held that the National Bank Act is not a "complete preemption statute" but "does preempt certain limited claims such as usury or breach of contract." The district court cited a case for the proposition that it is well

established that the National Bank Act "preempts all state law causes of action by a bank officer for breach of an employment agreement," then held that plaintiff's action in the instant case was not one for breach of a "contract," i.e., an employment contract. Thus, it is implicit in the district court's decision that plaintiff's cause of action under the Louisiana wiretap statute is not preempted by the National Bank Act despite plaintiff seeking damages for the employment-related consequences of the defendants' violation of the wiretap statute.

Nevertheless, the district court noted that the National Bank Act could potentially provide a defense to a state law cause of action, though not preempting that cause of action. The court stated: "[T]he fact that a federal law potentially provides a defense to a state law cause of action or may in some other way be applicable to the plaintiff's complaint is insufficient to establish subject matter jurisdiction." Wingrave v. Hebert, 2000 WL 341060 (E.D. La. 2000), p. 2.

Whitney does not argue in its writ application that the trial court erred in denying its motion for summary judgment on the ground that neither it nor any of its employees violated the Louisiana wiretap law. Rather, its argument on the denial of its motion for summary judgment is limited to the National Bank Act issue. Accordingly, in light of Wingrave, supra, we are

unable to say that the trial court erred in denying Whitney's motion for summary judgment.

The third issue presented to us in these consolidated writ applications is whether the trial court erred in denying plaintiff's motion to reconsider a prior judgment ordering him to produce the illegal audiotape and/or transcriptions. We note that plaintiff sets forth five assignments of error or arguments of why the trial court erred in granting defendants' motion to compel production of the tape and/or transcription thereof. However, all of his assignments and arguments are based on the premise that the audiotape is illegal under the Louisiana Electronic Surveillance Act, specifically, La. R.S. 15:1303. Because there is a genuine issue of material fact as to this issue and therefore the trial court erred in granting summary judgment, plaintiff's arguments are moot. Accordingly, we find no error in the trial court's denying plaintiff's motion to reconsider.

For the foregoing reasons, we reverse the judgment of the trial court only insofar as it granted plaintiff's motion for summary judgment on the issue of the legality of the tape, and the case is remanded for further proceedings.

REVERSED IN PART AND REMANDED.