

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

BRANDON FINCHUM, INDIVIDUAL
Plaintiff

V.

NACOGDOCHES COUNTY
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION No. 9:21-CV-285

PLAINTIFF'S OPPOSED MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT

1. Plaintiff Brandon Finchum comes before the Court today and files this Opposed Motion for Leave to File an Amended Original Complaint.

SUMMARY

2. This lawsuit was filed in early November of 2021. Initial disclosures were produced in early January of 2022 and depositions were taken September 2nd, 2022.

Since commencement of this lawsuit, Plaintiff Brandon Finchum has repeatedly requested the County of Nacogdoches to disclose if there were additional attorney client phone calls made between attorneys and inmates that were recorded and listened to by Nacogdoches County employees or others.

3. Defendants' Initial Disclosures were received on or about January 6th, 2022 and contain an email dated May 19th, 2021, from John Fleming to Paul Anderson (Defendants' Bates Nos. NC106-NC107). These same disclosure responses DID NOT contain an email dated May 19, 2021 from John Fleming to Courtney Luther and herein attached as Exhibit "A." *See attached Exhibit "A"* – John Fleming May 19, 2021 email to attorney Courtney Luther.

The Court's record of August 2nd, 2022 shows Plaintiff's clear and consistent requests to ascertain whether the County of Nacogdoches had listened to any other attorney's inmate calls or not. Defendants' Counsel remained silent.

In fact, Defendants' Counsel remained silent for an additional 29 days before sending, by email and only 40 hours *before* depositions were scheduled to begin, a copy of an email written to attorney Courtney Luther by Nacogdoches County Attorney John Fleming. *See attached Exhibit "A"* – May 19th, 2021 email to Courtney Luther. This email from Nacogdoches County Attorney John Fleming was written approximately 30 minutes *after* the Anderson May 19th, 2021 email was written. *See attached Exhibit "B"* – Fleming May 19th, 2021 email to Paul Anderson.

40 hours before Defendants' September 2nd, 2022 depositions, Counsel for Defendants produced this material and substantial email evidence that the Defendants have possessed since May 19th, 2021; since the initiation of this lawsuit in November of 2021; since the production of initial disclosures in January of 2022; and since the August 2nd, 2022 hearing in Lufkin, Texas.

Unfortunately, that was not the end of the revelation of intentionally withheld, substantial and material evidence extremely relevant to this litigation has been intentionally withheld by Defendants.

On Friday September 2nd, 2022 and literally *one minute* before the commencement of the deposition of Nacogdoches County Attorney John Fleming, counsel for Defendant handed to Plaintiff's Counsel a written agreement dated January 20th, 2022 executed between attorney Courtney Luther and Nacogdoches County Attorney John Fleming regarding the listening to "three" or more of Brandon Finchum's calls with attorney Courtney Luther. *See attached Exhibit "C"* – January 2nd, 2022 Agreement with Disability Rights Texas. Mr. Fleming also writes the employee "may have listened to more" and a "law school intern listened to one call." *See attached Exhibit "A"* – May 19th, 2021 John Fleming email to attorney Courtney Luther.

Counsel for Plaintiff had *never* seen this document before September 2nd, 2022. It is an understatement that Plaintiff's counsel was stunned at the audacity of the timing of such relevant, material and substantial evidence; evidence the Defendants have possessed at all times, but never produced during the discovery period of this litigation until, literally, the last minute.

Counsel for the Defendants possessed these documents and did not produce them after litigation had begun. Defendants possessed the documents at the hearing held on August 2nd, 2022, yet produced nothing and said even less to the Court or Plaintiff's Counsel.

There were, in fact, other telephone calls made between Plaintiff Brandon Finchum and attorney Courtney Luther. Specifically, "three" or "more" calls, and one law school intern call, but there may be "more." *See Exhibit "A"*- May 19th, 8:04 p.m. email from John Fleming to attorney Courtney Luther.

After discovery had ended in this litigation, it was revealed that the Defendants failed to disclose or reveal the following substantial and material witnesses:

1. Attorney Courtney Luther;
2. Attorney Jose Castaneda (former "intern");
3. Joe Garby; and
4. Keith Finchum.

After discovery had ended in this litigation, it was revealed that Defendants failed to disclose or reveal the following substantial and material documents:

1. A May 19th, 2021 email to Attorney Courtney Luther from John Fleming (Ex. A);
2. A January 22nd, 2022 written Agreement executed between Nacogdoches County and Disability Rights of Texas related to this litigation (Ex. C);
3. All other emails or other communications between Nacogdoches County and Integrated Communications Systems, San Antonio, TX not yet produced.

Defendants' conduct is tantamount to discovery abuse because Defendants have specifically failed to make complete disclosures or cooperate in discovery in violation of F.R.C.P 37 (c)(1). "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), ... the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).

Based on the last minute prejudicial revelation of these witness and documents, given the relevance and substantiveness of this newly produced evidence AND considering the extreme prejudice against the Plaintiff of withholding this information, Plaintiff asks the Court for leave to amend his Original Complaint to include additional claims for wiretapping and *Monell* claims for failure to supervise and train employees.

Plaintiff asks the Court for time to file appropriate motions to compel discovery, including sanctions for discovery abuse.

Plaintiff asks the Court for time to conduct additional discovery, including taking the depositions of Courtney Luther, Jose Castaneda and Joe Garby.

Plaintiff asks the Court for time to seek emails, documents and other material related to the use of the ICS jail recording system.

ADDITIONAL CLAIMS SOUGHT

Plaintiff Seeks Additional Wiretapping Claims.

Plaintiff Brandon Finchum seeks to amend his Original Complaint to now include additional wiretapping claims for the additional “three or more” listened to telephone calls admitted by the Nacogdoches County Attorney John Fleming in Exhibits “A” and “B.” During his deposition on September 2nd, 2022, when shown Exhibits “A” and “B,” Nacogdoches County Attorney John Fleming did not dispute the authenticity of Exhibits “A” and “B.”

Nacogdoches County Attorney John Fleming’s May 19th, 2021 email to Paul Anderson admitted to one or more calls being listened to by non-lawyer employees his office. John Fleming’s email to attorney Courtney Luther on May 19th, 2022, produced shortly before John Fleming’s September 2nd, 2022 deposition, divulges and admits there were at least three or more calls listened to by a Nacogdoches County Attorney Office employee and a “law school intern.”

Unlike the email to Paul Anderson where only a “non-lawyer” listened to privileged calls, in the email to Attorney Courtney Luther (also representing Brandon Finchum) John Fleming reveals an “law

school intern” intern listened to privileged attorney-client telephone calls. Defendants deliberately and intentionally withheld the fact and identity of a witness, specifically a “law-school intern,” Mr. Jose Castaneda.

Plaintiff Brandon Finchum seeks to amend his original complaint to include claims for at least three or more additional phone calls listened to by the County of Nacogdoches and by two or more non-lawyer employees.

The documents presented in Exhibits “A” and “B” were discoverable and should have been produced during the discovery period. These documents are relevant enough that they were required to be produced with Defendants’ Initial Disclosures but were not. If the Court had not intervened and extended the discovery period, it is certain the additional evidence of attorney-inmate calls being listened to by Defendants would not have been disclosed and Plaintiff would have never known of their existence. This appears to be willful, conscious, and intentional conduct by Defendant Nacogdoches County to withhold material, relevant and substantial evidence in federal litigation.

Given the gravity of the information withheld by Defendant Nacogdoches County, Plaintiff Brandon Finchum asks the Court to grant his motion for leave to amend his Original Complaint to include additional claims based on newly revealed tortious conduct by Nacogdoches County.

Plaintiff Brandon Finchum specifically seeks leave of the Court to amend his complaint to plead one or more additional causes of action accruing from this intentionally withheld evidence.

Plaintiff Seeks to Establish a *Monell* Claim.

Plaintiff Brandon Finchum seeks to amend his Original Complaint to establish a “*Monell*” claim against the County of Nacogdoches. *Monell v. Dept. Social Services*; 436 U.S. 658 (more) 98 S. Ct. 2018; 56 L. Ed. 2d 611. Plaintiff Brandon Finchum can establish that Nacogdoches County has the capability, expertise, resources, technology, and dedicated staff to avoid listening to privileged communications between attorneys and Nacogdoches County Jail inmates but has no written policy, rule or regulation prohibiting the practice. Nacogdoches County has never produced or identified a single written policy

document defining, outlining or guiding its employees about the “significance of privileged communications” between attorneys and inmates.

Nacogdoches County Attorney John Fleming states in his September 2nd, 2022 deposition:

Q. (Anderson): “Is there a [Nacogdoches] County policy prohibiting the listening of attorney phone calls from inmates at the Nacogdoches County Jail?”

A. (Fleming) “Not that I’m aware of.” *See Exhibit “D”* - Fleming Deposition 2; Page 37, L 7 – 10.

Q. (Anderson): “Apparently there is no County policy to prevent the recoding of attorney phone calls from the jail from inmates, is there?”

A. (Fleming): “I don’t believe that there is a written policy that says . . .” *See Exhibit “E”* - Fleming Deposition 2; Pg. 38, L.20 24.

Q. (Anderson): “How are you going to prevent this from never happening again if you have no policy?”

A. (Fleming): “That goes to management style and how I work within our office.” *See Exhibit “F”* - Fleming Deposition 2; Pg. 39, L.8 12.

Q. (Anderson): “Do you know if you have – does the Nacogdoches County Attorney’s Office have an employee or policy manual?”

A. (Fleming): “Not the County Attorney’s Office.”

Q. (Anderson): “Does an employee of the Nacogdoches County Attorney’s Office agree to abide by a County employee manual, a policy manual of some kind.?”

A. (Fleming): “That’s my understanding, yes.”

Q. (Anderson): “Does that manual to your understanding have anything in it regarding listening to attorney/client phone calls?”

A. (Fleming): “Not that I am aware of.” *See Exhibit “G”* - John Fleming Depo 1; Pg.37, L 16- 25, Page 38; L. 1 -3.

Q. (Anderson): “Do you know of any documents that Sheriff Bridges possesses that give guidance from any agency, law enforcement or otherwise, on the recording of phone calls between clients and their attorneys from jail?”

A. (Fleming): “I don’t – I don’t know. I don’t know what he has or does not have.” *See Exhibit “H”* - John Fleming Deposition 1; Pg. 52, L. 22 – 25; Pg. 53; L. 1-3.¹

Lt. Capel testifies that he is the only one that works on the jail recording system but that he has no authority to change policies or use of the system and that all polices come directly from the Sheriff. Lt. Capel states in his deposition that changes to the system cannot happen without the knowledge or “authority” of Sheriff Jason Bridges or Major Crisp. *See Exhibit “I”* - Lt. Capel Deposition; Pg. 42, L. 11- 25.

Nacogdoches County produced employee Lt. Kevin Capel to testify about the jail’s recording system and he is asked:

Q. (Anderson): “Are you comfortable being the person that is being held accountable for knowing the most about this system in the jail?”

A. (Lt. Capel): “Yes.”

Q. (Anderson): “And yet you have never read the manual?”

A. (Lt. Capel): “No sir, I’ve not read the manual.” *See Exhibit “J”* - Lt. Capel Depo. Pg. 12, L. 25; Pg. 13, L. 1-5.

Q. (Anderson): “Do you possess a physical copy of the manual?”

A. (Lt. Capel): “I do not.” *See Exhibit “K”* - Lt. Capel Deposition; Pg. 49, l. 25; Pg. 50, L. 1-2.

Nacogdoches County does not even know how many users have access to the jail telephone call and recording system. Lt. Capel testifies:

Q. (Anderson): “Are you aware of how many users have access to this system?”

¹ John Fleming states some variant of; “I don’t know,” “I’m not sure,” or “I don’t remember” no less than 107 times in response to deposition questions presented to him at his deposition on September 2nd, 2022.

A. (Lt. Capel): “ Many users, I don’t know the number.” **See Exhibit “L”** - Lt. Capel Deposition; Pg. 13, L. 9 -11.

And,

Q. (Anderson): “Do you have a sense of how many other Nacogdoches County employees have a password for this system?”

A. (Lt. Capel): “No sir, I do not know the number of how many people.” **See Exhibit “M”** - Lt. Capel Deposition; Pg. 13, L. 22 25; Pg. 14, L. 1-3.

Nacogdoches County has no clue how many people have access to its jail telephone recording system.

Nacogdoches County’s clearly non-existent policy about the permissive and unchecked listening and recording of confidential telephone calls between attorneys and clients amounts to an unconstitutional policy.

The unconstitutional practice of listening to attorney-client privileged communications has been exercised repeatedly by Nacogdoches County. The Nacogdoches County Sheriff’s Office has a pattern of constitutional violations so prevalent in the department that the practice of listening to privileged communications between inmates and attorneys is considered customary and ordinary.

Nacogdoches County Attorney John Fleming testifies that he “took steps to avoid this happening again” and “ something like this will never happen again.” Absolutely no evidence has been produced by Nacogdoches County demonstrating that any steps have been taken at all. In fact, testimony will show that Nacogdoches County has absolutely no control over the security or access of the system used to record and listen to inmate telephone calls made to attorneys. Nacogdoches County has absolutely no idea how many users have access or possess passwords to the County jail recording system.

Plaintiff Brandon Finchum’s lawsuit has exposed Nacogdoches County’s conscious indifference and willful ignorance toward preventing unlawful violations of interfering in constitutionally-protected attorney-client privileged communications.

PRAYER

Plaintiff Brandon Finchum seeks leave of the Court to amend his Original Complaint to include claims, under *Monell* and its progeny, against Nacogdoches County for unconstitutional policies and practices that led to a failure of supervision (in the Nacogdoches County Attorney's Office and Nacogdoches County Sheriff's Office) of employees and interns. Nacogdoches County Sheriff's Office and Nacogdoches County Attorney's Office have engaged in negligent supervision of its employees (and interns) that led to the harm Brandon Finchum has suffered and for which he seeks relief.

Plaintiff Brandon Finchum also seeks leave of the Court to amend his Original Complaint to include claims for the recently revealed "three" or "more" telephone calls listened to by Nacogdoches County employees, including a law-school intern and between Brandon Finchum and attorney Courtney Luther.

Brandon Finchum also seeks leave of the Court to extend the discovery period sufficiently to investigate the Defendants' newly disclosed facts, documents, and witnesses.

Plaintiff Brandon Finchum asks the Court to Grant this Motion so that justice may be done and not for delay.

Granting this Motion for Leave to Amend Plaintiff's Original Complaint should be, in all things, GRANTED, in the interest of justice.

Respectfully submitted,
PAUL ANDERSON, PLLC



Paul V. Anderson
SBOT №. 24089964
601 North Street
Nacogdoches, Texas 75961
Tel. 936.305.5600
Fax 713.236.4262
E-mail: paul@paulandersonlaw.com
ATTORNEY FOR BRANDON FINCHUM

CERTIFICATE OF CONFERENCE

Counsel for Plaintiff and Defendants conferred by telephone September 8th, 2022 and counsel for Defendants stated they were opposed to the Motion for Leave.

Counsel conferred by telephone on Friday, November 11th, 2022 at 11:00 a.m. and discussed substantive issues related to Plaintiff's Motion for Leave and Amended Complaint.

Plaintiff's Counsel provided Defendant's Counsel a copy of the Motion for Leave and Amended Complaint on Thursday morning, November 17th, 2022 and prior to a conference by telephone on Thursday, November 17th, 2022. After substantive conference, Defendant's Counsel stated its opposition to the Motion.

A handwritten signature in black ink, appearing to be the initials 'AP' with a horizontal line extending to the right.

From: **John Fleming** <jfleming@co.nacogdoches.tx.us>
Date: Wed, May 19, 2021 at 8:04 PM
Subject: Jail Calls between Ms. Luther and Brandon Finchum
To: <cluther@disabilityrightstx.org>

Ms. Luther:

Thank you for taking my call today and I am sorry for the long call but I felt it was warranted.

In connection with responding to an open records request from attorney Paul Anderson, one non lawyer employee and one law school intern within our office listened to jail calls between you and Brandon Finchum. I do not believe there was any ill intent at all. The employee has a recollection of listening to 3 calls between you and Mr. Finchum but may have listened to more. The law school intern listened to one call. Although neither person was directed to listen to privileged communications, I take responsibility for not emphasizing the significance of privileged communications. And, naturally, I take full responsibility for anything that happens in this office.

Once I realized what had happened, we separated the intern and the employee from any work on the open records response.

Obviously, I did not emphasize to the employee or the intern the significance of privileged communications. I have discussed this with the employee and the intern and instructed both not to disclose to anyone anything heard in the recording. In addition, I have taken steps to avoid this happening again. As I mentioned, we contacted the ethics helpline and they were very knowledgeable in my opinion. We appreciated their thoughts and suggestions and will take the steps they suggested so that something like this will never happen again.

I am very willing to talk to any of your supervisors. I will answer any questions that need to be answered. I am happy to furnish your office with details of what we are doing to rectify this circumstance and prevent repetition. If there is any information you need from me, please let me know. As you know, there are a lot of details and this is really more of a summary of what I mentioned.

I am sorry for this circumstance and want to make sure that you and your office get any questions answered.

Thank you.

John F.

--
John Fleming

NC397

Nacogdoches County Attorney
101 W. Main Street, Room 230
Nacogdoches, Texas 75961
Phone 936 560 7789
Facsimile 936 560 7809

--
John Fleming
Nacogdoches County Attorney
101 W. Main Street, Room 230
Nacogdoches, Texas 75961
Phone 936 560 7789
Facsimile 936 560 7809

NOTICE OF CONFIDENTIALITY:

The information contained in and transmitted with this email is: 1) SUBJECT TO THE ATTORNEY/CLIENT PRIVILEGE; 2) ATTORNEY WORK PRODUCT; AND/OR 3) CONFIDENTIAL.

This communication and any document, file or previous email message attached hereto, constitute an electronic communication within the scope of the Electronic Communication Privacy Act, 18 USCA 2510. This communication may contain non-public, confidential or legally privileged information intended for the sole use of the designated recipient(s). The unlawful interception, use or disclosure of such information is strictly prohibited under 18 USCA 2511 and any applicable laws. If you have received this message in error, please notify us immediately by return email and delete and destroy all copies of the original message.

From: **John Fleming** <jfleming@co.nacogdoches.tx.us>
Date: Wed, May 19, 2021 at 7:23 PM
Subject: PIA Request Dated May 5, 2021, Re: Brandon Finchum
To: <paul@paulanderson.law>

Paul:

In connection with responding to your open records request dated May 5, 2021, a non lawyer employee of our office listened to a jail call between you and Mr. Finchum. I do not believe it was listened to with any ill intent. It is my understanding that the employee did not hear anything of substance. It is my understanding the employee heard two statements that I will summarize: that you would meet with your client at 1:30 p.m. and that you would try to call Mr. Finchum's dad. Although the employee was not directed to listen to the call, I take responsibility for what employees of this office do or don't do.

As stated, I take responsibility for anything that happens in this office as I should. Obviously, I did not emphasize to the employee the significance of privileged communications. I have discussed this with the employee and instructed the employee not to disclose to anyone anything heard in the recording. In addition, I have taken steps to avoid this happening again. I believed that you needed to know this had happened.

Thank you.

John Fleming

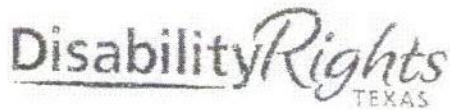
--

John Fleming
Nacogdoches County Attorney
101 W. Main Street, Room 230
Nacogdoches, Texas 75961
Phone 936 560 7789
Facsimile 936 560 7809

--

John Fleming
Nacogdoches County Attorney
101 W. Main Street, Room 230
Nacogdoches, Texas 75961

Phone 936 560 7789
Facsimile 936 560 7809



MEMORANDUM OF UNDERSTANDING

Disability Rights Texas ("DRTx") and the Nacogdoches County Attorney's Office enter into the following agreement:

Agreement

Recordings between DRTx staff and B.F.

1. The Nacogdoches County Sheriff's Office and/or the Nacogdoches County Attorney's Office were made aware on or around May 23, 2021 regarding recorded phone calls between B.F. and DRTx staff. DRTx and the Nacogdoches County Attorney's Office agree that no recordings of telephone conversations between DRTx and B.F. in the Nacogdoches County Attorney's possession shall be destroyed while litigation involving B.F. and Nacogdoches County is pending.
2. Following receipt of notice that the current litigation involving B.F. and Nacogdoches County has been dismissed or resolved (to include the expiration of any and all dates for appellate relief), the Nacogdoches County Attorney's Office agrees, as allowed by Texas law, to destroy any and all recordings of telephone conversations in its possession (original and any and all copies) between DRTx and B.F., as well as any and all documents containing notes or summaries of the content of the conversations between DRTx and B.F. within seven (7) days. The Nacogdoches County Attorney's Office will notify DRTx confirming the destruction of the recordings and any related documents within seven (7) days thereafter.
3. The Nacogdoches County Attorney's Office instructed any and all staff persons who listened to the recording(s) of the telephone conversation not to divulge the contents of the conversations to any other person unless ordered to do so by a Court.
4. If employees or agents of the Nacogdoches County Attorney's Office who listened to the recording of the telephone call(s) itself receive a subpoena or other discovery request related to the previously recorded conversations, the County Attorney's Office will notify DRTx within five (5) business days of receipt of the subpoena or discovery request. The County Attorney's Office will object to the subpoena or discovery request, will file a motion to quash if necessary and will not testify about the recordings unless ordered to do so by a court. If the party serving the subpoena or requesting the discovery files a motion to compel, the County Attorney's Office will notify DRTx within five (5) business days of receipt of the motion and any notice of the hearing so that DRTx can defend its communications. If DRTx files a motion to quash a request for discovery, the County Attorney's Office agrees not to oppose the motion to quash the request for the discovery.

Future Communications between DRTx staff and Nacogdoches County Jail Inmates

5. The Nacogdoches County Attorney Office coordinated with vendor ICSolutions in order to prevent the recording of inmate calls with DRTx by providing the following phone numbers:

713-974-7691

800-252-9108

512-454-4816

Phone numbers identified by DRTx, then provided to the Nacogdoches County Sheriff's Office, are expected to be immediately added to ICSolutions' (or subsequent vendor which services inmate telephone communication) database. It is anticipated that no inmate telephone calls involving phone numbers added to the database will be recorded. DRTx agrees that only its authorized staff may communicate with a Nacogdoches County inmate using the above identified telephone number(s). It is the responsibility of DRTx to inform the Nacogdoches County Sheriff's Office of any changes to the telephone numbers that are to be considered exempt from recording (as identified above).

6. If the Nacogdoches County Attorney's Office receives a Texas Public Information Act request for records to which recorded inmate calls with DRTx (that have not been destroyed) would be responsive, the County Attorney's Office will withhold the requested information and request an opinion from the Texas Attorney General pursuant to Texas Government Code Chapter 552. The request for an Attorney General's Opinion shall include §552.305 (*Information Involving Privacy or Property Interests of Third Party*) in addition to any other grounds the Nacogdoches County Attorney's Office raises. The County Attorney's Office will notify DRTx within five (5) business days that they received the request so that DRTx can submit information to the Attorney General's Office pursuant to Texas Government Code § 552.305(b).
7. If the Nacogdoches County Attorney's Office receive a subpoena or other discovery request in a legal proceeding for any recorded inmate calls with DRTx that have not been destroyed, the County Attorney's Office will notify DRTx within five (5) business days of receipt of the subpoena or discovery request. The County Attorney's Office will object to the subpoena or discovery request, will file a motion to quash if necessary, and will not testify about or produce the requested recording(s) unless ordered to do so by a court. If the party serving the subpoena or requesting the discovery files a motion to compel, the County Attorney's Office will notify DRTx within five (5) business days of receipt of the motion and any notice of the hearing so that DRTx can defend its communications. If DRTx files a motion to quash a request for discovery, the County Attorney's Office agrees not to oppose the motion to quash the request for the discovery.

County
NACOGDOCHES ATTORNEY'S OFFICE

DISABILITY RIGHTS TEXAS

By: John Fleming
Date: 1/20/2022
JOHN FLEMING
Nacogdoches County Attorney

By: Mary [Signature]
Date: 1/20/2022

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BRANDON FINCHUM,)
)
Plaintiff,)
) CIVIL ACTION
VS.) NO. 9:21-CV-285
) JURY DEMAND
NACOGDOCHES COUNTY,)
)
Defendant.)

ORAL AND VIDEOTAPED DEPOSITION OF
JOHN FLEMING
30 (b) (6) DEPOSITION
SEPTEMBER 2, 2022

ORAL AND VIDEOTAPED DEPOSITION OF JOHN FLEMING,
produced as a witness at the instance of the PLAINTIFF,
and duly sworn, was taken in the above-styled and
numbered cause on September 2, 2022, from 12:32 p.m. to
1:35 p.m., before Jan Newman Carter, CSR in and for the
State of Texas, reported by machine shorthand, at the
Nacogdoches County Courthouse Annex, 203 West Main
Street, Nacogdoches, Texas, pursuant to the Federal
Rules of Civil Procedure and the provisions stated on
the record or attached hereto.

1 inmates to attorneys?

2 A. I wouldn't necessarily be advised of it, no.

3 Q. Would you advise against it?

4 MR. DAVIS: Objection, form. That calls
5 for an opinion as to how he would advise his client, and
6 it's privileged.

7 Q. (BY MR. ANDERSON) Is there a -- yeah. Is
8 there a County policy against listening to attorney
9 recorded phone calls to inmates?

10 A. Not that I'm aware of.

11 Q. There's no County policy prohibiting the
12 listening of attorney phone calls from inmates at the
13 Nacogdoches County jail.

14 A. If there's a warning, there's probably not a
15 policy. And I do not know what the policy would be
16 otherwise.

17 Q. Does the Nacogdoches County jail have a policy
18 of excepting phone calls to attorneys from being
19 recorded?

20 MR. DAVIS: Objection, form.

21 MR. ANDERSON: This is 12(b)(6), this is
22 policies, procedures, Robert.

23 MR. DAVIS: You're asking Sheriff's office
24 policy and procedure.

25 MR. ANDERSON: Nacogdoches County.

1 MR. DAVIS: Okay. Make it Nacogdoches
2 County.

3 Q. (BY MR. ANDERSON) Does Nacogdoches County have
4 a policy which would be inclusive of the Sheriff's
5 office to notify lawyers when their calls have been --

6 MR. DAVIS: I'm going to object. If you
7 want to make it Nacogdoches County, I don't have a
8 problem with that. But you have to understand that
9 every Constitutionally-elected office can have their own
10 policies and procedures. But if you want to ask him
11 about Nacogdoches County, great. But that doesn't mean
12 that this witness can testify or has been prepared to
13 testify about what various county-elected officials who
14 are Constitutionally-elected what individual policies
15 they may have. I mean, this witness has been prepped on
16 it wouldn't know what individually
17 Constitutionally-elected officials, what policy they
18 have. But if you want to ask about the County policy,
19 feel free to do that.

20 Q. (BY MR. ANDERSON) Apparently there's no County
21 policy to prevent the recording of attorney phone calls
22 from the jail from inmates, is there?

23 A. I don't believe that there is a written policy
24 that says -- I'll put it to you this way: I do not
25 believe that there is a policy to listen to phone calls

1 between attorney and clients if there's no recording
2 that warns that it's being recorded and possibly
3 monitored.

4 Q. But yet this is "something that will never
5 happen again."

6 A. It's something I hope will never happen again
7 in our office.

8 Q. How are you going to prevent this from never
9 happening again if you have no policy?

10 A. That goes to management style and how I work
11 within our office.

12 MR. ANDERSON: If you give me a few minutes
13 just to kind of review here, I think I can wrap it up,
14 Robert. Are you going to have questions?

15 MR. DAVIS: Probably not. But if you're
16 going to take a few minutes though, I'll go talk to them
17 and see if we have any follow-up.

18 THE VIDEOGRAPHER: Off the record, the time
19 is approximately 1:20 p.m.

20 (Break taken from 1:00 to 1:29 p.m.)

21 THE VIDEOGRAPHER: We're now back on the
22 record, the time is approximately 1:29 p.m.

23 Q. (BY MR. ANDERSON) Mr. Fleming, a couple of
24 quick questions and we're done. The conversation that
25 you had with Courtney Luther sometime around the 19th of

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BRANDON FINCHUM,)
)
Plaintiff,)
) CIVIL ACTION
VS.) NO. 9:21-CV-285
) JURY DEMAND
NACOGDOCHES COUNTY,)
)
Defendant.)

ORAL AND VIDEOTAPED DEPOSITION OF
JOHN FLEMING
SEPTEMBER 2, 2022

ORAL AND VIDEOTAPED DEPOSITION OF JOHN FLEMING,
produced as a witness at the instance of the PLAINTIFF,
and duly sworn, was taken in the above-styled and
numbered cause on September 2, 2022, from 10:51 a.m. to
12:31 p.m., before Jan Newman Carter, CSR in and for the
State of Texas, reported by machine shorthand, at the
Nacogdoches County Courthouse Annex, 203 West Main
Street, Nacogdoches, Texas, pursuant to the Federal
Rules of Civil Procedure and the provisions stated on
the record or attached hereto.

1 that time.

2 Q. Is he still interning with you?

3 A. He is an employee now.

4 Q. What is his responsibilities?

5 A. He is a paralegal.

6 Q. Is he going to law school?

7 A. He's been to law school.

8 Q. Is he in law school?

9 A. He's finished law school.

10 Q. Waiting for bar exam, bar results?

11 A. Yes.

12 Q. Very good. I wish him the best.

13 Did you provide to Ms. George anything in
14 writing about this recording conduct or listening to the
15 phone calls conduct?

16 A. If I did, I have not been able to locate it.

17 Q. Do you know if you have a -- does the
18 Nacogdoches County Attorney's office have an employee or
19 policy manual?

20 A. Not the County Attorney's office.

21 Q. Does an employee of the Nacogdoches County
22 Attorney's Office agree to abide by a County employee
23 manual, a policy manual of some kind?

24 A. That's my understanding, yes.

25 Q. Does that manual to your understanding have

1 anything in it regarding listening to attorney/client
2 phone calls?

3 A. Not that I'm aware of.

4 Q. Have you taken any concrete steps to put or
5 express into writing the significance of privileged
6 communications to any of your employees since May 19th?

7 A. If I have, I've not been able to locate it.

8 Q. If you had, how would you have done that?

9 A. It would probably have been done by email if
10 we're talking about in writing.

11 Q. Like a group email, staff email.

12 A. Possibly.

13 Q. If you had done this and there is an email out
14 there to your staff commenting on the significance of
15 privileged communications, would you have sent that to
16 all lawyer and non-lawyer employees or different
17 buckets?

18 A. I don't know if I would have sent it to all or
19 not. It could have been focused -- if it was sent at
20 all, it would have possibly been sent to everyone. But
21 the only person that had access to it was Holly as I
22 understood it, and then I probably would have sent
23 something to Jose. But honestly, I'm not sure that I
24 did put anything in writing because I couldn't find it
25 on my email.

1 is knock out a couple of loose -- let me just run
2 through this real quick, and then I think I am ready to
3 move on.

4 MR. DAVIS: Okay.

5 Q. (BY MR. ANDERSON) If Sheriff Bridges were to
6 call you for your advice today on the recording of
7 telephone calls between inmates and attorneys only, what
8 would you say?

9 MR. DAVIS: I'm going to object to that, it
10 calls for speculation and it asks for a presumptive
11 attorney/client privileged communication.

12 Q. (BY MR. ANDERSON) Is there a policy that you
13 would refer Sheriff Bridges to about recording attorney
14 calls from inmates if he were to call and ask you?

15 MR. DAVIS: Same objection.

16 Q. (BY MR. ANDERSON) Is there anything in writing
17 you would refer Sheriff Bridges to that would refer and
18 give guidance on the recording of attorney/client calls
19 from inmates?

20 MR. DAVIS: Same objection, calls for
21 attorney/client communication.

22 Q. (BY MR. ANDERSON) Do you know of any documents
23 that Sheriff Bridges possesses that gives guidance from
24 any agency, law enforcement or otherwise, on the
25 recording of phone calls between clients and their

1 attorneys from jail?

2 A. I don't -- I don't know. I don't know what he
3 has or doesn't have.

4 Q. Very good. Is Holly George still employed --

5 A. Yes.

6 Q. -- with the County Attorney? And Mr.

7 Castaneda, Castaneda, he's employed as a full-time
8 employee now with your office?

9 A. Yes.

10 Q. Has Nacogdoches County Attorney's office
11 required -- has Nacogdoches County Attorney's office
12 notified any other attorneys, licensed attorneys, that
13 their calls have been listened to or recorded excluding
14 myself and Ms. Luther?

15 MR. DAVIS: I'm going to object to the
16 multifarious nature of the question. And I can tell you
17 kind of what I'm --

18 MR. ANDERSON: Well, here's the corollary.
19 I hear your objection; but if you want to object to the
20 multifarious, if it's too broad, then I have a list of
21 24 and I can just run down -- actually I won't --

22 MR. DAVIS: I think it's -- Paul, my
23 distinction is recorded and listened to because we know
24 the jail recorded all conversations up until the
25 attorneys' names were added.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

BRANDON FINCHUM,)
)
Plaintiff,)
) CIVIL ACTION
VS.) NO. 9:21-CV-285
) JURY DEMAND
NACOGDOCHES COUNTY,)
)
Defendant.)

ORAL AND VIDEOTAPED DEPOSITION OF
KEVIN CAPEL
SEPTEMBER 2, 2022

ORAL AND VIDEOTAPED DEPOSITION OF KEVIN CAPEL,
produced as a witness at the instance of the PLAINTIFF,
and duly sworn, was taken in the above-styled and
numbered cause on September 2, 2022, from 9:07 a.m. to
10:14 a.m., before Jan Newman Carter, CSR in and for the
State of Texas, reported by machine shorthand, at the
Nacogdoches County Courthouse Annex, 203 West Main
Street, Nacogdoches, Texas, pursuant to the Federal
Rules of Civil Procedure and the provisions stated on
the record or attached hereto.

1 with you.

2 MR. DAVIS: Good, good.

3 MR. ANDERSON: I'm going to move on, I'll
4 move on.

5 MR. DAVIS: Stay under your 30(b)(6).
6 Okay?

7 Q. (BY MR. ANDERSON) I'm just trying to figure
8 out, because you can't remember who told you to do this,
9 the food chain of your employment -- food chain -- okay?
10 You answer directly to Major Crisp who answers to
11 Bridges, but you're a lieutenant, do you have anybody
12 beneath you that works on the system?

13 A. No, sir.

14 Q. It's you or above.

15 A. Yes.

16 Q. The policies about the system, are those from
17 you about how to use it to change these things, do you
18 have that authority?

19 A. No, sir. It has to go through the sheriff.

20 Q. Would you make a change to the system like
21 adding a recording without communicating to the sheriff?

22 A. No, sir.

23 Q. Would you make a change to this system without
24 communicating it to Major Crisp?

25 A. No, sir.

1 Brown trained you on this system?

2 A. It was probably within the first six months of
3 my advancement to lieutenant.

4 Q. When were you advanced to lieutenant?

5 A. Oh, about four years ago.

6 Q. So, at the point in time that Lieutenant Brown
7 gave you responsibility for the system, she just sat
8 down and trained you on it?

9 A. She just showed me how to pull the calls.

10 Q. Okay. Is that the extent of your training on
11 the system?

12 A. On this system I've learned how to do other
13 things as I've worked through the system by utilizing
14 it.

15 Q. And when was the very last time you looked at
16 this manual or referred to it?

17 A. I've looked at it and just leafed through it
18 probably two or three nights ago.

19 Q. Okay. You leafed through it?

20 A. Yes, sir.

21 Q. Did you focus on anything specific in this
22 manual?

23 A. I focused on removal, pulling of calls and
24 adding attorneys to the call log.

25 Q. Are you comfortable with being the person that

1 is being held accountable for knowing the most about
2 this system in the jail?

3 A. Yes.

4 Q. And yet you've never read the manual.

5 A. No, sir, I've not read the manual.

6 Q. Are you aware if Molly Brown ever read the
7 manual?

8 A. I am unaware of any activity she has taken.

9 Q. Are you aware of how many users have access to
10 this system?

11 A. Many users, I don't know the number.

12 Q. Do these many user accessors have passwords?

13 A. Yes.

14 Q. And what do they use the system for?

15 A. Be able to pull -- they can utilize it to pull
16 calls, investigators mostly.

17 Q. Do jailers use this system?

18 A. No.

19 Q. When you say no, is that ever?

20 A. Ever. Unless you're including me as the
21 jailers.

22 Q. Fair enough. Do you have a sense of how many
23 other Nacogdoches County employees have a password for
24 this system?

25 A. By sense do you mean number?

1 calls?

2 A. Yes.

3 Q. (BY MR. ANDERSON) When did you first become
4 aware that this lawsuit was about --

5 MS. O'DONOGHUE: The Court is calling.

6 (Ms. O'Donoghue answers phone call.)

7 (Off-the-record discussion.)

8 Q. (BY MR. ANDERSON) Lieutenant, I'm going to
9 move on, we're still on the record and I think I can
10 wrap this up with you, and I appreciate your time and
11 you being a gentleman, no doubt.

12 Okay. How long has -- you said it earlier,
13 repeat, how long has the IC System been in the Sheriff's
14 Department?

15 A. I didn't say earlier because I do not know.

16 Q. Was it there when you got there --

17 A. Yes.

18 Q. -- 17 years ago?

19 A. No. 17 years ago? Not to my knowledge.

20 Q. When do you recall it went in?

21 A. I don't recall when it went in.

22 Q. Was it in there when you became lieutenant four
23 years ago?

24 A. Yes.

25 Q. Okay. Do you possess a physical copy of the

1 manual?

2 A. I do not.

3 Q. When you were leafing through it, was that
4 online?

5 A. It was on PDF.

6 Q. Right. Do you currently have a list of numbers
7 that you could identify or are identifiable of attorney
8 calls from inmates that are prohibited from the jail?

9 MR. DAVIS: Objection, form.

10 Q. (BY MR. ANDERSON) Are there any inmates
11 prohibited from making calls through the system in the
12 jail today?

13 A. No.

14 Q. Do you use the feature -- we talked about it --
15 but an ability to prohibit an inmate from making a call,
16 do you use that feature?

17 A. Yes.

18 Q. When?

19 A. On disciplinary issues and when they're on
20 lockdown.

21 Q. Is it used often for disciplinary?

22 A. Not normally.

23 Q. I want to understand something quickly. So,
24 the phones are located where in the facility, the dorms?

25 A. In the dorms?

1 is being held accountable for knowing the most about
2 this system in the jail?

3 A. Yes.

4 Q. And yet you've never read the manual.

5 A. No, sir, I've not read the manual.

6 Q. Are you aware if Molly Brown ever read the
7 manual?

8 A. I am unaware of any activity she has taken.

9 Q. Are you aware of how many users have access to
10 this system?

11 A. Many users, I don't know the number.

12 Q. Do these many user accessors have passwords?

13 A. Yes.

14 Q. And what do they use the system for?

15 A. Be able to pull -- they can utilize it to pull
16 calls, investigators mostly.

17 Q. Do jailers use this system?

18 A. No.

19 Q. When you say no, is that ever?

20 A. Ever. Unless you're including me as the
21 jailers.

22 Q. Fair enough. Do you have a sense of how many
23 other Nacogdoches County employees have a password for
24 this system?

25 A. By sense do you mean number?

1 is being held accountable for knowing the most about
2 this system in the jail?

3 A. Yes.

4 Q. And yet you've never read the manual.

5 A. No, sir, I've not read the manual.

6 Q. Are you aware if Molly Brown ever read the
7 manual?

8 A. I am unaware of any activity she has taken.

9 Q. Are you aware of how many users have access to
10 this system?

11 A. Many users, I don't know the number.

12 Q. Do these many user accessors have passwords?

13 A. Yes.

14 Q. And what do they use the system for?

15 A. Be able to pull -- they can utilize it to pull
16 calls, investigators mostly.

17 Q. Do jailers use this system?

18 A. No.

19 Q. When you say no, is that ever?

20 A. Ever. Unless you're including me as the
21 jailers.

22 Q. Fair enough. Do you have a sense of how many
23 other Nacogdoches County employees have a password for
24 this system?

25 A. By sense do you mean number?

1 Q. Yes.

2 A. No, sir, I do know the number of how many
3 people.

4 Q. More than you, right?

5 A. Yes, more than me.

6 Q. Less than ten? More than ten?

7 A. More than ten.

8 Q. A lot of people.

9 A. More than ten.

10 MR. DAVIS: Objection, form. And where is
11 this covered in your 30(b)(6) deposition notice,
12 Counsel?

13 MR. ANDERSON: Well, it's the manual and
14 I'm asking a question about the manual and I'm about
15 ready to wrap all of this up because he hasn't read the
16 manual. If you'd just give me a second to kind of prove
17 that, I'll move on and we're done with him.

18 I'm not pulling your leg on this, Robert,
19 he hasn't read the manual, and this is really -- if you
20 haven't read the manual, then you don't -- so, I just
21 want to cover a couple of features and make sure that...

22 MR. DAVIS: Okay.

23 Q. (BY MR. ANDERSON) You understand that this is
24 a very complicated system, right?

25 A. Yes.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

BRANDON FINCHUM, INDIVIDUAL
Plaintiff

V.

NACOGDOCHES COUNTY
Defendant.

§
§
§
§
§
§
§

CIVIL ACTION No. 9:21-CV-285

ORDER

Pending before the Court is Plaintiff's Motion for Leave to File an Amended Complaint. (Dkt. ____). After reviewing the Motion, the Response, the record and the applicable law, the Court is of the opinion that it should be _____.

It is SO ORDERED.