

No. S260391

IN THE SUPREME COURT OF CALIFORNIA

JEREMIAH SMITH, Plaintiff and Appellant,

v.

LOANME, INC., Defendant and Respondent.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two (Case No. E069752)

On Appeal from the Riverside County Superior Court
(Case No. RIC1612501; Hon. Sharon J. Waters)

ANSWER TO PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

INTRODUCTION

Plaintiff and Appellant Jeremiah Smith seeks review of the Court of Appeal's unanimous published decision that Penal Code Section 632.7 prohibits only third-party eavesdroppers from intentionally recording telephonic communications involving at least one cellular or cordless phone and, thus, does not prohibit the participants of a phone call from intentionally recording it. Based on its holding, the Court of Appeal found that Defendant and Respondent

LoanMe, Inc. is not liable under Penal Code Section 632.7 for recording a single, 18-second phone call with Smith in October 2015 (during which beep tones sounded).

The Court of Appeal’s unanimous published decision interpreting Penal Code Section 632.7 is the first and only reported Court of Appeal decision on the issue. Importantly, the Court of Appeal’s narrow decision does **not** impact causes of action under other provisions of California’s Invasion of Privacy Act (Cal. Penal Code §§ 630 et seq. (“CIPA”)), including Penal Code Section 632, which prohibits the intentional recording of “confidential” phone calls without the consent of all parties to the call. Thus, Smith’s claim that the Court of Appeal’s decision “effectively turns California into a one-party consent state” is false.

Smith cannot show that this Court’s review is necessary to secure uniformity of decision or settle an important question of law. The Court of Appeal’s unanimous published decision—which is binding on all superior courts—has already accomplished these purposes. In addition, because California courts are the ultimate authority on California law, the handful of conflicting federal district court decisions discussed in Smith’s Petition for Review are of no consequence.

As the first reported Court of Appeal decision interpreting Penal Code Section 632.7, the Court of Appeal’s decision is significant, but nothing in the decision merits the attention of this Court. The Court of Appeal faithfully followed this Court’s statutory interpretation framework in reaching its conclusion. *See Meza v. Portfolio Recovery Assocs., LLC*, 6 Cal. 5th 844, 856-57 (2019).

First, the Court of Appeal examined the statutory language of Penal Code Section 632.7, giving it a plain and commonsense meaning and examining the language in the context of the statutory framework of CIPA as a whole, and concluded that Section 632.7 clearly and unambiguously applies only to third-party eavesdroppers. Second, in an abundance of caution, the Court of Appeal considered the legislative history of Penal Code Section 632.7 and concluded that it supports the interpretation of Section 632.7 as limited to third-party eavesdroppers. The conclusion the Court of Appeal reached is unremarkable considering its thoughtful approach to statutory interpretation—consistent with this Court’s precedent—and it is correct in all respects.

Smith’s Petition raises various claims of “error” with the Court of Appeal’s decision. (Pet. at pp. 7, 18-31.) But there was no error, and even if there had been, mere “error” is not a recognized basis for review. *See* Cal. R. Ct. 8.500(b); *People v. Davis*, 147 Cal. 346, 348 (1905). Smith’s disagreement with the Court of Appeal’s decision is to be expected. It is just not enough to merit this Court’s review. Review should therefore be denied.

For these reasons, LoanMe requests that the Court deny Smith’s Petition.

ADDITIONAL ISSUES FOR REVIEW

Without conceding that review is appropriate (it is not) and so as to avoid a waiver argument, LoanMe proposes the following additional issues for review if the Court grants Smith’s Petition (*see* Cal. R. Ct. 8.504(c)):

For purposes of consent under Penal Code Section 632.7 does a party to a phone call consent to the call being recorded when he stays on the line after the other party causes a beep tone (or series of beep tones) to sound during the call?

BACKGROUND

I. Statement of Facts.

The parties stipulated to the following facts for purposes of the bench trial conducted in this case. (Clerk’s Transcript on Appeal (“CT”) pp. 72-74.)

LoanMe is a lender that offers personal and small business loans to qualified customers. (CT p. 73 (¶ 1).) Smith’s wife obtained a loan from LoanMe. (CT p. 73 (¶ 2).)

In October 2015, LoanMe called Smith’s wife to discuss her loan payment default. (CT p. 73 (¶ 3).) Smith answered his wife’s the phone and informed LoanMe that his wife was not home, after which the call ended. (*Id.*) The call lasted approximately 18 seconds. (*Id.*) LoanMe conditionally accepts as true that its call to Smith’s wife was placed to a cordless phone. (CT p. 73 (¶ 5).)

LoanMe recorded its 18-second call with Smith. (CT p. 73 (¶ 4).) LoanMe did not orally advise Smith that the call was being recorded, and Smith did not sign any contract with LoanMe granting consent to record calls with him. (CT p. 73 (¶ 9).) However, approximately 3 seconds into the call, LoanMe caused a “beep tone” to sound. (CT p. 73 (¶ 6).) A “beep tone” is played on outbound calls by LoanMe at regular intervals every 15 seconds. (CT p. 73 (¶ 8).)

II. Procedural History.

On September 26, 2016, Smith filed a class action complaint against LoanMe, alleging violations of Penal Code Section 632.7 on behalf of himself and a putative class. (CT pp. 1-14.) On December 9, 2016, LoanMe filed its First Amended Answer. (CT pp. 15-25.)

On July 13, 2017, the trial court entered an order on the parties' stipulation, agreeing to conduct a bifurcated bench trial on the issue of whether the use of beep tones by LoanMe disposed of the case. (CT pp. 26-29.) The parties filed pretrial briefs and a joint statement of stipulated facts. (CT pp. 30-90; Supplemental Clerk's Transcript on Appeal pp. 1-11.)

For purposes of the bifurcated trial, LoanMe contended that causing beep tones to sound at regular intervals during a phone call puts people on notice that the call is being recorded, and that people who continue the conversation after a beep tone (or series of beep tones) has played have consented to the call being recorded as a matter of law. (CT p. 73 (¶ 10).) Accordingly, LoanMe contended that Smith consented to his 18-second call with LoanMe being recorded because he continued the conversation after the beep tone played at the beginning of the call. (*Id.*)

Smith alleged that LoanMe's recording of the phone call violated Penal Code Section 632.7 because the use of beep tones, without more, is insufficient notice that the call is being recorded. (CT pp. 73-74 (¶ 11).)

On October 13, 2017, the trial court conducted the bifurcated trial. (Reporter's Transcript on Appeal ("RT") pp. 1-19.) During the trial, the trial court listened to a recording of the 18-second call

between Smith and LoanMe. (CT p. 91; RT p. 3.)

At the end of the bifurcated trial, the trial court concluded that the beep tone provided Smith sufficient notice under Penal Code Section 632.7 that the call was being recorded, and Smith implicitly consented to being recorded by remaining on the call. (RT p. 17.) The trial court concluded therefore that Smith had not established a violation of Penal Code Section 632.7 and ordered that judgment be entered in favor of LoanMe. (RT pp. 17-18.) On November 21, 2017, the trial court entered judgment. (CT pp. 92-104.)

III. The Appeal.

Smith appealed the trial court's ruling. After the parties briefed the issues on appeal, the Court of Appeal requested supplemental briefing on the issue of whether Penal Code Section 632.7 applies to the recording of a phone call by a participant in the phone call or instead applies only to recording by third-party eavesdroppers. (Ex. B to Pet. for Review.) The Court of Appeal asked that the parties' briefs address the question asked given the language of Penal Code Section 632.7, its legislative history, and its relationship to other provisions of CIPA. (*Id.*)

IV. The Court of Appeal's Unanimous Published Opinion.

On December 4, 2019, the Court of Appeal held oral argument, and the case was submitted. On December 20, 2019, the Court of Appeal issued its unanimous Opinion, which it designated "Certified for Publication." (Ex. A to Pet. for Review ("Op."))

In its Opinion, the Court of Appeal explained that there were no California appellate decisions interpreting Penal Code Section 632.7. (*Id.* at p. 2.) The Court of Appeal faithfully followed this Court’s statutory interpretation framework in interpreting Penal Code Section 632.7. (*Id.* at pp. 4-5.) First, the Court of Appeal examined the statutory language of Penal Code Section 632.7, giving it a plain and commonsense meaning and examining the language in the context of the statutory framework of CIPA as a whole, and concluded that Section 632.7 clearly and unambiguously applies only to third-party eavesdroppers, not to the parties to a phone call. (*Id.* at pp. 8-12.) Second, although not required based on the clear language of the statute, the Court of Appeal considered the legislative history of Penal Code Section 632.7 and concluded that it supports the interpretation of Section 632.7 as limited to third-party eavesdroppers. (*Id.* at pp. 17-22.)

After having faithfully followed this Court’s statutory interpretation framework, the Court of Appeal concluded unanimously that “[t]he plain language of section 632.7 clearly and unambiguously applies to third party eavesdroppers alone, not to the parties to cellular and cordless phone calls. The legislative history of section 632.7 confirms that interpretation. We must therefore affirm the judgment in favor of LoanMe, because Smith alleges only that LoanMe recorded calls to which LoanMe was a party.” (*Id.* at p. 22.)

On January 19, 2020, the Court of Appeal’s decision became final. On January 28, 2020, Smith filed his Petition with this Court.

ARGUMENT

As the petitioner, Smith has the burden to “explain how the case presents a ground for review.” *See* Cal. R. Ct. 8.504(b)(2). The first and most basic ground for granting review—“[w]hen necessary to secure uniformity of decision or to settle an important question of law”—is not present here. *See* Cal. R. Ct. 8.500(b)(1).

I. Review by this Court is Not Necessary to Secure Uniformity of Decision.

Smith cannot show that there is a need to secure uniformity of decision. The Court of Appeal’s decision interpreting Penal Code Section 632.7 does not conflict with any other Court of Appeal decision. In fact, it is the first and only reported Court of Appeal decision on the issue.

In addition, as the United States Supreme Court recognizes, “California courts are the ultimate authority on [California] law.” *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). Thus, the handful of conflicting federal district court decisions discussed in Smith’s Petition are of no consequence.¹ (Pet. at pp. 24-27.)

¹ Not all federal judges disagree with the decision. *E.g.*, *Young v. Hilton Worldwide, Inc.*, No. 2:12-cv-01788-R-(PJWx), 2014 WL 3434117, at *1 (C.D. Cal. July 11, 2014) (“[Penal Code] Sections 632.5, 632.6, and 632.7 restrict *third-party* interception of cellular and cordless telephonic radio transmissions.”) (emphasis in original); *Young v. Hilton Worldwide, Inc.*, 565 Fed. App’x 595, 599 (9th Cir. 2014) (J. Motz, dissenting) (“[R]eading [Penal Code] § 632.7 as covering persons who intercept or receive a cellular communication *other than a person who is an intended party to the communication* effectuates the California legislature’s intent.”) (emphasis in original).

“All trial courts are bound by all published decisions of the Court of Appeal, the only qualifications being that the relevant point in the appellate decision must not have been disapproved by the California Supreme Court and must not be in conflict with another appellate decision.” *Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 1193 (2008), *as modified on denial of reh’g* (Nov. 26, 2008) (citing *Auto Equity Sales, Inc. v. Superior Ct.*, 57 Cal. 2d 450, 455 (1962)). “Decisions of every division of the District Courts of Appeal are binding upon all the ... superior courts of this state” *Auto Equity Sales*, 57 Cal. 2d at 455.

Guidance from this Court is not necessary to secure uniformity of decision among the superior courts: The Court of Appeal’s unanimous published decision already did that.² Therefore, there is no need for review to secure uniformity of decision.

II. Review by this Court is Not Necessary to Settle an Important Question of Law.

To the extent that there was a question about the interpretation of Penal Code Section 632.7, guidance from this Court is not necessary to settle an important question of law: The Court of

² As it is, superior courts were previously in agreement with the Court of Appeal’s decision. *E.g.*, *Burkley v. Nine West Holdings Inc.*, No. BC641730, 2017 WL 4479316, at *3 (Cal. Super. Los Angeles County Sept. 5, 2017) (a person does not “receive” a phone communication “within the meaning of [Penal Code] section 632.7 when the telephone call is directed to him.”); *Granina v. Eddie Bauer LLC*, No. BC569111, 2015 WL 9855304, at *4 (Cal. Super. Los Angeles County Dec. 2, 2015) (“[Penal Code section] 632.7 was designed to *prohibit third parties*, who intercepted or otherwise received wireless communications, from intentionally recording them.”) (emphasis added).

Appeal’s unanimous published decision—the first and only reported Court of Appeal decision on the issue—already did that.

As the first reported Court of Appeal decision interpreting Penal Code Section 632.7, the Court of Appeal’s decision is significant. But the conclusion the Court of Appeal reached is unremarkable considering its straightforward application of this Court’s long-established statutory interpretation framework. *See Meza*, 6 Cal. 5th at 856-57. And the decision is correct in all respects.

In its Opinion, the Court of Appeal explained that there were no California appellate decisions interpreting Penal Code Section 632.7. (Op. at p. 2.) The Court of Appeal began its decision by analyzing the various provisions of CIPA—enacted in 1967—and the sequence of their enactment. (*Id.* at pp. 5-8.) “One of the provisions of the original 1967 legislation—[Penal Code Section] 632—prohibits the intentional recording of a confidential telephone communication without the consent of all parties.” (*Id.* at p. 5 (citation omitted).)

“In 1985, in response to the early stages of technological advances in wireless communication, particularly cellular radio telephones, the Legislature enacted [Penal Code Section] 632.5.” (*Id.* at p. 6 (citation omitted).) Section 632.5 prohibits the malicious and nonconsensual interception or receipt of cellular phone calls. Cal. Penal Code § 632.5(a).

“In 1990, the Legislature ... added [Penal Code Section] 632.6, which uses the same language as section 632.5 to extend the same protection to cordless telephones instead of cellular telephones.” (Op. at p. 7.) Section 632.6 prohibits the malicious and nonconsensual

interception or receipt of cordless phone calls. Cal. Penal Code § 632.6(a).

“In 1992, the Legislature amended [CIPA] to add [Penal Code Section] 632.7.” (Op. at p. 7.) Section 632.7 prohibits the nonconsensual interception or receipt and intentional recording of cellular and cordless phone calls. Cal. Penal Code § 632.7(a).

“[S]ection 632.7 differs from sections 632.5 and 632.6 in that it (1) removes the element of malice, (2) adds the element of (nonconsensual) intentional recording, and (3) covers both cellular phones and cordless phones in a single code provision.” (Op. at p. 8.)

As to the actual language of the statute, Penal Code Section 632.7 imposes liability on any person “who, without the consent of all parties to a communication, intercepts or receives and intentionally records” a communication involving a cellular phone or a cordless phone. (*Id.* at pp. 8-9 (quoting Cal Penal Code § 632.7(a)).) “The statute thus requires that the interception or receipt of the communication be without the parties’ consent. But the parties to a phone call always consent to the receipt of their communications by each other—that is what it means to be a party to the call (or at least that is part of what it means).” (*Id.* at p. 9.) “Consequently, the parties to a phone call are incapable of violating section 632.7, because they do not intercept or receive each other’s communications without all parties’ consent.” (*Id.*)

The Court of Appeal explained that its “interpretation of the plain meaning of section 632.7 aligns with the plain meaning of [Penal Code Sections] 632.5 and 632.6, whose language section 632.7 borrows. Sections 632.5 and 632.6 impose liability on anyone ‘who,

maliciously and without the consent of all parties to the communication, intercepts [or] receives’ a communication involving a cellular phone (§ 632.5) or a cordless phone (§ 632.6).” (*Id.* (quoting Cal Penal Code §§ 632.5(a), 632.6(a)).) The Court of Appeal continued: “Like section 632.7, sections 632.5 and 632.6 cannot apply to the parties to a phone call, because sections 632.5 and 632.6 apply only to someone who intercepts or receives a communication without all parties’ consent. Sections 632.5 and 632.6 thus prohibit only malicious third party eavesdropping on cordless or cellular phone calls.” (*Id.*)

As the Court of Appeal correctly noted, “[a] contrary interpretation, according to which sections 632.5 and 632.6 apply not only to third party eavesdroppers but also to the parties to cordless and cellular phone calls, would be absurd and unintelligible.” (*Id.* at p. 10.) “First, in order for a party to a call to be liable under either section, the party would have to receive the other party’s communications *without all parties’ consent*. We do not see how that is possible.” (*Id.* (emphasis in original).) “Second, in order for a party to a call to be liable under either section, the party would have to receive the other party’s communications *maliciously*. Again, we do not see how that is possible—it is not clear what it would mean for one party to receive the other party’s communications *with malice*.” (*Id.* (emphasis in original).) “Statutory interpretations that lead to absurd results are to be avoided.” (*Id.* (citing *Tuolumne Jobs & Small Bus. Alliance v. Superior Ct.*, 59 Cal. 4th 1029, 1037 (2014)).)

The Court of Appeal concluded that it saw “no viable alternative to interpreting sections 632.5 and 632.6 as limited to third

party eavesdroppers, because they apply only to persons who intercept or receive communications without all parties' consent. Section 632.7 contains the same restriction in the same language ('without the consent of all parties . . . intercepts or receives'), and we must interpret section 632.7 in a way that harmonizes it with the statutory scheme of which it is a part." (*Id.* at p. 12 (citation omitted).) The Court of Appeal therefore concluded that "section 632.7 clearly and unambiguously applies only to third party eavesdroppers, not to the parties to a phone call." (*Id.*)

Regarding the legislative history of Penal Code Section 632.7 (although the Court of Appeal noted that it was addressing legislative history only in an abundance of caution), the Court of Appeal explained that "[t]hroughout the legislative history of section 632.7, the Legislature demonstrates its concern with eavesdropping on wireless communications, and it never shows any concern about recording by parties." (*Id.* at p. 22.)³ The Court of Appeal therefore concluded that "the legislative history supports our interpretation of section 632.7 as limited to third party eavesdroppers." (*Id.*)

Importantly, the Court of Appeal's decision does **not** impact causes of action under Penal Code Section 632, which prohibits the intentional recording of "confidential" phone calls without the consent of all parties to the call. Thus, Smith's claim that the Court of Appeal's decision "effectively turns California into a one-party consent state" is false. (Pet. at p. 9.)

³ The Court of Appeal also considered—and rejected—the reasoning of those federal district courts that reached a different conclusion about Penal Code Section 632.7. (Op. at pp. 12-17.)

The Court of Appeal’s decision confirms what the text of Penal Code Section 632.7—in relation to CIPA as a whole—and its legislative history already make clear. It is the only Court of Appeal decision on the issue and is binding on the superior courts. Therefore, there is no need for review to settle an important question of law.

III. Smith’s Contention that the Opinion Is Erroneous Does Not Merit Review.

Smith’s Petition raises various claims of “error” with the Court of Appeal’s unanimous published decision. (Pet. at pp. 7, 18-31.) In particular, Smith contends that (a) the plain language of Penal Code Section 632.7 refutes the Court of Appeal’s ruling; (b) nearly all federal district courts that have ruled on the issue disagree with the Court of Appeal’s ruling; (c) the broader CIPA supports Smith’s view; and (d) the legislative history of Penal Code Section 632.7 supports Smith’s view. (*Id.*)

There was no error (as explained above), but even if there had been, alleged error in the Court of Appeal’s decision is not grounds for review in this Court. *See, e.g.,* Cal. R. Ct. 8.500(b); *Davis*, 147 Cal. at 348; *Snukal v. Flightways Mfg., Inc.*, 23 Cal. 4th 754, 768 (2000). Smith’s disagreement with the Court of Appeal’s decision is to be expected. It is just not enough to merit this Court’s review. Review should therefore be denied.

CONCLUSION

Smith has not shown that this Court's review is necessary to secure uniformity of decision or settle an important question of law. Therefore, the Court should deny Smith's Petition.

DATED: February 14, 2020

Respectfully submitted,

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PROOF OF SERVICE

I am over the age of eighteen years and am not a party to the within action. I am employed in the County of Orange, State of California, at the law offices of Finlayson Toffer Roosevelt & Lilly LLP, members of the bar of this Court. My business address is 15615 Alton Parkway, Suite 250, Irvine, California 92618. On February 14, 2020, I served a true copy / the original of the foregoing document(s) described as:

ANSWER TO PETITION FOR REVIEW

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Jeremiah Smith v. LoanMe, Inc.
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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

Case Name: **SMITH v.**
LOANME

Case Number: **S260391**

Lower Court Case Number: **E069752**

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