STATE OF MICHIGAN

COURT OF APPEALS

RICHARD F. BARNETT, ROSE CAPISTRAN, KENNETH E. RAASCH and THE THOMAS KINCADE COMPANY,

Plaintiffs-Appellants,

v

NORMAN YATOOMA & ASSOCIATES, a/k/a YATOOMA & YATOOMA, a/k/a YATOOMA & ASSOCIATES, a/k/a YATOOMA LEGAL GROUP, NORMAN YATOOMA, JOSEPH EJBEH and CYNTHIA EJBEH,

Defendants-Appellees,

and

THOMAS SHEPPARD,

Defendant.

UNPUBLISHED
March 20, 2007

No. 272126
Oakland Circuit Court
LC No. 06-072819-CZ

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's order granting summary disposition to defendants in this eavesdropping case. We affirm.

Plaintiffs first argue that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) before the completion of discovery. Plaintiff raises this issue for the first time on appeal; therefore, it is unpreserved. *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Unpreserved issues are reviewed for plain error. To avoid forfeiture under the plain error rule, an error must have occurred, it must have been plain, i.e., clear or obvious, and it must have affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

"A motion for summary disposition under MCR 2.116(C)(10) is premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support for the nonmoving party's position." *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715

NW2d 914 (2006). The party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. *Id*.

In this case, plaintiffs did not argue below that there was a fair likelihood that further discovery would yield support for their position. Instead, plaintiffs argued that under the undisputed facts of the case, defendants were liable for eavesdropping because they transmitted the live feed, employed Esquire Deposition Services to transmit the feed, and installed Livenote and the Internet feed without plaintiffs' consent. On appeal, plaintiffs argue that depositions of the witnesses who testified at the arbitration hearing and the members of the arbitration panel would lead to evidence supporting their argument that the arbitration hearing was private.

A conversation is private if it is "'intended for or restricted to the use of a particular person or group or class of persons . . . [and is] intended only for the persons involved.'" *Dickerson v Raphael*, 222 Mich App 185, 193; 564 NW2d 85 (1997), rev'd on other grounds 461 Mich 851 (1997), quoting *Webster's Third New International Dictionary, Unabridged Edition* (1966). The testifying witnesses were participants to the conversation at issue, and the intent of the conversation's participants is crucial to the determination of privacy. Moreover, because a number of those witnesses are plaintiffs in this case, it seems likely that their depositions would have yielded evidence that they intended the conversation to be private. Nevertheless, plaintiffs did not argue below that there was any such evidence in their favor and, instead, presented their arguments on the basis of what they considered to be the undisputed facts of the case. Given plaintiffs' position below, we conclude that it was not plain error for the trial court to grant summary disposition pursuant to MCR 2.116(C)(10) prior to the completion of discovery.

Next, plaintiffs argue the trial court erred in granting summary disposition to defendants. We review de novo whether the trial court properly granted summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004). We consider the entire record presented to the trial court at the time the motion was made in a light most favorable to the nonmoving party. *Id*. at 278; *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where the burden of proof at trial rests on the nonmoving party, as here, that party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiffs' first claim was made pursuant to MCL 750.539c, which provides:

> Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.

MCL 750.539h(b) provides for civil remedies and damages when a person violates the eavesdropping statutes.

Plaintiffs argue that a genuine issue of material fact exists regarding whether the conversation was private. We disagree. Whether a conversation is private depends on whether it was intended for or restricted to the use of a particular person or group or class of persons and was intended only for those persons. *Dickerson, supra* at 193. Generally, as used in the eavesdropping statute, "private conversation" and "private place" are places and conversations in which a person has a reasonable expectation of privacy. MCL 750.539a(1); *People v Stone*, 463 Mich 558, 563-564; 621 NW2d 702 (2001); *Lewis v LeGrow*, 258 Mich App 175, 186-188; 670 NW2d 675 (2003). "[W]hether a person can reasonably expect privacy in a conversation generally will present a question of fact." *Stone, supra* at 566.

The burden is on plaintiffs to go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto, supra* at 362. Here, plaintiffs offered evidence of times when defendants and Dana Levitt, plaintiffs' attorney at the arbitration hearing, requested witnesses be sequestered. But no order of sequestration or confidentiality was entered, though a panel member did ask that the witnesses not talk to each other about their testimony during any breaks. Plaintiffs also rely on the rules governing the American Arbitration Association (AAA) which state that "[a]rbitration has proven to be an effective way to resolve these disputes privately," and that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." Plaintiffs also assert evidence that Joseph Ejbeh lied when Levitt questioned the use of the white cord running from the court reporter's desk and the panel's subsequent finding that Ejbeh's actions were improper.

Defendants claim that there is no genuine issue of material fact regarding whether the conversation was private because plaintiffs knew that the court reporter was transcribing the arbitration testimony and that her transcription would be available for later use by the parties. We agree. The record below reveals that both sides to an arbitration hearing were fully aware the proceedings were being recorded by a court reporter. Indeed, both sides employed Esquire to provide real-time transcripts of the witnesses testifying at the proceedings. There is no evidence, however, that the parties to the arbitration proceedings ever entered a confidentially agreement. Further, a protective order providing that the proceedings would be confidential was never entered. The only logical reasons for preparing real-time transcripts of the arbitration testimony are to assist the parties in their on-going presentations and to preserve a record of the proceedings, including the witnesses' testimony, for possible future use by the parties. Moreover, nothing in the record suggests any restriction on the parties regarding their future use of the transcribed testimony. Absent a confidentiality agreement between the parties or a protective order, any expectation that others would not read the real-time transcriptions of witnesses' testimony at the arbitration hearing is unreasonable. Neither a routine request for sequestration of witnesses nor the AAA rules touting private resolution of disputes creates a material question of fact in that regard. Accordingly, on the evidence produced in this case, we conclude that reasonable minds could not differ in finding that the testimony of witnesses at the arbitration proceeding here were not part of a "private conversation" within the meaning of MCL 750.539c. *West, supra* at 183; *Stone, supra* at 563.

Plaintiffs also brought a claim under MCL 750.530d(1)(a), which provides that a person shall not "Install, place, or use in any private place, without the consent of the person or persons

entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place." "Private place" means "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access." MCL 750.539a(1).

Defendants asserted below, and continue to assert on appeal, that the arbitration room was open to the general public and, thus, not a private place. Plaintiffs, on the other hand, offered the rules of arbitration and requests for sequestration noted above. For the reasons already discussed, we conclude the trial court properly granted summary disposition to defendants because on the facts and circumstances of this case, plaintiffs could have no reasonable expectation of privacy with respect to the arbitration proceedings. Accordingly, reasonable minds could not differ in finding that the site where witnesses testified in the arbitration proceeding was not a "private place" within the meaning of the eavesdropping statute.

Plaintiffs argue that the trial court erred in granting summary disposition to defendants pursuant to MCR 2.116(C)(8). Even if we were to conclude the trial court erred by granting summary disposition under MCR 2.116(C)(8), we would still affirm the trial court's grant of summary disposition to defendants on the basis of MCR 2.116(C)(10). This Court will not reverse the trial court when it reaches the correct result, albeit for a wrong reason. *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Accordingly, we decline to address this issue.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly