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SJC-13027

JOSEPH A. CURTATONE vs. BARSTOOL SPORTS, INC., & another.<sup>1</sup>

Middlesex. February 1, 2021. - June 14, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Electronic Surveillance. Practice, Civil, Motion to dismiss.  
Words, "Secretly."

Civil action commenced in the Superior Court Department on June 17, 2019.

A motion to dismiss was heard by Maureen B. Hogan, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Leonard H. Kesten (Deidre Brennan Regan also present) for the plaintiff.

Aaron J. Moss, of California (Andrew F. Caplan also present) for the defendants.

Esha Bhandari, Brian Hauss, & Katie Townsend, of New York, & Jessie J. Rossman, Ruth A. Bourquin, Rachel Davidson, & Bruce D. Brown, for American Civil Liberties Union & others, amici curiae, submitted a brief.

Daniel J. Schneider, pro se, amicus curiae, submitted a brief.

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<sup>1</sup> Kirk Minihane.

GAZIANO, J. In this appeal, we consider whether the defendants, Barstool Sports, Inc. (Barstool or Barstool Sports), and Kirk Minihane, acting as agent for Barstool, violated the Massachusetts wiretap act, G. L. c. 272 § 99 (act), by first recording a telephone conversation with the plaintiff, Somerville mayor Joseph Curtatone, under an assumed identity and then publishing that recording on the Internet on Barstool's Web log, or "blog."<sup>2</sup> The defendants moved to dismiss the complaint on the ground that the plaintiff failed to state a claim upon which relief can be granted, see Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), and a Superior Court judge allowed the motion. The plaintiff appealed, and we transferred the case to this court on our own motion. Concluding that the plaintiff has failed to allege facts sufficient to state a cognizable cause of action because the telephone conversation at issue was not secretly recorded, as required under the act, we affirm the judge's decision to dismiss the complaint.<sup>3</sup>

1. Facts. We review the allowance of a motion to dismiss under Mass. R. Civ. P. 12 (b) (6) de novo, accepting as true all

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<sup>2</sup> See Commonwealth v. Entwistle, 463 Mass. 205, 223 (2012) (defining "blog").

<sup>3</sup> We acknowledge the amicus brief of the American Civil Liberties Union, the American Civil Liberties Union of Massachusetts, Inc., and the Reporters Committee for Freedom of the Press, as well as the amicus brief of Daniel J. Schneider.

well-pleaded facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor. See Rafferty v. Merck & Co., 479 Mass. 141, 147 (2018); Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011).

We summarize the factual allegations set forth in the complaint. On May 29, 2019, the Boston Herald, a Boston daily newspaper, published an article criticizing the Boston Bruins hockey team and the National Hockey League for distributing Barstool Sports promotional towels to attendees in advance of a professional ice hockey game in Boston. Barstool Sports is a corporation doing business in the Commonwealth that operates a blog with "a reputation for publishing crass content." Two days later, Curtatone posted a statement on his social media Web page criticizing the Bruins' association with Barstool. He wrote, "As a fairly rabid sports fan one of the more regrettable things I've seen is the attempt to disguise misogyny, racism & general right-wing lunacy under a 'sports' heading. Our sports teams & local sports fans need to push back to stress that's not for us. . . ." In response to Curtatone's statement, Barstool's president, David Portnoy, accused Curtatone of being a "professional" and "legitimate" criminal on Portnoy's own social media Web page. Using the same social media platform, Portnoy also accused Curtatone's family of engaging in rape, extortion, stabbing, and arson.

In light of this public dispute, Barstool employee Minihane attempted to interview Curtatone, identifying himself using his real name and affiliation, but he was unsuccessful. Minihane then contacted a Somerville public information office employee, falsely identifying himself as Kevin Cullen, a reporter for the Boston Globe, the city's largest daily newspaper, and asked to interview Curtatone. Curtatone agreed to an interview with Cullen, unaware that the interviewer would actually be Minihane.

Minihane interviewed Curtatone via telephone on June 6, 2019. Minihane altered his normal speaking voice to sound like Cullen and maintained throughout the interview that he was Cullen. At the beginning of the call, Minihane asked Curtatone for his consent to "record" the interview, and Curtatone consented. Minihane audio-video recorded his side of the conversation. Barstool Sports then posted the recording on its blog.

2. Discussion. Section 99 C of the act prohibits the "willful[] . . . interception of any wire or oral communication," by any person, except as specifically provided in a few narrow exceptions<sup>4</sup> that neither party contends are relevant here. See Commonwealth v. Tavares, 459 Mass. 289, 296-

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<sup>4</sup> Such as for employees of communications companies whose facilities transmit wire communications, financial institutions with their trading partners, and certain law enforcement actions. See G. L. c. 272, § 99 D 1.

297 (2011). Interception, as defined in the act, "means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication." G. L. c. 272, § 99 B 4. The act provides a cause of action for "[a]ny aggrieved person whose oral or wire communications were intercepted, disclosed or used . . . or whose personal or property interests or privacy were violated by means of an interception . . . against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest." G. L. c. 272, § 99 Q.

The plaintiff's argument that Minihane violated the act is two-fold. First, the plaintiff argues that the act requires that both parties to a conversation provide "actual consent" before a legal recording of that conversation may be made, consent that was impossible for Curtatone to provide here because he was unaware of the true identity of his interviewer. Second, the plaintiff contends that Minihane secretly heard and recorded the conversation because Curtatone believed that he was speaking with Cullen, rather than with Minihane. In other words, in Curtatone's view, Minihane heard and recorded the call secretly because his identity was a secret. Curtatone argues

that Barstool is liable insofar as it published the communication that Minihane is asserted to have intercepted illegally and while acting as Barstool's agent.

"Our primary goal in interpreting a statute is to effectuate the intent of the Legislature, and 'the statutory language is the principal source of insight into legislative purpose.'" AIDS Support Group of Cape Cod, Inc. v. Barnstable, 477 Mass. 296, 300 (2017), quoting Bronstein v. Prudential Ins. Co., 390 Mass. 701, 704 (1984). "Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent" (quotation and citation omitted). Worcester v. College Hill Props., LLC, 465 Mass. 134, 138 (2013). In such circumstances, "the sole function of the courts is to enforce [the statute] according to its terms." Commonwealth v. Soto, 476 Mass. 436, 438 (2017), quoting Commonwealth v. Dalton, 467 Mass. 555, 557 (2014).

As we previously have articulated, the definition of interception provided in the act requires that an interception of the type prohibited must be "(1) secretly made and (2) without prior authority by all parties." Commonwealth v. Boyarsky, 452 Mass. 700, 705 (2008). See Commonwealth v. Jackson, 370 Mass. 502, 507 (1976). If recordings are not made "secretly," they do not constitute an interception within the meaning of the act, and we need not reach the question whether

there was prior authority (i.e., consent) for the recording. See Jackson, 370 Mass. at 505-507. See also Commonwealth v. Ennis, 439 Mass. 64, 69-70 (2003). The initial question in this case is thus whether Minihane secretly recorded the challenged conversation.

Because the act does not define the term "secretly," "we give the term its 'usual and accepted meaning,' as long as it is 'consistent with the statutory purpose'" (alteration omitted). Commonwealth v. Matta, 483 Mass. 357, 372 (2019), quoting Commonwealth v. Zone Book, Inc., 372 Mass. 366, 369 (1977). "We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions." Matta, supra, quoting Zone Book, Inc., supra. See Modica v. Sheriff of Suffolk County, 477 Mass. 102, 104 (2017). Dictionary definitions of a "secret" include "something kept hidden or unexplained," Merriam-Webster's Collegiate Dictionary 1122 (11th ed. 2020), "[s]omething that remains beyond understanding or explanation," The American Heritage Dictionary of the English Language 1584 (5th ed. 2016), and "something that is studiously concealed," Black's Law Dictionary 1622 (11th ed. 2019). In the act, the term "secretly" modifies the words "hear," "record," or "aid another to" hear or record, indicating that the act of hearing or recording is that which must be done secretly in

order for the interception to fall within the prohibited activity. See G. L. c. 272, § 99 B 4.

With these definitions and this context in mind, it is readily apparent that the plaintiff's arguments are foreclosed by the plain meaning of the act. Minihane did not secretly hear or record the challenged communication within the meaning of the act, because the plaintiff knew throughout the call that his words were being heard and recorded. The identity of the party recording the communication or, indeed, the truthfulness with which that identity was asserted is irrelevant; rather, it is the act of hearing or recording itself that must be concealed to fall within the prohibition against "interception" within the act. See Jackson, 370 Mass. at 507-508 (telephone calls permissibly recorded under act where, contrary to defendant's beliefs, victim's brother made recordings, rather than police). See also Commonwealth v. Hyde, 434 Mass. 594, 603-605 (2001) (countenancing no violation of act where recording party simply informs those involved of intention to tape record encounter, or even holds tape recorder in plain sight, regardless of identification). The recording at issue was not made secretly and, therefore, there was no interception under the act.

To the extent that there is any ambiguity in the plain meaning of the language, "we strive to make [the act] an effectual piece of legislation in harmony with common sense and

sound reason and consistent with legislative intent."  
Commonwealth v. Gomes, 483 Mass. 123, 127 (2019), quoting  
Commonwealth v. Cassidy, 479 Mass. 527, 534, cert. denied, 139  
S. Ct. 276 (2018). Here, the legislative intent, apparent both  
in the legislative history of the act and the act itself,  
concerns limiting "electronic eavesdropping," circumstances  
unlike those at issue here, in which a recording is made  
unbeknownst to the parties involved. Ennis, 439 Mass. at 68.  
See Commonwealth v. Rivera, 445 Mass. 119, 126 (2005) ("the law  
bars all clandestine audio recording by private individuals").

The act was adopted in 1968 in direct response to "the  
commercial availability of sophisticated surveillance devices  
and the ease with which they facilitated surreptitious recording  
of private citizens" by private individuals and law enforcement  
alike. Tavares, 459 Mass. at 294-295. The language of the  
preamble of the act makes that clear: in addition to concerns  
about the "layers of insulation" that organized crime  
organizations use to surround themselves in secrecy to carry out  
their illicit purposes, the preamble notes the legislative  
concern with surveillance by private individuals:

"The general court further finds that the uncontrolled  
development and unrestricted use of modern electronic  
surveillance devices pose grave dangers to the privacy of  
all citizens of the [C]ommonwealth. Therefore, the secret  
use of such devices by private individuals must be  
prohibited. The use of such devices by law enforcement  
officials must be conducted under strict judicial

supervision and should be limited to the investigation of organized crime."

G. L. c. 272, § 99 A. See Commonwealth v. Thorpe, 384 Mass. 271, 275-282 & 280 n.7 (1981); Report of the Special Commission on Electronic Eavesdropping, 1968 Senate Doc. No. 1132, at 7-8, 18-19. These goals are unrelated to the facts at issue here, where the recording, but not the identity of the recorder, was known and agreed upon. To the extent that the plaintiff claims that his privacy rights protected under the act were violated as a result of the recording, it is also relevant to note that the plaintiff, the mayor of a city of more than 80,000 people,<sup>5</sup> believed he was speaking on the record to a newspaper reporter, circumstances in which the Commonwealth's interest in protecting his privacy is significantly limited.

3. Conclusion. Because Minihane did not secretly record his conversation with the plaintiff, the challenged recording does not fall within the statutory definition of an "interception" within the meaning of the Commonwealth's wiretap act. The plaintiff thus has not made factual assertions sufficient to state a cause of action upon which relief can be granted.

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<sup>5</sup> See United States Census Bureau, QuickFacts: Somerville city, Massachusetts, <https://www.census.gov/quickfacts/fact/table/somervillecitymassachusetts,US/PST045219> [<https://perma.cc/YVG7-87MV>].

Judgment affirmed.