

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN R. BLOOM,

Plaintiff-Appellant,

v

PEGASUS INVESTIGATIONS, INC.,
DANIEL H. MEAD, HARNISCH & HOHAUSER,
P.C. a/k/a HARNISCH & ASSOCIATES, P.C.,
SCOTT MOORE and JAY BIELFIELD,

Defendants-Appellees.

UNPUBLISHED

June 23, 1998

No. 200796

Oakland Circuit Court

LC No. 96-530687-CZ

Before: Young, Jr., P.J., and Kelly and Reilly, JJ.

PRE CURIAM.

This action arises out of a secret, nonconsensual tape recording made of a meeting that took place at the law office of defendant Harnisch & Hohauser, P.C. (Harnisch). Plaintiff, a participant in the conversation at issue, filed suit alleging violation of the Michigan eavesdropping statutes, MCL 750.539 *et seq.*; MSA 28.807 *et seq.* Plaintiff appeals as of right from the trial court's order granting summary disposition to all defendants under MCR 2.116(C)(8) and (C)(10). We reverse and remand.

On September 23, 1993, plaintiff and his attorney arrived at the Harnisch law office for a meeting regarding a dispute between plaintiff and defendant Jay Bielfield. Bielfield was represented by defendant Scott Moore, an attorney employed by Harnisch. Plaintiff's complaint alleged that Moore and Bielfield employed defendants Pegasus Investigations, Inc. (Pegasus), specifically Daniel H. Mead, a Pegasus employee, to secretly record the meeting. Plaintiff further alleged that the meeting was understood to be "off the record" and that the recording was later transcribed. Relying on this Court's decision in *Sullivan v Gray*, 117 Mich App 476; 324 NW2d 58 (1982), the trial court granted summary disposition to all defendants.¹ The trial court subsequently denied plaintiff's motion for reconsideration.

Plaintiff argues that the trial court erred in granting summary disposition to defendants because there was a genuine issue of material fact concerning whether Pegasus/Mead secretly recorded the meeting at the request of Bielfield and Moore. We agree.

This Court reviews de novo a trial court's decision granting or denying summary disposition. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). While the trial court granted summary disposition to defendants under both MCR 2.116(C)(8) (failure to state a claim) and (C)(10) (no genuine issue of material fact), the court clearly relied on materials outside the pleadings. Therefore, we will review its decision under the standards applicable to MCR 2.116(C)(10). See *Butler v Ramco-Gershenson, Inc.*, 214 Mich App 521, 524; 524 NW2d 912 (1995).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Id.* Therefore, a court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the party opposing the motion, granting the non-moving party the benefit of any reasonable doubt, and determine whether there is a genuine issue of disputed material fact. *Id.*; *Skinner v Square D Co.*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Marsh v Dep't of Civil Service (After Remand)*, 173 Mich App 72, 77-78; 433 NW2d 820 (1988).

In *Dickerson v Raphael*, 222 Mich App 185, 191-192; 324 NW2d 58 (1997), this Court summarized the law in Michigan applicable to eavesdropping on private conversations:

In Michigan, unlawful eavesdropping is a felony:

"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 750.539c; MSA 28.807(3).]

Similarly, divulging unlawfully obtained information is a felony:

"Any person who uses or divulges any information which he knows or reasonably should know was obtained in violation of sections 539b, 539c or 539d is guilty of a felony, punishable by imprisonment in a state prison not more than 2 years, or by a fine of not more than \$2,000.00." [MCL 750.539e; MSA 28.807(5).]

Additionally, Michigan statutory law provides the following civil remedies for eavesdropping violations:

“Any parties to any conversation upon which eavesdropping is practiced contrary to this act shall be entitled to the following civil remedies:

(a) An injunction by a court of record prohibiting further eavesdropping.

(b) All actual damages against the person who eavesdrops.

(c) Punitive damages as determined by the court or by a jury.”
[MCL 750.539h; MSA 28.807(8).]

Under statute, “eavesdropping” is defined as “to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse.” MCL 750.539a(2); MSA 28.807(1)(2).

In *Sullivan*, *supra*, notwithstanding the language of the statute, this Court concluded that a participant may tape-record the participant’s own conversation. The *Sullivan* Court observed that the definition of eavesdropping contained in MCL 750.539a; MSA 28.807(1) contemplates that “a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on.” *Id.* at 481. However, a participant may not unilaterally permit a third party to listen in upon a conversation. *Dickerson*, *supra* at 198.

“It is one thing to subject the average citizen to the risk that participants in a conversation with him will subsequently divulge its contents to another, but quite a different matter to foist upon him the risk that unknown third parties may be simultaneously listening in.” [*Id.* at 199, quoting *United States v White*, 401 US 745, 777; 91 S Ct 1122; 28 L Ed 2d 453 (1971).]

The *Dickerson* Court expressly adopted the following rationale from *Sullivan*:

While a participant may record a conversation with apparent impunity, his sole consent is insufficient to make permissible the eavesdropping of a third party. Thus, while a participant may record a conversation, he apparently may not employ third parties to do so for him. . . . When a third party is unilaterally given permission to listen in upon a conversation, unknown to other participants, those other participants are no longer able to evaluate and form accurate expectations since they are without knowledge of the third party. Therefore, it is not inconsistent to permit a person to record and utilize conversations he participates in yet deny him the right to unilaterally grant that ability to third parties. [*Dickerson*, *supra* at 198, quoting *Sullivan*, *supra* at 482.]

In the present case, plaintiff presented evidence to the trial court disputing Moore’s claim that he was the one who recorded the meeting. Specifically, plaintiff offered evidence that Moore did not

control the recording equipment, did not even know where the recording device was located, did not turn the recording device on, and did not have immediate control of the completed tape recordings. Moreover, the fact that Mead was in the building on the date in question for some eight hours supports the inference that Mead was the one who actually did the recording. While Bielfield denies plaintiff's claim that Bielfield participated in Pegasus/Mead's hiring, there is evidence that the parties' first, March 1993 meeting was also recorded, and Bielfield testified by way of deposition that the very purpose of the second meeting was to gather additional information to convince the Oakland County Prosecutor's Office to file extortion charges against plaintiff. Moreover, either Bielfield or Moore presented the transcript of the second meeting to the Oakland County Prosecutor's Office.² From this evidence, a jury reasonably could infer that Bielfield was involved from the beginning in the decision to hire Pegasus/Mead to record the second meeting.

To summarize, we conclude that the trial court erred in granting summary disposition to defendants because a genuine issue of material fact exists concerning whether Pegasus/Mead recorded the second meeting at Bielfield and Moore's request. In light of our resolution of this issue, there is no need to reach or address plaintiff's alternative claim that even participant-recording is prohibited where there is a request or some understanding that discussions be held "off the record."

Reversed and remanded. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Michael J. Kelly

/s/ Maureen Pulte Reilly

¹ The trial court ruled as follows: (1) Bielfield and Moore were participants and therefore could record the meeting without violating the eavesdropping statutes; (2) although plaintiff may have believed the meeting to be confidential, there was no evidence indicating that he made a specific request that it be held off the record; and (3) because the evidence, even when viewed in a light most favorable to plaintiff, showed only that Mead set up the recording equipment, there was no factual issue concerning whether Bielfield and Moore hired Pegasus/Mead to actually record the meeting.

² Moore gave the following deposition testimony on this matter, which clearly implicates Bielfield in Pegasus/Mead's hiring:

Q. Whose decision was it to second – tape the second meeting?

A. At that time again it was the – it was my understanding that it was by the directive of the Oakland County Prosecutor's Office –

Q. Okay.

A. -- as conveyed by Mr. Patterson.

Q. Did you talk to either L. Brooks Patterson or the Oakland County Prosecutor's office?

A. I believe that I've answered that now.

Q. Did that come from your client then?

A. Yes, it did.

Q. What did you employ Pegasus to do then specifically?

A. To set up a taping device so that the conversation could be recorded.