STATE OF MICHIGAN

COURT OF APPEALS

GREGORY J. BOWENS, PAULA M. BRIDGES, and GARY A. BROWN,

Plaintiffs-Appellants,

and

ROBERT B. DUNLAP and PHILLIP A. TALBERT,

Plaintiffs,

v

ARY, INC., d/b/a AFTERMATH ENTERTAINMNET, PHILLIP J. ATWELL, CHRONIC 2001 TOURING, INC., GERONIMO FILM PRODUCTIONS, INC., and ANDRE YOUNG,

Defendants-Appellees,

and

AMAZON.COM, INC., AOL TIME WARNER, INC., BARNES & NOBLE, INC., BARNES & NOBEL.COM, INC., BEST BUY COMPANY, INC., BLOCKBUSTER, INC., BORDERS GROUP, INC., CDNOW, INC., JOHN DOE #1, JOHN DOE #2, EAGLE ROCK ENTERTAINMENT, EAGLE VISION, INC., HARMONY HOUSE RECORDS & TAPES, HASTINGS ENTERTAINMENT, INC., H.M.V. MEDIA GROUP, HONIGMAN MILLER SCHWARTZ & COHN, L.L.P., HOUSE OF BLUES CONCERTS/HEWITT/SILVA, L.L.C., INGRAM ENTERTAINMENT HOLDINGS, INTERSCOPE RECORDS, INC., ERVIN JOHNSON, MAGIC JOHNSON PRODUCTIONS, INC., METROPOLITAN ENTERTAINMENT

UNPUBLISHED
September 24, 2009

No. 282711
Wayne Circuit Court
LC No. 02-233251-CZ

GROUP INC., MGA INC., MOVIE GALLERY.COM, INC., MTS, INC./TOWER RECORDS, THE MUSICLAND GROUP, INC., PANAVISION, INC., RADIO EVENTS GROUP, INC., RED DISTRIBUTION, INC., PHIL ROBINSON, WILLIAM SILVA, TRANS WORLD ENTERTAINMENT CORPORATION, KIRDIS TUCKER, WHEREHOUSE ENTERTAINMENT, INC., and W.H. SMITH, PLC,

Defendants.

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

MURRAY, P.J. (*concurring in part, dissenting in part*).

Although I concur in the majority's affirmance of the trial court's order dismissing plaintiff's claim based upon MCL 750.539d, I respectfully dissent from the majority's decision to reverse in part the order granting defendant's motion for summary disposition. An objective view of the evidence establishes no genuine issue of material fact that plaintiffs lacked a reasonable expectation that their conversation with tour officials would be private, let alone that it would not be recorded. The trial court's opinion and order should be affirmed in total.

In Michigan, eavesdropping is a felony for which statutory law provides civil remedies. MCL 750.539c; MCL 750.539d; MCL 750.539h. In this case, plaintiffs make eavesdropping claims under two sections – MCL 750.539c and MCL 750.539d. Regarding plaintiffs' first claim, MCL 750.539c 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 . . . .

Regarding plaintiffs' second claim, MCL 750.539d provided at the time of the alleged offense[1] as follows:

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[1] MCL 750.539d was amended in 2004 to read, in part:

> (1) Except as otherwise provided in this section, a person shall not do either of the following:
>
> (a) Install, place, or use in any private place, without the consent of the person

(continued…)

> Any person who installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, or eavesdropping upon the sounds or events in such place, or uses any such unauthorized installation is guilty of a felony . . . .

The statutes define "eavesdrop" 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), and "private place" as "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). The statutes provide no definition for "private conversation." Notwithstanding, our Supreme Court has provided the following guidance:

> Despite the Legislature's failing to define "private conversation" in the eavesdropping statutes, its intent can be determined from the eavesdropping statutes themselves. This is because the Legislature did define the term "private place." A "private place" is "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance." MCL 750.539a(1). By reading the statutes, the Legislature's intent that private places are places where a person can reasonably expect privacy becomes clear. Applying the same concepts the Legislature used to define those places that are private, we can define those conversations that are private. Thus, "private conversation" means a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance. Additionally, this conclusion is supported by this Court's decision in *Dickerson v Raphael*, [461 Mich 851; 601 NW2d 108 (1999)] in which we stated that whether a conversation is private depends on whether the person conversing "intended and reasonably expected that the conversation was private." *Dickerson*, *supra* at 851. [*People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).]

Further, as *Dickerson* explained, whether a party intended the subject matter of the conversation to be private is not relevant to the inquiry of a party's reasonable expectation of privacy. *Dickerson*, *supra* at 851.

Thus, the determination of a "private conversation" and a "private place" is materially identical. In light of this, cases determining a "private place" under MCL 750.539d are instructive to the analysis of whether plaintiffs had a reasonable expectation of privacy under MCL 750.539c.[2] See, e.g., *Lewis v LeGrow*, 258 Mich App 175, 188; 670 NW2d 675 (2003)

(…continued)

> 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.
>
> (b) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section. [MCL 750.539d.]

[2] MCL 750.539d is inapplicable because it applies to "installed" devices and there is no evidence
(continued…)

(finding a reasonable expectation of safety from casual or hostile intrusion or surveillance in a bedroom during consensual sex) and *People v Abate*, 105 Mich App 274, 277-279; 306 NW2d 476 (1981) (finding that restroom stalls constituted a "private place").

In their first appeal to this Court, plaintiffs contended that further discovery would show that:

> (1) defendants' responses to plaintiffs' requests for a private meeting were edited out, (2) only a limited number of concert staff and officials were allowed in the meeting, (3) a guard was stationed outside the meeting room door, and (4) plaintiffs were unaware that they were being videotaped. [*Bowens v Ary, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 250984) (Meter, J., concurring in part and dissenting in part).]

At the outset, it should be noted that this case was previously remanded with a particular eye towards whether unedited footage would support plaintiffs' claims. However, the raw footage provides *no* additional evidence of the meeting and consequently sheds no light on the potential genuine issues of material fact identified in this Court's previous opinion.[3] Regardless, even if additional evidence supported each of these contentions, plaintiffs would not necessarily prevail as the key to plaintiffs' case is whether their expectation of privacy or safety from casual or hostile intrusion was reasonable. *Dickerson*, *supra* at 851. It is here where the evidence fails to create a genuine issue of material fact.[4]

Telling in this regard are plaintiffs' admissions about the room. Specifically, plaintiffs admitted that while they wanted a private meeting with tour officials, they were unaware of or did not know several people in the room. Specifically, plaintiff Bowens explained that the individual depicted in the "Detroit Controversy" sipping water from a bottle[5] was "not interacting with us" and was not a part of the conversation. Plaintiff Bridges expressly noted there were three "fringe individuals" in the room whom she did not recognize and probably others "whom [Bridges] did not know or can't name at this point." Bridges further admitted that she was unaware of who was coming and going from the room and testified that the fact that someone was standing behind her and listening to her alleged private conversation with tour

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(…continued)

that a camera used in this case was installed.

[3] Plaintiffs were not prejudiced by defendants' failure to preserve additional raw footage because it was unreasonable for defendants to know that raw footage was relevant to pending litigation given that plaintiffs initiated suit over one year after the "Detroit Controversy" was released. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 212; 659 NW2d 684 (2002).

[4] Plaintiffs do not deem all interactions with tour officials private. Rather, it was only the meeting in the "small room" occurring after plaintiff Bowens inquired about the MTV cameras that plaintiffs considered private.

[5] Plaintiff Bowens assumed this man was a "roadie." However, speculation is insufficient to withstand a properly supported motion for summary disposition. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

officials "did not cause me pause." Even plaintiff Brown admitted that he could not remember everyone in the room during the conversation.

Finally, the video shows one of the individuals, whose identity was unknown to plaintiffs, wandering in and out of the meeting through the meeting room door, which was open, and exhibits of the film footage also show at least three unidentified individuals–none of whom were a part of the conversation–within a few feet of the conversation, standing both inside and outside the meeting room door, with all eyes on the conversation.

When these facts are considered in light of the circumstances of the meeting[6]–namely, backstage of the Joe Louis arena with unreceptive tour officials during the hectic hours preceding a high-profile concert–there is no genuine issue of material fact showing that plaintiffs' expectation of a private conversation or that the conversation would be safe from casual or hostile intrusion was unreasonable, even if Silva agreed to a private meeting as plaintiffs claim and even though plaintiffs were unaware they were being recorded against their express wishes. Certainly this case stands in stark contrast to a bedroom wherein parties engage in consensual sex, *Lewis*, *supra* at 188, or even a restroom stall, *Abate*, *supra* at 277-279.[7] Finally, it is important to emphasize again that the primary focus on remand concerned whether the unedited versions of the meeting revealed genuine issues of material fact. The raw footage yielded no new evidence and as such was incapable of sustaining plaintiffs' burden. Thus, even though a reasonable expectation of privacy is *generally* a question of fact, *Stone*, *supra* at 566, no question exists in this case. The order granting defendants' motion for summary disposition should be affirmed.

/s/ Christopher M. Murray

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[6] The majority misunderstands my opinion. It is not that a private conversation cannot as a matter of law take pace in a public building. Instead, my view is that considering all the evidence, no reasonable juror could conclude that plaintiffs had a reasonable expectation of privacy in the recorded conversation. Importantly, whether plaintiffs intended on the conversation to be private is not relevant. *Dickerson*, *supra* at 851.

[7] Even though plaintiffs asserted that a list of authorized personnel was posted outside the meeting room door on which was posted a sign indicating "No Unauthorized Personnel," plaintiffs fail to identify anyone on the list or explain any identification security procedure controlling ingress and egress from the room. While plaintiffs claim that security personnel were stationed near the door, plaintiffs admit that any such personnel was associated with the tour, was not under the city's employ, and had no special uniform or clothing delineating their roles as security guards.