STATE OF MICHIGAN
IN THE 53RD CIRCUIT COURT FOR THE COUNTY OF PRESQUE ISLE

STATE OF MICHIGAN, Plaintiff,	Case No. 21-93191-FH
v.	HON. AARON J. GAUTHIER
ERIN JO CHASKEY, Defendant.	**DEFENDANT'S MOTION TO DISMISS**

Kenneth A. Radzibon (P27713) *Prosecuting Attorney* Presque Isle County PO Box 110 Rogers City, MI 49779 989-732-4709	Daren A. Wiseley (P85220) *Attorney for Defendant* Wiseley Law, PLLC 41 ½ E. Bacon St. Hillsdale, MI 49242 517-234-4020

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-named defendant, by and through her attorney, will appear before the Honorable Aaron J. Gauthier, Circuit Court Judge, Presque Isle County Courthouse, 151 E Huron Ave, Rogers City, MI 49779, on the 14th date of March 2022 at 1:00 p.m. or as soon as counsel may be heard, and seek the relief set forth in the simultaneously filed Motion to Dismiss.

Daren A. Wiseley
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via regular mail, first class, postage prepaid, to the following on this 2nd of March 2022:

Kenneth A. Radzibon, Esq.
Presque Isle County Prosecutor
PO Box 110
Rogers City, MI 49779

Daren A. Wiseley

STATE OF MICHIGAN
IN THE 53RD CIRCUIT COURT FOR THE COUNTY OF PRESQUE ISLE

STATE OF MICHIGAN, Plaintiff,	Case No. 21-93191-FH
v.	HON. AARON J. GAUTHIER
ERIN JO CHASKEY, Defendant.	**DEFENDANT'S MOTION TO EXCEED 20 PAGE LIMIT**

Kenneth A. Radzibon (P27713) *Prosecuting Attorney* Presque Isle County PO Box 110 Rogers City, MI 49779 989-732-4709	Daren A. Wiseley (P85220) *Attorney for Defendant* Wiseley Law, PLLC 41 ½ E. Bacon St. Hillsdale, MI 49242 517-234-4020

MOTION TO EXCEED 20-PAGE LIMIT

Defendant respectfully asks this court to grant her motion to exceed the 20-page limit set forth in MCR 2.119(A)(2) because this motion and brief in support addresses several complex legal issues, including a rarely litigated Michigan statute and several issues relating to the United States Constitution. The additional pages are necessary for Defendant to adequately present the relevant points of law to provide a proper defense and preserve issues should an appeal be necessary.

For these reasons and because justice so requires, Defendant respectfully requests this Honorable Court grant her motion to exceed the 20-page limit.

Dated: March 1, 2022

Daren A. Wiseley (P85220)
Attorney for Defendant

STATE OF MICHIGAN
IN THE 53RD CIRCUIT COURT FOR THE COUNTY OF PRESQUE ISLE

STATE OF MICHIGAN, Plaintiff,	Case No. 21-93191-FH
v.	HON. AARON J. GAUTHIER
ERIN JO CHASKEY, Defendant.	**DEFENDANT'S MOTION TO DISMISS**

Kenneth A. Radzibon (P27713) *Prosecuting Attorney* Presque Isle County PO Box 110 Rogers City, MI 49779 989-732-4709	Daren A. Wiseley (P85220) *Attorney for Defendant* Wiseley Law, PLLC 41 ½ E. Bacon St. Hillsdale, MI 49242 517-234-4020

NOW COMES the Defendant, **ERIN JO CHASKEY**, by and through her attorney, Daren A. Wiseley, and hereby requests that this Honorable Court grant her Motion to Dismiss the Charge on the grounds that no criminal violation has been alleged, and this prosecution violates her rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, and for all the reasons stated in the attached brief which is fully incorporated herein by reference.

WHEREFORE, Erin Chaskey respectfully requests that this Honorable Court grant her Motion to Dismiss, dismiss the Charge against her with prejudice, and grant her all relief requested in the attached brief.

Dated: March 1, 2022

Daren A. Wiseley (P85220)
WISELEY LAW, PLLC
Attorney for Erin Chaskey

STATE OF MICHIGAN
IN THE 53RD CIRCUIT COURT FOR THE COUNTY OF PRESQUE ISLE

STATE OF MICHIGAN, Plaintiff,	Case No. 21-93191-FH
v.	HON. AARON J. GAUTHIER
ERIN JO CHASKEY, Defendant.	**BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

Kenneth A. Radzibon (P27713) *Prosecuting Attorney* Presque Isle County PO Box 110 Rogers City, MI 49779 989-732-4709	Daren A. Wiseley (P85220) *Attorney for Defendant* Wiseley Law, PLLC 41 ½ E. Bacon St. Hillsdale, MI 49242 517-234-4020

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DIMSISS

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

There are very few material facts in dispute. Simply put, the State has wrongfully charged Ms. Chaskey with a woefully insufficient, conclusory complaint lacking any legal merit. The question in this case is whether a parent has a First Amendment right to: record, in a manner that is otherwise lawful, her son's school officials, during the course of their official duties, when they are freely and publicly admitting to violating the law and making defamatory and disgusting remarks about said parent. The answer to that question is yes. Such recording is every bit as integral to freedom of expression as other forms of protected expression. Because no compelling or even substantial state interest is served by the contested application of the statute,[1] the Court should dismiss the charge with prejudice, finding that:

1) **The State failed to allege Ms. Chaskey committed any criminal violation;**
2) **Prosecution of the Michigan Eavesdropping Act (The "Act"), as applied to Ms. Chaskey, Violates Her First Amendment Rights; and**
3) **The Vindictive Prosecution is a Violation of Ms. Chaskey's right to the Due Process of Law.**

This case demonstrates the high jacking of local law enforcement and the legal process by Onaway Area Community Schools ("Onaway"); resulting from Ms. Chaskey's repeated attempts to gain, and outspoken criticism, of Onaway's lackluster effort to: provide oversight over its staff and curriculum, follow its own bylaws, comply with the Freedom of Information Act[2] - culminating when Ms. Chaskey stumbled upon a conversation between two officials that Onaway could not afford the backlash from public exposure to. In their view, Ms. Chaskey had to be silenced.

[1] Which was completely misapplied. *See infra*

[2] MCL 15.232 *et. seq* ("FOIA")

The State completely mischaracterizes Ms. Chaskey's actions, as if she didn't have the right to act after witnessing such egregious behavior. The Supreme Court of the United States would beg to differ; the "care, custody, and control" of her child is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville* 530 U.S. 57 (2000). Ms. Chaskey merely wanted oversight and accountability by officials responsible for the education and safety of her son when engaging in their public duties. In other words, in places and under circumstances where it is clear these officials have no legitimate expectation of privacy.

The Act Ms. Chaskey is charged under provides:

> "Any person who is present or who is not present during a private conversation and who willfully 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…" MCL 750.539 (c).

"Eavesdrop" as defined in MCL 750.539 (a): "[t]o overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse messages transmitted by communications common carriers…" The legislature has not defined "private conversation", but Michigan courts have focused on whether there was a "reasonable expectation of privacy" in their analysis.[3]

Even taking its allegations as true, the State has completely failed to allege Ms. Chaskey committed a criminal violation. Notwithstanding that, the alleged activity here is a far cry from The Act's purpose - its treatment by Michigan Courts has made that abundantly clear.[4] In fact,

---

[3] *Dickerson v. Raphael*, 461 Mich. 851, 601 N.W.2d 108 (1999) (unpublished table decision); *People v. Stone*, 463 Mich. 558, 563, 621 N.W.2d 702 (2001); *Bowens v. Ary, Inc.*, 489 Mich. 851, 794 N.W.2d 842, 843 (2011) (memorandum).

[4] While the cases under which the Act has been applied are sufficient to show this situation was nowhere near the purpose of it, the fact that it went into effect in 1967 should speak volumes. The purpose remains the same, protecting individual privacy when they have a reasonable expectation of it. It would not make sense to apply

Ms. Chaskey **cannot find one published or unpublished decision in which another individual has been prosecuted under The Act in circumstances similar to hers.**

This leads to only one appalling conclusion. The school officials, frantic that Ms. Chaskey may have obtained unprofessional, embarrassing, and even incriminating statements, had Ms. Chaskey wrongfully charged with a felony in hopes that they could silence her and protect themselves from the truth disseminating into the public.

STATEMENT OF FACTS

This all started in July 2020, when Ms. Chaskey became aware that Ms. Wregglesworth, a teacher at Onaway, her son's high school, was using a Go Fund Me to raise money for a controversial and political book to be taught in her class.[5] After further research, Ms. Chaskey became concerned the classroom instruction was very biased. While she saw the educational value of the book, and never opposed it being taught, Ms. Chaskey merely wanted oversight. A very involved member in the local community her entire life (she had been her daughter's junior class advisor at Onaway and even been a teacher and volunteer there) and knowing most of the school administration personally, she approached Onaway's Principal, Marty Mix, seeking answers, to no avail.

In October 2020, while at Onaway as the class advisor, she noticed a child, visibly upset. The teacher had told the student, "Your white privilege is showing" and the classroom laughed at him, causing him much embarrassment,[6] validating Ms. Chaskey's concerns. She started hearing

---

it to circumstances in today's day and age where every person in public has a recording device on their person at all times.

[5] Reynolds, Jason, and Ibram X. Kendi. *Stamped: Racism, Antiracism, and You.* 2020. Print.

[6] This was in response to the student disagreeing with Wregglesworth, saying, "I don't care the color of your skin, in America you can be what you want to be."

other concerning things and again when to the principal. When he failed to show any interest in looking into the matter, she started looking elsewhere, contacting Superintendent Fullerton.

Ms. Chaskey inquired about the curriculum, specifically concerned about bias. Fullerton assured her there was nothing to worry about, but in his email correspondences with her, was unwilling to put any effort into the matter. **(Ex. A)**. She started hearing of more instances that concerned her, including a video the students watched in class saying "Fu**" roughly 39 times. Seeking accountability from Onaway, she attended School Board meetings. In July 2021, she spoke up about her concerns, avoiding specific instances and names in an effort to work together as a community to resolve these issues, as opposed to being hostile. **(Ex. B)**. The Board seemed very disinterested in her concerns, so Ms. Chaskey started filing FOIA requests. **(Ex. C)**. Much to her dismay, the officials had used very derogatory language about her in the emails, such as, "she's [Chaskey] relentless." Even worse, when the administration realized Ms. Chaskey was getting their emails, Onaway started omitting portions of them, which is obvious from the chain of communication. ***Id.***

Ms. Chaskey then learned and memorized the Board's entire bylaws. She soon found out the bylaws had been disregarded by the curriculum committee, having zero oversight or awareness of what was taught at Onaway.[7] By this time she had learned about the controversial, "Critical Race Theory" being taught, further confirming her concerns about bias. Also, by now many parents had approached Ms. Chaskey, stating how they, too, had brought concerns to Onaway, which were also swept under the rug.[8] [9]

[7] Statements such as, "that will take a long time" in regards to why movies weren't reviewed, are a prototypical example of the complacent attitude.

[8] One statement was a teacher saying to a student, "your parent voting for Trump is like voting for Hitler."

[9] At that point she started recording the Board meetings, so they couldn't lie as easily.

Things Escalated. Ms. Chaskey asked Fullerton if *he* knew the bylaws, to which he stated, "I guess I don't." Within a week, he announced he was "taking another job offer." A board member also resigned at the same time. At the next Board meeting, Ms. Chaskey asked the Board President if he had watched the movie, to which he said, "*I don't let that kind of **filth** into my house*."[10] The board members didn't even know what was being taught. One of them even admitted, "I can't remember the last time we even approved a curriculum!"

It was then announced that the outgoing Superintendent (Fullerton) would have the applications for the vacant board position. Ms. Chaskey saw this as an excellent opportunity to start bringing oversight to Onaway. On October 13, 2021, around 3:14 p.m. she went to the Superintendent's Secretary's Office, where parents are instructed to go and check-in. She was unable to receive an application from Mr. Fullerton, however, and was told "they aren't ready" and to "come back tomorrow."

The next day, that is exactly what she did. Returning to the same office at the same time, she waited by the secretary's desk[11] to receive an application. As she waited, she heard from all the way down the hall, in the Superintendent's office, Fullerton and Benson[12] ***talking about her***. Among the discussion, was the fact that they were avoiding using email, specifically to avoid having to comply with requests made by Ms. Chaskey pursuant to FOIA. They also made many derogatory comments about Ms. Chaskey.[13] She further heard them admit to knowing about some of the biased teaching and the movie, as well as stating,[14] "good thing she [Chaskey] didn't

[10] And yet he apparently had no qualms letting it play at the school for which he was tasked a leadership role in.

[11] The same place as the day before

[12] An Onaway School Board Member

[13] Including, She [Chaskey]: "has an agenda"; and only gets her information from TikTok.

[14] This was extremely troubling for Ms. Chaskey, she was the one responsible for pcking up her son to and from school. Furthermore, Onaway knew this was the one way to hurt her. In this vile and vindictive

hear about [a teacher] calling the girl a cu**!" Clearly, Fullerton and Benson then had a motive to silence Ms. Chaskey.

The following day, she received a search warrant for her cell phone, which was seized by Deputy Schmoldt, who is also Onaway's Resource Officer. She also received a "no trespass" order from Fullerton[15] barring her from school grounds **(Ex. D)**.

Extremely hurt and appalled by what they had done to her, she contacted the undersigned to file a civil suit hoping to get the "No Trespass" lifted so she would be allowed on school grounds and not miss anymore of her son's games. 20 days after her phone had been seized, but within only one day of the civil action being filed, a felony warrant was filed against Ms. Chaskey.[16] Prior to this she had never had so much as a speeding ticket. Even after the Circuit Court dropped the "no trespass" and other conditions of her bond on February 14, 2022, since she is clearly not a danger or flight risk; Onaway refuses to fully drop their no trespass – which is clearly for no reason other than to be harassing, vindictive, and spiteful.

ARGUMENT

I. THE STATE FAILS TO ALLEGE A CRIMINAL VIOLATION.

The State's complaint, while vague and conclusory, doesn't have the legal or factual basis to support such a charge. **(Ex. E)**. In the search warrant, for example, the only "evidence" of the alleged crime is: "[C]haskey is observed on video footage making a video recording of a private conversation that is occurring out of the view of the video camera system and in an area that Chaskey should not be in as a private citizen." **(Ex. F)**.

---

manuever, they made it so a very involved, loving mother, could no longer watch her son's sporting events, or be involved in his school activites. She still cannot attend his home games to this day as a result of the "No Trespass."

[15] Awfully convenient

[16] The officer serving the warrant even stated to her, in my 20 years here, I have never seen a felony eavesdropping charge.

Apparently, the state's allegations are based on a recording taking place, outside of a conversation, neither of which can on the camera or have eyewitnesses. Which begs the questions: (1) how can the affiant know that the conversation is "private"? and, (2) how can affiant know it is in an area Ms. Chaskey allegedly "should not be as a private citizen"? At the preliminary examination, all three of the state's own witnesses even admitted they could not be certain Ms. Chaskey entered an area she "should not be as a private citizen." So, the witnesses were, in fact, conveniently speculating about her actions. **(Tr. p. 43, 21- 46, 6)**.[17]

The State does not have a single witness that can actually provide testimony of any alleged criminal activity, and instead presses felony charges on mere speculation. The State's entire basis for its charge, then, is an alleged act by Ms. Chaskey, that no one can corroborate occurred!

There are absolutely zero legal grounds to support the charge here. Ms. Chaskey can find no published or non-published Michigan case in which the State charged a person with felony eavesdropping merely for using a cell phone to record a conversation of public officials in the foyer of a public school. The facts in this case are ***completely contrary to any in which another individual has been prosecuted*** under the statute. In fact, the charges are so rare that the Michigan Supreme Court has only addressed the application of MCL 750.539 (c) three times. Of those instances - *Dickerson v. Raphael*, 461 Mich. 851, 601 N.W.2d 108 (1999) (unpublished table decision); *People v. Stone*, 463 Mich. 558, 621 N.W.2d 702 (2001); *Bowens v. Ary, Inc.*, 489 Mich. 851, 794 N.W.2d 842, 843 (2011) – *Stone* is the only published opinion.[18]

[17] Albeit this directly contradicts Dep. Schmoldt's sworn testimony in both the search warrant and complaint. **(Ex. E, F)**.

[18] To underscore this wild distinction, *Stone* involved the Defendant using his police scanner to intercept and record calls from Joanne Stone's cordless telephone. Joanne Stone was conducting a conversation on a telephone in the privacy of her own home. The Defendant did not unintentionally or accidentally pick up Joanne Stone's conversations on the scanner but targeted and intentionally monitored Joanne Stone's

Ms. Chaskey is charged based on mere speculation and legal conclusions; pointing to what she is accused of, then reverse engineering what "must" have occurred. Even taking its complaint as true, the State fails to allege the elements necessary to violate Michigan's Eavesdropping statute and cites no wrongdoing that could be implicated thereunder. The charge should be dismissed with prejudice.

a) A "Private Conversation" is Required.

The occurrence of a "private conversation" is a necessary element for a conviction under the Act. "Any person who is present or who is not present during a ***private conversation***…" [MCL 750.539 (c) (Emphasis Added)].[19]

The seminal case examining the eavesdropping statute is *Dickerson v. Raphael*, 222 Mich. App. 185 (1999), involving a person wearing a wire that transmitted a private conversation between two people to a third-party non-participant simultaneously recording it in a different location. In its analysis of whether a "private conversation" occurred for purposes of the Act, the court determined that "private" depends on the intent and reasonable expectation of the plaintiff, and "***not whether the subject matter was intended to be private*.**" *Id.* at 198. (Emphasis added).[20]

---

conversations with the scanner. The police found approximately fifteen cassette tapes at the homes of defendant and Pavlik that included private conversations between Joanne Stone and her friends, family, and attorney. This abundance of recorded material demonstrated the persistent and intentional nature of the eavesdropping and the egregious nature of the intrusions.

[19] The legislature has not defined "private conversation", but Michigan courts have focused on whether there was a "reasonable expectation of privacy" in their analysis.

[20] The District Court's analysis of "private conversation" was erroneous, as it stated: "Whether a conversation was private depends on whether the conversation was intended for or use restricted to the use of a particular person and it is intended only for the persons involved" (**Tr. 53, 4-7**), concluding, "Both Mr. Fullerton and Mr. Benson indicated that the conversation was private." ***Id.*** at 8.

The relevant facts in determining if a conversation is private involve the reasonable expectation and intent of the parties to keep the conversation private. The facts indicate that zero steps were taken by Fullerton and Benson to provide any privacy. Just because the claim was made "[t]hat the conversation was private..." on the record, is not persuasive that they had a reasonable expectation of privacy when the conversation took place. It is also extremely convenient to say that after the fact, in light of events that transpired and motives involved, claiming such when no actual steps were taken to ensure privacy at the time the conversation transpired.

The Court has also made clear that "there are significant differences between recording a conversation and simultaneously transmitting it to a third party." *Id.* at 201. The Eastern District of Michigan has applied this holding in *Carrier v. LJ Ross & Assocs.*, 2008 WL 544550 (E.D. Mich. Feb. 26, 2008), holding that MCL 750.539(c) "is not applicable here because the recordings were neither made by a third-party eavesdropper nor secretly published." The state has ***not*** alleged Ms. Chaskey transmitted or published to a third party.

In *People v. Stone*, the Supreme Court of Michigan used the Legislature's definition of "private place" in its analysis of the legislative intent of MCL 750.539 (c):

> [W]e must first define "private conversation." Determining this phrase's meaning requires us to construe the eavesdropping statutes, and the primary goal of statutory construction is to give effect to the Legislature's intent. *People v. Morey*, 461 Mich. 325, 330, 603 N.W.2d 250 (1999). To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed. *Id.* Here, the plain language of the eavesdropping statutes does not define "private conversation."
>
> [D]espite 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.* 463 Mich. 558 (2001) [*emphasis added*].
>
> To summarize, because there was no statutory definition of "private conversation," the

Supreme Court looked to the definition of "private place" in MCL 750.539 (a), determining that

---

The District Court's analysis was incorrect so far as it relied on whether the subject matter was intended to be private. Dickerson held that "private" depends on the intent and reasonable expectation of the plaintiff, and "not whether the subject matter was intended to be private." Whether the subject matter was supposed to be private or not, is of no relevance.

a "private conversation" means that a person reasonably expects to be free from casual or hostile intrusion or surveillance.

The state alleges a recording occurred **(Ex. E)**, but neither Mr. Fullerton nor Mr. Benson indicated that possibility until Dep. Schmoldt proposed it in his investigation. Schmoldt alleges that, "Chaskey's cell phone can be seen using to record the conversation between Benson and Fullerton**"** ***Id.***,[21] omitting the crucial element that the alleged conversation was *private*. ***Id.*** The State must show the conversation to be private, but any alleged facts supporting this necessary element are nowhere to be found.

While the fact that the events transpired in a public place, ***is*** alone, enough to establish the Act's inapplicability to Ms. Chaskey; it is further evidenced by the fact that a "private conversation" never took place at all. The conversation between Mr. Fullerton and Mr. Benson, took place ***with the door open.*** Both Fullerton and Benson admit that they knew the secretary, whose desk is in the foyer, had left for the day. Knowing this, ***they still left the foyer unattended,*** and the door to it unlocked, where any member of the public could enter. Finally, Ms. Chaskey had no way of knowing the two were involved in a conversation, as she couldn't see the individuals as she waited outside in the secretary's office. The only way she had of knowing the two were even in the vicinity was that ***they were so loud she could hear them from all the way down the hall***. *Even the State's witnesses, both in the information, and his testimony at the preliminary exam, admit that* ***"Chaskey's attention was drawn to the conversation"*** that she

[21] How one could tell that an individual is recording on a cell phone, based on the quality of the surveillance footage, remains to be seen.

heard from the foyer.[22] **(Ex. E, F)**. Absolutely zero effort was made to ensure their *conversation private*,[23] to the contrary, these actions created the appearance that they wanted to be heard.

In short, Ms. Chaskey's actions, even taken to be true as alleged by the State, create a factual impossibility that she could have violated Michigan's felony eavesdropping statute. Ms. Chaskey was waiting in the foyer, where parents are supposed to go to check in. She had even been specifically instructed to appear at that location to meet Mr. Fullerton[24] to receive an application for the School Board. Several, if not more, individuals had come and gone through that area within the previous hour. It is the area where a parent, or any other visitor, first goes to "check in" to the school. Furthermore, Fullerton and Benson were aware of the ease of access, that the secretary was gone for the day, the location is where members of the public go to check in, and yet they still took zero precautions to give themselves any privacy – leaving the door open. This was by no means a "private conversation" under the Act.

A private conversation may occur within the sight but not the hearing of others. *See, e.g., People v. Camak*, 5 Mich.App. 655, 658–660, 147 N.W.2d 746 (1967); *Dickerson v. Raphael* (citation omitted). This State alleges the *exact opposite* of this, purporting that Fullerton and Benson could not see Ms. Chaskey from the foyer area while she waited outside the hallway. **(Ex. E, F)**. But, from where she was standing in the foyer waiting to be assisted, she could hear them from down the hallway outside their office. *Id.*[25] The facts here indicate that *the conversation was not private, as the case law clearly indicates*. Ms. Chaskey could hear the

[22] And anyone who watches the surveillance footage can see this is the case.

[23] Reasonable Expectation of Privacy as it relates to a "public place" is discussed, *See Infra*

[24] Who, interestingly, later turned around and claimed she was "eavesdropping" despite this

[25] The District Court also failed to consider that a private conversation may occur within the sight, but not hearing of others. *People v. Camak* and *Dickerson, Supra.* Under this rationale, individuals could theoretically be as loud as they wanted. Of course, had it been considered, that fact would have further strengthened Ms. Chaskey's case.

conversation from a distance ***because they were so loud, had the door open, and took no steps to otherwise make the conversation private.*** She could not see the individuals in the conversation. a further reason there was no private conversation.[26]

Simply put, *the foyer is unequivocally a public place*, and therefore, the conversation in question could not have been "private." The state failed to allege any facts supporting that a private conversation could have occurred, instead relying on conclusory statements. Absent this necessary element, the state has failed to allege a violation of the Act.

b) There Must Be a Reasonable Expectation of Privacy

The only three instances in which the Michigan Supreme Court has addressed the application of Michigan's eavesdropping statute—*Dickerson v. Raphael*, *People v. Stone,* and *Bowens v. Ary., Inc.*— merely reinforce that the statutory prohibition against eavesdropping extends to "private conversations" in which, "a person reasonably expects to be free from casual or hostile intrusion or surveillance." In applying the statute to the circumstances of their respective cases, *each focused exclusively on the factual issue of whether the conversation had an expectation of privacy.*

Yet another insufficiency in the State's failure to allege a criminal violation by Ms. Chaskey, is the absence of any reasonable expectation of privacy, which is a necessary element.[27] *Dearborn Tree Serv., Inc. v. Gray's Outdoorservices, LLC,* 2014 WL 6886330 (E.D. Mich. Dec. 4, 2014); quoting *People v. Stone*, (under Michigan's Eavesdropping Statute, "'private conversation' means a conversation that a person reasonably expects to be free from

[26] Even though this is contrary to the case law, the State still, apparently, wants to assert that this was a private conversation.

[27] See, *Dickerson v. Raphael*; *People v. Stone*; *Bowens v. Ary, Inc,* Supra; Dearborn Tree Serv., Inc. v. Gray's Outdoorservices, LLC, Infra.

casual or hostile intrusion of surveillance."). The Eastern District of Michigan has held that where a party simply asserts that it "had an expectation that their conversation would be private, but fail to provide any facts, legal authority, or analysis to support their conclusion," then such statements are "underdeveloped" and "sounds in speculation." *Dearborn Tree Serv., Inc.*, supra at 7.

Here, the State provides nothing more than conclusions that the conversation was private – let alone provide facts, legal authority, or analysis. In fact, several pieces of evidence point to the contrary. First, that the door to the foyer was unlocked for public access, but with no staff inside. Second, the participants to the conversation knew there was no one attending the secretary's office, as they admitted at the preliminary examination. Third, the door to the hallway leading back to Mr. Fullerton's office was opened, along with the door to Mr. Fullerton's office also opened. And finally, as the complaint states, the conversation was so loud from back in the hallway that, "you could clearly see Chaskey turn her attention to something she could hear in another part of the office." **(Ex. E)**. The lack of a reasonable expectation of privacy establishes the impossibility for Ms. Chaskey to have violated the Act.[28]

c) Conclusion

The State fails to allege both that a private conversation occurred; and that Fullerton and Benson had a Reasonable Expectation of Privacy – both necessary elements under the Act. For those reasons, and the State's conclusory allegations against Ms. Chaskey, failing to allege any criminal violation occurred, the charge against her should be dismissed with prejudice.

II. THE PROSECUTION OF ERIN CHASKEY VIOLATES THE FIRST AMENDMENT

[28] The District Court also erred by failing to consider that Fullerton and Benson had no Reasonable Expectation of Privacy AND that this was a necessary element under the Act.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Audio recording of spoken words is an essential link in an indivisible chain of expression. It is integral to contemporary communication, as exemplified in cell phones, YouTube, and the six o'clock news. People use ubiquitous technology—rapidly, cheaply, and easily—to gather and retain information/expression occurring in public places, including spoken words. People then share their recordings with others. Here, Ms. Chaskey sought to gather information through audio recording, that could be shared with the public and government to inform parents and school administrators and reform education policy.[29] In all of these instances the initial action of making the recording is integral to the process of creating expression.

Enforcement of the Act, as applied to the Ms. Chaskey, violates the First Amendment. It deters her from recording information, disseminating it to others, and using it to petition government. Because of the speaker and viewpoint discrimination, the State must pass strict scrutiny to pass constitutional muster in its application towards her. The State fails to do this.

The United States Supreme Court has clearly affirmed the principle that when a criminal prosecution is based on an unconstitutional application of a statute, it is proper for the lower court to dispose of the criminal case through a motion to dismiss.[30] As a general matter, "state action to punish the publication of truthful information seldom can satisfy constitutional

[29] It is HIGHLY unlikely, any of the individuals would admit to their acts if there were not some type of recording as proof.

[30] So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. *Marbury v Madison*, 5 US 137, 178 (1803).

standards." *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979).[31]

The First Amendment is analyzed in three steps. The activity at issue must be protected.[32] The context of the activity is analyzed to determine which First Amendment standard or standards apply. And the Government's justification for restricting the activity is examined to ensure that it meets the applicable standard. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

a) The First Amendment Protects the Right to Gather, Receive and Record Information.

The U.S. Supreme Court has recognized a right to receive information in a variety of contexts. *See, e.g., Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality) ("the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.") *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial."); The First Amendment right to receive information is thus intertwined with the First Amendment rights to express oneself, to disseminate information, and to petition the government.[33]

---

[31] See also, *Perry Ed Assn v Perry Local Ed Assn*, 460 US 37, 45-46 (1983) ("Where the government regulates expressive activity by means of a criminal sanction, the government appropriately bears the burden of proving that its actions pass constitutional muster.")

[32] The First Amendment protects speech, but also "looks beyond written or spoken words" to protect other expressive acts. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569-70 (1995)

[33] *See, e.g., United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("We start with the premise that the rights to assemble peaceably and to petition for a redress or grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press."); *In re Primus*, 436 U.S. 412, 431 (1978) (protecting the intertwined freedoms of "political expression and association, "and of "communicating useful information to the public"); *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (protecting freedom of expression in public places).

In *New York Times Co. v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) *(per curiam),* the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party. In so doing, that decision resolved a conflict between the basic rule against prior restraints on publication and the interest in preserving the secrecy of information that, if disclosed, might seriously impair the security of the Nation. The Court relied on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *Id.* at 270.[34] Applied here, the case is much less contentious. Unlike in *New York Times Co.*, Ms. Chaskey did not steal information, she in fact was in a location she was lawfully allowed to be and had in fact been told to appear at by Fullerton. Furthermore, the resulting information was in no way a security threat. To the contrary, this is the type of information that could only benefit the public by being disseminated, so parents could know what is going on in their children's educational setting. There is no legitimate interest in restraining Ms. Chaskey from receiving and disseminating this lawfully gathered information. Applying the *New York Times Co.* standard, Ms. Chaskey's First Amendment Rights are clearly being violated.

In *Bartnicki v. Vopper*, 532 U.S. 514121 S.Ct. 1753 (2001), involving a stranger's illegal interception of negotiations with a Wyoming high school, the Court placed emphasis on First Amendment protections on matters of public concern – even if illegally recorded. It concluded, "[a] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern. The months of negotiations over the proper level of

[34] see *Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *De Jonge v. Oregon,* 299 U.S. 353, 365, 57 S.Ct. 255, 81 L.Ed. 278 (1937); *Whitney v. California,* 274 U.S. 357, 375–376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern.[35]

Numerous lower courts have held that the First Amendment right to gather and receive information includes the right to record information occurring in public places by taking photos and making video and audio recordings. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding a First Amendment right to "photograph or videotape police conduct" because "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest"); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a "First Amendment right to film matters of public interest").[36] *Csorny v. Shoreham-Wading River Cent. Sch. Dist*., 305 A.D.2d 83, 89 (N.Y. App. Div. 2003) (parents had right to videotape school board meeting.)[37]

Because audio and audiovisual recording enable speech, they are protected by the First Amendment. *See Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). This protection "en- compasses a range of conduct related to the gathering and dissemination of information." And "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik,* 655 F.3d at 82

---

[35] As discussed in Section I, *supra*, Ms. Chaskey did not engage in any illegal activity. This is only to emphasis the Court's Protection on the First Amendment, even in certain instances where information was gathered unlawfully.

[36] See, *Dorfman v. Meiszner,* 430 F.2d 558, 562 (7th Cir. 1970) (striking down a ban on photography and radio and television broadcasts from the courthouse lobby and plaza, because it "would likewise prohibit effective photographing or broadcasting of a demonstration in the plaza if it concerned in any way judicial proceedings");[36] S*ee also Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1039 (N.J. 2007) ("public watchdog" had right to video city council meeting).

[37] *See* also, *Maurice River Twp. Bd. of Educ. v. Maurice River Twp. Teachers Ass'n*, 475 A.2d 59, 60 (N.J. Super. Ct. App. Div. 1984) (union had right to videotape school board meetings).

(quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). "Restricting the use of an audio or audiovisual recording device suppresses speech just as effectively as restricting the dissemination of the resulting recording." *Alvarez*, 679 F.3d at 596.

The First Amendment protects the right to record public officials doing their jobs in public places, in part because their actions are newsworthy and the recordings promote accountability.[38] While most educators act lawfully, some do not. Often, the only evidence of what actually occurred will be conflicting testimony of officials and civilians, resulting in the ability to be proven or disproven.

Audio recordings often provide critical information not available in photographs or silent videos: first, some misconduct is purely verbal, such as threats and epithets; and second, the propriety of force frequently cannot be understood without knowledge of the spoken words preceding that force. *See, e.g. Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (protecting the right to record a government meeting, because the ban "did have some impact on how they were able to obtain access to and present information about the Committee and its proceedings").[39] Which is analogous to the situation here, had Ms. Chaskey no means to save the conversation, it could simply be denied, and she would have no ability to prove otherwise.

b) The First Amendment Protects Recording of School Officials Performing Their Jobs in Public Places, Including Classrooms.

[38] As the district court explained in *Robinson v. Fetterman*, "The activities of the police, like those of other public officials, are subject to public scrutiny. . . [V]ideotaping is a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case. In sum, there can be no doubt that the free speech clause of the Constitution protected Robinson as he videotaped the defendants. 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005). See *also Jean v. Massachusetts State Police*, 492 F.3d 24, 30 (1st Cir. 2007).

[39] See also, *Thompson v. City of Clio*, 765 F. Supp. 1066, 1070 (M.D. Ala. 1991) ("the ban on Thompson's tape recorder has some impact, however small or incidental, on how he is able to obtain access to and present such information, and as such regulates conduct protected by the first amendment")

The Act as the State has applied to Ms. Chaskey, prevents the audio recording of school officials to document any mistreatment of students or other misconduct, contrary to the firmly established rule that the First Amendment protects recording government officials engaged in their duties in public spaces.[40] That protection includes the right to "a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties"[41] *Gerick*e, 753 F.3d at 7. It includes the right to film an official in the hallway outside a public meeting. *See Iacobucci v. Boul*ter, 193 F.3d 14, 18 (1st Cir. 1999). And it includes the right of a teacher to film workplace conditions in a high school. *See Cirelli v. Town of Johnston Sch. Dist.,* 897 F. Supp. 663, 665 (D.R.I. 1995).

A school may restrict the right to record public officials in public places if it can meet either of two tests. First, the right "may be subject to reasonable time place and manner restrictions." *Glik*.[42] Second, though students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), schools are entitled to prevent "substantial disruption of or material interference with school activities." *Id.*[43] at 514.

Viewpoint-based restrictions are those whose very purpose is to drive certain viewpoints from the marketplace of ideas. "If there is a bedrock principle underlying the First Amendment,

---

[40] The school environment is a public setting. In *Long*, 2015 WL 3984950, the court found that a coach had no expectation of privacy in a locker room at halftime of an athletic event, and that a surreptitious recording of his speech to the team—by someone not present in the locker room at the time—therefore did not violate the state's wiretap statute. *In Plock*, 545 F. Supp.2d at 758, the court held that society is not willing to recognize as reasonable special- education teachers' claimed right to privacy in their classrooms. It rejected their challenge to the placement of audiovisual recording devices there, noting that "[w]hat is said and done in a public classroom is not merely liable to being overheard and repeated, but is likely to be overheard and repeated." *Id.* at 758

[41] Analysis in II.a, *Supra*

[42] 655 F.3d at 84.

[43] Like the wearing of a black armband in *Tinker*, the use of a small personal recording device by Ms. Chaskey could not have caused a disruption in the classroom.

it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[44] *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "View-point discrimination is censorship in its purest form," *Perry Ed. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37, 62 (1983) (Brennan, J., dissenting). If a restriction burdens protected speech on the basis of viewpoint, it is unconstitutional. *See Cornelius*, 473 U.S. at 806.[45]

A restriction is "content-based" if it applies to particular expression "because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015). A restriction is "content-based" if it is: (1) explicitly defined by a particular subject matter; (2) is more subtly defined by the function or purpose of the speech at issue; (3) cannot be justified without reference to the content of the regulated speech; or, (4) though facially neutral, was adopted because of a disagreement with a particular message. *Id.* (internal citations omitted). To satisfy the First Amendment, a content-based restriction must be narrowly tailored to serve a compelling governmental interest and must be the least restrictive means of achieving that interest. *See Boos v. Barry*, 485 U.S. 312, 321-22 (1988).

A restriction on protected speech is "narrowly tailored" when it does not burden substantially more speech than is necessary to further the government's interest. *McCullen,* 134 S. Ct. at 2535. The restriction need not be the least restrictive means of accomplishing the government's goal (as is required of content-based restrictions), but it is unconstitutional for the government to regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance the government's goals. *Id.* (internal citations omitted).

---

[44] Viewpoint-based restrictions on speech are "an egregious form of content discrimination" subject." *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 829 (1995).

[45] *Entm't Software Ass'n. v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006) (holding that content-based speech restrictions are subject to strict scrutiny).[45]*See also, Ridley v. Massachusetts Bay Transp. Auth.,* 390 F.3d 65, 82 (1st Cir. 2004).

Finally, the requirement that a restriction "leave open ample alternative channels" of communication does not require an identical opportunity for expression, but it does require that the remaining channels for communication be adequate. See *Ward,* 491 U.S. at 802-03.

c) Ms. Chaskey's First Amendment Right to Gather, Receive, and Record Information Was Violated.

Strict scrutiny is the appropriate legal standard here. As applied to the recording of school administration-parent conversations, the Act comprises speaker-based discrimination. As explained above, the right to speak and the right to record are flip sides of the same coin. The application, if applied the way the State would have it, allows the school to record virtually all interactions on its surveillance cameras, but prohibits parents or students from recording school officials. The discretion of schools is not limited in deciding which conversations to record. Officials may choose to record conversations that cast them in a positive light, and to not record conversations that cast them in a negative light,[46] controlling what information is conveyed to the public. In addition, this same one-sided license to record as applied to official-parent conversations comprises viewpoint discrimination, because it forbids parents (but not officials) from creating an audio record for later use to advance their viewpoint of what occurred. There is no principled basis for this twofold discrimination, much less a constitutional one.

Additional factors making strict scrutiny appropriate here are as it has been applied to Ms. Chaskey: (1) the Act flatly bans the audio recording, (2) it does so in all public places, whether or not they are public forums, and (3) it does so on threat of criminal penalty.

First Amendment strict judicial scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."

[46] Which is exactly why this case was brought in the first place.

Citizens United, 130 S. Ct. at 898. Under strict scrutiny, a speech restriction is not narrowly tailored if "a less restrictive alternative would serve the Government's purpose." *Entm't Software Ass'n.*, 469 F.3d at 646. Here, the State cannot satisfy this standard. First, the government has no interest, let alone a compelling interest, in prohibiting civilians from audio recording conversations of officials performing their public duties in public places – conversations for which they have no reasonable expectation of privacy. Second, as applied, the Act's means (prohibiting all recording between administration and parents) is not the least restrictive means to achieve a compelling government interest (whatever it may be).

d) The Unreasonable "Time, Place, and Manner" Restrictions, As Applied, Violated Ms. Chaskey's First Amendment Rights.

The application of The Act to Ms. Chaskey is not a reasonable time, place, and manner restriction because: (1) the application is based on her viewpoint and the content of the speech; (2) it regulates substantially more expressive activity than is necessary to accomplish the legislature's goal; and (3) it did not leave open ample alternative channels for Ms. Chaskey to engage in expression.

First, the Prosecution of Ms. Chaskey is based on her viewpoint. Onaway clearly disliked her intentions and views since she could potentially expose their malfeasance and misfeasance as school officials. Either the Act in its application unevenly grants exemptions to its enforcement so as to burden speech or speakers that it disfavors—which is unconstitutional under *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 759 (1988)—or it has restricted more speech than is necessary to accomplish its purpose, which is unconstitutional under the narrow-tailoring requirement. *Ward*, 491 U.S. at 791.

Critically, the prohibition on recording devices does not leave open ample alternative channels of communication for Ms. Chaskey. Though speakers are not guaranteed the most

effective means of communications, "time, place, and manner" restrictions may not result in a total ban on communication.[47] [48] The prosecution violated Ms. Chaskey's First Amendment Rights as applied through the 14th Amendment to the United States Constitution, and for this reason the Complaint should be dismissed with prejudice.

III. THE VINDICTIVE PROSECUTION OF ERIN CHASKEY VIOLATES HER RIGHT TO DUE PROCESS OF LAW

A prosecutor has "broad discretion" in deciding whom to prosecute and which charges to bring. *Bragan v Poindexter*, 249 F3d 476, 481 (6th Cir. 2001). This discretion, however, "is not unfettered." *Id.* At a minimum, prosecutorial discretion is restrained by Due Process requirements, which prohibits the prosecution from punishing a defendant for exercising a protected statutory or constitutional right. *United States v Goodwin*, 457 US 368, 372 (1982).

a) Prosecutorial Vindictiveness

In order to show vindictive prosecution, there must be: (1) exercise of a protected right; (2) a prosecutorial stake in the exercise of that right; (3) unreasonableness of the prosecutor's conduct; (4) the intent to punish the defendant for exercise of the protected right. See *Nat'l Eng'g & Contracting Co. v. Herman*, 181 F.3d 715, 722 (6th Cir. 1999). Presumably, if the first three elements are present, this may help establish grounds to believe the fourth is present, that there is the required "realistic likelihood of vindictiveness," which the government would have to rebut.

---

[47] One additional point is worth mentioning: the "right to record" jurisprudence has not developed with reference to forum analysis, which "has been criticized as unhelpful in many contexts" by both courts and commentators. See e.g. *Ridley v. Mass. Bay Transp. Auth.,* 390 F.3d 65, 75-76 (1st Cir. 2004). Instead, the relevant inquiry is whether the recording is of a public official performing his or her duties "in a public place." *Glik*, 655 F.3d at 82

[48] a "public place." It need not be a "public forum" per se, but a place where speakers have no reasonable expectation of privacy, where statements would be freely overheard, and where dissemination of such communications would not be actionable in tort. See *Alvarez,* 679 F.3d at 605-06.

See *Bragan v. Poindexter*, 249 F.3d 476, 481–82 (6th Cir. 2001) (citing *United States v. Andrews*, 633 F.2d 449, 453–56 (6th Cir. 1980) (en banc)).

The essence of a claim of prosecutorial vindictiveness is that the government may not punish a person for exercising a statutory or constitutional right. As stated in *Bordenkircher v Hayes*, 434 US 357, 364; 98 S Ct 663; 54 L Ed 2d 604 (1978):

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort [citation omitted], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." 98 S Ct at 668.[49]

There are two types of prosecutorial vindictiveness: presumed and actual. *Goodwin*, supra at 380. Actual vindictiveness will be found when there is objective evidence, such as expressed hostility or threat, that a prosecutor has acted to deliberately penalize a defendant for his exercise of a procedural, statutory or constitutional right. *Id.* In other cases, vindictiveness is presumed in those circumstances where "action detrimental to the defendant has been taken after the exercise of a legal right[.]" *Id.* Presumed vindictiveness requires a "reasonable likelihood" that the prosecution acted vindictively. *Id.*; *Blackledge*, supra at 27.

b) The Prosecution of Ms. Chaskey is in Response to Her Exercise of Legal Rights.

Quite frankly, the entire prosecution of Ms. Chaskey is rife with government abuse. Onaway initiated this entire matter in an effort to silence her, as discussed above. Even after the

[49] See *United States v Goodwin*, 457 US 368 (1982); *Blackledge v Perry*, 417 US 21 (1974); *People v Ryan*, 451 Mich 30, 35-36 (1996).

Circuit Court dropped its Bond Conditions, Onaway tried to play ridiculous games with her. (**Ex. G**) although they completely contradicted themselves in the process.

Ms. Chaskey's Fourth Amendment Rights were also violated by the Presque Isle County Sheriff's Office on two occasions. First, the search warrant affidavit is merely a "barebones" and conclusory, not enough to establish sufficient probable cause. But more egregious, is the fact that the search of her cell phone CLEARLY went far beyond the scope of the search warrant, which limits the scope to "any and all videos and text messages in reference to potential video recordings that are taken on 10/14/2021." The Michigan State Police report states, "[T]his information is to include, but is not limited to contact listing, call logs, text messages (SMS, MMS, IM, Chat), online Social chats (Facebook, KIK, Skype, etc.) photographs, videos, calendar and web history" – a total invasion of Ms. Chaskey's privacy and abomination to the Fourth Amendment! (**Ex. H**).

Applying the relevant standards then, the prosecution was in response to Ms. Chaskey exercising protected rights. The matter began while she had been exercising her First Amendment Right to the freedom of speech and assemble at school board meetings and her fundamental right as a parent. The specific incident in question resulted out of her exercising First Amendment rights, as discussed above. Finally, the criminal charge was filed the day after she exercised her legal right to file a civil action as a remedy.

The Prosecutorial stake in this matter results from Onaway putting significant pressure on the office to continue this case. It is apparent by this point in the matter that the reasonable option, and the one that sought the best interest of justice, as prosecutors are entrusted with the task of, would be to voluntarily dismiss this case and allow Ms. Chaskey and her family to go on

with their life after all the havoc that has been raised in the past half year. The combination of "saving face" may be an additional factor at play.

The Prosecutor's Conduct is clearly unreasonable. There has not even been sufficient allegations to charge her with a criminal complaint in the first place. Vindictiveness is apparent from the circumstances surrounding the charge: 1) as has been discussed, this statute is rarely used to prosecute individuals, and when it is, the facts have been completely different than in this case; 2) Sgt. Rabeau, when altering her to the fact she had a felony charge, even stated to Ms. Chaskey, "In my 20 years I haven't seen anyone charged with this."; and 3) likewise, Dep. Schmoldt said at the preliminary exam that he had never been involved with a felony eavesdropping case in his 15 years in law enforcement either. The vindictiveness doesn't end there, again this whole matter arose out of an effort to silence Ms. Chaskey. At her bond hearing, the Prosecutor tried using "FERPA" as some type of statutory authority in which to keep the bond conditions in place.[50] A very basic reading of Michigan law makes it clear the only relevant circumstances are public safety and flight risk, but the Prosecutor decided to ignore the law. The State is clearly grasping at straws with this prosecution.

Applying the final element, the intent is apparent through the malicious actions stated throughout this motion. At the very least, these actions amount to presumed vindictiveness, and as such the Complaint should be dismissed with prejudice for violating Ms. Chaskey's rights to Due Process under the 5th and 14th Amendments to the United States Constitution.

IV. PROSECUTION OF ERIN CHASKEY YIELDS ABSURD-RESULTS

[50] The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education. Saying that Ms. Chaskey should have a bond condition applied makes no sense as she couldn't have violated this statute – although Onaway certainly could have.

Justice Scalia observed that, "it is a venerable principle that a law will not be interpreted to produce absurd results." *K mart Corp v Cartier, Inc* (Citation Omitted). The absurd-results doctrine provides that a court may depart from a statute's plain language if following it would lead to an outcome the court views as ridiculous and inconsistent with the statute's overall purpose.[51] The Michigan Supreme Court[52] recognized recently that, ""[S]tatutes must be construed to prevent absurd results..." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999); *People v. Tennyson*, 487 Mich. 730, 741 (Mich. 2010)[53] [54]

While Ms. Chaskey, in her brief, has clearly established that, 1) the State has failed to allege a criminal violation in the first place; and 2) prosecuting her under the Act would violate her First Amendment Rights; it should be also be noted, that prosecution of her leads to absurd-results.[55] While courts have thankfully construed the statute narrowly in the past, evidenced by

[51] Black's Law Dictionary (5th ed) defines "absurdity" as "[a]nything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion." There are a variety of alternative formulations of the "absurd results" rule. See, e.g., Crooks v Harrelson, 282 US 55, 60; 51 S Ct 49; 75 L Ed 2d 156 (1930) ("so gross as to shock the general moral or common sense"); Sturges, supra at 203 ("so monstrous, that all mankind would, without hesitation, unite in rejecting the application"); Public Citizen, supra at 471 (Kennedy, J., concurring) ("quite impossible that [the Legislature] could have intended the result"); Green, supra at 511 ("can't mean what it says"); Green, supra at 527

[52] In *Alvord v Lent*, Justices Graves, Campbell ad Cooley held that "[i]f [statutory] construction would produce great inconvenience, if it would lead to absurd or mischievous results, if it would tend to embarrass the course of justice and serve to defeat necessary legal remedies, it ought not to be adopted unless required by some positive rule of law, and we are not aware of any such rule." 23 Mich 369 (1871). This holding by some of the most highly regarded justices of this Court continued the application of the absurd results rule that became part of Michigan law as early as 1844. *See Green v Graves*, 1 Doug 351, 354 (Mich, 1844).[52]

[54] For more on the doctrine, *see:* "The Absurd-Results Doctrine in Michigan." Michigan Defense Quarterly: Appellate Practice Report, 2017. https://www.dickinson-wright.com/-/media/documents/documents-linked-to-attorney-bios/phil-derosier-michigan-defense-quarterly1117.pdf?la=en&hash=AA2EA2765A4A1590686CCDCB209F263769B08F3B.

[55] For example, Looking at the allegations against her, and the plaint meaning of the statute, any student who happened to walk into the secretary's office, making a snapchat to send to their friends, who happened to pickup a conversation in the backdrop, could be charged with a felony!

the limited amount of times it has been litigated, a reading given here as the State advocates, certainly would lead to absurd-results.

CONCLUSION

This case is quite simple. The State has provided nothing more than conclusory statements in its allegations against Ms. Chaskey. This is merely an attempt to silence her for her actions in attempting to seek accountability at her son's school. This Complaint should be dismissed because: (1) The State has failed to even allege Ms. Chaskey engaged in a criminal violation; (2) The Prosecution as applied to Ms. Chaskey violates her First Amendment rights; and (3) The Vindictive Prosecution Violates her Right to Due Process of Law guaranteed by the Fifth and Fourteenth Amendments.

For all the reasons stated above, Erin Chaskey respectfully requests this Honorable Court Dismiss the State's Charge against her with Prejudice and grant such other and further relief as is just and appropriate.

Respectfully Submitted,

Dated: March 1, 2022

Daren A. Wiseley (P85220)
WISELEY LAW, PLLC
Attorney for Erin Chaskey

APPENDIX

EXHIBIT A

Chaskey – Fullerton Email Correspondence

From: Rod Fullerton <rfullerton@oacsd.com>
Sent: Thursday, August 12, 2021 9:46 AM
To: erin chaskey <erinjchaskey@hotmail.com>
Subject: Re: Email

This is a response to your request that was received on Monday, August 9. This response is being treated as a Freedom of Information Act (FOIA). Attached are the email correspondences regarding your curriculum questions. This is all of the emails that exist to my knowledge and my ability to retrieve and make available.

Your specific request for the email from Kymberli Wregglesworth to the Equal Justice Initiative does not exist. There was never any direct communication as the Equal Justice Initiative sponsored this project through Donors Choose. Mrs. Wregglesworth did provide a link to the communications within Donor's Choose and that link is below:

https://www.donorschoose.org/project/just-mercy-in-the-classroom/5370433/

This shall fulfill your FOIA request that was received on August 9, 2021

Thanks,

Rod.

On Sat, Aug 7, 2021 at 3:56 PM erin chaskey <erinjchaskey@hotmail.com> wrote:

> I am formally requesting the email sent from Kymberli Wregglesworth to the Equal Justice Initiative for funding to purchase the book Just Mercy within her classroom as part of her curriculum. I am also formerly requesting any email/communications between any combination of yourself, Rod Fullerton, Kymberli Wregglesworth, Marty Mix, and any current school board member/members concerning the issue of curriculum I have brought into question. These communication were done via school property - under school provided email accounts, and they pertain to school functions/ performance. Thank you.

--
Rod Fullerton
Superintendent/Business Manager
Onaway Area Community Schools
989-733-4970
989-733-8612 fax

A-02

From: Rod Fullerton <rfullerton@oacsd.com>
Sent: Thursday, August 12, 2021 9:46 AM
To: erin chaskey <erinjchaskey@hotmail.com>
Subject: Re: Email

This is a response to your request that was received on Monday, August 9. This response is being treated as a Freedom of Information Act (FOIA). Attached are the email correspondences regarding your curriculum questions. This is all of the emails that exist to my knowledge and my ability to retrieve and make available.

Your specific request for the email from Kymberli Wregglesworth to the Equal Justice Initiative does not exist. There was never any direct communication as the Equal Justice Initiative sponsored this project through Donors Choose. Mrs. Wregglesworth did provide a link to the communications within Donor's Choose and that link is below:

https://www.donorschoose.org/project/just-mercy-in-the-classroom/5370433/

This shall fulfill your FOIA request that was received on August 9, 2021

Thanks,

Rod.

On Sat, Aug 7, 2021 at 3:56 PM erin chaskey <erinjchaskey@hotmail.com> wrote:

> I am formally requesting the email sent from Kymberli Wregglesworth to the Equal Justice Initiative for funding to purchase the book Just Mercy within her classroom as part of her curriculum. I am also formerly requesting any email/communications between any combination of yourself, Rod Fullerton, Kymberli Wregglesworth, Marty Mix, and any current school board member/members concerning the issue of curriculum I have brought into question. These communication were done via school property - under school provided email accounts, and they pertain to school functions/ performance. Thank you.

--
Rod Fullerton
Superintendent/Business Manager
Onaway Area Community Schools
989-733-4970
989-733-8612 fax

EXHIBIT B

Chaskey Email to the Presque Isle Advance

From: pete piadvance.com <pete@piadvance.com>
Sent: Wednesday, September 22, 2021 3:19 PM
To: erin chaskey <erinjchaskey@hotmail.com>
Subject: Re: School board meeting

Sorry to say, but for several reasons I did not get the article in this week. I will be in touch and talk about what you have and what I want to put in.

Pete

> On Sep 22, 2021, at 11:12 AM, erin chaskey <erinjchaskey@hotmail.com> wrote:
>
> Also, how do I go about putting an article in? Should I pay for space an actual space in the paper, or pay for a letter to the editor?
>
> ---
>
> **From:** erin chaskey <erinjchaskey@hotmail.com>
> **Sent:** Wednesday, September 22, 2021 10:11 AM
> **To:** pete piadvance.com <pete@piadvance.com>
> **Subject:** Re: School board meeting
>
> Run my piece. Might also want to investigate to confirm, but Rod has given his notice and is taking a job in Harbor Springs. Run instead of admitting to your mistakes and reuniting the community you claimed to be so invested in.
>
> ---
>
> **From:** pete piadvance.com <pete@piadvance.com>
> **Sent:** Tuesday, September 21, 2021 8:47 AM
> **To:** erin chaskey <erinjchaskey@hotmail.com>
> **Subject:** Re: School board meeting
>
> Ok, I'm still going to run something on the meeting this week.
>
> > On Sep 21, 2021, at 9:44 AM, erin chaskey <erinjchaskey@hotmail.com> wrote:
> >
> > No. However, I am going to have you pause on running it for the moment.
> >
> > ---
> >
> > **From:** pete piadvance.com <pete@piadvance.com>
> > **Sent:** Tuesday, September 21, 2021 8:23 AM
> > **To:** erin chaskey <erinjchaskey@hotmail.com>
> > **Subject:** Re: School board meeting
> >
> > Did you post this anywhere on social media?
> >
> > > On Sep 20, 2021, at 6:48 PM, erin chaskey <erinjchaskey@hotmail.com> wrote:
> > >
> > > As the Onaway Area School Board meeting was called to order on September 14th, the tension in the room was almost palpable. There was a clear division amongst the attendees, noted by the congregation of teachers in one area and parents, grandparents and concerned community members filling the rest of the available space.
> > > The meeting began as expected, but as Rod Fullerton finished reading his report, as well as letters composed by Kym Wregglesworth and Steve Watson (both high school teachers at Onaway Area Schools), the crowd was in a near outrage.
> > > Kortney Crawford and Tim Paulus were the first to address the board during the public comment. As Tim's minutes drew to a close, he charged the board to leave the development of our children's morals and personal stances, up to the parents- focusing instead on teaching our childrenfacts, not training them to follow the beliefs of the teachers.
> > > Stepping up to the podium next, was Erin Chaskey. Chaskey had addressed the board last months, asking that the board, administrators and community members work together to solve the concerns so many children, parents and grandparents have brought forward.
> > > It quickly became clear, however, that Chaskey's previous hopes of working as a solidified unit, had dissolved.
> > > Armed with a binder or documents, Chaskey began to demand accountability. She reminded Mr. Fullerton that she had been emailing him- asking for simple oversight into two particular classes, whose teaching materials showed a great possibility of teachers placing their own personal ideologies and political beliefs upon their students, since last March.
> > > Chaskey then opened her binder and began to read some of the answers provided to her as to why there wasn't, nor would there be, any monitoring of the classes.
> > > Chaskey followed this by reading the schools bi-laws and procedures, pointing out that it was a requirement that every class, not just core curriculum classes, be reviewed, evaluated and ultimately approved by the board.
> > > She proceeded to recite other school policy, pointing out incidences of improper procedures, one in particular of blatant teacher misconduct and also the failure to retain documentation as stated in the required retention practices, deleted emails which had been requested under a freedom of information act.
> > > Stunning the crowd, she also recited some of the emails, obtained through a foia requests, the emails sent between Mr. Fullerton and Mr. Mix (principle), informing the crowd as to how they viewed her, and the community, questioning of classroom content and the idea of a teacher's personal beliefs/opinions being used to influence the students.
> > > Chaskey was very pointed in reminding Mr. Fullerton and the board, that she had not once asked for any topic, or current political/social issue to be excluded from curriculum, but for months, had simply been asking asking for them to monitor these classes in order to ensure neutrality on each topic.
> > > Being over her time, Chaskey charged the administration and board to step up and do their jobs.
> > >
> > > ---
> > >
> > > **From:** pete piadvance.com <pete@piadvance.com>
> > > **Sent:** Friday, September 17, 2021 10:27 AM
> > > **To:** erin chaskey <erinjchaskey@hotmail.com>
> > > **Subject:** Re: School board meeting
> > >
> > > Yes, please! That would be great!
> > >
> > > ---
> > >
> > > **From:** erin chaskey <erinjchaskey@hotmail.com>
> > > **Sent:** Friday, September 17, 2021 10:39 AM
> > > **To:** pete piadvance.com <pete@piadvance.com>
> > > **Subject:** School board meeting
> > >
> > > Hey Pete. Would you like me to write the summarization of my discussion with the board for this last meeting again? I would be happy too if that is what you would like. Let me know if so, and when you need it by. Have a great day!

EXHIBIT C

Chaskey FOIA Requests

Rod Fullerton <rfullerton@oacsd.com>

Re: Reply

17 messages

erin chaskey <erinjchaskey@hotmail.com> Thu, Apr 22, 2021 at 8:45 AM
To: Rod Fullerton <rfullerton@oacsd.com>

I still have not received a reply to the questions I have asked to be addressed. As everyone in this country (and specifically this community) is aware of the heated, and highly controversial, idea of "one-sides" or "exposure that may influence" children to see current events in a particular light, every tax payer deserves to know what their money is funding. I find it particularly upsetting that ANY individual (especially one with a child in the school- regardless if they are in the class in question), does not have easy access to materials taught on any particular day within a classroom. Teachers should have that easily available as they would need it available for students who were absent that day anyways (or for on-line students). Again, I believe you know whom I am referring to (as you have already had incidents where this teacher has "stepped out of line"). Do not confuse my concerns with the idea of not wanting any idea of racism being taught. However, as a "non-biased" public school, BOTH sides of the "white-privilege"/ "black suppression" (showing specific facts/statistics supporting and opposing the concepts) should be presented, given equal effort and taught in a NON-BIASED manner, allowing students to draw their own conclusions on the matter.

From: erin chaskey <erinjchaskey@hotmail.com>
Sent: Friday, March 26, 2021 4:36 PM
To: Rod Fullerton <rfullerton@oacsd.com>
Subject: Re: Meeting

Hey Rod. My concerns are very simple. You are aware, I would assume, of the literature (as well as specific "agenda leaning" curriculum) within one of your high school classrooms. I was told that the school cannot control what a teacher promotes/posts on FB. If that is the case, why is this teacher allowed to use her FB page as a platform to "fundraise" for books she would like in her classroom, books that are agreeable and supportive of the agenda she clearly supports. Sure, she can argue it is a "current event" and it is on the "acceptable reading list", but is a classroom not there to provide facts/opinions from both sides as to what is happening? I don't think many parents are aware of this, but I am 100% positive, if they were made aware, I would not be the only parent questioning and upset by this.

From: Rod Fullerton <rfullerton@oacsd.com>
Sent: Wednesday, March 17, 2021 4:26 PM
To: erin chaskey <erinjchaskey@hotmail.com>
Subject: Re: Meeting

Obviously this afternoon didn't work, and I will be out tomorrow. Maybe on Friday? What concerns did you have?

Thanks,

Rod

On Wed, Mar 17, 2021 at 1:18 PM erin chaskey <erinjchaskey@hotmail.com> wrote:

> Hey Rod. Wondering if you would be available sometime this afternoon. I have some concerns I would like to address.

--
Rod Fullerton
Superintendent/Business Manager
Onaway Area Community Schools
989-733-4970
989-733-8612 fax

Rod Fullerton <rfullerton@oacsd.com> Thu, Apr 22, 2021 at 12:22 PM
To: Marty Mix <mmix@oacsd.com>

Can we get together and talk about this and maybe Kym as well. Just want to make sure I understand everything before I respond to her.
[Quoted text hidden]

Rod Fullerton <rfullerton@oacsd.com> Mon, Apr 26, 2021 at 2:03 PM
To: erin chaskey <erinjchaskey@hotmail.com>

It would be difficult if not impossible to control what a teacher promotes or posts on Facebook. Obviously everyone would have a different opinion on what is or isn't appropriate. Many teachers promote various fundraisers on their Facebook or other social media platforms. From a communication perspective, it is an efficient way to reach a wide array of people.

I believe that our staff is well versed on what the curriculum standards are and what is required of them to teach. I also understand that many may or may not agree with the state curriculum. I do not believe our staff are trying to change any students political or non political stance. Based on what I see in our hallways and in my interactions with students, I don't see all students sharing one point of view over another. I see a widely different and varying cross section of our student body. Similar to what I see in our community and in others

Education can be a rather strange animal in that by design, it doesn't necessarily teach one "facts" as much as to show students how to learn, debate, and think for themselves. As I mentioned, from what I can see in our student body, we have a lot of very different, independent students.

Hope my perspective helps.

Rod.
[Quoted text hidden]

---

erin chaskey <erinjchaskey@hotmail.com> Tue, Apr 27, 2021 at 10:14 AM
To: Rod Fullerton <rfullerton@oacsd.com>

I would whole heartily disagree. When a teacher is including/promoting the "economic hardships" of her (I believe we know who I am referring to at this point) almost completely "white" student body in order to solicit funds for classroom materials, from a platform in which she also promotes/supports an organization that sees those same students as "privileged" is very upsetting!

With both books used this year in her classroom to "give a wider perspective" on current issues, being centered around the idea of black suppression, I am curious to see how the majority of the community would consider that appropriate. Yes, according to the state curriculum, these books meet their standards, but does the school administration and board not have any "say" over what is being taught within their walls, as in the inclusion of the opposing opinion? If not, what then is their role?

EXHIBIT D

Onaway "No Trespass"

Onaway Area Community School

4549 M-33 Hwy. Onaway, MI 49765
Ph: (989) 733-2700 • Fax: (989) 733-8612
Rod Fullerton • rfullerton@oacsd.com

Working together to prepare students for life. *Go Cardinals!!*

October 20, 2021

Erin Chaskey
3654 Maple Street, P.O. Box 135
Onaway, MI 49765

Re: Unlawful Eavesdropping – No Trespass

Dear Mrs. Chaskey:

It has come to my attention that on October 14, 2021, you entered my office at 3:14 p.m. You did not announce yourself and there was no administrative staff in the office at the entry as it was after the instructional day.

I was in my office meeting with a member of the Board of Education discussing various issues, including an individual student. You walked down to my office, stood outside my door, and began recording my conversation with the Board member by use of your cell phone. You were not a party to the conversation, and were unlawfully eavesdropping.

Your conduct violates Michigan's felony criminal eavesdropping statute. Michigan Penal Code § 750.539c, which states:

> 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.

Moreover, based upon this significant invasion of privacy and violation of law, you are directed to no longer enter Onaway Area Schools (the "District") property at any time without prior written authorization from the Superintendent. This includes all the District buildings, Board offices and athletic field, excluding Board of Education meetings.

You are permitted to be on District property without prior authorization for the limited purpose of attending a public meeting of the Board of Education or to participate in an election conducted on school property. If it is necessary for you to make any contact with the School District, you are directed to do so exclusively with the Superintendent's office.

Onaway Area Community School

4549 M-33 Hwy. Onaway, MI 49765
Ph: (989) 733-2700 • Fax: (989) 733-8612
Rod Fullerton • rfullerton@oacsd.com

Working together to prepare students for life. *Go Cardinals!!*

If you fail to comply with this directive, you will be considered a trespasser. School staff have been directed to promptly contact the Presque Isle Sheriff's Department for assistance if you are on school property. Criminal trespass charges will be filed against you pursuant to MCL 750.552 (Trespassing). The criminal trespass statute applies to property held by a local governmental unit, including a school district. *People v Johnson*, 16 Mich App 745, 748 (1969). The Michigan Attorney General has opined that the protections of this statute are available to school districts and that law enforcement officers may remove unauthorized visitors from school buildings or grounds. OAG No. 503, p 618 (1976).

Please be aware that our video of your conduct has been turned over to law enforcement.

Sincerely,

Rod Fullerton
Superintendent of Schools

cc: Resource Officer
Prosecutor's Office
Building Principals

EXHIBIT E

The State's Complaint

2021000247 RR

Information - Circuit Court
Original Complaint - Court
Warrant - Court

Bindover/Transfer - Circuit/Juvenile Court
Complaint copy - Prosecutor
Complaint copy - Defendant/Attorney

STATE OF MICHIGAN 89TH JUDICIAL DISTRICT 53RD JUDICIAL CIRCUIT	WARRANT FELONY	CASE NO. 2021000247 DISTRICT: CIRCUIT:

District Court ORI: MI-

Circuit Court ORI: MI- MI710025J
COURTHOUSE P. O. BOX 110 ROGERS CITY, MI 49779 989-734-3288

	Defendant's name and address	Victim or complainant
THE PEOPLE OF THE STATE OF MICHIGAN	V ERIN JO CHASKEY 3564 MAPLE ST ONAWAY, MI 49765	RODNEY FULLERTON
		Complaining Witness
Co-defendant(s) (If known)		Date: On or about 10/15/2021

City/Twp./Village	County in Michigan	Defendant TCN	Defendant CTN	Defendant SID	Defendant DOB
Township of Allis	PRESQUE ISLE		71-21000247-01		07/15/1984

Police agency report no.	Charge	Maximum penalty
71PISD 21-7678	See below	

[ ] A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.	Oper./Chauf./CDL	Vehicle Type	Defendant DLN
	Oper./Chauf		C 200 234 420 559

Witnesses
DAVE SCHMOLDT RODNEY FULLERTON MICHAEL BENSON

STATE OF MICHIGAN, COUNTY OF PRESQUE ISLE

To any peace officer or court officer authorized to make arrest: The complaining witness has filed a sworn complaint in this court stating that on the date and the location described above, the defendant, contrary to law,

COUNT 1: EAVESDROPPING

One **ERIN JO CHASKEY** did willfully use a device to eavesdrop upon the private conversation of Rodney Fullerton and Michael Benson, without the consent of all the parties thereto; contrary to MCL 750.539c. [750.539C]
FELONY: 2 Years and/or $2,000.00

Court shall order law enforcement to collect a DNA identification profiling sample before sentencing or disposition, if not taken at arrest.

Upon examination of the complaining witness, I find that the offense charged was committed and that there is probable cause to believe that defendant committed the offense. THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN,

- ❑ a. I order you to arrest and bring defendant before the **89th** District Court immediately.
- ❑ b. I order you to arrest and bring defendant before the **89th** District Court.

Date (SEAL) Judge/Magistrate Bar no.

See return on next page.

MCL 764.1 *et seq.*, MCL 766.1 *et seq.*, MCL 767.1 *et seq.*,MCR6.110

STATE OF MICHIGAN 89TH DISTRICT COURT	COMPLAINT AND AFFIDAVIT	CASE NO. 21-0200-FY

THE PEOPLE OF THE STATE OF MICHIGAN v. Erin Jo Chaskey 3654 Maple St Onaway, MI 49765	DEFENDANTS NAME AND ADDRESS	POLICE AGENCY PRESQUE ISLE SHERIFF DEPT ARRESTING OFFICER Schmoldt REPORT NO. #21-7861
CO-DEFENDANTS	DEFENDANTS D.O.B. 07/15/1984	OFFENSE DATE (ON OR ABOUT) 10/14/2021

☐CITY/☒TOWNSHIP/☐VILLAGE	COUNTY:	STATE:	
ALLIS	PRESQUE ISLE	MI	☐ MISDEMEANOR ☒ FELONY

BRIEFLY DESCRIBE FACTS (NOT CONCLUSIONS) WHICH LED OFFICERS TO ARREST DEFENDANT: I.E., WHO, WHAT, WHY, WHEN, WHERE, AND HOW? WHO TOLD YOU AND HOW DO THEY KNOW?

INCIDENT: On Friday, October 15, 2021 I was advised of an incident in the main office of the Onaway Area Community School on Thursday, October 14, 2021. I was advised that Erin Chaskey was in the main office when school was not in session and after Secretary Faith Robins had left for the day. I pulled up the school system's security camera footage from Thursday and began reviewing.

VIDEO FOOTAGE: I observed Chaskey approach the main entrance doors of the school building at 3:12:15 and stood at the front door until a person exited the building and she entered the building at 3:13:54 P.M. Chaskey walked directly to the central office and opened the door, entering at 3:14:09 and walking up to Faith Robins' desk. No other persons were present in the office and you could clearly see Chaskey turn her attention to something she could hear in another part of the office. Chaskey maneuvers her phone around, starting to record a person or persons that are not visible in the office. Chaskey walks to the back corner of Robins' office and is seen holding her phone down the hallway towards the Superintendent's Office at 3:16:06 P.M. Chaskey moves around a little while watching for people walking around inside the school and then walks back to the north end of Robins' desk just prior to Principal Mix entering the office at 3:26:27 P.M. Chaskey speaks with mix momentarily and then has a brief exchange of words with Benson when he emerges from Fullerton's Office. Fullerton also comes out and speaks to Chaskey who leaves the office in under 30 seconds. Chaskey is seen engaging in a very brief exchange of words with Benson before leaving the building at 3:27:34 P.M.

INTERVIEW WITH RODNEY FULLERTON: I spoke with Fullerton, he stated that the front office door was closed after school and he had Benson come in to speak with him. The two of them were having a conversation in reference to school business as well as Benson asking specific questions in reference to school students. Fullerton was not aware that anyone had entered the front office and did not give anyone permission to record the conversation between him and Michael Benson.

INTERVIEW WITH MICHAEL BENSON: I spoke with Benson, he stated that came up to meet with Fullerton in reference to upcoming schoolboard issues and to speak about some things involving students inside the Onaway School Building. Benson stated that he did not give anyone permission to record his conversation with Fullerton, nor was he aware that it had been recorded until I made contact with him on Friday. Benson was not happy that his conversation had been recorded because some of it, he believes, was personal in nature. Benson stated that he has received several messages from Chaskey since Thursday, October 14th that was in quotations as if she was quoting part of his conversation with Fullerton.

EVIDENCE: Thumb drive containing the video footage from the Onaway Area Community Schools Main Office, Main Entrance and Hall Main Entrance Doors from Thursday October 14, 2021.

SEARCH WARRANT: I also filled out an affidavit for search warrant for Chaskey's cell phone that she can be seen using to record the conversation between Benson and Fullerton.

STATUS: TOT Prosecutor's Office for review.

PRIOR CONVICTIONS:

OFFENSE	DATE OF CONVICTION	COURT	PLACE
1. N/A	N/A	N/A	N/A
2. N/A	N/A	N/A	N/A

REQUESTED CHARGES:

Eavesdropping

REQUESTED BOND CONDITIONS:

PA

I DECLARE UNDER THE PENALTIES OF PERJURY THAT THE STATEMENTS ABOVE ARE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

SGT. C #29 — COMPLAINING WITNESS SIGNATURE

11/09/2021 — DATE

JUDGE/MAGISTRATE

AUTHORIZED CHARGES: ON THE DATE AT THE LOCATION DESCRIBED, THE DEFENDANT, CONTRARY TO LAW DID THE FOLLOWING:

EAVESDROPPING MCL 750.539c 2 YEARS

BOND CONDITION REQUEST: STANDARD - NO ENTRY ON OSHAWAY SCHOOL GROUNDS

APPROVED FOR CHARGES STATED ABOVE — 11/9/24 — DATE

PROSECUTING OFFICIAL AND P NUMBER — P27713

EXHIBIT F

The State's Search Warrant

STATE OF MICHIGAN JUDICIAL DISTRICT	AFFIDAVIT FOR SEARCH WARRANT	CASE NO.

Police Agency Presque Isle Sheriff's Department
Report Number: 7678-21

Deputy David Schmoldt , affiant(s), state that:

1. The person, place, or thing to be searched is described as and is located at:

The person, place, or things to be searched are described as the cellular telephones of Erin Jp Chaskey 07/15/84. This cell phone is described as an Apple IPhone, 989-306-2633. The phone was in possession of Erin Chaskey on 10/14/2021 at the Onaway School and is observed in surveillance video being used to eavesdrop on a private conversation that she was not a part of.

2. The PROPERTY to be searched for and seized, if found, is specifically described as:

The property to be searched for and seized, if found, is specifically described as an Apple IPhone with the number 989-306-2633, and any and all videos and text messages in reference to potential video recordings that are taken on 10/14/2021.

The search of this cell phone is to be completed by a qualified designee of the Presque Isle County Sheriff's Office.

3. The FACTS establishing probable cause or the grounds for the search are:

A) Affiant is a Deputy with the Presque Isle County Sheriff's Office and has been so employed for approximately the last fifteen years.

B) Affiant has approximately twenty years of service in law enforcement during which time he has investigated a high volume of criminal complaints.

4) The Presque Isle County Sheriff's Office is currently investigating Erin Jo Chaskey (07/15/1984) for eavesdropping on a private conversation.

5) On 10-14-21 at approximately 1514 hours, Chaskey is observed on video footage making a video recording of a private conversation that is occurring out of view of the video camera system and in an area that Chaskey should not be in as a private citizen.

6) Affiant knows through training and experience, perpetrators of crimes will often take, cause to be taken, receive, possess, or disseminate videos, photographs or other digital media files. This can be done by many electronic means, often personal cell phones.

This affidavit consists of: _____ pages.

Affiant

Review on: 10/20/21
Date

By: _____
Prosecuting Official

Subscribed and sworn before me on:
Date

Judge/Magistrate

EXHIBIT G

Michigan State Police Report

MICHIGAN DEPARTMENT OF STATE POLICE

ORIGINAL INCIDENT REPORT

ORIGINAL DATE:	INCIDENT NO:
Mon, Oct 25, 2021	CCU-0003238-21
TIME RECEIVED:	**FILE CLASS:**
1400	57002

ADDRESS:
2075 CASS RD
TRAVERSE CITY MI

DOT #
ICC #
MPSC #
MISC #

SEIZED:

SEIZED BY: DFA BAUMGARTNER
Prop 0001 -Type: OFFICE EQUIPMENT Qty: 1 Article Type: Cellular Telephone Brand: Model: A2275
Serial #: 356477104511423 Misc #: OAN: Value: $0.00 Recovered Value: $0.00
Descrp: ONE APPLE IPHONE, WHITE IN COLOR, CLEAR
CASE,MODEL:A2275,IMEI:356477104511423,SIM ID:8901150327723355040 6(PRESQUE ISLE SHERIFF 7678-21 ITEM #1)
Obtained From: 2075 CASS RD
66 - TRAVERSE CITY, MI
28 - GRAND TRAVERSE,
SHIPPED VIA USPS TO THE TC CCU
Date/Time Recovered: 10/25/2021

EXTERNAL DOCUMENT:

Traverse City CCU Property Intake and Tracking Form
Request for Digital Analysis Form
Search Warrant

DISPOSITION:

Pends extraction, report and property return.

STATUS:
OPEN

MICHIGAN DEPARTMENT OF STATE POLICE ORIGINAL INCIDENT REPORT	ORIGINAL DATE: Mon, Oct 25, 2021	INCIDENT NO: CCU-0003238-21
	TIME RECEIVED: 1400	FILE CLASS: 57002
	WORK UNIT: ITB - COMPUTER CRIMES UNIT	COUNTY: GRAND TRAVERSE

COMPLAINANT: PRESQUE ISLE SHERIFF		TELEPHONE NO:	
ADDRESS: STREET AND NO: 2075 CASS RD	CITY: TRAVERSE CITY	STATE: MI	ZIP CODE:
INCIDENT STATUS: OPEN			

DE X 1 PRIVACY

SUMMARY:

On 10/25/21, Deputy Schmoldt,Presque Isle Co. Sheriff's Office, shipped a cellular phone to the TC CCU office. The property was logged into CCU property and pends further investigation. Also submitted was a signed search warrant.

Incident # - Presque Isle Sheriff 7678-21
OIC: Deputy Schmoldt
Email / Phone #: resoff@oasd.com 231-622-1524

INFORMATION:

Presque Isle SO requested extraction and analysis of all available information contained in the submitted devices, seeking evidence and information related to an ongoing investigation. This information is to include, but is not limited to contact listing, call logs, text messages (SMS, MMS, IM, Chat), online Social chats (Facebook, KiK, Skype etc..) photographs, videos, calendar and web history.

VENUE:

GRAND TRAVERSE COUNTY
2075 CASS RD
TRAVERSE CITY, MI

DATE & TIME:

ON OR AFTER: MON, OCT 25, 2021, AT 1400

COMPLAINANT:

BUSINESS NAME: PRESQUE ISLE SHERIFF CODE: POLICE AGENCY

MICHIGAN DEPARTMENT OF STATE POLICE	ORIGINAL DATE: Mon, Oct 25, 2021	INCIDENT NO: CCU-0003238-21
SUPPLEMENTAL INCIDENT REPORT 0001	SUPPLEMENTARY DATE: Thu, Oct 28, 2021	FILE CLASS: 57002

INCIDENT STATUS:
OPEN

DE X 1 PRIVACY

NO JOURNALS

INFORMATION:

The following supplement will outline the forensic acquisition and analysis of the submitted property conducted from October 27-28, 2021. The device was analyzed for video footage that specifically occurred on October 14, 2021 at approximately 1514 hours.

AUTHORITY:

My authority to complete the forensic data extraction and analysis is supported by a signed search warrant.

PRE-ACQUISITION:

The following information regarding property item #1 was noted.

Device Make:	Apple
Device Model:	iPhine SE (A2275)
Device S/N:	F17CXBLTPLJN
Device SIM:	A Cricket SIM was accompanied with the device
Device Color:	White
Device Passcode:	No passcode enabled

SOFTWARE UTILIZED:

The following forensic software was used during the forensic acquisition and analysis of the submitted device. Graykey [OS version 1.6.17 and App Bundle version 2.1.12], Cellebrite UFED 4PC [version7.49.0.2] and Cellebrite Physical Analyzer [version 7.49.0.28]

DEVICE SIGNAL ISOLATION:

Prior to performing a data extraction on the listed device, I verified that "airplane mode" was enabled on the device.

FINDINGS:

The MSISDN associated with the submitted device is (989)306-2633.
Videos taken on October 14, 2021 at approximately 1514 hours were located and placed on a disk for OIC review.

REPORTS:

The full application report was too large to fit on a disk. A disk containing video footage of possible interest to the investigation was placed on a disk for OIC review.

EXTERNAL DOCUMENTS:

Mobile Device Examination & Seizure Checklist for property item #1

STATUS:

OPEN PENDING RELEASE OF PROPERTY

EXHIBIT H

CHASKEY – HORN EMAIL Correspondence

From: Mindy Horn <mhorn@oacsd.com>
Sent: Wednesday, February 16, 2022 11:17 AM
To: erinjchaskey@hotmail.com <erinjchaskey@hotmail.com>; Mindy Horn <mhorn@oacsd.com>
Subject: Basketball Games

Erin,

To confirm from our phone call earlier this morning, I have no issue with you attending Jackson's home basketball games. The remainder of the no-trespass order will stay as written pending the outcome of the court proceedings.

Take care,
Mindy

Onaway Area Community Schools,4549 M-33, Onaway, MI, www.onawayschools.com

EXHIBIT I

Unpublished Court Opinions

2014 WL 6886330
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

DEARBORN TREE SERVICE, INC., Plaintiff,

v.

GRAY'S OUTDOORSERVICES, LLC, et al., Defendants.

Civil Action No. 13–cv–12584.
|
Signed Dec. 4, 2014.

Attorneys and Law Firms

Brian A. Hall, Traverse Legal, Traverse City, MI, Shawn H. Head, Dean Koulouras, Law Offices of Dean Koulouras, Livonia, MI, for Plaintiff.

Gary D. Hooper, Hooper Law Partners, LLC, Atlanta, GA, Joel H. Kaufman, Farmington Hills, MI, James M. Jernigan, Law Office of James M. Jernigan PLLC, Dearborn, MI, for Defendants.

OPINION AND ORDER DENYING DEFENDANTS' MOTION TO DISQUALIFY COUNSEL [94] AND SECOND MOTION TO STRIKE [109]

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter comes before the Court on DefendantsTreeservicemarketing.com, Inc. and Brandon Lombardo's Motion to Disqualify Plaintiff's Counsel (docket no. 94) and Second Motion to Strike the Affidavit of Kayleigh Burden (docket no. 47–8), attached to Plaintiff's Motion to Compel (docket no. 47) as "Exhibit G" (docket no. 109). Plaintiff responded to Defendants' Motions (docket nos. 100 and 113), and Defendants replied to Plaintiff's Responses (docket nos. 101 and 114). The Motions have been referred to the undersigned for consideration. (Docket nos. 102 and 110.) The parties have fully briefed the Motions; the undersigned has reviewed the pleadings and dispenses with oral argument pursuant to Eastern District of Michigan Local Rule 7.1(f) (2). The Court is now ready to rule pursuant to 28 U.S.C. § 636(b)(1)(A).

I. Background

Plaintiff Dearborn Tree Service, Inc., a provider of tree and outdoor landscaping services, initiated this action on June 13, 2013 against Defendants Gray's Outdoorservices, LLC, its owner, Thomas Gray, Treeservicemarketing.com, Inc. (TSM), and its owner, Brandon Lombardo. (*See* docket no. 1.) Plaintiff alleges that DefendantTreeservicemarketing.com is a customer lead generation business for tree care professionals and that Defendant Gray's Outdoorservices provides tree care and other related services, is a registered contractor with DefendantTreeservicemarketing.com, and pays DefendantTreeservicemarketing.com for customer leads and other services. (Docket no. 43 ¶¶ 10–11.) Plaintiff's Amended Complaint sets forth claims of Cybersquatting, False Designation of Origin, Business Defamation, Unfair Competition, and Concert of Action against Defendants. (*See* docket no. 43.) Essentially, Plaintiff alleges that Defendants intentionally copied and used Plaintiff's service mark in conjunction with the domain names "dearborntreeservice.com" and "dearborntreeservices.net" to divert customers from Plaintiff and profit from Plaintiff's goodwill and reputation in the community. (*Id.*) Plaintiff seeks damages and injunctive relief. (*Id.*)

Plaintiff served Defendants TSM and Lombardo with Interrogatories and Requests for Production of Documents on December 23, 2013. (Docket no. 94 at 2; docket no. 100 at 9.) Defendants TSM and Lombardo responded to Plaintiff's discovery requests on January 22, 2014. (*Id.*) Plaintiff's Interrogatories and Defendants' responses relevant to the instant Motions are:

> ***Plaintiff's Interrogatory No. 5:*** Identify any entity in which Defendant TSM and/or Lombardo have any ownership interest. For each entity, please identify the purpose of such entity.
>
> *Defendant TSM's Response:* TSM has no interest in any other entity.
>
> *Defendant Lombardo's Response:*
>
> Lombardo Management, Inc....
>
> Emachinery.com, Inc.
>
> This entity is dormant and is not operating.

CRM Service Pro, Inc.

This entity is dormant and is not operating.

***2** Contractorstop.com, Inc.

This entity is dormant and is not operating.

Bestwebpagemarketing.com, Inc.

This entity is dormant and is not operating.

TreeServiceMarketing.com, Inc.

This entity is dormant and is not operating.

LMG Capital, LLC ...

Treejob.com, Inc.

This entity was dissolved on April 26, 2007.

Plaintiff's Interrogatory No. 6: Identify all lawsuits, arbitrations or adversarial proceedings in which You have been involved, as named Plaintiff or Defendant, Complainant or Respondent, or otherwise, from inception to present. Please include the parties of each proceeding, the jurisdiction, and the case number/proceeding number.

Defendant TSM's Response: To my knowledge, TSM has not been involved in any lawsuits.

Defendant Lombardo's Response: To my knowledge, I have not been involved in any lawsuits other than a suit in the state of Texas involving a land purchase in approximately 2004. I have no other information on that lawsuit.

(Docket no. 100–2 at 5; docket no. 100–3 at 4–5.)

Also relevant is Plaintiff's Request for Production (RFP) No. 25, which asked Defendants to "[p]roduce a list of all domain names registered by Defendants since inception." (Docket no. 94 at 2.) In response, Defendants produced a list of approximately one thousand domains owned by Defendant TSM, includingdearborntreeservice.com, treeservice.com, mariettatreeservice.com, treejob.com, atlanta-tree.com, andatlantatreeservice.com. (*Id.* at 2–3.)

Allegedly, Plaintiff was suspicious of Defendants' response to Interrogatory No. 5 that Defendant TSM was "dormant and [ ] not operating." (Docket no. 100 at 10.) Plaintiff claims that the response was inconsistent with statements made in settlement discussions between Plaintiff's counsel and Defendants' counsel. (*Id.* at 10–11.) Plaintiff also believed that Defendants were untruthful in their responses to Interrogatory No. 6 when Plaintiff discovered an amended complaint filed in a lawsuit in 2010 by Tracey Langston and Marietta Tree Service, Inc. in the Cobb County, Georgia Superior Court that named both Defendant TSM and Defendant Lombardo as defendants. (*Id.* at 10; docket no. 100–4.)[1,2] Plaintiff asserts that because of Defendants' alleged untruthful discovery responses, failure to respond to Plaintiff's discovery requests, and failure to participate in discovery in good faith, Plaintiff and Plaintiff's counsel had a duty to further investigate Defendants. (Docket no. 100 at 13.)

To aid with this investigation, Plaintiff's counsel, Shawn H. Head, enlisted the services of Kayleigh Burden, a legal assistant who worked for a law firm that shared office space with Plaintiff's counsels' law firm. (Docket no. 100 at 13; docket no. 94–1 at 4.) On March 26, 2014, Plaintiff's counsel asked Ms. Burden to contact the telephone numbers posted on the following websites:dearborntreeservice.com, mariettatreeservice.com, treejob.com, atlanta-tree.com, andatlantatreeservice.com. (Docket no. 94–1 at 7, 10; *see* docket no. 47–8.) According to Defendants, the websites and their associated telephone numbers were owned by Defendant TSM or a Lombardo-related entity. (Docket no. 94 at 4.) Defendants assert that two of the telephone numbers direct calls to a call center forTreeservice.com, and the other two telephone numbers callTreejob.com offices in Atlanta, Georgia. (Docket no. 94–2 ¶ 4.) Ms. Burden made the telephone calls on a speaker phone, and the calls were recorded on Plaintiff's counsel's cellular telephone. (Docket no. 94–1 at 6, 8; *see* docket no. 94–1 at 24–50.)

***3** Plaintiff's counsel provided Ms. Burden with a two-page, typed list of questions to ask the persons who answered the telephone at the numbers provided. (Docket no. 94–1 at 6, 7, 11.) Plaintiff's counsel was also present during Ms. Burden's telephone conversations and verbally instructed her to ask questions in addition to those on the list he provided. (*Id.* at 6, 8.) Some of the questions asked by Ms. Burden were: "who is it, then, that you work for;" "is this a call center that answers for several different companies;" "is the company called 'Stericycle Communication Solutions;' " "I was just wondering if your company was a referral service or if they perform tree services directly;" "who is the owner of your company;" "What's the name of your company;" "Is there any association with Brandon Lombardo;" "is this 'treejob'

or 'treeservice.com;' " and "I'm trying to reach Atlanta Tree Service. Is this the correct number." (Docket no. 94–1 at 24–50.)

In her deposition, Ms. Burden testified that, prior to making the phone calls, she did not know thatTreeservicemarketing.com or Brandon Lombardo were Defendants in this case. (*Id.* at 11.) She also testified that, prior to the phone calls, Plaintiff's counsel told her that he thought they would be contacting call centers and that he had been told that the Defendant corporate entity was no longer doing business. (*Id.* at 18.) Ms. Burden further testified that, when placing the phone calls, she did not identify herself, indicate that she was calling on behalf of an attorney, or state that she was calling to ask about information regarding a lawsuit. (*Id.* at 14, 16.)

After the telephone conversations, Plaintiff's counsel prepared an affidavit for Ms. Burden that summarized the conversations. (Docket no. 94–1 at 8; docket no. 47–8.) Ms. Burden signed the affidavit, which Plaintiff attached to and relies upon in its April 2, 2014 Motion to Compel. (*Id.*) Defendants TSM and Lombardo filed a Response to Plaintiff's Motion to Compel and a separate Motion to Strike the Affidavit of Kayleigh Burden on May 7, 2014. (Docket nos. 62 and 60.) Defendants then filed the instant Motion to Disqualify Counsel on June 18, 2014. (Docket no. 94.) In an October 15, 2014 Order, the Court denied Defendants' Motion to Strike for failure to comply with Eastern District of Michigan Local Rule 7.1. (Docket no. 108.) Defendants corrected the Rule 7.1 violations and filed their Second Motion to Strike the Affidavit of Kayleigh Burden on October 21, 2014. (Docket no. 109.)

In their Motions, Defendants TSM and Lombardo seek an Order (1) disqualifying Plaintiff's counsel Shawn H. Head, his law firm, the Law Offices of Dean Koulouras, Brian A. Hall, and his law firm, Traverse Legal; (2) striking Ms. Burden's affidavit (docket no. 47–8); (3) prohibiting Ms. Burden from offering evidence in this case; (4) prohibiting persons identified in Ms. Burden's affidavit from offering evidence in this case on Plaintiff's behalf; (5) prohibiting Plaintiff's counsel from having any further contact with Defendants' employees and (6) awarding Defendants' counsel attorney's fees and expenses. (Docket no. 94 at 18; docket no. 109 at 3.) According to Defendants, the facts and arguments set forth in their Second Motion to Strike are "virtually identical" to those in support of their Motion to Disqualify Plaintiff's Counsel. (Docket no. 109 at 6.) The Court agrees and will rule on the two Motions concurrently.

II. Governing Law

***4** "A motion to disqualify counsel is the proper method for a party to bring an alleged breach of ethical duties to the court's attention." *DeBiasi v. Charter Cnty. of Wayne,* 284 F.Supp.2d 760, 770 (E.D.Mich.2003) (citations omitted). "A violation of the rules of professional ethics, however, does not automatically necessitate disqualification of an attorney." *El Camino Res., Ltd. v. Huntington Nat'l Bank,* 623 F.Supp.2d 863, 875 (W.D.Mich.2007) (citation omitted). Disqualification is an "extreme sanction" which should be used only when there is a "reasonable possibility that some specifically identifiable impropriety actually occurred, and where the public interest in requiring professional conduct by an attorney outweighs the competing interest of allowing a party to retain counsel of his choice." *DiBiasi,* 284 F.Supp.2d at 770 (citations and internal quotation marks omitted). The movant bears the burden of proving the grounds for disqualification of counsel. *In re Valley–Vulcan Mold Co.,* 237 B.R. 322, 337 (B.A.P. 6th Cir.1999) (citation omitted); *Hutto v. Charter Twp. of Clinton,* No. 12–CV–12880, 2014 WL 1405216, at *1 (E.D.Mich. Apr.11, 2014) (citation omitted).

Before the Court can determine whether disqualification is appropriate, it must determine whether a violation of the professional ethics rules has occurred. The Michigan Rules of Professional Conduct ("MRPC") govern attorneys' ethical responsibilities in this state, and have been adopted by this Court for regulating the conduct of counsel who practice before it. *See* E.D. Mich. LR 83.20(j). Defendants TSM and Lombardo rely on Michigan Rules of Professional Conduct 4.2, 5.3, and 8.4 to support their Motion to Disqualify and Motion to Strike.[3]

Rule 4.2, Communication With a Person Represented by Counsel, provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

MRPC 4.2.

Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, provides:

> With respect to a nonlawyer employed by, retained by, or associated with a lawyer:
>
> (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
>
> > (1) the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved; or
> >
> > ***5** (2) the lawyer is a partner in the law firm in which the person is employed or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MRPC 5.3.

Rule 8.4, Misconduct, provides:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;
>
> (c) engage in conduct that is prejudicial to the administration of justice;
>
> (d) state or imply an ability to influence improperly a government agency or official; or
>
> (e) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law.

MRPC 8.4.

III. Analysis

Defendants assert that Plaintiff's counsel, Shawn H. Head, violated Michigan Rules of Professional Conduct 4.2, 5.3, and 8.4 when he enlisted the services of Ms. Kayleigh Burden to call telephone numbers that he knew would result in direct contact with Defendants' employees or agents to obtain evidence regarding the subject matter of this case. (Docket no. 94 at 9.) Defendants further assert that Plaintiff's counsel's ethics rule violations warrant the disqualification of Plaintiff's counsel, the striking of Ms. Burden's affidavit, and the prohibition of any evidence gained through those phone calls. (*Id.* at 11.)

Plaintiff's counsel contends that he did not commit misconduct, and, therefore, neither he nor his co-counsel should be disqualified from this matter or assessed any other sanctions. (Docket no 100 at 4, 6.) Specifically, Plaintiff's counsel asserts that neither he nor Ms. Burden attempted to contact a party known to be represented in this matter or any of Defendants' employees or agents with managerial authority or persons whose acts or omissions could be imputed to Defendants. (*Id.* at 4.) Plaintiff's counsel elaborates that he asked Ms. Burden to make the telephone calls to verify Defendants' discovery response that Defendant TSM was dormant and not operating and to determine whether it was still paying a call center to answer its calls. (*Id.* at 13–14.) Plaintiff's counsel claims to have believed that if Defendant TSM was still operating, Ms. Burden would be speaking to employees of Stericycle, a non-party call center identified by Defendants in their response to Plaintiff's Interrogatory no. 10. (*Id.* at 14; docket no. 100–2 at 6.)

First and foremost, it is undisputed that Ms. Burden is the person who called the telephone numbers posted on Defendants' websites as directed by Plaintiff's counsel. It is common for lawyers to enlist the services of assistants, such as investigators, secretaries, paralegals, and law student interns for use in their practice. MRPC 5.3 cmt. A supervisory lawyer must make reasonable efforts to ensure that the conduct of his legal assistant is compatible with the professional ethics standards that govern the lawyer's conduct. MRPC 5.3(b). A lawyer is responsible for the conduct of his assistant that would constitute a violation of the rules of professional conduct if engaged in by a lawyer if "the lawyer orders or, with knowledge of the relevant facts and the specific conduct, ratifies the conduct involved." MRPC 5.3(c)(1). Accordingly, Plaintiff's counsel, Mr. Head, would be responsible for Ms. Burden's conduct if it would have violated the professional ethics rules if executed by a lawyer.

***6** Defendants assert that Ms. Burden's conduct would have violated Michigan Rule of Professional Conduct 4.2 and that her conduct should be imputed to Plaintiff's counsel. Rule 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter" without consent or authorization. MRPC 4.2. The parties dispute whether Ms. Burden communicated with a represented party.

To support their position, Defendants submitted the Declaration of Blake Linnekin, an exhibit attached to the Motion to Disqualify, in which Mr. Linnekin describes the telephone numbers that Ms. Burden contacted:

> The phone numbers (800) 515–7537, (888)650–8733, (770)873–3562, and (404)8733562 are phone numbers that are used by our companies in marketing tree service work. The phone numbers (800)515–7537 and (888)650–8733 areTreeServiceMarketing.com, Inc phone numbers that direct calls to a call center forTreeservice.com. The numbers (770)873–3562, and (404)873–3562 areTreejob.com phone numbers that actually call local offices here in Atlanta Georgia. If you call those numbers you'll speak to employees of our company.

(Docket no. 94–2 ¶ 4.) Based on this description, it is clear that Ms. Burden did not communicate with Defendant Lombardo; however, it is not clear whether she made contact with DefendantTreeservicemarketing.com, Inc. (TSM). First, there is no information in Mr. Linnekin's Declaration regarding who he is or how he is connected to Defendants. Also, Mr. Linnekin asserts that two of the telephone numbers are answered by a call center, which was identified in Plaintiff's response as non-party Stericycle, Inc. Mr. Linnekin asserts that the other two telephone numbers are directed toTreejob.com's local offices in Atlanta; however, according to Defendant Lombardo's discovery responses, Treejob.com, Inc. is a non-party entity in which Defendant Lombardo has an ownership interest, but was dissolved on April 26, 2007. Lastly, Mr. Linnekin asserts that if someone calls those telephone numbers, that person would speak to "employees of our company." Mr. Linnekin does not specify whether a caller would reach company employees at all four telephone numbers or only the last two numbers. Furthermore, it is uncertain what company Mr. Linnekin is referring to when he says, "employees of our company." Based on the Court's review of the pleadings, this could be any one of a number of companies, such as Defendant TSM, Treejob.com, Inc., Lombardo Management, Inc., or any one of the other non-party entities purportedly owned by Defendant Lombardo. At this juncture, there is no evidence that Ms. Burden communicated with a represented party; thus, her actions would not have violated MRPC 4.2 if otherwise performed by an attorney.

Assuming, *arguendo,* that Mr. Linnekin is referring to Defendant TSM as "our company," thereby alleging that Ms. Burden directly communicated with Defendant TSM's employees or agents, the comment section accompanying MRPC 4.2 is instructive. It states that "[i]n the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." MRPC 4.2 cmt. Notably, Defendants have failed to provide to the Court any information regarding the identity of the persons with whom Ms. Burden communicated, including their positions within the company or their job responsibilities. Moreover, Defendants have not set forth any argument or explanation as to how the verbal conduct of those persons could be imputed to Defendant TSM or considered an admission of Defendant TSM. The Court is not willing to speculate in order to develop Defendants' arguments on their behalf. Accordingly, the Court finds that Ms. Burden's actions would not have violated MRPC 4.2 if they had been performed by an attorney, and, in turn, Plaintiff's counsel has not violated Michigan Rules of Professional Conduct 4.2, 5.3, or 8.4. Defendants' Motion to Disqualify and Motion to Strike (docket nos. 94 and 109) will be denied with regard to this issue.

***7** Defendants set forth two ancillary arguments in support of their Motions. First, Defendants allege that Plaintiff's counsel violated the Consent Protective Order entered in this matter by providing Ms. Burden with five domain names from the list of domain names produced by Defendant TSM in response to Plaintiff's RFP no. 25, without obtaining from her an executed copy of the Agreement of Confidentiality. (Docket no. 94 at 8, 12; *see* docket no. 42.) Plaintiff argues that Defendants' domain names and the telephone numbers associated with those domains are not confidential because they are publically available, published information; the Court agrees. (Docket no. 100 at 18.) Indeed, the list of domain names that Defendant TSM produced in response to Plaintiff's RFP is confidential; however, the domain

names themselves are not. Plaintiff's counsel did not provide Ms. Burden with Defendant TSM's discovery response; he provided Ms. Burden with five web domain names and the telephone numbers that were posted on those websites. There is no evidence that Plaintiff's counsel disclosed to Ms. Burden that those domain names were associated with Defendants. Therefore, Defendants' Motions are denied with regard to this issue.

Lastly, Defendants assert that Plaintiff's counsel should be disqualified because he "may have violated" Michigan's Eavesdropping Statute, Michigan Compiled Laws § 750.539, et seq., by listening in on and recording Ms. Burden's telephone calls. (Docket no. 94 at 16–17.) The statute provides that:

> [a]ny 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.

Mich. Comp. Laws § 750.539c. " 'Eavesdrop' or 'eavesdropping' means 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. The Michigan Court of Appeals has interpreted MCL 750.539c to permit a party to the conversation to record a private conversation without the consent of the other parties, but prohibits a party from allowing or employing a third party to do so. *Dickerson v. Raphael,* 222 Mich.App. 185, 564 N.W.2d 85, 91 (Mich.Ct.App.1997) (citing *Sullivan v. Gray,* 117 Mich.App. 476, 324 N.W.2d 58, 60–61 (Mich.Ct.App.1982)).

It is undisputed that Plaintiff's counsel was present during and overheard the telephone calls that Ms. Burden made to the numbers associated with Defendants' web domains, but a question remains as to whether those conversations were private. Specifically, the issue is whether the persons answering the telephones had a reasonable expectation of privacy. *See People v. Stone,* 463 Mich. 558, 621 N.W.2d 702, 704–05 (Mich.2001) (Under Michigan's Eavesdropping Statute, " 'private conversation' means a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance."). In a conclusory fashion, Defendants assert that the telephone representatives had an expectation that their conversations would be private, but fail to provide any facts, legal authority, or analysis to support their conclusion. Defendants' underdeveloped argument that Plaintiff's counsel "may have violated" Michigan's Eavesdropping Statute sounds in speculation. Consequently, the Court will deny Defendants' Motions with regard to this issue.

***8 IT IS THEREFORE ORDERED** that Defendants' Motion to Disqualify Plaintiff's Counsel [94] and Second Motion to Strike the Affidavit of Kayleigh Burden [109] are **DENIED.**

NOTICE TO THE PARTIES

Pursuant to Federal Rule of Civil Procedure 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

All Citations

Not Reported in F.Supp.3d, 2014 WL 6886330

Footnotes

1 In its Response to the instant Motion, Plaintiff contends that Defendants' counsel violated Michigan Rule of Professional Conduct 3 .4 in submitting these allegedly false responses to Plaintiff's discovery requests and seeks an order of sanctions against Defendants and Defendants' counsel. (Docket no. 100 at 11, 26.) The undersigned will not address this issue, as it is not properly before the Court.

2 In their Reply to Plaintiff's Response, Defendants explain that although Defendants were named in the aforementioned amended complaint, the plaintiffs in that case never sought leave to amend their complaint and never attempted to serve Defendants with that complaint. (Docket no. 101 at 5.)

3 Defendants also purport to rely on MRPC 4.1, 4.3, and 4.4 to support their Motions but fail to set forth any cohesive arguments as to how Plaintiff's counsel may have violated these rules; it is not the Court's responsibility to scour the pleadings to piece together Defendants' arguments for them.

2014 WL 6886330

End of Document

463 Mich. 558
Supreme Court of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Brian James STONE, Defendant–Appellant.

Docket No. 114227.
|
Calendar No. 4.
|
Jan. 30, 2001.

Synopsis

Defendant, who was charged with eavesdropping on former wife's private conversations and divulging unlawfully obtained information, moved to quash the information. The St. Clair Circuit Court, James P. Adair, J., granted motion, finding that wife's conversations on cordless telephone were not "private conversations" within meaning of eavesdropping statute. State appealed. The Court of Appeals, 234 Mich.App. 117, 593 N.W.2d 680, reversed, and defendant appealed by leave granted. The Supreme Court, Michael F. Cavanagh, J., held that: (1) as a matter of law, it was not unreasonable for defendant's former wife to expect that her cordless telephone conversations were private, and (2) wife's testimony provided a sufficient basis for magistrate to find probable cause that defendant violated eavesdropping statute.

Affirmed.

Attorneys and Law Firms

****703 *559** Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Peter R. George, Prosecuting Attorney, and Timothy K. Morris, Assistant Prosecuting Attorney, Port Huron, MI, for the people.

Lord & Guilliat (by Kenneth M. Lord), Port Huron, MI, for the defendant-appellant.

Opinion

MICHAEL F. CAVANAGH, J.

This criminal prosecution under the Michigan eavesdropping statutes requires us to decide whether a conversation held on a cordless telephone is a "private conversation" as that term is used in the statutes. We conclude that, although current technology may allow cordless telephone conversations to be intercepted, such conversations nonetheless can be private conversations under the eavesdropping statutes. Accordingly, we affirm the judgment of the Court of Appeals.

I

The facts underlying this case occurred while the divorce of defendant Brian Stone from Joanne Stone ***560** was pending. During their marriage, the Stones lived next door to Ronald Pavlik. In 1995, defendant became estranged from his wife and moved out of the couple's home, though Joanne continued to live there. After defendant moved from the couple's home, Pavlik told defendant that he owned a police scanner, and that he could listen to, and had been recording, calls Joanne made on her cordless telephone. Defendant asked for the tapes, and told Pavlik to "keep on top of things, tape and find out what was going on."

Joanne suspected that her calls were being monitored because certain people had information about her that they should not have had. In one instance, a friend of the court investigator told Joanne that defendant had told the investigator that he had a tape recording proving that Joanne was pregnant and planning to leave the state. According to Joanne, she had only mentioned these matters in a telephone conversation with a friend. Because of her suspicions, in 1996, Joanne contacted the State Police.

After interviewing several people, the police obtained search warrants for both defendant's and Pavlik's residences. Between the two homes, they found approximately fifteen tapes containing recordings of Joanne's telephone conversations with her family, her friends, and her attorney.

Defendant was charged under the eavesdropping statutes and was bound over for trial. He brought a motion to quash the information, which the circuit court granted because it believed that a person conversing on a cordless telephone could not reasonably expect her conversation to be a "private conversation." The people appealed, and the Court of Appeals reversed, reasoning that the circuit court erred by ***561**

relying on the concept of a reasonable expectation of privacy. 234 Mich.App. 117, 593 N.W.2d 680 (1999). Initially, this Court held this case in abeyance, pending our resolution of *Dickerson v. Raphael,* 461 Mich. 851 (1999). Thereafter, we granted leave to appeal. 461 Mich. 1002, 610 N.W.2d 928 (2000).

II

Because this case arrives here on defendant's motion to quash the information, we must review the magistrate's decision to bind defendant over for trial. A ****704** magistrate has a duty to bind over a defendant for trial if it appears that a felony has been committed and there is probable cause to believe that the defendant committed that felony. MCL 766.13; MSA 28.931. Absent an abuse of discretion, reviewing courts should not disturb a magistrate's determination. *People v. Doss,* 406 Mich. 90, 101, 276 N.W.2d 9 (1979). In the instant case, defendant argues that the magistrate's decision to bind him over was an abuse of discretion because his alleged conduct does not fit within the scope of the eavesdropping statutes. Determining the scope of a criminal statute is a matter of statutory interpretation, subject to de novo review. *People v. Denio,* 454 Mich. 691, 698, 564 N.W.2d 13 (1997).

A. the Eavesdropping Statutes

Defendant was charged under M.C.L. § 750.539c; MSA 28.807(3), 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 ***562** 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.

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); MSA 28.807(1)(2). In the present case, the facts as alleged indicate that Joanne Stone's cordless telephone conversations were wilfully recorded by Ronald Pavlik, without her consent, at defendant's prompting. Because this case involves such alleged wilful "record[ing]," the statutory prohibition against wilful "overhear[ing]" is not before us. Instead, the question before us is whether defendant is correct that the conversations eavesdropped on could not be "private conversations" because they were held on a cordless telephone.

B. the Meaning of "Private Conversation"

To answer this question, we must first define "private conversation." Determining this phrase's meaning requires us to construe the eavesdropping statutes, and the primary goal of statutory construction is to give effect to the Legislature's intent. *People v. Morey,* 461 Mich. 325, 330, 603 N.W.2d 250 (1999). To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed. *Id.*

***563** Here, the plain language of the eavesdropping statutes does not define "private conversation." This Court may consult dictionaries to discern the meaning of statutorily undefined terms. *Id.* However, recourse to dictionary definitions is unnecessary when the Legislature's intent can be determined from reading the statute itself. *Renown Stove Co. v. Unemployment Compensation Comm.,* 328 Mich. 436, 440, 44 N.W.2d 1 (1950).

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); MSA 28.807(1)(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 ****705** 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,* 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.

Although this definition of "private conversation" facially resembles standards that the United States Supreme Court has used in Fourth Amendment cases, ***564** those standards developed in the context of law enforcement activity seeking to detect criminal behavior. See *Katz v. United States,* 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J.). However, our definition of "private conversation" emanates from our eavesdropping statutes, which, by their own terms, do not apply to law enforcement personnel acting within their lawful authority. MCL 750.539g(a); MSA 28.807(7)(a). Because of these differences, we do not rely on Fourth Amendment jurisprudence, and do not incorporate it into our statute. Rather, we rely only on the eavesdropping statutes' language to define the term "private conversation."

C. private Conversations on Cordless Telephones

Defendant invites this Court to hold that, as a matter of law, a conversation held on a cordless telephone cannot be a private conversation. He relies on language in the Court of Appeals decision in *Dickerson v. Raphael,* 222 Mich.App. 185, 194, 564 N.W.2d 85 (1997), rev'd 461 Mich. 851, 601 N.W.2d 108 (1999), to argue that a cordless telephone works by sending a radio-like signal from the telephone's handset to its base, and that users of cordless telephones know that these signals can be intercepted by devices including other cordless telephones and police scanners. This knowledge, he concludes, "renders unreasonable an expectation of privacy" in a cordless telephone conversation. *Id.*

We decline defendant's invitation because such an interpretation would negate an express protection in the eavesdropping statutes. Specifically, M.C.L. § 750.539c; MSA 28.807(3) protects private conversations against eavesdropping accomplished through ***565** the wilful use of "any device." This protection indicates that the Legislature considered that a conversation can be private, yet can also be susceptible to eavesdropping through any device. Otherwise, it would have had no need to protect private conversations against such an intrusion. Indeed, were defendant correct that a conversation that a person knows is susceptible to eavesdropping through any device is not private, then the statutory protection against eavesdropping accomplished through any device would be null. This is because a conversation susceptible to eavesdropping with any device would, because of that characteristic, fall outside the protected class of private conversations, leaving no "private conversation" to be protected from eavesdropping with any device. Whenever possible, courts must give effect to every word, phrase, and clause in a statute. *Morey, supra* at 330, 603 N.W.2d 250. Therefore, to give effect to the statutory protection against eavesdropping accomplished through "any device," we must reject defendant's position.

Further, although a person who talks on a cordless telephone may know that technology makes it possible for others to overhear the conversation, that person also can presume that others will obey the criminal law. See *Papadimas v. Mykonos Lounge,* 176 Mich.App. 40, 47, 439 N.W.2d 280 (1989); Prosser & Keeton, Torts (5th ed.), § 33, p. 201. Thus, although the victim may have known that her cordless telephone conversations could be wilfully intercepted with a device, she also could presume that others would not eavesdrop on her cordless telephone conversations using any device because doing so is a felony under the eavesdropping ****706** statutes, and is additionally prohibited ***566** by federal law. See 47 USC 1001 *et seq.* As a matter of law, it was not unreasonable for her to expect that her cordless telephone conversations were private.

We recognize that our holding differs with many decisions concluding that cordless telephone users cannot expect privacy in their telephone conversations. See, e.g., *People v. Wilson,* 196 Ill.App.3d 997, 1009–1010, 143 Ill.Dec. 610, 554 N.E.2d 545 (1990); *Salmon v. State,* 206 Ga.App. 469, 470, 426 S.E.2d 160 (1992), *superseded by statute,* Ga Code Ann § 16–11–66.1; *McKamey v. Roach,* 55 F.3d 1236, 1239–1241 (C.A.6, 1995). However, these cases were decided under statutes with language different from that of the Michigan eavesdropping statutes governing our decision in this case. Notably, other state courts have held that cordless telephone users can expect privacy in their telephone conversations when those states' governing statutes have so provided. See, e.g., *State v. Faford,* 128 Wash.2d 476, 486, 910 P.2d 447 (1996); *State v. Bidinost,* 71 Ohio St.3d 449, 460, 644 N.E.2d 318 (1994). In addition, although certain federal decisions, including *McKamey, supra,* held that there cannot be an expectation of privacy in cordless telephone conversations, federal law was subsequently amended to grant strict privacy protections to cordless telephone conversations. See 47 USC 1001. Thus, although our decision differs with several foreign authorities, it accords with current federal law, and accords full meaning to the Michigan eavesdropping statutes.

Under those statutes, whether a person can reasonably expect privacy in a conversation generally will present a question of fact. See *Dickerson, supra* at 851. For example, although a

person is not precluded from having a reasonable expectation of privacy in a ***567** conversation held on a cordless telephone, a person who converses on a party line may not reasonably expect the conversation to be private because perhaps that person should know that others will be able to listen to the conversation. Many such conversations may be subject to "casual or hostile intrusion or surveillance," M.C.L. § 750.539a(1); MSA 28.807(1)(1), but the final determination will generally be for the factfinder.

D. the Instant Case

In the instant case, we conclude that defendant was properly bound over for trial. Defendant argues that Joanne Stone could not have expected privacy in her cordless telephone conversations because of her particularized knowledge that Pavlik could intercept them. He bases his argument on an averment in the warrant affidavit, which stated that Pavlik had told Joanne that his scanner could intercept cordless telephone conversations. However, Joanne's testimony at the preliminary examination was that Pavlik had told her that he could listen to police signals, not cordless telephone conversations. Although this evidence is conflicting, Joanne's testimony provided a sufficient basis for the magistrate to find probable cause that defendant committed the charged felony. The conflicts in the evidence must be resolved by the trier of fact, not the magistrate. See *People v. Hill,* 433 Mich. 464, 469, 446 N.W.2d 140 (1989). Because the eavesdropping statutes do not preclude cordless telephone conversations from being "private," and because the evidence at the preliminary examination was sufficient for the magistrate to find probable cause of ***568** defendant's guilt, the magistrate did not abuse his discretion by binding defendant over for trial.

III

In conclusion, although technology provides a means for eavesdropping, the Michigan eavesdropping statutes specifically protect citizens against such intrusions. Therefore, a person is not unreasonable to expect privacy in a conversation although he knows that technology makes it possible for others to eavesdrop on such conversations. The judgment of the Court of Appeals is affirmed.

****707** CORRIGAN, C.J., and WEAVER, MARILYN J. KELLY, TAYLOR, YOUNG, and MARKMAN, JJ., concurred with MICHAEL F. CAVANAGH, J.

All Citations

463 Mich. 558, 621 N.W.2d 702

End of Document

489 Mich. 851
Supreme Court of Michigan.

Gregory J. **BOWENS**, Paula M. Bridges, and Gary A. Brown, Plaintiffs–Appellees,
and
Robert B. Dunlap and Phillip A. Talbert, Plaintiffs,
v.
ARY, INC., d/b/a Aftermath Entertainment, Phillip J. Atwell, Chronic 2001 Touring, Inc., Geronimo Film Productions, Inc., and Andre Young, Defendants–Appellants,
and
Amazon.Com, Inc., AOL Time Warner, Inc., Barnes & Noble, Inc., Barnes & Noble.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., HMV 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, L.L.C., Metropolitan Entertainment 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 WH Smith, P.L.C., Defendants.

Docket No. 140296.
|
COA No. 282711.
|
March 18, 2011.

Prior report: 2009 WL 3049580.

Order

On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we hereby REVERSE in part the September 24, 2009 judgment of the Court of Appeals and we REINSTATE the December 4, 2007 summary disposition order of the Wayne Circuit Court.

After ten years of litigation—during which time this case has been summarily dismissed, reversed and remanded to the trial court for additional discovery, summarily dismissed for a second time, and reversed and remanded yet again—our review of this matter is limited to plaintiffs' one remaining claim. Specifically, plaintiffs allege that defendants violated Michigan's eavesdropping statute, MCL 750.539a *et seq.*, which prohibits "[a]ny person who is present or who is not present during a *private conversation* [from] willfully us[ing] any device to eavesdrop upon the conversation without the consent of all parties thereto...." MCL 750.539c (emphasis added). "[P]rivate conversation' means a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance." *People v. Stone,* 463 Mich. 558, 563, 621 N.W.2d 702 (2001). After considering all the evidence of record in the light most favorable to plaintiffs, the non-moving party, *Quinto v. Cross & Peters Co.,* 451 Mich. 358, 362, 547 N.W.2d 314 (1996), we conclude that no genuine issue of material fact exists to warrant a trial concerning whether the conversation at issue constituted a "private conversation."

As the Court of Appeals dissenting opinion correctly asserted, under the circumstances presented, "no reasonable juror could conclude that plaintiffs had a reasonable expectation of privacy in the recorded conversation" at issue. The following evidence compels this conclusion: (1) the general locale of the meeting was the backstage of the Joe Louis arena during the hectic hours preceding a high-profile concert, where over 400 people, including national and local media, had backstage passes; (2) the concert-promoter defendants were

not receptive to the public-official plaintiffs' requests and, by all accounts, the parties' relationship was antagonistic; (3) the room in which plaintiffs chose to converse served as defendants' operational headquarters with security personnel connected to defendants controlling the open doors; (4) there were at least nine identified people in the room, plus unidentified others who were free to come ***844** and go from the room, and listen to the conversation, as they pleased; (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including a crew from MTV and a crew specifically hired by defendants to record backstage matters of interest; (6) and video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present, thereby establishing that at least one cameraman was openly and obviously filming during the course of what plaintiffs have characterized as a "private conversation." Given these facts, plaintiffs could not have reasonably expected that their conversation with defendants would "be free from casual or hostile intrusion or surveillance." *Stone,* 463 Mich. at 563, 621 N.W.2d 702. To the contrary, the conversation strikes us as one that was uniquely defined by both "casual" and "hostile" "intrusion," and "surveillance." Accordingly, although a reasonable expectation of privacy is "generally" a question of fact, *id.* at 566, 621 N.W.2d 702, no such question reasonably exists in this case.

MARILYN J. KELLY, J. (dissenting).

I respectfully dissent from the Court's order reversing the judgment of the Court of Appeals and reinstating the trial court's order granting defendants' motion for summary disposition. I believe that material questions of fact exist regarding whether plaintiffs could have reasonably expected their conversation with defendants to be private. Accordingly, I would affirm the Court of Appeals.

This case involves application of the Michigan eavesdropping statute[1] to defendants' videotaping of a conversation between plaintiffs and defendants. During that conversation, plaintiffs demanded that a video, which they believed to be unsuitable for a young audience, not be played during an upcoming concert. The concert included performances by Dr. Dre, Snoop Dogg, and Eminem, among others. Defendants did not play the video during the concert. But they used portions of a videotape of the conversation with plaintiffs in a "bonus track" of a DVD of the concert tour, which drew a worldwide audience.

Plaintiffs filed suit alleging, among other things, invasion of privacy, fraud, and eavesdropping. The trial court granted summary disposition to defendants on all of plaintiffs' claims, ruling that plaintiffs did not have a reasonable expectation of privacy in the conversation. The Court of Appeals affirmed the dismissal of plaintiffs' claims with the exception of the eavesdropping claim. It concluded that there were outstanding issues of fact as to whether the conversation was secretly taped and whether plaintiffs had a reasonable expectation that the conversation would be private.[2] We denied defendants' interlocutory application for leave to appeal.[3]

On remand, the trial court again granted summary disposition to defendants. It concluded that plaintiffs did not have a reasonable expectation that the conversation would be private. The Court of Appeals reversed the trial court's decision on the eavesdropping claim, concluding that plaintiffs presented compelling issues of ***845** fact that only a jury may resolve.[4]

A majority of this Court holds that plaintiffs could not have reasonably expected that their conversation with defendants would be free from casual or hostile intrusion or surveillance. I disagree. MCL 750.539c prohibits "[a]ny person who is present or who is not present during a private conversation [from] willfully us[ing] any device to eavesdrop upon the conversation without the consent of all parties thereto...." A "private conversation" is one in which a person reasonably expects to be free from casual or hostile intrusion or surveillance.[5] Whether a conversation is private depends on the intent and reasonable expectation of the plaintiff.[6] And whether a person can reasonably expect privacy in a conversation generally will present a question of fact.[7]

Applying those principles to this case, I cannot conclude that the Court of Appeals clearly erred in holding that issues of fact exist concerning whether the conversation was "private" under the statute. Without question, some portions of a conversation between the parties were openly recorded. But a review of the recorded video footage submitted to the Court reveals that it is quite possible that the conversation at issue was secretly taped. Although defendants contend that the presence of the video camera should have been obvious, there is no footage of the filming itself. It is not clear whether the camera was visible when the contested filming occurred. Moreover, defendants' representatives explicitly acquiesced in plaintiffs' demand that the conversation be held in private. Hence, I believe that a material question of fact

exists concerning whether plaintiffs reasonably expected the conversation at issue to be private. At the very least, it is not a question that this Court should definitively answer as a matter of law.

A majority of the Court finds that six facts compel the conclusion that no reasonable juror could conclude that plaintiffs had a reasonable expectation of privacy: (1) the meeting was held backstage at Joe Louis Arena during the hectic hours preceding a high-profile concert where over 400 people, including national and local media, had backstage passes, (2) the defendant concert-promoters were not receptive to the requests of plaintiffs, who were public-officials, and by all accounts, the relationship was antagonistic, (3) the room in which plaintiffs chose to converse was defendants' operational headquarters, and security personnel connected to defendants controlled the doors, (4) at least nine people in the room, plus others who were unidentified, were free to listen to the conversation and come and go from the room, (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including one from MTV and one specifically hired by defendants to record backstage matters of interest, and (6) video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present.

Several of these facts have no relevance to whether plaintiffs had a reasonable expectation of privacy in their conversation ***846** with defendants. First, the location of the meeting and the fact that many people had backstage passes are irrelevant to whether plaintiffs reasonably expected the conversation to be private. Simply because many people were permitted entry to the room at one time or another does not render a conversation held there open to all of them. Second, the fact that plaintiffs and defendants had an antagonistic relationship is wholly immaterial to whether they engaged in a private conversation. Third, it does not follow as a matter of law that, merely because one party controlled access to the room where the parties conversed, a private conversation did not occur there. Fourth, the fact that camera crews were in the vicinity does not mean that plaintiffs could not reasonably expect a private conversation, especially since defendants explicitly agreed to a private conversation. Fifth, the presence of unidentified people in the room does not mean that the conversation at issue was not private. Rather, it simply establishes that people had access to the room who may or may not have been part of a private conversation.

I believe that the majority erroneously substitutes its judgment for that of the trier of fact. As we stated in *Stone,* "whether a person can reasonably expect privacy in a conversation generally will present a question of fact."[8] I would affirm the judgment of the Court of Appeals and hold that, viewing the evidence in a light most favorable to plaintiffs, there exists a material question of fact with regard to whether the parties' conversation was private.[9] Accordingly, I respectfully dissent.

All Citations

489 Mich. 851, 794 N.W.2d 842 (Mem)

Footnotes

1 MCL 750.539a *et seq.*

2 ***Bowens*** *v. Aftermath Entertainment,* unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005, 2005 WL 900603 (Docket No. 250984).

3 ***Bowens*** *v. Aftermath Entertainment,* 474 Mich. 1111, 711 N.W.2d 751 (2006).

4 ***Bowens*** *v.* ***ARY****, Inc.,* unpublished opinion per curiam of the Court of Appeals, issued September 24, 2009, 2005 WL 900603 (Docket No. 282711).

5 *People v. Stone,* 463 Mich. 558, 563, 621 N.W.2d 702 (2001).

6 *Dickerson v. Raphael,* 461 Mich. 851, 601 N.W.2d 108 (1999).

7 *Stone,* 463 Mich. at 566, 621 N.W.2d 702.

8 *Stone,* 463 Mich. at 566, 621 N.W.2d 702.

9 "A court reviewing a motion for summary disposition must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Radtke v. Everett,* 442 Mich. 368, 374, 501 N.W.2d 155 (1993).

End of Document

461 Mich. 851
(The decision of the Court is referenced in the North Western Reporter in a table captioned “Supreme Court of Michigan Applications for Leave to Appeal.”)
Supreme Court of Michigan

Dorothy Jean Dickerson

v.

Sally Jessy Raphael, Multimedia Entertainment, Inc., John Mroz, Steve Bostwick, G.T.N., John Peak; Dorothy Jean Dickerson v. Sally Jessy Raphael, Multimedia Entertainment, Inc., G.T.N., John Mroz, John Peak, Steve Bostwick

NOS. 109931, 109944. COA No. 172610.
|
July 30, 1999

Synopsis

Prior Report: 222 Mich.App. 185, 564 N.W.2d 85.

Opinion

Disposition: On order of the Court, leave to appeal having been granted and the case having been argued and submitted for decision, we REVERSE, in part, the judgment of the Court of Appeals. Plaintiff was not entitled to a directed verdict because reasonable minds could differ on the question whether the conversation at issue was “private.” The trial court should have instructed the jury that the question whether plaintiff's conversation was private depends on whether she intended and reasonably expected it to be private at the time and under the circumstances involved. Also, the court improperly instructed the jury that “where one reasonably expects the substance of a private conversation to be communicated to others and not remain confidential, it is not a private conversation within the meaning of the eavesdropping statute.” This instruction was erroneous because it focused on the “substance” of plaintiff's conversation. The proper question is whether plaintiff intended and reasonably expected that the *conversation* was private, not whether the subject matter was intended to be private. Finally, the trial court improperly instructed the jury that “a conversation knowingly broadcast by a participant into the public airways is not private.” Again, this is not an accurate statement of the law—a participant may not unilaterally nullify other participants' expectations of privacy by secretly broadcasting the conversation. In light of the erroneous jury instructions, we REMAND the case to Washtenaw Circuit Court for a new trial as to liability. We do not reach the question whether the Court of Appeals properly construed other portions of the eavesdropping statute. MCL 750.539 et seq; MSA 28.807 et seq.

CORRIGAN, J., not participating.

All Citations

461 Mich. 851, 601 N.W.2d 108 (Table), 27 Media L. Rep. 2215

End of Document

2008 WL 544550
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Kenneth T. CARRIER, Plaintiff,

v.

LJ ROSS AND ASSOCIATES, Defendant.

No. 06-14185.
|
Feb. 26, 2008.

Attorneys and Law Firms

Brian P. Parker, Brian P. Parker Assoc., Bingham Farms, MI, for Plaintiff.

Jeffrey C. Turner, Boyd W. Gentry, John P. Langenderfer, Surdyk, Dowd, Dayton, OH, Jeffrey A. Smolek, Paluda Smolek, Troy, MI, for Defendant.

ORDER

JULIAN ABELE COOK, JR., District Judge.

***1** This litigation involves a claim by the Plaintiff, Kenneth T. Carrier, that the Defendant, LJ Ross and Associates ("LJ Ross"), engaged in an unlawful practice of harassment in an attempt to collect a debt that he does not owe, in violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p. A jury trial is scheduled to begin on February 26, 2008. The parties have each filed one motion in limine, both of which will be examined by the Court seriatim.

I. *The Defendant's Motion to Exclude the Plaintiff's Evidence of Emotional Distress Damages*

On February 11, 2008, the Defendant filed a motion in limine, in which it seeks to preclude the Plaintiff from introducing any evidence of "emotional distress" during the trial that would ostensibly support his quest for damages. The Plaintiff opposes this motion, claiming that he should be permitted to proffer evidence of the emotional upheaval which was suffered by him as the result of over fifty harassing telephone calls from the Defendant's representatives who wrongly sought to obtain payment for an obligation that was known by them to have been covered by his insurance.

Without addressing the harassment issue, the Court must initially seek to determine if the Plaintiff's emotional damage claim is relevant to this controversy. An examination of the pleadings in this action does not support the Plaintiff's desire to proffer testimony regarding the emotional distress that he claims to have suffered. There is no language or wording within the complaint, the joint final pre trial order or any other pleading which contains a reference to emotional damages. In his opposition to the motion, the Plaintiff appears to imply that this "emotional distress" issue has been subsumed into his "actual damages" claim under the Fair Debt Collection Practices Act.

Contrary to the Plaintiff's argument on this issue, he-as the proponent of the emotional damages claim-has the burden of submitting a pleading that is reasonably specific in its wording which would enable the opposing party to know the nature and the breadth of the allegations.[1] Under these circumstances, it is clear that the Defendant was never put on notice that the Plaintiff sought to obtain anything more in this case than actual damages. Arguably, if the Defendant had been made aware of the Plaintiff's claim for emotional damages, it could have undertaken appropriate steps to counter his contention on this issue. Moreover, the Plaintiff has not cited any statute or case to support his argument. Therefore, any evidence of emotional damages would not be relevant under Fed.R.Evid. 402[2] to his claims against the Defendant. As such, the Court will grant the Defendant's motion, and, in so doing, it will preclude the Plaintiff from introducing evidence for the purpose of proving any alleged emotional damages.

II. *The Plaintiff's Motion to Exclude any Tape, CD, DVD or Recording of any Conversation Between the Plaintiff and the Defendant without the Consent of both Parties*

***2** The Plaintiff requests that the Court bar the Defendant from introducing any recordings of his conversations with its representatives. In support of his motion, he contends that (1) these recordings were created illegally according to Michigan law, (2) the probative value of these proposed exhibits is substantially outweighed by the danger of unfair prejudice, and (3) the recordings are hearsay under the Federal Rules of Evidence. The Plaintiff contends, without citing any authority, that Michigan is a "two-party consent state" which mandates that "[i]f there are more than two

people involved in the conversation, all must consent to the taping." He also points to a Michigan statute (to wit, Mich. Comp. Laws § 750.539c),[3] which states, in part, that "a conversation cannot be overheard or recorded without the consent of all participants." Furthermore, the Plaintiff cites to a Michigan Supreme Court case for the proposition that (1) a participant in a conversation "may not unilaterally nullify other participants' expectations of privacy by secretly broadcasting the conversation" and (2) the overriding inquiry for a court to consider is whether the parties "intended and reasonably expected that the conversation was private." *Dickerson v. Raphael,* 461 Mich. 851, 601 N.W.2d 108 (Mich.1999). Finally, he points to two Federal Rules of Evidence which, in his judgment, support the argument for the exclusion of the taped recordings; namely(1) Fed.R.Evid. 802 which defines hearsay evidence,[4] and (2) Fed.R.Evid. 403 which authorizes the preclusion of evidence if its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

In its opposition papers, the Defendant, while generally contending that all of the Plaintiff's arguments are without merit makes several arguments. First, it submits that the Michigan statute (Mich. Comp. Laws § 750.539c), upon which the Plaintiff relies, does not prohibit a party to a telephone conversation from tape recording a conversation absent the consent of all other participants. *Sullivan v. Gray,* 117 Mich.App. 476, 324 N.W.2d 58, 59 (Mich.Ct.App.1982). Second, the Defendant contends that the Plaintiff's reliance on *Dickerson* is inapplicable because the plaintiff in that case was a talk show host-a third party-who recorded a telephone conversation without the consent of both parties to the conversation while simultaneously secretly broadcasting it over the air waves. *Dickerson v. Raphael,* 222 Mich.App. 185, 564 N.W.2d 85 (Mich.Ct.App.1997), *rev'd* 461 Mich. 851, 601 N.W.2d 108 (Mich.1999). Here, the Defendant asserts that (1) there is no third party in this case, and (2) the Plaintiff was advised by the Defendant that their telephone conversation was being recorded.[5]

The Defendant also disputes the Plaintiff's contention that (1) the admission of these telephone conversations would be more prejudicial than probative, (2) it violated 15 U.S.C. § 1692e(11) which requires a debt collector to disclose that its telephone calls are communications from a debt collector, and (3) these challenged telephone calls are hearsay.

***3** In its assessment of these arguments, the Court concludes that (1) Mich. Comp. Laws § 750.539c is not applicable here because the recordings were neither made by a third-party eavesdropper nor secretly published; (2) the probative value of the taped recordings outweighs any prejudicial effects that they may have under Fed.R.Evid. 403; and (3) the projected statements in the recordings are not hearsay, as defined by Fed.R.Evid. 801(c) because they are not being proffered to prove the "truth of the matter asserted."

Thus and for the reasons that have been stated above, the Plaintiff's motion to exclude the recordings of any conversations between the Plaintiff and the Defendant shall be, and is, denied.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 544550

Footnotes

1 Fed.R.Civ.P. 8(a)(2) requires that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

2 Fed.R.Evid. 402 states the following: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

3 This statute states the following: "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."

4 Fed.R.Evid. 802 states the following: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

5 In addition, the Defendant claims that it was informed by the Plaintiff that he was also recording some of their telephone conversations.