STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN R. BLOOM,

Plaintiff-Appellant,

v

PEGASUS INVESTIGATIONS, INC. and DANIEL H. MEAD,

Defendants,

and

HARNISCH & HOHAUSER, P.C., f/k/a HARNISCH & ASSOCIATES, P.C., SCOTT MOORE, and JAY BIELFIELD,

Defendants-Appellees.

UNPUBLISHED
June 25, 2002

No. 227731
Oakland Circuit Court
LC No. 96-530687-CZ

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

This case involves the secret, nonconsensual tape-recording of a meeting in which plaintiff was a participant. In a prior appeal, this Court reversed an order granting defendants summary disposition because it determined that a genuine issue of material fact existed as to whether defendants Pegasus/Mead had tape-recorded the meeting at the requests of defendants Bielfield and Moore. *Bloom v Pegasus Investigations, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 23, 1998 (Docket No. 200796). After the matter was remanded for further proceedings, defendants again moved for summary disposition, and the trial court granted the motion. Plaintiff appeals by right. We affirm.

We review the trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). As the parties agree, an eavesdropper must be a third party who is not otherwise involved in the conversation being eavesdropped on. *Sullivan v Gray*, 117 Mich App 476, 481; 324 NW2d 58 (1982). Therefore, if defendants Moore and Bielfield, who were participants in the meeting, recorded the conversation with plaintiff, there is no cause of action under the eavesdropping statutes. If there is evidence that Pegasus/Mead recorded it for them, however, plaintiff may have a cause of action. When this Court initially reviewed the trial court's grant of summary disposition, it found that on the

basis of the evidence submitted at that time, there was a genuine issue of material fact with regard to whether Pegasus/Mead recorded the conversation. On remand, defendants submitted evidence indicating that the meeting was recorded using voice-activated equipment and that defendants Moore and Bielfield both participated in the meeting, but that Mead was outside the room and unable to hear the conversation. On the basis of this newly submitted uncontradicted evidence, there is no longer any inference in plaintiff's favor and, therefore, summary disposition was properly granted.

We are not persuaded by plaintiff's claim that defendants' affidavits should not have been considered because they contradicted their previous testimony. First, there is no evidence of any kind that Mead overheard or personally recorded the conversation. Further, defendants Moore and Bielfield were never asked about voice activation previously and, accordingly, never testified that voice activation was not used. Neither Moore nor Bielfield made statements of fact in a "clear, intelligent, unequivocal" manner that could be considered conclusively binding. *Barlow v Crane-Houdaille, Inc*, 191 Mich App 244, 250; 477 NW2d 133 (1991). Nor is there any merit to plaintiff's suggestion that the trial court erred in ignoring his expert's affidavit. "Summary disposition is not precluded simply because a party has produced an expert to support its position. The expert's opinion must be admissible." *Amorello v Monsanto Corp,* 186 Mich App 324, 331; 463 NW2d 487 (1990). To be admissible, the "facts and data upon which the expert relies in formulating an opinion must be reliable." *Id.* at 332. The affidavit plaintiff submitted does not contain sufficient indicia of reliability.

There is no merit to plaintiff's argument that the trial court improperly based its decision on the affidavit of Diane Harnisch. Both listening and recording the conversation of third parties may fall within the prohibition of the eavesdropping statute. MCL 750.539a(2). Thus, it was not inappropriate for the trial court to consider both whether Mead recorded the meeting and whether Mead, the only defendant who did not participate in the conversation, may have listened to the conversation.

Also, the trial court did not create a statutory exception for voice-activated recorders. The statute clearly prohibits a third party from using "any device" to eavesdrop on a conversation and places no limits on the means that can be used by participants. MCL 750.539c. Here, the trial court's decision was not based on an apparent belief that the statute did not apply to voice-activated recorders, but rather, that the evidence failed to show that a third party was involved in eavesdropping. The court did not err in its interpretation of the statute. *People v Borchard-Ruhland*, 460 Mich 278, 284; 597 NW2d 1 (1999).

We reject plaintiff's suggestion that there is a special rule for "off the record" conversations. The reasoning in *Sullivan, supra,* does not support plaintiff's argument. Although plaintiff may have believed that the meeting would be "off the record," he was still able to evaluate and form expectations about the confidentiality of the conversation based on his knowledge of the other participants. The "statutory language, on its face, unambiguously excludes participant recording from the definition of eavesdropping." *Id.*

Plaintiff also contends that summary disposition was inappropriate because discovery had not been completed. Summary disposition may be granted before the completion of discovery if "discovery does not stand a fair chance of uncovering factual support for opposing the motion." *State Treasurer v Sheko,* 218 Mich App 185, 190; 553 NW2d 654 (1996). Here, defendants

presented evidence that the meeting was tape-recorded by participants and that no third party recorded or overheard the conversation. Plaintiff does not explain what additional discovery would reveal to create a factual dispute. Plaintiff offered no evidence that the discovery sought could have established that a dispute did indeed exist, and we find no error. *Gara v Woodbridge Tavern*, 224 Mich App 63, 68-69; 568 NW2d 138 (1997).

Finally, in light of our disposition, we need not consider plaintiff's claim that this matter should be remanded to a different judge.

We affirm.

/s/ Jane E. Markey
/s/ Michael J. Talbot

I concur in result only.

/s/ Brian K. Zahra