STATE OF MICHIGAN

COURT OF APPEALS

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

Plaintiffs-Appellants,

and

ROBERT B. DUNLAP and PHILLIP A. TALBERT,

Plaintiffs,

v

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

Defendants-Appellees,

and

AMAZON.COM, INC., AOL TIME WARNER, INC., BARNES & NOBLE, INC., BARNES & 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,

UNPUBLISHED
September 24, 2009

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

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.

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

PER CURIAM.

In this action alleging a violation of Michigan's eavesdropping statutes, MCL 750.539a *et seq*., plaintiffs Gregory J. Bowens, Paula M. Bridges and Gary A. Brown appeal as of right a circuit court order granting summary disposition to defendants. We affirm in part, reverse in part, and remand for further proceedings.

I. Underlying Facts and Proceedings

On July 6, 2000, the "Up in Smoke" music tour, featuring performances by artists known as Dr. Dre, Eminem, Ice Cube and Snoop Dogg, prepared for a concert at Joe Louis Arena in Detroit. During the late afternoon of July 6, 2000, several Detroit officials, including Bowen, a mayoral press secretary, Bridges, a Detroit Police Department spokesperson, and Brown a Detroit police commander, arrived at the arena and sought a meeting with tour organizers. Plaintiffs expressed concern about an eight-minute video introduction to the performances of Dr. Dre and Snoop Dogg. Plaintiffs advised concert personnel that because the video contained sexually inappropriate images, its display would violate city ordinances. They threatened legal sanctions and disruption of power to the arena if the video accompanied the concert performance. Contentious discussions and negotiations ensued. Eventually, the concert proceeded without the video. The tour promoters subsequently incorporated, as "exclusive backstage footage" on a tour concert DVD, audio and video recordings of portions of plaintiffs' discussions with tour personnel. The DVD achieved a worldwide audience.

Plaintiffs filed suit against the present defendants, Ary, Inc., d/b/a Aftermath Entertainment, Phillip J. Atwell, Chronic 2001 Touring, Inc., Geronimo Film Productions, Inc., and Andre Young, along with many others. Plaintiffs alleged that they had requested repeatedly that the portion of the July 2000 meeting included on concert DVD remain private, and that they had not given anyone permission to record the discussion. The initial complaint asserted multiple claims, including false light invasion of privacy, invasion of privacy through appropriation, fraud, and eavesdropping. Defendants moved for summary disposition, and the

circuit court dismissed the lawsuit in its entirety. This Court affirmed the circuit court's ruling in nearly all respects, except with regard to plaintiffs' eavesdropping claim, which the Court remanded so that the parties could conduct additional discovery. *Bowens v Aftermath Entertainment*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 250984), lv den 474 Mich 1111 (2006). The Court explained that

> from a review of the cassette submitted to the trial court, it is not at all clear that plaintiffs were aware that the meetings were being taped. Indeed, while at some points in the footage a hand-held video camera appears in a reflection from a mirror, when plaintiffs are shown, the footage contains characteristics that suggest that the meeting was being secretly taped. For example, at times there are no bright lights as there are when the video camera's presence is clear, and at the same time, the person being taped appears, because of the proximity and height of the recording, to be speaking to an individual who was not holding a video camera. Thus, it is quite possible that the meeting with plaintiffs was secretly taped, yet the other portions of the segment (where plaintiffs were not present) were openly videotaped. Only further discovery, and in particular, a review of any unedited versions of the recordings, will reveal the existence or non-existence of such material facts. [*Id*. at 2-3.]

Further discovery yielded a limited quantity of unedited footage of the discussions that appeared on the DVD. Defendants again moved for summary disposition, contending that plaintiffs lacked any reasonable expectation of privacy during their videotaped discussions with tour personnel, and that the nature of the conversations did not qualify as "intensely personal," as required under case law construing the eavesdropping statutes. Plaintiffs responded that defendants failed to turn over complete raw footage of the conversations, and that the record evidence demonstrated that defendants had covertly recorded a private conversation and displayed it on the DVD. The circuit court granted defendants summary disposition, finding that the circumstances did not give rise to a reasonable expectation of privacy.

II. Issues Presented and Analysis

Plaintiffs raise several challenges to the circuit court's grant of summary disposition. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). We also review de novo the interpretation and application of statutes as questions of law. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App 621. When a court affords "the benefit of reasonable doubt to the opposing party" and identifies an issue about which reasonable minds "might differ," summary disposition should not be granted. *West*, 469 Mich 183. A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

A. Plaintiffs' Eavesdropping Claim

Plaintiffs maintain that defendants eavesdropped on a private conversation by recording it without their consent.[1] Bowens averred in an affidavit that he "asked that we have a private unrecorded meeting and the tour representatives agreed to my suggestion." The parties supplied this Court with DVDs depicting the segment of the allegedly private conversation that defendants included as "exclusive backstage footage" on the "Up In Smoke" DVD and outtakes obtained during discovery. A portion of the DVD footage contains the following conversation:

> *Bowens*: Did you have a good time running to get MTV?
>
> *Tour Official*: We can come in here and shut the door.
>
> *Bowens*: Good. I am glad you did. We're still going to have a private meeting. We can have a private meeting here, or we can have a private meeting someplace else.
>
> *Tour Official*: Okay.

Brown testified at his deposition that he noticed "thousands of dollars' worth" of video equipment backstage, and learned from an MTV cameraman that "he was shooting a video." Both Brown and Bowen recounted that they instructed people wielding cameras to turn them off. When asked whether he would "have done anything different if they had said we are not shutting the camera off," Brown responded, "We would not have had that meeting had I known the camera was on." Bridges's deposition testimony also supported that the parties had agreed to an unrecorded meeting: "When I first entered the room and [Bowens] and the tour officials were at the door and they were discussing it not being videotaped and the tour officials said sure, of course, and they walked out, and the cameras walked out with them. I did not see them reenter."

Brown explained that the private conversation requested by Bowens took place in a backstage area at Joe Louis Arena called "[t]he referees' room." A sign on the room's door stated, "Authorized Personnel Only." Brown described that he allowed into the room during the private conversation "[o]nly persons that I deemed to be authorized to be there," and that a security person "attached to the promoters" stood outside the room during the meeting. Concerning the accessibility of the backstage referees' room, William Silva, a representative of the tour promoters, testified that "you certainly couldn't walk through the door there. It would be somebody who had backstage credentials or somehow had access to the backstage area." Plaintiffs averred that they did not see any cameras present during the conversation that occurred in the referees' room.

Plaintiffs insist that when defendants acquiesced to their request that the conversation in the referees' room remain unrecorded, the meeting qualified as private under the eavesdropping

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[1] The second amended complaint alleges that "in violation of MCL 750.539a et seq, defendants knowingly aided, employed or procured persons to eavesdrop on the private discourse."

statutes. Michigan law establishes civil and criminal penalties for conduct violating prohibitions against "eavesdropping" or "surveillance." The Legislature has created the following civil remedy for eavesdropping violations:

> Any parties to any conversation upon which eavesdropping is practiced contrary to this act shall be entitled to the following civil remedies:
>
> (a) An injunction by a court of record prohibiting further eavesdropping.
>
> (b) All actual damages against the person who eavesdrops.
>
> (c) Punitive damages as determined by the court or by a jury. [MCL 750.539h.]

In MCL 750.539a(2), the Legislature defined "eavesdropping" 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." Eavesdropping contrary to the act occurs when "[a]ny person who is present or who is not present during a private conversation and … willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or … knowingly aids, employs or procures another person to do the same . . . ." MCL 750.539c. In *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001), our Supreme Court defined the term "private conversation" as follows:

> "[P]rivate conversation" means a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance. Additionally this conclusion is supported by this Court's decision in *Dickerson v Raphael*[, 461 Mich 851; 601 NW2d 108 (1999),] in which we stated that whether a conversation is private depends on whether the person conversing "intended and reasonably expected that the conversation was private."

Dickerson v Raphael, 222 Mich App 185; 564 NW2d 85 (1997), rev'd in part 461 Mich 851, arose from "the surreptitious, nonconsensual recording, simultaneous transmission, and later broadcast" of a conversation between a mother and her children. *Id*. at 188. The conversation took place in an Ann Arbor public park, while the participants sat on park benches. *Id*. at 190. "At the park, plaintiff's children discussed with their mother her income, the stability of her marriage, and her religious beliefs." *Id*. The children did not inform their mother that one of them wore a device that transmitted the conversation to a company simultaneously recording it for later broadcast on television. The defendants later played four vignettes from the recorded conversation on a nationally televised program. The plaintiff sued several defendants, claiming a violation of Michigan's eavesdropping statutes. The trial court denied the plaintiff's motion for a directed verdict regarding her eavesdropping claim, and a jury returned a no cause of action verdict in favor of the defendants. *Id*.

This Court held that as a matter of law, the defendants' conduct violated the Michigan eavesdropping statutes. *Dickerson*, 222 Mich App 195-196. The Supreme Court reversed in part, holding that the "[p]laintiff was not entitled to a directed verdict because reasonable minds could differ on the question whether the conversation at issue was 'private.'" *Dickerson*, 461

Mich 851. The Supreme Court explained that 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." *Id*. (emphasis omitted). Whether a conversation is private depends on the intent and reasonable expectation of the plaintiff, and "not whether the subject matter was intended to be private." *Id*.

Our Supreme Court again construed Michigan's eavesdropping statutes in *Stone*, 463 Mich 558, in which it considered "whether a conversation held on a cordless telephone is a 'private conversation' as that term is used in the statutes." *Id*. at 559. The Supreme Court noted that the plain language of the eavesdropping statutes does not specifically define the term "private conversation." *Id*. at 563. The Court defined conversations that are private by applying concepts set forth by the Legislature in defining the term "private place":

> Thus, "private conversation" means a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance. Additionally, this conclusion is supported by this Court's decision in *Dickerson v Raphael*, 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." [*Stone*, 463 Mich 563.]

The Supreme Court also observed that under the Michigan eavesdropping statutes, "whether a person can reasonably expect privacy in a conversation generally will present a question of fact." *Id*. at 566. The Supreme Court held that "[a]s a matter of law, it was not unreasonable for [plaintiff] to expect that her cordless telephone conversations were private" because, "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 statutes . . . ." *Id*. at 565-566.

In this case, our Court's prior opinion observed that factual questions existed with respect to whether plaintiffs' conversation with the tour promoters had been secretly recorded:

> [F]rom a review of the cassette submitted to the trial court, it is not at all clear that plaintiffs were aware that the meetings were being taped. Indeed, while at some points in the footage a hand-held video camera appears in a reflection from a mirror, when plaintiffs are shown, the footage contains characteristics that suggest that the meeting was being secretly taped. [*Bowens*, slip op at 2-3.]

The unedited versions of the recordings obtained during subsequent discovery fail to clarify with certainty whether plaintiffs knew or should have been aware of the presence of functioning cameras during the conversation they believed to be private. After reviewing the additional materials submitted, we find no basis to disagree with this Court's prior observation that "[i]t is quite possible that the meeting with plaintiffs was secretly taped, yet the other portions of the segment (where plaintiffs were not present) were openly videotaped." *Id*. at 3. Although defendants submit that the camera's existence should have been "obvious," the outtakes supplied do not include footage of the filming itself. Stated differently, no new evidence conclusively refutes this Court's earlier finding that "the footage contains characteristics that suggest that the meeting was being secretly taped." *Id*.

The circuit court ruled that regardless whether someone secretly recorded the meeting, plaintiffs lacked a reasonable expectation of privacy because no barrier prevented people from entering and leaving the referees' room. The circuit court opined that "the plaintiffs could have selected another—a better—room," but that "[u]nder the circumstances, the plaintiffs could not have had a reasonable expectation of privacy." Defendants suggest that the conversation could not have objectively qualified as private because its venue was not a "private place": "The City Officials could have no reasonable expectation of privacy when they did not control access to the room, nor the door, and did not even recognize everyone who was in the room."

We reject the notion that as a matter of law, parties may not conduct a "private conversation" under MCL 750.539c in a public place, or a location where nonparticipants in the conversation are physically present. Secret monitoring of a conversation deprives the participants of their right to control the reach of their words. However, the mere presence of others in the general vicinity does not eliminate the parties' ability to carry on a private conversation. "[T]he proper question is whether plaintiff intended and reasonably expected that the conversation was private." *Dickerson*, 461 Mich 851 (emphasis omitted). A private conversation takes place when a person reasonably expects the conversation "to be free from casual or hostile intrusion or surveillance." *Stone*, 463 Mich 563. "A private conversation may occur within the sight but not the hearing of others." *Dickerson*, 222 Mich App 201. Private conversations may occur in public parks, as in *Dickerson*, or in public buildings. The location of a conversation, standing alone, does not dispositively establish whether the parties to the conversation reasonably intended and expected that their interchange would remain private.

Here, the record evidence establishes that plaintiffs insisted that the conversation in the referees' room occur in the absence of recording devices, and that defendants' representatives acquiesced to plaintiffs' demand. This evidence suffices to create a material question of fact with regard to whether the parties' conversation constituted one in which a person could reasonably expect to be free from casual or hostile intrusion or surveillance. *Stone*, 463 Mich 563. The parties do not dispute that defendants recorded some portion of the conversation that plaintiffs believed was private. Viewed in the light most favorable to plaintiffs, the evidence establishes a genuine issue of material fact concerning whether defendants violated MCL 750.539c, which prohibits a person from willfully using any device to eavesdrop on a private conversation without the consent of all parties thereto.

We respectfully disagree with the dissent's conclusion that "even if Silva agreed to a private meeting as plaintiffs claim and even though plaintiffs were unaware they were being recorded against their express wishes," "there is no genuine issue of material fact showing that" plaintiffs had a reasonable expectation of a private conversation, given the evidence that other people wandered in and out of the room and had "all eyes on the conversation. *Post* at 6. To the contrary, the circumstances presented here give rise to compelling factual questions about the reasonableness of plaintiffs' expectation of privacy, and do not as a matter of law eliminate an eavesdropping claim under MCL 750.539c. We find no support in the statutory language, *Stone*, or the Supreme Court's order in *Dickerson* for the proposition that an eavesdropping claim cannot proceed unless the violation occurred in a "private place." Rather, the Supreme Court has directed that a reviewing court's inquiry must focus on the reasonableness of a party's expectations of privacy. "[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." *Stone*, 463 Mich 568. Irrespective whether others present in a room may qualify as *potential* eavesdroppers, a person in a public place may nevertheless possess a reasonable expectation of conducting a private conversation. Consistent with the mandate in *Stone*, a jury must make the determination whether plaintiffs' expectation of privacy under the circumstances presented here qualified as a reasonable one. *Id*. at 566.

B. Claim Alleging Installation of a Device

We next consider whether plaintiffs have presented sufficient evidence to establish a violation of MCL 750.539d, which in 2000 provided,

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

In *Lewis v LeGrow*, 258 Mich App 175, 186; 670 NW2d 675 (2003), this Court defined the statutory term "install" as "to place in position or connect for service or use." The common meaning of the term "install" contemplates a settled location. In context, MCL 750.539d forbids a person from setting up a secret recording device in a private place to record words or activity. Applying the common meaning of the term "install," we detect no evidence supporting that defendants "installed" a device for observing or eavesdropping on plaintiffs. The parties agree that if someone employed a secret or hidden camera to record the conversation in the referees' room, it was handheld, and not placed in position or used in a specific location. Accordingly, we affirm the circuit court's grant of summary disposition regarding plaintiffs' claim under MCL 750.539d.

C. Remaining Issues

Defendants assert that plaintiffs' status as public officials at the time of the allegedly private meeting rendered their conversation with the tour promoters public "per se." According to defendants, "police officers cannot reasonably expect their public law-enforcement actions to be private." We note initially that only Brown was employed as a police officer in July 2000. Bowen worked for the office of the mayor, and Bridges was a civilian employee of the Detroit Police Department. But even assuming that all three plaintiffs worked as police officers, we decline to hold that as a matter of law an on-duty police agent may not engage in a private conversation. Defendants have pointed to no case law supporting this position. Furthermore, such a rule would unduly inhibit the ability of police officers to converse among themselves or with others at a crime scene or other law enforcement locations. Consequently, we reject the suggestion that police officers may not engage in private conversations immune from eavesdropping under MCL 750.539c.

Defendants also contend that because the cameramen were present during the July 6, 2000 conversation and consented to the recording, neither they nor their principals violated the eavesdropping statute. The plain language of MCL 750.539c reveals the weakness of this argument. Section 539c imposes criminal liability on "any person" present during a private conversation who willfully eavesdrops "without the consent of *all* parties thereto." (Emphasis

added). "[A] participant may not unilaterally nullify other participants' expectation of privacy by secretly broadcasting the conversation." *Dickerson*, 461 Mich 851.

Defendants lastly assert that pursuant to the United States Supreme Court's decision in *Bartnicki v Vopper*, 532 US 514; 121 S Ct 1753; 149 L Ed 2d 787 (2001), the First Amendment shields those defendants "who did not directly participate in the interception" of the conversation at issue. In *Bartnicki*, an unknown person illegally intercepted a cellular telephone conversation between union representatives that occurred during contentious contract negotiations. *Id*. at 518. A radio station played a tape of the conversation, which the station claimed that it received from someone who had found it in his mailbox. *Id*. at 519. The union representatives filed suit alleging that the radio station had violated federal and state wiretapping statutes because it knew or should have known that the conversation was intercepted illegally. *Id*. at 519-520. The Supreme Court accepted the fact that the radio station and other defendants "played no part in the illegal interception," and that their "access to the information on the tapes was obtained lawfully, even though the information was intercepted unlawfully by someone else." *Id*. at 525. The Supreme Court concluded that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id*. at 535.

In contrast to *Bartnicki*, plaintiffs here allege that defendants directed the camera operators, and thus did not qualify as "strangers" to the disclosure. Furthermore, defendants are not members of the press, and did not disseminate the fruits of the allegedly illegal recordings to the media. Instead, they used the recordings for profit. In *Bartnicki*, the Supreme Court distinguished between the facts of that case and the more common situation in which intercepted information is used for purposes other than informing listeners about matters of public interest: "Although this suit demonstrates that there may be an occasional situation in which an anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise, surely this is the exceptional case." *Id*. at 531. We find these distinctions compelling, and supportive of our conclusion that the First Amendment does not shield the instant defendants, under circumstances such as these, from the applicability of Michigan's eavesdropping statutes.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

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Defendants.

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

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

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

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

> Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section is guilty of a felony . . . .

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

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

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

(continued…)

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

The statutes define "eavesdrop" as "to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse[,]" MCL 750.539a(2), and "private place" as "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access[,]" MCL 750.539a(1). The statutes provide no definition for "private conversation." Notwithstanding, our Supreme Court has provided the following guidance:

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

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

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

(…continued)

> or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place.
>
> (b) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section. [MCL 750.539d.]

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

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

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

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

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

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

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(…continued)

that a camera used in this case was installed.

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

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

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

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

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

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

/s/ Christopher M. Murray

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

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