

ANDREA J. FERRARA, Plaintiff, v. DETROIT FREE PRESS, INC., DAVID
ASHENFELTER, and HOWARD TARJEFT, JR. jointly and severally, Defendants.

CIVIL ACTION NO. 97-CV-71136-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION

1998 U.S. Dist. LEXIS 8635; 26 Media L. Rep. 2355

May 6, 1998, Decided
May 6, 1998, Filed

DISPOSITION: Motion for summary judgment brought by Detroit Free Press, Inc. and David Ashenfelter GRANTED, and as to those defendants, plaintiff's complaint DISMISSED. Defendant Tarjeft's motion for judgment on the pleadings or for summary judgment GRANTED with respect to all claims except plaintiff's claims under 18 U.S.C. § 2520 (Federal Wiretapping Act); with respect to that claim, defendant Tarjeft's motion DENIED. Plaintiff's motion for an evidentiary hearing DENIED, WITHOUT PREJUDICE. Motions for sanctions brought by Detroit Free Press, Inc. and David Ashenfelter, and motion for sanctions brought by Lawrence Stockler DENIED.

COUNSEL: For ANDREA J. FERRARA, plaintiff: Malcolm B. Campbell, Lawrence J. Stockler Assoc., Southfield, MI. Mark R. Bendure, Bendure & Thomas, Detroit, MI.

For DAVID ASHENFELTER, defendant: Herschel P. Fink, Honigman, Miller, Detroit, MI.

HOWARD TARJEFT, JR., defendant, Pro se, Trenton, MI.

For DETROIT FREE PRESS, INCORPORATED, defendant: Herschel P. Fink, Honigman, Miller, Detroit, MI.

For LAWRENCE J. STOCKLER, respondent: Lawrence J. Stockler, Malcolm B. Campbell, Lawrence J. Stockler Assoc., Southfield, MI.

JUDGES: PATRICK J. DUGGAN, UNITED STATES DISTRICT [*2] JUDGE.

OPINION BY: PATRICK J. DUGGAN

OPINION

OPINION

On March 20, 1997, plaintiff Andrea Ferrara, a Wayne County Circuit Court Judge, filed a complaint alleging that defendant Howard Tarjeft, Ferrara's ex-husband, recorded certain telephone conversations between himself and Ferrara. The complaint also alleges that defendant David Ashenfelter, a staff writer for defendant Detroit Free Press, Inc., disseminated the contents of these recordings. The complaint asserts claims under 18 U.S.C. § 2520 (the Federal Wiretapping Act), 18 U.S.C. § 1341 (mail fraud), Mich. Comp. Laws §§ 750.92 (attempt to commit a crime), 750.151 *et seq.* (conspiracy), 750.213 (malicious threats to extort money), and 750.539 (eavesdropping). The complaint also asserts claims of tortious interference with contractual relations, and violation of plaintiff's "right to privacy."

Currently before the Court are the Free Press and Ashenfelter's motion for summary judgment, Tarjeft's motion for judgment on the pleadings or for summary judgment, Ferrara's motion for an evidentiary hearing, and the Free Press and Ashenfelter's and Lawrence Stockler's motions for sanctions. The Court held a hearing on April 23, 1998. For the reasons set forth in this Opinion and at the hearing, the motion for an evidentiary hearing is denied without prejudice, summary judgment is granted with respect to all of Ferrara's claims, except for her Federal Wiretapping claim against Tarjeft, and the motions for sanctions are denied.

Background

Ferrara and Tarjeft were married from 1982 until their divorce in 1985. They had two children during the marriage. Following the divorce, Ferrara had custody of the children, and Tarjeft was obligated to pay a total of \$ 30 per week in child support. According to Ferrara, Tarjeft currently owes approximately \$ 12,000 in back child support payments, and was in arrears on these payments during 1992 and 1993.

In 1992 and 1993, Tarjeft recorded eleven conversations with Ferrara, in which Ferrara reportedly expressed fears that Tarjeft's car might break down in "niggertown," accused Tarjeft of having "nigger blood" in him, referred to a fellow Circuit Court Judge as a "little whore Jew," and complained about an Arab family moving into her neighborhood. (Free Press, Ex. A.)

Ferrara presented evidence that on February 24, 1994, Tarjeft and Ferrara had an argument [*4] after Tarjeft dropped off their children at Ferrara's house. During this argument, Tarjeft told Ferrara that he had numerous tapes of her private conversations and that he would use them to destroy her. (Ferrara Aff. P 5A; Pl. Ex. G.)

At a September 12 and 13, 1996 state court show cause hearing concerning the judgment of divorce, Tarjeft stated that he had tape recordings of Ferrara and other evidence showing that Ferrara was an unfit parent. Tarjeft did not produce this evidence, and he was held in contempt of court for violating the visitation provisions of the divorce judgment. An unnamed Detroit Free Press reporter was present for this hearing. (Combey Aff. P12, Pl. Ex. H.)

On September 28, 1996, Tarjeft met with Ferrara, her attorney Michael Flack, and members of Ferrara's family. According to Flack, Tarjeft submitted a written document containing a "proposed settlement" according to which Tarjeft would gain custody of their two children and his child support arrearage would be forgiven. (Flack Aff. P 5, Pl. Ex. E.) Tarjeft stated that if Ferrara refused his terms, Ferrara's career was "finished" and that he had tapes that could destroy her. *Id.* P7.

On October 3, 1996, a preliminary hearing was held on parental neglect charges that Tarjeft had filed against Ferrara. At that hearing, Tarjeft claimed to have recordings that would prove Ferrara's instability. Again, Tarjeft did not produce the tape recordings.

In December 1996, Ashenfelter met with Ferrara and told her that Tarjeft claimed to have tapes of Ferrara using racial slurs and other offensive language. (Ferrara Aff. P 8, Pl. Ex. D.)

On January 8, 1997, a Wayne County Friend of the Court referee held a show cause hearing regarding Tarjeft's failure to pay child support. The referee recommended a contempt finding against Tarjeft based on his child support arrearage. Ashenfelter attended the hearing, and following the hearing, told Ferrara that he had listened to tapes in which Ferrara used racial slurs and other offensive language.

On January 30, 1997, Tarjeft called Constance Cumbey, Ferrara's attorney, and left a message stating that if Ferrara did not waive his child support arrearage within 24 hours, he would have to take steps to protect himself. (Cumbey Aff. P 18.)

Ferrara obtained a copy of the tape in question on February 11, 1997. One of her attorneys, Thomas A. Howard, sent a letter to Ashenfelter on February 14, 1997. This letter stated that the tape was "a fake" ¹ and that Tarjeft "has threatened to destroy Judge Ferrara in any manner possible, unless she agrees to give him physical custody of their two (2) minor children." (Pl. Ex. I.) The letter further stated:

In my judgment, you knowingly teamed with Mr. Tarjeft to facilitate his extortive conduct Your publication of this tape is an unconscionable effort to destroy Judge Ferrara's reputation. I again urge you not to publish this tape.

You are put on notice that utilization of this fake tape will subject you to litigation. *Id.*

----- Footnotes -----

¹ Ferrara has not argued, for the purposes of the instant motions, that the tapes were fabricated.

----- End Footnotes-----

In the February 19, 1997 edition of the Free Press, Ashenfelter authored an article entitled "Judge slurred Jews, blacks and others, recordings indicate." (Free Press Ex. A.) The

article reported Ferrara's comments concerning African-Americans, a Jewish judge, and an Arab family.

Ferrara's suit and an investigation of Ferrara by the Michigan Judicial Tenure Commission ("JTC") followed the publication of the article. On February 9, 1998, the JTC recommended to the Michigan Supreme Court that Ferrara be removed from office based on her statements made in the tape and her conduct during the JTC investigation.

Discussion

I. Federal Wiretapping Act

A. Summary Judgment

Title III of the Omnibus Crime Control Act, 18 U.S.C. § 2510 *et seq.* (commonly referred to as the Federal Wiretapping Act ("FWA")) prohibits the improper interception of wire, oral, or electronic communications. 18 U.S.C. § 2511(1) imposes criminal penalties² on any person who:

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or to endeavor to intercept, any wire, oral, or electronic communications;

....

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.

18 U.S.C. § 2511(2)(d) provides:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing a criminal or tortious act in violation of the Constitution or laws of the United States or any State.

----- Footnotes -----

² 18 U.S.C. § 2520 provides a civil remedy for violation of the FWA.

----- End Footnotes-----

Ferrara claims that Tarjeft, although a party to the conversations at issue, violated the FWA by recording the conversations with the purpose of using the tapes [*9] to blackmail Ferrara into giving up custody of their children and into forgiving the child support arrearage. ³ Ferrara claims that Ashenfelter and the Free Press violated the FWA by intentionally disclosing and/or using the contents of the tapes in the February 19, 1997 article.

----- Footnotes -----

³ Mich. Comp. Laws § 750.213 makes it a crime to threaten an injury to a person with the intent to extort money or with the intent to compel another to do any act against his or her will.

----- End Footnotes-----

Defendants present numerous arguments why their conduct is not actionable under the FWA. Defendants first argue that they did not violate the FWA because Tarjeft did not "intercept" the conversations with Ferrara because Tarjeft was a participant in the conversations. Defendants rely on *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir. 1973). In that case, the plaintiff sued a newspaper for publishing a recording of a conversation in which the plaintiff told the individual who recorded the conversation that he could arrange for a "fix" in a divorce case then pending in state domestic relations court. *Id.* at 740-41. The court stated:

Since there is no "interception" or "eavesdropping" when a party to a conversation, or a third person acting with the consent of one of the parties to the conversation, records that conversation, and since the appellant has conceded that the recording of the conversation was not unlawful in that the recorder was a participant to the conversation, it follows that it could not in any way be wrongful for that person to later disclose the contents of the conversation.

Id. at 741 (citation omitted) (emphasis added).

This reasoning was rejected in *Boddie v. American Broadcasting Companies, Inc.*, 731 F.2d 333 (6th Cir. 1984). In *Boddie*, the trial court had dismissed the plaintiff's FWA claim. On appeal, the defendants argued that the plaintiff's FWA claim could not succeed under *Smith* because the conversation had been taped by a party to the conversation. In rejecting *Smith's* reasoning, the *Boddie* court cited legislative materials showing that the intent of § 2511(2)(d) was to "prohibit an interception 'when the party acts in a way with [*11] an intent to injure the other party to the conversation in any other way.'" *Id.* at 337 (quoting 114 Cong. Rec. 14,694); *see also United States v. Underhill*, 813 F.2d 105, 110-11 (6th Cir. 1987); *Meredith v. Gavin*, 446 F.2d 794, 798 (8th Cir. 1971). The court concluded that "the language and legislative history of the statute clearly demonstrate that the privilege is not extended if the intercepting party acted with the purpose of committing a criminal, tortious, or injurious act." *Id.* 731 F.2d at 338. ⁴

----- Footnotes -----

⁴ Defendants argue that a different panel of the Sixth Circuit "reversed" the *Boddie* decision following remand to the trial court. The Court does not agree that the original *Boddie* decision was "reversed." Following remand, the Sixth Circuit recognized that a party to a communication was not privileged to intercept it if he or she had an improper purpose, but affirmed the lower court's second dismissal of the FWA claim on different grounds. *See Boddie v. American Broadcasting Companies, Inc.*, 881 F.2d 267, 268 (6th Cir. 1989).

----- End Footnotes-----

Defendants argue, however, that the Sixth Circuit embraced *Smith's* holding in *United States v. Meriwether*, 917 F.2d 955 (6th Cir. 1990). In *Meriwether*, the defendant argued that his telephone number was illegally seized when a federal agent read it off of a pager that had been seized pursuant to a valid search warrant. The Sixth Circuit ruled that the agent did not "intercept" the phone number because he did not record a "transmission" to the pager and Congress intended the FWA to apply only to transmissions to pagers. *Id.* at 960. The court also reasoned that the FWA was not violated because the agent did not resort to an electronic, mechanical or other device to obtain the telephone number. *Id.* While the *Meriwether* court cited *Smith* for the proposition that no "interception" had occurred because the agent was a party to the communication, *Smith* was not necessary to the court's holding because, as discussed above, there were other grounds for the court's holding. Therefore, the *Meriwether* court's reliance on *Smith* was *obiter dictum*, *see Black's Law Dictionary* 1072 (6th ed. 1990), and does not supersede *Boddie*.⁵

----- Footnotes-----

⁵ The Court also notes that, as a party to the communication (as characterized by the *Meriwether* court), the federal agent was privileged to "intercept" the pager number under § 2511(2)(c), which does not limit the privilege to those who act without an improper purpose. *See Obron Atlantic Corp. v. Barr*, 990 F.2d 861, 865 (6th Cir. 1993). Therefore, the *Meriwether* court was not faced with the issue presented in this case, i.e., whether an improper purpose on the part of Tarjeft made his taping of the conversations in question illegal.

----- End Footnotes-----

In *Stockler v. Garratt*, 893 F.2d 856 (6th Cir. 1990), a party secretly tape recorded a conversation. The Court referring to the language of 18 U.S.C. §§ 2511(1)(a) and (2)(d) stated: "We first must answer the question whether Title III makes unlawful an interception by a participant in a conversation ... when the information obtained is never used." *Id.* at 858 (emphasis added).

The Court answered the question: "We hold, therefore, that it is not necessary for liability that the interception be used for a criminal or tortious purpose." *Id.* at 859.

A fair reading of *Stockler* makes it clear that the Sixth Circuit believed that liability could be imposed on a participant if the "interception" was for the purpose of committing any criminal or tortious act, regardless of whether or not such "interception" was actually used for a criminal or tortious purpose.

Based on *Stockler* and the plain language of § 2511(2)(d), the Court believes that, if squarely faced with this issue, the Sixth Circuit would follow the *Boddie* decision and rule that a party to a communication is not privileged to "intercept" it if he does so "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." § 2511(2)(d).

Defendants next argue that even if Tarjeft "intercepted" the conversations under the FWA by taping them, Tarjeft did not have an impermissible purpose in recording the conversations. Tarjeft stated in an affidavit that his purpose in recording the conversations was to preserve an accurate record of the conversations "in order to prevent Ferrara from later falsifying the substance of the child visitation agreements made by and between Tarjeft and Ferrara during said conversations, thus allowing Tarjeft to protect himself from false criminal and/or civil charges related to child visitation." Taping a conversation for the purpose of making an accurate record of the conversation is permissible. *See Underhill*, 813 F.2d at 110.

Ferrara argues, however, that Tarjeft's purpose to record the tapes in order to blackmail her can be inferred from his conduct with respect to the tapes. A party to a communication is not privileged to intercept the communications if his purpose is to blackmail the other party to the communication. *See Stockler v. Garratt*, 893 F.2d 856, [*15] 859 (6th Cir. 1990). Ferrara notes that Tarjeft never used the tapes for the purpose of defending himself against Ferrara in a dispute over visitation. Ferrara has produced evidence that Tarjeft told Ferrara in February 1994 that he had numerous tapes of their conversations and that he would destroy her. Furthermore, Tarjeft stated in court proceedings in 1996 that he had recordings that would show that Ferrara was an unfit parent and that she was unstable. On September 28, 1996, Tarjeft allegedly told Ferrara that if she did not comply with his settlement demands, including agreeing to grant him custody of their children and forgiving his child support arrearage, he would destroy her by means of the tapes. On January 30, 1997, Tarjeft left a message for attorney Cumbey in which he stated that if the child support arrearage were not waived in 24 hours, he would take steps to protect himself. (Cumbey Aff. P 18.)

If these facts are true, Tarjeft did not use the tapes for the purpose he stated in his affidavit, i.e., to protect himself from a distortion of oral visitation agreements. Moreover, there is evidence that he threatened to "destroy" Ferrara by means of the tapes and appeared to take steps in that direction when he stated in court proceedings that he would produce the tapes to show that Ferrara was unstable and unfit as a parent. The Court believes that Tarjeft's conduct and statements concerning his intention to use the tapes against Ferrara, which occurred as long ago as early 1994, raise a possible inference that his purpose in recording the conversations was to blackmail Ferrara, and thus a genuine issue of fact exists as to Tarjeft's purpose in recording the conversations.

The Free Press and Ashenfelter argue that they cannot be held liable for the dissemination of the contents of the tapes because Ashenfelter was not aware that Tarjeft's recordings were illegal. Ashenfelter stated in an affidavit that he believed that Tarjeft had the right to tape his own calls and to disclose them to the Free Press. (Ashenfelter Aff. P 6, attached to Br. in Supp. of Mot. for Summ. J. by Detroit Free Press Defs.)

Section 2511(1)(c) and (d) prohibit the intentional disclosure or use of the contents of an intercepted communication by a person "knowing or having reason to know that the information was obtained ... in violation of this subsection." Thus, the "defendant [*17] must know 1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of Title III." *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992); *see also Williams v. Poulos*, 11 F.3d 271, 284 (1st Cir. 1993). "Although a defendant may be presumed to know the law, to establish the use and disclosure liability under Title III, a defendant must be shown to have been aware of the factual circumstances that would violate the statute." *Thompson*, 970 F.2d at 749.

Ferrara has submitted the following evidence showing that the Free Press and Ashenfelter had "reason to know" that Tarjeft had made the tapes impermissibly. First, a Free Press reporter was present when Tarjeft stated at a show cause hearing that he had tapes showing that Ferrara was an unfit parent. Second, Ashenfelter told Ferrara in December 1996 that Tarjeft claimed to have tapes of Ferrara using racial slurs. Third on January 8, 1997, Ashenfelter told Ferrara that he had heard tapes of Ferrara using racial [*18] slurs. Finally, Ferrara points to attorney Howard's letter in which he urged Ashenfelter to refrain from publishing the contents of the tapes and informed Ashenfelter that Tarjeft had threatened to destroy Ferrara.

The Free Press and Ashenfelter argue that Ferrara's evidence fails to raise a genuine issue of fact that Ashenfelter either knew or had reason to know that the tapes were made for a criminal or tortious purpose. The Court agrees. Although Mr. Howard's letter states that Tarjeft was attempting to blackmail Ferrara, it does not indicate that Tarjeft was motivated by blackmail at the time he made the recordings. ⁶ Moreover, while Tarjeft indicated at the state court hearings that he had tapes of Ferrara, he did not make any threats at those hearings. In *Cox v. Kentucky Dept. of Transportation*, 53 F.3d 146, 150 (6th Cir. 1995), the court stated:

The Sixth Circuit has concluded that, in the "new era" of summary judgment that has evolved from the teachings of the Supreme Court in *Anderson*, *Celotex*, and *Matsushita*, trial courts have been afforded considerably more discretion in evaluating the weight of the nonmoving party's evidence. *Street*, 886 F.2d 1472 at 1480. The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* If the record taken in its entirety could not convince a rational trier of fact to return a verdict in favor of the nonmoving party, the motion should be granted. *Id.* (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989)). Based on the evidence presented by Ferrara, the Court concludes that a rational trier of fact could

not conclude that Ashenfelter knew "sufficient facts concerning the circumstances of the interception such that [he] ... determine that the interception was prohibited in light of Title III." *Thompson*, 970 F.2d at 749.

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⁶ Howard's letter asserted that the tape was "a fake," (Pl. Ex. I), a statement which Ashenfelter had reason to believe was incorrect based on an expert's opinion that the tapes were authentic, (Free Press Ex. A), thus justifying Ashenfelter giving little credence to the rest of the letter. Plaintiff, in fact, has not asserted, in response to defendants' motions that the tapes are "fakes."

----- End Footnotes-----

The Court can easily dispose of the remaining arguments. Tarjeft argues that he was unaware of the FWA at the time and that he had a good faith belief his conduct was legal under Michigan law. This argument must fail because ignorance of the law is not a defense under the FWA. *See Fultz v. Gilliam*, 942 F.2d 396, 404 (6th Cir. 1991). Furthermore, Tarjeft has not shown that he is entitled to use the "good faith" defense contained in § 2520(d)(1). ⁷ Tarjeft also argues that he did not "intercept" the communication because he used a business answering machine to record the calls. Under the so called "business use of a telephone extension" exemption, the defendant must satisfy two essential elements: "the intercepting equipment must be furnished to the user by the phone company or connected to the phone line, and it must be used in the ordinary course of business." *Deal v. Spears*, 980 F.2d 1153, 1157 (8th Cir. 1992). Tarjeft has not made either of these showings. Finally, Tarjeft argues that he has an "absolute, unfettered" right under the First and Fourth Amendments to record his telephone conversations. Tarjeft has provided no support for this provocative argument and the Court is aware of no authority that supports this argument.

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⁷ Section 2520(d)(1) provides that a person is immune from civil or criminal action if he relies in good faith on "a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization." Good faith reliance on a mistake of law is not a defense under the FWA. *See Heggy v. Heggy*, 944 F.2d 1537, 1542 (10th Cir. 1991).

----- End Footnotes-----

In sum, the Court believes that Ferrara has raised a genuine issue of fact regarding Tarjeft's purpose in recording the conversations. However, Ferrara has not shown that Ashenfelter knew or had reason to know that the conversations were illegally recorded. Therefore, the Free Press and Ashenfelter's motion is granted and Tarjeft's motion is denied.

B. Motion for Evidentiary Hearing on the FWA Claim

Ferrara argues that she is entitled to an evidentiary hearing concerning the admissibility of the tapes at trial. 18 U.S.C. § 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2518(10)(a) provides in pertinent part: "Any aggrieved person in any trial, hearing, or proceeding in or before any court . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that -- (i) the communication was unlawfully intercepted." An "aggrieved party" is one who "was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11).

Ferrara seeks to have the contents of Tarjeft's recordings suppressed, except for the purpose of proving that there was a violation of the FWA. Thus, Ferrara seeks to show at the evidentiary hearing that Tarjeft produced the tapes with an illegal purpose.

The Court believes that a suppression hearing under §§ 2515 and 2518(10) may be warranted. These provisions indicate that a victim of an illegal "interception" may move in *any* trial or proceeding to seek the communication's suppression. There is no explicit limitation to criminal trials. Furthermore, allowing suppression in civil actions would further the purpose of § 2515, which is to protect the privacy of communications and "to ensure that the courts do not become partners to illegal conduct." *Gelbard v. United States*, 408 U.S. 41, 51, 33 L. Ed. 2d 179, 92 S. Ct. 2357 (1972). In *Management Information Technologies, Inc. v. Alyeska Pipeline Service Co.*, No. 92-1739, 1993 WL 524745, *4-5 (D.D.C. Dec. 1, 1993), the plaintiff desired to suppress certain recorded conversations that formed the basis for the plaintiff's FWA suit. The court stated, "The conundrum facing the Court is that by deciding the preliminary question of the tapes' legality for evidentiary purposes, this Court will in effect be deciding the ultimate question of fact for the jury." *Id.* *5. The court, however, felt that the purposes of the act warranted a suppression hearing. *Id.*, see also *McQuade v. Michael Gassner Mechanical & Elec. Contractors, Inc.*, 587 F. Supp. 1183, 1189 and n. 12 (D. Conn. 1984) (noting the possibility that the legality of the interception could be resolved in a suppression hearing brought pursuant to § 2518(10)(a)).

At oral argument, counsel for Ferrara acknowledged that it may be necessary for plaintiff to use the tapes, or the contents of the tapes, in order to prove the FWA claim at trial. Therefore, the Court believes that it may well be an inefficient use of the Court's time to conduct a suppression hearing, when in fact plaintiff may not want the tapes suppressed. Accordingly, Ferrara's motion for an evidentiary hearing is denied, without prejudice, to her right to raise the issue after the close of plaintiff's proofs.

II. Summary Judgment of Michigan Eavesdropping Statute Claim

Defendants argue that summary judgment is appropriate with respect to Ferrara's claim under Michigan's eavesdropping statute. Mich. Comp. Laws § 739c prohibits the use of a device to eavesdrop on conversations. Mich. Comp. Laws § 739e prohibits the "use or divulgence" of information the defendant knew or reasonably should have known was obtained in violation of § 739c. Eavesdropping is defined as "to overhear, record, amplify or transmit part of the private discourse of others without the permission of all persons involved in the discourse." Mich. Comp. Laws § 750.539a(2). In *Sullivan v. Gray*, 117 Mich. App. 476, 481, 324 N.W.2d 58 (1982), the court held that the statutory definition of eavesdropping precluded an eavesdropping action against a participant of the conversation. *Accord Knasiak v. Rigg*, No. 195324 at 2 (Mich. Ct. App. Jan. 16, 1998) (Free Press Ex. F.).

In this case, Tarjeft participated in the conversation. Therefore, the Court grants summary judgment with respect to the Michigan eavesdropping statute claim.

III. Summary Judgment of Privacy Claim

Defendants next argue that summary judgment is appropriate with respect to Ferrara's "right to privacy" claim. Defendants argue that Ferrara cannot succeed under any of the traditional "invasion of privacy" torts, i.e., intrusion upon the plaintiff's seclusion, public disclosure of private facts, false light, and commercial appropriation. *See generally Lewis v. Dayton Hudson Corp.*, 128 Mich. App. 165, 168, 339 N.W.2d 857 (1983).

Ferrara counters that she is not attempting to raise one of these torts. Rather, she is simply arguing that by violating the FWA, defendants have "invaded the privacy interest protected by § 2511, and their conduct is actionable." (Pl.'s Br. at 20.)

Thus, it appears that Ferrara's "right to privacy" claim is indistinguishable from her FWA claim. The Court is at a loss to explain why Ferrara believes that this claim should be presented as a separate "right to privacy" claim. To the extent that this claim is an attempt to create a separate tort out of violations of the FWA, this claim is dismissed. The FWA provides its own civil enforcement mechanism, and Ferrara has not convinced the Court that it should (or even could) create a remedy that supplements the remedy presented in the FWA.

IV. Summary Judgment of Tortious Interference Claim

Defendants next argue that summary judgment is appropriate with respect to Ferrara's tortious interference claim. Ferrara argues that defendants wrongfully interfered with her employment relations with the State of Michigan when they violated the FWA.

The basic elements of tortious interference with a business relationship are the existence of a business relation or expectancy, knowledge of the relationship or expectancy on the part of the interferer, an intentional interference inducing or causing a

breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship was disrupted.

Lakeshore Community Hosp., Inc. v. Perry, 212 Mich. App. 396, 401, 538 N.W.2d 24 (1995). In *Lakeshore*, the court recognized that when a plaintiff's tortious interference claim is based on negative or "defamatory" statements concerning the plaintiff, privileged speech is a defense. *Id.* Thus, as in a defamation claim, a public figure plaintiff must show that the defendant's statements are false and that they were made with malice, i.e., with reckless disregard of whether the statement was false. *Id.*

The essence of Ferrara's claim is that the defendants caused her difficulties with the State of Michigan by disseminating Ferrara's use of racial slurs to the general public. Thus, it is safe to say that her claim is based on negative or defamatory statements about Ferrara. Because plaintiff does not allege the statements are false, Ferrara does not have a tortious interference claim against defendants under *Lakeshore*. Therefore, summary judgment is granted with respect to this claim.

V. Summary Judgment of Federal Mail Fraud Claim

Ferrara has indicated that she is no longer pursuing a federal mail fraud claim. This claim is dismissed.

VI. Summary Judgment of State Criminal Law Claims

Plaintiff's complaint sets forth claims pursuant to Mich. Comp. Laws §§ 750.92 (attempt to commit a crime), 750.151 *et seq.* (conspiracy), and 750.213 (malicious threats to extort money). These are criminal statutes. Plaintiff's complaint indicates that she is entitled to recover in a civil action for violation of these statutes pursuant to Mich. Comp. Laws § 750.4. Section 750.4 provides that the failure of the legislature to provide an explicit civil remedy for crimes contained in the Michigan Penal Code "does not affect the right to recover" under existing law. The Court does not read that section as creating civil remedies for crimes. It merely "preserves" civil remedies that exist outside of the penal code. The Court is not aware of an independent civil remedy for these claims. Therefore, summary judgment is granted with respect to these claims.

VII. Sanctions

The Free Press and Ashenfelter have filed motions for sanctions against Lawrence Stockler, Ferrara, and Mark Bendure for filing the instant action and for filing frivolous pleadings in this action.

Fed. R. Civ. P. 11(b) provides in pertinent part:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
 - (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
 - (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- 28 U.S.C. § 1927 provides for the recovery of excess costs, expenses, and attorneys' fees reasonably incurred due to the unreasonable and vexatious multiplication of proceedings by an attorney.

As discussed above, there is a genuine issue of fact regarding Ferrara's FWA claim. Therefore, the Court does not believe that her complaint was filed frivolously. Furthermore, while Ferrara may not have prevailed on certain motions filed in this Court, the Court does not believe that they were so devoid of merit as to be sanctionable. Therefore, the motion for sanctions is denied.

Lawrence Stockler has filed a counter-motion for sanctions based on the Free Press and Ashenfelter's sanctions motion. Stockler's motion did not comply with the "safe harbor" provisions of Rule 11(c)(1)(A) because he failed to serve the motion on the opposing parties at least 21 days before filing the instant motion for sanctions. *See* (Stockler Mot. P 8.) His motion is denied for that reason. The Court also concludes that Stockler's motion should be denied because the Free Press and Ashenfelter's motion for sanctions was not "frivolous" or "vexatious."

Conclusion

For the reasons set forth above, Ferrara's motion for an evidentiary hearing is denied without prejudice, summary judgment is granted with respect to all but Ferrara's FWA claim against Tarjeft, and the motions for sanctions are denied. An order consistent with this opinion shall issue forthwith.

PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE

MAY 06 1998

ORDER GRANTING DEFENDANTS DETROIT FREE PRESS, INC. AND DAVID ASHENFELTER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT HOWARD TARJEFT, JR.'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT AND DENYING, WITHOUT PREJUDICE,

PLAINTIFF'S MOTION TO SUPPRESS EVIDENCE AND DENYING MOTIONS FOR SANCTIONS

At a session of said Court, held in the U.S. District Courthouse, City of Detroit, County of Wayne, State of Michigan on

PRESENT: THE HONORABLE PATRICK J. DUGGAN

U.S. DISTRICT COURT JUDGE

This matter is before the Court on Detroit Free Press, Inc. and David Ashenfelter's motion for summary judgment, defendant Tarjeft's motion for judgment on the pleadings or for summary judgment, plaintiff's motion for an evidentiary hearing, and motions for sanctions brought by defendants Detroit Free Press, Inc. and David Ashenfelter and by Lawrence Stockler. For the reasons set forth in an Opinion issued [*32] this date,

IT IS ORDERED that the motion for summary judgment brought by Detroit Free Press, Inc. and David Ashenfelter is hereby **GRANTED**, and as to those defendants, plaintiff's complaint is **DISMISSED**, and

IT IS FURTHER ORDERED that defendant Tarjeft's motion for judgment on the pleadings or for summary judgment is **GRANTED** with respect to all claims except plaintiff's claims under 18 U.S.C. § 2520 (Federal Wiretapping Act); with respect to that claim, defendant Tarjeft's motion is **DENIED**, and

IT IS FURTHER ORDERED that plaintiff's motion for an evidentiary hearing is **DENIED, WITHOUT PREJUDICE**, and

IT IS FURTHER ORDERED that the motions for sanctions brought by Detroit Free Press, Inc. and David Ashenfelter, and the motion for sanctions brought by Lawrence Stockler are **DENIED**.

PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE