

IN THE COURT OF COMMON PLEAS
DELAWARE COUNTY, OHIO

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PLATINUM PROMOTIONS &
MARKETING, LLC,

Case No. 12-CV-C-04-0412

Plaintiff,

JUDGE WHITNEY

vs.

RYAN BROWN

Defendant.

E-FILED

**DEFENDANT RYAN BROWN'S MOTION FOR PROTECTIVE ORDER TO
EXCLUDE EVIDENCE OBTAINED THROUGH THE UNLAWFUL INTERCEPTION
OF WIRE AND/OR ORAL COMMUNICATIONS PURSUANT TO R.C. §§ 2933.62 AND
18 U.S.C. §§ 2515**

Defendant and Third-Party Plaintiff Ryan Brown respectfully requests that this Court issue a protective order prohibiting Plaintiff or any other person from using the Brown-Mucci or Brown-Ronald VanScyoc recordings (as described below), or any evidence obtained therefrom, in these proceedings. Permitting the use of these recordings would violate federal and Ohio law regarding the use of unlawfully intercepted wire and/or oral communications. The detailed reasons for Defendant's motion are fully explained in the accompanying memorandum.

Respectfully submitted,

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Attorneys for Defendant and Third Party Plaintiff

MEMORANDUM IN SUPPORT OF MOTION

On November 2, 2012, the Court held a hearing on several motions pending at that time. The following exchange occurred between the Court and Plaintiff's Counsel during oral argument regarding Defendant Brown's Motion to Remove Preliminary Injunction:

THE COURT: You have any evidence he violated the --

██████████: We have it on tape, Your Honor, on tape.

THE COURT: What type of tape?

██████████: It was a taped conversation between Doug Mucci and Massimo Castelli and Mr. Brown, discussing how they are going to hide the fact they are taking these clients.

THE COURT: Was that tape made in compliance with the law of Ohio as to wire tapping?

██████████: Yeah. Someone was in the room taping.

(Hearing Transcript p. 14-15, attached hereto as Exhibit A)

The tape Plaintiff's Counsel was referring to during this exchange was the result of the interception of a telephone call between Doug Mucci, owner of recently joined Defendant High Impact Promotions, LLC, and Defendant Brown. But this tape was not made in compliance with Ohio law. Indeed, the making of this tape clearly violated Ohio, Federal and Michigan laws. As a result, Defendant Brown has filed a civil action pursuant to 18 U.S.C. §§ 2510 *et seq.* against Third-Party Defendant Shawn VanScyoc in the Southern District of Ohio - Case No. 2:12-cv-00023-EAS-TPK.¹ Additionally, Defendant Brown has filed Counterclaims in this case pursuant to R.C. §§ 2933.51 *et seq.* in response to Plaintiff's recent Amended Complaint.

¹ Defendant Brown filed a separate action in federal district court as it appears that this Court does not have concurrent jurisdiction to hear Brown's federal claims under 18 U.S.C. §§ 2510 *et seq.*

Plaintiff PPM and Third-Party Defendant Shawn VanScyoc have stated their intent to use the contents of this, and another, unlawfully intercepted wire communication in these proceedings. But R.C. §§ 2933.62 and 18 U.S.C. §§ 2515 expressly prohibit such use. Accordingly, Defendant Brown respectfully requests that this Court issue an Order restraining Plaintiff PPM, Third-Party Defendant Shawn VanScyoc and all other persons from using and/or referring to the contents of the intercepted communications in any fashion in this litigation, including during depositions, hearings, motions practice and at trial.

The Brown-Mucci Recording

High Impact Promotions ("High Impact") is a Michigan company that provides sales and sales marketing services for car dealerships throughout Michigan and the Midwest United States. [See Exhibit B, Affidavit of Doug Mucci] PPM has recently amended its Complaint to include High Impact as a Defendant. Although High Impact is a competitor of PPM's, both Shawn VanScyoc and Defendant Brown used to work for High Impact in the years preceding PPM's creation.

Dominic Simms worked for High Impact for approximately fifteen years. During that time, Simms worked for High Impact as an automotive detailer, a driver, and a performer of various odd jobs. Sometime during the Summer of 2012, Shawn VanScyoc recruited Simms to spy on his employer and its owner, Doug Mucci, with the promise of payment. Shawn VanScyoc specifically instructed Simms to attempt to record any conversations between Mucci and Brown. Simms did eventually record such a conversation. PPM and Shawn VanScyoc have recently turned over that recording to Brown's attorneys in discovery and stated their intention to use that recording in these proceedings. [See Exhibit C, Affidavit of Ryan Brown]

The recording is clearly a telephone call between Brown and Mucci. Brown carried on his part of the conversation on his cellular phone while in Ohio. Mucci carried on his part of the conversation over a speakerphone in his office in Michigan. Thus, the conversation was a “wire communication” under Federal and Ohio law. See 18 U.S.C. §§ 2510 and R.C. 2933.51. From the contents of the recording alone, it is easy to determine that Simms was not a party to the conversation. Affidavit testimony from both Mucci and Brown, however, confirm this. That affidavit testimony also confirms that neither Mucci nor Brown knew that their conversation was being intercepted or recorded. Accordingly, this communication was intercepted unlawfully and Shawn VanScyoc knew as much when he turned this recording over to his attorneys.

During Defense Counsel's investigation into the recording, Plaintiff's Counsel made the following representation: “the recording on Shawn's phone was a recording of a recording made by Doug Mucci's limo driver Dominic Simms, who recorded the conversation while he was sitting with everyone in an office at High Impact.” [See Exhibit D, E-mail between Plaintiff's and Defense Counsel] Combined with Plaintiff's Counsel's November 1, 2012 exchange with the Court (“Someone was in the room taping.”), it appears that Plaintiff's Counsel believes that some sort of “expectation of privacy” standard determines whether this communication was lawfully intercepted.

It does not. While a limited expectation of privacy standard applies to “oral communications,” no such standard applies to “wire communications.” See *Briggs v. American Air Filter Co.*, 630 F.2d 414, 417 (5th Cir. 1980) (“Wire communications, unlike oral communications, are protected against interception by electronic, mechanical, and other devices regardless of the speaker's expectation of privacy.”) Simms’ capture of Doug Mucci’s live voice may arguably be an “oral communication,” but his capture of Brown’s voice, an “aural transfer”

over a wire, is clearly a "wire communication." Accordingly, Simms capture of Brown's wire communication without the consent of either party to the communication is a violation, regardless of whether any expectation of privacy attended the communication.

Furthermore, "oral communications" are not fair game for interception simply because a party may know that the communication "might" be overheard. The question is whether the party had a subjective belief that his communication was not subject to "interception" (read – surreptitious recording) that was objectively reasonable. Doug Mucci was in his own office, surrounded by people who owed him an employee duty of loyalty, having a private conversation about subjects, which Simms had no involvement in. Clearly, Mucci's subjective expectation that his private conversation with Brown would be free from interception and disclosure to a competitor was objectively reasonable. See *Boddie v. Am. Broad. Cos.*, 731 F.2d 333, 339 n.5 (6th Cir. 1984); see also *U.S. v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978) (reasonable expectation of privacy exists in one's own office). Any other interpretation of the law would make unrestrained corporate espionage the norm. See *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) (discussion regarding Congressional intent to combat "commercial espionage" through the enactment of Title III).

Although the past and threatened uses have occurred and will occur in Ohio, the actual interception occurred in Michigan. Accordingly, it is important to understand that Michigan's eavesdropping law is even stricter than both federal and Ohio law. All three jurisdictions categorize secret recording situations into "participant" and "consensual" recordings. "Participant" recordings are situations where *one party to the conversation* records the conversation with or without the consent of the other party. "Consensual" recordings, on the other hand, are recordings made by *one who is not a party to the conversation* but has the

consent of one or more parties to the conversation. Federal and Ohio laws permit consensual recordings to be made as long as "one-party " to the conversation consents and so long as the recording is not made for a criminal, tortious or other injurious purpose. Michigan law, however, requires the consent of "all parties" before a non-party may record the conversation. See *Sullivan v. Gray*, 117 Mich App. 476, 324 NW2d 58 (1982). In this case, no party to the conversation had consented to the recording, either expressly or impliedly. As with federal and Ohio law, it is also a felony under Michigan law to unlawfully intercept or procure another to intercept private communications. Mich. Comb. Laws § 750.539c.²

Mucci has provided affidavit testimony that Simms was not physically present in the room when the recording was made. Furthermore, Mucci has testified that Simms confessed that Shawn VanScyoc procured him to make the recording with the promise of payment. Because of the criminal and civil liability attached to his conduct, Simms' confessions to Mucci are statements against interest, and thus admissible in these proceedings. In short, this recording clearly violated Michigan, Ohio and Federal law and there is no way Shawn VanScyoc could have reasonably believed it didn't when he used this recording, or threatened to use it, in these proceedings.

The Brown - Ronald VanScyoc Recording

On April 12, 2012, Brown called Ronald VanScyoc using his cell-phone. In the months prior, Ronald VanScyoc had been telling Brown that he was going to leave PPM's employ. [See Exhibit E, Affidavit of Ronald VanScyoc] Ronald VanScyoc was sitting in a car with Shawn VanScyoc when he received the call from Brown. He didn't inform Brown that Shawn

² Under the Michigan statute, it is unlawful to "eavesdrop" on a private conversation, regardless of whether the eavesdropper records the conversation.

VanScyoc was in the car listening to the call. Indeed, he led Brown to believe that the call was being held in private. But the entire episode had been staged, so that Shawn VanScyoc could intercept and record Brown's phone conversation with Ronald VanScyoc, using an audio/video recording device.³

Brown's call to Ronald VanScyoc's telephone was a "wire communication" as defined by Federal and Ohio law. Shawn VanScyoc's recording of that phone call was an "interception" as defined by the law. Although Shawn VanScyoc may or may not have had Ronald VanScyoc's consent to make the recording, *he could do so only if the purpose of the recording was not to commit a criminal, tortious or other injurious act.* (18 U.S.C. § 2511; R.C. 2933.52) In other words, the "one party consent exception" has its limits and will not save an interception from the reach of the statute when the interception is made for a criminal, tortious or other injurious purpose. *Bowens et al. v. Aftermath Entertainment et al.*, 254 F.Supp. 2d 629 (E.D. Mich., March 28, 2003).

Shawn VanScyoc's purpose in making an audio/video recording of the phone call was to post that audio/video recording publicly on the internet, on YouTube, to invade Brown's privacy, embarrass him publicly and harm his ability to engage in lawful competition. And Shawn VanScyoc did in fact post the audio/video recording publicly on YouTube on April 12, 2012 (the very same day he made the recording). [See Brown and Ronald VanScyoc Affidavits] Ronald VanScyoc testifies in his affidavit that he didn't know his brother was intercepting the call for the purpose of posting it on YouTube and believes that doing so was wrong. Ronald VanScyoc further testifies in his affidavit that he never would have given his consent for Shawn VanScyoc

³ Ronald VanScyoc provided a prior affidavit, dated April 16, 2012, which was attached in support of PPM's original Complaint for Injunctive Relief. In that affidavit, Ronald VanScyoc testified that he made the recording. Review of the recording, however, demonstrates that this was false. In the video, Shawn VanScyoc clearly makes the recording and states as much.

to record if he had known that Shawn intended to post the recording on the internet. Even if Shawn VanScyoc had as an additional purpose to later use the recording in some future lawsuit,⁴ his other improper purpose would still render the interception unlawful. See *Bowens*, 254 F.Supp. 2d 629.

Use and Disclosure of Unlawfully Intercepted Wire Communications

Under both Federal and Ohio law, it is unlawful to use and/or disclose the contents of wire communications when a person knows, or has reason to know, that the communications were intercepted unlawfully. The law treats unlawful use and disclosure as a serious matter and prescribes harsh penalties for use and disclosure violations - even for attorneys and court personnel who use intercepted material in the course of their duties. See *U.S. v. Wuliger*, 981 F.2d 1497 (6th Cir. 1992) (attorney criminally convicted for using unlawfully intercepted communications during litigation); and, *1994 Ohio Op. Atty Gen. 479*, Opinion No. 94-097 (December 30, 1994)("additionally, use or disclosure by the court of a recording known to have been made in violation of R.C. 2933.52 may subject the court to criminal and civil liability."); and, *Leach v. Byram, et al.*, 68 F.Supp. 2d 1072 (D. Minn., May 24, 1999)(attorney's threat to use unlawfully intercepted communications for impeachment gives rise to liability).

A person is presumed to know whether they have lawfully or unlawfully intercepted a wire communication at the time of interception. *McIntyre*, 582 F.2d 1221 at 1224 ("Ignorance of the law" is no defense). Accordingly, Shawn's use of the contents of the Brown-Ron VanScyoc phone call, during the TRO hearing for example, was a separate "use/disclosure" violation because Shawn is presumed to know he obtained the contents unlawfully. See *Bess v. Bess*, 929

⁴ The instant lawsuit wasn't filed until April 16, 2012.

F.2d 1332 (8th Cir. 1991) (reciting facts in court proceeding that were obtained from unlawfully intercepted communications is prohibited). Because Shawn VanScyoc procured the interception of the Brown-Mucci recording, he clearly knew that recording was obtained unlawfully, as well. Accordingly, his use of that recording in these proceedings constitutes further violations of the law.

Conclusion

Although the issue of whether the recordings were obtained unlawfully has yet to be adjudicated, the Court nevertheless has the discretion to rule on evidentiary issues. Thus, the Court has the discretion to exclude the use of these recordings even without a final adjudication of Defendant Brown's wiretapping/eavesdropping claims. Accordingly, to avoid further violations of the law and to protect Defendant Brown's rights under the law, Defendant Brown requests that the Court issue a protective order preventing Plaintiff or any other persons from using these recordings, or other evidence obtained therefrom, in these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served by e-mail to Plaintiff's attorney at the following address on this 5 day of February, 2013:

[REDACTED]

/s/Danny L. Caudill
Danny L. Caudill (0078859)

Attorney for Defendant