

STATE OF MICHIGAN  
COURT OF APPEALS

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BERNARD P. KNASIAK,

Plaintiff-Appellant,

v

MARA J. RIGG, f/k/a MARA J. KNASIAK,

Defendant-Appellee.

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UNPUBLISHED

January 16, 1998

No. 195324

Washtenaw Circuit Court

LC No. 96-006812

Before: White, P. J., and Cavanagh and Reilly, JJ

PER CURIAM.

Plaintiff appeals as of right from the order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and ordering plaintiff to pay costs and fees pursuant to MCR 2.114(E). We affirm.

Plaintiff filed suit against defendant alleging that defendant intentionally recorded private telephone conversations between plaintiff and defendant for the purpose of eliciting incriminating statements from plaintiff in violation of (1) the federal wiretapping act, 18 USC 2510 *et seq.*, (2) Michigan's eavesdropping statutes, MCL 750.539 *et seq.*; MSA 28.807 *et seq.*, and (3) the common law tort of invasion of privacy. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8). The trial court granted defendant's motion, reasoning that because there is no illegality in recording one's own telephone conversations, plaintiff had failed to state a claim upon which relief could be granted. A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. See *ABC Supply Co v City of River Rouge*, 216 Mich App 396, 397; 549 NW2d 73 (1996). A motion for summary disposition based on a failure to state a claim tests the legal sufficiency of a claim by the pleadings alone. All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusion that can be drawn from the facts. The motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Jackson v Oliver*, 204 Mich App 122, 125; 514 NW2d 195 (1994).

Plaintiff, proceeding in propria persona, first argues that his due process rights were violated in a prior criminal proceeding in which he was convicted of solicitation for murder in violation of MCL 750.157b; MSA 28.354(2).<sup>1</sup> The circumstances of plaintiff's prior conviction have no bearing on our disposition of this appeal. Plaintiff next argues that the recordings at issue were used against plaintiff in the prior criminal trial in contravention of the spousal evidentiary privileges. Again, the circumstances of plaintiff's prior conviction are not relevant to this civil action.

Next, plaintiff argues that defendant's prior sworn statements indicate that she recorded the telephone conversations at issue at the behest of government officials not possessing a warrant. However, plaintiff fails to explain why this allegation is relevant to the trial court's decision to grant defendant's motion for summary disposition. Accordingly, we deem this issue abandoned as being insufficiently briefed. *Dresden v Detroit Macomb Hospital Corp*, 218 Mich App 292, 300; 553 NW2d 387 (1996).

Plaintiff's next question presented raises the issue of the applicability of the federal wiretapping act, 18 USC 2510 *et seq.*, to defendant's alleged conduct. The federal wiretapping act provides in part:

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 any criminal or tortious act in violation of the Constitution or laws of the United States or any State. [18 USC 2511(2)(d) (emphasis added).]

Because defendant was a party to the conversations she surreptitiously recorded and because plaintiff failed to allege facts from which one could reasonably infer that defendant recorded the communication for the purpose of committing a criminal or tortious act, defendant's conduct, as alleged, was not in violation of the federal wiretapping act. See *By Prod Corp v Armen-Berry Co*, 668 F2d 956, 959 (CA 7, 1982), citing 18 USC 2511(2)(d). Moreover, defendant's recording of her own conversations was not "eavesdropping" under Michigan's eavesdropping statutes. See *Sullivan v Gray*, 117 Mich App 476, 481; 324 NW2d 58 (1982). Plaintiff's apparent reliance on *Young v Young*, 211 Mich App 446; 536 NW2d 254 (1995), is misplaced because the defendant in *Young*, *supra* at 448, recorded the plaintiff's conversations with third parties rather than conversations to which he was a party himself. Accordingly, because no factual development could possibly justify a right of recovery, we hold that the trial court did not err in granting defendant's motion for summary disposition. *Jackson*, *supra* at 125.

Plaintiff next contends that certain actions of the trial judge exhibited bias against him. In order to properly preserve a claim of judicial bias for appellate review, a party must have (1) made a motion for disqualification before the trial court, *In re Forfeiture of \$53*, 178 Mich App 480, 497; 444 NW2d 182 (1989), and (2) requested referral to the chief judge of the trial court after the trial court's denial of the motion for disqualification, *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). In this case, although plaintiff filed an ex parte motion to disqualify the trial judge pursuant to

MCR 2.003, nothing in the record suggests that plaintiff's motion was ever considered by the trial judge or by the chief judge. Accordingly, this issue was not preserved for this Court's review. *Welch, supra* at 258. Plaintiff further contends that defendant's attorney's representation of defendant created a conflict of interest. However, because this issue was not raised before the trial court,<sup>2</sup> it need not be addressed on appeal. See *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994).

Finally, plaintiff argues that the trial court should not have awarded costs to defendant pursuant to MCR 2.114(E), because in the order granting defendant's motion for summary disposition, the trial court also denied defendant's motion for a bill of peace. We disagree. A trial court's finding with respect to whether a claim was frivolous will not be disturbed on appeal unless clearly erroneous. *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 466; 531 NW2d 768 (1995). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Andrews v Pentwater Twp*, 222 Mich App 491, 493; 563 NW2d 713 (1997). In this case, the trial court's implicit finding that defendant's suit was frivolous was not clearly erroneous.

Plaintiff further contends that, because defendant's motion for a bill of peace was frivolous, plaintiff should have been awarded costs pursuant to 2.114(E). This aspect of plaintiff's final argument was not preserved for appellate review. On June 24, 1996, plaintiff filed a motion to impose sanctions based on the trial court's denial of defendant's motion for a bill of peace. On the same date, plaintiff also filed a notice of hearing for June 17, 1996, a date which had already passed. Because nothing in the record suggests that a hearing was ever held or that plaintiff's motion was ever addressed by the trial court, there is nothing for this Court to review.

Affirmed. Defendant being the prevailing party, she may tax costs pursuant to MCR 7.219.

/s/ Helene N. White

/s/ Mark J. Cavanagh

/s/ Maureen Pulte Reilly

<sup>1</sup> Defendant was the intended victim of plaintiff's solicitation.

<sup>2</sup> Plaintiff first raised this issue in a motion made to this Court for a writ of superintending control.