

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAROLD L. CARE; )  
LAWRENCE CLAAR; ) Civil Action  
TREANTAFFELO KARAHALIAS; ) No. 2003-CV-04121  
MICHAEL KLINE; )  
GORDON KONEMANN; )  
FRANCIS A. ROSSI; and )  
LEE G. SMITH, )

Plaintiffs )

vs. )

THE READING HOSPITAL AND )  
MEDICAL CENTER; )  
JAKOB (JAPP) OLREE, )  
Individually, and in His )  
Capacity as Director of )  
Facilities Management for The )  
Reading Hospital and )  
Medical Center, Inc.; )  
MICHAEL FORBES, )  
Individually, and in His )  
Capacity as Assistant Director )  
of Facilities Management for )  
The Reading Hospital and )  
Medical Center, Inc.; )  
MARK BALATGEK, )  
Individually, and in His )  
Capacity as Maintenance )  
Manager for The Reading Hospital )  
and Medical Center, Inc.; )  
RICHARD MABLE, )  
Individually, and in His )  
Capacity as Vice President of )  
the Engineering Department for )  
The Reading Hospital and )  
Medical Center, Inc.; )  
PAUL McCOY, )  
Individually, and in His )  
Capacity as the Former )  
Chief Engineer for The Reading )  
Hospital and Medical )  
Center, Inc.; and )

JOHN AND JANE DOES 1 Through 20, )  
Individually and in Their )  
Capacities as Employees of The )  
Reading Hospital and Medical )  
Center, Inc., )  
Defendants )

\* \* \*

APPEARANCES:

RICK LONG, ESQUIRE  
SIMON GRILL, ESQUIRE  
On behalf of Plaintiffs

VINCENT CANDIELLO, ESQUIRE  
CLAUDIA A MORENO, ESQUIRE  
On behalf of Defendants The Reading Hospital and  
Medical Center, Jakob (Japp) Olree,  
Michael Forbes, Richard Mable, and Paul McCoy

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O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

INTRODUCTION

This matter is before the court on The Reading Hospital and Medical Center, Inc.'s, Jakob Olree's, Michael Forbes', Richard Mable's and Paul McCoy's Motion to Dismiss, which motion was filed July 21, 2003. Plaintiff's Answer to Motion to Dismiss of Defendants Reading Hospital and Medical Center, Inc., Jakob Olree, Michael Forbes, Richard Mable and Paul McCoy was filed August 1, 2003. The Reading Hospital and Medical Center, Inc.'s, Jakob Olree's, Michael Forbes', Richard Mable's and Paul McCoy's

Reply Memorandum in Support of their Motion to Dismiss was filed October 6, 2003. For the reasons expressed below, we grant in part and deny in part defendants' motion to dismiss.

Specifically, we deny defendants' motion to dismiss Counts I through VII and a portion of Count XIII of Plaintiffs' Complaint alleging invasion of privacy relating to incidents occurring prior to January 22, 2002. We grant defendants' motion to dismiss Counts X, XI, XII, XIV, XV, XVI, XVII and that portion of Count XIII alleging the January 22, 2002 incident involving invasion of privacy.

#### JURISDICTION

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441(b). Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiffs' claims allegedly occurred in this judicial district, namely, Berks County, Pennsylvania.

#### BACKGROUND

On June 16, 2003 Plaintiffs' Complaint ("Complaint") was filed in the Court of Common Pleas of Berks County, Pennsylvania. The Complaint alleges multiple violations of the Pennsylvania Wire Tapping and Electronic Surveillance Control Act ("Wiretap Act")<sup>1</sup> (Counts I, II, III, V, VI, and VIII) and Title

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<sup>1</sup> 18 Pa.C.S.A. §§ 5701-5781.

III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III")<sup>2</sup> (Counts IV, VII and IX), as well as state law claims for civil conspiracy (Counts X, XI and XII), invasion of privacy (Count XIII), negligent supervision (Counts XIV, XV and XVI) and respondeat superior liability (Count XVII). On July 14, 2003 defendant The Reading Hospital and Medical Center together with individual defendants Jakob (Japp) Olree, Michael Forbes, Richard Mable and Paul McCoy, with the concurrence of defendant Mark Balatgek<sup>3</sup>, removed this action to this court.<sup>4</sup> Plaintiffs have not contested removal.

#### PLAINTIFFS' COMPLAINT

Based upon the allegations in Plaintiffs' Complaint and the exhibit attached thereto, which we must accept as true for purposes of this motion, the operative facts are as follows.

Plaintiffs Harold L. Care, Lawrence Claar, Treantaffelo Karahalias, Michael Kline, Gorden Konemann, Francis A. Rossi and

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<sup>2</sup> 18 U.S.C. §§ 2510-2522.

<sup>3</sup> On September 11, 2003 defendant Mark Balatgek filed a Voluntary Petition for bankruptcy pursuant to Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania in case number 2003-24879. By Order dated January 20, 2004 United States Bankruptcy Judge Thomas M. Twardowski granted the application of defendants The Reading Hospital and Medical Center, Inc., Jakob Olree, Michael Forbes, Richard Mable and Paul McCoy to modify the automatic stay in Mark Balatgek's bankruptcy case to permit the within action to continue against these defendants until this matter is either settled or final judgment is entered. At this time, it does not appear that Judge Twardowski has lifted the stay with regard to plaintiffs' claims against defendant Mark Balatgek. Thus, we do not address those claims.

<sup>4</sup> This case was removed prior to defendant Balatgek filing his bankruptcy petition.

Lee G. Smith are each employees of defendant The Reading Hospital and Medical Center ("RHMC") and worked in its engineering department.

Defendant Richard Mable is the Vice-President of the Engineering Department for RHMC. Defendant Jakob Olree is the Director of Facilities Management for RHMC and reported to defendant Mable. Defendant Michael Forbes is the Assistant Director of Facilities Management for RHMC and reported to defendant Olree. Defendant Mark Balatgek was the former Maintenance Manager for RHMC and oversaw certain day and night shift supervisors. Finally, defendant Paul McCoy was the Chief Engineer for RHMC until his retirement in 1997.

Since prior to defendant McCoy's retirement in 1997 there have been allegedly unlawful interceptions of plaintiffs' oral communications by one or more of the defendants. The last such interception occurred on January 22, 2002 during a meeting conducted by labor/management consultant Sue McQuen and the Engineering Department employees, which included plaintiffs.

On January 22, 2002 plaintiffs found a tape recorder in defendant Balatgek's locker. One of the employees (not a plaintiff) telephoned defendant Olree to report the finding of the tape recorder. Shortly thereafter defendants Olree, Forbes and Mable, together with defendant Balatgek and the hospital security supervisor Michael Resch, arrived at the meeting

location and retrieved the tape recorder and tape; and defendant Mable took possession of the items.

Several employees, including all plaintiffs, filed a criminal complaint in West Reading, Berks County, Pennsylvania. On January 24, 2002 West Reading police executed a search warrant and seized the tape and recording device. Thereafter, on January 25, 2002 defendant Balatgek gave a formal Statement to police.

Plaintiffs contend that the meeting with the labor/management consultant was supposed to be confidential. Specifically, they contend that while the consultant was going to report back to management certain concerns raised by the employees, the names of the employees expressing concerns would be kept confidential.

Moreover, in his Statement to the West Reading police, defendant Balatgek stated that he had been told by a management level employee, Rich Pavanarias, that defendants Olree and McCoy had performed this type of surveillance of employees often in the past and that defendant Olree had in the past specifically asked Balatgek to do this. Thus, Plaintiffs' Complaint asserts that the alleged interception of oral communications was a continuing course of conduct by defendants.

### STANDARD OF REVIEW

A Rule 12(b)(6) motion to dismiss examines the sufficiency of the Complaint. Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957). In determining the sufficiency of the Complaint the court must accept all plaintiffs' well-pled factual allegations as true and draw all reasonable inferences therefrom in favor of plaintiffs. Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997).

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Conley, 355 U.S. at 47, 78 S.Ct. at 103, 2 L.Ed.2d at 85.

(Internal footnote omitted.) Thus, a court should not grant a motion to dismiss unless it appears beyond a doubt that the plaintiffs can prove no set of facts in support of his claim which would entitle them to relief. Graves, 117 F.3d at 726 citing Conley, 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at 84.

In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the Complaint, exhibits attached to the Complaint, matters of public

record, and documents that form the basis of the claim.

Lum v. Bank of America, No. 01-4348, 2004 U.S. App. LEXIS 4637 at \*9, n.3 (3d Cir. Mar. 11, 2004).

## DISCUSSION

### Statute of Limitations

Initially, defendants assert that certain of plaintiffs' claims are barred by the statute of limitations. Specifically, defendants contend that plaintiffs' claims for invasion of privacy are governed by a one-year statute of limitations.<sup>5</sup> Defendants aver that the most recent allegations of invasion of privacy occurred on January 22, 2002; and plaintiffs did not file their Complaint until June 16, 2003, more than one year later. Thus, defendants argue that the statute of limitations on this incident has expired and that Count XIII of Plaintiffs' Complaint should be dismissed.

Moreover, defendants assert that plaintiffs' claim for conspiracy to invade their right to privacy is also time-barred because the time period for the statute of limitations on a conspiracy is controlled by the substantive offense alleged to be the object of the conspiracy. Defendants rely on Chappelle v. Case, 487 F. Supp. 843 (E.D. Pa. 1980) for this proposition.

Defendants cite McKeeman v. Corestates Bank, N.A.,

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<sup>5</sup> See 42 Pa.C.S.A. § 5523(1).

751 A.2d 655, 660 (Pa. Super. 2000) for the proposition that absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy. Hence, defendants assert that because plaintiffs' underlying cause of action for invasion of privacy is time-barred, any conspiracy to commit that offense is also time-barred. Thus, defendants contend that Count XII of Plaintiffs' Complaint must be dismissed.

Next, defendants assert that all claims for unlawful interception, attempted interception, or procuring under either the Pennsylvania Wiretap Act or Title III occurring prior to June 16, 2001 should be dismissed because they are outside the two-year statute of limitations for such actions. Specifically, defendants assert that Pennsylvania law provides a two-year statute of limitations for all other intentional or negligent wrongs pursuant to 42 Pa. C.S.A. § 5524. Moreover, in Bristow v. Clevenger, 80 F. Supp. 2d 421 (M.D. Pa. 2000) United States District Judge Sylvia H. Rambo determined that the two-year statute of limitations applied to a Wiretap Act cause of action.

Finally, defendants assert that there is a two-year statute of limitations pursuant to Title III.<sup>6</sup> Defendants aver that because plaintiffs did not file this action until June 2003, any alleged violations of Title III prior to June 2001 are time-barred. Thus, defendants assert that the statute of limitations

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<sup>6</sup> 18 U.S.C. § 2520(e).

bars all claims contained in Counts I through VII and the conspiracy counts in X and XI of Plaintiffs' Complaint asserted prior to June 16, 2001.

Initially, plaintiffs concede<sup>7</sup> that their invasion-of-privacy claim based upon the January 22, 2002 incident is barred by the statute of limitations. Accordingly, we grant defendants motion to dismiss this portion of Count XIII of Plaintiffs' Complaint.

Next, plaintiffs contend that their cause of action for invasion of privacy should not be dismissed regarding alleged incidents occurring in the past because plaintiffs assert that they did not discover the prior instances of potential claims for invasion of privacy, or for that matter earlier alleged claims under either the Wiretap Act or Title III, until they obtained a copy of defendant Balatgek's "confession"<sup>8</sup> on October 10, 2002. Plaintiffs aver that they were unaware of defendants' alleged

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<sup>7</sup> Plaintiffs' memorandum in opposition to defendants' motion to dismiss states: "Plaintiffs acknowledge that there is a one-year statute of limitations for actions based upon a claim of invasion of privacy, 42 Pa. C.S.A. § 5523(1) and that, as a result, any invasion of privacy claims relating to the January 22, 2002 incident would be time barred." See Memorandum of Law in Opposition to Defendant Reading Hospital's, Olree's, Forbes', Mable's and McCoy's Motion to Dismiss, page 4.

<sup>8</sup> The Statement of defendant Mark Balatgek was taken by the West Reading, Pennsylvania police department on January 25, 2001. The Statement is a six-page document that is attached as Exhibit A to Plaintiffs' Complaint. Plaintiffs label this as defendant Balatgek's "confession". At oral argument defense counsel referred to the Statement as an "affidavit". We make no determination at this time regarding the appropriate characterization of the Statement. However, because it is attached to Plaintiffs' Complaint as an Exhibit, we may consider the contents of the Statement in our determination on defendants' motion to dismiss. Lum, supra.

continuing course of conduct in surreptitiously using electronic surveillance devices to intercept or attempt to intercept the oral communications or conversations of plaintiffs and others until they were in receipt of defendant Balatgek's Statement.

Plaintiffs further aver that they were not aware that defendant Balatgek made a Statement to the police until his arraignment on criminal charges on October 2, 2002. Plaintiffs rely on the decision of the late United States District Judge Robert S. Gawthrop, III, in Doe v. Kohn, Nast & Graf, P.C., 866 F. Supp. 190, 195 (E.D. Pa. 1994) for the proposition that under Pennsylvania's discovery rule, a statute of limitations does not begin to run until such time as the plaintiff has discovered his injury, or in the exercise of reasonable diligence, should have discovered the injury. Thus, plaintiffs contend that the statute of limitations did not begin to run until October 10, 2002 on all claims for invasion of privacy or claims pursuant to Title III or the Wiretap Act because that is the date that they came into possession of the Statement.

Finally, plaintiffs concede that there is a two-year statute of limitations in a Title III case. However, plaintiffs contend that there is a six-year statute of limitations in Wiretap Act cases pursuant to the Commonwealth Court of Pennsylvania's decision in Boettger v. Miklich, 142 Pa. Commw. 136, 142, 599 A.2d 713, 716 (1991). Hence,

notwithstanding their discovery rule argument, plaintiffs assert that they can seek damages regarding any alleged violation of the Wiretap Act for six years preceding the filing of their Complaint.

#### Discovery Rule

Initially, we address plaintiffs' assertion that the statute of limitations on the state law causes of action for invasion of privacy and for alleged violations of the Pennsylvania Wiretap Act are tolled pursuant to the Pennsylvania discovery rule.

In Pocono International Raceway Inc., v. Pocono Produce, Inc., 503 Pa. 80, 468 A.2d 468 (1983), the Supreme Court of Pennsylvania analyzed the application of the Pennsylvania discovery rule as follows:

As a matter of general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period. Thus, the statute of limitations begins to run as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations, even though a person may not discover his injury until it is too late to take advantage of the appropriate remedy, this is incident to a law arbitrarily making legal remedies contingent on mere lapse of time. Once the prescribed statutory period has expired, the party is barred from bringing suit unless it is

established that an exception to the general rule applies which acts to toll the running of the statute.

The "discovery rule" is such an exception, and arises from the *inability* of the injured, *despite the exercise of due diligence*, to know of the injury or its cause. Thus, in the case of a subsurface injury in which, unknown to the plaintiff, the defendant removes coal from his land via access originating on the defendant's land, the inability of the plaintiff, despite the exercise of diligence, to know of the trespass, tolls the running of the statute, for "no amount of vigilance will enable him to detect the approach of a trespasser who may be working his way through the coal seams underlying adjoining lands," and until such time as the plaintiff discovers, or reasonably should have discovered, the trespass, the running of the statute is tolled. Likewise, in a case of medical malpractice involving the failure of a surgeon to remove an implement of surgery, it is the inability of the plaintiff to ascertain the presence of the offending implement which prevents the commencement of the running of the statute, for "[c]ertainly he could not open his abdomen like a door and look in; certainly he would need to have medical advice and counsel." The salient point giving rise to the equitable application of the exception of the discovery rule is the inability, despite the exercise of diligence by the plaintiff, to know of the injury. A court presented with an assertion of applicability of the "discovery rule" must, before applying the exception of the rule, address the ability of the damaged party, exercising reasonable diligence, to ascertain the fact of a cause of action.

503 Pa. at 84-85, 468 A.2d at 471. (Emphasis in original.)

(Citations omitted.)

In this case, based upon the Statement of defendant

Balatgek given to the West Reading Police Department, plaintiffs contend that they were unaware that defendants had been allegedly surreptitiously recording the oral communications of the employees of the Engineering Department since prior to Paul McCoy's retirement in 1997. Furthermore, plaintiffs contend in their response to defendants' within motion that they could not have known about these alleged recordings until they received a copy of defendant Balatgek's Statement after his October 2, 2002 arraignment on the criminal charges related to the January 22, 2002 incident.

Also, in the alternative, plaintiffs assert that even if the court determines that January 22, 2002 is the earliest date that plaintiffs should have been aware of defendants perpetration of additional incidents of allegedly illegal interceptions, all of the causes of action under either the Wiretap Act or Title III survive pursuant to the discovery rule.

We note that the two traditional areas where the discovery rule previously has been applied are the two circumstances reviewed by the Supreme Court of Pennsylvania in Pocono Raceway. Traditionally, the discovery rule has been applied where the injury involves either a subsurface injury or in a medical malpractice action.

However, in Doe Judge Gawthrop held that the discovery rule applied in an invasion-of-privacy case where plaintiff

alleged that his former employer was, while plaintiff was an employee, secretly opening and reading his personal mail, without notifying him. Plaintiff did not find out about his employer opening his mail until after the litigation had commenced. There, the court held that the discovery rule applied to toll the statute of limitations until plaintiff was aware of the alleged invasion of privacy. 866 F. Supp. at 195. We find that decision persuasive in our determination of whether to apply the discovery rule in this case.

If the Supreme Court of Pennsylvania has not addressed a precise issue, a prediction must be made taking into consideration "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." Nationwide Mutual Insurance Company v. Buffetta, 230 F.3d 634, 637 (3d. Cir. 2000) (citation omitted). "The opinions of intermediate state courts are 'not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court in the state would decide otherwise.'" 230 F.3d at 637 citing West v. American Telephone and Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940).

We are unaware of any appellate decision from either the Supreme Court of Pennsylvania or any Pennsylvania

intermediate appellate court where the discovery rule has been applied to either a cause of action for invasion of privacy or to a violation of the Wiretap Act.

The only decision of which we are aware is the Doe case where Judge Gawthrop applied the discovery rule to an invasion of privacy claim. For the following reasons, we predict that the Supreme Court of Pennsylvania would permit the application of the discovery rule to either a cause of action for invasion of privacy or pursuant to the Wiretap Act.

Plaintiffs' allegations of surreptitious recording of conversations by defendants constitute the type of conduct that belies easy detection. Absent someone involved in the scheme revealing the activity as defendant Balatgek did in his Statement to the West Reading Police Department, or being caught in the act as Mr. Balatgek was on January 22, 2002, there would be no way for plaintiffs to know that their conversations were being recorded in violation of their rights.

We find this type of conduct analogous to the causes of action where the discovery rule has been traditionally applied. In a case where a trespasser is removing coal from under the ground, the landowner would ordinarily have no reason to know or believe that his rights are being violated. In addition, a patient who has a sponge or some other surgical device left in his body after surgery would ordinarily have no reason to know

that such an incident has occurred.

In this case, we conclude that plaintiffs would have had no reason to believe that agents of their employer were secretly recording their conversations in the workplace. Thus, it would not be until someone was caught perpetrating this activity or admitted such conduct, that plaintiffs would have any reason to know, or in the exercise of due diligence have reason to believe, that such conduct was occurring.

As noted by former Chief United States District Judge for the Eastern District of Pennsylvania Edward N. Cahn,

We recognize the particular difficulties plaintiffs face in presenting evidence to support wiretap claims. "The fact that most of the plaintiffs have no personal, first-hand knowledge that any particular [oral communication was recorded] is not remarkable . . . [T]he intentional [torts] of wiretapping [and invasion of privacy] created [under Pennsylvania law are] obviously [ones] which by [their] very nature [are] unknown to the [plaintiffs]."

Gross v. Taylor, No. Civ. A. 96-6514, 1997 U.S. Dist. LEXIS 11657 at \*16 (E.D. Pa. Aug. 5, 1997). (Citation omitted.)

Because we conclude that this case presents issues of the exact type which requires application of the Pennsylvania discovery rule, we predict that the Supreme Court of Pennsylvania, if given the opportunity under a case alleging similar facts, would apply the discovery rule to toll the statute of limitations in a matter involving either an invasion of

privacy claim or a claim pursuant to the Wiretap Act.

In Title III cases, there is a built-in discovery rule pursuant to the statute. "A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation." 18 U.S.C. § 2520(e). Thus, we do not have to determine whether the discovery rule applies under federal law because it is written into the applicable statute.

In addition to the foregoing, while a determination of whether the statute of limitations has run is usually a question of law for the judge to decide, where the issue involves a factual determination, that determination is for the jury. Resolution Trust Corporation v. Farmer, 865 F. Supp. 1143, 1158 (E.D. Pa. 1994).

Moreover, Pennsylvania courts have extended this concept to include a determination by a jury of whether plaintiffs knew, or with the exercise of diligence, should have known, about a cause of action for purposes of applying the discovery rule. See Crouse v. Cyclops Industries, 560 Pa. 394, 745 A.2d 606 (2000); Gallucci v. Phillips & Jacobs, Inc., 418 Pa. Super 306, 614 A.2d 284 (1992).

Finally, if a jury determines that in the exercise of diligence, plaintiffs could not have known about their causes of

action until October 10, 2002,<sup>9</sup> then we would not have to decide whether a two-year or six-year statute of limitations applies to plaintiffs' cause of action pursuant to the Wiretap Act. This is because the statute of limitations for plaintiffs' causes of action for invasion of privacy, the Wiretap Act and Title III would all be tolled until October 10, 2002 (based upon the discovery rule) as the result of such a jury finding. The filing of Plaintiffs' Complaint on June 16, 2003 (eight months after October 10, 2002) would be well within a one-, two-, or six-year statute of limitations.

If on the other hand, the jury determines that plaintiffs should have known about their causes of action under the Wiretap Act, or could have discovered it in the exercise of reasonable diligence, we would then make a determination regarding the length of the applicable statute of limitations in a Wiretap Act case.

Thus, it is not free and clear from doubt whether the discovery rule permits plaintiffs' causes of action for incidents of invasion of privacy which occurred prior to January 22, 2002. Nor is it free and clear from doubt whether the discovery rule permits plaintiffs' causes of action for alleged violations of the Wiretap Act and Title III which occurred prior to the

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<sup>9</sup> As noted above, October 10, 2002 is the date on which plaintiffs contend that they first came into possession of the Statement which defendant Balatgek gave to the police on January 25, 2002, which was disclosed at Mr. Balatgek's arraignment on criminal charges on October 2, 2002.

statute-of-limitations period. And because it appears that such determinations are required to be made by the jury, we deny defendants' motion to dismiss Counts I, II, III, IV, V, VI, VII and XIII of Plaintiffs' Complaint, which motion is based on defendants' contentions that these counts are barred by the statute of limitations.

Moreover, we conclude that, at this time, plaintiffs are not limited to incidents occurring after June 16, 2001 based upon either the Wiretap Act or Title III. Furthermore, it will be for the jury to determine what date -- either January 22, 2002 (the discovery of a tape recorder in defendant Balatgek's locker), October 10, 2002 (when plaintiffs allegedly first come into possession of Mr. Balatgek's Statement to the police), or some date in between -- that plaintiffs first discovered the basis for their claims for invasion of privacy and for violations of Title III and the Wiretap Act. (As noted above, the invasion of privacy claim relating to the January 22, 2002 incident is barred by the statute of limitations.)

#### Oral Communications

"Oral communication" is defined under the Wiretap Act as: "Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation."

18 Pa.C.S.A. § 5702. The expectation of non-interception must be

analyzed by considering whether the speaker possessed a reasonable expectation of privacy. The standard for analysis is objective and the subjective expectation of plaintiffs is irrelevant. Agnew v. Dupler, 533 Pa. 33, 40-41, 717 A.2d 519, 523 (1998).

"Oral communication" is similarly defined under Title III as: "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation...." 18 U.S.C. § 2510(2).

In this case, defendants contend that the allegations contained in Plaintiffs' Complaint negate any reasonable expectation of privacy in the January 22, 2002 meeting. Defendants assert that plaintiffs were told on numerous occasions that the communications made by them to the labor/management consultant would be reported back to management.

On the contrary, plaintiffs assert in their response to defendants' motion that they had a reasonable expectation of privacy with respect to their meeting with the labor/management consultant because they had been assured by management that only legitimate concerns would be forwarded to management, but that the identities of any employee who made a specific comment or concern during the meeting would not be revealed.

In paragraphs 35, 36, 37, 38, 40 and 42 of Plaintiffs'

Complaint, it is alleged that the meeting with the labor/management consultant was a "confidential meeting". Moreover, in paragraph 59 of the Complaint, plaintiffs allege that they had a reasonable expectation of privacy regarding their oral conversations not only at the January 22, 2002 meeting, but in all other meetings and conversations while they were working inside defendant hospital.

Pursuant to the standard of review, we are required to accept all plaintiffs' well-pled facts as true and may not dismiss a cause of action unless it is clear and free from doubt that plaintiffs cannot prevail under any set of facts presented. In applying this standard, we conclude that plaintiffs adequately assert that they had a reasonable expectation of privacy and non-interception in the January 22, 2002 meeting and that plaintiffs adequately assert that their conversations at work prior to January 22, 2002 were subject to a reasonable expectation of privacy and non-interception.

Accordingly, we deny defendants' motion to dismiss Counts I, II, III, IV, V, VI and VII, which motion is based upon defendants' assertion that the conversations of plaintiffs were not "oral communications" pursuant to either the Wiretap Act or Title III.

### Civil Conspiracy

A civil conspiracy exists pursuant to Pennsylvania law when: (1) a combination of two or more persons act with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act is done in pursuit of the common purpose; and (3) actual legal damage results. Moreover, absent an underlying cause of action for a particular act, there can be no separate cause of action for civil conspiracy. McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa. Super. 2000).

Defendants contend that plaintiffs fail to assert a cause of action for conspiracy because they have not pled an underlying cause of action<sup>10</sup> for an invasion of privacy, or pursuant to either the Wiretap Act or Title III. In addition, defendants assert that because Plaintiffs' Complaint alleges that all defendants were acting in their official capacity as agents of defendant RHMC, there can be no conspiracy claim because acts of agents are acts of the entity itself, and a corporation cannot conspire with itself.

On the other hand, plaintiffs contend that they have properly pled a cause of action for civil conspiracy. Specifically, plaintiffs aver that they have set forth a cause of

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<sup>10</sup> Count X of Plaintiffs' Complaint avers a cause of action for civil conspiracy to violate the Wiretap Act. Count XI avers a cause of action for civil conspiracy to violate Title III. Count XII avers a cause of action for civil conspiracy to violate plaintiffs' rights to privacy.

action for invasion of privacy based upon events occurring prior to, but not including, the January 22, 2002 incident. In addition, they assert that they have set forth causes of action under both the Wiretap Act and Title III. Finally, plaintiffs concede that they have pled that all the individual defendants have acted as agents of RHMC.

However, plaintiffs assert that defendants will contend that defendant Balatgek was acting on his own in an ultra vires fashion regarding the January 22, 2002 incident. Plaintiffs rely on the case of Tyler v. O'Neill, 994 F. Supp. 603 (E.D. Pa. 1998) for the proposition that when agents or employees are acting outside the scope of their duties for the corporation, for personal reasons, and one of the parties to the conspiracy is not an agent or employee of the corporation, a cause of action for civil conspiracy exists.

Moreover, plaintiffs rely on Tyler for the proposition that this rule has been liberally construed so as to allow a civil conspiracy claim to proceed where agents or employees act outside their corporate roles, even in the absence of a co-conspirator from outside the corporation. For the following reasons, we agree with plaintiffs in part; we agree with defendants in part; and we dismiss plaintiffs' claims for civil conspiracy in Counts X, XI and XII of Plaintiffs' Complaint.

Initially, based upon our analysis articulated above,

we conclude that plaintiffs have sufficiently pled causes of action based upon a claim of invasion of privacy and claims brought pursuant to the Wiretap Act and Title III. Accordingly, we deny defendants' motion to dismiss on those grounds. However, for the following reasons, we agree with defendants that a corporation cannot conspire with its own agents. Thus, we grant defendants' motion to dismiss on that ground and dismiss Counts X, XI and XII of Plaintiffs' Complaint.

"A single entity cannot conspire with itself and similarly, agents of a single entity cannot conspire among themselves." Rutherford v. Presbyterian-University Hospital, 417 Pa. Super 316, 333-334, 612 A.2d 500, 508 (1992). In this case, plaintiffs allege that all the individual defendants acted in the course and scope of their employment.<sup>11</sup> We find unpersuasive plaintiffs' argument that defendants will assert that defendant Balatgek was acting in an ultra vires manner and outside the scope of his employment regarding his activities on January 22, 2002 or before. This contention is belied by Mr. Balatgek's Statement to the West Reading Police Department which is attached as Exhibit A to Plaintiffs' Complaint.

In his Statement, Mark Balatgek contends that he was instructed by Jakob Olree to record the meeting on January 22, 2002 and that he had done similar recording in the past at the

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<sup>11</sup> See Plaintiffs' Complaint paragraphs 13 (Balagtek), 17 (Olree), 20 (Forbes), 23, (Mable) and 26 (McCoy).

direction of Mr. Olree. Mr. Balatgek stated that he knew that the recording was morally wrong, but that he did not know it was a crime. Moreover, he stated that the reason that he did this was because he was concerned for his own job at the time.

Thus, we conclude Mr. Balatgek's Statement supports plaintiffs' contention in the Complaint that defendant Balatgek was acting in the course of his duties for the hospital at the direction of Mr. Olree. Because Plaintiffs' Complaint alleges activity of all the individual defendants involved acting in an official capacity on behalf of RHMC, we conclude that absent an allegation of conduct outside of their corporate roles, Tyler, supra, and absent a third party co-conspirator, plaintiffs fail to set forth a claim for civil conspiracy.

Accordingly, we grant defendants' motion to dismiss Counts X, XI and XII of Plaintiffs' Complaint.

#### Negligent Supervision

Counts XIV<sup>12</sup>, XV<sup>13</sup> and XVI<sup>14</sup> of Plaintiffs' Complaint all aver causes of action sounding in negligent supervision.

Defendants argue that these three claims should be dismissed because they are preempted by the Pennsylvania Workmen's

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<sup>12</sup> Count XIV of Plaintiffs' Complaint avers a cause of action against RHMC for negligent or reckless supervision of its duly authorized officials, officers, agents, servants workers and employees.

<sup>13</sup> Count XV of Plaintiffs' Complaint avers a cause of action against RHMC for negligent or reckless supervision of a premises under its control.

<sup>14</sup> Count XVI of Plaintiffs' Complaint avers a cause of action for negligent or reckless supervision of instrumentalities under its control.

Compensation Act.<sup>15</sup> We agree.

That Act provides, in pertinent part, that "the liability of an employer under this act shall be exclusive and in place of any other liability to such employees . . . in any action at law or otherwise on account of any injury or death defined in [§ 411] or occupational disease in [§ 27.1]."

The Act provides a single narrow exception to preemption, known as the personal animus exception, for "employee injuries caused by the intentional conduct of third parties for reasons personal to the tortfeasor and not directed against him as an employee or because of his employment." Durham Life Insurance Company v. Evans, 166 F.3d 139, 160 (3d Cir. 1999).

Plaintiffs aver two theories why the Workmen's Compensation Act does not bar their claims for negligent supervision against RHMC. First, plaintiffs contend that defendants are precluded from raising the Workmen's Compensation Act defense because defendants removed this action to federal court. Specifically, plaintiffs rely on the language of 28 U.S.C. § 1445 which provides: "A civil action in any State court arising under the workmens' compensation laws of such state may not be removed to any district court of the United States." 28 U.S.C. § 1445(c).

Second, relying upon the decision of the Supreme Court

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<sup>15</sup> Act of June 2, 1915, P.L. 736, art. III, § 303, as amended, 77 P.S. § 481(a).

of Pennsylvania in Martin v. Lancaster Battery Company, 530 Pa. 11, 606 A.2d 444 (1992), plaintiffs assert that the Workmen's Compensation Act is not the exclusive remedy where fraudulent misrepresentation occurs. For the following reasons, we agree with defendants, disagree with plaintiffs, and grant defendants' motion to dismiss Counts XIV, XV and XVI of Plaintiffs' Complaint.

Initially, we find unpersuasive plaintiffs' reliance on the language of 28 U.S.C. § 1445(c). That statutory section is designed to preclude removal of actions which "arise under" a state's workmen's compensation laws. Plaintiffs' claims for negligent supervision do not "arise under" the Pennsylvania Workmen's Compensation Act. Rather, they are negligence claims (which may be precluded by the exclusivity provisions of the Workmen's Compensation Act). Because we conclude plaintiffs' negligent supervision claims are precluded by the exclusivity provisions of the Act, plaintiffs would not have been able to maintain these negligence claims in Pennsylvania state court, where they were originally filed, because they must be brought, if at all, as a workmen's compensation claim.

Accordingly, we conclude that defendants did not remove an action "arising under" a state's workmen's compensation law.

Next, we find unpersuasive plaintiffs' contention that the Workmen's Compensation Act does not bar their negligent

supervision claims because a fraudulent misrepresentation has occurred. Specifically, plaintiffs contend that defendants fraudulently misrepresented the confidentiality of communications made during the January 22, 2002 meeting. Plaintiffs reliance on Martin in support of this theory is misplaced.

In Martin the Supreme Court of Pennsylvania held that where the employer fraudulently misrepresented a safety condition which resulted in the aggravation of a pre-existing work-related injury, the suit was not barred by the exclusivity provision of the Workmen's Compensation Act. There, defendant manufactured automotive and truck wet storage batteries. The manufacturing process involved extensive employee exposure to lead dust and fumes that required employees to be regularly tested pursuant to federal safety regulations for lead content in their blood.

Plaintiff, in Martin, along with other employees, had his blood tested regularly. However, one of the defendants intentionally withheld, and altered test results which would have alerted plaintiff to a heightened level of lead in his blood. Plaintiff was eventually diagnosed with lead toxicity, lead neuropathy and other ailments which would have been substantially reduced if his employer had not perpetrated the fraudulent misrepresentation.

The Pennsylvania Supreme Court distinguished Martin as an exception to the general rule enunciated in Poyser v. Newman &

Co., 514 Pa. 32, 522 A.2d 458 (1987) (that an employee's claim against his employer for a work-related injury caused by an employer's fraudulent misrepresentation is barred by the exclusivity provision of the Workmen's Compensation Act).

We conclude that the fraudulent misrepresentations alleged by plaintiffs in the case before this court (that plaintiffs' communications would be kept confidential) are more closely related to the general rule than to the rare exception enunciated in Martin. We conclude this is because plaintiffs here do not allege, as alleged in Martin, that defendants withheld and distorted information which substantially threatened plaintiffs' health, when advising plaintiffs of the truth may have saved them from serious health problems. Because we have concluded that any alleged misrepresentation in this case does not overcome the exclusivity bar of the Act, plaintiffs' negligent supervision claims are barred by the Act.

Finally, after reviewing the Complaint, we conclude that none of plaintiffs' allegations involve the personal animus of any defendant which would invoke that exception to the exclusivity provision of the Act. There is nothing in the Complaint which suggests that defendants tape recorded plaintiffs' conversations for reasons of personal animosity unrelated to work. Rather, it appears that the conduct complained of related to defendants seeking information for

business reasons. Therefore, the personal animus exception does not apply.

Accordingly, we grant defendants' motion to dismiss Counts XIV, XV and XVI of Plaintiffs' Complaint.

#### Respondeat Superior

Count XVII of Plaintiffs' Complaint asserts a cause of action for respondeat superior liability. Defendants contend that there is no such cause of action. Defendants assert that respondeat superior liability is inferred from a Complaint based on certain alleged facts, but it is not a separate cause of action.

Plaintiffs assert that in Willinger v. Mercy Catholic Medical Center, 241 Pa. Super. 456, 362 A.2d 280 (1976) the Superior Court of Pennsylvania stated that there is a separate cause of action for vicarious liability under the doctrine of respondeat superior. For the following reasons, we agree with plaintiffs in part; we agree with defendants in part; and we grant defendants' motion to dismiss Count XVII. However, we determine that plaintiffs have sufficiently pled a theory of liability (as opposed to a separate cause of action) concerning Counts VI, VII, VIII and IX<sup>16</sup> based upon the doctrine of

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<sup>16</sup> Numerous individual counts of Plaintiffs' Complaint already specifically list defendant The Reading Hospital and Medical Center as a defendant. However, Counts VI, VII, VIII and IX assert causes of action pursuant to either the Wiretap Act or Title III against individual defendants but not RHMC. We read Count XVII of Plaintiffs' Complaint as an attempt to

respondeat superior.

Count XVII of Plaintiffs' Complaint attempts to assert a separate cause of action for "respondeat superior". However, "[r]espondeat superior merely connotes a doctrine of imputation once an underlying theory of liability has been established. It is not a separate cause of action." Simcox v. National Rolling Mills, Inc., No. Civ.A. 90-1295, 1990 U.S. Dist. LEXIS 6757 at \*7 (E.D. Pa. June 4, 1990).

Plaintiffs reliance on the decision of the Superior Court of Pennsylvania in Willinger is misplaced. In Willinger defendant hospital attempted to amend its third-party complaint against an additional defendant doctor to allege that a nurse-anesthetist was the additional defendant's employee in order to render the additional defendant doctor liable for the negligence of the nurse-anesthetist. The trial court in Willinger refused to allow the amendment. In affirming the result, the Superior Court of Pennsylvania stated: "There can be little dispute that vicarious liability as an employer and liability for personal negligence are separate causes of actions, and as such, would require significantly different trial preparation."

241 Pa. Super. at 466, 362 A.2d at 285.

We agree that to permit an amendment of a cause of

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assert vicarious liability of RHMC into each count of the Complaint. Thus, while we determine that respondeat superior is not a separate cause of action, it is an additional theory of liability.

action at trial in order to allow an additional theory of liability, namely vicarious liability of an employer under the doctrine of respondeat superior, should not normally be permitted because it would require significantly different trial preparation. However, we do not read the decision in Willinger as adopting a new "cause of action" of respondeat superior. Rather, we conclude that respondeat superior remains what it has always been: a means of imputing liability to an employer for the actions of its agents, servants, or employees.

Accordingly, we grant in part and deny in part defendants' motion to dismiss Count XVII. We grant defendants' motion and dismiss Count XVII because Count XVII inappropriately attempts to allege a separate and distinct cause of action for respondeat superior. However, for the reasons expressed above, we will treat Count XVII as a request to amend Counts VI, VII, VIII and IX to allege that defendant RHMC is liable to plaintiffs for the Wiretap Act and Title III violations alleged in those counts, based upon the alleged acts of RHMC's employees, under the theory of respondeat superior. In other words we engraft the allegation of vicarious liability of defendant RHMC from Count XVII into the counts of Plaintiffs' Complaint which remain but do not specifically name RHMC as a defendant. To that extent, we deny defendants' motion to dismiss Count XVII.

Furthermore, while we are not bound by the decisions of

the Pennsylvania intermediate appellate courts, in the absence of clear precedent from the Supreme Court of Pennsylvania, we should not disregard the decisions of those intermediate appellate courts unless we are convinced that the highest court of a state would rule otherwise. Nationwide Mutual Insurance Company v. Buffetta, 230 F.3d 634, 637 (3d. Cir. 2000). In this case, for the foregoing reasons, we predict that, if presented with the question, the Supreme Court of Pennsylvania would conclude that respondeat superior does not constitute a separate cause of action. Rather, we predict that the Pennsylvania Supreme Court would conclude, as we have, that respondeat superior is a doctrine of imputation once an underlying theory of liability has been established, and not a separate cause of action.

#### CONCLUSION

For all the foregoing reasons, we grant in part and deny in part defendants' motion to dismiss. Accordingly, we dismiss Counts X, XI, XII, XIV, XV, XVI, XVII and that portion of Count XIII which alleges an invasion of privacy based upon the January 22, 2002 incident contained in Plaintiffs' Complaint. In all other respects defendants' motion to dismiss is denied.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HAROLD L. CARE; )  
LAWRENCE CLAAR; ) Civil Action  
TREANTAFFELO KARAHALIAS; ) No. 2003-CV-04121  
MICHAEL KLINE; )  
GORDON KONEMANN; )  
FRANCIS A. ROSSI; and )  
LEE G. SMITH, )  
 )  
Plaintiffs )  
 )  
vs. )  
 )  
THE READING HOSPITAL AND )  
MEDICAL CENTER; )  
JAKOB (JAPP) OLREE, )  
Individually, and in His )  
Capacity as Director of )  
Facilities Management for The )  
Reading Hospital and )  
Medical Center, Inc.; )  
MICHAEL FORBES, )

Individually, and in His )  
Capacity as Assistant Director )  
of Facilities Management for )  
The Reading Hospital and )  
Medical Center, Inc.; )  
MARK BALATGEK, )  
Individually, and in His )  
Capacity as Maintenance )  
Manager for The Reading Hospital )  
and Medical Center, Inc.; )  
RICHARD MABLE, )  
Individually, and in His )  
Capacity as Vice President of )  
the Engineering Department for )  
The Reading Hospital and )  
Medical Center, Inc.; )  
PAUL McCOY, )  
Individually, and in His )  
Capacity as the Former )  
Chief Engineer for The Reading )  
Hospital and Medical )  
Center, Inc.; and )

JOHN AND JANE DOES 1 Through 20, )  
Individually and in Their )  
Capacities as Employees of The )  
Reading Hospital and Medical )  
Center, Inc., )  
 )  
Defendants )

O R D E R

NOW, this 31<sup>st</sup> day of March, 2004, upon consideration of The Reading Hospital and Medical Center, Inc.'s, Jakob Olree's, Michael Forbes', Richard Mable's and Paul McCoy's Motion to Dismiss, which motion was filed July 21, 2003; upon consideration of Plaintiff's Answer to Motion to Dismiss of Defendants Reading Hospital and Medical Center, Inc., Jakob Olree, Michael Forbes, Richard Mable and Paul McCoy filed August 1, 2003; upon consideration of The Reading Hospital and Medical Center, Inc.'s, Jakob Olree's, Michael Forbes', Richard Mable's and Paul McCoy's Reply Memorandum in Support of their Motion to Dismiss filed October 6, 2003; upon consideration of Plaintiffs' Complaint and Exhibit A attached thereto; after oral argument

conducted before the undersigned October 27, 2003; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendants' motion to dismiss is granted in part and denied in part.

IT IS FURTHER ORDERED that defendants' motion to dismiss Counts I through VII of Plaintiffs' Complaint alleging violations of the Pennsylvania Wire Tapping and Electronic Surveillance Control Act ("Wiretap Act")<sup>17</sup> and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III")<sup>18</sup>, is denied.<sup>19</sup>

IT IS FURTHER ORDERED that defendants' motion to dismiss Counts X through XII of Plaintiffs' Complaint alleging civil conspiracy is granted.

IT IS FURTHER ORDERED that Counts X, XI and XII of are dismissed from Plaintiffs' Complaint.

IT IS FURTHER ORDERED that defendants' motion to dismiss Counts XIII of Plaintiffs' Complaint alleging invasion of privacy is granted in part and denied in part.

IT IS FURTHER ORDERED that the portion of Count XIII

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<sup>17</sup> 18 Pa.C.S.A. §§ 5701-5781.

<sup>18</sup> 18 U.S.C. §§ 2510-2522.

<sup>19</sup> As more fully set forth in the accompanying Opinion, defendant Mark Balatgek has not appeared in this action as yet because he has filed a Voluntary Petition for Bankruptcy in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Counts VIII and IX of Plaintiffs' Complaint allege violations by defendant Balatgek of both the Wiretap Act (Count VIII) and Title III (Count IX). Because a stay of proceedings is in effect regarding defendant Balatgek we do not address those claims.

alleging invasion of privacy based upon the January 22, 2002 incident is dismissed from Plaintiffs' Complaint.

IT IS FURTHER ORDERED that in all other respects defendants' motion to dismiss Count XIII is denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss Counts XIV through XVI of Plaintiffs' Complaint alleging negligent supervision is granted.

IT IS FURTHER ORDERED that Counts XIV, XV and XVI of are dismissed from Plaintiffs' Complaint.

IT IS FURTHER ORDERED that defendants' motion to dismiss Count XVII of Plaintiffs' Complaint alleging respondeat superior is granted in part and denied in part.

IT IS FURTHER ORDERED that Count XVII is dismissed from Plaintiffs' Complaint.

IT IS FURTHER ORDERED that Counts VI, VII, VIII and IX of Plaintiffs' Complaint are deemed amended to allege that defendant The Reading Hospital and Medical Center is liable to plaintiffs for the Wiretap Act and Title III violations alleged in those counts, based upon the alleged acts of the hospital's employees, under the theory of respondeat superior, without the necessity of further pleading by plaintiffs.

BY THE COURT:

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James Knoll Gardner  
United States District Judge