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The U.S. Sixth Circuit Court of Appeals Affirms: Michigan is Still a One-Party Consent State for Purposes of the Eavesdropping Statute

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In a recent case and opinion recommended for publication regarding the participant exception to Michigan's eavesdropping statute, *Fisher v. Perron*, __ F.3d __ (6th Cir. 2022), the Sixth Circuit Court of Appeals again affirmed that Michigan law supports one-party consent to record a conversation, meaning that a participant to a conversation may legally record the conversation without the knowledge or consent of other participants.

This has, in fact, long been the law in Michigan. But some have recently attempted to argue that either it is not the law, or no longer should be the law. With this opinion—in conjunction with the Michigan Supreme Court recently declining to revisit the question—it is now solidly and unquestionably the law across all courts in the State of Michigan that Michigan is a one-party consent state.

In *Fisher v. Perron*, No. 20-12403, 2021 WL 103633 (E.D. Mich. Jan. 12, 2021), the plaintiff alleged that his sister, defendant Perron, violated federal and state law by recording over a dozen phone conversations among himself, the defendant, and their two siblings that discussed their late mother's estate and related litigation. Among other claims, the plaintiff asserted that his sister's recording of several calls among siblings violated Michigan's eavesdropping law, MCL § 750.539(c), which makes the use of an electronic "device to eavesdrop upon [a] conversation without the consent of all parties thereto" a felony. The District Court dismissed the plaintiff's claims for failure to state a claim as Michigan law permits a participant to a conversation to record that conversation, even if the other participants do not consent or even know of the recording. This is known as "one-party consent." Fisher appealed.

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On appeal, Fisher argued that Michigan's eavesdropping statute requires consent of all parties to the conversation for a legal recording. The Sixth Circuit noted that whether the statute provides for liability of participants who make recordings without the knowledge or permission of other participants is a threshold question for an actionable claim under Michigan's eavesdropping statute. Michigan defines "eavesdropping" as "to overhear, record, amplify, or transmit any part of the private discourse **of others** without the permission of all persons engaged in this discourse." *Id.* § 750.539a (emphasis added).

While the Michigan Supreme Court has yet to determine whether this statutory language allows for secret participant recordings or requires the consent of all parties to record a call, the Supreme Court recently had the opportunity to review the question but declined to revisit it in a case that Butzel Long was responsible for bringing to the Supreme Court. See *In re Certified Question*, 959 N.W.2d 172 (Mich. 2021) (mem.); see also, *AFT Mich. v. Project Veritas*, No. 17-13292, 2021 U.S. Dist. LEXIS 215090, at 2 (E.D. Mich. Nov. 8, 2021) (a case successfully defended by Butzel Long in which the Court ruled that "the statute is not violated when a conversation is recorded by one of its participants.").

The Sixth Circuit looked to the fact that the Michigan Supreme Court declined to overturn the long-held one-party consent rule despite having the opportunity to do so as evidence of the rightful interpretation of the statute. The Supreme Court also looked to Butzel Long's prior victory in the Eastern District of Michigan, noted above, and relied on that precedent extensively in its ruling. Butzel Long has long fought for media outlets' rights under the statute.

Although Michigan's highest court has not ruled on the issue, the lower Michigan courts have long held that the Michigan eavesdropping statute provides for one-party consent. In the leading case, *Sullivan v. Gray*, the Michigan Court of Appeals concluded that "the statutory language, on its face, unambiguously excludes participant recording from the definition of eavesdropping by limiting the subject conversation to 'the private discourse of others.'" 324 N.W.2d 58, 60 (Mich. App. 1982) (per curiam). As such, "a potential eavesdropper must be a third party not otherwise involved in the conversation being eavesdropped on." *Id.* The *Sullivan* Court reasoned that excluding participants from statutory coverage avoids making surplusage of the words "private discourse of others" in the definition of eavesdropping. *Id.*

Relying heavily on the reasoning in *Sullivan*, the Sixth Circuit in *Fisher* held that a participant does not violate Michigan's eavesdropping statute by recording a conversation without the consent of the other participants. Therefore, the plaintiff in that case failed to state a claim under Michigan's eavesdropping statute and the trial court properly dismissed the case. This ruling is in accord with the vast majority of cases that have reviewed this same question.

The *Fisher* case solidifies what has already long been held by state and federal courts alike: Michigan is a one-party consent state. This was, until recently, undisputed. But despite recent arguments to the contrary, the *Fisher* Court reasoned that all available evidence confirms that the Michigan Supreme Court would reach a similar conclusion as the Court of Appeals in *Sullivan*, and further, that many state appellate court decisions have affirmed *Sullivan*'s finding that Michigan is a one-party consent

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state.

Butzel Long has proudly defended its media clients and other clients alike when faced with eavesdropping allegations, as well as other media-related claims. And Butzel Long will continue to do so, even when helping to establish the law as it did in the wiretapping cases noted above and cited by the Sixth Circuit Court of Appeals in the *Fisher v. Perron* case.

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