

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

CHRISTINA M. POTTER,

PLAINTIFF,

vs.

JEFFREY D. HAVLICEK,

DEFENDANT.

:
:
:
:
:
:
:
:
:
:

CASE NO. 3:06 CV 0211

JUDGE THOMAS M. ROSE

MOTION FOR PRELIMINARY INJUNCTION

* * *

Pursuant to Fed Civ.R. 65 Plaintiff Christian Potter hereby moves this Court to issue Preliminary Injunction against Defendant Jeffrey Havlicek to restrain Defendant from any use, disclosure, copying, dissemination or destruction of the electronic communications, electronic files, data recordings, audio recordings, video recordings, and any other documents, objects, information, or data, in his possession or control which contain or relate to any statements, communications, writings, thoughts, images, sounds, ideas or personal information of Plaintiff Christina Potter, subject of her Amended Complaint.

Plaintiff further moves this Court to order Defendant to disclose, produce and convey to the Court under seal and/or to Plaintiff for safe keeping pending final resolution of this matter all such material as described above.

The grounds for this motion are set forth in the attached Memorandum, the attached Affidavits by Plaintiff and undersigned counsel, as well as the Amended Complaint.

Memorandum

As set forth in the Amended Complaint, during divorce proceedings between Defendant Jeffrey Havlicek and his wife Amy Havlicek in the Spring of 2006 it was discovered that Defendant: 1) intercepted and recorded electronic communications between Plaintiff and Defendant's wife; 2) unlawfully accessed Plaintiff's e-mail accounts with AOL and Yahoo to review, copy, or alter private e-mail messages; and, 3) subsequently used and attempted to use the material and/or contents of the electronic communications in the divorce action. Defendant has also used, disclosed, disseminated, copied and/or communicated the electronic communication and/or its contents to others with intent to harass, annoy, embarrass, and humiliate Plaintiff.

As further identified in the Amended Complaint, Defendant's conduct constitutes violations of Ohio common law and several Federal and State Statutes, including violations of the Federal Electronic Communications Privacy Act – 18 USC §2510, et al., pertaining to electronic communications interception. In particular, 18 USC § 2511 of the Act provides the following:

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who--

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

(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; ...

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Defendant admitted in an Affidavit filed in response to his wife's motion to exclude the electronic communications in the divorce action, that he recorded the electronic communications from a computer used by his wife without her authorization or consent by secretly capturing computer screen images and by recording the key strokes made on the key board.¹ In the memorandum portion of the response, Defendant sought to legitimize his interception and use of the electronic communication by citing the case of *Beaber v. Beaber* (1974) 41 Ohio Misc. 95, which recognized an interspousal exception to an the Ohio wiretap statute, based upon a Fifth Circuit Court of Appeals decision, *Simpson v. Simpson*, (1974) 490 F.3d 803 finding an interspousal exception to the corresponding Federal Statute.

What Defendant failed to appreciate in citing the *Beaber* case is that the 6th Circuit rejected an interspousal exception to the federal statute in the case of *U. S. v. Jones*, 542 F.2d 661 (6th Cir.(Tenn.) 1976). Correspondingly, in 1991 that Court specifically refused to consider a defendant's claim of ignorance of the law based in part on the *Simpson* decision, and instead held that the "unlawfulness of interspousal wiretapping has been a settled point of law in this Circuit since our decision in *Jones*, supra." *Fultz v. Gilliam*, 942 F.2d 396, 404 (6th Cir. 1991).

Defendant's reliance on the *Beaber* decision to defend his conduct, admitted by affidavit, is instead conclusive evidence of his violations of the statute. Defendant's use of advanced computer expertise is even more insidious than placing a tape recording devise on a telephone line, but does not change the operative facts – Defendant recorded a private communication to which he was not a party without permission from a party. Moreover, his intentional use and disclosure of the contents of the electronic communication, constitute separate violations of the

¹ See, Plaintiff's Motion and Memorandum in Opposition to Defendant's Motion to Preclude use of Documents, Exhibit A to Attorney Hale's Affidavit, attached hereto. Please note that Defendant Jeffrey Havlicek is the Plaintiff in the divorce case.

statutes.

In addition to admitting that he has created hundreds of electronic files, Defendant also claims to have video and audio recordings which may relate to the Plaintiff and her communications with Defendant's wife. Defendant identified these materials in his affidavit as well as his intentions to use these materials in the pending divorce action. See, Defendant's affidavit ¶¶10,12 and 16.

Unless Defendant is compelled to disclose and produce under seal to this Court and Plaintiff all of the material he has generated from his secret recordings, surveillance, and interception of Plaintiff's electronic communications, and all the devices used therefor, Plaintiff has no reasonable means to protect her privacy and will be subject to additional irreparable harm by Defendant's further use, dissemination, or disclosure of the electronic communication and its content. Such likely irreparable harm is verified by Defendant's refusal to disclose these materials to Plaintiff or provide Plaintiff with any reasonable access to review the material, despite Plaintiff's repeated requests therefor.

For the reasons set forth above, supported by the Amended Complaint and the attached affidavits, Plaintiff has established the following facts:

1. There exists strong or substantial likelihood of Plaintiff's success on the merits of her claims.

2. If Defendant is not restrained, he will likely continue to cause irreparable injury to Plaintiff through continued use of the electronic communication and its contents in violation of law to further his interests in the divorce action and to harass, annoy, and inflict emotional injury upon Plaintiff.

3. Granting a preliminary injunction and ordering the production of this material will not

cause any substantial harm to others or Defendant since the records and material will be secure and protected for future use, if necessary.

4. The public interest is served by issuing a preliminary injunction by prohibiting the release of private information in violation of Federal and State laws, preventing criminal behavior, and preserving the status quo pending further resolution of the matter.

Respectfully submitted,
SAM G. CARAS CO., L.P.A.

s/ Tarin S. Hale

SAM G. CARAS (0016376)
TARIN S. HALE (0059263)
Attorneys for Plaintiff
SAM G. CARAS CO., L.P.A.
130 W. Second Street, Suite 310
Dayton, Ohio 45402
Tel: (937) 223-2200
Fax: (937) 223-8989
tarinhale@caraslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2006 I electronically filed this Motion for Preliminary Injunction along with the Amended Complaint with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel for Defendant: D. Michael Crites - Mcrites@RichCrites.com and Joseph E. Schmansky – Jschmansky@RichCrites.com.

s/ Tarin S. Hale

TARIN S. HALE (0059263)
Attorney for Plaintiff
SAM G. CARAS CO., L.P.A.
130 W. Second Street, Suite 310
Dayton, Ohio 45402
Tel: (937) 223-2200
Fax: (937) 223-8989
tarinhale@caraslaw.com