

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 01-CV-10890-RBC

François Gouin, Jr.
Plaintiff

v

Dori C. Gouin, Esq., in her professional and individual capacities,
Todd D. Posey,
William R. Toner, in his official and individual capacities,
Edward McMahon, in his official and individual capacities,
City of Boston,
Paul F. Evans, Police Commissioner of Boston, Mass., in his official and individual capacities,
John Does,
Jane Doe,
Defendants

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**PLAINTIFF'S SURREPLY IN OPPOSITION TO**  
**DEFENDANT EDWARD McMAHON'S AND WILLIAM TONER'S REPLY**  
**TO PLAINTIFF'S OPPOSITION TO DEFENDANTS'**  
**MOTION FOR RECONSIDERATION AND REQUEST FOR HEARING**

Now comes François Gouin, Jr. ["Gouin"], and surreplies to Defendant Officers William Toner ["Toner"] and Edward McMahon's ["McMahon"] Reply to Gouin's Opposition to Defendants' Motion for Reconsideration and Request for Hearing, for the purpose of correcting three errors regarding (1) the time within which a Fed.R.Civ.P. 59(e) motion must be filed, (2) the significance of "silence" in the Court's Order on the issue of the officers' qualified immunity defense, and (3) whether Gouin met the requirement of filing his motion for partial reconsideration.

**Error 1**

It is undisputed

- that a motion for reconsideration under Rule 59(e) must be filed within 10 days after the judgment. Fed.R.Civ.P. 59(b). United States v. \$23,000 in United States Currency, 356 F.3d 157, 2004.C01.0000027 at ¶57 n. 10 <<http://www.versuslaw.com>> (1st Cir. 2004),
- that Fed.R.Civ.P. 59(e) reads, "Any motion to alter or amend a judgment shall be filed

**no later than 10 days after entry of the judgment**" [emphasis supplied],

- that Fed.R.Civ.P. 6(b) reads: ". . . but [the court] may **not** extend the time for taking any action under Rules . . . 52(b), 59(b), (d), and (e) . . . except to the extent and under the conditions stated in them" [emphasis supplied], and
- that the Administrative Procedures of the General Order Re: Electronic Case Filing does not alter the time within which Rule 59(e) motions must be filed.

So, as the defendant officers' counsel agrees, Gouin's counsel wrote

Here, the officers' motion to reconsider was untimely served, albeit but a day later than the ten days within which any complaint of the alleged judgment was to be made. [Case citation omitted]. While the minor infraction does not offend Gouin [footnote omitted], his counsel does believe that there is significance in the officers' failure to even request an enlargement of time.

Defendant Officers' Reply to Gouin's Opposition to Defendants' Motion for Reconsideration and Request for Hearing, p. 2.

Chronologically the facts to be considered, Gouin contends, are the following:

1. On Thursday, January 20, 2005, judgment entered.
2. Ten days later fell on a Sunday, January 30, 2005.
3. Where the due date fell on a Sunday, the due date was extended by Fed.R.Civ.P. 6(a) to Monday, January 31, 2005.
4. The defendant officers filed their Rule 59(e) motion on Tuesday, February 1, 2005.

Where the defendant officers filed their Rule 59(e) motion on Tuesday, February 1, 2005, their motion was filed one day late, which was what Gouin contended in his opposition, and **not** timely filed, as the defendant officers asserted in their Reply brief.

Because the defendant officers used the wrong rule to calculate the due date, they erroneously concluded that February 3, 2005, was the due date:

Toner and McMahon's motion for reconsideration was therefore, due to be filed by February 3, 2005.

Defs. Reply, p. 2. Using the rules cited above, their motion was to be filed by January 31, 2005.

## **Error 2**

The defendant officers argue that because the order on their motion for summary judgment was silent on the issue of their qualified immunity defense, they may attack the summary judgment on the basis of its silence. It appears that there are no cases on this issue in any jurisdiction, federal or state.<sup>1/</sup> Gouin contends that there is no need for the Court to comment in the court order or decision upon each defense set forth in a motion for summary judgment.

## **Error 3**

In footnote 1, on page 3 of their Reply, the defendant officers assert that Gouin did not meet the requirement of **(1)** clearly establishing a manifest error of law or **(2)** presenting newly discovered evidence. Gouin disagrees. In his motion for reconsideration of the officers' counterclaim, he argued -- and demonstrated -- that the application of strict civil liability via §99(Q) was a manifest error of law.

As the basis for his assertion, Gouin states that he clearly established that where he was not charged criminally with or convicted of violating M.G.L. c. 272, §99(C), the doctrine of strict civil liability is inapplicable. Specifically, he reasoned **(a)** that in the absence of a charge or conviction for violating §99(C) and **(b)** that the elements of 99(Q) were not previously proven and established by an adjudication, the application of strict civil liability via M.G.L. c. 272, §99(Q) is precluded. The application of strict civil liability via §99(Q) was, therefore, a manifest error of law.

WHEREFORE, Gouin prays Toner and McMahon's Motion for Reconsideration [Paper #148] be DENIED.

Respectfully submitted,  
FRANÇOIS GOUIN, JR.  
By his attorney,

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<sup>1</sup> A Westlaw reference attorney, too, searched ALLCASES and was unable to find any case on this issue.

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DEFENDANTS TONER AND McMAHON'S REPLY TO  
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