

PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION
OF ORDER [#142] ALLOWING SUMMARY JUDGMENT OF
OFFICER TONER'S AND McMAHON'S COUNTERCLAIM
FOR ALLEGED VIOLATION OF M.G.L. C. 272, §99Q [sic]

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 MOTION FOR PARTIAL RECONSIDERATION  
OF ORDER [#142] ALLOWING SUMMARY JUDGMENT OF  
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FOR ALLEGED VIOLATION OF M.G.L. C. 272, §99Q [sic]**

Now comes François Gouin, Jr. ["Gouin"], and moves for partial reconsideration of order [#142] allowing summary judgment of defendant officers' counterclaim for alleged violation of M.G.L. c. 272, §99(Q).<sup>1</sup>

As grounds for his motion, Gouin states **(1)** that there are genuine issues of material facts, all of which must be tried to a jury, **(2)** that where the officers had no personal, property, or privacy interests in the events of 5 January 2001, the defendant officers do not have a civil cause of

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<sup>1</sup> Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person—**(1)** actual damages but not less than liquidated damages computed at the rate of \$100 per day for each day of violation or \$1000, whichever is higher; **(2)** punitive damages; and **(3)** a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

M.G.L. c. 272, §99(Q), Civil remedy.

action, (3) the statute is inapplicable if the elements of the statute do not exist in the facts supporting the action, (4) that the original and later purposes of the statute, as described in its Preamble, have no bearing on the facts of this case. For the convenience of this Court, Gouin has parsed the statute in **Table 1** below; there the statute can be clearly seen to be ***not*** applicable here.

## **FACTS**

Gouin incorporates herein by reference all the facts set forth both in his Local Rule 56.1 Statement of Facts and his memorandum supporting his opposition to the officers' motion for a brevis disposition. For the convenience of the court, however, Gouin summarizes those facts needed for a discussion of c. 272, §99, here:

- (1) Gouin was openly taping his communications with Todd Posey ["Posey"], the stepbrother of Gouin's estranged wife, prior to the officers' arrival at the condominium,
- (2) Gouin's open, i.e., nonsecretive taping, continued after the police arrived at the condo,
- (3) Todd Posey's deposition testimony confirms the latter facts,
- (4) Todd Posey deposed that he might have told the officers they were being taped, but he did not recall whether he did [T&M's 56.1 Statement of Facts, Exh. B, p. 291]; Posey did "not know for sure" whether he told the officers Gouin was taping [Gouin's 56.1 Statement of Fact, Exh. D, p. 298, line 17],
- (5) when Officer McMahon admitted that he thought the tape recorder was a cellphone [T&M's 56.1 Statement of Facts, ¶¶25-27, Exh. A, p. 45, Exh. E], he was admitting the taping was not done in secrecy,
- (6) Officers Toner and McMahon had no personal interest – beyond court-time pay – in the events at the condominium on 5 January 2001, and no property interest at the condominium on 5 January 2001, no privacy interest on that date at the condo, and no reasonable expectation of privacy.

Where the officers had ***no*** personal interests in the events at Gouin's condo (except for potential court-time pay), had ***no*** property interests in Gouin's condo, and had ***no*** privacy interest<sup>2/</sup>

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<sup>2</sup> See issue #1, *infra*, for discussion of privacy.

in anything that occurred there, the statute was not applicable. *Mere presence at the scene of tapping is not enough!* If the defendant officers wanted secrecy to cloak what they said and did to Gouin that day, it was to cover up their wrongdoing, their improper conduct.<sup>3</sup> If they were not trying to cover up what they said and did to Gouin that day, January 5<sup>th</sup>, 2001, at the condominium, they would have no interest in precluding the tape and/or the transcript from the trial.<sup>4</sup> They want to hide what they said because they were not truthful to Gouin on January 5<sup>th</sup> and had absolutely no reason to arrest him, which is why the criminal case at Boston Municipal Court was dismissed prior to trial.

Where the elements of the cause of action provided by M.G.L. c, 272, §99(Q) are absent from the facts here [see Table 1], §99(Q) cannot be applied to circumstances in which the elements do not exist, and there is no claim for which relief may be granted. In addition to the jury's function of determining whether the officers had a personal, property, or privacy interest being affected on 5 January 2001 and whether the section was applicable or inapplicable, it is for a jury to decide whether the officers suffered any personal harm or damage.

| <b>Table 1.</b><br><b><u>The Parsing of M.G.L. C. 272, §99</u></b> |                                                                                                                                                               |
|--------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b><u>Elements of M.G.L. c. 272, §99(Q)</u></b>                    | <b><u>Argument</u></b>                                                                                                                                        |
| Any <u>aggrieved person</u>                                        | There is a genuine issue of material fact as to whether Officers William Toner and Edward McMahon were or are aggrieved. This is a fact for a jury to decide. |

<sup>3</sup> . . . The legislative intent as reflected in the statutory language is explicit: to protect the privacy interests of citizens. While the statutory language enacted to accomplish these purposes can be broadly read, **there is no suggestion that the Legislature had in mind outlawing the secret tape recording of a public exchange between a police officer and a citizen.**

. . . to hold . . . that a police officer possesses a privacy interest in statements he makes as a public officer effectuating a traffic stop sets the jurisprudence of this Commonwealth apart from all others.

*Com. v. Hyde*, 434 Mass. 594, 610, 750 N.E.2d 963, 974 (2001) (MARSHALL, C.J., dissenting, with whom CORDY, J., joins).

<sup>4</sup> The "exclusionary rule does not exclude evidence obtained by way of purely private conduct or misconduct." *Com. v. Barboza*, 54 Mass.App.Ct. 99, 104, 763 N.E.2d 547, 552 (2002), quoting *Commonwealth v. Brandwein*, 435 Mass. 623, 632, 760 N.E.2d 724 (2002).

**PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION OF ORDER #1421 ALLOWING SUMMARY JUDGMENT OF OFFICER TONER'S AND McMAHON'S COUNTERCLAIM FOR ALLEGED VIOLATION OF M.G.L. C. 272, §99Q [sic]**

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|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>whose oral ... communications were <b><u>intercepted</u></b> . . .</p>                                                                                                                          | <p>The statute defines the term "interception" to include "to secretly record," G.L. c. 272, § 99 B 4, as amended by St.1968, c. 738, § 1,</p> <p><u>Com. v. Wright</u>, 61 Mass.App.Ct. 790, 792, 814 N.E.2d 741, 743 (2004).</p> <p>4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than the person given authority by all parties to such communication ...</p> <p><u>O'Sullivan v. Nynex Corp.</u>, 1996 WL 560274 *4 (Mass. Super. 1996), quoting M.G.L. c. 272, §99(B)(4).</p> <p>There was nothing done here that was secretive, either the taping or the dissemination of the transcript to court or copies of the tape to opposing counsel.</p> <p>Neither Toner nor McMahon explained how their walking into "a recording studio" was not an interception of the ongoing communications between Gouin and Posey.</p> |
| <p>whose oral ... communications were . . . <b><u>disclosed</u></b> . . .</p>                                                                                                                      | <p>The communications of Toner and McMahon have been disclosed only in legal pleadings and proceedings</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <p>whose oral ... communications were . . . <b><u>used</u></b> except as permitted or authorized by this section,</p>                                                                              | <p>The communications of Toner and McMahon have been disclosed only in legal pleadings and proceedings and such disclosure is authorized by §99.</p> <p>The officers have not identified how their communications were used except as permitted or authorized by §99.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <p>or whose <b><u>personal . . . interests</u></b> . . . were violated</p>                                                                                                                         | <p>Neither Toner nor McMahon identified a personal interest of his that was violated</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p>or whose . . . <b><u>property interests</u></b> . . . were violated</p>                                                                                                                         | <p>Neither Toner nor McMahon identified a property interest of his that was violated</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p>or whose . . . <b><u>privacy</u></b> [was] violated</p>                                                                                                                                         | <p>Neither Toner nor McMahon identified what private and embarrassing facts were violated at Gouin's condo on 5 January 2001. <b><i>See the discussion of privacy below.</i></b></p> <p>Every State, with the exception of Vermont, has some type of eavesdropping or wiretapping statute. The majority contain language that, to some degree, prohibits only the surreptitious recording of another's words when spoken with a reasonable expectation of privacy.</p> <p><u>Com. v. Hyde</u>, 434 Mass. 594, 599 n. 5, 750 N.E.2d 963, 977 n. 5 (2001).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <p>by means of an interception <b><u>except as permitted or authorized by this section</u></b></p>                                                                                                 | <p>Where the elements are absent from the facts, this section does not apply. If this statement is disputed, the genuine issue of material fact is an issue to be decided by a jury and not the court.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <p>shall have a <b><u>civil cause of action</u></b> against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest,</p> | <p>Where no one intercepted, disclosed or used such communications or violated any personal, property or privacy interest of Toner and/or McMahon, the officers have no</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

|                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                             |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| and                                                                                                                                                                                                                                                                                                                                 | civil cause of action.                                                                                                                                                                                      |
| shall be <b>entitled</b> to recover from any such person— (1) actual damages but not less than liquidated damages computed at the rate of \$100 per day for each day of violation or \$1000, whichever is higher; (2) punitive damages; and (3) a reasonable attorney's fee and other litigation disbursements reasonably incurred. | The issues of damages, actual and punitive, must be given to a jury. To make that determination, Gouin must be allowed to present the full tape and the introduce evidence on the issue of wiretap statute. |
| Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.                                                                                                                                                                                           | There was no warrant in this case. It was an unlawful warrantless arrest.                                                                                                                                   |

**1. The conduct of the defendant officers on 5 January 2001 was not protected by the Constitution.**

Unlike the First Amendment right to free speech, privacy is not a right explicitly guaranteed by the Constitution. Instead, privacy law has developed over the last century. Four types of privacy invasion have emerged: (A) Public Disclosure of Private and Embarrassing Facts, (B) False Light, (C) Intrusion, and (D) Misappropriation.

**A. Public Disclosure of Private and Embarrassing Facts**

“[P]ublication is an essential ingredient of the tort of invasion of privacy.” Bratt v. International Business Machines Corp., 392 Mass. 508, 517 n. 14, 467 N.E.2d 126, 137 n. 14 (1984). Certain intimate details about people, however, even though true, may be “off limits” to the press and public. Such details may be, for example, about a private person's sexual conduct, that person’s medical condition, or that person’s educational records. In order to succeed in a lawsuit for the public disclosure of private and embarrassing facts, the person suing must show that the information was:

- (1) sufficiently private or not already in the public domain,
- (2) sufficiently intimate, and
- (3) highly offensive to a reasonable person.

There are, however, exceptions. *See* Smith v. Daily Mail, 443 U.S. 97 (1979), in which the First Amendment was found to protect the right of journalists to use even the names of minors in

newsworthy stories as long as the information was “lawfully obtained” and “truthfully” reported. If published information about a public figure or public official is deemed newsworthy, the media will be protected from private-facts privacy claims. Reports of recent criminal behavior may also be deemed newsworthy and thus protect the media from private-facts privacy claims. “‘News-worthiness’ is a complete defense to an invasion of privacy action, even if the plaintiff establishes that private, offensive facts about her have been disclosed.” Ayash v. Dana Farbar Cancer Institute, 1997 WL 438769 \* 3 (Mass.Super. 1997), citing Gilbert v. Medical Economics Co., 665 F.2d 305, 309 (10th Cir.1981); Cefalu v. Globe Newspaper Co., 8 Mass.App.Ct. 71, 74, 391 N.E.2d 935 (1979), *cert. denied*, 444 U.S. 1060, 100 S.Ct. 994, 62 L.Ed.2d 738 (1980).

Courts in other jurisdictions also have decided that the disclosure of personal information, in certain situations, serves a legitimate business interest which outweighs a plaintiff's privacy right. See, e.g., Harrison v. Humble Oil & Refining Co., 264 F.Supp. 89, 92 (D.S.C.1967) (creditor may disclose the existence of an outstanding debt to the debtor's employer; this reasonable method of persuading payment does not constitute an actionable intrusion on the debtor's privacy); Yoder v. Smith, 253 Iowa 505, 510, 112 N.W.2d 862 (1962) (same); Household Fin. Corp. v. Bridge, 252 Md. 531, 543-544, 250 A.2d 878 (1968) (same).

Bratt, 392 Mass. at 521 n. 18, 467 N.E.2d at 137 n. 18. “An employer thus may seek certain personal information concerning an employee when the importance of the information in assessing the employee's efficacy in his work outweighs the employee's right to keep this information private.” Id. at 520-521. Gouin's use of the tape is analogous to the employer in Bratt.

*Neither Toner nor McMahon can make a showing that any private or intimate facts about either of them was captured on the audiotape, or that any private or intimate facts about either of them was published. Nor have they professed they can. Neither Toner nor McMahon can make a showing of any elements of a private-facts privacy claims. Nor have they professed they can.*

Where the officers cannot demonstrate that Gouin disclosed private facts about them that

were of a highly personal or intimate nature, the officers' invasion of privacy claim fails.

Mullen v. Silva, 2001 WL 34042647 \* 3, No. C000413 (Mass.Super. Dec. 10, 2001) (Volterra, J.).

**B. False Light**

Anytime a person is unflatteringly portrayed, in words or pictures, as something that he or she is not, or a misleading caption is published with a photo, a false light claim can arise, but not in Massachusetts. "Massachusetts law does not recognize a claim of invasion of privacy based on a theory of putting a plaintiff in a false light." Shephard v. Bay Windows, Inc., 2003 WL 22225764 \*11, No. Civ.A. 01-0284 (Mass.Super. Sept. 22, 2003) (Fabricant, J.), citing ELM Medical Laboratory, Inc. v. RKO General, Inc., 403 Mass. 779, 787 (1995).

The elements of false light, found in the Restatement (Second) of Torts, §652E are:

- (1) the portrayal must be found to be "highly offensive to a reasonable person" and
- (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

***Neither Toner nor McMahon can make that showing. Nor have they professed they can.***

. . . [W]here public officials are concerned, a false light claim cannot succeed in the absence of clear and convincing proof that the false statements were made with knowledge of their falsity or at a time when the defendants entertained a serious doubt as to their truth. Time, Inc. v. Hill, 385 U.S. 374, 397 (1967); Cantrell v. Forest City Publishing Co., Inc., 419 U.S. 245, 250 (1974).

McNulty v. Kessler, 1995 WL 809931 \* 11, No. 914375 (Mass.Super. April 3, 1995) (McHugh, J.). And ***neither have Toner or McMahon presented any evidence beyond a tape recorder being on. Given the absence of any facts whatsoever that Gouin said anything on that tape regarding the officers, they not only cannot make a showing of clear and convincing proof of false statements, the officers cannot even make a showing that Gouin said anything about them on that tape. Nor have the officers professed they can. Therefore a false-light privacy claim must fail.***

**C. Intrusion upon Seclusion**

Under the Restatement (Second) of Torts, § 652B, in order to state a claim under this tort theory of invasion of privacy, the plaintiff must show that the defendant intruded upon his or her "solitude or seclusion ... or ... private affairs" and that the intrusion would be "highly offensive to a reasonable person." Restatement, at § 625B.

Community TV Corp. v. Twin City Fire Ins. Co., 2002 WL 31677184 \*5, No. 199905819J

(Mass.Super. Oct. 21, 2002) (Burns, Nonnie, J.).<sup>5/</sup>

*Where neither Toner nor McMahon can make a showing that Gouin intruded upon the officers' "solitude or seclusion . . . or . . . private affairs" (id.) and where neither officer has professed he can, this form of invasion of privacy is not applicable here.*<sup>6/</sup>

**D. Misappropriation of Name or Likeness**

Misappropriation is the unauthorized use of a person's name, photograph, likeness, voice or endorsement to promote the sale of a commercial product or service. This is not the case in the instant case. *Neither Toner nor McMahon can make that showing. Nor have they professed they can.* In sum, none of the four types of privacy claims is applicable here.

**2. The wiretap statute, M.G.L. C. 272, §99, is not to shield public officials from exposure of their wrongdoings and therefore is not applicable to this case.**

The original purpose of the statute was to curtail the activities of "organized crime," which, as explained in the Preamble [**Exhibit A**],

- "constitutes a grave danger to the public welfare and safety,"
- "consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services,"
- "commits unlawful acts and employs brutal and violent tactics" . . . "[i]n supplying these goods and services,"

<sup>5</sup> Intrusion is a claim often based on the act of news-gathering. For example, where a reporter gathers information about a person in a place where that person has a reasonable right to expect privacy, "intrusion" would occur.

<sup>6</sup> And according to the Restatement, it appears that it is not Gouin who was guilty of intrusion, but Toner and McMahon, when they intruded upon Gouin.

- “is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living,”
- “carries on its activities through layers of insulation and behind a wall of secrecy,”
- eludes effective curtailment of its “illegal acts.”

O'Sullivan v. Nynex Corp., 1996 WL 560274 \*9 n. 10 (Mass. Super. 1996). “The purpose of G.L. c. 272, §99, is not to shield public officials from exposure of their wrongdoings.” Com. v. Hyde, 434 Mass. 594, 612, 750 N.E.2d 963, 975 (2001) (MARSHALL, C.J., dissenting, with whom CORDY, J., joins).

... “The public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner.” Attorney Gen. v. Collector of Lynn, 377 Mass. 151, 158, 385 N.E.2d 505 (1979). To hold that the Legislature intended to allow police officers to conceal possible misconduct behind a cloak of privacy requires a more affirmative showing than this statute allows.

In our Republic the actions of public officials taken in their public capacities are not protected from exposure. Citizens have a particularly important role to play when the official conduct at issue is that of the police. See Rotkiewicz v. Sadowsky, 431 Mass. 748, 754, 730 N.E.2d 282 (2000) (recognizing importance of “public discussion and public criticism directed toward the performance” of police officers). Their role cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording--secretly recording on occasion--an interaction between a citizen and a police officer.

Hyde, 434 Mass. at 612, 750 N.E.2d at 976 (MARSHALL, C.J., dissenting, with whom CORDY, J., joins).

In Gouin’s case, the recording was ***not*** secret: it began before the police arrived, before Gouin even knew that the police were going to arrive at the condo [Compl. Exh. A], and certainly ***without any intention*** to record the police.

Ironically, at Gouin’s Boston condominium, Gouin was using his tape recorder not to pose a danger to other citizens but to protect ***his*** property interests that were being unlawfully usurped from him. Given that his experience in the State family court was evidence of a system gone awry and decidedly pro-woman, Gouin feared, with good cause, that he would find himself needing

proof of what he did and said and what others (in particular, people holding themselves out as agents of his estranged wife) did and said to him. Gouin was not going to be shark bait ever again.

**A.. Similarities between “Organized Crime” and “Federal-State Bonus Incentive Schemes.**

Also ironically, there is a great resemblance between “organized crime” and the federal government scheme to hand out bonus incentives to the States to encourage them to act in certain ways that clearly deprive all fathers who are parties in family-court actions of their constitutional rights to due process and equal protection. Here, Gouin refers to such laws and policies as those discussed in considerable detail in his memorandum in opposition to the officers’ motion for summary judgment: for example, the arrest-preferred policy, the infamous restraining orders, the unlawfully and arbitrarily applied child-support guidelines. In **Table 2**, Gouin demonstrates the grotesque and remarkable similarity between how our State law-enforcement entities and Organized Crime operate.

| <b><u>Table 2.</u></b><br><b><u>Similarities between “Organized Crime” and “Federal-State Bonus Incentive Schemes</u></b>              |                                                                                                                                                                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b><u>ORGANIZED CRIME</u></b>                                                                                                          | <b><u>STATE LAW-ENFORCEMENT ENTITIES: POLICE AND COUNTY D.A.s</u></b>                                                                                                                                                                                                                                                                                                            |
| “constitutes a grave danger to the public welfare and safety,”                                                                         | constitute a grave danger to the constitutional rights of the public: right to life, liberty, property, family, due process, equal protection                                                                                                                                                                                                                                    |
| “consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services,” | are also highly organized and disciplined groups that conspire to arrest men – regardless of whether domestic violence occurred. The men are the “goods” used to increase statistics used to obtain increased annual bonus incentives. [Gouin’s 56.I Statement of Facts, Exhs. G, H, I, J, and K].                                                                               |
| “[i]n supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics,”                | in arresting the men and supplying the arrest statistics to meet the requirements for bonus incentives from the federal government, the police and the DAs commit unlawful acts and employ tactics resulting in false arrests and imprisonment, strip searches. An example of that unlawfulness is arresting men because the police are told that is the “preferred action,” and |

|                                                                                                                  |                                                                                                                                                                                                                                                                                                   |
|------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                                  | not because the men arrested did, were doing, or were about to do anything criminal. No <i>mens rea</i> is required.                                                                                                                                                                              |
| “is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living,” | infiltrate a system of justice and both conspire to falsely arrest, falsely charge, and imprison, and deprive fathers of their right to have a paternal relationship with their children, and all-too-often to create a situation by which the fathers lose their employment and/or business(es). |
| “carries on its activities through layers of insulation and behind a wall of secrecy,” and                       | carry on their activities through layers of insulation and behind walls of secrecy,                                                                                                                                                                                                               |
| eludes effective curtailment of its “illegal acts.”                                                              | elude effective curtailment of their “illegal acts.”                                                                                                                                                                                                                                              |

**3. Toner and McMahon are not entitled to summary judgment on their counterclaim for the alleged violation of M.G.L. c. 272 ¶ 99(Q).**

The only reason the taping was allegedly<sup>7</sup>/ unbeknownst to the officers was because McMahon was unable to distinguish between a cellphone and a tape-recorder. McMahon even saw it close-up when he handcuffed Gouin, but was unable to discern what it was. One can only reasonably conclude that his training at the academy as an observer was inadequate or that his personal skill at observation was inadequate for the essential functions of his job.

The statute upon which the officers rely and which their counsel argued follows. Note that it is silent as to the circumstance when police officers walk into an event where recording is already underway.

First, the officers were not parties to an intercepted wire or oral communication. They are not aggrieved persons. It was not Toner’s or McMahon’s oral communications that were intercepted. It was Gouin’s and Posey’s. (Posey, of course, consented to the interruption, if not, the interception.) So, it was Toner and McMahon who did the intercepting of an oral communication between Posey and Gouin. Gouin is the one who was aggrieved. The officers walked into what was essentially the equivalent of a “recording studio.”

Second, neither Toner nor McMahon had a personal interest in what they said . . . or at least should not have. Third, neither Toner nor McMahon had a property interest in what they said . . . or at least should not have. Fourth, neither Toner nor McMahon had a reasonable expectation of privacy in what they said . . . or at least should not have. Every police officer on a call expects to have to disclose and/or produce his notes, expects to have his words to a dispatcher disclosed and/or produced, expects to have his police report scrutinized with a “fine tooth comb,” expects to be examined and cross-examined as to what was done and said when “on the job.”

. . . The legislative intent as reflected in the statutory language is explicit: to protect the privacy interests of citizens. While the statutory language enacted to accomplish these purposes can be broadly read, **there is no suggestion that the Legislature had in mind outlawing the secret tape recording of a public exchange between a police officer and a citizen.**

. . . to hold . . . that a police officer possesses a privacy interest in statements he makes as a public officer effectuating a traffic stop sets the jurisprudence of this Commonwealth apart from all others.

Com. v. Hyde, 434 Mass. 594, 750 N.E.2d 963, 974 (2001).

This is not similar, as the officers argue, to the situation in which Hyde turned his recorder on *after* he was stopped in a “routine traffic stop” and then continued surreptitiously to tape record the encounter.

Further, the record indicated that Hyde fully intended “to use the recording as proof in his subsequent complaint of police misconduct.” 434 Mass at 601, 750 N.E.2d at 968. That is not the case here. Having been victimized by the lies of his estranged wife and her three counsel and other of her agents on numerous occasions – all documented – Gouin began carrying the recorder as *his* witness to expected *and* unexpected events – such as his unanticipated encounter with Posey on January 5<sup>th</sup> [T&M’s Exh. D, p. 140]. Gouin told Posey and sought and got his consent to the recording, which Gouin fully intended to use in his own defense should Posey lie about what oc-

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<sup>7</sup> Posey might have told the officers about the taping. He was not sure. [Posey’s depo, pp./ 291, 298, supra.]

curred at the condo. So it was after the open taping had begun when Posey phoned 911 to summon the police. Thus the officers walked in while Gouin was recording openly. [Notwithstanding that Gouin denies waving his tape recorder in Posey's face, see **Exh. D, p. 179, lines 20-21; p. 180, line 2-3; and T&M Exh. D, Gouin's Depo., p. 109**].

After that, it is clear that it was Gouin who was the only aggrieved person in sight. And significantly, the law-enforcement authorities – the police and the county DA -- did not see fit to charge Gouin criminally. Had Gouin been charged criminally with violating the wiretap statute, he would have been entitled to a jury trial.<sup>8</sup> To deprive him a trial on the same charge in the civil context where there are genuine issues of material facts would constitute a clear deprivation of due process and equal protection of the laws. Cf. Com. v. Hyde, 434 Mass. 594, 750 N.E.2d 963 (2001) (defendant was entitled to a jury trial), and Com. v. Wright, 61 Mass.App.Ct. 790, 792, 814 N.E.2d 741, 744 (2004) (whether there was a violation was given to the jury).

Moreover, any harm, imagined or otherwise, was caused by the officers' own incompetence and/or their own negligence. Also, the officers suffered no actual damages and given the substandard quality of their performance and unconstitutional acts, whether they should receive punitive damages is a question that must be given to a jury.

WHEREFORE, Gouin prays both that the decision on Toner and McMahon's motion for summary judgment on their counterclaim under M.G.L. c. 272 ¶ 99 be reconsidered and denied.

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

/s/ Barbara C. Johnson <barbaracjohnson@worldnet.att.net>

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<sup>8</sup> In criminal court, there was not enough evidence to bring a criminal charge of violating the wiretap statute. One must ask, therefore, not rhetorically, where is the evidence to bring a civil one?

30 January 2005

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**AFFIDAVIT BY BARBARA C. JOHNSON**

I, Barbara C. Johnson, Esq., hereby depose that all statements and observations I attribute to myself saying or observing are true, and all other statements are true upon information and belief.

I also hereby depose that all exhibits attached to Gouin's Local Rule 56.1 Statement of Facts in Support of his Opposition to Defendants Toner and McMahon's Motion for Summary Judgment and referred to in the within pleading are true and accurate copies of those I have kept in the ordinary course of business.

Sworn under the pains and penalties of perjury.

30 January 2005

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