

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MASSACHUSETTS

CIVIL ACTION: 03-CV-11895-MLW

François Gouin, Jr.
Plaintiff

v.

Dori C. Gouin, Esq., a/k/a Dori Faith Chadbourne, in her professional and individual capacities,

John G. DiPiano, Esq., in his partnership, professional, and individual capacities,
Mauser & Mauser,

Timothy M. Mauser, Esq., in his partnership, professional, and individual capacities

Martha D. Mauser, Esq., in her partnership, professional, and individual capacities

Susan James, in her official and individual capacities,

City of Boston

Defendants

MOTION AND MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS COUNTERCLAIMS OF JOHN G. DiPIANO
OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT
(A supporting affidavit by Plaintiff accompanies this motion.)

Now comes François Gouin, Jr. ["Gouin"], and moves this court to dismiss the counterclaims by Defendant John G. DiPiano ["DiPiano"].

As grounds, Gouin states that the counterclaims should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state claims upon which relief may be granted.

FACTS

1. Upon motion by DiPiano on behalf of his client Dori C. Gouin ["Dori"], the Probate & Family Court ordered Gouin to make his condominium available at 10 a.m. on 13 May 2002 for inspection by his estranged wife's appraiser [**Compl. Exh. F (motion) and Compl. Exh. G (court order)**].
2. Gouin was waiting for the appraisers to arrive at his condominium.
3. Gouin's video-camera¹ was on when DiPiano, Dori, and two appraisers arrived.

¹ Gouin was using a Sony Handycam, Video Hi8, CCD-TR818NTSC, Serial 37276. 460x Digital Zoom Steady Shot. Sound was indigenous to these video recorders: there is no jack to lead to an external microphone, without which the audio cannot be stopped. To find users of these video cameras liable to those whose voices are recorded – all openly – would require **WARNING** labels -- **USE MAY BE DANGEROUS TO YOUR LIBERTY** -- on all the video cameras being sold in Wal-Mart, Circuit City, and the like.

4. At 10:04:36 a.m., Dori exits an appraiser's car and walks toward DiPiano as he arrives at outdoor stairs of the building identified as 58 Temple Street, Boston, MA, and is in view of the camera.
5. At 10:04:48 a.m., DiPiano begins speaking to Gouin about a restraining order.
6. Dori takes the Maine restraining order out of her jacket pocket and holds it in front of John.
7. John and Dori speaking to each other: [Unintelligible].
8. DiPiano makes a 911 call to the police and reports that Gouin refuses to leave property [**Compl. Exh. I**, report of 911 call of 13 May 2002; **Compl. Exh. J**, transcript of the 911 call by DiPiano on 13 May 2002].
9. At 10:05:40 a.m., François Gouin and the two appraisers greet each other and walk inside for the inspection.
10. Until 10:13:20 a.m., the inspection, recorded by Gouin's videocamera, is conducted inside.
11. François Gouin locks the condo. The two appraisers and Gouin go outside.
12. At 10:13:40 a.m., Gouin and the appraisers leave.
13. The Sony Handycam stayed on and with Gouin during the entire event [**Paper #89, Exh. D**, transcript of audio-videographed event on 13 May 2002. Paper #89's title is PLAINTIFF'S OPPOSITION TO JOHN DiPIANO'S MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF SEPTEMBER 2004 DENYING DiPIANO'S MOTION TO DISMISS (#4).
14. No camera was focused on DiPiano or Dori when Gouin and the appraisers went inside for the inspection. The purpose of the videocamera was to prove Gouin allowed the appraisal inspection to go forward. Gouin had a good-faith reason to believe that he would need such proof. In fact, as anticipated, that same day 13 May 2002, DiPiano told a court-appointed Discovery Master that the appraisal did NOT go forward [**Compl. ¶30 and Exh. M, page 35 of Dori's deposition on 13 May 2002**]. But for the videocamera, Gouin might have been held in contempt of a court order.
15. DiPiano and Dori waited outside during the entire event for the police to arrive at the condo. [See **Compl. Exh. L**, 13 May 2002 incident report].

ARGUMENTS

1. **Where a charge of violating M.G.L. c. 272, § 99, was never brought against Gouin, §99(Q) is inapplicable. That is, absent a criminal action that has been adjudicated, §99(Q) cannot provide strict civil liability. It has elements to be proven. Where the facts of the case satisfy none of the elements of 99(Q), DiPiano's counterclaims in this action must fail – as must the counterclaim of the officers in *Gouin I* must fail.**

No criminal charge was brought, pursuant to M.G.L. c. 272, § 99(C), the charging provision,

against Gouin for violating the wiretap statute. Thus there was no trial or any criminal disposition.

C. Offenses.

1. Interception, oral communications prohibited.

Except as otherwise specifically provided in this section any person who— willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Had Gouin been tried and convicted, an argument could be made that strict civil liability would be available. The elements would have been satisfied. Absent, however, the criminal adjudication, §99(Q) is not available to provide strict civil liability.

That section, 99(Q), has elements, elements that must be plead and be supported by the facts. Mass. Assoc. of Health Maintenance Organizations v. Ruthardt, 194 F.3d 176 (1999), quoting United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-752 (1st Cir. 1985) (“All words and provisions of statutes are intended to have meaning and are to given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous”);² United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992). Therefore, this court must "attempt to ascertain legislative intent first, as [it does] with all statutes, ‘from the words used.’” Lehan v. North Main St. Garage, Inc., 312 Mass. 547, 550 (1942).

Here DiPiano did not plead any of the elements for §99(Q) that ***do*** appear in §99(C), the charging provision. DiPiano also did not plead those elements that ***do not*** appear in §99(C), namely, “**or whose personal or property interests or privacy were violated.**” The legislature would not have inserted those words into §99(Q) had it not intended those elements to be proven.

² Com. v. Conaghan, 433 Mass. 105, 110 (2000) (statute to be interpreted according to plain and ordinary meaning of its words). Shabshelowitz v. Fall River Gas Co., 412 Mass. 259, 262 (1992) (language of statute is best indication of legislative intent). Adamowicz v. Town of Ipswich, 395 Mass. 757, 760 (1985) (statute must not be interpreted so as to render it or any portion of it meaningless).

This entire issue as to whether §99(Q) provides strict civil liability with or without a prior criminal disposition appears to be a case of first impression.

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 [emphasis supplied]

Where DiPiano had no personal interests in the events at Gouin's condo, had no property interests in Gouin's condo, and had no privacy interest [*see infra*] in anything that occurred there, the statute was not applicable. ***The camcording was not done in secret. Mere presence at the scene is not enough!***

The long-standing rule in this Commonwealth, in accordance with the majority of jurisdictions that have considered this issue, is that "purely economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage." FMR Corp. v. Boston Edison Co., 415 Mass. 393, 395, 613 N.E.2d 902 (1993). See Garweth Corp. v. Boston Edison Co., 415 Mass. 303, 305, 613 N.E.2d 92 (1993) ("The traditional economic loss rule provides that, when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the person or property of the plaintiff, the plaintiff may not recover for purely economic losses"); Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co., 404 Mass. 103, 107, 533 N.E.2d 1350 (1989).

Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 788 N.E.2d 522, 543 (2003). In

Bay State-Spray, the SJC wrote,

in this State when economic loss is the only damage claimed, recovery is not allowed in tort-based strict liability (see Restatement [Second] of Torts § 402A [1965]) or in negligence. . . . In this respect Massachusetts joins the majority view in this country which is also the view favored by commentators. . . .

Bay State-Spray, 404 Mass. at 108, 533 N.E.2d at 1353-1354 (internal cites omitted), citing East

River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 868-869, 106 S.Ct. 2295, 2301-2302, 90 L.Ed.2d 865 (1986). DiPiano's counterclaim under §99(Q), in which he fails to plead any harm or damage whatsoever, economic or otherwise, must therefore fail.

Where the **elements** of the cause of action provided by M.G.L. c. 272, §99(Q) are absent from the facts here, §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. F.R.Civ.P. 12(b)(6).

Element 1: An aggrieved person. If the counterclaim is not dismissed, DiPiano must prove to a jury that he is an aggrieved person.

Element 2-5: There was no unconsented-to interception or disclosed or used oral communications. When DiPiano spoke, he knew he was being recorded. And it was planned speech. He had been videotaped shortly prior to this at an appraisal inspection for another of Gouin's properties, and there was no complaint. The family court did not allow Dori to attend that appraisal inspection, for Gouin's terminally ill father was residing at that property. Dori was allowed, however, to choose to attend or not to attend the appraisal inspection in Boston, but she did not give Gouin notice of her choice. The failure to give notice was also planned. *See* the outline of the alleged conspiracy set forth in Table 1 in PLAINTIFF'S OPPOSITION TO JOHN DiPIANO'S MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF SEPTEMBER 2004 DENYING DiPIANO'S MOTION TO DISMISS (#4).

The communications of DiPiano were not "secretly intercepted."³ They have been disclosed only in legal pleadings and proceedings and such disclosure is authorized by §99. DiPiano has not pled how the Handycam recording was used except as permitted or authorized by §99.⁴

³ Com. v. Wright, 61 Mass.App.Ct. 790, 792, 814 N.E.2d 741, 743 (2004). (§99(B)(4) defines the term "interception" to include "to secretly record"). *See also* O'Sullivan v. Nynex Corp., 1996 WL 560274 *4 (Mass. Super. 1996), M.G.L. c. 272, §99(B)(4).

⁴ Of course, to outlaw in today's society the use of camcorders except in circumstances where each and every person being recorded is aware that he or she is being recorded would require social change that would be tantamount to social upheaval.

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.

Com. v. Hyde, 434 Mass. 594, 599 n. 5, 750 N.E.2d 963, 977 n. 5 (2001). With two appraisers, Gouin, Dori, and himself at the condo around ten o'clock in the morning, DiPiano absolutely could not have had a reasonable expectation of privacy.

Element 6: Applicability requires secrecy. Nothing done here was secretive: neither the taping nor the dissemination of copies of the tape or transcript to court or to opposing counsel. Confirmation of that truth is DiPiano's failure to plead that the recording was secret . . . for it began before DiPiano arrived, before Gouin even knew that DiPiano was going to arrive at the condo [**Exh. D of Paper #89**], for there was no need for DiPiano's presence at the appraisal inspection . . . a fact that the camcording itself demonstrated: DiPiano never attempted to make entry to the property. He preferred to wait for the arrival of the police he summoned.

Element 7: Aggrieved person had to have personal, property, or privacy interest. DiPiano neither identified nor had a personal, property, or privacy interest captured by the Sony Handycam. Neither did DiPiano identify what, if any, private and embarrassing facts were violated at Gouin's condo on 13 May 2002. *See the discussion of privacy below.*

Where the elements are absent from the facts, §99(Q) does not apply.

Element 8: Unlike the First Amendment right to free speech, privacy is not a right explicitly guaranteed by the Constitution. Privacy law has, instead, 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. None of the four is applicable to the facts of this case.

For type A privacy invasion, **Public Disclosure of Private and Embarrassing Facts**,

“publication is an essential ingredient.” 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; for example, details about a private person's sexual conduct, that person’s medical condition or 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.⁵ Clearly DiPiano cannot make that showing, given the facts here underlying this case.

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 Sony Handycam is analogous to the employer in Bratt. Gouin had a right to preserve information from that May 13th event when the importance of the information outweighs any interest DiPiano can concoct out of it.

⁵ There are, however, exceptional circumstances when private, intimate, or offensive information may be published without liability attaching. 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. “Newsworthiness 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

DiPiano cannot make a showing that any private or intimate facts about him were captured on the recorder or were published. Nor has he professed he can. DiPiano cannot make a showing of any elements of a private-facts privacy claim. Nor has he professed he can.

Where DiPiano cannot demonstrate that Gouin disclosed private facts about him which were of a highly personal or intimate nature, DiPiano's invasion of privacy claim fails. Mullen v. Silva, 2001 WL 34042647 * 3, No. C000413 (Mass.Super. Dec. 10, 2001) (Volterra, J.).

A **False Light** privacy claim can arise 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. It is likely, however, not to arise 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). Therefore, DiPiano's claim must fail if brought under this type of privacy claim.

Notwithstanding the above, 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. *DiPiano cannot make that showing. Nor has he professed he 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 has DiPiano presented any evidence beyond the camcorder being on. Given the*

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).

absence of any facts whatsoever that Gouin said anything on that camcorder regarding DiPiano personally, DiPiano not only cannot make a showing of clear and convincing proof of false statements, DiPiano cannot even make a showing that Gouin said anything about him . . . period. Nor has DiPiano professed he can. Therefore a false-light privacy claim must fail.

In order to state a claim under the third tort for invasion of privacy, **Intrusion upon Seclusion**, DiPiano would have to “show that the defendant intruded upon his ‘solitude or seclusion ... or ... private affairs’ and that the intrusion would be ‘highly offensive to a reasonable person.’” Community TV Corp. v. Twin City Fire Ins. Co., 2002 WL 31677184 *5, No. 199905819J (Mass.Super. Oct. 21, 2002) (Burns, Nonnie, J.), citing Restatement, at § 625B.⁶

Where DiPiano has neither made a showing that Gouin intruded upon his “solitude or seclusion . . . or . . . private affairs” (id.) nor has professed he can, this form of invasion of privacy is not applicable here.

The fourth type of privacy claim, **Misappropriation of Name or Likeness**, is also inapplicable here. 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. *DiPiano cannot make that showing. Nor has he professed he can.* In sum, none of the four types of privacy claims is applicable here. The third counterclaim is frivolous.

2. Where DiPiano has failed to plead sufficiently all the elements to support his first counterclaim, a claim for Intentional and Tortious Interference with Advantageous Business Relationship, the counterclaim must be dismissed. Rule 12(b)(6).

The elements of a case of tortious interference with an advantageous business relationship are by now firmly established. The plaintiff has the burden of demonstrating that a business relationship from which the plaintiff might benefit existed; the defendant knew of the relationship; the defendant intentionally interfered with the relationship for an improper purpose or by improper means; and the plaintiff was damaged by that interference. See United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 812, 815-817, 551 N.E.2d 20

⁶ 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.

(1990); Swanset Dev. Corp. v. City of Taunton, 423 Mass. 390, 397, 668 N.E.2d 333 (1996). Tortious interference has become the "tort du jour" in the world of commercial litigation; that increases the importance of distinguishing truly inappropriate behavior for which there should be a remedy from normal competitive behavior permissible in the marketplace. The judgment usually turns on whether the plaintiff succeeds in demonstrating that the defendant has acted with an improper motive or in an improper manner, and this case is no exception.

The evidence establishes neither the existence of an improper purpose nor the employment of improper means on the part of the defendant.

Pembroke Country Club, Inc. v. Regency Savings Bank, F.S.B., 62 Mass.App.Ct. 34, 38-39, 815 N.E.2d 241, 246 (2004).

Gouin has personal knowledge that DiPiano represented Dori Gouin in the Gouins' marriage dissolution action, but Gouin has never seen any attorney-client fee agreement between DiPiano and Dori. And Gouin has some personal knowledge and sufficient other knowledge and information to believe that the defendant partnership lawfirm, Mauser and Mauser ["M&M"], also represented Dori [*see* Exhibit V attached to the Complaint in this action; it is a "Billing Summary" prepared by M&M].⁷

DiPiano has failed to include a client-fee agreement with his Answer and Counterclaims. Therefore Gouin does not know the exact nature of the attorney-client relationship between Dori and DiPiano.

DiPiano has also failed to supply any fact to support the third and fourth elements, to wit, the existence of an improper purpose or the employment of improper means on Gouin's part to interfere with an advantageous business relationship.

Moreover, DiPiano has failed to state what advantage he allegedly lost. Significantly, DiPiano represented Dori until around the end of July 2004, when the final judgment of divorce entered by operation of law (almost 15 months after the end of trial). Therefore Gouin absolutely has

⁷ It appears the court believed Gouin was suing M&M only on a theory of respondeat superior. That was not the only theory, but not having seen a fee agreement between Dori and DiPiano or between Dori and M&M, Gouin chose not to fight that battle.

no knowledge, belief, or information as to what DiPiano is referring when he wrote that he lost a business advantage. Gouin does know:

- that on 7 May 2004, fearing Dori would convey certain property, Gouin sought an *ex parte* attachment [*Gouin I*, Papers ##124-125],
- that on 10 May 2004, the Magistrate-Judge denied Gouin's *ex parte* motion and struck parts of the motion [*Gouin I*, Papers ##126 and 127] and gave notice to Dori by ECF,
- that shortly thereafter receiving that notice, Dori entered into negotiations with DiPiano and Raymond Sayeg (another of her divorce attorneys) regarding payment of their fees,
- that on 6 July 2004,⁸ Dori signed two certificates for attorneys' liens that gave her interest in the Boston condo to DiPiano and Sayeg [**Paper #89, Exh. E, the two attorney liens. Paper #89's is Gouin's opposition to DiPiano's motion for reconsideration (#80) of the September 2004 Order denying DiPiano's motion to dismiss (#4)**],
- that on 13 July 2004, the attorney liens for DiPiano and Sayeg on Dori's interest in the Boston condo were recorded in the Registry of Deeds.

Given those facts, it is beyond even the imagination of Gouin's counsel as to what economic loss DiPiano experienced as a result of Gouin recording the 9-minute event on 13 May 2002.

Where DiPiano has not pled that Gouin had an ulterior motive or improper purpose in bringing this action, or what advantage he lost, DiPiano's first counterclaim must be dismissed.

*Pembroke, supra.*⁹

3. Where DiPiano has failed to plead the elements to support his claim for the violation of M.G.L. c 231, §6F, by filing a frivolous suit, his second counterclaim must fail because he failed to plead sufficiently all the elements of the cause of action. Rule 12(b)(6).

In fact, it is impossible for DiPiano to prove his averments in ¶11 of second counterclaim, to wit, that Gouin was "*attempt[ing] to gain an advantage in the underlying divorce proceedings, and in attempts to intimidate, harass or embarrass Plaintiff-in-Counterclaim.*" For instance:

⁸ The reason for the delay was that which was stricken, so it – albeit true -- shall not be repeated here.

⁹ Curiously, DiPiano pleads in ¶¶5-6 that one of the elements of the interference claim has two additional elements: the elements of duty of care and breach of duty, that is, Gouin owed DiPiano a duty of care and that Gouin breached

- The subject event of the complaint in this action occurred on **13 May 2002**.
- The first day of the divorce trial was **10 June 2002**, a day by which DiPiano and Dori had hoped Gouin would be both in jail and embroiled in a second criminal action initiated by Dori and an agent.^{10/}
- The last day of the divorce trial, for which DiPiano represented Gouin's wife, occurred on **9 May 2003**, just a few days shy of one entire year later.
- The parties' counsel, Johnson and DiPiano, had to file Proposed Findings of Fact and Rulings of Law by **mid-August 2003**. At that point except for the Judgment Nisi, and diverse posttrial pleadings, the trial was **OVER!**^{11/}
- All the data that were going to be accepted as evidence at the divorce trial had been entered.
- The charge of violating a restraining order was dismissed on **19 September 2003**.
- The action at bar was not filed until **29 September 2003**.

Therefore, it was impossible to *“attempt to gain an advantage in the underlying divorce proceedings.”* The divorce case was over. The taking of evidence had ended almost **five months earlier!**

And given that it was DiPiano who initiated the criminal action underlying this lawsuit by calling 911 two weeks before the trial was to begin, it is more objectively reasonable to conclude that it was DiPiano who was *“attempt[ing] to intimidate, harass or embarrass”* Gouin in the divorce court . . . and not the other way around.

In ¶12, DiPiano shows that he is seriously disoriented. Gouin's counsel is not saying this to be insulting or out of order, but seriously observant. DiPiano wrote there:

Gouin opposed the divorce and filed the instant suit in bad faith because of the then pending action for divorce.

[DiPiano's Mot.Dism., ¶12]. As noted above, the taking of evidence in the divorce had ended al-

that duty. That is a fascinating notion. Is DiPiano suggesting that Dori owed Gouin's counsel a duty of care and breached her duty to Johnson?

¹⁰ Dori initiated the first criminal action by employing her stepbrother Todd Posey as her agent. She initiated the second criminal action by employing her divorce counsel, DiPiano, as her agent.

¹¹ The judgment *nisi* did not issue until the end of February 2004, and the amended judgment *nisi*, during April 2004.

most five months earlier! The Proposed Findings of Fact and Rulings of Law in the divorce had been filed almost two months earlier. There is nothing in the instant suit that can affect the finality of the Gouins' divorce.

DiPiano's counterclaim for a violation of c. 231, §6F, must be dismissed. That DiPiano's claims against Gouin which are wholly insubstantial, frivolous, and not advanced in good faith, are therefore themselves in violation of section 6F of chapter 231 of the Massachusetts General Laws, as well as in violation of Fed.R.Civ.P Rule 11.

CONCLUSIONS

The original purpose of the wiretap 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,"
- "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).

Significantly, Gouin was using his video recorder not to pose a danger to other citizens, but to protect his property interests that were being unlawfully usurped from him. And DiPiano was not a party to an intercepted wire or oral communication. He saw the camcorder upon his arrival. If DiPiano did not want to be recorded, he need not have said anything. He did not complain to Gouin about the being video-ed that day, May 13th. He did not ask Gouin to shut the camera off. And exactly a week earlier, on May 6th, DiPiano had gone to Gouin's other property for an ap-

praisal inspection and said nothing, and has not complained since that inspection about being cam-corded.^{12/}

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.^{13/} Had he been convicted, an argument could be made that strict civil liability would be available. Elements would have been satisfied. Absent, however, the criminal adjudication, §99(Q) is not available for strict civil liability. 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, in two of his counterclaims, DiPiano failed to plead any harm, imagined or otherwise, or actual damages. Only in one, interference with his business with Gouin's former wife, did he plead that he suffered loss, but the facts make that averment impossible and untrue.

WHEREFORE, Gouin prays that this Court allow this motion and dismiss DiPiano's counterclaims.

¹² Having been victimized by the mendacity 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.

¹³ 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?

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

5 February 2005

/s/ Barbara C. Johnson <barbaracjohnson@worldnet.att.net>
Barbara C. Johnson
6 Appletree Lane
Andover, MA 01810-4102
978-474-0833
BBO #549972

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.

Sworn under the pains and penalties of perjury.

5 February 2005

/s/ Barbara C. Johnson <barbaracjohnson@worldnet.att.net>
Barbara C. Johnson, Esq.
BBO #549972

PLAINTIFF'S CERTIFICATION PURSUANT TO LOCAL RULE 7.1(A)(2)

I hereby certify, pursuant to Local Rule 7.1(A)(2), that counsel for Plaintiff François Gouin, Jr., has not conferred with opposing counsel, for this pleading was written on the weekend. I shall attempt to contact DiPiano on Monday, 7 February 2005, and then file an amended certificate.

5 February 2005

/s/ Barbara C. Johnson <barbaracjohnson@worldnet.att.net>
Barbara C. Johnson
6 Appletree Lane
Andover, MA 01810-4102
978-474-0833
BBO #549972