IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID,

Appellant,

v.

SEAN ABID,

Respondent.



Supreme Court No. 69995
District Court Case No. D-10-424830-Z

# DOCKETING STATEMENT
# CIVIL APPEALS

1. Judicial District Nevada Department B
   County Clark Judge LINDA MARQUIS
   District Ct. Case No. D-10-424830-Z

2. **Attorney filing this docketing statement:**

   Attorney Radford J. Smith, Esq. Telephone (702) 990-6448
   Firm Radford J. Smith, Chartered
   Address 2470 St. Rose Parkway, Suite 206
   Henderson, Nevada 89074
   Client: Lyudmyla Abid

3. **Attorney representing Respondent:**

   Attorney John D. Jones, Esq. Telephone (702) 869-8801
   Firm Black & LoBello
   Address 10777 West Twain Avenue, Suite 300
   Las Vegas, Nevada 89135
   Client: Sean Abid

4. **Nature of Deposition below (check all that apply):**

| | |
|---|---|
| ___ Judgment after bench trial | ___ Grant/denial of NRCP 60(b) relief |
| ___ Judgment after jury verdict | ___ Grant/denial of injunction |
| ___ Summary Judgment | ___ Grant/denial of declaratory relief |
| ___ Default judgment | ___ Review of agency determination |
| ___ Dismissal | _X_ Divorce decree: |
| ___ Lack of Jurisdiction | _X_ Original ___ Modification |
| ___ Failure to state a claim | __X Other disposition (specify) |
| ___ Failure to prosecute | Orders on Motions |
| ___ Other (specify) _____ | _____ |

5. **Does this appeal raise issues concerning any of the following: Yes.**

| | |
|---|---|
| _X_ Child custody | ___ Termination of parental rights |
| ___ Venue | ___ Grant/denial of injunction or TRO |
| ___ Adoption | ___ Juvenile matters |

6. **Pending and prior proceedings in this Court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this Court that are related to this appeal.

None.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts that are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings and their dates of disposition.

*Abid v. Abid*, D-10-424830-Z; District Court, Family Division, Clark County, Nevada. The case is presently open.

8. **Nature of the action.** Briefly describe the nature of the action, including a list of the causes of action pleaded and the result below.

Plaintiff/Respondent Sean Abid ("Sean") and Defendant/Appellant Lyuda Abid ("Lyuda") were divorced by Decree filed February 17, 2010. Under the stipulated Decree, the parties agreed to joint legal and physical custody of their minor child Aleksandr Anton Abid, born February 13, 2009. The parties confirmed their agreement of joint legal and physical custody in a stipulated order filed September 9, 2014, arising from a hearing in December 2013. In November 2014, Lyuda moved Judge Linda Marquis, Department B of the Eighth Judicial District Court, to issue an Order directing Sean to show cause why he should not be held in contempt for failing to provide the child's passport to Lyuda so that she could travel with the child. She further moved to address the provision in the September 9, 2014 order regarding her time with Sasha after school on the days she was scheduled to have him in her care.

By Countermotion filed February 4, 2015, Sean moved to modify primary custody. He based his motion almost entirely upon an audio recording that Sean surreptitiously obtained by placing a recording device into Sasha's school backpack. Without the consent of anyone who was residing in Lyuda's home, Sean placed the recording device in Sasha's backpack (without Sasha's knowledge) with the intent to record conversations in Lyuda's home and vehicle. Lyuda objected to the use and admission of the tapes as evidence because they were illegally obtained in violation of NRS 200.650. That statute identifies the surreptitious recording of an in person conversation between two persons without the consent of one of those persons as a crime. Sean countered that his surreptitious recording was permissible under the "vicarious consent" doctrine adopted in other jurisdictions, but not Nevada, that allowed a parent or guardian to receive vicarious consent from a child under certain circumstances.

Over Lyuda's continued objection, the district court permitted Sean to provide the surreptitiously obtained and selectively altered recordings to Dr. Stephanie Holland who conducted a child interview in the case. Dr. Holland's report included a transcription of the tape and numerous references to the tape. The contents of the tape formed the basis of the questions she asked in her interview of Sasha and the

parties. Lyuda objected to the admission of the recordings, and objected to the admission of any expert report that utilized the tapes as all or part of its basis.

Prior to issuing her report, and based upon the content of the tape recordings, Dr. Holland made findings and a recommendation (in the form of a letter to the Court) that the Court modify the stipulated summer visitation schedule set forth in the parties' Decree of Divorce. The Court, based upon and consistent with Dr. Holland's recommendation, modified the 2015 summer visitation schedule consistent with Dr. Holland's recommendation.

After Dr. Holland interviewed the parents and Sasha, she made recommendations arising from those interviews and her review of the tape recordings. She did not recommend a modification of custody, acknowledging that she did not have sufficient basis upon which to make such a recommendation.

On November 17, 18 and 19, 2015, the district court held an evidentiary hearing on the issue of Lyuda's objection to the admission of the tapes, the use of the tapes by Dr. Holland, and Sean's defense of "vicarious consent." The district court acknowledged that the tapes on their face were violative of NRS 200.650, but that it would permit the admission and use of the tapes if Sean could meet the elements of the "vicarious consent doctrine." Those elements At the evidentiary hearing, Sean testified that he understood that Lyuda, her husband, Ricky Marquez ("Ricky"), and her daughter Iryna (from a previous marriage), all resided in Lyuda's home. He further understood that the recording would, for a period of 30 hours, record all conversations of any individual within recording distance of the device in the backpack.

During the litigation, Sean did not produce the entirety of the two recordings that he secretly recorded, and he later acknowledged that he destroyed and/or altered selected portions of the recordings, he trashed the computer that housed them, he trashed device used to record them. Instead, he submitted,

what he admitted were selected portions of the recordings that he edited with software that he could not identify, and that he erased from his computer.

By Findings of Fact, Conclusions of Law and Decision entered on January 5, 2016, Judge Marquis concluded that Sean's testimony was not credible, and Sean did not have good faith basis to place the recording device in Lyuda's home. The Court found that the doctrine of vicarious consent does not extend to the facts presented in this case, and that Sean surreptitiously caused a recording device to be placed inside Lyuda's home. The Court denied Sean's request to admit any portion of the audio recording into evidence.

Remarkably, in that order the district court indicated that content of the illegally obtained tapes would be admissible as a basis for the testimony and report of Dr. Holland. At further hearings, the Court admitted the report of Dr. Holland, containing a transcription of the altered tapes. Lyuda objected at those hearing, and under her counsel's cross examination, Dr. Holland admitted that if the tapes were found inadmissible and illegal by the district court (something the district court had already done), then experts in her position would not rely on such evidence. Nevertheless, the district court permitted the admission of Dr. Holland's report, and permitted her testimony regarding the tape recordings and their content.

Equally important, Dr. Holland testified that her interviews of Sasha and the parties did not grant her adequate basis to recommend a modification of custody. Dr. Holland's written report also indicated that given the scope of the ordered child interview, Lyuda and Sean were not evaluated and therefore, definitive recommendations regarding custody were not requested by the Court as a result, Dr. Holland did not offer any definitive recommendations.

By Findings of Fact, Conclusions of Law, and Decision entered on March 1, 2016, the Court entered into an Order granting Sean's Motion that he be granted primary physical custody of Sasha. The Court relied upon Dr. Holland's testimony and report to form the basis of its order changing custody. The

district court held that the modification was justified by the ill effects to the child of Lyuda's parental alienation. The Court's findings did not materially consider, or misstated, other evidence or testimony that was presented, including the testimony of Sasha's two teachers, Ms. Susan Abacherli and Ms. Masa, who testified that Sasha had and is doing well in school, did not evidence any behavioral problems, and did not evidence of any signs of alienation from his father. Moreover, the did not address the presumption that joint custody is in the best interest of the child when the parties have previously agreed to joint custody. The findings upon which the district court supported its order should have not been admitted, were not based upon substantial evidence, and constituted an abuse of discretion.

**Issues on appeal.** State concisely the principal issue(s) in this appeal:

- Whether the district court erred by adopting and considering a "vicarious consent" doctrine permitting the admission of tapes recorded in violation of NRS 200.650.
- Whether the district court erred in providing and disseminating illegally obtained tapes to a court appointed expert before ruling upon their admissibility or legality.
- Whether the district court erred by ordering an interview of the minor child without explanation of the purpose and scope of the interview.
- Whether the district court erred in permitting the admission of illegally obtained and altered tape recordings through the testimony of an expert.
- Whether the district court erred by failing to award Lyuda sanctions and attorney's fees incurred in the defense of Sean's unsuccessful attempt to admit illegally obtained and altered tape recordings.
- Whether the district court erred in admitting Dr. Holland's report after Dr. Holland recognized her report included evidence not regularly relied upon by experts in her field.
- Whether a district court erred by almost solely relying upon facts attested to by an expert, and rebutted by fact witnesses, as the basis for a modification of custody.
- Whether the district court erred in relying upon Dr. Holland's testimony and report to form the basis of its order changing custody.
- Whether the district court erred in failing to address the child's relationship to biological siblings in its findings upon which it based its change of custody.

- Whether the district court erred in failing to address or acknowledge testimony or evidence that countered the "facts" expressed by Dr. Holland regarding "alienation" by Lyuda of the minor child
- Whether the court erred in relying upon an expert report to change custody when the expert acknowledged that her report did not provide a sufficient basis for a recommendation of a change of custody as being in the child's psychological best interest.
- Whether the district court erred in not addressing the presumption that joint custody is in the best interest of the child when the parties have previously agreed to joint custody.
- Whether the court erred by failing to grant Lyuda's motions to secure the child's passport for travel, her request to appoint a parenting coordinator consistent with the order of Judge Matthew Harter previously in the case, and her request for time after school consistent with the parties' agreement entered in December 2013, and read into the minutes of the court.

9. **Pending proceedings in this Court raising the same or similar issues.** If you are aware of any proceedings presently pending before this Court that raises the same or similar issues raised in this appeal, list the case number and docket number and identify the same or similar issues raised:

None.

10. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the Clerk of this Court and the Attorney General in accordance with NRCP 44 and NRS 30.130?

N/A X Yes _____ No _____

11. **Other issues.** Does this appeal involve any of the following issues? No.

___ Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))

x An issue arising under the United States and/or Nevada Constitutions

x A substantial issue of first impression

x An issue of public policy

x An issue where *en banc* consideration is necessary to maintain uniformity of this Court's decisions

___ A ballot question

If so, explain:

This case presents two issues of first impression that could greatly affect the actions of parents in custody actions by encouraging the surreptitious and otherwise illegal taping of conversations between third parties and a child. Here, the district court adopted a doctrine not previously

addressed in Nevada, the "vicarious consent" doctrine, allowing the otherwise illegal taping of children's conversations with other individuals without the child or the other individuals consent. Further, in this case, though the district court found that the father had not shown a basis to apply the vicarious consent doctrine, the content of the illegally obtained tapes would be permitted (in violation of the express provisions of NRS 200.650) to be disseminated to an expert, quoted by the expert in a written report that was admitted into evidence, and testified about by the expert. The district court ruling arises from the notion that a expert may rely upon "anything," even inadmissible evidence. Such a ruling would encourage others to present surreptitiously and illegally obtained recordings to experts with the knowledge that they could be used for advantage in a custody action (or any lawsuit). Such a ruling undermines a basic constitutional right of privacy ensured by Nevada statue.

12. **Trial.** If this action proceeded to trial, how many days did the trial last? Two full days.

13. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice? No.

## TIMELINESS OF NOTICE OF APPEAL

14. **Date of entry of written judgment or order appealed from:** March 1, 2016.

Attach a copy. If more than one judgment or order is appealed from, attach copies of each judgment or order from which an appeal is taken.

Exhibit "31" – Notice of Entry of Order from Hearing and Findings of Fact, Conclusions of Law, and Decision

Exhibit "32" – Notice of Appeal filed on March 14, 2016

15. **Date written notice of entry of judgment or order served:** March 1, 2016

Was service by delivery _____ or by mail ( ) regular or

by E-Service

16. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)** specify the type of motion, and the date and method of service of the motion, and date of filing, and attach copies of all post-trial tolling motions: N/A

17. **Date Notice of Appeal was filed:** March 14, 2016. If more than one party has appealed from the judgment or order, list date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

18. **Specify statute or rule governing the time limit for filing the Notice of Appeal, *e.g.*, NRAP 4(a), NRS 155.190, or other:** NRAP 4(a)

## SUBSTANTIVE APPEALABILITY

19. Specify the statute or other authority granting this Court jurisdiction to review the judgment or order appealed from:

NRAP 3A(b)(1) ___X___ NRS 155.190_____ (specify subsection)

NRAP 3A(b)(2) _____ NRS 38.205_____ (specify subsection)

NRAP 3A(b)(3) _____ NRS 703.376_____

Other (specify)_____NRAP 3A(b)(7)_____

NRAP 3A(b)(1) permits an appeal from: "A final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered." Here, the Notice of Entry of Order from Hearing and Findings of Fact, Conclusions of Law, and Decision is a final judgment; and the Order alters the custody of the minor child (NRAP 3A(b)(7).

20. **List all parties involved in the action in the District Court:**

LYUDMYLA ABID

SEAN ABID

If all parties in the District Court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other: Not applicable.

21. **Give a brief description (3 to 5 words) of each party's separate claims, counter-claims, cross-claims or third-party claims, and the trial court's disposition of each claim, and how each claim was resolved (*i.e.*, judgment, stipulation), and the date of disposition of each claim. Attach a copy of each disposition.**

- There were multiple claims and issues in the custody action, but this appeal docket only deals with the district court's modification of custody from both parties having joint physical custody to Respondent having primary physical custody based upon the court's material reliance on Dr. Holland's testimony and report which was tainted by Dr. Holland's reliance on an inadmissible, doctored, and illegal tapes.

22. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action below?**

___No __X__Yes

23. **If you answered "No" to the immediately previous question, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the District Court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

____ No ____Yes **If Yes, attach a copy of the certification or order, including any notice of entry and proof of service.**

(d) Did the District Court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment: N/A

____No ____Yes

24. **If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):** Not Applicable

25. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third partyclaims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, countermotions, cross-claims and/or third party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

1. Notice of Entry of Amended Order Re: December 9, 2013 Evidentiary Hearing filed on September 15, 2014
2. Amended Order Re: December 9, 2013 Evidentiary Hearing filed on September 9, 2014;
3. Motion to Hold Plaintiff in Contempt of Court, to Modify Order Regarding Timeshare or in the Alternative for the Appointment of a Parenting Coordinator, to Compel Production of Minor Child's Passport and for Attorney's Fees filed on January 9, 2015;
4. Opposition of Plaintiff, Sean R.Abid, to Defendant's Motion to Hold Plaintiff in Contempt of Court, to Modify Order Regarding Timeshare or in the Alternative for the Appointment of a Parenting Coordinator, to Compel Production of Minor Child's Passport and for Attorney's Fees and Countermotion to Change Custody and for Attorney's Fees and Costs filed on February 4, 2015;
5. Opposition to Plaintiff's Motion to Change Custody and Countermotion to Strike Plaintiff's Opposition and to Suppress the Alleged Contents of the Unlawfully Obtained Recording and for Sanctions and Attorney's Fees filed on March 13, 2015;
6. Declaration of Lyudmyla A. Abid in Support of her Motion and in Response to Plaintiff's Opposition and Countermotion filed on March 13, 2015;

7. Submission of Authorities filed on March 16, 2015;

8. Declaration of Plaintiff, Sean R. Abid, in Response to Defendant's Opposition to Plaintiff's Motion to Change Custody and Countermotion to Strike Plaintiff's Opposition and to Suppress the Alleged Contents of the Unlawfully Obtained Recording and for Sanctions and Attorney's Fees filed on March 16, 2015;

9. Minutes from the Hearing of March 18, 2015;

10. Referral Order for Outsourced Evaluation Services filed on March 18, 2015;

11. Points and Authorities Regarding Dr. Holland Receiving Recordings filed on March 19, 2015;

12. Points and Authorities in [sic] Support of Defendant's Objection to Providing Contents of Alleged Tape Recording to Dr. Holland filed on March 23, 2015;

13. Minute Order from the Hearing of March 24, 2016;

14. Plaintiff's Emergency Motion Regarding Summer Visitation Schedule filed on June 10, 2015;

15. Opposition to Plaintiff's Emergency Motion Regarding Summer Visitation Schedule and Countermotion to Strike Plaintiff's Pleadings, to Suppress the Alleged Contents of the Unlawfully Obtained Recording, to Strike the letter from Dr. Holland and for Sanctions and Attorney's Fees filed on June 23, 2015;

16. Minutes from the Hearing of June 25, 2015;

17. Reply of Plaintiff, Sean R. Abid, to Defendant's Opposition to Plaintiff's Emergency Motion Regarding Summer Visitation Schedule and Countermotion to Strike Plaintiff's Pleadings, to Suppress the Alleged Contents of the Unlawfully Obtained Recording, to Strike the letter from Dr. Holland and for Sanctions and Attorney's Fees filed on July 13, 2015;

18. Supplemental Points and Authorities in Support of Defendant's Countermotion to Strike Plaintiff's Pleadings, to Suppress the Alleged Contents of the Unlawfully Obtained Recording, to Strike the letter from Dr. Holland and for Sanctions and Attorney's Fees filed on July 14, 2015;

19. Order for Family Mediation Center Services filed on July 16, 2015;

20. Minutes from the Hearing of July 16, 2015;

21. Notice of Entry of Order from the Hearing filed on August 31, 2015;

22. Plaintiff's Pre Trial Memorandum filed on or about November 16, 2015;

23. Defendant's Pre Hearing Memorandum Filed on November 16, 2015;

24. Plaintiff's Brief Regarding Recordings filed on or about December 4, 2015;

25. Defendant's Supplemental Brief in Support of her Objection to Plaintiff's Request to Admit Portions of Audio Recordings He Illegally Obtained, Modified, and Willfully Destroyed to Avoid Criminal Prosecution and Prevent Defendant from Reviewing filed on December 4, 2015;

26. Motion in Limine to Exclude Recording Plaintiff Surreptitiously Obtained Outside Courtroom on November 18, 2015, Sanctions and Attorney's Fees filed on December 29, 2015;

27. Findings of Fact, Conclusions of Law and Decision filed on January 5, 2016;

28. Minutes from the Hearing of January 11, 2016;

29. Minutes from the Hearing of January 25, 2016;

30. Opposition of Plaintiff, Sean R. Abid, to Defendant's Motion in Limine to Exclude Recording Plaintiff Surreptitiously Obtained Outside Courtroom on November 18, 2015, Sanctions and Attorney's Fees and Countermotion for Attorney's Fees and Costs filed on January 6, 2016;

31. Notice of Entry of Order from Hearing and Findings of Fact, Conclusions of Law, and Decision filed on March 1, 2016

32. Notice of Appeal filed on March 14, 2016

**VERIFICATION**

I declare under penalty of perjury that I have read this Docketing Statement, and that the information provided in this Docketing Statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this Docketing Statement.

Lyudmyla Abid
Name of Appellant

4/21/2016
Date

State of Nevada, County of Clark
State and County where signed

Radford J. Smith, Esq. and Garima Varshney, Esq.
Name of Counsel of Record

Garima Varshney
Signature of counsel of record

## CERTIFICATE OF SERVICE

I certify that on the 21st day of April, 2016, I served a copy of this Docketing Statement upon all counsel of record by mailing it by first class mail with sufficient postage prepaid to the following address:

John Jones, Esq.
10777 W. Twain Ave., #300
Las Vegas, Nevada 89135
Attorney for Sean Abid

Garima Varshney
GARIMA VARSHNEY, ESQ.

DOCKETING STATEMENT ATTACHMENT 1

NEOJ
BLACK & LOBELLO
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Fax: (702) 869-2669
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Attorneys for Plaintiff,
SEAN R. ABID

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CLERK OF THE COURT

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID<br><br>Defendant. | CASE NO.: D424830<br>DEPT. NO.: N |

**NOTICE OF ENTRY OF AMENDED ORDER RE: DECEMBER 9, 2013 EVIDENTIARY HEARING**

PLEASE TAKE NOTICE that an Amended Order re: December 9, 2013 Evidentiary Hearing was entered in the above-entitled matter on the 9th day of September, 2014, a copy of which is attached hereto.

DATED this 12 day of September, 2014.

BLACK & LOBELLO

John D. Jones
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10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
Attorneys for Plaintiff,
SEAN R. ABID

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## CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 2014 I served a copy of the **NOTICE OF ENTRY OF AMENDED ORDER RE: DECEMBER 9, 2013 EVIDENTIARY HEARING** upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a true and correct copy of the same in a sealed envelope in the First Class United States Mail, Postage Pre-Paid, addressed as follows:

Michael R. Balabon, Esq.
5765 S. Rainbow Blvd., #109
Las Vegas, NV 89118
*Attorney for Defendant*
*Lyudmyla Abid*

Cheryl Berdahl
an Employee of BLACK & LOBELLO

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CLERK OF THE COURT

ORDR
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Attorneys for Plaintiff,
SEAN R. ABID

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID<br><br>Defendant. | CASE NO.: D424830<br>DEPT. NO.: N |

**AMENDED ORDER RE: DECEMBER 9, 2013 EVIDENTIARY HEARING**

This matter having come before this Court on the 9th day of December, 2013 for an Evidentiary Hearing; Plaintiff, SEAN ABID ("Sean"), present and represented by his attorneys of record, John D. Jones, Esq., of the law firm of Black & LoBello; Defendant, LYUDMYLA ABID ("Lyudmyla"), present and represented by her attorney of record, Michael R. Balabon, Esq., of the Balabon Law Office; the Court having considered the papers and pleadings on file herein, as well as the argument of counsel and the parties at the last hearing, and otherwise finding good cause, finds, orders and rules as follows:

The Court referred Mr. Jones to his Pretrial Memorandum, page 3, and clarified that the "pure best interest Truax standard" did not apply. Court noted the parties agreed to joint physical custody and cited NRS 125.490(1) and Mosley vs. Figliuzzi case. Opening statements WAIVED. Testimony and exhibits presented, see worksheets.

THE COURT ORDERED, John Paglini, Psy.D., report dated October 4, 2013, shall be ADMITTED as the Court's Exhibit 1, pursuant to EDCR 5.13. Discussion regarding Dr.

Paglini's testimony regarding Defendant's husband, Ricky Marquez. The Court noted that it is not concerned with guns, as long as they are kept in a safe. The Court is inclined to refer Mr. Marquez for a criminal risk assessment with Shera Bradley, Ph.D (at Plaintiff's cost), and inclined to refer the matter to a Parenting Coordinator. The Court is also inclined to maintain supervised visitation for a period of 3 years. If Defendant wants the supervised visitation lifted, Defendant shall pay the cost of the criminal risk assessment. Further, if Plaintiff can prove that Defendant left the minor child alone with Mr. Marquez, the Court shall modify custody immediately. Matter TRAILED. Counsel agreed to confer on the issue. Matter RECALLED.

The parties reached the following agreement:

a. The parties shall maintain their time share of Monday and Tuesday to Defendant and Wednesday and Thursday to Plaintiff, alternating weekends. The following modification will apply: Plaintiff shall pick up the minor child after school on Defendant's custodial days and shall keep him until 5:30 PM. The parties shall work with each other on the exchanges and will communicate in a manner that is positive and reasonable. Further, the parties will be reasonable and flexible with the exchange times;

b. The minor child will attend American Heritage School and the parties shall equally pay the cost of the tuition;

c. Beginning next year, the minor child will attend school in Plaintiff's school zone;

d. Defendant shall reimburse Plaintiff one half of Dr. Paglini's cost (approximately $12,000 to $14,000), for his evaluation and testimony time;

e. The parties holiday schedule shall remain the same; however, the default return time shall be 8:00 AM the next day. The parties may agree to a different time, but if no agreement is reached, the default time shall apply;

f. The following schedule shall apply during the summer: in even years, beginning 2014, Plaintiff shall have 6 weeks of summer vacation and Defendant shall have 4 weeks of summer vacation with the minor child. In odd years, beginning 2015, Defendant shall have 6 weeks of summer vacation and Plaintiff shall have 4 weeks of summer vacation with the minor child;

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g. The parties shall refer to a Parenting Coordinator if difficulties arise in the future. The parties agreed to use Margaret Pickard;

h. All other provisions of the prior Custody and Support Orders shall remain in effect;

i. The temporary Order requiring supervised visitation for Mr. Marquez is lifted;

j. There will be no police involvement unless there is a violation of the Orders.

Mr. Jones and Mr. Balabon stipulated to EDCR 7.50. COURT ORDERED as follows:

1. The above agreement is binding and enforceable pursuant to EDCR 7.50;

2. If problems arise in the future, Plaintiff and/or Defendant shall contact Department N for a Parenting Coordinator Order. The Court shall incorporate Ms. Pickard's name in the Order. If Ms. Pickard finds that a Coordinator with a Psy.D level is necessary, the Court suggested Michelle Gravley; and

3. Mr. Jones shall prepare the Order and Mr. Balabon shall review and sign off.

IT IS SO ORDERED this 3 day of September, 2014.

DISTRICT COURT JUDGE
Mathew Harter

DATED this 18 day of ~~February~~ August, 2014

BLACK & LOBELLO

JOHN D. JONES, ESQ.
Nevada Bar No. 6699
10777 West Twain Ave., Suite 300
Las Vegas, NV 89135
(702) 869-8801
Attorney for Plaintiff,
SEAN R. ABID

DATED this 12 day of ~~February~~ August, 2014

BALABON LAW OFFICE

MICHAEL BALABON, ESQ.
Nevada Bar No. 4436
5765 S. Rainbow Blvd., #109
Las Vegas, NV 89118
(702)450-3196
Attorney for Defendant,
LYUDMILA A. ABID

**Approved:**

**LYUDMYLA A. ABID**

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Parties are put on notice of NRS 125.510(6):

PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHABLE AS A CATEGORY D FELONY AS PROVIDED IN NRS 193.130. NRS 200.359 provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child in violation of an order of this court, or removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished for a category D felony as provided in NRS 193.130.

Parties are put on notice of NRS 125.510(8):

8. If a parent of the child lives in a foreign country or has significant commitments in a foreign country:

(a) The parties may agree, and the court shall include in the order for custody of the child, that the United States is the country of habitual residence of the child for the purposes of applying the terms of the Hague Convention as set forth in subsection 7.

(b) Upon motion of one of the parties, the court may order the parent to post a bond if the court determines that the parent poses an imminent risk of wrongfully removing or concealing the child outside the country of habitual residence. The bond must be in an amount determined by the court and may be used only to pay for the cost of locating the child and returning the child to his or her habitual residence if the child is wrongfully removed from or concealed outside the country of habitual residence. The fact that a parent has significant commitments in a foreign country does not create a presumption that the parent poses an imminent risk of wrongfully removing or concealing the child.

Parties are put on notice of NRS 125C.200:

If custody has been established and the custodial parent intends to move his or her residence to a place outside of this State and to take the child with him or her, the custodial parent must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this State. If the noncustodial parent refuses to give that consent, the custodial parent shall, before leaving this State with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent.

**NOTICE IS HEREBY GIVEN** that the parties are subject to the provisions of NRS 31A and 125.450 regarding the collection of delinquent child support payments.

**NOTICE IS HEREBY GIVEN** that either party may request a review of child support pursuant to NRS 125B.145.

DOCKETING STATEMENT ATTACHMENT 2

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CLERK OF THE COURT

**ORDR**
BLACK & LOBELLO
John D. Jones
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10777 West Twain Avenue, Suite 300
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(702) 869-8801
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Email Address: jjones@blacklobellolaw.com
Attorneys for Plaintiff,
SEAN R. ABID

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID<br><br>Defendant. | CASE NO.: D424830<br>DEPT. NO.: N |

**AMENDED ORDER RE: DECEMBER 9, 2013 EVIDENTIARY HEARING**

This matter having come before this Court on the 9th day of December, 2013 for an Evidentiary Hearing; Plaintiff, SEAN ABID ("Sean"), present and represented by his attorneys of record, John D. Jones, Esq., of the law firm of Black & LoBello; Defendant, LYUDMYLA ABID ("Lyudmyla"), present and represented by her attorney of record, Michael R. Balabon, Esq., of the Balabon Law Office; the Court having considered the papers and pleadings on file herein, as well as the argument of counsel and the parties at the last hearing, and otherwise finding good cause, finds, orders and rules as follows:

The Court referred Mr. Jones to his Pretrial Memorandum, page 3, and clarified that the "pure best interest Truax standard" did not apply. Court noted the parties agreed to joint physical custody and cited NRS 125.490(1) and Mosley vs. Figliuzzi case. Opening statements WAIVED. Testimony and exhibits presented, see worksheets.

THE COURT ORDERED, John Paglini, Psy.D., report dated October 4, 2013, shall be ADMITTED as the Court's Exhibit 1, pursuant to EDCR 5.13. Discussion regarding Dr.

Paglini's testimony regarding Defendant's husband, Ricky Marquez. The Court noted that it is not concerned with guns, as long as they are kept in a safe. The Court is inclined to refer Mr. Marquez for a criminal risk assessment with Shera Bradley, Ph.D (at Plaintiff's cost), and inclined to refer the matter to a Parenting Coordinator. The Court is also inclined to maintain supervised visitation for a period of 3 years. If Defendant wants the supervised visitation lifted, Defendant shall pay the cost of the criminal risk assessment. Further, if Plaintiff can prove that Defendant left the minor child alone with Mr. Marquez, the Court shall modify custody immediately. Matter TRAILED. Counsel agreed to confer on the issue. Matter RECALLED.

The parties reached the following agreement:

a. The parties shall maintain their time share of Monday and Tuesday to Defendant and Wednesday and Thursday to Plaintiff, alternating weekends. The following modification will apply: Plaintiff shall pick up the minor child after school on Defendant's custodial days and shall keep him until 5:30 PM. The parties shall work with each other on the exchanges and will communicate in a manner that is positive and reasonable. Further, the parties will be reasonable and flexible with the exchange times;

b. The minor child will attend American Heritage School and the parties shall equally pay the cost of the tuition;

c. Beginning next year, the minor child will attend school in Plaintiff's school zone;

d. Defendant shall reimburse Plaintiff one half of Dr. Paglini's cost (approximately $12,000 to $14,000), for his evaluation and testimony time;

e. The parties holiday schedule shall remain the same; however, the default return time shall be 8:00 AM the next day. The parties may agree to a different time, but if no agreement is reached, the default time shall apply;

f. The following schedule shall apply during the summer: in even years, beginning 2014, Plaintiff shall have 6 weeks of summer vacation and Defendant shall have 4 weeks of summer vacation with the minor child. In odd years, beginning 2015, Defendant shall have 6 weeks of summer vacation and Plaintiff shall have 4 weeks of summer vacation with the minor child;

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g. The parties shall refer to a Parenting Coordinator if difficulties arise in the future. The parties agreed to use Margaret Pickard;

h. All other provisions of the prior Custody and Support Orders shall remain in effect;

i. The temporary Order requiring supervised visitation for Mr. Marquez is lifted;

j. There will be no police involvement unless there is a violation of the Orders.

Mr. Jones and Mr. Balabon stipulated to EDCR 7.50. COURT ORDERED as follows:

1. The above agreement is binding and enforceable pursuant to EDCR 7.50;

2. If problems arise in the future, Plaintiff and/or Defendant shall contact Department N for a Parenting Coordinator Order. The Court shall incorporate Ms. Pickard's name in the Order. If Ms. Pickard finds that a Coordinator with a Psy.D level is necessary, the Court suggested Michelle Gravley; and

3. Mr. Jones shall prepare the Order and Mr. Balabon shall review and sign off.

IT IS SO ORDERED this 3 day of September, 2014.

DISTRICT COURT JUDGE
Mathew Harter

DATED this 18 day of ~~February~~ August, 2014

BLACK & LOBELLO

JOHN D. JONES, ESQ.
Nevada Bar No. 6699
10777 West Twain Ave., Suite 300
Las Vegas, NV 89135
(702) 869-8801
Attorney for Plaintiff,
SEAN R. ABID

DATED this 12 day of ~~February~~ August, 2014

BALABON LAW OFFICE

MICHAEL BALABON, ESQ.
Nevada Bar No. 4436
5765 S. Rainbow Blvd., #109
Las Vegas, NV 89118
(702)450-3196
Attorney for Defendant,
LYUDMILA A. ABID

**Approved:**

**LYUDMYLA A. ABID**

BLACK & LOBELLO
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

Parties are put on notice of NRS 125.510(6):

PENALTY FOR VIOLATION OF ORDER: THE ABDUCTION, CONCEALMENT OR DETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHABLE AS A CATEGORY D FELONY AS PROVIDED IN NRS 193.130. NRS 200.359 provides that every person having a limited right of custody to a child or any parent having no right of custody to the child who willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child in violation of an order of this court, or removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation is subject to being punished for a category D felony as provided in NRS 193.130.

Parties are put on notice of NRS 125.510(8):

8. If a parent of the child lives in a foreign country or has significant commitments in a foreign country:

(a) The parties may agree, and the court shall include in the order for custody of the child, that the United States is the country of habitual residence of the child for the purposes of applying the terms of the Hague Convention as set forth in subsection 7.

(b) Upon motion of one of the parties, the court may order the parent to post a bond if the court determines that the parent poses an imminent risk of wrongfully removing or concealing the child outside the country of habitual residence. The bond must be in an amount determined by the court and may be used only to pay for the cost of locating the child and returning the child to his or her habitual residence if the child is wrongfully removed from or concealed outside the country of habitual residence. The fact that a parent has significant commitments in a foreign country does not create a presumption that the parent poses an imminent risk of wrongfully removing or concealing the child.

Parties are put on notice of NRS 125C.200:

If custody has been established and the custodial parent intends to move his or her residence to a place outside of this State and to take the child with him or her, the custodial parent must, as soon as possible and before the planned move, attempt to obtain the written consent of the noncustodial parent to move the child from this State. If the noncustodial parent refuses to give that consent, the custodial parent shall, before leaving this State with the child, petition the court for permission to move the child. The failure of a parent to comply with the provisions of this section may be considered as a factor if a change of custody is requested by the noncustodial parent.

**NOTICE IS HEREBY GIVEN** that the parties are subject to the provisions of NRS 31A and 125.450 regarding the collection of delinquent child support payments.

**NOTICE IS HEREBY GIVEN** that either party may request a review of child support pursuant to NRS 125B.145.

DOCKETING STATEMENT ATTACHMENT 3

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MICHAEL R. BALABON, ESQUIRE
Nevada Bar No. 4436
5765 So. Rainbow, #109
(702) 450-3196
Las Vegas, NV 89118
Attorney for Defendant



DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID,<br><br>Defendant. | ) | CASE NO. D-10-424830-Z<br>DEPT. NO. ~~N~~ B |

**MOTION TO HOLD PLAINTIFF IN CONTEMPT OF COURT, TO MODIFY ORDER REGARDING TIMESHARE OR IN THE ALTERNATIVE FOR THE APPOINTMENT OF A PARENTING COORDINADOR, TO COMPEL PRODUCTION OF MINOR CHILD'S PASSPORT AND FOR ATTORNEY FEES**

**NOTICE: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF COURT AND TO PROVIDE THE UNDER-SIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO PROVIDE A WRITTEN RESPONSE WITH THE CLERK OF COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.**

COMES NOW, Defendant, by and through her attorney, MICHAEL R. BALABON, ESQ., hereby moves this Court for the following relief:

1. That the Order entered and filed herein of the 9th day of September, 2014, be modified.

2. In the alternative, that this Court appoint a Parenting Coordinator (PC), Margaret Pickard, to deal with the issue of timeshare modification as detailed herin.

3. That in the event of a PC appointment, that Plaintiff be ordered to bear 100% of the cost of the PC, as his actions as described herein have left Defendant no choice but to seek relief from the Court.

4. That Plaintiff be compelled to provide Defendant with the minor child's passport so as to permit Defendant to make travel arrangements for her contemplated trip to the Ukraine in the summer, 2015.

5. That Plaintiff be held in contempt of Court for refusing to provide Defendant with the minor child's Passport thereby effectively denying Defendant her Court authorized summer trip to the Ukraine.

6. For an award of attorney fees to Defendant.

7. For such other and further relief as the Court may deem appropriate.

This Motion is based upon all the pleadings and papers on file herein, the attached Points and Authorities, and oral argument to be heard at the time of hearing of this cause.

DATED this 9 day of January, 2015.

MICHAEL R. BALABON, ESQUIRE
5765 So. Rainbow, #109
Las Vegas, NV 89118
Attorney for Plaintiff

**NOTICE OF MOTION**

TO: JOHN JONES, ESQ., attorney for Plaintiff, and

TO: SEAN ABID, Plaintiff:

PLEASE TAKE NOTICE that the Defendant will bring the foregoing Motion on for hearing on February 9, 2015 at 10:00 a.m. or as soon thereafter as the matter can be heard before the Family Court, Department B.

**POINTS AND AUTHORITIES**

I

STATEMENT OF THE CASE

1. The parties were divorced by way of Joint Petition which Decree was filed on 02/17/2010. Pursuant to the terms of the stipulated Decree and subsequent Orders, both parties were awarded joint legal and joint physical custody of the minor child, ALEKSANDR ANTON ABID, born 02/13/09 (Sasha). The parties' timeshare pursuant to previous Custody Orders is as follows:

a) With Defendant (Lyuda), on all Mondays and Tuesdays, with the Plaintiff (Sean) on all Wednesdays and Thursdays, and the parties alternate weekends, Friday through Sunday.

b) Sean is allowed to pick up the minor child after school on Lyuda's custodial days and shall keep him until 5:30 p.m.

c) The parties shall work with each other on the exchanges and will communicate in a manner that is positive and reasonable. Further the parties will be reasonable and flexible with the exchange times.

2. The latest custody Order was entered and filed herein on the 9th day of September, 2014. This Order modified an existing Order that was entered on the 12th day of March, 2014.

3. The Order filed on 03/12/14 had to be modified because it contained a clerical error in that it provided that Sean was entitled to pick up the minor child on his days after school. Rather, it should have provided that Sean was allowed to pick up the child after school until 5:30 p.m. on Lyuda's days.

4. By way of background, the Order filed on 09/09/14 was the result of a stipulation reached by the parties at a hearing held on December 7, 2013.

5. The parties reached and agreement that was placed on the record in open Court. Prior to entry of that Stipulation, the parties met together outside of Court and negotiated for an extended period of time in the absence of counsel.

6. Of particular relevance to the instant proceeding is that portion of the Stipulated Order that provided that Sean would be allowed to pick up the minor child after school on Lyuda's days and keep the child until 5:30 p.m.. These days would include Mondays, Tuesdays, and every other Friday. The only reason Lyuda

agreed to this provision was because at the time she worked until 5:00 p.m. and Sean had requested that he be allowed to pick up the child after school in lieu of after school care. As indicated, the parties further agreed to henceforth "work with each other on exchanges and communicate with each other in a manner that is positive and reasonable. Further, the parties will be reasonable and flexible with exchange times".

7. Subsequent to the December, 2013 hearing the parties got along reasonably well. In the spirit of good faith and cooperation, there were many instances when Lyuda would get off work early, she would text Sean, and Sean would allow her to pick up the child before 5:30. This certainly made sense because the only reason Sean was given the time after school on Lyuda's days was the fact that she was at work. There were other instances when Lyuda would allow Sean extra time with the child, on her time, and on many occasions Sean reciprocated.

8. In an e-mail dated 07/07/14, Sean's counsel contacted Lyuda's counsel and requested that the Order filed on 03/12/14 be modified because it contained the error as indicated above. In response, in an e-mail to Sean's counsel dated 08/04/14, Lyuda advised that her work schedule had changed, that she was now off every day at 3:30 and there was no longer a need for Sean to pick up the child after school on Lyuda's days. Lyuda requested in good faith that the new Order contain a stipulation to delete

that portion of the Order that allowed Sean to pick up the child on Lyuda's days based upon her schedule change.

9. In response, Sean asserted that the Order had to be drafted in strict accordance with the terms of the stipulation that was placed on the record. Notably, through counsel, Sean conceded in e-mail correspondences dated 08/11/14 and 08/14/14 that if in fact Lyuda's schedule had changed, that there would no longer be a need for Sean to pick up the child after school and keep him until 5:30. But the Order had to be submitted based upon the agreement that was placed on the record.

10. Lyuda contemplated filing for relief in August, 2014 to modify the Order. However, the parties communicated via phone and Sean made a promise to Lyuda that he would always release Sasha to Lyuda early on her days when she got off work and there was no need to modify the Order.

11. Sean continued to allow Lyuda to pick up the child when she got off work, before 5:30. Therefore, as Sean was in fact complying with the that portion of the Order that required both parties to work with each other on exchanges and communicate with each other in a manner that is positive and reasonable, Lyuda felt no need to file to modify the Order.

12. This all changed in November, 2014. For whatever reason, Sean again became belligerent and uncooperative towards Lyuda. He commenced again calling Lyuda names and making threats that

he was going to get full primary physical custody. That he had found out things about Ricky, Lyuda's Husband, and he started calling Ricky's parole officer in a renewed campaign of harassment. He also indicated that he had the absolute right to keep the child on Lyuda's days until 5:30 and that it did not matter that Lyuda was off work and available to pick up the child. On several occasions, Lyuda would show up at Sean's home at 3:15 and Sean would deny her custody and tell her to return at 5:30. This position was now being echoed by Sean's counsel. That the Order was not conditional on whether Lyuda was available to pick up the child, and represented a 100% change from their earlier position on this issue. As an apparent defense, it was alleged that the child's school performance was improving because Sean was allegedly working with the child. (The child is in kindergarten).

13. Since refusing to allow Lyuda to pick up the child after school on her days, Sean has commenced removing the child's daily correspondences and other assignments from the child's backpack. Lyuda is now effectively precluded from participating in the child's education as Sean has custody on Wednesdays and Thursdays and every other Friday.

14. Lyuda is also precluded from enrolling the child in after school extra-curricular activities. Lyuda has wanted to enroll Sasha in Jiu Jitsu classes after school. Sean has advised

he absolutely will not cooperate and if she wants to enroll the child in any activity she can do so only on her time. With a later pick up at 5:30 there simply is not enough time.

15. Pursuant to the terms of the Order filed on 12/03/12, Lyuda is allowed to take the minor child to the Ukraine to visit her family during the summer vacation period. That Order was modified in the Order from the December, 2013 hearing in that the parties agreed to a modified summer schedule. Notably, there was no restriction placed in the latest Stipulation and Order that prevented Lyuda taking her summer vacation in the Ukraine.

16. On or about October, 2014, Lyuda asked Sean for the minor child's Passport so she could purchase flight tickets in advance to realize a substantial cost savings. In a confrontation at Sean's residence in October, 2014, Sean commenced calling Lyuda names and angrily stated that he would never give Lyuda the Passport.

17. This coincided with Sean taking the irrational, bad faith stance that Lyuda had to wait until 5:30 to pick up the child.

18. Lyuda retained counsel and e-mails were sent to Sean's counsel requesting the production of the passport and a modification of the time share to eliminate Sean's right to pick up Sasha on Lyuda's days. The first e-mail was sent on 11/19/14. In a responsive e-mail dated 11/21/14, the timeshare modification

request was denied and a request was made by Sean for more specifics about the Lyuda's contemplated summer vacation to the Ukraine. That responsive e-mail contained the first purported excuse for Sean to deny the trip, that Lyuda had to be present at all times with the child because Sasha "is too young to be anywhere for any period of time without one of his parents present". Notwithstanding the fact that Sean had left Sasha in the care of his Wife's relatives in Iowa for one (1) full week in a previous vacation taken by Sean to Iowa, an e-mail was sent dated 12/11/14 providing all details of the proposed trip and assurances were given that Lyuda would be with the child at all times during the vacation.

19. Sean responded through counsel in an e-mail dated 12/22/14. Sean advised he would not produce the passport, citing a State Department travel advisory that warned against travel to Eastern Ukraine. Sean also made his very first demand that Lyuda be required to post a substantial bond because it was alleged that based upon Ricky's past, that he represented a flight risk. It was further alleged that the Passport would not be turned over unless and until the Court ruled in Lyuda's favor and all appellate relief is exhausted.

20. The travel advisory is specific to two provinces in far Eastern Ukraine. Ukraine is a very large country. As Sean is aware, Lyuda's family resides in far Western Ukraine, more than

700 miles from the "war zone". There are no travel restrictions or warnings for Western Ukraine and there have been no hostilities in Western Ukraine. Lyuda's daughter from a previous marriage has traveled to the Ukraine every summer to visit family with absolutely no problems.

21. Sean's refusal to provide the passport, his demand that Lyuda post a bond, and his unreasonable refusal to modify the timeshare represents a return by Sean of his extreme hostility and anger towards Lyuda that the Order from the December, 2013 hearing was designed to address. Sean freely admitted his "anger" issues towards Lyuda and her Husband Ricky in an e-mail to Lyuda dated 06/19/14 wherein Sean freely admits his anger and for "crossing the line". In that e-mail exchange Sean rightfully points out that a return to hostilities that preceded the December, 2013 hearing was not in Sasha's best interest.

22. But Sean runs hot and cold. He simply cannot control his anger towards Lyuda and her Husband Ricky. Sean feels that he is the superior parent and he desires total control over Sasha. His return to name calling and making threats at recent custody exchanges is further evidence of Sean's bad faith and refusal to co-parent in a productive and healthy manner that is clearly in the best interest of the child.

2. <u>THE SHOULD TIMESHARE SHOULD BE MODIFIED</u>

NRS 125.510 provides in relevant part:

1. In determining custody of a minor child in an action brought under this chapter, the court may:

(a) During the pendency of the action, at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such an order for the custody, care, education, maintenance and support of the minor children as appears in their best interest; and

(b) At any time modify or vacate its order, even if the divorce was obtained by default without an appearance in the action by one of the parties. The party seeking such an order shall submit to the jurisdiction of the court for the purposes of this subsection. The court may make such an order upon the application of one of the parties or the legal guardian of the minor.

2. Any order for joint custody may be modified or terminated by the court upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination. The court shall state in its decision the reasons for the order of modification or termination if either parent opposes it.

In the instant case, the parties have been awarded joint legal and joint physical custody. In Rivero vs. Rivero, 125 Nev. 410, 216 P.3rd 213 (2009), the Nevada Supreme Court defined the standard of review for custody modification requests when the parents have joint physical custody, as follows:

"That when considering whether to modify a physical custody arrangement the district court must first determine what type of custody arrangement exists.....A modification to a joint physical custody arrangement is appropriate if it in the child's best interest. Citing 125.510(2).

Lyuda's request to modify the existing timeshare to eliminate Sean's time after school on her days is in the child's best interest for a number of reasons.

First, Sean, in bad faith and out of his continuing desire to control everything regarding the minor child, has excluded Lyuda from participation in the minor child's schooling. Sean has commenced removing all of the child's papers from his backpack, including daily assignments and teacher notices. Lyuda had to go to the school and meet with Sasha's teacher and request that two separate mailings go out to each parent because Sean was taking everything. Although helpful, Lyuda still misses many notices and other information that is not typically mailed out. This precludes Lyuda from any meaningful participation in the minor child's schooling as Sean has access to the backpack contents each and every school day.

The Nevada Supreme Court, in Mosley vs. Mosley, 113 Nev. 51, 930 P.2d 1110 (1997) set forth the public policy of the State of Nevada in child custody matters, as follows:

"NRS 125.460 dictates the public policy of this state in child custody matters. The policy is that the best interests of children are served by "frequent associations and a continuing relationship with both parents" and by a sharing of parental rights and responsibilities of child rearing".

In this case, Sean feels he is the better parent and that only he can assist the minor child with his schooling. In fact, that is one of Sean's primary arguments in denying Lyuda's request to eliminate Sean's timeshare on her days. That with the

timeshare change that somehow the child's' performance in Kindergarten has improved. Implied in that position is the belief that Lyuda is not as capable as Sean in assisting Sasha with Kindegarden level schoolwork. This is ludicrous. The importance to Lyuda of this time after school cannot be understated. Lyuda actively lobbied her employer for the schedule change for the sole reason that she would be able to spend this quality time after school with Sasha. She certainly did not anticipate that Sean would then insist on the 5:30 exchange time. Lyuda is a competent and involved parent and wants the same opportunity to participate in the minor child's schooling as Sean. And that desire for equal participation is consistent with the policy of the State of Nevada as indicated in the Mosely decision, that the best interests of the child are served by a "sharing of parental rights and responsibilities of child rearing".

Second, the elimination of Sean's timeshare after school on Lyuda's days reduces the number of child exchanges between the parties, which reduces the chances of the reoccurrence of the name calling and parental conflict that has existed in previous custody exchanges between the parties. The minor child has been witness to this hostility towards his mother on Sean's part, and it is not in the child's best interest to be witness to such events.

Given Sean's continued, admitted hostility towards Lyuda

and her Husband Ricky, and his feeling of superiority, these conflicts are bound to continue and steps should be taken to minimize such confrontations. To substantially reduce the number of child exchanges between the parties, would go a long way to accomplishing that goal.

Third, Lyuda's work schedule constitutes a material change in circumstance and this change completely eliminates the need for Sean to watch the minor child after school on Lyuda's days. In good faith and consistent with the spirit of negotiated settlement from the December, 2013 hearing, Lyuda agreed to allow Sean to pickup the child after school on her days because she was working until 5:00. The work schedule issue was the *only* reason why the parties agreed to this modification. And Lyuda's agreement to the modification at the time was absolutely consistent with the overall intent of the agreement that the parties would be flexible and reasonable with each other in child custody exchanges and times. This intent was plainly indicated by Sean's counsel in open Court at the December, 2013, prove-up hearing.

In this matter, Sean, by now insisting upon strict compliance with a 5:30 exchange time when Lyuda is at the door requesting to pick up the child on her days at 3:15 p.m., is absolutely inconsistent with and violates those provisions of the Order that mandate that the parties will be reasonable and

flexible with exact dates and times for custody exchanges. In fact, this position is the exact opposite of being reasonable and flexible.

Fourth, this timeshare is very restrictive for Lyuda and she is not on equal footing with Sean in the sharing of "parental rights and responsibilities of child rearing" that she is entitled to by virtue of having joint legal and joint physical custody. Lyuda is not only precluded from equal participation in the minor child's education, but the existing timeshare effectively prevents/restricts Lyuda from enrolling the child in after school activities, like Jiu Jitsu, that she would be free to pursue with a return to the custody schedule that the parties had for the previous 4 years prior to the December, 2013 hearing. Sean has made it clear to Lyuda on more than one (1) occasion that he will not accommodate any extra-curricular activity that Lyuda chooses for the child, and Lyuda must schedule events "on her time". A return to the timeshare previously enjoyed by the parties for almost 4 years will allow Lyuda to pursue these activities for Sasha.

In summary, the timeshare request by Lyuda will have the effect of restoring the parties to equal footing so that each party can share equally in parental rights and the responsibilities of child rearing.

The restoration of an equal timeshare between the parties

takes on even greater significance where you have one parent (Sean) who feels he is the superior parent and he actively seeks to limit and/or completely eliminate Lyuda's involvement in the minor child's life and education.

For these reasons, the best interests of Sasha mandate that this Court restore the timeshare that pre-dated the last custody Order and eliminate Sean's timeshare on Lyuda's custodial days.

3. SEAN SHOULD BE HELD IN CONTEMPT OF COURT FOR REFUSING TO TURN OVER SASHA'S PASSPORT; SEAN SHOULD ORDERED TO TURN OVER PASSPORT

This Court has the authority to hold Sean in contempt for his failure to abide by the terms of the Order filed herein on 12/03/12 pursuant to NRS 22.010, which provides in pertinent part as follows:

> The following acts or omissions shall be deemed as contempt:
>
> 3. Disobedience or resistance to any lawful writ, order or judge at chambers.....

Sean has, through counsel indicated a steadfast refusal to turn over Sasha's passport knowing that the refusal to provide the passport will have the direct effect of denying Lyuda her Court authorized trip to the Ukraine. This constitutes Contempt of Court.

Sean's alleged reasons for the denial are without merit.

First, as stated, the travel restrictions cited by Sean only deal with two (2) far eastern regions of the Ukraine, more than 700 miles from where Lyuda will be staying.

And to demand a bond because Lyuda's Husband Ricky represents a flight risk is ludicrous. Lyuda is an American citizen and she has no right to permanently reside in the Ukraine or any other country for that matter. Lyuda has maintained gainful employment with Freeman Decorating Co. in Las Vegas for more than eight (8) years, and she has a beautiful home here in Las Vegas. She has absolutely no incentive to flee the Country with Sasha and she has no past history of fleeing the Country with Sasha or of violating any of the previous custody orders that have been filed in this case. There is absolutely no factual basis in this case to justify the imposition of a bond.

In summary, Sean's various excuses for his refusal to turn over the passport are without merit. His refusal constitutes Contempt of Court for which Sean should be liable for contempt sanctions, including an award of attorney fees. And Sean should be ordered to turn over the passport without further delay.

5. APPOINTMENT OF PARENTING COORDINATOR

The written Order from the December, 2013 hearing provided that in the event of problems in the future that either party may contact the Department for the appointment of Parenting

Coordinator.

In the present circumstances, Lyuda feels that the appointment of a PC is unnecessary to deal with the custody modification request, and that the PC should not be dealing with contempt issues. PCs are expensive and the issues to be resolved are relatively straightforward. Accordingly, Lyuda is content to let the Court decide these issues.

Should the Court disagree and elect to appoint a PC to deal with the issues, Lyuda requests that Sean be ordered to bear the cost thereof as it has been Sean's unreasonable, bad faith actions as described herein that have forced Lyuda to seek relief from the Court.

5. LYUDA IS ENTITLED TO AN AWARD OF ATTORNEY FEES

Prior to the filing of the instant Motion, and in compliance with EDCR 5.11, Lyuda made several attempts to contact Sean (through counsel) in an effort to resolve the issues in dispute.

Despite these attempts, Sean has refused to provide the passport and has refused to modify the timeshare which modification would serve the child's best interests.

Lyuda therefore seeks recovery of her attorney fees and costs she has incurred in this action by virtue of the Sean's unreasonable refusal to negotiate these issues in good faith thereby necessitating the filing of the instant motion, pursuant to the applicable provisions of EDCR 5.11 et. seq. and NRS

18.010(2), prevailing party.

III

**CONCLUSION**

Based upon the foregoing facts, Memorandum of Law and Legal Argument, Lyuda respectfully requests that she be granted the relief requested herein, and for such other and further relief as the Court may deem just and equitable.

DATED this 9 day of January, 2015.

MICHAEL R. BALABON, ESQ.
5765 So. Rainbow, #109
Las Vegas, NV 89118
Attorney for Plaintiff

**AFFIDAVIT OF LYUDMYLA A. ABID IN SUPPORT OF MOTION**

STATE OF NEVADA )
) SS
COUNTY OF CLARK )

LYUDMYLA A. ABID, being first duly sworn, deposes and says:

1. That I am the Defendant in the above-entitled action and I am competent to testify as to the matters set forth herein based on my own knowledge except to those matters stated upon information and belief and as to those matters I believe them to be true.

2. I have read the contents of the foregoing Motion and I do hereby affirm and certify under penalty of perjury that all the allegations contained herein in are true and correct to the best of my knowledge and they are, therefore, incorporated herein in this Affidavit as if fully set forth herein.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENT IS TRUE AND CORRECT

DATED this 8 day of January, 2015.

LYUDMYLA A. ABID

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

Sean R Abid
Plaintiff/Petitioner

-vs-

Ljudmyla A. Abid
Defendant/Respondent

CASE NO. D-10-424830-Z

DEPT. B

**FAMILY COURT MOTION/OPPOSITION FEE INFORMATION SHEET (NRS 19.0312)**

Party Filing Motion/Opposition: ☐ Plaintiff/Petitioner ☒ Defendant/Respondent

MOTION FOR/OPPOSITION TO _____

**Notice**

**Motions and Oppositions to Motions filed after entry of final Decree or Judgment (pursuant to NRS 125, 125B & 125C) are subject to the Re-open Filing Fee of $25.00, unless specifically excluded. (See NRS 19.0312)**

**Excluded Motions/Oppositions**

☐ Motions filed before final Divorce/Custody Decree entered (Divorce/Custody Decree NOT final)

☐ Child Support Modification ONLY

☐ Motion/Opposition For Reconsideration (Within 10 days of Decree)
Date of Last Order _____

☐ Request for New Trial (Within 10 days of Decree)
Date of Last Order _____

☐ Other Excluded Motion _____
(Must be prepared to defend exclusion to Judge)

NOTE: If no boxes are checked, filing fee MUST be paid.

☒ Motion/Opp IS subject to $25.00 filing fee ☐ Motion/Opp IS NOT subject to filing fee

Date: 1-9-15, 2015

Michael Ballabon
Printed Name of Preparer

Signature of Preparer

DOCKETING STATEMENT ATTACHMENT 4

Electronically Filed
02/04/2015 01:25:20 PM

CLERK OF THE COURT

OPPC
BLACK & LOBELLO
John D. Jones
Nevada State Bar No. 6699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Fax: (702) 869-2669
Email Address: jjones@blacklobellolaw.com
Attorneys for Plaintiff,
SEAN R. ABID

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID<br><br>Defendant. | CASE NO.: D424830<br>DEPT. NO.: B<br><br>**Date of Hearing: February 9, 2015**<br>**Time of Hearing: 10:00 a.m.** |

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NOTICE: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS Motion. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS Motion MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.

**OPPOSITION OF PLAINTIFF, SEAN R. ABID, TO DEFENDANT'S MOTION TO HOLD PLAINTIFF IN CONTEMPT OF COURT, TO MODIFY ORDER REGARDING TIMESHARE OR IN THE ALTERNATIVE FOR THE APPOINTMENT OF A PARENTING COORDINATOR, TO COMPEL PRODUCTION OF MINOR CHILD'S PASSPORT AND FOR ATTORNEY FEES**
**AND**
**COUNTERMOTION TO CHANGE CUSTODY AND FOR ATTORNEYS' FEES AND COSTS**

COMES NOW, Plaintiff, SEAN R. ABID ("Sean"), by and through his attorneys of record, John D. Jones and the law firm of BLACK & LOBELLO, and hereby files his OPPOSITION OF PLAINTIFF, SEAN R. ABID, TO DEFENDANT'S TO DEFENDANT'S

MOTION TO HOLD PLAINTIFF IN CONTEMPT OF COURT, TO MODIFY ORDER REGARDING TIMESHARE OR IN THE ALTERNATIVE FOR THE APPOINTMENT OF A PARENTING COORDINATOR, TO COMPEL PRODUCTION OF MINOR CHILD'S PASSPORT AND FOR ATTORNEY FEES as well as his COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS.

DATED this 4 day of February, 2015.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Plaintiff,
SEAN R. ABID

**NOTICE OF COUNTERMOTION**

TO: LYUDMYLA A. ABID, Defendant, and

TO: MICHAEL R. BALABON, ESQ., Counsel for Defendant:

YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS, on for hearing before the above-entitled Court on the **9th day of February, 2015, at 10:00 a.m.** of said day, or as soon thereafter as counsel can be heard in Department B.

DATED this 4 day of February, 2015.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Plaintiff,
SEAN R. ABID

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## I. INTRODUCTION

The Motion currently before the Court is the ultimate example of bad faith on the part of a litigant and parent. As set forth hereinafter, and in the Declarations of Sean Abid, Lyuda's bad faith Motion practice is the least of her transgressions. Each and every position taken by Lyuda is specifically addressed in the DECLARATION OF SEAN ABID IN SUPPORT OF RESPONSE TO DEFENDANT'S MOTION TO HOLD PLAINTIFF IN CONTEMPT OF COURT, TO MODIFY ORDER REGARDING TIMESHARE OR IN THE ALTERNATIVE FOR THE APPOINTMENT OF A PARENTING COORDINATOR, TO COMPEL PRODUCTION OF MINOR CHILD'S PASSPORT AND FOR ATTORNEY FEES (attached hereto as **Exhibit "1"**). This declaration is incorporated herein by reference as if fully set forth herein.

With regard to the Motion, Sean's attorney tried to resolve it prior to the Motion being filed. (see email attached as **Exhibit "2"**) The simple facts, which Lyuda ignores, is that a month long visit to the Ukraine is not in Sasha's best interest and creates a significant risk to Sasha and his relationship with his father. The bigger issue is the absolutely baseless request to vacate an order that was negotiated in order to resolve Sean's first Change of Custody Motion on the day of trial. Sean having Sasha each day after school until 5:30 p.m. was a material part of the resolution. It was not dependent upon Lyuda's work schedule. Settlement, however, was dependent upon that additional time being awarded to Sean. Even more baseless still is the request for contempt. The request is without a qualifying affidavit or even a citation to an order that was allegedly violated. This request is made in bad faith and is worthy of sanctions.

The Court's real focus should be on what Sean has recently discovered. Based upon things that Sasha has said to Sean, Sean has always been concerned about Lyuda and her husband bad-mouthing Sean to Sasha. These concerns were also recorded by Dr. Paglini in his report which resulted from this Court's outsource evaluation order. The report specifically stated that Lyuda's inappropriate comments about Sean to Sasha "NEEDS TO STOP." (Paglini Report p. 57) Clearly such alienation is not in the best interests of Sasha. In order to protect the best interests of his son, Sean placed a recording device in Sasha's book bag to confirm or eliminate his fear of the abuse that Sasha may be suffering at the hands of his mother.

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As set forth in the DECLARATION OF SEAN ABID IN SUPPORT OF HIS COUNTERMOTION TO CHANGE CUSTODY, (attached as **Exhibit "3"**) what was learned from just a few days of recording is absolutely shocking. Despite being told by Dr. Paglini that her badmouthing of Sasha is contrary to his best interests, Lyuda has continued her campaign to destroy Sean's relationship with Sasha. Her abuse of a 5 year old boy is absolutely diabolical. The recordings will be made available to the Court at the time of the evidentiary hearing in this matter.

Sean, who has always tried to avoid conflict and litigation, has no choice but to seek Primary Custody in order to protect his son and preserve his bonded relationship with him that Lyuda seeks to destroy.

## II. LEGAL ANALYSIS

### A. The Recordings In Question Are Absolutely Legal.

It is likely, that rather than recognize the horrific nature of her manipulations and alienations, that Lyuda will argue that the recordings should not be considered by the Court. Whereas the recordings would certainly be considered by a custody evaluator, fortunately, the current status of the law is that this Court can consider the recordings directly. NRS 200.650 states as follows:

> **200.650. Unauthorized, surreptitious intrusion of privacy by listening device prohibited**
> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

The key aspect of the statute is that of consent. Case law recognizes the ability of a parent to consent to recording on behalf of a child. In Pollock v. Pollock, the 6th Circuit Court of Appeals address the issue of "vicarious consent" by summarizing the status of the law as follows:

> Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability. The question of whether a parent can "vicariously consent" to the recording of her minor child's phone calls, however, is a question of first impression in all of the federal circuits. Indeed, while other circuits have addressed cases raising similar issues, these have all been decided on different grounds, as will be discussed below. The only federal courts to directly

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address the concept of vicarious consent thus far have been a district court in Utah, Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), a district court in Arkansas, Campbell v. Price, 2 F.Supp.2d 1186 (E.D.Ark.1998), and the district court in this case, Pollock v. Pollock, 975 F.Supp. 974 (W.D.Ky.1997).

....

The district court in the instant case held that Sandra's "vicarious consent" to the taping of Courtney's phone calls qualified for the consent exemption under § 2511(2)(d). Accordingly, the court held that Sandra did not violate Title III. The court based this decision on the reasoning found in Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), and Silas v. Silas, 680 So.2d 368 (Ala.Civ.App.1996).

The district court in Thompson was the first court to address the authority of a parent to vicariously consent to the taping of phone conversations on behalf of minor children. In *Thompson*, a mother, who had custody of her three and five-year-old children, recorded conversations between the children and their father (her ex-husband) from a telephone in her home. 838 F.Supp. at 1537. The court held:

[A]s long as the guardian has a *good faith basis* that it is *objectively reasonable* for believing that it is *necessary* to consent on behalf of her minor children to the taping of phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.

Id. at 1544 (emphasis added). The court noted that, while it was not announcing a *per se* rule approving of vicarious consent in all circumstances, "the holding of [*Thompson* ] is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father." Id. at 1544 n. 8.

An obvious distinction between this case and *Thompson*, however, is the age of the children for whom the parents vicariously consented. In *Thompson*, the children were three and five years old, and the court noted that a factor in its decision was that the children were minors who "lack[ed] both the capacity to [legally] consent and the ability to give actual consent." Id. at 1543. The district court in the instant case, in which Courtney was fourteen years old at the time of the recording, addressed this point in a footnote, stating:

Not withstanding this distinction [as to the age of the children], *Thompson* is helpful to our determination here, and we are not inclined to view Courtney's own ability to actually consent as mutually exclusive with her mother's ability to vicariously consent on her behalf.

Clearly, the current status of the law is to accept and admit recordings of this nature. The only question the Court should have is just what abuse and manipulation occurs beyond the parameters of Sean's recorder.

B. The Best Interests Of Sasha Require A Change Of Custody.

Because the current custodial order is one of joint custody, the Truax best interests

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standard applies to the instant Motion.

NRS 125.480 States as follows:

> **NRS 125.480 Best interests of child; preferences; presumptions when court determines parent or person seeking custody is perpetrator of domestic violence or has committed act of abduction against child or any other child.**
>
> 4. In determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things:
>
> (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her custody.
>
> (b) Any nomination by a parent or a guardian for the child.
>
> **(c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.**
>
> **(d) The level of conflict between the parents.**
>
> **(e) The ability of the parents to cooperate to meet the needs of the child.**
>
> **(f) The mental and physical health of the parents.**
>
> **(g) The physical, developmental and emotional needs of the child.**
>
> (h) The nature of the relationship of the child with each parent.
>
> (i) The ability of the child to maintain a relationship with any sibling.
>
> **(j) Any history of parental abuse or neglect of the child or a sibling of the child.**
>
> (k) Whether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child.
>
> (l) Whether either parent or any other person seeking custody has committed any act of abduction against the child or any other child.
>
> (emphasis added)

The highlighted considerations above make clear what the Court must do in this case. Lyuda is not well, and is clearly incapable of sharing joint custody. Her desire is to destroy Sean's relationship with his son. It always has been, as noted by Dr. Paglini, and apparently, it always will be. The physical and developmental needs of the children can only be protected by the relief requested herein. Pursuant to NRS 125.480, it is in the children's best interests for Sean to be awarded Primary Physical Custody.

## III. ATTORNEY FEES

There are multiple authorities for this Court to award attorneys' fees. Pursuant to NRS 18.010:

> 1. The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law.
>
> 2. In addition to the cases where an allowance is authorized by specific statute, **the court may make an allowance of attorney's fees to a prevailing party:**
>
> a. When he has not recovered more than $20,000; or

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b. **Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.**

3. In awarding attorney's fees, the court may pronounce its decision on the fees at the conclusion of the trial or special proceeding without written Motion or with or without presentation of additional evidence.

4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees.

NRS 18.010(2)(b) provides that the court may award attorneys' fees to the prevailing party in such circumstances. Pursuant to NRS 18.010, this Court should liberally construe the provisions of this statute "in favor of awarding attorney's fees in all appropriate situations." Lyuda's Motion is completely frivolous. Moreover, her bad faith throughout these proceedings require that Sean be awarded his attorney fees, now, and once the evidentiary hearing in this matter is concluded.

## IV. CONCLUSION

Based upon the foregoing, and the Declarations of Sean, filed separately and attached hereto, the Court should enter the following orders:

1. Denying Lyuda's Motion.
2. Awarding Sean temporary primary physical custody subject to Lyuda having visitation every other weekend.

///

///

///

///

///

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3. Requiring that Lyuda attend intensive therapy regarding her alienation issues.

4. Awarding Sean his attorney fees.

5. Any other relief that this Court deems just and proper.

DATED this 4 day of February, 2015.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Plaintiff,
SEAN R. ABID

BLACK & LOBELLO
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Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

## CERTIFICATE OF MAILING

I hereby certify that on the 4th day of February, 2015 a true and correct copy of the OPPOSITION OF PLAINTIFF, SEAN R. ABID, TO DEFENDANT'S TO DEFENDANT'S MOTION TO HOLD PLAINTIFF IN CONTEMPT OF COURT, TO MODIFY ORDER REGARDING TIMESHARE OR IN THE ALTERNATIVE FOR THE APPOINTMENT OF A PARENTING COORDINATOR, TO COMPEL PRODUCTION OF MINOR CHILD'S PASSPORT AND FOR ATTORNEY FEES AS WELL AS HIS COUNTERMOTION FOR ATTORNEYS' FEES AND COSTS upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid, addressed as follows:

Michael Balabon, Esq.
Balabon Law Office
5765 S. Rainbow Blvd., #109
Las Vegas, NV 89118
Email for Service: mbalabon@hotmail.com
*Attorney for Defendant,*
*Lyudmila A. Abid*

Cheryl Barnabel
an Employee of BLACK & LOBELLO

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**MOFI**
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Email: jjones@blacklobellolaw.com
Attorneys for Plaintiff,
SEAN R. ABID

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID,<br><br>Defendant. | CASE NO. D424830<br>DEPT. NO. B<br><br>FAMILY COURT MOTION/OPPOSITION<br>FEE INFORMATION SHEET (NRS 19.0312) |

Party Filing Motion/Opposition: ■ Plaintiff/Petitioner Defendant/Respondent

**MOTION FOR/OPPOSITION TO:** Opposition Of Plaintiff, Sean R. Abid, To Defendant's To Defendant's Motion To Hold Plaintiff In Contempt Of Court, To Modify Order Regarding Timeshare Or In The Alternative For The Appointment Of A Parenting Coordinator, To Compel Production Of Minor Child's Passport And For Attorney Fees As Well As His Countermotion For Attorneys' Fees And Costs

**Motions and Oppositions to Motions filed after entry of a final Order pursuant to NRS 125, 125B or 125C are subject to the Re-open filing fee of $25.00, unless specifically excluded.** (NRS 19.0312)

*NOTICE If it is determined that a motion or opposition is filed without payment of the appropriate fee, the matter may be taken off the Court=s calendar or may remain undecided until payment is made.*

**Excluded Motions/Oppositions**

1. No Final Decree or Custody Order has been entered. YES ■ NO
2. This document is filed solely to adjust the amount of support for a child. No other request is made. YES ■ NO
3. This motion is made for reconsideration or a new trial and is filed within 10 days of the Judge=s Order. If YES, provide file date of Order. YES ■ NO

If you answered YES to any of the questions above, you are not subject to the $25 fee.

■ Motion/Opposition IS subject to $25.00 filing fee □ Motion/Opposition IS NOT subject to filing fee

Date: February 4, 2015

Cheryl Berdahl
Print Name of Preparer

Cheryl Berdahl
Signature of Preparer

# Exhibit 2

# Exhibit 2

## John Jones

**From:** John Jones
**Sent:** Monday, December 22, 2014 9:03 AM
**To:** 'michael Balabon'
**Cc:** 'Sean R. Abid'
**Subject:** Response to 5.11 email.

1. With regard to the Ukraine, it is not currently in Sasha's best interests, or any US citizen for that matter to travel to the Ukraine. Please see Travel warning at the following web address:

http://travel.state.gov/content/passports/english/alertswarnings/ukraine-travel-warning.html . There are similar travel advisories issued by the UK and Canada.

Even if our government did not advise against such travel, because of your client's husband's past, and the legitimate concerns my client has that he is a flight risk, even if the Court ignores the travel advisory, we will be asking to Court for your client to post a significant bond to cover my client's expenses in the event your client does not return. Too many Countries in that area are not Hague Signatories. If the Court rules in your favor, and all appellate relief is exhausted, the passport will be turned over.

2. The portion of the Order which gives my client custody of Sasha from after school until 5:30 was an integral part of the settlement that was reached the day of trial. It was not contingent upon your client's schedule remaining the same. Sasha and Sean have an established homework regimen which has produced very positive results for Sasha. There can be no settlement which vacate this portion of the order. My client only acquiesced on lifting Mr. Marquez' supervised contact with Sasha, because it afforded meaningful time during the school week with Sasha so he could provide much needed structure and participation in his education. Your client got what she wanted, Marquez off supervised contact, now she is trying to take back what she agreed to. We would not have settled and, rather, pursued primary had we known she had no intention to follow an agreement that was reaffirmed in September.

If you feel the need to file a motion, I suppose that the judge will decide.

**John D. Jones, Esq.**
**Partner.**
**Nevada Board Certified Family Law Specialist**

BLACK LOBELLO
ATTORNEYS AT LAW

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www.blacklobellolaw.com

Exhibit 3

Exhibit 3

**Details of filing:** *Declaration of Sean Abid in Support of His Countermotion to Change Custody*
**Filed in Case Number:** D-10-424830-Z

| | |
|---|---|
| **E-File ID:** | 6620677 |
| **Lead File Size:** | 682367 bytes |
| **Date Filed:** | 2015-02-04 09:37:29.0 |
| **Case Title:** | D-10-424830-Z |
| **Case Name:** | In the Matter of the Joint Petition for Divorce of: Sean R Abid and Lyudmyla A Abid, Petitioners. |
| **Filing Title:** | Declaration of Sean Abid in Support of His Countermotion to Change Custody |
| **Filing Type:** | EFS |
| **Filer's Name:** | Black & LoBello |
| **Filer's Email:** | NVClarkCountyEfiling@blacklobellolaw.com |
| **Account Name:** | efile card |
| **Filing Code:** | DECL |
| **Amount:** | $ 3.50 |
| **Court Fee:** | $ 0.00 |
| **Card Fee:** | $ 0.00 |
| **Payment:** | Filing still processing. Payment not yet captured. |
| **Comments:** | |
| **Courtesy Copies:** | |
| **Firm Name:** | Black & LoBello |
| **Your File Number:** | Abid - 4181-0001 |
| **Status:** | Pending - (P) |
| **Date Accepted:** | |
| **Review Comments:** | |
| **Reviewer:** | |
| **File Stamped Copy:** | |
| **Documents:** | Cover Document:<br>Lead Document: Abid - Declaration in Supp of Countermotion to Change Custody.pdf 682367 bytes |
| **Data Reference ID:** | |
| **Credit Card Response:** | System Response: VXHCCCDE7B4C<br>Reference: |

DECL

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Email Address: jjones@blacklobellolaw.com
Attorneys for Plaintiff,
SEAN R. ABID

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID<br><br>Defendant. | CASE NO.: D424830<br>DEPT. NO.: B |

**DECLARATION OF PLAINTIFF, SEAN R. ABID, IN SUPPORT OF HIS COUNTERMOTION TO CHANGE CUSTODY**

SEAN ABID, being first duly sworn, deposes and says:

1. That I am the Plaintiff in this action and I offer this declaration of my own personal knowledge.

2. That because of things that Sasha had been telling me, and Lyuda's history of alienating him from me, I placed a recording device in Sasha's backpack. I did so out of concern that Sasha's mother was abusing Sasha by denigrating me. In the few days that it recorded, what I heard was devastating.

3. On January 26, 2015, this dialogue took place after Sasha returned to his mother's from a weekend with me. There was no inciting incident on my end to warrant more "daddy bashing" from Lyudmyla.

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L: Did Riley ask you to play Call of Duty?

S: But Momma, It's your choice, if you want me to play "Call of Duty" then....

**Lyuda interrupts: Listen! You've got to tell me everything when you go back to daddy house.**

Sasha weakly: **Why?**

L: **You have to tell me every single thing that he ask you. Did you play with Riley? Think about it.**

S: Ya, but he has a toy set (inaudible) I played (inaudible) MineCraft.

L: You played MineCraft. What else?

S: Um (inaudible) I wanna get one of those cuz I really wanna play that too. (Inaudible)

L: Ya. You did not play "Call of Duty" no more?

S: Ya but it's OK for me to play here.

L: (Inaudible)

S: I want to play but

L: But what?

S: He doesn't think I should play the game there. (Inaudible) It's Ok for me to play here.

L: Did you watch Riley play?

S: No

L: Why not?

S: I wanted to play but

L: But what?

S: But I did not tell him that it's not his age. He knows it's not his age. I telled him and he says he doesn't know. But it's your choice.

L: Ya, but did Riley play while you were there?

S: I telled him to see if he knows and he does know. It's your choice

L: What do you think is my choice right now?

S: Your choice is whether I play "Call of Duty."

L: (Inaudible)

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S: Ugh, I don't like that kind of choice to make

L: **You say, that's my choice, and your daddy give me problems. He gives me problems. He writes me nasty messages**.

S: He just want you to

Lyuda interrupts: No, you brought this game to our home from Riley's house. I never knew about it before you told me. Is that true? I did not know about this game.

S: No but he told you, he was trying to tell you

L: (Inaudible) It happened today? When did this happen? It happened today?

S: No, it happened a couple days ago. But daddy, I mean momma, it's your choice. If you want me to play, you let me play

L: (Inaudible) You can't play, do you know why?

S: Why?

L: **Because you going to go to daddy house and tell him that momma (inaudible) is bad mother who lets you play this violent game and then he takes you away from your mother. Is that what you want? Because if you don't keep your promise, and you tell everything to your daddy and you are not allowed to play this game**.

S: Ya but...

Lyuda interrupts: **No! Tell your daddy it's not his business what you do at our house. But you not keep your promise and you tell every single thing to daddy.**

Inaudible

S: Ya, but it's your choice (inaudible)

Lyuda flippantly: Nope, that's it

Sasha crying

L: What?

L: **Ira, you know how sneaky his daddy is. (Inaudible) Sasha crying harder and louder.**

L: Because your daddy is sneaky, he wants you to tell him everything. Everything! Your daddy is a sneaky guy. K? And very nasty and mean person, that's what he is. Everything what he does is try to hurt your momma, every single day. Do you understand what he is doing? Do you want him to take you away from me? Cuz that's what he's doing right now. Do you understand? (Sasha crying) He and Angie is lying to you every single time. You know why? If they can take you away from you,

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from me, then I will have to pay him money. That's why they want to do this. **You understand? You will play sometimes, not every day, but sometimes**.

Sasha inaudible

**Sasha, you will be able to play only if you keep the secret from daddy. You play at momma's house, you have to say, no my momma is not letting me.**

S: **I tell him no?**

L: **Ya!**

S: **And then I can play?**

L: **Ya!**

S: **Ok!**

L: **But I don't trust that you're going to do it!**

Sasha crying: **I will try to**

L: **What will you say if your daddy says, "Sasha, I'm OK if you play at your momma house? Did you play, Sash, at momma house? (Mocking Sean) Sasha crying**

S: **I will try to .... I will try to but...**

Lyuda **interrupts**: **Because Angie will be sneaky too. Angie will say, "Sasha, did you play at your momma house? (Mocking Angie) You can play at your momma house. That's Ok." That's what they will try to do, Sasha.**

S: I will try to

L: **Listen. When they ask you what you do at momma's house, they trying to use it against me. Everything what you say to them, they use against your momma. Is that what you want? You tell them I love my mom more than anybody. And more than you daddy, I love my momma. And not ask me about my momma. Because I'm going to be with my momma**.

Sasha says something while crying

L: **No. I love my mom more than my dad. My mom carry me in her belly for so many months. My mom gave me milk breast so I would get healthy. That was not my dad. That was my mom. My dad give me nothing. What your dad did? Nothing. Ira, who you like? Your dad or mom?**

Ira: Both

L: Ok both...but who do you like more? Your daddy?

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Ira: (Inaudible)

L: Ira, it's your choice. Ok, who do you like more, your momma or your daddy?

Ira and Lyuda arguing

Sasha: **Daddy, Momma, I really will try to not tell him**

L: **I don't trust you**

Ira: You said that last time, Sasha!

Lyuda: **Ya, you said that last time and then I got this nasty message on my phone. You know what he said to me? I will tell you what he said to me. Here is what he said to me**.

S: **You already told me!**

L: **This is what he told me. (Reading) "Come on, Lyuda! How can you possibly argue that you should have time with Sasha when this is how he spends time in your house, playing games." (Inaudible) Do you think this will hurt my feelings? Do you think it's OK it against your mom? But he does it. He does it. That's why. You are a boy. You have to protect your momma. When he accuse me about something, I love my momma, more than anybody. (Sasha crying) Huh? It's OK Sash. He just bad person. He's gonna be like that all his life. (Sasha crying louder)**

Ira: Sasha, how old are you? How old are you?? How old are you?

Sasha crying: Five

Ira: You're almost six. (Inaudible) Let me tell you this. When I was your age I had never played a game like that ever ever ever. Sasha, you have so much, like, to do. If you play "Call of Duty", it will hurt your brain, you are so young. (Continues, inaudible) Look at the game, Sasha. It's 17 and up. It's mature.

L: Did you ask Riley to play again?

Sasha: I forgot to.

L: You forgot to? You can play Minecraft, and you can have Mario (Sasha crying)

**Sasha, what do you want to eat? Hmm? What do you eat in daddy house?**

S: Corn dog

L: Corn dog? Hmm.

**Quizzing him: What car is Angie driving? New car? Did she stop working? When you get home, is she home with the babies? How are**

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**the babies? Reed and Brook? Is Angie there?**

4. Another recording made on Wednesday evening, January 22, 2015. Lyuda is angry about a text she received from me, in which I asked her to read up on the game "Call of Duty" before allowing Sasha to play it all day at her house. This conversation carries over into the morning of Jan. 23 in the car. Below is a summary of what is recorded:

Sasha says he wants to play Call of Duty

Lyuda: Do you know your daddy contacted me?

Iryna: Sasha, you said you wouldn't tell and you told. No more Call of Duty for you.

Lyuda: Your dad said you told him you were playing full weekend here with Ira. **Do you want your daddy to take you away from me?**

Ira: This game is not for your age.

**Sasha crying. Lyuda: You can blame your daddy.**

Ira: No this game is not for his age. It's true.

Lyuda: **This is your daddy. You want to hear his message? Come here, I'll read it to you. Sasha continues to cry.**

She reads text to him. He continues to cry. Your daddy says you never played the game with Riley. You tell him that you have played this game with Riley and momma found out about this game from me. Continues to read text to Sasha.

**He says you never played at Riley's. Is he lying? Did you play this game at Riley's house?**

**Is he lying? Sasha—Ya (Crying)**

Keeps asking him over and over if he played the game at Riley's house. Who plays the game at Riley's house? Does your daddy allow you to play games?

Sounds like she is playing back a recording of Sasha saying that he played the game at Riley's while Sasha is talking to Ira.

Sasha says something about telling his daddy. Lyuda says and do you see what happened? What happened?

Sasha, he cannot tell me what to do at my house, do you understand? If you want to play, you can play, that's my decision.

**Oh Sash, you know I love you so much and he's trying to hurt me all the time. He thinks I'm a bad mother you understand? Do you think I'm a bad mother? Do you think Angie could be your mother? What**

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do you think about that? Do you want Angie to be your mother? Your daddy does. What do you think about the babies? How are the babies doing? Do they sleep at night?

Do you see what I deal with? These messages from your daddy?

Sasha: Today Reed fell off a chair and cried.

L: What did Angie do? Was she sad? Did Angie yell at daddy?

The next time your daddy asks if you play this game, you tell him it's Ira's game. Not my game. You tell him only Minecraft. "Call of Duty" is Ira's.

Ira: You are going to blame it on me?

Ira can play the game as much as she wants, right? You can play the game too, you just can't tell daddy. Do you understand? You do not tell him nothing. When you do that, you go against your mom. Do you understand that? You can't play today. You made a mistake. What do you think about that?

Mocking Sean asking Sasha questions. What should you say, Sasha?

Sasha repeats back what he should say.

He tells about a time that he tricked his daddy, and she encourages him. She laughs loudly and claps. Sasha seems happy about this and continues. What happened? How did they find out you played this game? How did you say it? Do you remember? What did you tell them? How did you say it? Can hear Sasha telling her his answers, she keeps asking questions. Did you tell them the truth? You tell them Call of Duty is Ira's game. My game is Marble? And Minecraft. Call of Duty is Ira's game.

She keeps telling him what he should say.

Sasha is crying again.

I like Call of Duty myself. Ira what do you think? Ira says her friends are 11. Lyuda talks about all the friends who play who are young.

Sasha: They don't understand that this game isn't for their age. Have to be 13, 14, 15, 18.

Still talking about it at 55 min.

Did you tell your daddy you played with Riley or you didn't discuss it? Did you talk about it today? 57 min

1:11 Sasha if I ever get a nasty message from your dad you will never play this game again. That's on you. You going to talk to him about me, you're going to take it. Deal? Or not?

Ira—Do you want to play call of duty? If you want to play, you can't tell your dad.

Lyuda—This is what you tell your dad. I play Minecraft. Ira plays call of duty. Is that so hard?

Ira and Sasha start playing Call of Duty.

5. This is audio text from when Lyuda is driving Sasha to school in the morning, after also interrogating him the day before.

Sasha, if I will find out that you tell daddy, oh, momma says not tell you this, momma says not tell you this, you will never touch Xbox. Do you understand? You do not talk about your momma because all what he wants is hurt your momma. Every time you talk about momma, you're hurting your own momma. Do you understand? So every time he ask you about momma, about Ira, you say I do not want to talk about my momma with you, that's it. How..how difficult is that? That's your right. Do you hear me?

Sasha: YA!

Is it that hard?

Sasha: No!

**So why you talking with him about me? Hm? You forget you are hurting me. You think it's OK?**

Sasha weakly: No

**Then he send me this messages, accusing me of something that he is doing himself. Every time he ask you about games, Daddy, I started play games with Vanessa and Riley, not my mom. Why this is so hard to say, the truth? Hm? Tell me. You got to be strong. You have to be strong. He cannot ...? He takes you to Riley you playing there all kinds of games. He doesn't care. The minute you go to your momma home and play with your sister, oh, you cannot play this game. But I was playing Riley's house. What does it matter? You cannot play momma's house. You think it's OK?**

Sasha weakly: No

**That's what you have to tell him.**

Sasha: **Maybe he doesn't want me to play...**

**He doesn't want you to have fun in momma house. That's what he wants. He doesn't want you to have fun in momma house. That's it.**

Sasha: **I think he only wants me to play Call of Duty at Riley's house**

**Yea. That's it.**

Sasha: **He just wants me to not have...?**

**Yea.**

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Sasha mumbling. I will play it Riley, but he just forgot. Mumbling...

So only when you play at momma's house he brings this up. When you playing in Riley house he doesn't care. That's called double standards.

Sasha: Maybe he was mad because I was playing it all year, like all day long.

Why do you tell him that?? You should not tell him that. I asked you to go to park, you tell me you don't want to. Why you tell him? You see what you doing to me? Huh? Why you doing this? I ask you. How many times I tell you not tell this idiot nothing! Do you understand? All he wants is hurt me, nothing else. You understand?

Sasha: Yes

Why you doing this? Why you keep talking with him about me? You should stop doing this, Sasha. Hm? Be smart. Every time he ask you about Ira, momma, do not answer. Tell him, I forgot. I don't remember. Do you understand? Huh?

Sasha weakly: Ya (crying)

You want him to take you away forever?

Sasha: No

Well then be smart. That's all that he wants. To hurt your mom, take you away from mom forever. That's what he wants. He tried last year. I stop him. Do you understand?

Sasha weakly: Ya

Obviously, it is not in Sasha's best interest to be with his mother 50% of the time. I am asking the Court to change custody to protect my son and preserve my relationship with him.

Dated this 3 day of February, 2015.

SEAN R. ABID

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## CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2015 I served a copy of the **DECLARATION OF SEAN ABID IN SUPPORT OF HIS COUNTERMOTION TO CHANGE CUSTODY** upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a true and correct copy of the same in a sealed envelope in the First Class United States Mail, Postage Pre-Paid, addressed as follows:

Michael R. Balabon, Esq.
5765 S. Rainbow Blvd., #109
Las Vegas, NV 89118
Email for Service: mbalabon@hotmail.com
*Attorney for Defendant*
*Lyudmyla Abid*

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DOCKETING STATEMENT ATTACHMENT 5

OPPS
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Attorney for Defendant

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CLERK OF THE COURT

DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID,<br><br>Defendant. | ) | CASE NO. D-10-424830-Z<br>DEPT. NO. B |

**OPPOSITION TO PLAINTIFF'S MOTION TO CHANGE CUSTODY AND COUNTERMOTION TO STRIKE PLAINTIFF'S OPPOSITION AND TO SUPPRESS THE ALLEGED CONTENTS OF THE UNLAWFULLY OBTAINED RECORDING AND FOR SANCTIONS AND ATTORNEY FEES**

COMES NOW, Defendant, LYUDMYLA A. ABID, by and through her attorney, MICHAEL R. BALABON, ESQ., and hereby moves this Court for an Order awarding her the following relief:

1. That Plaintiff's requests for relief relative to a change of custody, be denied.

2. That Plaintiff's entire Opposition and Countermotion be striken and that Defendant's Motion be granted.

3. That this Court impose sanctions against Plaintiff for abusive litigation practices, including attorney fees.

4. For such and further relief as the Court may deem just

and proper.

This Motion is based upon all papers and pleadings on file, the attached points and authorities, the Declaration of Defendant and the Exhibits attached thereto, and oral argument to be adduced at the time of hearing of this cause.

DATED this 13 day of March, 2015.

MICHAEL R. BALABON, ESQ.
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702-450-3196
Attorney for Defendant

## POINTS AND AUTHORITIES

I

1. THE VICARIOUS CONSENT DOCTRINE

NRS 200.650 provides as follows:

**Unauthorized, surreptitious intrusion of privacy by listening device prohibited.**

Except as otherwise provided in NRS 179.410 to NRS 179.515, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation enagaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored, or recorded, unless authorized to do so by one of the persons engaging in the conversation.

In the instant case, it is undisputed that Plaintiff intentionally placed a listening device in the minor child's backpack and proceeded to record the conversations that were

occurring in the Defendant's private residence. It is also undisputed that none of the parties who were being recorded, Ricky, Lyuda, Irena or the minor child, knew of the recording device or consented to be recorded. It is also evident that private conversations between Lyuda, her Husband Ricky, and Lyuda's daughter, Irena, in which the minor child was not a party to the conversation, were also recorded.

Plaintiff is relying upon the "vicarious consent doctrine" in maintaining that the interception of the Plaintiff's private conversations that occurred in her private residence without the actual consent of any party being recorded, was in fact legal.

In the case entitled Pollock v. T.Pollock, 154 F.3rd 601 (1998) cited by Plaintiff, the Court addressed the issue of "vicarious consent".

In Pollock, the Plaintiffs were Husband and Wife. The Plaintiffs alleged violations of the Federal Wiretapping Statute 18 USC Sec.2510-2521 ("Title III") when the Husband's ex-wife tape recorded conversations between the daughter and both Plaintiffs. The issues framed by the Court were as follows:

1. Whether the statutory consent exception contained in U.S.C. sec. 2511(2)(d) of the Federal wiretapping statute permits a parent to "vicariously consent" to recording a telephone conversation on behalf of a minor child in that parent's custody, without the actual consent of the child; and (2) if vicarious

consent does qualify for the consent exception, whether questions of material fact precluding summary judgment exist as to whether Defendant's recording of her minor child's phone conversations with the child's father and step-mother was motivated by a concern for the child's best interest.

The Court cited numerous cases that upheld the doctrine and others that had rejected it. Ultimately the Court upheld the underlying District Court decision and stated as follows:

"We agree with the district Court's adoption of the doctrine, provided that a clear emphasis is put on the need for the "consenting parent" to demonstarte a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. Accordinglhy we adopt the standard se forth by the district Court in Thompson and hold that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the the taping of telephone conversations, the guardian may vicariously consent on behalf of the minor child to the recording".

2. NEVADA IS A TWO PARTY CONSENT STATE; THEREFORE THE DOCTRINE DOES NOT APPLY

The Nevada Supreme Court, in Lane vs. Allstate Ins. Co., 114 Nev. 1176, 969 P.2d 938 (1998) interpreted NRS 200.620 as requiring the consent of both parties to an intercepted telephone conversation.

In a subsequent opinion, Mclellean vs. State, 124 Nev. 263 267, 182 P.3rd 106, 109 (2008) the Supreme Court held as follows:

" We must now determine whether evidence lawfully seized by California law enforcement under California law is admissible in a Nevada court, when such an interception would be unlawful in Nevada and therefore inadmissible. Mclellan argues that the tape of the intercepted phone call was inadmissible because NRS 200.620 dictates that all parties to a communication must consent to the interception of wire **or oral communication** for it to be

lawful, and therefore admissible at trial. ....." (Emphasis added).

"Under Nevada law, there are two methods by which a communication may be lawfully intercepted, and thus, admissible. First, both parties to the communication can consent to the interception. Second, one party to the communication can consent to the interception if an emergency situation exists such that it is impractical to obtain a court order and judicial ratification is sought within 72 hours. California law does not require the consent of both parties to the communication to constitute a lawful interception, but rather requires consent by only one party."

Thus, the Court made no distinction between intercepted wire or oral communications, and held specifically that for a "communication" to be lawfully intercepted, both parties must consent. Accordingly, the implied consent doctrine does not apply.

3. **THE DECISIONS OF THE FEDERAL CIRCUITS ADOPTING THE DOCTRINE ARE NOT BINDING UPON THIS COURT AND THIS COURT SHOULD REJECT THE DOCTRINE AND SUPPRESS THE TAPE**

The Pollock case was based upon the Federal wiretapping statute. In order for the tape recoding to be admitted into evidence in this case, the Court must specifically rule that the doctrine applies in the State of Nevada and to the specific State Statute cited above. There have been no decisions from the Nevada Supreme Court or in the 9th Circuit that have adopted this doctrine. Therefore this issue is one of first impression in the State of Nevada.

As stated in the Pollock case, not all Courts that have addressed this issue have adopted this rule.

In Williams vs. Williams, 229 Mich.App 318, 581 N.W. 2nd

777(1998). the, the Court of Appeals of the State of Michigan, rejected the doctrine as it applied to the applicable Michigan State Statute. Citing legislative intent, the Court stated as follows:

"The facts of this case were set forth in detail in our prior opinion, Williams v. Williams, 229 Mich.App. 318, 581 N.W.2d 777 (1998), and will not be reiterated here. The issue that plaintiff presented on appeal was an issue of first impression for this Court: whether a custodial parent of a minor child may consent on behalf of the child to the interception of conversations between the child and another party and thereby avoid liability under the Michigan eavesdropping statute and the federal wiretapping act. We analyzed the question under each statute and found no indication that either the Michigan Legislature or Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf to interceptions of conversations between the child and a third party. Accordingly, we declined to create judicially a vicarious consent exception to the Michigan eavesdropping statute or to construe so broadly the existing consent exception to the federal wiretapping act as to include such an exception. Since the release of our prior opinion, the Sixth Circuit Court of Appeals in Pollock, supra at 610, adopted the analysis of the federal district court in Thompson v. Dulaney, 838 F.Supp. 1535, 1544 (D.Utah, 1993), holding that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.This Court considered the reasoning in Thompson in our previous opinion and rejected it, finding no authority to follow the lead of Thompson and like-minded courts. However, because the Sixth Circuit Court of Appeals has now spoken concerning the issue and no conflict among the federal courts exists, we are bound to follow the Pollock holding with respect to the federal question in this case. See Young v. Young, 211 Mich.App. 446, 450, 536 N.W.2d 254 (1995). The trial court referred to the holding in Thompson, but it did not specifically decide whether defendants had a good-faith, objectively reasonable basis for believing that it was necessary and in the best interest of the minor child to consent on behalf of the child to the tape-recording of the telephone conversations with plaintiff. Rather, the trial court held merely that "a legal guardian under the present circumstances, has the right to give vicarious consent." Defendants here claimed that they recorded the conversations to find out whether plaintiff was violating a court order that prohibited her from portraying the minor child's father in a negative light. However, plaintiff stated in her deposition testimony that defendants had also tape-recorded conversations between the minor child and plaintiff's husband and between the minor child and the daughter of plaintiff's husband. Consequently, we again reverse but remand to the trial court to make this necessary inquiry and decide whether there exists a genuine issue of material fact warranting trial. In contrast, this Court is not compelled to follow federal precedent or guidelines in interpreting the Michigan eavesdropping statute. See Continental Motors Corp. v. Muskegon Twp., 365 Mich. 191,

194, 112 N.W.2d 429 (1961). We remain convinced by the statutory analysis in our prior opinion that if the Legislature had intended the result argued by defendants, then it could have included such an exception in M.C.L. § 750.539g; ?MSA 28.807(7). Moreover, we remain convinced that the delicate question posed in this case and the effect that its resolution may have both on how family law is practiced and the relationship between the child and each of the parents, is more appropriately commended to the legislative branch. Accordingly, we again reverse with respect to that part of the trial court's order granting summary disposition for the defendants with respect to the count brought pursuant to the Michigan eavesdropping statute and denying summary disposition for the plaintiff with respect to that count." Williams, 581 N.W.2nd 777, 781.

In Bishop vs. State, 241 Ga. App. 517, 526 S.E.2nd 917(1997), decided after the Pollock decision, the Georgia Court of Appeals refused to apply the doctrine. The Court reasoned that Georgia law as it existed at the time precluded the application of the vicarious consent exception. In addition the Court declared that "it is solely the task of the legislature to amend Georgia's Wiretapping statute to allow admission into evidence of tape recordings such as those that are at issue here, i.e. tapes made by parents with a good faith, objectively reasonable basis for concern regarding the safety of thier children as victins of criminal conduct of another."

In response to the Bishop decision, the Georgia legislature amended the Georgia wiretap statute and specifically provided the for the exception. See Ga. Code Ann Sec 16-11-666(a)(2005).

Defendant agrees with the reasoning of the Michigan Court in Williams and the Appeals Court in Bishop. If the Nevada

legislature intended for there to be a "vicarious consent" exception to the consent requirement in family law cases, it would have included such an exception in the statute, just as the Georgia legislature did. To date, despite the existence of several prior cases in many jurisdictions dealing with this issue, the Nevada Legislature has adopted no such exception.

Case law in Nevada is well settled that when interpreting a statute, legislative intent "is the controlling factor". Robert E. Vs. Justice Court, 99 Nev. 443, 445, 664 P.2nd 957, 959 (1983). The starting point for determining legislative intent is the statute's plain meaning; when a statute "is clear on its face, a court can not go beyond the statute in determining legislative intent." Id.; see also Catanio, 120 Nev. 1033, 102 P.3rd at 590 ("we must attribute the plain meaning to a statute that is not ambiguous). But when the statutory language lends itself to two or more reasonable interpretations," the statute is ambiguous, and we may look beyond the statute in determining legislative intent. Catanio, 120 Nev, 1033, 102 P.3rd at 590.

In the instant case the applicable statute (NRS 200.650) is not ambiguous. The statute makes unlawful the unauthorized, surreptitious intrusion of privacy by a listening device, "unless authorized to do so by one of the persons *engaging in the conversation.*" (Emphasis added). And according to the

Supreme Court in McLellan, Id., the consent of both parties engaging in the conversation is required.

The statute could not be more clear on its face. For the consent exception to apply, consent must be given by "one of the persons engaging in the conversation". (In this regard, the Nevada Statute differs from the Federal Wiretap statute (18 USC sec. 2511(2)(d)(2000), which contains no such language).

Therefore, based upon the plain language of the Nevada Statute, as the Statute is not ambiguous, this Court cannot go beyond its plain meaning and impose a "vicarious consent" exception to the Statute. As such, the placement of the listening device was unlawful, and all remedies that are available to Defendant for the unlawful recoding of private conversations in her home, including the absolute suppression of the tape for any purpose, the striking of Plaintiff's entire Opposition and Countermotion, and including the imposition of sanctions, should be considered by the Court.

4. **IF THE COURT ADOPTS THE DOCTRINE IT DOES NOT APPLY TO THE FACTS OF THIS CASE**

Pursuant to the Pollock decision, for the "vicarious consent doctrine" to apply, the parent or guardian must demonstrate a "good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the

the taping of telephone conversations".

Sean's motives in placing the device are questionable at best.

Sean makes general statements as to why he felt it necessary to place the recording device. Since he has nothing else upon which to base his unsupported Motion to Change Custody or for the unlawful placement of a listening device, he again relies on parental alienation as his excuse. First, Plaintiff selectively edits the Child Custody Evaluation performed by Dr. Paglini more than one year ago, and includes portions of the report that indicate that Lyuda has made some inappropriate statements in the past. But he excludes those portions of the Report that found specifically that Lyuda's actions did not rise to the level of parental alienation.

Page 50 of the Report, Paragraph 3:

"This evaluator opines that Lyudmyla is not a threat towards Sean or Angie. Lyudmyla has no history of aggressive behavior. Lyudmyla has occasionally become extremely emotional and she has interpersonal dynamics that she needs to work on. She has no history of prior criminal offenses pertaining to aggression and psychological testing is within normal limits. Lyudmyla admitted to making inappropriate comments towards Iryna and Sasha when frustrated. This needs to stop. Please note, <u>the above is a concern, yet does not reach the level of parental alienation</u>."

Second, Plaintiff states that he had concerns "because of things Sasha had been telling me". Nothing specific is provided in the Motion as to what specifically Sasha was saying that would justify such a drastic step of placing a

listening device in Lyuda's home. And, there were no allegations that the child had been experiencing psychological or emotional problems, that he was having problems in school, that the child was expressing negative feelings towards him, or some other mainfestation of problems that are commonly associated with parental alienation.

Lyuda submits that the placement of the device was nothing less than a fishing expedition. That the device was planted not out of any real concern about Sasha, but instead Sean was trying to find out if Ricky was engaged in criminal activity. And he no doubt hoped that Lyuda might say something that may be construed as inappropriate.

The timing of the placement of the device is also instructive. If Sean had concerns about parental alienation based upon Dr. Paglini's report, why did he wait until one year later to place the device. The timing of the placement of the device, three (3) weeks after Lyuda filed her instant Motion, is not a coincidence.

Before this Court accepts the alleged tape recording as evidence in this case, (assuming it adopts the "vicarious consent doctrine") it must make a factual determination that Sean had a good faith, objectively reasonable basis for believing that it was necessary and in the best interest of the child to consent on behalf of his child to the placement

of the device.

Lyuda submits that after evidence is taken on this issue the Court will find that Sean was not acting in good faith. That rather, he was acting out of pure spite and hatred of Lyuda, out of his feeling of superiority as a parent, and out of his continued hatred and mistrust of Lyuda's Husband Ricky.

5. **THE VICARIOUS CONSENT DOCTRINE DOES NOT APPLY AS THE RECORDING DEVICE PICKED UP COMMUNICATIONS BETWEEN PERSONS OTHER THAN THE MINOR CHILD; THE RECODING CONSTITUTES A VIOLATION OF BOTH THE FEDERAL AND STATE WIRETAP STATUTES AND THE CONTENTS THEREOF MUST BE SUPPRESSED**

Based upon a review of Sean's Declaration, it is indicated that conversations in Lyuda's home were recorded for a "few days".

Further, Sean makes statements about Ricky's proposed business venture with Lyuda's brother-in-law in the Ukraine.

As is admitted by Sean, he placed the recording device in the minor child's backpack. According to Lyuda, this backpack was usually placed in a common area of the home. As such, the device no doubt recorded conversations that the minor child was not a party to, conversations that occurred when the child was asleep. Conversations between Lyuda and Ricky, conversations between Lyuda and her mother via Skype, conversations between Lyuda and her daughter Iryna, and conversations between Ricky and Iryna.

Further, Lyuda indictes that the only way Sean could know about Ricky's pending business venture was if he intercepted a private conversation that Ricky was having with her to which the minor child was not a party.

In Lewton vs. Divingnzzo, the United States District Court for the District of Nebraska, 8:09-cv-0002-FG3 (2011) a mother was convicted of violating the Federal Wiretap Act after she concealed an audio recording device in her minor child's teddy bear for the purpose of gathering evidence to use in her custody case.

In Lewton, the District Court rejected the application of the "vicarious consent doctrine" to the case. The court held that:

"Nor does the "consent exception" included 18 U.S.C. § 2511(2)(d) absolve the defendants of liability under the circumstances presented here. Section 2511(2)(d) provides: It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication isintercepted for the purpose of committing any criminal or tortious act in violationof the Constitution or laws of the United States or of any State. Even assuming (without deciding) that Dianna Divingnzzo could legally give "vicarious consent" on Ellenna's behalf, the uncontroverted evidence shows that the bugging of Little Bear accomplished much more than simply recording oral communications to which Ellenna was a party. Rather, the device was intentionally designed to record absolutely everything that transpired in the presence of the toy, at any location where it might be placed by anybody. The evidence demonstrates conclusively that the device recorded many oral communications made by each of the plaintiffs, to which Ellenna was not a party."

The facts of Lewton with regard to the placement of the device are in essence identical to the facts of the instant case. There is can be no dispute that the listening device was

placed in the child's backpack which was placed in a common area of Lyuda's home and that it recorded not only conversations between Lyuda and the minor child, but other conversations and activities to which the minor child was not a party.

As such, as in Lewton, the "vicarious consent doctrine" does not apply and the placement of the device was unlawful pursuant to both the Federal Wiretap Statute and the Nevada Statute.

The Federal Wiretap statute also specifically provides that Lyuda may Petition this Court to suppress the tape. 18 U.S.C. § 2518(10)(a), provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter ,or evidence derived therefrom, on the grounds that– (i) the communication was unlawfully intercepted[.]* * *.... The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice. See McQuade v. Michael Gassner Mech. & Elec. Contractors, Inc. 487 F. Supp. at 1189 n.12.

6. **THE CHANGE IN CUSTODY MOTION MUST BE DENIED**

Sean's Motion to change custody is based solely upon the contents of a recording that was obtained in violation of State and Federal law.

In Rooney v. Rooney, 109 Nev. 540, 853 P.2d 123 (1993) the Supreme Court held that a district court has the

discretion to deny a motion to modify custody without holding a hearing unless the moving party demonstrates adequate cause for holding a hearing.

With no factual basis alleged that would support a radical change in custody in this case, Lyudmyla respectfully submits that Sean has not demonstrated "adequate cause" for a hearing and his Motion to Change Custody and to relocate should be summarily denied.

7. **ATTORNEY FEES AND SANCTIONS**

A District Court can award attorney fees in a post-judgment proceeding in a divorce case. Love vs. Love, 114 Nev. 572 (1998) (applying NRS 18.010(2), prevailing party) and NRS 125.150(3) (divorce fees), as the basis to award fees in a motion. See Also Halbrook vs. Halbrook, 114 Nev. 1455 (1998).

As a potential prevailing party in this litigation, Lyudmyla requests payment of her attorey fees incurred in this matter.

With regard to sanctions, the Court in Lane vs. Allstate Ins Co., Id., upheld the District's Court's suppression of the illegally obtained wire intercepts that were in issue in that case. The Court further stated as follows:

"Courts have inherent equitable powers to dismiss actions for abusive litigation practices." Citing Young v. Johnny Ribeiro Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

In the instant case, Plaintiff obtained alleged evidence

via a process (the unlawful placement of a listening device) that constitutes a Category D Felony pursuant to NRS 200.690. He then submitted that evidence to this Court in support of his Opposition and Countermotion. This should be construed by the Court as "abusive litigation practices".

As Plaintiff's Opposition and Countermotion and associated Declarations all make reference to the contents of the illegally obtained tape, all of the documents must be stricken from the record. In striking the Opposition and Countermotion, this Court should then construe Defendant's Motion as being unopposed and grant the relief requested by Defendant.

By seeking to have the tape suppressed, Lyuda is in no way making an admission that the contents of the alleged tape recordings, whatever they may be, constitute parental alienation warranting a change in custody. Lyuda reserves her right to contest that issue if or when the alleged tape recordings are actually authenticated and admitted into evidence in this case.

CONCLUSION

Based upon the foregoing facts, Memorandum of Law and Legal Argument, Lyudmyla respectfully requests that the relief requested by Plaintiff be denied, that she be awarded the relief requested herein and for such other and further relief

that the Court may deem appropriate.

DATED this 13th day of March, 2015.

MICHAEL R. BALABON, ESQ.
5765 So. Rainbow, #109
Las Vegas, NV 89118
702-450-3196
Attorney for Defendant

**CERTIFICATE OF SERVICE OF DEFENDANT'S OPPOSITION**

I, Michael R. Balabon, Esq., hereby certify that on the 13th day of March, 2015, a true and correct copy of the foregoing Opposition was served to the Law Offices of JOHN D JONES, ESQ., via electronic service pursuant to Eighth Judicial District Court, Clark County, Nevada Administrative Order 14.2, to jjones@blacklobellolaw.com, and by depositing a copy thereof in a sealed envelope, first class postage prepaid, in the United States Mail, to the following:

John D. Jones, Esq.
Black & Lobello
10777 W. Twain Ave., #300
Las Vegas, NV 89135
Attorneys for Plaintiff

DATED this 13th day of March, 2015

MICHAEL R. BALABON, ESQ.

0001

Name Michael R. Balabon, Esq.
Address 5765 So. Rainbow Blvd., #109
City/State/Zip Las Vegas, NV 89118
Telephone (702) 450-3196

DISTRICT COURT

CLARK COUNTY, NEVADA

Plaintiff(s) Sean R. Abid

Plaintiff(s),

-vs-

Defendant(s) Lyudmyla A. Abid

Defendant(s).

CASE NO. D-10-424830-Z
B

DEPT. NO.

**FAMILY COURT MOTION/OPPOSITION FEE INFORMATION SHEET (NRS 19.0312)**

Party Filing Motion/Opposition: ☐ Plaintiff/Petitioner ☑ Defendant/Respondent

MOTION FOR OPPOSITION TO Name

**Motions and Oppositions to Motions filed after entry of a final order pursuant to NRS 125, 125B or 125C are subject to the Re-open filing fee of $25.00, unless specifically excluded.** (NRS 19.0312)

*NOTICE:*

*If it is determined that a motion or opposition is filed without payment of the appropriate fee, the matter may be taken off the Court's calendar or may remain undecided until payment is made.*

**Mark correct answer with an "X."**

1. No final Decree or Custody Order has been entered. ☑ YES ☐ NO

2. This document is filed solely to adjust the amount of support for a child. No other request is made.
☐ YES ☐ NO

3. This motion is made for reconsideration or a new trial and is filed within 10 days of the Judge's Order
If YES, provide file date of Order: _____
☐ YES ☐ NO

If you answered YES to any of the questions above, you are not subject to the $25 fee.

Motion/Opposition ☐ IS ☒ IS NOT subject to $25 filing fee

Dated this 13 of March, 2005.

Michael R. Balabon, Esq.
Printed Name of Preparer

Signature of Preparer

DOCKETING STATEMENT ATTACHMENT 6

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CLERK OF THE COURT

0001
MICHAEL R. BALABON, ESQUIRE
Nevada Bar No. 4436
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(702) 450-3196
Las Vegas, NV 89118
Attorney for Defendant

DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

| | | |
|---|---|---|
| SEAN R. ABID, Plaintiff, vs. LYUDMYLA A. ABID, Defendant. | CASE NO. | D-10-424830-Z |
| | DEPT. NO. | B |

**DECLARATION OF LYUDMYLA A. ABID IN SUPPORT OF HER MOTION AND IN RESPONSE TO PLAINTIFF'S OPPOSITION AND COUNTERMOTION**

COMES NOW, Defendant, LYUDMYLA A. ABID, and her hereby submits the attached Declaration in Support of her Motion and in Response to Plaintiff's Opposition and Countermotion.

DATED this 13th day of March, 2015.

Submitted by:

MICHAEL R. BALABON, ESQ.
5765 So. Rainbow, #109
Las Vegas, NV 89118
Attorney for Defendant

CERTIFICATE OF SERVICE OF DECLARATION OF LYUDMYLA A. ABID

I, Michael R. Balabon, Esq., hereby certify that on the 13th day of March, 2015, a true and correct copy of **DECLARATION OF LYUDMYLA A. ABID IN SUPPORT OF HER MOTION AND IN RESPONSE TO PLAINTIFF'S OPPOSITION AND COUNTERMOTION** was served to the Law Offices of JOHN D JONES, ESQ., via electronic service pursuant to Eighth Judicial District Court, Clark County, Nevada Administrative Order 14.2, to jjones@blacklobellolaw.com, and by depositing a copy thereof in a sealed envelope, first class postage prepaid, in the United States Mail, to the following:

John D. Jones, Esq.
Black & Lobello
10777 W. Twain Ave., #300
Las Vegas, NV 89135
Attorneys for Plaintiff

DATED this 13th day of March, 2015

MICHAEL R. BALABON, ESQ.

I am hopeful that after reviewing my declaration and reviewing the exhibits provided that court will begin to see the entire picture of the constant harassment and manipulation my family endures on a daily basis. I am shocked at the opposition filed to my motion to change the hours that I pick up Sasha to my new work schedule on my scheduled days. It is evident that in order to stop me from getting my 2 hours back on my days with my son they broke the law, committed a crime and have come to court with lies. I am fearful for my family. I believe that only a mentally unstable person would have such a level of obsession and go so far as to break the law and try to justify his actions. I am asking the court to help the police in procuring all tapes of conversations recorded at my house without our knowledge. I am asking the court to punish Sean and his attorney for lies and complete disrespect to court, judge and law.

I. BACKGROUND

After an evidentiary hearing On December 9th 2013, it was resolved through extensive custody evaluations By Dr. Paglini, that no "Parenting Alienation" had been executed by the mother and that there was no imminent danger to myself nor my family by my current husband who had been incarcerated for a non-violent crime. It was also discovered that the Plaintiff, Sean Abid, made false statements in court claiming that he and his family were moving to Iowa to better his position for full custody. After Dr. Paglini testified the hearing was stopped and it was agreed that we would settle without a trial. An agreement was reached that the defendant would pay half of Dr. Paglini's Psychologists bill ($14,000.00) and Sean Abid would recant all accusations regarding Ricky Marquez. All restrictions for Ricky were lifted.

The order states further that the parents shall work together with each other on the exchanges and will communicate in a manner that is positive and reasonable. Further, the parties will be reasonable and flexible with the exchange times. During the settlement Sean asked me if he would be able to pick up Sasha from school and help him with his homework since I worked until 5pm. I felt this was a reasonable request and I agreed based on my work schedule. John Jones was in charge to write the order but he failed to clarify what exactly this change means. **I never gave up my time on my days and I agreed to allow Sean to pick up my son only because I was working till 5pm.** Because order didn't have important clarifications like what if mother was off from work early, what if she is not working and has PTO, etc... That allowed Sean again to start prior behavior of complaining about my current husband Ricky Marquez, instituting, harassing, controlling and manipulating has escalated to the point where I am fearful for my family's safety and well-being. Again threating to take primary custody of Sasha. I firmly believe that my child is being manipulated and is at risk.

On August 5, 2014 I changed my time schedule at work so that I would be able to pick up Sasha from school on my court appointed days and asked to adjust the custody schedule peacefully and reasonably. After a lengthy telephone conversation on August 20th 2014 with Sean and Angela, they agreed to put all anger aside and stop all the harassment for the sake of our son. It was after this conversation that I wrote to my Attorne y to stop any further action against Sean because I felt we had finally come to an understanding. I am attaching copy of minutes that prove that conversation took place on August 20th 2014 at 2:29 pm and my correspondence with my attorney. **SEE EXHIBIT #A**

The agreement was that I was going to pick up Sasha after work on my way home from 3pm. Starting November 7th and continuing for two to three weeks after on my way home from work I would stop at Sean's house to pick up my son at 3pm as agreed based on my new work schedule. Sean refused to give me Sasha and each time asked me to come back at 5:30 to pick him up or he and his wife would bring him to my house at 5:30pm. I would also like to note that from September through October when I

arrived to pick Sasha up they would make me wait in the car for 25-40 minutes after acknowledging my presence.

On Monday November 24th and the next day when after not seeing my son for 5 days I came to their home at 3pm to pick up my son and they refused to give me my son. Sean ran outside while his wife Angela was pulling her car into the garage demanding her to ignore me. These actions left me no choice, but to wait at my house on my court appointed days from 3pm till 5:30pm for my son, as that is when they would return him to me or text me where I should drive to pick him up. I was so emotionally destroyed that I sent a mean text message that evening but regretted next morning and apologized for it in text message. **SEE EHIBIT #B**

On February 2nd 2015 my day Sean notified me that they may be late returning home due to an emergency. I arrived to discover Sasha had been left with a friend of Sean's who was babysitting. I was still expected to wait until 5:30 even when Sasha wasn't with Sean. **SEE EXHIBIT #C**

On February 27 2015 Sean texted me at 4:28 pm that I can pick up Sasha from his house. **It is very clear to me that our co-parenting is not about being reasonable and flexible, but it is only about Sean, what is convenient for him at that day.** The reason that Sean didn't bring Sasha to my home that day is because we went to watch a basketball game with his friend Tico. **SEE EXHIBIT #D**

After consistently refusing me access to Sasha, and me asking politely to be reasonable and flexible with the exchange times (as per our court order), Sean and his attorney John Jones told me NO, that the time was stipulated within the agreement discussed on December 9, 2013. These actions left me no choice but file with the court again to change the time schedule were Sean has no court appointed time on my days.

I feel like Sean has invaded my life... secretly taping intimate moments, sex life and personal conversations at my home. I have no idea how many times Sean had taped conversations until he found one he felt was discriminatory. It is also ironic that just prior to learning of the tape recording that my home was broken into. My daughter arrived home while a perpetrator was still in the house. A police report was filed. A witness saw the young man leave. I am not being accusatory, however, I would also like to point out that Sean has a young male non-relative living in his home. I feel violated and unsafe within my own home. I believe that Sean Abid and his attorney violated not only Nevada law NRS 200.650, but the Federal Wiretap Act as well which are crimes in the law's eye. This needs to be reviewed and resolved within the justice system. An open investigation is currently proceeding within the Henderson Police Department as well as the Clark County District Attorney's office. John Jones tried to justify this criminal act as legal based of the one party consent, all knowing that per Nevada regulations the state is all parties consent state.

Through this recording device conversations were recording at my home:

1. Sasha is at bed by 8 pm. In the evening Sean was listening all conversation between my husband Ricky Marquez and I.
2. Conversations between my daughter Ricky and I
3. I skype with my family every night, so conversations on skype between my mom and I, my sister and I.

There is no way for Sean to know that Ricky is planning on opening window business with my brother in law without that listening device that was placed into my house.

This back pack is in our living area when Sasha gets home and later before I go sleep I am taking it to my bedroom to go through all old papers that Sean leaves for me. So I am afraid that more private staff is on those tapes.

II. HARRASSMENT OF RICKY MARQUEZ

1. On many occasions Sean was laughing at me that I am with a man without higher education, that I am with a loser. It began with strange calls on my phone stating "Did you fill out application on line for Marquez higher education", another; "Did you fill out the application for Marquez for hair restoration"? Then I received an envelope addressed to my house (See Exhibit #1). The name on the envelope altered. Instead of "Ricky Marquez" it is "Dicky Marquez"... It is very clear to me that, my ex-husband's obsession with my current husband is crossing all limits. **SEE EXHIBIT #E**

2. A letter was written and delivered to each of my neighbors describing all the particulars involved with my current husbands' prior incarceration warning them that he was dangerous. I was unaware of this until two separate neighbors approached me with their concerns. Most have said "Lyuda, I don't want to be involved in your personal life". Same email was sent to my daughter's father in the Ukraine. This email has destroyed a once amicable relationship with him making communications regarding our daughter extremely difficult. **SEE EXHIBIT #F**

3. Sean has harassed Ricky's probation officer up until August, 2014

4. Sean placed a hidden recording device into Sasha's backpack in order to record my household's personal conversations and life. Their primary reason was to find out if I and my husband Ricky Marquez are doing any illegal activities. Sean clearly indicates that he "knows what my current husband Ricky Marquez is up too." That he is trying to open his own business to sell and install windows and doors, which was part of a private conversation that took place within my residence. Within the counter complaint filed by Sean Abid's Attorney they attached transcripts of the recorded conversations as evidence. John Jones, Sean's attorney, tried to justify this criminal act as legal based on the one party consent, all knowing that per Nevada regulations the state is all parties consent state. At no point in time was there ever reasonable cause to

III. FALSE STATEMENT ON SEAN ABID BEHALF

I want to address each issue that was presented by Sean Abid with attached EXHIBITS which prove that all what they state is untrue.

1. They informed the court that my husband Ricky Marquez is on parole. That is absolutely untrue; Ricky is on probation that ends on November 1st 2015, basically in 7 months. They claimed that they had stopped harassing his probation officer on December 9th 2013, while mentioning the last time he called Ricky's probation officer in August 2014.

2. On page 2 lines 23-28 Sean states "that we never had a verbal agreement with Lyuda either in person or by phone." I am attaching the minutes that I spoke with Sean on August 2014. On that day Sean called me from his cell phone 702-290-7406 at 02:29 PM, we spoke for 39 minutes **SEE Exhibit # A** . That same day I asked my attorney to postpone filing a material change in my schedule when I don't need Sean present on my scheduled days. I asked my attorney to wait one month to see if Sean is going to keep his promises. I am attaching the email that I sent to my attorney.

3. Defamation of character of my brother-in-law, Kolya, stating he is part of organized crime and part of an international kidnapping scheme. My sister and her husband were here to receive medical treatment not available in their country. His text, attached, acknowledges my brother in-law's illness. **SEE EXHIBIT #G**

4. I never lied that Sean owed me child support in 2012. If Mr. Jones wants to go back we can address who is lying. I still have all correspondence between my attorney and John Jones. I told Dr Paglini exactly what happened and it is clearly different from what Sean is trying to accuse me of today. That was part of the settlements between us. I forgave Sean the unpaid child support and he allowed me to travel with my kids to Ukraine to visit my parents and relatives. We also adjusted schedule so it is 50/50.

5. On page 7, Sean accuses me of violating some kind of order while I was visiting my husband in San Diego. There was no order broken and it is a completely false statement.

6. It is simply disgusting for me to read on (page 3) on Sean's response "The simple facts, which Lyuda ignores is that a month long visit to the Ukraine is not in Sasha's best interest and creates a significant risk to Sasha and his relationships with his father". How can they write that after taking my son for 6 weeks during the summer 2014 for vacation to IOWA . This coming summer, 2015, is my turn for 6 weeks' vacation and their one month vacation.

7. On page 4 Sean claims that I refused to enroll my son into baseball. He also stating that I never asked about Sean agreeing to bring Sasha into my classes on his days. Here are messages exchanged between Sean and myself regarding baseball. He is attending practices starting February 14th on my days. And I still never received responses if they are going to do the same for my class on their days. During a conversation on Jan 2nd I clearly asked Sean about Israeli class and on January 24th I agreed to bring Sasha to baseball practice. I still have $200 deposit is sitting at Israeli school for Sasha that I can use when he will start his training. **SEE EXHBIT #H**

8. Sean claims that he never discussed my class that I want my son to be enrolled into. On February 18, 2013 Sean told me that under no circumstances will he allow Sasha to be in any type of fighting/self-defense class. This position on Sean's behalf has never changed since. **SEE EXHIBIT #I**

9. Sean states that consistency for Sasha has not been priority for me and stating that I enrolled Sasha into different preschool after I got angry with Sean. This is absolutely another lie. My mother in law was watching Sasha on my days; during those days Sean could see Sasha all the time. In order to get back to me on August 12th 2013, they told me that my mother in law, Mary Abid, is no longer available so I have to find my own school. **SEE EXHIBIT #J**

10. On page 2 Sean claims that he has only communicated with me in a positive and reasonable way. Please see attached messages of our relationship since December 2013. I have installed an application on my phone where I archived all conversations between myself and Sean Abid. I will address each issue by date's time since our last order.

    **A.** On May 20th 2014 while Sasha was attending American Heritage preschool I informed Sean that I will pick up Sasha from school (that was Friday, my day according to schedule) and we are going for the weekend to San Diego. Sean's response was that I have to wait till 5:30 because it is his time before I can go to San Diego. **SEE EXHIBIT #K**

    **B.** Same day I contacted Sean's wife again about things are going out of control and offered to meet with Sean and Angie to resolve all issues. Angie informed me that Sean has no interest to resolve it, but she would meet me. **SEE EXHBIT #L**

    **C.** After I met Angie on June 1st 2014 at Starbucks at Target, Sean sent me a message that I can't use his wife Angela to communicate regarding Sasha. **SEE EXHIBIT #M**

    **D.** Because Sean was allowed to pick up Sasha on my days he was making me drive after my work around Las Vegas to find my son. Later his wife Angela agreed with me that it is not right what Sean was doing. Examples are represented. **SEE EXHIBIT #N**

    **E.** My four weeks' vacation with Sasha has started on June 2nd till June 30th, same weekend Sean asked me to take Sasha to California to visit his dad and I did let him. He also was allowed to watch Sasha during those days while I was at work. Next weekend Sean again asked for favor in demand form and that time I said no. **SEE EXHBIT #O**

    **F.** On June 19th after that escalated tension Sean sent me messages demanding me to inform him who is watching Sasha during my weeks. After realizing that he crossed the line he sent me apologies **SEE EXBHIBIT #P**

    **G.** Sean came to Las Vegas without my son from IOWA summer vacation. I didn't know that while I was writing these messages later my son and Angela told me that Sasha arrived in Las Vegas one week later. When I asked him about arrival and that there is one more week left of my summer vacation left with my son this is how he treated me. I wrote to my attorney about detail of days that Sean owed me. Thanks to my attorney it was fixed. I asked Sean about my son on Thursday August 7th but he finally gave me my son on Sunday August 10th very well knowing that I was missing my son terribly after not seeing him for 6 weeks. He was completely ignoring that all favors that I gave him were with condition that I will get all my days back. **SEE EXHIBIT #Q**

    **H.** There are daily logs in messages between me and Sean that prove that Sean did allow me to pick up my son from first day at school till November 7th. See last log when I was able to pick up my son at 3pm on November 8th **SEE EXHIBIT #R**

    **I.** On November 9th I requested Sean to bring Sasha passport and he completely ignored my request. Sending me email stating that I never asked for my son passport. **SEE EXHIBIT #S**

## IV. PARENTING ALLIENATION

This is the second time when Sean is accusing me of Parenting Alienation in court. He is bragging that he sent me a message using our son Sasha and recorded my reaction at my own house at this message. I want court to address the fact that Sean and his attorney have no respect for law, court or judge. They have no problem to break the law in order to get back at me. I agree with my attorney that Mosley VS Mosley case clear indicates that when parents have agreed on joint custody and suddenly one is demanding primary. It is true that that parent is guilty who refuses to agree, compromise and co-parent. That parent is the one who exercises Parenting Alienation.

I want to remind all favors that were giving to Sean on daily basis... All these favors were given to Sean, on top of that he had access to my son on my days on daily basis. There is no one favor was given to me on their behalf since December 9th 2013.

1. On February 2nd 2014 Sean asked me if he can take Sasha to Superball party to his friend Randy. I did let him.
2. During spring break at school Sean asked me to give him my days April 14-15th 2014 to take Sasha to California on a trip. I did let him. The unacceptable thing was that they gave me false places where they were going to stay. They told me that they are going to Santa Barbara and provided me below with hotel site; instead they went to San Diego at LEGO LAND according to our son.
3. On June 5th during my four weeks' vacation no interrupt. Sean asked me to allow them to take Sasha to visit his grandfather in California and I let him.
4. On June 10th Sean asked me if he can keep Sasha longer that day because his friend Randy is bringing his girls to his house. I let Sasha stay there longer to play with kids.
5. When school started I asked Sean if he wants me to pay for safe key for his days as well so he will reimburse me later. Later in November I paid accidently for his days and he refused to reimburse me but took advantage of situation.
6. On August 29th Sean asked me if he can take Sasha to football game with his friend Bobby and I let them.
7. On August 30th Sean asked me if he can take Sasha to Lazer tag with Riley his friend Craig's kid. And I let him.
8. On September 12th Sean again asked me if he can take Sasha to football game and I let him.
9. On September 25th Sean asked me if he can take Sasha to Utah to watch football game and I let him.
10. On October 10th Sean asked me if he can take Sasha to football game again and I let him.

## V. CONCLUSION

I see no other solution but restrict communications between us as parents. Sean is always trying to create an argument, trying to bait me and has no interest in peace and what is the best for our son. I didn't come to court because I want a war I came to court because I had no choice.

I feel like every time when I settle with John Jones somehow he always finds the way to get around it.

First time when I forgave Sean all unpaid child support in order to have rights for my kids to visit my country, to know my culture my parents and relatives. Today Sean and his attorney claim that my husband Ricky Marquez is a flight risk and I will kidnap my son. I don't want to make comments on that since it is completely ludacris. They are using any argument but just not to provide me with my son's passport. My parents live in West of Ukraine and there is no war going on. My family will never allow me to visit them if there is a chance for any danger to me or my kids. I already missed the time when I can afford tickets to Ukraine since I can't buy them without passport. However I want court to address the fact that Sean is in contempt of court for denying passport of my son.

During same settlement we agreed that we will represent to each other our true earnings and will adjust child support. A different order was filed inconsistent with our settlement. I never filed to change it since I just want peace.

I regret on settling at court on December 9, 2013. They lied at court about relocation to IOWA, they filled ex-parte trying to get primary custody on false accusations. Two days before trial Sean was at my pre-school bragging that starting Monday December 9th Sasha will see his mom once in two weeks under supervision... I made myself forgive them and move on. One year later they have same issues with my husband Ricky Marquez and they again demand primary custody.

As a mother I have problems with Sean regarding my son:

- They don't provide food for my son when they pick him up on my days. Sasha complains of being hungry and has stated that he doesn't eat after school. By the way on tape that was recorded that was actually first time that they fed him. Of course, they did they knew it will be recorded.
- They don't have winter jackets, shoes back pack and school uniforms for my son. It is all provided by me. School supplies are purchased by me. I have all receipts that show how much money I spent.
- During 5 years after divorce Sean took my son to cut his hair only one time. I am the only one who cares that my son looks neat and clean. Every hair cut cost me $12 every time I am taking my son to salon and Sean never bothered to share these expenses.
- We have been in court back and forth since 2011 and they never enrolled my son in any activities. Their intentions are documented in the court custody battles. They committed to start Sasha in tennis and dancing classes but it never happened. Currently they stated that Sasha would be enrolled into baseball class. We will see how long it will last and I will not be surprised that after this court my son again will be locked at their home at back yard.
- In the summer of 2012 Sean took my son to dentist one day before hearing and they pulled a tooth without my consent. When I took Sasha to my own dentist he couldn't understand why the tooth was pulled.
- Sasha's appearance is consistently sloppy and dirty. Bathing is not a priority when at Sean's house resulting in a rash and infection around his uncircumcised penis that made urination painful. We had the argument on many occasions about it. It is breaking my heart as a mother to see my son being neglected. Every time when my son spends 5 nights at his father home he comes to my home with rash. I am attaching for you doctor's report that support my

accusations. In the past responses from Sean was always that I am lying and it is untrue... It is true **SEE EXHIBIT #T** For court I have pictures to show clear neglect of my son. I asked Sean about rash in writing on two occasions but he completely ignored me. **SEE EXHIBIT #U**

- He is sent to school with holey, tattered clothing which will eventually result in teasing and alienation from his school mates. On Friday my son came home from their house with huge holes on the knees. I asked him "did you fall today at school?" his response was "No mama it happened couple of days ago". "Did your dad dress you today for school with these huge holes on the pants?", "Yes mama". Obviously when Sasha gets home they don't change clothes and result three pairs of my pants are destroyed. See pictures in **EXHIBIT#V**

- Sean is refusing is give me Sasha's passport so we can visit my parents abroad. He declares it is too much time away from his father after me allowing 6 weeks away from me so he could travel to Iowa.

Enough is enough I am asking court to step in and put everything into 50/50 with limited correspondence between me and my ex. The conflict level has exceeded all limits. As a mother and human being I am looking for a stable, predictable life. I can no longer put myself and my family into nonstop stress. I did try to co-parent, be reasonable and flexible, but what I get in return is unacceptable.

As mother of two kids I am not interested in court battles. I spent $20,000 in court in two years. I could spend this money on my own kids and I am sure it is the same for Sean.

My older daughter is at High School and I have to prepare her for college. I dealing with stress that Sean puts me and it affects my job performance.

At this point based on history with Sean I can only rely on court to help me to resolve this situation

I DECLARE UNDER PENALTY OF PERJURY THE FOREGOING STATEMENT IS TRUE AND CORRECT

LYUDMYLA A. ABID

# EXHIBIT "A"

| Billing Account Numb | Cost Cente | Wireless Number | User Name | Call_Date | Call_Time | In/Out Number | Rate | Usage Type | Orig | Dest | Intl Call Duration | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 7-Aug-14 | 10 23AM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 53 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 8-Aug-14 | 03 55PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 8-Aug-14 | 04:01PM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | INCOMING CL | N/A | 13 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 11-Aug-14 | 10 18AM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 11-Aug-14 | 10 26AM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 20-Aug-14 | 02 29PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | INCOMING CL | N/A | 39 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 21-Aug-14 | 12 35PM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 3 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 21-Aug-14 | 12 58PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 21-Aug-14 | 12 59PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 21-Aug-14 | 04 00PM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | INCOMING CL | N/A | 3 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 22-Aug-14 | 10 39AM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 22-Aug-14 | 02 56PM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 2 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 25-Aug-14 | 06 43AM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 25-Aug-14 | 02 17PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 5 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 25-Aug-14 | 02 28PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | INCOMING CL | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 25-Aug-14 | 03 44PM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 25-Aug-14 | 04 33PM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 25-Aug-14 | 04 44PM | 702-290-7406 | Peak | PlanAllow | HENDERSON NV | LAS VEGAS NV | N/A | 7 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA AB D | 28-Aug-14 | 03 25PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 28-Aug-14 | 03 27PM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | INCOMING CL | N/A | 4 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 29-Aug-14 | 11 49AM | 702-290-7406 | Peak | PlanAllow | LAS VEGAS NV | LAS VEGAS NV | N/A | 1 |
| 821744619-00001 | 1080000 | 702-208-0633 | LYUDA ABID | 29-Aug-14 | 09 37PM | 702-290-7406 | Off-Peak N&W | | HENDERSON NV | LAS VEGAS NV | N/A | 2 |

Michael I think it sounds reasonable and they have to sign it. Disregard my previous message.

**Lyudmyla Pyankovska**
Business Analyst
**Freeman**
6555 West Sunset Rd | Las Vegas, NV 89118
lyuda.abid@freemanco.com
PH 702-579-1845 | FX 702-579-6194 | C 702-208-0633
www.freemanco.com

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**From:** Lyuda Pyankovska
**Sent:** Wednesday, August 20, 2014 3:15 PM
**To:** mbalabon@hotmail.com
**Subject:** Abid vs Abid

Michael I don't know what to do. My ex just called me with his wife they swear that they will prove me to be reasonable and stop harassing me.
I want to give them two month chance and if this again goes to crap than we will file clarification.
I will pick up Sasha by my first request after I am done with work at 3:30pm

Please keep the money(that I will use in future) because I am sure we will need to file in future, now I want to stop the war before it has started and see how it goes.

**Lyudmyla Pyankovska**
Business Analyst
**Freeman**
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# EXHIBIT "B"

lyuda.abid@gmail.com <lyuda abid@gmail.com>
Tue, Nov 25, 2014 at 4:38 PM
To: Sean <7022907406@unknown email>

**Brings him to my house. This will be fixed through PC. I am going to your top supervisor about everything. You superintendent will get in trouble too for corruption in CCSD I have all your messages. I have a lot to disclose about you. Good luck.**

---

lyuda.abid@gmail.com <lyuda.abid@gmail.com>
Tue, Nov 26, 2014 at 8:47 AM
To: Sean <7022907406@unknown.email>

**I apologize for my text yesterday I snapped which is human nature when someone is pushed too far. I again pulled to your house to get my Sasha and was told I couldn't have him until after 5pm. I have when you understanding and have been flexible when you asked for favors with extra time but you have not returned that courtesy. Since you do not show me the same respect as a parent I show you I feel the only way to resolve our issues is to go back to court.**

---

lyuda.abid@gmail com <lyuda.abid@gmail.com>
Mon, Dec 1, 2014 at 4:05 PM
To Sean <7022907406@unknown.email>

**I will not come to your house going forward. Bring Sasha to my home. We are going to Parenting Coordination and it will be resolved in near future**

---

# EXHIBIT "C"

| | | | | |
|---|---|---|---|---|
| 509 seanabid@icloud com | +1 (702) 208-0633 | in | 2015-02-02 15:29:12 | We experienced an emergency this afternoon Therefore, you will need to pick sasha |
| 510 seanabid@icloud com | +1 (702) 208-0633 | in | 2015-02-02 15.29 26 | Up from our house at 5 30pm |
| 511 +1 (702) 208-0633 | seanabid@icloud.com | out | 2015-02-02 15:32:14 | I will pick him up in 20 minutes. |
| 512 seanabid@icloud.com | +1 (702) 208-0633 | in | 2015-02-02 15 32.16 | 5.30 will be fine |
| 513 +1 (702) 208-0633 | seanabid@icloud com | out | 2015-02-02 15 33:17 | No you have emergency I will get Sasha now |
| 515 seanabid@icloud.com | +1 (702) 208-0633 | in | 2015-02-02 15 36.32 | Once again you are welcome to show up at 5:30pm--not before |
| 516 +1 (702) 208-0633 | seanabid@icloud.com | out | 2015-02-02 15.38:26 | No you can bring him to my house at 5.30 if I cannot pick him up now. |
| 518 +1 (702) 208-0633 | seanabid@icloud.com | out | 2015-02-02 15 57.03 | Let the record show that I was trying to accommodate your emergency, but you have refused my access to my son. |
| 520 +1 (702) 208-0633 | seanabid@icloud com | out | 2015-02-02 17 40 21 | Let Sasha out we are next to your home |

# EXHIBIT "D"

| | | | | | |
|---|---|---|---|---|---|
| 959 | seanabid@icloud com | +1 (702) 208-0633 | in | 2015-02-27 16:28 57 | You can pick up sasha anytime |
| 960 | +1 (702) 208-0633 | seanabid@icloud.com | out | 2015-02-27 17:33.05 | You have to bring him this is agreement |
| 961 | seanabid@icloud com | +1 (702) 208-0633 | in | 2015-02-27 17.42.24 | I am ok with bringing him most days, but today I need you to pick him up |

# EXHIBIT "E"

**BOSLEY**
9100 Wilshire Boulevard
East Tower Penthouse
Beverly Hills
California 90212

Electronic Service Requested

PRSRT STANDARD AUTO
Time Sensitive Material

Postage
AD
Mail 30297
3052 LAX
1-6

DHLGM#: 1041850172708935

T1-8ZCPLZ
Mr. Dicky Marquez
2167 Montana Pine Dr.
Henderson, NV 89052-5800

**HERE IS THE INFORMATION YOU REQUESTED.**

# EXHIBIT "F"

**Lyuda Pyankovska**

**Subject:** FW: Iryna's New step dad

**From:** Sergiy NEZHURBIDA [mailto:s.nezhurbida@gmail.com]
**Sent:** Wednesday, June 26, 2013 6:40 AM
**To:** Lyuda Abid
**Subject:** Fwd: Iryna's New step dad

---------- Forwarded message ----------
From: **Sean R. Abid** <abidsr@interact.ccsd.net>
Date: 2013/6/4
Subject: Fwd: Iryna's New step dad
To: s.nezhurbida@gmail.com

**The person in these links is now living with your daughter.**

----- Original Message -----

http://legacy.utsandiego.com/news/metro/20040422-9999-1m22jackson.html

http://legacy.utsandiego.com/news/metro/20040609-9999-6m9rock.html

http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch&needingmoreIis=false&firstname=ricky&middle=&lastname=marquez&race=U&sex=U&age=&x=60&y=14

**Sean Abid MA NCC NCSC**
**CCSD NCAA Eligibility Liaison**
**Lead Guidance Counselor**
**Last Names A-C**
**Desert Oasis HS**
**702-799-6881 Ext. 4301**

**"Better to fight on your feet than live on your knees!"**

-
Sergiy NEZHURBIDA

PhD (in Law), Associate Professor, Head of Department

Department of Criminal Law and Criminalistics
Chernivtsi National University
19, Universytetska Str.
Chernivtsi, Ukraine 58000

# EXHIBIT "G"

Sean <7022907406@unknown.email>

Mon, Dec 16, 2013 at 6:38 AM

To lyuda.abid@gmail.com

We were sleeping when you sent this message. I am sad for kolya and hope he can receive the best treatment. As a father, I cannot imagine how difficult his is for him and his family. I have never forgot how kind he was to me when I visited Chernovtsy.

# EXHIBIT "H"

Sean <7022907406@unknown.email>
Sat, Jan 24, 2015 at 11:39 AM
To: lyuda abid@gmail.com

Sasha wanted you to know that he was a superstar at baseball tryouts today! He was the top 6 year old and played better than 75% of the 7 year olds who've been playing for two years. He's going to play in the highest level of little league for his age. Month of training and preparation have paid off. He feels great about himself and it'll be a great way to bolster his self-confidence. I hope you will re-consider taking him on your days. I'll send you the schedule when I know what it is, in case you change your mind.

---

lyuda.abid@gmail.com <lyuda.abid@gmail.com>
Sat, Jan 24, 20154 at 11 42 AM
To: Sean <7022907406@unknown email>

I have no problems to take him if you will agree to take him to my class on your days. I still have deposit sitting there since he attended year ago. I believe it is fair request.

---

| | | | | | |
|---|---|---|---|---|---|
| 133 | Sean [+17022907406] | +1 (702) 208-0633 | in | 2015-01-02 09:35:58 | Little League sign-up is tomorrow morning at 10 at Dick's Sporting Goods Are you planning to take him or should I? You will need his birth certificate and proof of address. |
| 134 | +1 (702) 208-0633 | Sean [+17022907406] | out | 2015-01-02 09:40:24 | Please do so on your days. I will sing up Sasha to jiujitsu on my days after court will adjust visitation schedule and restore my mothers rights on my days. |
| 135 | Sean [+17022907406] | +1 (702) 208-0633 | in | 2015-01-02 09:45:29 | For Sasha to be involved in team sports, it will require cooperation on both of our days This is the sport I have been preparing him for, as we discussed before Now you have changed your mind? I can't sign Sasha up for a sport that he will only participate in half the time It will require commitment from both of us |
| 136 | +1 (702) 208-0633 | Sean [+17022907406] | out | 2015-01-02 09:57:57 | You told me that you will never put him in Israeli class which he loved and was attending. So how can you expect me to agree with what ever you decide while completely ignore my activities that I want my son to be enrolled at. It can't be just your way sean. Vacate your time on my days. Provide me with Sasha passport so I can take him for vacation to visit my family and the last thing stop harassing and hate my husband Ricky Marquez. Only after that maybe again maybe I will start believe that you really a normal ex husband who wants the best for Sasha and all of us. Until it is achieved there will be no more favors on my days. I paid already to my attorney to resolve what I am dealing with at court. I was more than exceptional ex wife I was always flexible with you regarding Sasha and what I got in return from you is unacceptable. |
| 137 | Sean [+17022907406] | +1 (702) 208-0633 | in | 2015-01-02 10:05:52 | So is that a no for sign-ups tomorrow? FYI, we took Sasha to the fighting class you enrolled him in, which you never consulted with me about beforehand I treasure and value my time with Sasha during the week He has learned to read because I spend one on one time with him everyday, teaching and coaching him We don't spend our time watching movies and playing video games All of our time is spent together, for his development and growth Any change from his weekly routine would only hurt him at this point I would think any mother would be quite happy to have this commitment shown to their son everyday |
| 138 | +1 (702) 208-0633 | Sean [+17022907406] | out | 2015-01-02 10:15:38 | He is my son and I have equal rights as you as father. I am capable to do homework and all other staff with my son. I don't think it is ok for any court to decide that I have to wait two hours on my days to get my son after your time on my days. I wrote very clear above if you ignore my activities that I want for my son you get same attitude from me regarding that you want. It will not go one way only. And I have your messages that you clear stating that Sasha will never attend on your days my classes. I am busy right now and you can enroll Sasha on your days where ever you want and I will do same as you told me couple months ago. |

| | | | | | |
|---|---|---|---|---|---|
| 139 | Sean [+17022907406] | +1 (702) 208-0633 | In | 2015-01-02 10:25:04 | Remember, you gave up your time with Sasha as part of our settlement because you thought it was more important to have Ricky off supervised contact Now that you have that, you can't go back on your part of the deal It doesn't work that way. The court didn't decide this you did This is about Little League If you don't want to sign him up because you are trying to hurt me, you are only hurting Sasha Think about Sasha first before you decide not to allow him to participate in a sport that he's been preparing for. You have chosen to have animosity now between us because you became angry when I told you that Sasha is falling asleep at our house after your days. I'm still in the same position as before with co-parenting |
| 140 | +1 (702) 208-0633 | Sean [+17022907406] | Out | 2015-01-02 10:35:18 | Sean we are not trading meat or stocks etc... This is About my SON. Last year you came to court lying that Sasha's life is in danger, after you came and claimed relocation to Iowa which was lie as well. You were responsible for all Paglini bill you asked me to settle and help with half of the bill. You tried to steal my son and get primary custody You were stopped. The only reason that I agreed for you to pick up Sasha from school on my days was the only fact that I was working till 5 pm and as normal human being as mother I thought it was great that Sasha will spend that time with you while I am at work. As you know I am off from work early now. So you presents on my days no needed. |

# EXHIBIT "I"

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 1 59 PM
To lyuda abid@gmail com

*So under no circumstances do I allow my son to be in any type of fighting/self defense class*

---

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 1 59 PM
To lyuda abid@gmail com

Lol

---

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 1 59 PM
To lyuda abid@gmail com

3 kids 3 dads = unstable home

---

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 2 00 PM
To lyuda abid@gmail com

Parental alienation is not ok

---

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 2 00 PM
To lyuda abid@gmail com

I warned you about teaching hate

---

**lyuda.abid@gmail.com** <lyuda abid@gmail com> Mon, Feb 18, 2013 at 2 02 PM
To. Sean <7022907406@unknown email>

Just read that you wrote makes me wonder when are you going to move on and be respectful for sake of our son

---

**lyuda.abid@gmail.com** <lyuda abid@gmail com> Mon, Feb 18, 2013 at 2 02 PM
To Sean <7022907406@unknown email>

No comments

---

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 2 02 PM
To lyuda abid@gmail com

Go back and read your hate filled texts and emails The counselor is shocked at what she has heard so far

---

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 2 05 PM
To lyuda abid@gmail com

I will have sole custody You will not continue to teach him that 50% of him is bad He will know in time that I am good man You will lose him on you

---

**Sean** <7022907406@unknown email> Mon, Feb 18, 2013 at 2 05 PM
To lyuda abid@gmail com

r own by teaching hate Our judge is an advocate for parental alienation

---

# EXHIBIT "J"

I got it from Angie

---

**Sean**< 7022907406@unknown.email> Mon, Aug 12, 2013 at 12:58 PM
To: lyuda.abid@gmail.com

I also informed you via text on the day of the tooth extraction. You chose to call the dental office and accuse me of having an extraction done because o

---

**lyuda.abid@gmail.com**< lyuda.abid@gmail.com> Mon, Aug 12, 2013 at 12:58 PM
To: Sean <7022907406@unknown.email>

I notified you on July 30 you didmy have issues. Today is too late to cancel

---

**Sean**< 7022907406@unknown.email> Mon, Aug 12, 2013 at 12:58 PM
To: lyuda.abid@gmail.com

f the court case. They told you that his abscess was a serious threat to his health.

---

**Sean**< 7022907406@unknown.email> Mon, Aug 12, 2013 at 1:02 PM
To: lyuda.abid@gmail.com

Read the divorce decree. This decision does not reflect making collaborative decisions in regards to Sasha's medical care. Your basis for changing dentis

---

**Sean**< 7022907406@unknown.email> Mon, Aug 12, 2013 at 1:02 PM
To: lyuda.abid@gmail.com

ts is alleged dishonesty. We wholeheartedly disagree.

---

**Sean** < 7022907406@unknown.email> Mon, Aug 12, 2013 at 1:47 PM
To: lyuda.abid@gmail.com

When we were negotiating preschool in the spring, you informed me that you preferred to take care of your own days regarding where Sasha would be while y

---

**Sean** < 7022907406@unknown.email> Mon, Aug 12, 2013 at 1:48 PM
To: lyuda.abid@gmail.com

ou're at work. My mother is NOT an option for you after next Tuesday, August 20th. I will leave work early tomorrow, Friday, and next Monday and Tuesday

---

**Sean** < 7022907406@unknown.email> Mon, Aug 12, 2013 at 1:48 PM
To: lyuda.abid@gmail.com

to assist my mother with watching Sasha. Linda is no longer there to help her, and it is too much strain on her to watch him all day by herself.
Also, I

---

**Sean** < 7022907406@unknown.email> Mon, Aug 12, 2013 at 1:48 PM
To: lyuda.abid@gmail.com

do not approve your mother to watch Sasha on your days due to safety concerns which I've already mentioned to you. They do not speak the same language a

# EXHIBIT "K"

Sean <7022907406@unknown email>
Fri, May 23, 2014 at 1:15 PM
To lyuda.abid@gmail.com

Court order allows me to have him till 5:30

I suggest you return him

You are violating a court order. I will contact my attorney.

I expect my son will be returned to my home

The order filed with the court is correct. Your attorney failed to show you the annebded document. This is a clear violation. We can settle this, and some other issues before a judge.

Violation of court order. Action already taken

It is in Sasha's best interest for the judge to examine new information and reevaluate custody so

Threats from you are meaningless Keep checking Clark county web site for new filings

# EXHIBIT "L"

7022364442 <7022364442@unknown.email>

Wed, May 28, 2014 at 3:02 PM
To: lyuda abid@gmail.com

**Lyuda, I got your voice message and spoke with Sean. He is not interested in meeting with you, but I would be willing to if you'd like.**

# EXHIBIT "M"

Sean <7022907406@unknown.email>

Sun, Jun 1, 2014 at 7:20 AM
To: lyuda.abid@gmail.com

**All communication regarding Sasha needs to go through me, not my wife. It is fine if you start your four weeks on Monday, June 2nd, but we are planning to leave June 26th for Iowa. I said the 30th earlier because that was our weekend with Sasha. You may need to use your final week when we get back.**

# EXHIBIT "N"

Sean <7022907406@unknown.email>
Fri, Feb 28, 2014 at 4:03 PM
To: lyuda.abid@gmail com

**We will be at Craig's when you get off from work**

---

Sean <7022907406@unknown.email>
Tue, May 27, 2014 at 3:43 PM
To: lyuda.abid@gmail com

**You can pick up Sasha from Nila's house.**
**I am telling you not asking**

---

Sean <7022907406@unknown.email>
Mon, Jun 2, 2014 at 3:42 PM
To: lyuda abid@gmail.com

**Sasha will be at Nila's.**

---

Sean <7022907406@unknown.email>
Tue, Jun 3, 2014 at 2:20 PM
To: lyuda abid@gmail.com

**Sasha is at school with me. You can pick him up here**

---

# EXHIBIT "O"

Sean <7022907406@unknown.email>
Wed, Jun 11, 2014 at 11:28 AM
To: lyuda.abid@gmail.com

**The Robertson family is having a reunion this weekend in Utah and we will be staying with Linda, leaving early Friday through Monday. We'd love to take Sasha if you are ok with it.**

---

lyuda.abid@gmail.com <lyuda.abid@gmail com>
Wed, Jun 11, 2014 at 11 30 AM
To: Sean <7022907406@unknown email>

**No Sean sorry but I will not see my son 6 weeks this summer. You can't take him**

---

Sean <7022907406@unknown.email>
Wed, Jun 11, 2014 at 11.32 AM
To: lyuda.abid@gmail.com

**We are requesting that he see his family. You may make a similar request in the future. Your refusal will be noted.**

---

lyuda.abid@gmail com <lyuda.abid@gmail.com>
Wed, Jun 11, 2014 at 11 32 AM
To: Sean <7022907406@unknown.email>

**Too much you asked already spring vacation,last weekend...etc Please start think about Sasha's time with his mother. Sorry but no.**

---

lyuda.abid@gmail.com <lyuda.abid@gmail com>
Wed, Jun 11, 2014 at 11:34 AM
To: Sean <7022907406@unknown.email>

**You are crossing all limits you have 6 weeks with Sasha this summer not me. Please start plan your vacation according to your family plans reunions. NOT during my time with my son.**

---

lyuda.abid@gmail com <lyuda.abid@gmail.com>
Wed, Jun 11, 2014 at 11.35 AM
To: Sean <7022907406@unknown email>

**Your abuse of my parent cooperation will be noted and is noted.**

---

*Sean <7022907406@unknown.email>*
Wed, Jun 11, 2014 at 11:36 AM
To lyuda.abid@gmail com

**You have a poor choice as usual.**

Lyuda.abid@gmail.com <lyuda.abid@gmail.com>
Wed, Jun 11, 2014 at 11:37 AM
To: Sean <7022907406@unknown.email>

**Really Sean... no comments.**

---

Sean <7022907406@unknown.email>
Wed, Jun 11, 2014 at 11:37 AM
To: lyuda.abid@gmail.com

**We are anxious to get back to court. We had an informative meeting with someone in Santa Barbara. Seems he had his own investigator.**
**We are pretty excited**
**You are putting Sasha at risk. It will get fixed. Good luck**

# EXHIBIT "P"

Sean <7022907406@unknown email>
Thu, Jun 19, 2014 at 6:55 PM
To: lyuda.abid@gmail.com

I was already aware that you had him in daycare without right of first refusal. You are required to notify me of any caregiver.

---

lyuda.abid@gmail.com <lyuda.abid@gmail.com>
Thu, Jun 19, 2014 at 7:10 PM
To: Sean <7022907406@unknown.email>

50/50 to the teeth after your threats of court, disrespectful attitude towards me and my family. If you can't grow up and be reasonable for sake of our son than it is not my problem anymore.

---

Sean <7022907406@unknown.email>
Thu, Jun 19, 2014 at 8:56 PM
To: lyuda.abid@gmail.com

I crossed the line last week with you, and I apologize. I appreciate the time that you were willing to let me see Sasha during your four weeks. If things continue the way they are, the only one who will get hurt is Sasha, and I know neither of us wants that. For his sake, I'm willing to put aside my angry feelings and speak with you and Ricky and Angela in person so that we can try to bring things back to where they were in December.

---

lyuda.abid@gmail.com <lyuda.abid@gmail.com>
Thu, Jun 19, 2014 at 8.58 PM
To: Sean <7022907406@unknown.email>

That is all I want piece and mutual respect.

---

Sean <7022907406@unknown.email>
Thu, Jun 19, 2014 at 8:59 PM
To: lyuda.abid@gmail.com

I'm willing to come to the table with an open mind so that I can put to rest my frustration with the circumstances that brought us to court. I realize the trust between us gone, but I have no other agenda than to put all this to rest once and for all.
Tell ricky that I will try to hear him out and understand where he is coming from. I want him to understand where my anger is coming from as well, which is simply a desire to protect my son.
I'm sure all this is quite a surprise to you and a lot to process. Just please think it over, and let us know if you'd like to meet up. Good night.

---

Sean <7022907406@unknown.email>
Sat, Jun 21, 2014 at 10:35 AM
To: lyuda abid@gmail.com

I understand you guys may not be ready or willing to meet us at this time. We were hoping to have a peaceful accord before we leave for Iowa. The offer stands at any time.

---

lyuda abid@gmail.com <lyuda.abid@gmail com>
Sat, Jun 21, 2014 at 11:04 AM
To Sean <7022907406@unknown email>

Sean there is no need for meeting since words and promises has no value at this point based on history. After you come back from IOWA you decide how you want relations between us to be. American way 50/50 by court or normal human and most beneficial for Sasha. I am tired that every time when I am nice to you for sake of my son I get back threats of court, insults towards my family and completely unacceptable behavior toward me. Imagine that I am your neighbour on the street basically nobody to you the only that we have is Sasha to raise together. I want only piece and no interaction for at least 6 monthes. If you go back for looking for reasons to hate me and create tensions we will be completely 50/50 for sake of all of us. I must be mentally stable at work and be a mom who is calm and happy. Your behavior was putting me in stressfull mode which is cruel to my family. And I want that stop. I cant live around your mood switches I am looking for stable predicting life.

---

Sean <7022907406@unknown.email>
Sat, Jun 21, 2014 at 11:08 AM
To: lyuda.abid@gmail.com

I respect your position.

---

Sean <7022907406@unknown.email>
Sat, Jun 21, 2014 at 11:09 AM
To. lyuda abid@gmail.com

I do need to know if you still intend to give Sasha to us on the 26th so we can reserve our flights. We have decided not to drive.

---

lyuda.abid@gmail.com <lyuda.abid@gmail.com>
Sat, Jun 21, 2014 at 11:10 AM
To: Sean <7022907406@unknown.email>

Of course you get Sasha on 26 as agreed

---

Sean <7022907406@unknown.email>
Sat, Jun 21, 2014 at 11:14 AM
To· lyuda abid@gmail.com

*Thank you.*

# EXHIBIT "Q"

lyuda abid@gmail.com <lyuda.abid@gmail com>
Thu, Aug 7, 2014 at 9 59 AM
To Sean <7022907406@unknown email>

**When are you arriving? Today is my day.**

---

Sean <7022907406@unknown.email>
Thu, Aug 7, 2014 at 10 14 AM
To: lyuda.abid@gmail.com

**Today is Thursday**

---

lyuda.abid@gmail com <lyuda.abid@gmail.com>
Thu, Aug 7, 2014 at 12:13 PM
To: Sean <7022907406@unknown email>

**You are violating order. Please return my son to me so I will have remained week of my four weeks' vacation with my son**

---

Sean <7022907406@unknown.email>
Thu, Aug 7, 2014 at 1:01 PM
To: lyuda abid@gmail.com

**Today is my court ordered timeshare. I did not offer you any of my court ordered visitation. Sasha will be returned to you according to the court ordered schedule on Monday. I will expect Sasha to be returned to me Wednesday morning at 8 am.**

# EXHIBIT "R"

lyuda.abid@gmail.com <lyuda.abid@gmail.com>
Fri, Nov 7, 2014 at 2:48 PM
To: Sean <7022907406@unknown.email>

I will pick up Sasha in 15 minutes

---

Sean <7022907406@unknown.email>
Fri, Nov 7, 2014 at 2:52 PM
To: lyuda.abid@gmail.com

Ok

# EXHIBIT "S"

lyuda.abid@gmail.com <lyuda.abid@gmail com>
Sat, Nov 8, 2014 at 9:04 AM
To. Sean <7022907406@unknown.email>

**Bring Sasha passport I am buying ticket for summer**

# EXHIBIT "T"

**AB** ABID, ALEKSANDR
Chart ABIAL001
DOB 2/13/09
Provider GREGORY, DON

**15**

**PEDIATRIC PROGRESS NOTE: AUC-PPN**

| MAR 09 2015 | | 5 |
|---|---|---|
| Date | Triage Time | Room # |

☐ Male ☒ Female ☒ Established ☐ New Patient ☐ Appointment ☒ Walk-In

Triage Level (1-5)

**Chief Complaint:**

Genital buttocks rash new onset

**Triage Assessment:**

Mother noticed genital rash & buttocks rash. Please see photos on her phone (Mothers)

**Medications:**

mother denies

**Immunization Status:**

☒ Up-to-date ☐ Behind

**ALLERGIES:**

☒ None ☐ Cillins ☐ Sulfa ☐ Codeine ☐ E-mycin ☐ Tylenol ☐ Motrin

**Past Medical History:**

☐ Born Full-Term via ☐ Vaginal Delivery ☐ C-Section
☐ Born Premature @ _____ Weeks via ☐ Vaginal Delivery ☐ C-Section

| | | |
|---|---|---|
| ☐ Asthma | ☐ Diabetes | ☐ Seizures |
| ☐ Pneumonia | ☐ Eczema | ☐ Meningitis _____ |
| ☐ RAD | ☐ Heart Murmur | ☐ Appendectomy |
| ☐ RSV | ☐ Reflux | ☐ T&A Surgery (Tonsils & Adenoids) |
| ☐ ADD / ADHD | ☐ UTIs | ☐ Myringotomy (Ear) Tubes |
| ☐ Develop Delay | ☐ Cerebral Palsy | ☐ Hospitalizations _____ |

**Social History:**

Daycare? ☐ Yes ☐ No School / Preschool? ☐ Yes ☐ No
Tobacco ☐ None ☐ Secondhand Smoke ☐ _____ PPD
EtOH ☐ None ☐ _____
Drugs ☐ None ☐ THC ☐ Amphet ☐ _____

**Family History:**

☐ None ☐ Noncontributory
☐ Cancer
☐ DM
☐ HTN
☐ Other

Sexually Active? ☐ Yes ☐ No LMP _____ ☐ Normal ☐ Abnormal
G _____ P _____ SAB _____ EAB _____ Ectopic _____
☐ Cervical Dysplasia ☐ S/P LEEP _____ ☐ S/P Conization

| Height | Weight | Head Circum |
|---|---|---|
| 42 | 51 lbs | |

Triage Signature

**VITAL SIGNS:**

| Time: | Temp. | RR | $O_2$ Sat. | HR | B/P |
|---|---|---|---|---|---|
| 0823 | 97.2 | 22 | 98 | 100 | 96/64 |

**HPI:** ☐ Triage Note and assessment reviewed.

Historian ☒ Parent ☐ Patient ☐ Other _____

**History Elements:** *Minimum 4 for Levels III+*

| | |
|---|---|
| **Onset:** | Chronic Gradual Acute Time _____ |
| **Time Course:** | Constant Intermittent Resolved Lasted _____ |
| **Provoked by:** | Exertion Movement At Rest Position _____ |
| **Relieved by:** | Nothing Medication _____ Rest Position _____ |
| **Quality:** | Sharp Stabbing Burning "Pain" Dull Pressure Aching Throbbing Crampy Other _____ |
| **Radiation:** | None To _____ |
| **Severity:** | Mild Moderate Severe _____/10 |
| **Associated Sx:** | Rash Nausea/Vomiting SOB Dizziness None Other _____ |

**Review of Systems:** *Minimum 10 for New Pt/Level IV (2 otherwise)*

*Checked box is negative*

| | | *Checked box is negative* | |
|---|---|---|---|
| ☐ Constitutional | T > 100.3°F Dec Feeding Fussy _____ | ☐ Musculoskeletal | Arthralgias Myalgias _____ |
| ☐ Eyes | Discharge Redness Pain _____ | ☐ Skin | Rash Pruritis Bruising _____ |
| ☐ ENT | Sore Throat Congestion Earache _____ | ☐ Neurological | Headache Limpness _____ |
| ☐ Cardiovascular | Palpitations Chest Pain _____ | ☐ Psychiatric | Depression Suicidality Anxiety _____ |
| ☐ Respiratory | Cough SOB Wheezing _____ | ☐ Lymphatic | Edema Swollen Glands _____ |
| ☐ Gastrointestinal | Nausea Vomiting Diarrhea Constipation _____ | ☐ Genitourinary | Dysuria Frequency Hematuria _____ Decreased # Wet Diapers |
| ☐ Immunologic | Allergic Rhinitis Hives _____ | | |

# EXHIBIT "U"

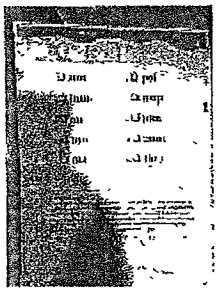
Gmail by Google

Lyuda Abid <lyuda.abid@gmail.com>

# SMS with Sean

14 messages

**Sean** <7022907406@unknown.email> Mon, Oct 27, 2014 at 5 26 PM
To lyuda abid@gmail com



IMG955631.jpg
223K

---

**Sean** <7022907406@unknown email> Mon, Oct 27, 2014 at 5 27 PM
To lyuda abid@gmail com

Sasha needs to learn these words by tomorrow We did not have time today

---

**Sean** <7022907406@unknown email> Tue, Oct 28, 2014 at 2 59 PM
To lyuda abid@gmail com

Two days in a row sasha is falling asleep and whining when we are trying to complete his work Keeping him up late is hurting his ability to learn

---

**lyuda.abid@gmail.com** <lyuda abid@gmail com> Tue, Oct 28, 2014 at 3 38 PM
To Sean <7022907406@unknown email>

Sean I told you already he goes sleep at 8 He whining at my home all the time He got sick and my question is if you give him jacket in the morning? He was sick with running nose I want to ask you to make sure he takes a bath every night This last Friday all his man staff was red and on fire This is very serious he had pain only because he was dirty and didn't have bath in your home As mother that breaks my heart that you dont give him right care Angie is pregnant with a baby I have no rights to bother her about it

---

**Sean** <7022907406@unknown email> Tue, Oct 28, 2014 at 3 40 PM
To lyuda abid@gmail com

Talking on the phone right now might not be the best idea to keep things civil between us Sasha is falling asleep and exhausted every day that I pick hi

---

**Sean** <7022907406@unknown email> Tue, Oct 28, 2014 at 3 40 PM
To lyuda abid@gmail com

m up on your days I have never had this problem on my days He is constantly sick, tired, and whiny after coming back from being with you I work hard o

Gmail by Google

Lyuda Abid <lyuda.abid@gmail.com>

## SMS with Sean

3 messages

**lyuda.abid@gmail.com** <lyuda abid@gmail com> Sat, Oct 4, 2014 at 8 07 AM
To Sean <7022907406@unknown email>

Sean,Sasha pipi was hurt yesterday I gave him hot bath and put a lot of cream I checked and the opening on pipi got smaller I am thinking of taking him to doctor We might ask doctor to open it Let me know that you are ok with that

---

**Sean** <7022907406@unknown email> Sat, Oct 4, 2014 at 8 40 AM
To lyuda abid@gmail com

I am ok with you taking to a doctor

---

**lyuda.abid@gmail.com** <lyuda abid@gmail com> Sat, Oct 4, 2014 at 8 40 AM
To Sean <7022907406@unknown email>

Ok

DOCKETING STATEMENT ATTACHMENT 7

Electronically Filed
03/16/2015 09:00:56 AM

CLERK OF THE COURT

MISC

BLACK & LOBELLO
John D. Jones
Nevada State Bar No. 6699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Fax: (702) 869-2669
Email Address: jjones@blacklobellolaw.com
Attorneys for Plaintiff,
SEAN R. ABID

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID<br><br>Defendant. | CASE NO.: D424830<br>DEPT. NO.: B<br><br>**Date of Hearing: March 18, 2015**<br>**Time of Hearing: 10:00 a.m.** |

## SUBMISSION OF AUTHORITIES

Comes now Defendant, SEAN R. ABID ("Sean"), by and through his attorneys of record, John D. Jones, and the law firm of BLACK & LOBELLO, hereby submits the following authorities in support of his DECLARATION OF SEAN ABID IN SUPPORT OF HIS COUNTERMOTION TO CHANGE CUSTODY.

1. Thompson v. Delaney, 838 F.Supp. 1535 (1993);
2. State v. Morrison, 203 Ariz. 489 (2002);
3. Pollock v. Pollock, 154 F.3d 601 (1998);
4. Lawrence v. Lawrence, 360 S.W.3d 416 (2010);
5. Smith v. Smith, 923 So.2d 732 (2005);
6. Stinson v. Larson, 893 So.2d 462 (2004); and

///

BLACK & LOBELLO
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

7. Wagner v. Wagner, 64 F.Supp.2d 895 (1999).

DATED this 16 day of March, 2015.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Plaintiff,
SEAN R. ABID

**CERTIFICATE OF MAILING**

I hereby certify that on the 16th day of March, 2015 a true and correct copy of the SUBMISSION OF AUTHORITIES upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid, addressed as follows:

Michael Balabon, Esq.
Balabon Law Office
5765 S. Rainbow Blvd., #109
Las Vegas, NV 89118
Email for Service: mbalabon@hotmail.com
*Attorney for Defendant,*
*Lyudmila A. Abid*

an Employee of BLACK & LOBELLO

BLACK & LOBELLO
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

# Exhibit 1

# Exhibit 1

838 F.Supp. 1535
United States District Court, D. Utah, Central Division.

James THOMPSON, Plaintiff,
v.
Denise DULANEY; Elsie Dulaney; Phil Dulaney; Dale Brounstein; Russ Sardo; Robert Moody; and Jerry Kobelin, Defendants.

No. 90–CV–676–B. | Dec. 1, 1993.

Divorced husband brought action against former wife, wife's parents, and wife's experts and attorneys at custody hearing, for violations of federal wiretapping statutes, based upon wife's taping of husband's telephone conversations with their children. After remand, 970 F.2d 744, the District Court, Brimmer, J., sitting by designation, held that: (1) wife could consent to taping on behalf of children; (2) triable issues existed regarding wife's purpose in recording conversations; (3) husband did not have unlawful wiretapping or use and disclosure claims against wife's parents; but (4) genuine issues of material fact existed regarding use and disclosure claims against experts and attorneys.

Ordered accordingly.

West Headnotes (18)

[1] **Federal Civil Procedure**
⇐Materiality and genuineness of fact issue

Ultimate determination regarding genuineness of issue of fact is whether reasonable minds could differ as to import of evidence; if they cannot, then there is no genuine issue of fact, and summary judgment is proper. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[2] **Federal Civil Procedure**
⇐Ascertaining existence of fact issue

Trial court's role on motion for summary judgment is limited to determining existence vel non of genuine issue of material fact, and nothing more; court does not assess credibility or probative weight of evidence that established existence of genuine issue of material fact. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[3] **Federal Civil Procedure**
⇐Burden of proof

Party moving for summary judgment has initial burden of producing evidence that is admissible as to content, not form, identifying those portions of record, including pleadings and any material obtained during discovery, that demonstrate absence of any genuine issue of material fact; if movant meets its burden of production, then burden of production shifts to nonmoving party, which may not rest upon mere allocations or denials of his pleadings to avoid summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

1 Cases that cite this headnote

[4] **Telecommunications**
⇐Persons concerned; consent

Federal wiretapping statutes apply to cases of interspousal wiretapping within marital home. 18 U.S.C.A. §§ 2510–2520.

Cases that cite this headnote

[5] **Telecommunications**
⇐Acts Constituting Interception or Disclosure

For plaintiff to prevail on use or disclosure

claim under federal wiretapping statutes, plaintiff must prove that defendant knew or should have known that information was product of illegal wiretap, and that defendant had knowledge of facts and circumstances surrounding interception so that he knew or should have known that interception was prohibited under wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[6] **Telecommunications**
⇐Persons concerned; consent

Divorced wife who voluntarily taped former husband's conversations with their children had intent required for federal wiretapping violation, even if she did not act with bad purpose or in disregard of law. 18 U.S.C.A. § 2520(a).

10 Cases that cite this headnote

[7] **Telecommunications**
⇐Persons liable; immunity

Divorced wife's alleged good faith reliance on advice of attorneys in taping former husband's conversations with their children was not defense to husband's claim under federal wiretapping statutes. 18 U.S.C.A. § 2520(a, d).

Cases that cite this headnote

[8] **Federal Civil Procedure**
⇐Affirmative Defense or Avoidance

Divorced wife's failure to raise consent as affirmative defense to former husband's illegal wiretapping claims did not give rise to waiver of defense, though it would have been more prudent for wife to err on side of raising consent as affirmative defense, where it was hard to discern any possible prejudice to husband from wife's failure. Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.; 18 U.S.C.A. § 2511(2)(d).

Cases that cite this headnote

[9] **Telecommunications**
⇐Persons liable; immunity

As long as guardian has good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to taping of telephone conversations, **vicarious consent** will be permissible, and will serve as defense to claim under federal wiretapping statutes, in order for guardian to fulfill her statutory mandate to act in best interest of children. 18 U.S.C.A. § 2511(2)(d).

29 Cases that cite this headnote

[10] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding divorced wife's purpose in intercepting former husband's communications with their children precluded summary judgment on husband's illegal wiretapping claim based upon defense that wife **vicariously consented** on behalf of children. 18 U.S.C.A. § 2511(2)(d).

2 Cases that cite this headnote

[11] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Divorced husband's conclusory statement that former wife admitted to him that her parents were involved in taping husband's conversations with children was insufficient to create genuine issues of material fact precluding summary judgment on husband's illegal wiretapping claim

against wife's parents. 18 U.S.C.A. § 2520(a); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[12] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding expert's involvement in and knowledge of tape **recordings** precluded summary judgment on divorced husband's claim that former wife and expert conspired to engage in illegal wiretapping, where husband alleged that expert specifically requested wife to gather wiretap evidence for expert's use at custody hearing, and that expert admitted that wife taped and transcribed conversations for him, and that he reviewed them and discussed them with others. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[13] **Telecommunications**
⇐Acts Constituting Interception or Disclosure

Proof of knowledge that information came from wiretap is, without more, insufficient to make out prima facie plan for use and disclosure liability under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[14] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issue of material fact as to whether divorced wife knew that wiretap, used to tape former husband's conversations with children, was illegal precluded summary judgment, pursuant to defense that wife **vicariously consented** on behalf of children, on former husband's use and disclosure liability claim under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

13 Cases that cite this headnote

[15] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Divorced husband's conclusory assertion that former wife's parents disclosed contents of illegally intercepted communications did not create genuine issue of material fact precluding summary judgment on husband's claim against parents for use and disclosure liability under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

[16] **Federal Civil Procedure**
⇐Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding whether wife's experts had knowledge that material supplied to them in connection with custody proceeding came from illegal wiretap precluded summary judgment on husband's use and disclosure claims against experts under federal wiretapping statutes. 18 U.S.C.A. § 2520(a); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

Cases that cite this headnote

[17] **Telecommunications**
⇐Acts Constituting Interception or Disclosure

Reading document or listening to tape amounts to "use" of those items within meaning of federal wiretapping statutes. 18 U.S.C.A. §

2520(a).

9 Cases that cite this headnote

[18] **Federal Civil Procedure**
Wiretapping and electronic surveillance, cases involving

Genuine issues of material fact regarding whether wife's attorneys at divorce proceedings and custody hearing had knowledge that material came from illegal wiretap precluded summary judgment on husband's use and disclosure claims under federal wiretapping statutes. 18 U.S.C.A. § 2520(a).

Cases that cite this headnote

**Attorneys and Law Firms**

*1537 James Thompson, pro se.

Roger P. Christensen, Lynn S. Davies, Salt Lake City, UT, Thomas S. Taylor, Provo, UT, for defendants.

***ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT***

BRIMMER, District Judge.*

The above-entitled matter having come before the Court upon Defendants' Motions for Summary Judgment, and the Court having reviewed the materials on file herein, having heard argument from the parties, and being fully advised in the premises, FINDS and ORDERS as follows:

***Factual Background***

In 1989, defendant Denise Dulaney and her husband James Thompson obtained a divorce in Utah state court. During subsequent custody proceedings, Denise Dulaney attempted to introduce transcripts of several phone conversations she had **recorded** with a wiretap between Thompson and the couple's then three and five year old children, who lived with Dulaney. In 1988, when these conversations were **recorded**, divorce proceedings between Dulaney and Thompson had commenced and Dulaney and the children were living with Dulaney's parents, Phil and Elsie Dulaney, in Oregon.

Prior to trial, Thompson filed a motion in limine to exclude the transcripts of the wiretapped conversations from the custody proceeding. The motion was not granted,[1] and the transcripts were introduced. At the custody hearing, the court determined that both Thompson and Dulaney were fit to be named guardian of the children, but nonetheless awarded Denise Dulaney custody.

In 1990, Thompson initiated the present suit against the seven above-named defendants,[2] alleging violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510– *1538 2520 (1968 & West Supp.1993) ("Title III"),[3] conspiracies to violate Title III, and numerous state law claims, both statutory and common law. He sought several million dollars in compensatory and punitive damages.

***Procedural Background***

After discovery commenced, the parties filed cross-motions for summary judgment, and this Court heard oral argument on those motions on May 3, 1991. In an order dated May 29, 1991, this Court, relying on *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir.1977), concluded that this case was outside the purview of Title III since it was a "purely domestic conflict," *id.* at 679, and judgment was entered for all the defendants on Thompson's claims. Given the Court's disposition on the sole federal cause of action, there was no longer a basis for the exercise of subject matter jurisdiction over the pendent state law claims, and they were dismissed accordingly.

Thompson appealed the Court's ruling on summary judgment to the Tenth Circuit, which, on July 23, 1992, issued an order affirming in part and reversing in part this Court's order granting summary judgment. *See Thompson v. Dulaney*, 970 F.2d 744 (10th Cir.1992). The appeals court remanded the case to this Court for further proceedings.

This Court has subject matter jurisdiction over the federal cause of action pursuant to 28 U.S.C. § 1331 (1988) and 18 U.S.C. §§ 2510–2520 (1968 & West Supp.1993), over the state-law claims by way of supplemental jurisdiction under 28 U.S.C. § 1367(a) (West Supp.1993), venue is proper in this Court under 28 U.S.C. § 1391 (West Supp.1993), and no objections have been raised to this Court's assertion of personal jurisdiction over the defendants.

### *Standard of Review*

#### A. *The Requirements of Rule 56(c)*

Pursuant to Rule 56(c), a trial court hearing a motion for summary judgment is simply required to determine if there are any "genuine issues of material fact," and whether the moving party is entitled to "judgment as a matter of law." FED.R.CIV.P. 56(c). In deciding a summary judgment motion, the Court must therefore make two separate inquiries. First, are the facts in dispute "material" facts, and if so, does the dispute over these material fact create any "genuine" issues for trial.

In determining materiality, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also Carey v. United States Postal Service*, 812 F.2d 621, 623 (10th Cir.1987). Factual disputes over collateral matters will therefore not preclude the entry of summary judgment. *See Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510 (citation omitted).

[1] If the Court concludes that the fact in dispute is a "material" fact, then the Court must determine whether the issue is a "genuine" issue of fact that must be resolved by a jury. This requires a court to assess whether the evidence presented is such "that a reasonable jury could return a verdict for the nonmoving party." *Id.* This inquiry focuses on the sufficiency of the evidence as well as its weight. In the absence of "any significant probative evidence tending to support the complaint," *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968), summary judgment is warranted. The Supreme Court has noted that assessing whether an issue is genuine under Rule 56(c) is similar to standard used for deciding a motion for a judgment as a matter of law, formerly known as a directed verdict, under Rule 50(a). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (citation omitted). The primary difference between a Rule 56(c) motion and a Rule 50(a) motion is procedural; the former is based on documentary evidence while the latter is ***1539** based on evidence admitted at trial. *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 745, 103 S.Ct. 2161, 2171, 76 L.Ed.2d 277 (1983). Thus, it is apparent that the ultimate determination is whether reasonable minds could differ as to the import of the evidence; if they cannot, then there is no "genuine" issue of fact and summary judgment is proper.

This approach to ruling on a motion for a directed verdict, adopted in the summary judgment context, represents a repudiation of what had been known as the "scintilla of evidence" standard. Under that standard, the production of any evidence, without regard to its probative value, which created an issue of fact, required a trial judge to deny a motion for a directed verdict and let the jury decide. *See Anderson*, 477 U.S. at 251, 106 S.Ct. at 2511 (adopting several old Supreme Court precedents on the standard for a directed verdict in the summary judgment context) (citations omitted).

[2] The trial court's role is limited to determining the existence *vel non* of a genuine issue of material fact, and nothing more. The Court does not assess the credibility or the probative weight of the evidence that established the existence of the genuine issue of material fact. The determination that a true factual dispute exists means, *ipso facto*, that summary judgment may not be entered "as a matter of law," and the case must therefore be submitted to a jury.

#### B. *The Burdens of Proof*

[3] The initial burden of production under Rule 56(c) is on the moving party. That party must make a sufficient "showing" to the trial court that there is an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 322–24, 106 S.Ct. at 2552–53. The movant satisfies its burden by producing evidence that is admissible as to content, not form, identifying those portions of the **record**, including the pleadings and any material obtained during discovery, that demonstrate the absence of any genuine issues of material fact. *Id.* at 323–24, 106 S.Ct. at 2552–53.

If the movant meets its burden of production, then the burden of production shifts to the nonmoving party. That

party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510 (emphasis added). The nonmoving party is now put to their proof; they must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986) (citations omitted). They must make a "sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 25; *Carey*, 812 F.2d at 623. They must demonstrate to the Court's satisfaction that the "evidence presents a sufficient disagreement to require submission to a jury." *Id.* at 623. In making this determination, the trial court must "examine the factual record and [draw all] reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Dorrance v. McCarthy*, 957 F.2d 761, 762 (10th Cir.1992) (quoting *Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1230 (10th Cir.1990)).

The Court will now apply these legal standards to the facts of the case before it.

### *Discussion*

#### A. *The Tenth Circuit's Order on Remand*

##### 1. *Rulings on Summary Judgment*

In its order on remand, the Tenth Circuit affirmed in part and reversed in part the grant of summary judgment. The appellate court specifically took the time to discuss and interpret Title III and to delineate what was necessary to establish a *prima facie* cause of action under that statute in an effort to provide this Court, and other courts, with guidance under this little-used statute. *See Thompson*, 970 F.2d at 749–50.

The opinion of the Court of Appeals can be broken down into three separate rulings: one on the conspiracy claims, one on the unlawful wiretapping claims, and one on the use or disclosure claims.

*1540 The grant of summary judgment on Thompson's claims that Phil and Elsie Dulaney conspired to violate Title III, and that Denise Dulaney's expert witnesses and her attorneys also conspired to violate Title III, was affirmed on appeal. *See id.* at 749. The appellate court did, however, state that there were factual issues as to whether Denise Dulaney and Russ Sardo engaged in a conspiracy to violate Title III and remanded for a determination of that issue. *Id.* at 749–50.

The Court of Appeals reversed and remanded Thompson's unlawful wiretapping claims against Phil, Elsie and Denise Dulaney. *Id.*

Finally, the appellate court reversed and remanded Thompson's use or disclosure claims against all seven defendants. *Id.*

##### 2. *The Tenth Circuit's Interpretation of Title III*

As noted above, the Court of Appeals took the time to render an interpretation of Title III in an effort to provide this Court with controlling legal standards to apply in this case. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 2511(1)(a)–(d), provides in relevant part:

> (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;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral 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; or
>
> (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).[4]

[4] In this Court's May 1991 order granting the defendants' motions for summary judgment, this Court was faced with an issue of first impression in the Tenth Circuit regarding the applicability of Title III to cases of interspousal wiretapping.[5] Although three other circuits had ruled that Title III did apply to interspousal wiretapping, *see Kempf v. Kempf,* 868 F.2d 970, 973 (8th Cir.1989); *Pritchard v. Pritchard,* 732 F.2d 372, 274 (4th Cir.1984); *United States v. Jones,* 542 F.2d 661, 673 (6th Cir.1976), two circuits had ruled that interspousal wiretapping was beyond the reach of Title III. *See Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir.1977); *Simpson v. Simpson,* 490 F.2d 803, 810 (5th Cir.), *cert. denied,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974) (adopting the reasoning of *Anonymous* ). This Court adopted the "minority" view of the Second and Fifth Circuits that Title III was inapplicable to interspousal wiretapping, which provided the basis for granting summary judgment to the defendants.

***1541** While Thompson's appeal was pending in this matter, the Tenth Circuit issued two opinions within a period of five weeks that essentially dictated the result in Thompson's appeal.

*Newcomb* was decided in late August, 1991. That case involved a minor child who sued his custodial parents under Title III for intercepting his telephone conversations. While the Tenth Circuit noted that there was a split in the circuits over the question of whether Title III extended to so-called interspousal wiretapping, *see id.* at 1535 n. 3, the court avoided that question, concluding that interspousal wiretapping was "qualitatively different from a custodial parent tapping a minor child's conversation within the family home." *Id.* at 1535–36.

Five weeks later, the Tenth Circuit was squarely confronted with the issue left open in *Newcomb.* In *Heggy v. Heggy,* 944 F.2d 1537 (10th Cir.), *cert. denied,* 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992), which was decided in early October, 1991, the Tenth Circuit adopted the "majority" view taken by the Fourth, Sixth and Eighth Circuits, concluding that Title III did provide a remedy for interspousal wiretapping within the marital home. *Id.* at 1539. In its opinion in *Heggy,* the Tenth Circuit specifically rejected and criticized the conclusion reached in *Simpson* and *Anonymous,* which were the cases that this Court relied on in granting the defendants' motions for summary judgment.

*Heggy,* which was decided after this Court's May 1991 ruling, justified reversal of this Court's order granting summary judgment for the defendants. In *Thompson v. Dulaney,* 970 F.2d 744 (10th Cir.1992), the Court of Appeals relied on *Heggy* in reversing in part this Court's order granting summary judgment. The Court explained that in *Heggy,* it elected to follow the majority view because the words "any person" in the statute were a "clear and unambiguous" dictate that compelled the result that "[t]here exists no interspousal exception to Title III liability." *Thompson,* 970 F.2d at 748.

While the language of the statute compelled this result, the court also pointed out that the statute established certain limits on the actionability of interspousal wiretapping in a particular case. First, the statute requires proof of actual intent on the part of the intercepting spouse, thereby excluding what the court called "inadvertent interceptions." *Id.* Second, the court noted that 18 U.S.C. § 2511(2) enumerated specific exceptions that would often relieve the actor of liability, the most notable of which was the "consent" exception, *see* 18 U.S.C. § 2511(2)(d). Finally, the court pointed out that liability under Title III premised on the wrongful use or disclosure of information obtained from a wiretap requires an even "greater degree of knowledge on the part of the defendant." *Thompson,* 970 F.2d at 749. In addition to proving that the use or disclosure was done intentionally, a defendant "must be shown to have been aware of the factual circumstances that would violate the statute." *Id.*

Thus, to establish use or disclosure liability, it is insufficient to prove only that the defendant knew that the information was the product of a wiretap. The reason for this is that not all wiretaps are illegal *per se.* As discussed above, § 2511(2) specifically lists exceptions to the general prohibition against wiretaps. It is apparent that the intent of Congress was only to deter the use or disclosure of information *illegally obtained* in violation of Title III, and not all wiretap evidence. It would not further the purposes underlying the prohibition against the use or disclosure of such information to punish people who use or disclose information known to have been obtained from a wiretap if, in fact, that wiretap was consented to or otherwise lawfully obtained.

[5] Therefore, in order for a plaintiff to prevail on a use or disclosure claim, the plaintiff must prove: (1) that the defendant "knew or should have known" that the information was the product of an illegal wiretap, and (2) that the defendant had knowledge of the facts and circumstances surrounding the interception so that he "knew or should have known" that the interception was prohibited under Title III. *See id.*

This will often require the plaintiff to prove that the

defendant had notice that *1542 neither party consented to the wiretap, since consent would negate the requirement that the party had knowledge that the wiretap was an illegal one. Mere knowledge that the information allegedly used or disclosed came from a wiretap is insufficient unless additional circumstantial proof is introduced that would enable an inference to be drawn that the defendant knew or should have known that the wiretap was an illegal one under Title III.

With these principles in mind, the Court will now turn to the merits of the contentions.

### B. *Application to this Case*

#### 1. *The Unlawful Wiretapping Claims*

##### a. *Denise Dulaney*

After expounding on what is required to state a claim under the various aspects of Title III, the appellate court concluded that this case should be remanded for a determination of whether any factual issues existed regarding the conduct of Denise, Phil and Elsie Dulaney with respect to Title III. As discussed above, establishing a violation of 18 U.S.C. § 2511(1)(a) for intercepting an electronic communication requires proof of actual intent on the part of the intercepting spouse, Denise Dulaney.

##### i. *Intent*

[6] Denise Dulaney's argument is that she did not act with the requisite state of mind in this case. In support of her contention, she first argues that she recorded these conversations because she was concerned that Thompson may have been trying to undermine the childrens' relationship with her. In essence, she argues that she taped the conversations because she was acting in the best interests of her children. She also argues that she did so in reliance on the advice of her attorneys that her actions were legal, and after consulting with Thompson.

Thompson alleges that Denise Dulaney admitted that the recordings were "innocuous," but that she still continued to tape the conversations. As a result, he contends that she intended to tape the recordings. This Court agrees.

The critical issue on this point is the definition of intent. Denise Dulaney argues that her acts were not performed with a bad purpose, or with a specific disregard of the law, and that they were not without justifiable excuse. This Court is not persuaded.

In *United States v. Townsend,* 987 F.2d 927 (2d Cir.1993), the Second Circuit set forth a suggested jury instruction on the intent element of Title III. The Court stated that the defendant must be shown to have acted "deliberately and purposefully; that is, defendant's act must have been the product of defendant's conscious objective *rather than the product of a mistake or an accident.*" *Id.* at 930 (emphasis added).

The Court is aware that *Townsend* was a criminal prosecution. Nonetheless, this Court is convinced that this definition of intent is consistent with the view taken by the Tenth Circuit in *Thompson.* In *Thompson,* the court stated that the wording of the statute "requires that interceptions be intentional before liability attaches, thereby excluding liability for *inadvertent* interceptions." *Thompson,* 970 F.2d at 748 (emphasis added). Thus, the focus of the Tenth Circuit, like the Second Circuit, is on the issue of the deliberateness of the act, or, stated another way, whether the actor intended to intercept the communication or whether it happened inadvertently. Thus, Dulaney's *motive,* whether she acted with a bad purpose or in disregard of the law, is not the issue. *See* S.REP. No. 99–541, 99th Cong., 2d Sess. 23 (Oct. 17, 1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577–79 ("The term 'intentional' is not meant to connote the existence of a motive."). As a result, this Court concludes that the proper focus is on the volitional nature of the *act* of intercepting the communication. Since Denise Dulaney does not contest the fact that she did voluntarily tape record these conversations, the Court concludes that she had the requisite intent as a matter of law.

[7] Denise Dulaney's second argument is that she relied, in good faith, on the advice of her attorneys in taping the conversations. This contention has been flatly rejected by the Tenth Circuit. In *Heggy,* the Tenth Circuit specifically rejected the defense of *1543 "good faith reliance on a mistake of law" for two reasons. First, § 2520(d) expressly provides for a good faith defense in a limited number of circumstances, such as reliance on a warrant or subpoena; good faith reliance on mistake of law is not listed, and thereby deemed not to be a defense. Second, the Court stated that "[t]he law's reluctance to allow testimony concerning subjective belief after the fact reflects an obvious concern with the reliability of such testimony." *Heggy,* 944 F.2d at 1542. Thus, this evidence

cannot be considered probative in determining whether to grant summary judgment.

### ii. *The Defense of Consent*

Even though Thompson may have stated a claim against Denise Dulaney under Title III with respect to intentional wiretapping, the statute expressly provides several defenses to these claims. One specific defense is § 2511(2)(d), which provides a safe harbor from Title III liability

> where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

In this case, Denise Dulaney alleges that she gave **vicarious consent**, on behalf of her minor children, to tape the conversations.

It is clear from the case law that Congress intended the consent exception to be interpreted broadly. *See Griggs–Ryan v. Smith,* 904 F.2d 112, 116 (1st Cir.1990) (citing *United States v. Amen,* 831 F.2d 373, 378 (2d Cir.1987)). Some courts interpreting the consent exception have drawn a distinction between whether a party had the legal capacity to consent and whether they actually consented.[6] *See United States v. King,* 536 F.Supp. 253 (C.D.Cal.1982).

In *King,* the party who allegedly consented to the wiretapping was an adult with legal capacity to consent. The district court concluded that, for purposes of the consent exception to Title III, the "only issue under the statute is a factual one: did the individual 'voluntarily' consent?" *Id.* at 268 (citations omitted); *see also Luna v. State of Oklahoma,* 815 P.2d 1197, 1199–1200 (Okla.Crim.App.1991) (finding that a seventeen-year old, who lacked legal capacity to consent, nonetheless "freely and voluntarily consented" to wearing a wiretap). While this Court is inclined to agree with the analysis of consent in *King* and *Luna,* which focus on actual consent, those cases would not be controlling here since this case involves minor children who lack *both* the capacity to consent and the ability to give actual consent.

[8] The children in this case were ages three and five. They clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent, either express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent. Thus, this case presents a unique legal question of first impression on the authority of a guardian to **vicariously consent** to the taping of phone conversations on behalf of minor children who are both incapable of consenting and who cannot consent in fact. Denise Dulaney asserts that in this situation, "the parent as legal guardian must have the ability to give actual consent for the child." Thompson vehemently contests this proposition.[7]

*1544 Denise Dulaney's argument is four-fold. First, she argues that the Utah Supreme Court has declared that the rights associated with being a parent are fundamental and basic rights and therefore, she should be afforded wide latitude in making decisions for her children. *See In re J.P.,* 648 P.2d 1364, 1372–74 (Utah 1982) (citing various state and federal constitutional provisions). Second, she bolsters this argument by noting that Utah statutory law gives parents the right to consent to legal action on behalf of a minor child in other situations, such as for marriage, medical treatment and contraception. Third, she argues that as the legal guardian of the children, Utah law allows her to make decisions on behalf of her children. Thus, the argument goes, the parental right to consent on behalf of minor children who lack legal capacity to consent and who cannot give actual consent, is a necessary parental right. In addition, she argues that the decision in *Newcomb* lends support to her argument. While this is a close and difficult question, this Court is persuaded that, on the specific facts of this case, **vicarious consent** is permissible under both *Newcomb* and applicable Utah law.

Utah law clearly vests the legal custodian of a minor child with certain rights to act on behalf of that minor child. While UTAH CODE ANN. § 78–3a–2(13) (1958) enumerates certain rights that the guardian has vis-a-vis the minor child, the statute does not, by its own terms, purport to be all-inclusive. In addition, § 78–3a–2(14)(b) states that a guardian is responsible for, *inter alia,* protecting the minor child. Denise Dulaney argues that if she is unable to **vicariously consent** for her minor children, then she is deprived of her ability to protect them. This Court believes that this case presents the paradigm example of why **vicarious consent** is necessary.

[9] Denise Dulaney argued that she **recorded** the conversations with Thompson because he allegedly was interfering with her relationship with the children to whom she was awarded custody. In this case, or perhaps a

more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, **vicarious consent** is necessary to enable the guardian to protect the children from further harassment in the future. Thus, as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, **vicarious consent** will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.[8]

*1545 [10] The consent exception, however, contains an express limitation stating that if the communication is intercepted "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State," 18 U.S.C. § 2511(2)(d) (West Supp.1993),[9] then the defense of consent is inapplicable for public policy reasons which are readily apparent. Here, Thompson alleges that the interceptions amounted to criminal and civil violations of Utah law, and as a result, the consent exception is inapplicable.

Utah recognizes the crime of "communication abuse." UTAH CODE ANN. § 76-9-403(1)(a) (1953). A person is guilty of this crime, which is a misdemeanor, if he "[i]ntercepts, without the consent of the sender or receiver, a message by telephone ..." This statute would appear to fall within the scope of the limitation on consent. The Court has concluded, however, that whether Thompson can rely on this limitation on the consent exception requires a factual resolution of what Denise Dulaney's "purpose" was in intercepting the communication. As noted above, she asserts it was to protect the children; Thompson submitted contrary evidence on this issue alleging that Denise Dulaney continued taping the conversations several months after she concluded that the conversations were in fact "innocuous." Thus, the viability of the consent defense is contingent on a resolution of her purpose in intercepting these communications.

In sum, this Court concludes that Denise Dulaney did in fact intentionally **record** the phone conversations between Thompson and their children. She asserts the defense of consent, and while this Court concluded that she could **vicariously consent** for the children as a matter of law, there are factual issues as to whether she did in fact give such consent, and if so, whether it was "prior" consent, as required by the statute. Finally, Thompson has argued that the limitation in § 2511(2)(d) removes the defense of consent from this case. The Court concluded that while Utah law does criminalize[10] Denise Dulaney's conduct, there is a fact question as to what her "purpose" was in intercepting the conversations.

### b. *The Unlawful Wiretapping Claims Against Phil and Elsie Dulaney*

[11] Thompson allegations with respect to his unlawful wiretapping claim against Denise Dulaney's parents, Phil and Elsie Dulaney, are wholly conclusory. He simply alleges that they "agreed" to gather wiretapped evidence against him, and that they intercepted his conversations and procured Denise Dulaney to intercept them.

As to Thompson's first contention regarding their "agreement," the court of appeals affirmed this Court's initial grant of summary judgment with respect to Thompson's conspiracy claim. *Thompson*, 970 F.2d at 749. The appeals court noted that Phil and Elsie Dulaney's "ownership of their home and telephone and their conduct in hiring lawyers and experts for Denise Dulaney's custody suit" did not state a claim for conspiracy, and thus affirmed summary judgment on that claim.

As to plaintiff's claim of unlawful wiretapping, it is well-established that in opposing a motion for summary judgment, a party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510 (emphasis added). The nonmoving party must produce proof in support of its assertion that there are genuine issues of material fact for trial. Thompson has failed to make this showing with respect to his unlawful wiretapping claims against Phil and Elsie Dulaney.

*1546 The only possible allegation to support these claims is Thompson's claim that on February 11, 1989, Denise Dulaney admitted to him that her parents were involved in taping the conversations. Thompson has, however, failed to provide any affirmative evidence other than his own conclusory statements in support of this contention. Moreover, at his deposition, he admitted that all he knew about Mr. and Mrs. Dulaney was that the tapings occurred in their house with their equipment, and that they hired experts and attorneys for Denise Dulaney. He admits that this is the full extent of his knowledge regarding the involvement of Phil and Elsie Dulaney. As a result, this Court concludes that he has failed to meet his burden of demonstrating that there are any factual issues for trial, and summary judgment will therefore be entered for Mr. and Mrs. Dulaney on Thompson's unlawful wiretapping claim.

### 2. *The Conspiracy Claim*

[12] The Tenth Circuit concluded that there was a question of fact as to whether Denise Dulaney and one of her expert witnesses, Dr. Russ Sardo, engaged in a conspiracy to violate Title III. Thompson alleges that Dr. Sardo specifically requested that Denise Dulaney gather wiretapped evidence for his use at the custody hearing. He also alleges that Dr. Sardo admitted that Denise taped and transcribed the conversations for him, and that he reviewed them and discussed them with other defendants.

Dr. Sardo vigorously contests these allegations. He denies that he conspired with Denise Dulaney to tape the conversations at issue; he denies any participation in any form relative to the taping of these conversations; he further denies that the tapes, which he admits he reviewed, were created in violation of the law; and finally, he denies that he disclosed the contents to anyone other than when he testified in court.

The Court concludes that there are conflicting factual allegations here as to Dr. Sardo's involvement in, and knowledge of, the tape **recordings** at issue here. As a result, summary judgment on the conspiracy claim must be denied.

### 3. *The Use or Disclosure Claims*

#### a. *In General*

[13] As discussed above at length, in order to set forth a *prima facie* claim for use and disclosure liability under Title III, a defendant must know that the information used or disclosed was the result of an illegal wiretap. Proof of knowledge that the information came from a wiretap is, without more, insufficient to make out a *prima facie* claim. The Tenth Circuit clearly stated that unless circumstantial evidence is introduced which would allow an inference that the defendant knew or should have known that the wiretap was illegal under Title III, which will often require the plaintiff to prove that no consent was ever given, then summary judgment is appropriate. The Court will now apply these principles to the particular circumstances of each defendant.

#### b. *Application to this Case*

##### i. *Denise Dulaney*

[14] Denise Dulaney has not contested the issue of whether the information obtained came from a wiretap. She has also not challenged Thompson's claim that she did in fact disclose this information to her attorneys, Moody and Kobelin, as well as her expert witnesses, Drs. Sardo and Brounstein. She has, however, asserted that consent is a valid defense. Thus, there is a factual issue of whether she, acting on behalf of the minor children, *knew* that the wiretap itself was illegal. Therefore, summary judgment is unwarranted on this claim.

##### ii. *Phil and Elsie Dulaney*

[15] In Thompson's opposition to summary judgment, he makes the conclusory statement that Phil and Elsie Dulaney "disclosed to other Defendants and others the contents of the intercepted communications." Thompson's affidavit opposing summary judgment does not, however, contain any factual allegations as to Phil and Elsie Dulaney and his claim of unlawful disclosure. It bears repeating that a party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510 ***1547** (emphasis added). The nonmoving party must produce proof in support of its assertion that there are genuine issues of material fact for trial. While Thompson is not resting on his pleadings *per se*, a conclusory assertion in his affidavit that Phil and Elsie Dulaney disclosed this information, does not provide this Court with any additional guidance as to what, if any, material disputes of fact exist. In their motion for summary judgment, the Dulaneys argue precisely this point: that Thompson has failed to identify the factual basis for these claims.[11] This Court agrees, and concludes that Phil and Elsie Dulaney are entitled to judgment as a matter of law on Thompson's disclosure claims.

##### iii. *Drs. Dale Brounstein and Russ Sardo*

[16] Dr. Brounstein sets forth three arguments in support of his motion for summary judgment on Thompson's use or disclosure claims. First, he argues that he never "used" the communications as the term is employed in the statute. Second, he argues that he had no knowledge that

the information came from a wiretap. Third, he argues that he certainly had no knowledge of the facts and circumstances surrounding the interception of the communication that would enable an inference to be drawn that he knew the wiretap was illegal. He does not, however, dispute the fact that he did read the transcripts.

Likewise, Dr. Sardo argues that he did not know that the information that he read came from a wiretap, and further, that he had no knowledge of any facts that would enable an inference to be drawn that he knew that the wiretap was illegal.

In his opposition, Thompson argues that both Brounstein and Sardo used the contents of these wiretapped conversations in formulating their expert opinions, and that they also discussed these conversations with Denise Dulaney and other defendants, presumably Kobelin and Moody.

[17] As to Dr. Brounstein's first contention in regards to the "use" requirement, the Court is not persuaded by the innovative argument that the term "use," as utilized in the statute, is an active, rather than a passive term, and therefore, Congress did not intend for reading or listening to constitute "use." This Court thinks that it strains logic to conclude that reading a document or listening to a tape does not amount to "use" of those items.

As to remaining elements regarding knowledge that the information came from an illegal wiretap, neither of these defendants denies the fact that they did in fact listen to the **recordings** and/or read the transcripts of these conversations.[12] In supplemental pleadings filed by counsel for Dr. Brounstein, he argues that at the custody hearing, Brounstein did not rely on the **recorded** conversations in formulating his opinion that Thompson was an unfit parent.

The Court is somewhat perplexed by this argument since it is essentially contending that there was no "disclosure" of the contents of these communications, while nonetheless admitting "use." This does not help the defendant's position. Use or disclosure liability is disjunctive; liability attaches for one or the other, and while proof of both use and disclosure is sufficient, it is certainly not necessary. *See* 28 U.S.C. § 2511(1)(b)–(d) (1988).[13]

*1548 As to the elements regarding knowledge that the material came from an illegal wiretap, the Court concludes that there are questions of fact regarding these elements. Thompson submitted evidence, discussed above, which alleges that Sardo specifically requested that Denise Dulaney gather wiretapped evidence for his personal use. As to defendant Brounstein, Thompson submitted evidence that would support an inference that Brounstein knew, or at least should have known, that the information came from a wiretap. Therefore, the Court concludes that summary judgment is inappropriate on these claims.

### iv. *Jerry Kobelin and Robert Moody*

[18] Kobelin and Moody were Denise Dulaney's attorneys at the custody hearing and were involved in the divorce proceedings as well. Once again, for reasons that are similar to those set forth above with respect to Drs. Sardo and Brounstein, the Court concludes that there are genuine issues of fact over the knowledge elements of the use or disclosure claims of Thompson. The affidavits of these defendants and Thompson are in conflict. It appears undisputed that these defendants did use or disclose these conversations during the course of their representation of Denise Dulaney. Whether they knew that the material came from an unlawful wiretap, however, is a question of fact which this Court may not decide. Therefore, summary judgment is unwarranted on these use or disclosure claims as well.

**THEREFORE**, it is,

**ORDERED** that Defendant Denise Dulaney's Motion for Summary Judgment on the illegal wiretapping claim be, and the same hereby is, **DENIED.** It is further

**ORDERED** that Defendants Phil and Elsie Dulaney's Motion for Summary Judgment on the illegal wiretapping claim be, and the same hereby are, **GRANTED.** It is further

**ORDERED** that Defendants Phil and Elsie Dulaney's Motion for Summary Judgment on the use or disclosure claims be, and the same hereby are, **GRANTED.** It is further

**ORDERED** that Defendant Dale Brounstein's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.** It is further

**ORDERED** that Defendant Russ Sardo's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.** It is further

**ORDERED** that Defendant Russ Sardo's Motion for Summary Judgment on the conspiracy claim with Denise

Dulaney be, and the same hereby is, **DENIED.** It is further

**ORDERED** that Defendant Robert Moody's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.** It is further

**ORDERED** that Defendant Jerry Kobelin's Motion for Summary Judgment on the use or disclosure claim be, and the same hereby is, **DENIED.**

**Parallel Citations**

139 A.L.R. Fed. 765

Footnotes

* United States District Judge for the District of Wyoming, sitting by designation.

1 It is unclear from the record whether the state court actually denied Thompson's motion or whether it was simply never ruled on one way or the other. The critical fact, which is that the contents of the transcripts were introduced at the hearing, is undisputed.

2 The defendants in this matter are Denise Dulaney, Thompson's ex-wife; Elsie and Phil Dulaney, Denise's parents; Drs. Dale Brounstein and Russ Sardo, Denise's expert witnesses at the custody hearing; and Robert Moody and Jerry Kobelin, Denise's attorneys.

3 18 U.S.C. § 2520(a) (1968), which is part of the Omnibus Crime Control and Safe Streets Act of 1968, explicitly creates a civil cause of action for "any person" whose electronic communications are "intercepted, disclosed, or intentionally used in violation of [the other sections of Title III]."

4 The initial version of Title III required the plaintiff to prove only "willfulness" on the part of the defendant. The 1986 amendments to this statute modified the mental state required to establish a violation to proof of actual intent. "We proceed under the statute as in effect at the time of the alleged violation." *Newcomb v. Ingle,* 944 F.2d 1534, 1535 n. 2 (10th Cir.), *cert. denied,* 502 U.S. 1044, 112 S.Ct. 903, 116 L.Ed.2d 804 (1992). Thus, since the conduct in question occurred in 1988, the proper *mens rea* is actual intent.

5 It should be pointed out that the term "interspousal wiretapping" is misleading. The term is used as a shorthand description for electronic surveillance by one spouse against the other spouse. As one court noted, the phrase is incorrect because "[Denise Dulaney], of course, was not talking to herself on the telephone." *Kratz v. Kratz,* 477 F.Supp. 463, 468 n. 10 (E.D.Pa.1979).

6 For purposes of this analysis, the phrase "actual consent" includes both express and implied consent. Implied consent is, of course, true consent, or "consent in fact," which is inferred from the surrounding circumstances. It is quite different from the legal fiction known as constructive consent. *See Smith,* 904 F.2d at 116–17.

7 In addition to contesting the consent issue on the merits, Thompson makes the conclusory assertion that Denise Dulaney's failure to raise consent as an affirmative defense in her answer constitutes waiver of that defense. *See Renfro v. City of Emporia, Kansas,* 948 F.2d 1529, 1539 (10th Cir.1991), *cert. dismissed,* 503 U.S. 915, 112 S.Ct. 1310, 117 L.Ed.2d 510 (1992). This Court is not persuaded by the plaintiff's waiver argument.

The problem with this waiver argument is that it assumes the truth of the question before the Court, which is whether consent is in fact an affirmative defense under Rule 8(c). The only way that it could be an affirmative defense is if it fell within the nebulous catch-all of "any other matter constituting an avoidance or affirmative defense," FED.R.CIV.P. 8(c), since it is not one of the nineteen specifically enumerated affirmative defenses. Thus, this Court is left with the task of determining whether consent under 18 U.S.C. § 2511(2)(d) should be considered an affirmative defense.

Rule 8(c) makes no attempt to elaborate what other matters constitute an affirmative defense. Courts have, therefore, been left to determine this issue and "some working principles" for determining what constitutes an affirmative defense under the catch-all have been formulated. *See* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1990) (collecting authority). Relevant considerations include whether the allegation is likely to take the opposite party by surprise, whether the opposite party had notice of this defense, and whether the defense arises by logical inference from the allegations of plaintiff's complaint.

This Court concludes that Denise Dulaney's failure to plead consent under this statute does not constitute a waiver of that defense. While it would have been more prudent for Dulaney to err on the side of raising consent as an affirmative defense, it is hard to discern any possible prejudice to the defendant from this failure at this stage of the proceedings. Indeed, he has not alleged any in his opposition to motion for summary judgment.

Finally, the Court notes that "the liberal amendment of pleadings philosophy expressed in Rule 15 can be used by the parties and the court to correct a failure to plead affirmatively when the omission is brought to light." 5 CHARLES A. WRIGHT &

ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1990). In light of the lack of prejudice to the plaintiff, the Court concludes that the defense has not been waived.

8 The Court wishes to emphasize a point that should already be apparent. The holding in this case is very narrow and limited to the particular facts of this case. It is by no means intended to establish a sweeping precedent regarding **vicarious consent** under any and all circumstances. The holding of this case is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father. Under these limited circumstances, the Court concludes that **vicarious consent** is permissible.

9 Thompson also vigorously argued in his brief that if the communication is intercepted for the purpose of "committing any other injurious act," then consent is unavailable. What he failed to recognize is that while this used to be a valid criterion for limiting the applicability of the consent defense, Congress amended the statute in 1986, as part of the same amendments changing the *mens rea* requirement from "willful" to "intentional." The 1986 amendments specifically eliminated the "injurious act" limitation on the consent exception and it is therefore no longer a relevant concern.

10 Thompson asserted that Denise Dulaney's conduct also amounted to an invasion of privacy tort. This Court is unable to find any statutes that make Denise Dulaney's conduct tortious.

11 The probable reason that he has failed to allege any facts in support of this contention was revealed during his deposition, where Thompson stated that he was relying on hearsay and speculation in support of this claim, and has no firsthand knowledge.

12 In Dr. Sardo's affidavit, he clearly states "I listened to the tape" that Denise Dulaney brought him. In Dr. Brounstein's affidavit, he states that "I listened to a tape of one conversation between Thompson and his children."

13 In other words, "use," as the term is used in the statute, does not require the defendant to "rely" on the information at a later date. "Use" means exactly what it says: to use. The statute does not limit use to certain types of use, or require actual reliance. Thus, by acknowledging that he did in fact listen to a **recording**, Brounstein has basically conceded the first element necessary to establish liability. Of course, the plaintiff will still have to prove the more difficult elements which are that the defendant knew that the information came from a wiretap that was illegally established.

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# Exhibit 2

# Exhibit 2

203 Ariz. 489
Court of Appeals of Arizona, Division 1.

STATE of Arizona, Appellee,
v.
Bruce Alan MORRISON, Appellant.

No. 1 CA–CR 01–0789. | Oct. 22, 2002. | As Amended Nov. 19, 2002. | Review Denied March 18, 2003

Defendant was convicted in the Superior Court, Maricopa County, Cause No. CR 00-017293, Joseph B. Heilman, J., sexual abuse, molestation of child, sexual conduct with minor, and attempted sexual conduct with minor. Defendant appealed. The Court of Appeals, Philip Hall, J., held that mother had good faith belief that it was necessary and in best interest of child to consent on child's behalf to recording of telephone conversations.

Affirmed.

**Attorneys and Law Firms**

**63 *489 Janet Napolitano, Attorney General by Randall M. Howe, Chief Counsel, Criminal Appeals Section, Diane M. Ramsey, Assistant Attorney General and Ginger Jarvis, Assistant Attorney General, Phoenix, Attorneys for Appellee.

Blumberg & Associates by Bruce E. Blumberg, Phoenix, Attorneys for Appellant.

## OPINION

HALL, Judge.

¶ 1 Bruce Alan Morrison ("defendant") appeals his convictions and sentences for two **64 *490 counts of sexual abuse, one count of molestation of a child, four counts of sexual conduct with a minor, and one count of attempted sexual conduct with a minor. The issue presented in this opinion[1] is whether the audiotape of a telephone conversation between defendant and victim G,[2] made by G's mother without defendant's or G's consent, was admissible under Arizona Revised Statutes ("A.R.S.") section 13–3005 (1988) and 18 U.S.C. § 2511 (1996).

## BACKGROUND

¶ 2 The material facts are undisputed. When G was fourteen years old, her mother read passages in her diary containing sexual language and descriptions with references to defendant who was thirty-five years old. Concerned for G's well-being, G's mother asked her boyfriend to install a tape recorder in her home that automatically recorded all telephone calls to determine what, if anything, was going on between defendant and G. Without defendant's or G's knowledge, the tape recorder recorded their sexually explicit conversation.

¶ 3 Defendant filed a motion to suppress the audiotape of the conversation because it was recorded without his or G's consent. Relying on *Pollock v. Pollock*, 975 F.Supp. 974 (W.D.Ky.1997),[3] the trial court determined that G's mother vicariously consented to the recording on G's behalf and denied defendant's motion.

## ANALYSIS

[1] ¶ 4 Defendant argues that the trial court erred by denying his motion to suppress the audiotape of the sexually explicit telephone conversation between himself and G because it was made without his or her consent in violation of A.R.S. § 13–3005 and 18 U.S.C. § 2511 and was, therefore, inadmissible. Because this issue presents a question of statutory interpretation, our review is de novo. *Gray v. Irwin*, 195 Ariz. 273, 275, ¶ 7, 987 P.2d 759, 761 (App.1999).

¶ 5 Both A.R.S. § 13–3005 and 18 U.S.C. § 2511 criminalize the unlawful interception of wire, electronic, and oral communications, but neither provides for the exclusion of evidence obtained unlawfully. The federal constitution likewise does not require exclusion of the audiotape in this case because there was no state action. *See Colorado v. Connelly*, 479 U.S. 157, 166, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) ("The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.").

¶ 6 However, 18 U.S.C. § 2511 is part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18

 

U.S.C. §§ 2510 through 2522 ("Title III"), which contains a statute that mandates exclusion of the contents of any intercepted wire communication in any trial before any court, including state courts,[4] "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (2000). Federal cases addressing whether parents may record telephone conversations of their minor children without violating Title III discuss two general theories that permit parents to surreptitiously record the phone conversations of their minor children—the "home extension exception" and "vicarious consent." *See Pollock v. Pollock*, 154 F.3d 601 (6th Cir.1998).

¶ 7 The Seventh, Tenth, and Second Circuits have held that parental interception of their minor child's phone conversations does not violate Title III if the recording is done from an extension within the home. *Id.* at 607 (citing **65 *491 *Scheib v. Grant*, 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin*, 843 F.2d 110 (2d Cir.1988)). The Sixth Circuit has expressly rejected the home extension exception theory;[5] however, in *Pollock*, the Sixth Circuit affirmed the district court's adoption of the vicarious consent doctrine:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. Such vicarious consent will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d).[6]

*Id.* at 610 (internal citation omitted). Therefore, although the Circuit Courts addressing the issue have used different approaches, they are uniform in holding that under certain circumstances a parent may surreptitiously record the telephone conversations of their children without violating Title III.[7]

[2] ¶ 8 We find the reasoning behind vicarious consent as explained in *Pollock* persuasive. If the parent has a good faith, objectively reasonable basis for believing that the recording of a child's telephone conversations is necessary and in the best interest of the minor, the guardian may vicariously consent on behalf of the child to the recording without violating Title III. "We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well-being." *Id.* (quoting *Scheib*, 22 F.3d at 154).

## CONCLUSION

¶ 9 Defendant concedes that G's mother had a good faith, objectively reasonable basis for believing it was necessary and in the best interest of her minor daughter to vicariously consent to the taping of the telephone conversation. Because the recording of the conversation was lawful pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d), 18 U.S.C. § 2515 does not prohibit its use as evidence.

¶ 10 Therefore, for the reasons stated in this Opinion and the Memorandum Decision, we affirm defendant's convictions and sentences.

CONCURRING: JON W. THOMPSON, Presiding Judge, and EDWARD C. VOSS, Judge.

**Parallel Citations**

56 P.3d 63, 385 Ariz. Adv. Rep. 3, 387 Ariz. Adv. Rep. 12

Footnotes

1 Defendant raises seven issues on appeal. We address the remaining six issues in a separate Memorandum Decision. *See* Ariz.R.Crim.P. 31.26.

2 G is one of two minor victims. To protect her privacy, we use only the first letter of her first name.

3 The trial court cited the district court opinion. The matter was subsequently affirmed in part and reversed in part in *Pollock v. Pollock*, 154 F.3d 601 (6th Cir.1998).

4 We do not discuss whether Congress has the authority to promulgate evidentiary rules binding on the states because the issue was not raised by either party. *See Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 203 n. 14, 16 P.3d 757, 764 (2001) ("court[s]

traditionally do [ ] not address issues not presented by the parties").

5 The home extension exception is based on 18 U.S.C. § 2510(5)(a)(i) (1996), which exempts from Title III "any telephone or telegraph instrument, equipment or facility, or any component thereof ... being used by the subscriber or user in the ordinary course of its business ...."

6 "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception ...." *See also* A.R.S. § 13–3012(9) (1997) (exempting from A.R.S. § 13–3005 any interception "effected with the consent of a party to the communication or a person who is present during the communication").

7 The Ninth Circuit has not addressed this issue.

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# Exhibit 3

# Exhibit 3

154 F.3d 601
United States Court of Appeals,
Sixth Circuit.

Samuel B. POLLOCK Jr. and Laura Pollock,
Plaintiffs–Appellants,
v.
Sandra T. POLLOCK, Oliver H. Barber, and Luann C. Glidewell, Defendants–Appellees.

No. 97–5803. | Argued April 24, 1998. | Decided Sept. 1, 1998. | Rehearing and Suggestion for Rehearing En Banc Denied Oct. 16, 1998.

Father of minor daughter and his wife sued mother and her attorneys, alleging violations of federal wiretapping statute and seeking damages and injunctive relief. The United States District Court for the Western District of Kentucky, Charles R. Simpson, III, Chief Judge, 975 F.Supp. 974, entered summary judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, McCalla, District Judge, addressing an issue of first impression, held that: (1) as long as guardian has good faith belief that **recording** is in child's best interests, guardian may **vicariously consent** on behalf of the child to the **recording** of child's telephone conversations, but (2) genuine issue of material fact as to whether mother was motivated by concern for child's best interests when she **vicariously consented** to tape **recording** of child's telephone conversations precluded summary judgment.

Affirmed in part and reversed in part.

West Headnotes (6)

[1] **Child Custody**
⇐Right to Control Child in General

As long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may **vicariously consent** on behalf of the child to the **recording**; such **vicarious consent** will be exempt from liability under federal wiretapping statute, pursuant to the consent exception. 18 U.S.C.A. § 2511(2)(d).

38 Cases that cite this headnote

[2] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Evidence raised genuine issue of material fact as to whether mother was genuinely motivated by concern for her minor child's best interests when she **vicariously consented** to tape **recording** of child's telephone conversations with child's father and father's wife precluded summary judgment in father's action against mother under federal wiretapping statute; taping began soon after mother discovered that father had hired attorney to represent daughter in ongoing domestic dispute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

34 Cases that cite this headnote

[3] **Federal Civil Procedure**
⇐Form and Requisites

An unsworn affidavit cannot be used to support or oppose a motion for summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

21 Cases that cite this headnote

[4] **Federal Civil Procedure**
⇐Form and Requisites

Unsworn affidavits which contained declarations that they were made under penalty of perjury and were signed and dated could be considered when ruling on summary judgment motion. 28 U.S.C.A. § 1746.

36 Cases that cite this headnote

[5] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Evidence raised genuine issues of material fact as to whether mother knew that **recording** of child's telephone conversations with child's father and father's wife was potentially illegal precluded summary judgement in father's action under federal wiretapping statute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

12 Cases that cite this headnote

[6] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Whether mother's attorneys knew, or should have known, that tape **recorded** conversations of mother's minor child came from an unlawful wiretap when they disclosed contents of the conversations during course of their representation of mother precluded summary judgement in action under federal wiretapping statute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

9 Cases that cite this headnote

**Attorneys and Law Firms**

*602 Samuel Manly (argued and briefed), Louisville, KY, for Plaintiffs–Appellants.

Allen K. Gailor (argued and briefed), Louisville, KY, for Defendants–Appellees.

Before: BATCHELDER and COLE, Circuit Judges; McCALLA, District Judge.*

**OPINION**

McCALLA, District Judge.

Plaintiffs Samuel and Laura Pollock appeal the judgment of the district court granting Defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56.[1] Plaintiffs brought an action against Defendants, alleging that Defendants violated the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2521 ("Title III"), when Defendant Sandra Pollock tape-**recorded** conversations between her ex-husband, Plaintiff Samuel Pollock, and their minor daughter Courtney, and between Plaintiff Samuel Pollock's current wife, Plaintiff Laura Pollock, and Courtney. On appeal, we must determine: (1) whether the statutory consent exception contained in 18 U.S.C. § 2511(2)(d) of the federal wiretapping statute permits a parent to "**vicariously consent**" to **recording** a telephone conversation on behalf of a minor child in that parent's custody, without the ***603** actual consent of the child; and (2) if "**vicarious consent**" does qualify for the consent exception, ****3** whether questions of material fact precluding summary judgment exist as to whether Defendant Sandra Pollock's **recording** of her minor daughter's phone conversations with the child's father and step-mother was motivated by concern for the child's best interest. The district court concluded that "**vicarious consent**" to **recording** a telephone conversation, by a parent on behalf of a minor child in that parent's custody, qualifies for the statutory consent exception, and found that no questions of material fact existed as to Defendant Sandra Pollock's motivation in **recording** the conversations. Accordingly, the district court granted summary judgment for Defendants. For the reasons set forth below, we **AFFIRM IN PART** and **REVERSE IN PART** the judgment of the district court.

**I.**

Samuel Pollock ("Samuel") and his current wife, Laura Pollock ("Laura"), are Plaintiffs–Appellants in this matter. Samuel's former wife, Sandra Pollock ("Sandra"), and her attorneys, Oliver Barber ("Barber") and Luann Glidewell ("Glidewell"), are Defendants–Appellees. Samuel and Sandra were married in 1977, and had three children: Courtney Pollock, born April 24, 1981; Robert Pollock, born May 24, 1984; and Ian Pollock, born July 8, 1987. Samuel and Sandra separated in 1992, after Sandra discovered that Samuel had been having an extramarital affair. Joint Appendix ("J.A.") at 127. Their divorce

became final in 1993, and the final divorce decree granted Sandra custody of all three children.

After the divorce, Samuel married Laura. In 1995, during the pendency of an appeal from the Jefferson County Circuit Court's property and support decrees, Sandra taped certain telephone conversations between Courtney and Samuel, and between Courtney and Laura. It is undisputed that Courtney, Samuel, and Laura did not consent to the **recording** of these conversations. Rather, Sandra argues that she "**vicariously consented**" to the **recording** on behalf of Courtney, a minor child in her custody, because she was concerned that Samuel was emotionally abusing Courtney.

**4 **5 A.

Careful consideration of the complete **record** in this matter is essential to the determination of the issues before us. As we conduct our analysis, it is important to be cognizant of the fact that the tape **recordings** by Sandra Pollock that form the basis of this lawsuit occurred in the context of a bitter and protracted child custody dispute. Accordingly, we begin with a summary of the events leading up to, and relating to, the tape-**recording** of the conversations by Sandra Pollock.

In May of 1994, Sandra learned that a telephone conversation between herself and her daughter Courtney had been tape-**recorded**.[2] Sandra contends that Courtney told her that Samuel and Laura had tape-**recorded** the telephone call, but that Courtney would not give any further details. J.A. at 102. Laura and Courtney contend that Courtney told Sandra that *Courtney* had **recorded** a conversation with her mother from her father's home, with Samuel and Laura's knowledge and consent. J.A. at 157, 160. Laura concedes that on April 10, 1994, "Courtney tape-**recorded** a telephone conversation with Sandra with my knowledge and consent and with the knowledge and consent of my husband, Sam."[3] J.A. at 157.

Sandra contends that Samuel was very upset about losing custody of the children, especially Courtney.[4] J.A. at 101. According *604 to Sandra's affidavit, during the divorce proceedings, and even after Jefferson County Circuit Court Judge Geoffrey P. Morris confirmed Sandra's custody of the **6 children in April of 1994,[5] she "believed that Courtney was being subject to emotional and psychological pressure by Samuel and Samuel's wife, Laura, whereby Samuel was trying to get Courtney to do whatever she could to convince [Sandra] to let Courtney primarily live with Samuel." J.A. at 102. During this process, Sandra contends that she "noticed a gradual change in Courtney which included what [Sandra] felt was a[sic] excessive or compulsive desire to be with her father and corresponding deteriorating relationship with [Sandra]." *Id.* According to Sandra, she "could not determine merely from talking with or observing Courtney how far this desire of Courtney extended but [Sandra] believed, at the minimum, the psychological and emotional pressure which she believed was being put upon Courtney by Samuel was detrimental to Courtney and perhaps rose to the state of abuse or emotional harm or injury." *Id.*

According to Sandra, it was this concern for Courtney, who was fourteen years old at the time, that caused her to place a tape **recorder** on her extension telephone in her bedroom to monitor the telephone activity at her house. J.A. at 102–03. Sandra maintains that her only motivation in doing this was "concern for her child's well being." *Id.* The monitoring began in May of 1995, and lasted only a few weeks. During the course of the monitoring, Sandra heard a conversation between Courtney and Laura "which greatly alarmed and frightened" her and "gave [her] immediate concern for the safety and well being of 3 other individuals and confirmed to [her] the abuse and emotional injury and harm she suspected Courtney was being subjected to." J.A. at 103. The **7 substance of that conversation, according to Laura,[6] was the following:

> In late May of 1995, Courtney called me up one night when Sam was not at home, and was upset and complaining of Judge Morris's decision to require her to live with Sandra. Courtney began, as is not unusual for a teenager to do, to let off steam, even to the point of remarking—*in obvious jest and with no semblance of seriousness*—that she would like to kill "the two of them," referring to Oliver Barber and Luann Glidewell [Sandra's attorneys]. In equal jest, I joined in her sentiments, adding Judge Morris to the "hit list."
>
> J.A. at 157 (emphasis in original). According to Laura, neither she, nor Courtney, took this conversation seriously, "as is obvious to anyone who would listen to the tape **recording**."[7] *Id.*

Because Sandra was disturbed by this conversation, she reported it to her attorney, Oliver Barber. J.A. at 103. After learning of the conversation's contents, Sandra alleges that Barber felt compelled by Ky.Rev.Stat. Ann. § 620.030,[8] to report the conversation to the Crimes Against Children Unit ("CACU"), a joint task force operated by the Louisville Division of Police and Jefferson County Police Department. **8 *Id.* Barber had Sandra's permission to report the conversation. *Id.* Sandra ceased monitoring after she reported this conversation to Barber.

*Id.* Subsequent to this, Courtney discovered the rest of the *605 tapes in her mother's bathroom cabinet and gave them to Samuel and Laura.

The CACU then disclosed the contents of the tape containing the above conversation to Judge Morris, who had presided over Samuel and Sandra's divorce and subsequent custody disputes. A transcript of the conversation was made a part of the official **record** in the case, and Judge Morris recused himself.

According to Samuel and Laura, Sandra was not motivated by concern for Courtney when she **recorded** the phone conversations. Instead, they contend that Sandra was angry that Courtney had taped a conversation between herself and Sandra with Samuel and Laura's consent, and "wanted to return the favor by taping Courtney's conversations with Sam and [Laura]." J.A. at 155–56. Laura further contends that immediately before the **recording** began, Sandra discovered Courtney's diary, in which Courtney had **recorded** that she was being represented by counsel (hired by her father Samuel), Rebecca Ward, incident to the then on-going dispute as to Courtney's custody. J.A. at 156. Before discovering the diary, Sandra was unaware that Courtney had her own attorney. *Id.* Rather than being motivated by concern for Courtney's welfare, Laura contends that "Sandra's predominant motive in eavesdropping on the children's calls was to overhear Courtney's confidential, attorney-client conversations with her lawyer." *Id.*

In addition, Courtney's declaration states: "I believe my mother started **recording** calls when she discovered my diary entries which said that I was being represented by my own attorney, Becky Ward. At about the same time, someone had reported my mother to the authorities for possible abuse and neglect of me and my brothers." J.A. at 159–60. As to the state of her relationship with her mother, or any deterioration thereof, Courtney states: "I simply do not get along well with my mother, and do get along well with my father and **9 stepmother. I was not happy at all living with my mother, and so told Judge Morris when he interviewed me....The decision which Judge Morris made, against my wishes, to require me to live with my mother led to the further deterioration of my relationship with her." J.A. at 159. Finally, Courtney alleges that "[her] relationship with [her] mother was not helped by [Sandra] dating a man only a few years older than [Courtney] was, who had been convicted of a crime." *Id.*[9]

Samuel and Laura filed their amended complaint on January 16, 1996. Counts 1–5 of the amended complaint allege that Sandra violated 18 U.S.C. § 2511(1)(a) by intentionally intercepting telephonic communications between two parties without either party's consent. Counts 6–11 allege that Sandra, Barber, and Glidewell violated 18 U.S.C. § 2511(1)(b)-(d) by intentionally using and disclosing the contents of these communications to third parties. Samuel and Laura also allege a violation of their right to privacy under Kentucky common law. In response to the complaint, Defendants filed a motion to dismiss, which the district court construed as a motion for summary judgment. On May 22, 1997, the district court granted summary judgment for Defendants, finding that Sandra had **vicariously consented** to the **recording** of the phone calls, and thus qualified for the consent exception found in 18 U.S.C. § 2511(2)(d). Because the court found that Sandra's interceptions of the phone conversations were not unlawful, the district court granted summary judgment as to the claims against Sandra, Barber, and Glidewell for distribution and use of the tapes. Finally, as all of the federal claims were dismissed before trial, the court dismissed the pendent state claims as well. Plaintiffs Samuel and Laura then filed this appeal.

**10 **11 II.

We review a district court's grant of summary judgment *de novo. City Management Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 250 (6th Cir.1994). Accordingly, we must consider all facts and inferences drawn therefrom in the light most favorable to the nonmoving *606 party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir.1987).

III.

Plaintiffs allege that Sandra and her attorneys violated Title III when: (1) Sandra taped conversations between Courtney and Plaintiffs; (2) Sandra disclosed these conversations to her attorneys; and (3) Sandra and her attorneys disclosed these conversations to the CACU. As set forth above, there appears to be no dispute that Sandra intentionally intercepted the phone calls or that Defendants intentionally disclosed the contents thereof.[10] Instead, this case raises two principal questions. First, whether a parent, motivated by concern for the welfare of his or her child, can "**vicariously consent**" to tape-**recording** the calls of a minor child, when the child

has not consented to the **recording**. If we answer this question in **12 the negative, judgment must be entered for Plaintiffs, and our inquiry ends there. If, however, **vicarious consent** does qualify for the consent exception to the wiretap statute, we must then address the second question: whether questions of fact precluding summary judgment exist as to Sandra's motivation in **recording** the telephone calls at issue in this case.

A.

Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability.[11] The question of whether a parent can "**vicariously consent**" to the **recording** of her minor child's phone calls, however, is a question of first impression in all of the federal circuits.[12] **13 Indeed, while other circuits have addressed cases raising similar issues, these have all been decided on different grounds, as will be discussed below. The only federal courts to directly address the concept of **vicarious consent** thus far have been a district court in Utah, *607 *Thompson v. Dulaney*, 838 F.Supp. 1535 (D.Utah 1993), a district court in Arkansas, *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998), and the district court in this case, *Pollock v. Pollock*, 975 F.Supp. 974 (W.D.Ky.1997).

B.

As a threshold matter, we note that Seventh, Tenth, and Second Circuits have decided cases with facts similar to those of this case on different grounds, holding that parental wiretapping without the consent of the minor child does not violate Title III because the **recording** was done from an extension phone within the home. *Scheib v. Grant*, 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin*, 843 F.2d 110 (2d Cir.1988); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir.1977). The "extension telephone" exemption, also known as the "ordinary course of business exemption," is set forth in 18 U.S.C. § 2510(5)(a)(i), which expressly exempts from the coverage of Title III "any telephone or telegraph instrument, equipment or facility or any component thereof ... being used by the subscriber or user in the ordinary course of its business...."

From this language, the Seventh, Tenth, and Second Circuits have held that the § 2510(5)(a)(i) exemption was intended to cover tape **recorders** attached to extension phones in the home. In *Scheib*, the Seventh Circuit stated:

> **14 The language of § 2510(5)(a)(i) juxtaposes the terms "subscriber" and "user" with the phrase "in the ordinary course of business." Although the latter phrase might be used to distinguish commercial from personal life, in the context presented here, it must be read in conjunction with the terms "subscriber" and "user." These terms certainly do not have exclusively market-oriented connotations. Reading this extension phone exemption as a whole, then, it is no lexical stretch to read this language as applying to a "subscriber's" conduct—or "business"—in raising his or her children.

*Scheib*, 22 F.3d at 154.

In 1995, however, this Court expressly rejected the line of cases holding that the extension exemption extended to the home in *United States v. Murdock*, 63 F.3d 1391 (6th Cir.1995).[13] Instead, this Court held that the statute did not permit the sort of extension phone **recordings** at issue in this case. *Murdock*, 63 F.3d at 1396 ("[W]e conclude that the **recording** mechanism (a tape **recorder** connected to extension phones in Mrs. Murdock's home) does not qualify for the telephone extension (or business extension) exemption."). The Court further noted that "spying on one's spouse does not constitute use of an extension phone in the ordinary course of business." *Id.* at 1400.[14]

Accordingly, this Court's rejection of the "extension exemption" in these types of cases dictates that the cases **15 discussed above, though cited by both parties, are not persuasive as to the issue of **vicarious consent**.

C.

The district court in the instant case held that Sandra's "**vicarious consent**" to the taping of Courtney's phone calls qualified for the consent exemption under § 2511(2)(d). Accordingly, the court held that Sandra did not violate Title III. The court based this decision on the reasoning found in *Thompson v. Dulaney*, 838 F.Supp. 1535 (D.Utah 1993), and *Silas v. Silas*, 680 So.2d 368 (Ala.Civ.App.1996).

The district court in *Thompson* was the first court to address the authority of a parent to **vicariously consent** to the taping of phone conversations on behalf of minor children. In *Thompson*, a mother, who had custody of her

three and five-year-old children, *608 **recorded** conversations between the children and their father (her ex-husband) from a telephone in her home. 838 F.Supp. at 1537. The court held:

> [A]s long as the guardian has a *good faith basis* that it is *objectively reasonable* for believing that it is *necessary* to consent on behalf of her minor children to the taping of phone conversations, **vicarious consent** will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.

*Id.* at 1544 (emphasis added). The court noted that, while it was not announcing a *per se* rule approving of **vicarious consent** in all circumstances, "the holding of [*Thompson* ] is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father." *Id.* at 1544 n. 8.

An obvious distinction between this case and *Thompson,* however, is the age of the children for whom the parents **vicariously consented**. In *Thompson,* the children were three and five years old, and the court noted that a factor in its decision was that the children were minors who "lack[ed] **16 both the capacity to [legally] consent and the ability to give actual consent." *Id.* at 1543. The district court in the instant case, in which Courtney was fourteen years old at the time of the **recording**, addressed this point in a footnote, stating:

> Not withstanding this distinction [as to the age of the children], *Thompson* is helpful to our determination here, and we are not inclined to view Courtney's own ability to actually consent as mutually exclusive with her mother's ability to **vicariously consent** on her behalf.

*Pollock v. Pollock,* 975 F.Supp. 974, 978 n. 2 (W.D.Ky.1997).

The only other federal case to address the doctrine of **vicarious consent** is also the most recent case to analyze this issue. In *Campbell v. Price,* 2 F.Supp.2d 1186 (E.D.Ark.1998), a father, who had custody of his twelve-year-old daughter, tape-**recorded** conversations between the child and her mother because the father observed that his daughter "would cry and become upset after talking with her mother on the phone," and he was concerned that the mother was emotionally abusing the child. 2 F.Supp.2d at 1187. The child's mother then brought an action against the child's father, alleging that he violated 18 U.S.C. § 2511 by intentionally intercepting and **recording** conversations between herself and her minor daughter. *Id.* at 1188. The court, noting that "[it] uncovered no cases rejecting the **vicarious consent** argument," and "find[ing] persuasive the cases allowing **vicarious consent**," adopted the concept of **vicarious consent** and granted summary judgment for the father. *Id.* at 1189. In support of its decision, the court cited *Thompson* and the district court's opinion in the instant case, and noted that these cases "clearly stand for the proposition that a defendant's good faith concern for his minor child's best interests, may, without liability under Title III, empower the parent to intercept the child's conversations with the non-custodial parent." *Id.* at 1191.

In addition, two state courts have recently addressed the issue of **vicarious consent** by a parent on behalf of a minor **17 child under the applicable state's version of the federal wiretap act, *Silas v. Silas,* 680 So.2d 368 (Ala.Civ.App.1996) and *State v. Diaz,* 308 N.J.Super. 504, 706 A.2d 264 (1998), and two state courts have addressed the issue under both the state and federal statutes, *Williams v. Williams,* 229 Mich.App. 318, 581 N.W.2d 777 (1998) and *West Virginia Dep't of Health & Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994).

In *Silas,*[15] the court held that a father had authority to consent on behalf of his seven-year-old son to taping phone conversations with the child's mother, pursuant to Alabama's version of the federal wiretap statute.[16] The court did, however, make the test *609 for valid **vicarious consent** more stringent than the one set forth in *Thompson,* in that it specifically required the parent to have a "good faith basis that it is objectively reasonable to believe that the minor child is being *abused, threatened, or intimidated by the other parent,*" *Silas,* 680 So.2d at 371 (emphasis added), as opposed to the *Thompson* court's requirement of "a good faith basis that is objectively reasonable for believing that it is necessary ... [and] in the best interests of the [child]." 838 F.Supp. at 1544. The district court in the instant case adopted the test as set forth in *Thompson. Pollock,* 975 F.Supp. at 978.

In *State v. Diaz,* 308 N.J.Super. 504, 706 A.2d 264 (1998), the court held that parents could **vicariously consent** on behalf of their five-month-old infant to **recording** a nanny abusing the child on videotape, under

New Jersey's version of the **18 federal wiretap act. The Court in *Diaz* noted that the New Jersey statute was modeled after the federal statute, and cited *Thompson* and the district court's opinion in this case in support of its holding that the state statute incorporates the theory of **vicarious consent**. *Diaz*, at 514–15, 706 A.2d 264.

Finally, two state courts have addressed this issue under both the federal and state wiretap statutes. The Court of Appeals of Michigan is the only court that has evaluated the concept of **vicarious consent** and declined to adopt it. In *Williams v. Williams*, 229 Mich.App. 318, 581 N.W.2d 777 (1998), a divorced father tape-**recorded** conversations between his five-year-old son and the child's mother. The *Williams* court reversed the lower court's grant of summary judgment for the father, holding that the "language [of Title III] gives us no indication that Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf and tape **record** telephone conversations between the child and a third party." 581 N.W.2d 777, 780. The court noted, however, that in declining to adopt the doctrine of **vicarious consent**, it was departing from the path chosen by all of the other courts that have addressed this issue. *Williams*, 581 N.W.2d 777, 781 ("[W]e nonetheless recognize that several courts in other jurisdictions have analyzed this precise issue....In general, these courts have been willing to extend the consent exception in the federal wiretapping act to include **vicarious consent** by a parent on behalf of his or her minor child to intercepting and using communications with a third party where such action is in the child's best interests.").

In the final case to address this issue, *West Virginia Dep't of Health & Human Resources v. David L.*, 192 W.Va. 663, 453 S.E.2d 646 (1994), the court discussed the concept of **vicarious consent** under both Title III and the West Virginia statute. The facts of *David L.* are distinguishable from the facts in the instant case. In *David L.*, the court held that a father violated Title III when he **recorded** conversations between his children and their mother (his ex-wife) via a tape **recorder** secretly **19 installed *in the mother's home.*[17] 453 S.E.2d at 648. The father, David L., argued that, under the state's version of the wiretap statute, he had authority to **vicariously consent** to the taping on behalf of his children. *Id.* at 653. The court rejected this argument and held that "under the specific facts of the case before us, ... a parent has no right on behalf of his or her children to give consent under W. Va.Code § 62–1D–3(c)(2) or 18 U.S.C. § 2511(2)(d), to have the children's conversations with the other parent **recorded** while the children are in the other parent's house." *Id.* at 654. In so holding, however, the court discussed *Thompson* and stated:

> *We do not disagree with the reasoning in Thompson;* however, we determine the facts of the present case are different from the facts of in *Thompson* in two significant respects. First, [in *Thompson* ], the children were physically residing with [their mother] at the time the conversations were **recorded**. Second, the conversations were **recorded** from a telephone in the house where [the mother] and her children resided. On the other hand, in the present case, first, [the mother], not [the father], was awarded temporary custody of the *610 children during the divorce proceedings. Second, the **recordings** occurred in [the mother's] house, not [the father's] house, and he had absolutely no dominion or control over [the mother's] house where he procured his mother's assistance to hide the tape **recorder**.

*Id.* (emphasis added). The court further noted:

> We draw a distinction between the present situation and a situation in which a guardian, *who lives with the children and who has a duty to protect the welfare of the children,* gives consent on behalf of the children to intercept telephone conversations *within the house where the guardian and the children reside.*

**20 **21 *Id.* at 654 n. 11 (emphasis added). Accordingly, while the court in *David L.* declined to permit **vicarious consent** in that particular case, it appears from the above language that the court did not oppose the concept of **vicarious consent** to a parental wiretap in all cases.

**D.**

[11] After this review of the relevant case law, we conclude that although the child in this case is older than the children in the cases discussed above in which the doctrine of **vicarious consent** has been adopted, we agree with the district court's adoption of the doctrine, provided that a clear emphasis is put on the need for the "consenting" parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. Accordingly, we adopt the standard set forth by the district court in *Thompson* and hold that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to

consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may **vicariously consent** on behalf of the child to the **recording**. *See Thompson*, 838 F.Supp. at 1544. Such **vicarious consent** will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d).

We stress that while this doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: "I was doing it in his/her best interest," there are situations, such as verbal, emotional, or sexual abuse by the other parent, that make such a doctrine necessary to protect the child from harm. It is clear that this is especially true in the case of children who are very young. It would be problematic, however, for the Court to attempt to limit the application of the doctrine to children of a certain age, as not all children develop emotionally and intellectually on the same timetable, and we decline to do so.

Moreover, support for adopting the doctrine is found in the decisions of the Seventh, Tenth, and Second Circuits which ****22** have permitted parental taping of minor children's conversations in situations similar to this one on the "extension exemption" ground. *Scheib v. Grant*, 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin*, 843 F.2d 110 (2d Cir.1988); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir.1977). Thus, while these cases address the question from a different perspective than the instant case, the end result—that these kinds of wiretaps should be permitted in certain instances—supports adoption of the doctrine. *See Scheib*, 22 F.3d at 154 ("We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for **recording** their minor child's phone conversations out of concern for that child's well-being.").[18] Accordingly, the district court's adoption of the concept of **vicarious consent** is **AFFIRMED.**

## IV.

[2] We turn next to the question of whether questions of material fact exist as to Sandra's motivation and purpose in taping the telephone conversations at issue that would preclude summary judgment for the Defendants. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to ***611** any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," *id.* at 323, 106 S.Ct. 2548, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. *Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir.1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden–Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir.1986).

****23** When confronted with a properly supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52, 106 S.Ct. 2505.

### A.

The district court found that no question of material fact existed as to whether Sandra was motivated by genuine concern for her child's best interest, and granted summary judgment for Defendants. We disagree. Upon a *de novo* review of the **record**, it appears that questions of fact precluding summary judgment exist as to whether Sandra had a good faith basis that was objectively reasonable for believing it was necessary to consent on behalf of her minor child to the taping of these conversations.

As set forth above, both Laura and Courtney submitted declarations asserting that Sandra was motivated by something other than concern for her child's welfare. The allegations that Sandra was taping the phone conversations to gain access to Courtney's attorney-client communication with her lawyer, combined with the fact that the taping began soon after Sandra found the diary in which Courtney stated that her father had hired a lawyer to represent her, without Sandra's knowledge or consent, create a question of material fact as to Sandra's motives. J.A. at 155–56. Moreover, Courtney's allegations in her declaration that the deterioration in her relationship with her mother was caused by the fact that she did not get

along with her mother, and by her mother's relationship with a convicted felon "only a few years older than [Courtney]," rather than by anything done by her father, **24 further contribute to our determination that questions of material fact exist. J.A. 159–60.[19]

[3] [4] The district court did not directly address any of the statements contained in Laura's and Courtney's declarations.[20] In *612 granting summary judgment for Defendants, the district court stated:

> We find no ... countervailing evidence offered by the plaintiffs that would eviscerate Sandra's **vicarious consent** defense here and preclude summary judgment. Sandra's affidavit clearly supports her claim that she acted to protect the welfare of her children in taping the conversations at issue.... [P]laintiffs have offered no evidence tending to suggest that the **vicarious consent** defense is inappropriate here or that Sandra's "child **25 welfare" contention is pretextual. The plaintiffs cannot simply point to the tension and bitterness among the parties and expect the court to leap to the conclusion that Sandra's motives in taping were improper.[21]

*Pollock v. Pollock,* 975 F.Supp. 974, 979 (W.D.Ky.1997). In support of the decision to grant summary judgment, the district court cited *Silas* and *Scheib,* in which summary judgment was granted in favor of the taping parent. The facts in these two cases, however, were quite different than those in the instant case. In *Silas,* the father asserted that he began taping conversations between his seven-year-old son and the child's mother after "observing several instances when the minor child became extremely upset and began to cry during the telephone conversations." *Silas v. Silas,* 680 So.2d 368, 371 (Ala.Civ.App.1996). In *Scheib,*[22] the father who taped his eleven year old child's phone conversations stated that "on more than one occasion, [the child] became upset after speaking with his mother." *Scheib v. Grant,* 22 F.3d 149, 150 (7th Cir.1994).[23] In contrast, here Sandra states only that she "noticed a gradual change in Courtney which included what [Sandra] felt was a[sic] excessive or compulsive desire to be **26 with her father and corresponding deteriorating relationship with [Sandra]." J.A. at 102.

In *Thompson,* the district court, after approving of the doctrine of **vicarious consent**, declined to grant summary judgment because there was conflicting evidence as to what the mother's "purpose" was in intercepting the conversations. *Thompson v. Dulaney,* 838 F.Supp. 1535, 1545 (D.Utah 1993). Given the conflicting evidence offered by the parties, we find that there is a dispute as to material facts, making this case inappropriate for summary judgment. Thus, as in *Thompson,* while the doctrine of **vicarious consent** is properly adopted, there are questions of material fact as to Sandra's motivation in taping the conversations, and this issue should be submitted to a jury.

**B.**

If the jury determines that Sandra did properly consent on behalf of her minor child because she had a good faith, objectively reasonable belief that such consent was necessary and in the best interest of the child, judgment must be entered for Defendants as to the use and disclosure claims against Sandra, Barber, and Glidewell because the taping of the conversations would not, therefore, have been illegal. In order to state a claim for use or disclosure in violation of Title III, the communication at issue must be the product of an illegal wiretap. 18 U.S.C. § 2511(1)(c)-(d). If, however, the jury determines that Sandra was motivated by something other than concern for her child, it will have to evaluate the use and disclosure *613 claims and determine whether Sandra and her lawyers "knew or should have known" that the communication was the product of an illegal wiretap. *Id.*

[5] There are also questions of fact as to whether Sandra and her attorneys knew that the wiretap itself was potentially illegal. Sandra claims that she did not know the wiretap was **27 potentially illegal,[24] and that as soon as she learned it was, she stopped taping. J.A. at 102–04. Plaintiffs contend that they have a tape (one of Sandra's tapes provided to them by Courtney) on which Sandra has a discussion with another adult woman in which "Sandra goes to great lengths to explain to the other woman that her conversation with Sandra is being tape **recorded**. Sandra says herself that she is so advising the other woman because Sandra believes it is illegal to tape **record** telephone conversations without the knowledge of the other person whose call is being **recorded**." J.A. at 154–55.

[6] As to Sandra's attorneys, Barber and Glidewell, it appears undisputed that these Defendants did use or disclose the contents of these conversations during the course of their representation of Sandra. Whether they knew, or should have known, that the material came from an unlawful wiretap, however, is a question of fact for the jury.[25] *See Thompson,* 838 F.Supp. at 1548 (declining to grant summary judgment as to father's use and disclosure claims against mother's attorneys and stating: "Whether [the attorneys] knew the material came from an unlawful wiretap, ... is a question of fact which this Court may not

decide.").

Accordingly, the district court's grant of summary judgment is **REVERSED**, and this case is **REMANDED** for a trial on the disputed issues in this case in accordance with this opinion.

## CONCLUSION

In summary, we **AFFIRM** the district court's adoption of the doctrine of **vicarious consent** as set forth above, **28 REVERSE** the district court's grant of summary judgment, and **REMAND** this matter for trial.

**Parallel Citations**

1998 Fed.App. 0271P

Footnotes

* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

1 Defendants' motion was styled as a motion to dismiss Plaintiffs' amended complaint pursuant to Fed.R.Civ.P. 12(b)(6). Because both parties' briefs included, and relied upon, extraneous material, the district court construed Defendants' motion as a motion for summary judgment. *See* Fed.R.Civ.P. 12(b).

2 It is unclear whether Courtney told Sandra that one conversation, or multiple conversations, had been **recorded**.

3 Although this incident may or may not be a contributing factor to Sandra's later taping of Courtney's conversations with Samuel and Laura, it is not the taping incident at issue in this case.

4 The **record** contains copies of two settlement letters from Samuel's attorney in which he offers to drop this lawsuit in exchange for joint custody of Courtney, with Courtney residing with him. J.A. at 146–51.

5 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law note that Judge Morris interviewed Courtney and she expressed that she preferred to stay with her father, rather than her mother. J.A. at 113. Even so, Judge Morris found that Sandra should retain custody of Courtney. On May 13, 1995, Judge Morris issued Amended Findings of Fact and Conclusions of Law, again confirming his prior grant of custody of Courtney to Sandra, over Courtney's and Samuel's objections. J.A. at 128.

6 A transcript of the actual conversation is not included in the **record**, and Sandra does not discuss the contents of the conversation in her affidavit. Accordingly, the only sources regarding this conversation are the declarations submitted by Laura and Courtney, which describe the conversation as set forth above.

7 The Court was not provided with a copy of the tape.

8 Ky.Rev.Stat. Ann. § 620.030 provides:

> (1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky state police....

9 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law make reference to a Mr. Kevin Downs as follows: "The relationship [Sandra] has established with a convicted felon (Mr. Kevin Downs) and her visits to see Mr. Downs while in jail has required this Court to order [Sandra] not to allow the children to have any contact with Mr. Downs." J.A. at 113.

10 Title 18 U.S.C. § 2511(1) provides that a claim under Title III can be made against any person who:

> (a) intentionally intercepts ... the contents of any wire, oral, or electronic communication; ...
> (c) intentionally discloses ... to any 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 ... 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....

11 Title 18 U.S.C. § 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception....

12 We note that although it can be argued, from a policy perspective, that the federal courts should stay out of these kinds of domestic disputes, that option has been foreclosed by the decisions of this Court and numerous other federal courts. In one of the earliest cases to address the issue of domestic wiretaps in a case involving interspousal wiretapping, *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir.1974), *cert. denied*, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974), the Fifth Circuit stated, "The naked language of Title III, by virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a result, one extending into areas normally left to states, those of the marital home and domestic conflicts." While the Fifth Circuit has not overruled that decision, it has been severely criticized by a number of other circuits, beginning with this Court in *United States v. Jones*, 542 F.2d 661, 673 (6th Cir.1976) (holding that "the plain language of § 2511 and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps"). *See also Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir.1991) (holding that "Title III does apply to interspousal wiretapping within the home"), *cert. denied*, 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir.1989) (holding that "the conduct of a spouse in wiretapping the telephone communications of the other spouse within the marital home falls within [Title III's] purview"); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir.1984) (stating that there is "no legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping").

13 In *Murdock*, the defendant had been convicted after the district court admitted into evidence incriminating tape-**recordings** made by his estranged wife.

14 In *State v. Shaw*, 103 N.C.App. 268, 404 S.E.2d 887 (1991), the North Carolina Court of Appeals held that a mother who **recorded** her son's telephone conversation regarding an upcoming drug deal, from a telephone extension in her home using a microcassette **recorder**, violated Title III. ("There was no evidence before the trial court that the mother used a microcassette **recorder** 'in the ordinary course of business.' ") *Shaw*, 404 S.E.2d at 889.

15 The district court in this case also relied upon *Silas* in support of its decision.

16 The *Silas* court also addressed the question of parental wiretaps under Title III and held, in accordance with the circuits discussed *supra*, that the father's actions were exempt under the "extension exemption." 680 So.2d at 370. As set forth above, that exemption is not available as a basis for the decision in this case. *United States v. Murdock*, 63 F.3d 1391 (6th Cir.1995).

17 The children's paternal grandmother installed the tape **recorder** in the children's bedroom, pursuant to her son's request, when she was in the mother's home babysitting the children.

18 The child in *Scheib* was eleven years old. 22 F.3d at 150.

19 In addition, Courtney alleges that at about the same time that Sandra began taping the phone conversations, "someone had reported [Sandra] to the authorities for possible abuse and neglect of me and my brothers." J.A. at 160. Reading all inferences of fact in favor of Plaintiffs, as we must do on Defendants' motion for summary judgment, we note that such an allegation against her could provide further motive for Sandra to embark on a mission to "gather dirt" on Samuel in the context of their battle for custody of the children.

20 Defendants acknowledge that the district court did not directly address Laura and Courtney's allegations. In doing so, however, Defendants make much of the fact that the declarations were "unsworn affidavits." An unsworn affidavit cannot be used to support or oppose a motion for summary judgment. *See Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968–69 (6th Cir.1991) ("the unsworn statements of the two employees ... must be disregarded because a court may not consider unsworn statements when ruling on a motion for summary judgment"). However, a statutory exception to this rule exists which permits an unsworn declaration to substitute for a conventional affidavit if the statement contained in the declaration is made under penalty of perjury, certified as true and correct, dated, and signed. 28 U.S.C. § 1746; *see also Williams v. Browman*, 981 F.2d 901, 904 (6th Cir.1992). Both Laura's and Courtney's declarations contain the statement: "I declare, under penalty of perjury, that the foregoing is true and correct," and both declarations are signed and dated. J.A. at 157, 160. Accordingly, we must consider these declarations when deciding this appeal.

21 Similarly, we cannot simply look to Sandra's poor relationship with her daughter and "leap to the conclusion" that Samuel was the cause of the deterioration of that relationship.

22 As discussed above, in *Scheib*, the Seventh Circuit permitted parental wiretapping on the "extension exemption" ground.

23 We note that summary judgment was also granted for the defendants in *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998), which was decided subsequent to the district court's opinion in this case. As in *Silas* and *Scheib*, the taping parent in *Campbell*, the child's father, offered evidence to substantiate his claim that the **recording** of the child's phone conversations was motivated by legitimate concern that the child's relationship with her mother was potentially abusive. *Id.* at 150–51. The child's father submitted an affidavit stating that "his daughter would cry and become upset after talking with her mother on the telephone, that she would 'mope around' and 'go into her room and just sit there' and that she was 'not willing to talk about what was wrong with her.' " *Id.*

24 However, Sandra does concede, as she must, that Courtney was unaware of, and did not consent to, the taping.

25 The **record** does not contain any affidavits from Barber and Glidewell as to what they knew, or did not know, about the **recording**.

End of Document

# Exhibit 4

# Exhibit 4

360 S.W.3d 416
Court of Appeals of Tennessee,
Eastern Section, at Knoxville.

Chris LAWRENCE
v.
Leigh Ann LAWRENCE.

No. E2010–00395–COA–R3–CV. | Nov. 8, 2010 Session. | Nov. 29, 2010. | Permission to Appeal Denied bySupreme Court April 13, 2011.

**Synopsis**

**Background:** Father brought action against mother seeking damages for, among other things, wiretapping, arising out of mother secretly tape recording their two-and-one-half-year-old daughter's telephone conversation with father during course of divorce and custody dispute. The Circuit Court, Knox County, Dale C. Workman, J., entered partial summary judgment in favor of mother. Father appealed.

**[Holding:]** The Court of Appeals, Charles D. Susano, Jr., J., held that mother had the right to vicariously consent, within meaning of wiretapping statute, to interception of child's telephone conversation with father, precluding mother's liability.

Affirmed; case remanded.

West Headnotes (3)

[1] **Parent and Child**
⇐Compromise, settlement, waiver, and release
**Telecommunications**
⇐Persons concerned; consent

Mother had the right to vicariously consent, within meaning of wiretapping statute, to intercepting, recording, and disclosing two-and-one-half-year-old child's telephone conversation with father during the course of a divorce and custody dispute, precluding mother's liability. West's T.C.A. § 39–13–601(b)(5).

2 Cases that cite this headnote

[2] **Parent and Child**
⇐Care, Custody, and Control of Child; Child Raising

Child-rearing autonomy encompasses unrestricted control of a two-and-one-half–year–old child's access to the telephone, including to whom the child speaks and when the child speaks and under what conditions the child speaks.

Cases that cite this headnote

[3] **Infants**
⇐Validity

Society's concern for minors may be constitutionally reflected in statutes to account for: (1) minors' peculiar vulnerabilities and their need for concern, sympathy, and paternal attention; (2) minors' inability to make sound judgments about their own conduct; and (3) the courts' deference to the guiding role of parents.

Cases that cite this headnote

**Attorneys and Law Firms**

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R. Deno Cole, Knoxville, Tennessee, for the appellee, Leigh Ann Lawrence.

## OPINION

CHARLES D. SUSANO, JR., delivered the opinion of the Court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

CHARLES D. SUSANO, JR.

Leigh Ann Lawrence ("Mother") secretly tape recorded her 2 1/2–year–old daughter's telephone conversation with the child's father, Chris Lawrence ("Father"), during the course of a divorce and custody *417 dispute. After the divorce was concluded, Father filed a complaint against Mother seeking damages for, among other things, wiretapping in violation of Tenn.Code Ann. § 39–13–601 (2006). Father filed a motion for partial summary judgment which the trial court denied upon finding that "[n]o set of facts would create liability under § 39–13–601 et seq. for [Mother's] interception of [Father's] communication with his daughter." The court then entered partial summary judgment in favor of Mother and certified the judgment as final. Father appeals. We affirm.

### I.

The parties agree that the following facts are undisputed:

> [Mother] secretly recorded a phone conversation between [Father] and his daughter.
>
> [Mother's] recording actions were intentional.
>
> [Mother's] recording was made without [Father's] knowledge or consent.
>
> [Mother] was not a party to the conversation between [Father] and his daughter that [Mother] recorded.
>
> [Mother] recorded the conversation sometime in late May or early June of 2007.
>
> The parties' child was approximately 2 1/2 years old at the time of the recording, and had no capacity to provide consent to the recording of the conversation between the child and [Father].
>
> Regardless of whether the parties' child had the capacity to provide consent, the child had no knowledge of the recording device, and to make the recording, [Mother] stationed herself at a phone other than the phone being used by the parties' daughter to speak with [Father], to not alert the child to the fact that [Mother] was holding a tape recorder, because the child would have wanted to sing into the tape recorder or play with it.
>
> [Mother] disclosed the recording to a third party, a psychologist ... who was conducting a custody evaluation in connection with the parties' divorce.
>
> The parties were going through a divorce proceeding in 2007.

The above facts are taken verbatim from Father's "[Tenn. R. Civ. P.] 56.03 Statement of Material Facts." Mother filed her own statement of facts which the parties have addressed in the following stipulation filed in this Court:

> [Father] filed a Motion for Partial Summary Judgment on May 29, 2009.
>
> [Mother] waived the 30–day provision under TRCP 56, to allow [Father's] motion to be heard on June 26, 2009.
>
> The trial court entertained [Father's] motion on June 26, 2009.
>
> The trial court made its pronouncement relating to [Father's] motion on June 26, 2009.
>
> [Mother] filed her Motion for Partial Summary Judgment on June 29, 2009.
>
> The trial court has never entertained a hearing on [Mother's] motion; however the parties stipulated, pursuant to the Order entered February 1, 2010 ..., that [Mother's] Motion for Partial Summary Judgment should be granted, in light of the trial court's findings that [Father's] invasion of privacy claim was non-justiciable.
>
> [Mother] stated "Additional Material Facts" in her June 22, 2009 response to [Father's] ... Statement of Material Facts, in order to raise the defense of the vicarious consent doctrine and create a question of fact as to whether she had a good faith, objectively reasonable basis for believing it was necessary and in the best interests of the parties' minor child to consent on behalf of her to the taping *418 of a conversation with [Father] and the minor child.
>
> The parties stipulate that these Additional Material Fact statements sworn to by [Mother], as part of [Mother's] Motion for Partial Summary Judgment, were not

 

operative in the granting of [Mother's] Motion for Partial Summary Judgment.

The parties stipulate that if the court construes the law in such a way that the Additional Material Fact statements sworn to by [Mother] would become operative, then the case should be returned to the trial court to allow [Father] an opportunity to demonstrate that a genuine issue of material fact exists with respect to these statements.

The trial court stated its reasons for granting partial summary judgment in favor of Mother as follows:

The Tennessee wiretapping act found at § 39–13–601 et seq. does not abrogate a parent's constitutionally protected common law right and duty to protect the welfare of his or her child. This act is overbroad in its application to the set of circumstances involving parents and their children's telephone conversations. Therefore, this court finds that a parent has an unrestricted right to vicariously consent to the interception and recording of any phone conversation between a child and any other person, including another parent.

The parties agree that the Court's ruling renders Count 1 of [Father's] Complaint non-justiciable. No set of facts would create liability under § 39–13–601 et seq. for [Mother's] interception of [Father's] communication with his daughter. Therefore [Mother's] Motion for Partial Summary Judgment, filed on June 29, 2009, should be granted.

(Paragraph numbering omitted.) As we have stated, the trial court certified the judgment as final pursuant to Tenn. R. Civ. P. 54.02.[1]

II.

Father has appealed. The single issue he raises is

> [w]hether the Trial Court ... erred by denying summary judgment to [Father] and granting summary judgment to [Mother], when he found that no set of facts would create liability under the Tennessee wiretapping statute, TCA § 39–13–601 et seq., for [Mother's] actions of eavesdropping and taping [Father's] phone conversation with their 2 1/2–year–old daughter.

III.

[1] We are called upon to construe the term "consent" as it is used in Tenn.Code Ann. § 39–13–601 to determine whether Mother had an "unrestricted right to vicariously consent" to the interception of her daughter's telephone conversation. Issues of statutory construction are issues of law, *419 which we review *de novo* without a presumption of correctness as to the trial court's construction. *Leab v. S & H Mining Co.*, 76 S.W.3d 344, 348 (Tenn.2002). A trial court's determination that no set of facts can be proven which will afford relief is equivalent to dismissal for failure to state a claim and is also reviewed *de novo*. *Trau–Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696–697 (Tenn.2002).

IV.

Before we look at the exact statutory language at issue, it will be helpful to have some context for the language we will be examining; Tenn.Code Ann. § 39–13–601 identifies prohibited conduct, § 602 sets forth the criminal penalty for the prohibited conduct, and § 603 provides a private right of action to "any aggrieved person whose wire, oral or electronic communication is intentionally intercepted, disclosed or used in violation of § 39–13–601 ..." The pertinent part of § 39–13–601 reads as follows:

(a)(1) Except as otherwise specifically provided in §§ 39–13–601—39–13–603 ... a person commits an offense who:

(A) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor 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 (a);

* * *

(2) A violation of subdivision (a)(1) shall be punished as provided in § 39–13–602 and shall be subject to suit as provided in § 39–13–603.

(b)....

* * *

(5) *It is lawful* under §§ 39–13–601—39–13–603 and title 40, chapter 6, part 3 *for a person* not acting under color of law *to intercept a wire, oral, or electronic communication,* where the person is a party to the communication or *where one of the parties to the communication has given prior consent to the interception,* unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the state of Tennessee.

* * *

(Emphasis added.) The word "consent" is not defined in Tenn.Code Ann. § 39–13–601.

The parties agree that this is an issue of first impression in Tennessee. The lack of a definition and the obvious inability of a 2 1/2–year–old child to consent to a phone call or the recording of same convinces us that the statute is ambiguous and therefore subject to interpretation. *See State v. Spencer,* 737 N.W.2d 124, 129 (Iowa 2007)("Iowa's legislative policy ordinarily requires a parent's or guardian's input. With this in mind, we find ... the word "consent" as used in [Iowa's wiretapping statute] is ambiguous when applied to minors."). We have a duty to construe the term in such a way to avoid any constitutional conflict if it is susceptible to such a construction. *Jordan v. Knox County,* 213 S.W.3d 751, 780 (Tenn.2007).

The parties agree that parents have a fundamental constitutional right to make decisions concerning the care, custody and control of their children. *See Hawk v. Hawk,* 855 S.W.2d 573, 577–79 (Tenn.1993). In fact, the right of a parent to *420 make decisions for a child without state interference is bounded only by "the state's authority as *parens patriae* ... to prevent serious harm to a child." *Id.* at 580. The Tennessee Supreme Court has held that

> [t]he relations which exist between parent and child are sacred ones.... The right to the society of the child exists in its parents; the right to rear it, to its custody, to its tutorage, the shaping of its destiny, and all of the consequences that naturally follow from the relationship are inherently in the natural parents.
>
> ...

*Hawk,* 855 S.W.2d at 578 (quoting *In re Knott,* 138 Tenn. 349, 355, 197 S.W. 1097, 1098 (1917)). A parent has a right to "childrearing autonomy" unless and until a showing is made of "a substantial danger of harm to the child." *Id.* at 579.

[2] It is readily apparent to us that "childrearing autonomy" encompasses control of a 2 1/2–year–old child's access to the telephone, including to whom the child speaks and when the child speaks and under what conditions the child speaks. We are also inclined to agree with the trial court that as to a 2 1/2–year–old, this right is "unrestricted." We are not, by this opinion, painting a bright line as to age. *See Cardwell v. Bechtol,* 724 S.W.2d 739, 744–45 (Tenn.1987)(recognizing "varying degrees of maturity" and that normally a child under age seven has no capacity to consent). Since 2 1/2 is obviously an age at which a child is too young to give consent, we see no need to determine a bright line rule in this case.

It is true, as Father argues, that divorce proceedings necessarily interject the government into the realm of "the parents' constitutionally protected fundamental liberty interest in the care and custody of their children." *Tuetken v. Tuetken,* 320 S.W.3d 262, 272 (Tenn.2010)(*quoting Lee v. Lee,* 66 S.W.3d 837, 847 (Tenn.Ct.App.2001)). Father therefore argues that the parental bill of rights codified at Tenn.Code Ann. § 36–6–101(a)(3) (Supp.2009) reflects a policy decision by the legislature that limits Mother's rights to make decisions for the child. Father relies specifically on the "right to unimpeded telephone conversations with the child at least twice a week at reasonable times and for reasonable durations." *Id.* We note that the divorce court retains the ability to deny the listed rights "when the court finds it not to be in the best interests of the affected child." *Id.*

We believe Father focuses on the wrong question. The question is not whether the court with divorce jurisdiction can allocate rights between litigating parents. Clearly it can. It can enforce its decrees in any number of ways, including contempt and sanctions. *See Hannahan v. Hannahan,* 247 S.W.3d 625, 628 (Tenn.Ct.App.2007)("Husband was obligated to comply with the terms of the April 5, 2006 order which he signed, and we find no error in the trial court's decree holding him in contempt for his failure to do so."); *see also* Tenn. R. Civ. P. 69.

The pertinent question in this case is whether the legislature intended to subject a parent to criminal penalties and money damages for eavesdropping, from another telephone, on a 2 1/2–year–old child's telephone conversation without the child's knowledge. For the

reasons we have already identified, we do not believe the legislature intended to invade the parent-child relationship. Further, we do not believe that the legislature intended to impose criminal penalties and money damages with respect to a telephone conversation between a parent and a 2 1/2–year–old child during the pendency of a divorce proceeding. Accordingly, we hold that, as *421 a matter of law, Mother had the right to consent, as that term is used in Tenn.Code Ann. § 39–13–601, vicariously to intercepting, recording and disclosing the child's conversation with Father.

Our holding is in accord with the *result* produced under a variety of tests in other jurisdictions. The leading case under the federal wiretapping statute is *Pollock v. Pollock*, 154 F.3d 601 (6th Cir.1998). In *Pollock*, a mother recorded her 14–year–old daughter's conversation with her stepmother. *Id.* at 604. The court recognized that several other federal circuits had held that parental wiretapping without the consent of a minor child did not violate the federal law because it was done from an extension phone as part of "the ordinary course of business" of raising children. *Id.* at 607. The Sixth Circuit could not follow that same path because it had, in another case, rejected the proposition that recording from an extension phone was part of the "ordinary course of business." *Id.* Instead, the court held that "as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording." *Id.* at 610. The court adopted the objective test because of concern that a parent might abuse the doctrine of vicarious consent by falsely claiming to act in the best interest of the child. Also, the court rejected the idea of "limit[ing] the application of the doctrine to children of a certain age," but recognized the greatest need for vicarious consent is "in the case of children who are very young." *Id.*

A recent state case that took a broad look at the law in various jurisdictions and allowed parental recording of a child's conversation is *Spencer*, 737 N.W.2d 124. *Spencer* involved the criminal prosecution of a teacher for sexual exploitation of his 13–year–old female student. Part of the evidence against him was a tape recording the student's father had made without the child's knowledge. The case came before Iowa's Supreme Court on appeal from the criminal court's suppression of the evidence as a violation of Iowa's wiretapping law. *Id.* at 126. The Supreme Court, after surveying the cases from other jurisdictions, reversed the suppression and held that the father had the ability to vicariously consent for the child. *Id.* at 132.

[3] Although the *Spencer* Court imposed some restrictions on the ability to vicariously consent that we have not imposed by our holding, its analysis is consistent with our result in several important respects. First, it recognized that "[s]ociety's concern for minors may be constitutionally reflected in ... statutes to account for: (1) minors' peculiar vulnerabilities and their need for concern, sympathy, and paternal attention; (2) minors' inability to make sound judgments about their own conduct; and (3) our deference to the guiding role of parents." *Id.* at 132. We agree. Second, it recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* We have articulated that same right under the Tennessee Constitution. Third, it recognized that "the minor's age ... is also an important factor in considering whether a parent or guardian can vicariously consent for the minor child." *Id.* at 131. We believe that in the case of a 2 1/2–year–old, the right to vicariously consent exists as a matter of law.

## V.

To the extent that non-Tennessee cases cited by us go beyond our holding in this case, we do not find it necessary to state our approval or disapproval of those portions *422 of the other jurisdictions' holdings that go beyond our own.

## VI.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Chris Lawrence. This case is remanded, pursuant to applicable law, for collection of costs assessed by the trial court.

Footnotes

1 The pertinent text of Rule 54.02 is as follows:

> When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court, whether at law or in equity, may direct the entry of a final judgment

as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

From statements in the briefs, it appears that the other counts in the complaint were non-suited. However, we have not found an order of dismissal in the record nor do we see an order of dismissal listed in the docket sheet that is part of the record. Therefore, we rely on the order of certification to provide finality to the judgment.

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# Exhibit 5

# Exhibit 5

923 So.2d 732
Court of Appeal of Louisiana,
First Circuit.

Markus Lee SMITH
v.
Michaelle Lea SMITH.

No. 2004 CU 2168. | Sept. 28, 2005.

**Synopsis**

**Background:** Ex-wife appealed from decision of the Twenty–First Judicial District Court, Parish of Livingston, Trial Court Number 71,057, Ernest G. Drake, Jr., J., modifying the parties' custodial arrangement from joint custody, with ex-wife designated as the domiciliary parent of the minor child, to sole custody in favor of ex-husband.

**Holdings:** The Court of Appeal, Welch, J., held that:

[1] ex-husband had a good faith, objectively reasonable basis for believing that it was necessary and in child's best interest for ex-husband to consent, on behalf of child, to the interception of child's conversations with ex-wife; and

[2] modification of custody was warranted.

Affirmed.

McClendon, J., filed concurring opinion.

West Headnotes (14)

[1] **Child Custody**
⇐Interference with custody rights
**Telecommunications**
⇐Persons concerned; consent

In context of child custody modification action, ex-husband had a good faith, objectively reasonable basis for believing that it was necessary and in child's best interest for ex-husband to consent, on behalf of child, to the interception of child's conversations with ex-wife, and, thus, ex-husband's actions fell under consent exception set forth in wiretapping statute, and therefore, the wiretapped conversation did not violate the statute; child was residing equally with ex-husband and ex-wife, child was residing with ex-husband at time wiretapped conversation was recorded, and ex-husband wiretapped telephone because of his concern that ex-wife was alienating him from child. LSA–R.S. 15:1303(C)(4).

Cases that cite this headnote

[2] **Telecommunications**
⇐Persons concerned; consent

Although law generally prohibits the interception of wire or oral communications, an exception is made where the interceptor is a party to the communication or where one of the parties consents to the interception. LSA–R.S. 15:1303(C)(4, 5).

Cases that cite this headnote

[3] **Telecommunications**
⇐Persons concerned; consent

Vicarious consent doctrine is applicable to the consent exception set forth in wiretapping statute when the parent has a good faith, objectively reasonable basis to believe that it is necessary and in the child's best interest to consent on behalf of child to the taping of child's telephone conversations. LSA–R.S. 15:1303.

4 Cases that cite this headnote

[4] **Child Custody**
⇐Interference with custody rights

**Telecommunications**
⇐Persons concerned; consent

Since the law provides that the paramount consideration in any determination of child custody is the best interest of the child, in the context of a child custody modification proceeding, a parent, who is in his own home, should be able to consent to the interception of the child's communications with the other parent, if the parent has a good faith, objectively reasonable basis to believe that such consent to the interception is necessary and in the best interest of the child.

1 Cases that cite this headnote

[5] **Telecommunications**
⇐Persons concerned; consent

Since the law provides that minors do not have the capacity to consent to juridical acts, such as marriage, contracts, matrimonial agreements, and likewise vests parents with the authority to protect their children, to make all decisions affecting their minor children and to administer their minor children's estates, it follows that a parent should have the right to consent, on behalf of a child lacking legal capacity to consent, to an interception of the child's communications, particularly if it is in the child's best interest.

1 Cases that cite this headnote

[6] **Appeal and Error**
⇐Rulings on admissibility of evidence in general
**Trial**
⇐Admission of evidence in general

Generally, the trial court is granted broad discretion on its evidentiary rulings, and its determinations will not be disturbed on appeal absent a clear abuse of that discretion.

7 Cases that cite this headnote

[7] **Evidence**
⇐Determination of question of competency
**Evidence**
⇐Testimony of Experts

The trial court has great discretion in determining the qualifications of experts and the effect and weight to be given to expert testimony.

Cases that cite this headnote

[8] **Appeal and Error**
⇐Competency of witness

Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, an appellate court will not reject the testimony of an expert or find reversible error.

Cases that cite this headnote

[9] **Evidence**
⇐Medical testimony

Since wiretapped conversation between ex-wife and child did not violate wiretapping statute and, thus, was admissible into evidence, doctor could testify and render an expert opinion in child custody action based on that conversation. LSA–R.S. 15:1303.

Cases that cite this headnote

[10] **Costs**
⇐Nature and Grounds of Right
**Telecommunications**
⇐Persons concerned; consent

Sanctions were not warranted against

ex-husband in child custody modification action, since ex-husband's actions in wiretapping conversation between ex-wife and child fell under consent exception set forth in wiretapping statute. LSA–R.S. 15:1303.

Cases that cite this headnote

[11] **Child Custody**
Joint custody

Modification of parties' custodial arrangement from joint custody, with ex-wife designated as the domiciliary parent of the child, to sole custody in favor of ex-husband was warranted because it was in child's best interest; during telephone conversation with child, ex-wife criticized the child for being honest with doctor who conducted psychological custody evaluation, told the child that she had hurt ex-wife with the things that child had told doctor, and that, since the evaluation was not in ex-wife's favor, ex-wife and child needed to strategize to salvage the situation.

Cases that cite this headnote

[12] **Child Custody**
Dependency on particular facts

Every child custody case must be viewed in light of its own particular set of facts and circumstances.

Cases that cite this headnote

[13] **Child Custody**
Welfare and best interest of child

Paramount consideration in any determination of child custody is the best interest of the child.

Cases that cite this headnote

[14] **Child Custody**
Discretion
**Child Custody**
Questions of Fact and Findings of Court

Trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances, and accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown.

Cases that cite this headnote

**Attorneys and Law Firms**

*734 Charlotte A. Pugh, Angela D. Sibley, Denham Springs, for Plaintiff—Appellee Markus Lee Smith.

Frank Ferrara, Walker, for Defendant—Appellant Michaelle Lea Smith.

Before: WHIPPLE, McCLENDON, and WELCH, JJ.

**Opinion**

WELCH, J.

**2 In this child custody dispute, the mother, Michaelle Lea Smith (now "Duncan"), appeals a judgment modifying the parties' custodial arrangement from joint custody, with Michaelle Duncan designated as the domiciliary parent of the minor child, to sole custody in favor of the father, Markus Lee Smith, subject to supervised visitation by Michaelle Duncan with the minor child. Based on the record before us, we find no abuse of the trial court's discretion and therefore, we affirm the judgment.

## FACTUAL AND PROCEDURAL HISTORY

The parties in this matter, Markus Smith and Michaelle Duncan, were married to one another on July 27, 1992,

and had one child prior to their marriage. The parties separated on April 19, 1994, and on April 20, 1994, a petition for divorce was filed. A judgment of divorce was subsequently rendered and signed on January 13, 1995. During the pendency of the divorce proceedings, the parties entered into a stipulated judgment, which among other things, awarded the parties joint custody of their minor child, with each party having physical custody of and being designated as domiciliary parent of the minor child on an alternating weekly basis, subject to modifications of the custodial periods for holidays and birthdays.

Thereafter, pursuant to a stipulated judgment rendered and signed on April 17, 2000, the parties modified their custodial *735 arrangement to provide that the parties would continue to share joint custody of the minor child, and that Michaelle Duncan would be designated as the child's domiciliary parent, subject to reasonable and specific visitation by Markus Smith, consisting of three weekends per month, Father's Day, Markus Smith's birthday, and other holiday visitation as agreed on by the parties.

On November 7, 2002, Michaelle Duncan filed a rule to show cause requesting that her award of child support be increased, that Markus Smith's **3 regular visitation schedule be modified from three weekends per month to alternating weekends, and that his summer visitation be set with specificity.

Markus Smith responded by filing a reconventional demand requesting a modification of custody and a recalculation of child support in accordance with any modification of custody. Specifically, with regard to the modification of custody, Markus Smith requested that he be awarded custody and be designated as the domiciliary parent of the child, subject to reasonable visitation by Michaelle Duncan. Alternatively, he requested that neither party be designated as the domiciliary parent of the minor child and that the parties share equal physical custody of the child on an alternating weekly basis.

Thereafter, the parties stipulated to (and, therefore, the trial court ordered) a psychological custody evaluation to be performed by Dr. Alicia Pellegrin, a clinical psychologist selected by the parties. On July 11, 2003, Dr. Pellegrin issued a written report regarding the custody evaluation. In this report, Dr. Pellegrin made the following recommendations pertaining to custody: that the parties continue to share joint custody of the minor child; that there be no designation of domiciliary parent, and that the child spend equal time (alternating weeks and holidays) with both families; that the child go to Markus Smith's home after school (even during Michaelle Duncan's week) as Markus Smith was better equipped to assist the child with her homework; that the child remain in counseling with Markus Smith and his new wife (the child's step-mother) to aid the child in adjusting to her new and "blended family;" that the child receive individual counseling to aid her in adjusting to her parents' divorce and the present custody battle; that Michaelle Duncan cease placing obstacles in the way of the relationship between the child and Markus Smith, and if she continued to do so, the custodial arrangement be modified by designating Markus Smith as the domiciliary parent; and that both parties cease placing the child in the middle of their disputes. **4 According to an interim consent judgment rendered on July 21, 2003, the parties agreed to abide by all of these recommendations set forth in Dr. Pellegrin's report.

Thereafter, on August 19, 2003, Dr. Pellegrin wrote a letter to the trial judge changing her recommendation to immediately awarding sole custody in favor of Markus Smith, with Michaelle Duncan being granted supervised visitation. According to the letter, Dr. Pellegrin changed her recommendation based on the contents of a taped telephone conversation between Michaelle Duncan and the child, which occurred after the parties received the custody evaluation. This conversation was intercepted and tape-recorded by Markus Smith (in his home), without Michaelle Duncan's knowledge or consent and without the child's knowledge or consent (hereinafter referred to as "the wiretapped conversation"). Based on Dr. Pellegrin's letter, Markus Smith sought an *736 *ex-parte* sole custody award; however, his request was deferred to a hearing.

When Michaelle Duncan learned that Markus Smith had been intercepting and tape-recording the telephone conversations between her and the child without their knowledge or consent (which she contends was an action in violation of La. R.S. 15:1303 or an illegal wiretap), Michaelle Duncan sought orders: (1) compelling Markus Smith to produce copies of all tape-recorded conversations between her and the child; (2) prohibiting Markus Smith from using the tapes (or the contents thereof) as evidence at any trial or hearing in accordance with La. R.S. 15:1307; (3) disqualifying and removing Dr. Pellegrin as a witness of the court, on the basis that her opinion was tainted by the alleged illegal wiretapped conversation; (4) sanctioning Markus Smith for his alleged illegal behavior by ordering him to pay costs and attorney fees; (5) prohibiting Markus Smith from further intercepting or tape-recording conversations between her and the child without their consent; and (6) awarding her custody of the child due to Markus Smith's alleged illegal

behavior. On March 1, 2004, after a contradictory hearing **5 on Michaelle Duncan's requests, the trial court rendered judgment ordering Markus Smith to produce copies of all tape-recorded conversations between her and the child, denying the remainder of Michaelle Duncan's requests, and setting all pending custody issues for a trial on the merits to be held on March 15, 2004. Michaelle Duncan sought a supervisory writ of review with this Court of the trial court's ruling, which was denied on July 23, 2004, on the basis that the trial court's rulings in this regard could be reviewed on an appeal of the judgment from the March 15, 2004 custody trial.[1]

The custody trial was held on March 15, 2004. After the introduction of evidence, the trial court rendered judgment, that among other things, awarded Markus Smith sole custody of the minor child, awarded Michaelle Duncan supervised visitation to occur on every other weekend and on holidays, and ordered Michaelle Duncan to obtain counseling with a qualified therapist, who was to be recommended by Dr. Pellegrin and who would be able to make recommendations to the court in the future concerning modifications of Michaelle Duncan's visitation schedule. The trial court signed a written judgment to this effect on May 3, 2004, and it is from this judgment that Michaelle Duncan has appealed.

## ASSIGNMENTS OF ERROR

In Michaelle Duncan's appeal, she raises three assignments of error, all of which pertain to the wiretapped conversation. These assignments of error are that the trial court erred in ruling that the wiretapped conversation was admissible in evidence because she alleges it was intercepted in violation of La. R.S. 15:1303, and hence inadmissible according to La. R.S. 15:1307; that the trial court erred in refusing to remove or disqualify Dr. Pellegrin as an expert, since she reviewed and rendered an opinion based on that allegedly illegal wiretapped conversation; and that the trial court erred in refusing to sanction Markus Smith for his alleged **6 violation of La. R.S. 15:1303. The resolution of all of these assignments of error depends on the determination of whether the interception and tape-recording of the wiretapped conversation *737 by Markus Smith was a violation of La. R.S. 15:1303.

## LOUISIANA'S WIRETAPPING STATUTE

[1] Louisiana Revised Statute 15:1303 (the "wiretapping statute") provides, in pertinent part, as follows:

> A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:
>
> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> (2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication when:
>
> (a) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
>
> (b) Such device transmits communications by radio or interferes with the transmission of such communication;
>
> (3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection; or
>
> (4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.
>
> B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor.
>
> * * *
>
> C. (3) It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. Such a person acting under color of law is authorized to possess equipment used under such circumstances.

> **7 4) It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

[2] Thus, although Louisiana law generally prohibits the interception of wire or oral communications, an exception is made where the interceptor is a party to the communication or where one of the parties consents to the interception (the "consent exception"). La. R.S. 15:1303(C)(4) and (5).

In this case, it is undisputed that the interceptor, Markus Smith was not a party to the wiretapped conversation, and that Michaelle Duncan, a party to the wiretapped conversation did not consent to its interception. However, Markus Smith contends that he consented to the interception and tape-recording of the wiretapped conversation on behalf of his child, while the child was in his home, and hence, his *738 action fell under the consent exception to the wiretapping statute.

Although the issue of allegedly illegal wiretaps and/or secretly recorded telephone conversations have been mentioned and discussed in the jurisprudence of our state,[2] these cases have never specifically resolved the issue of whether a parent may consent to the interception of an oral, wire, or electronic communication on behalf of his or her minor child. However, there is jurisprudence from the federal courts and from the appellate courts of other states that resolve this issue in favor of allowing a parent to consent on behalf of the child under certain circumstances, referred to as the "vicarious consent" doctrine. Although these federal cases and cases from other states are not binding on this court because those cases review the issue of vicarious consent pursuant to the consent exception set forth in 18 U.S.C. § 2511(2)(c) & (d), which is contained in **8 the federal wiretapping statute, 18 U.S.C. § 2511, and the consent exceptions set forth in the wiretapping statutes from the respective states in which those courts were situated, these cases are persuasive in determining whether a vicarious consent doctrine should be applied to the consent exception set forth in Louisiana's wiretapping statute in some certain, limited situations.

In *Thompson v. Dulaney,* 838 F.Supp. 1535, 1544 (D.Utah 1993), a federal district court determined that "as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her [or his] statutory mandate to act in the best interests of the children." In reaching this determination, the court noted that the Utah Supreme Court had declared that the rights associated with being a parent were fundamental and basic rights, and therefore, a parent should be afforded wide latitude in making decisions for his or her children. The court further noted that Utah statutory law gave parents the right to consent to legal action on behalf of a minor child in situations, such as marriage, medical treatment, and contraception, and that it also gave the custodial parent the right to make decisions on behalf of her children. Thus, the parental right to consent on behalf of a minor child, who lacks legal capacity to consent, was a necessary parental right. *Id.* However, the federal district court made it clear that its holding was "very narrow and limited to the particular facts of the case" (i.e., the minor children's relationship with their guardian was allegedly being undermined by the other parent), and was "by no means intended to establish a sweeping precedent regarding vicarious consent under any and all circumstances." *Thompson,* 838 F.Supp. at 1544 n. 8.

In *Pollock v. Pollock,* 154 F.3d 601, 610 (6th Cir.1998), a federal appellate court adopted the standard set forth by the federal district court in *Thompson* and **9 held "that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording." Like the court in *Thompson,* the *Pollock* court stressed that the *739 vicarious consent "doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest,' " but rather should be limited to "situations, such as verbal, emotional, or sexual abuse by the other parent" wherein it is necessary for the parent to protect a child from harm. *Pollock,* 154 F.3d at 610.

In *Campbell v. Price,* 2 F.Supp.2d 1186, 1191 (E.D.Ark.1998), a federal district court, in noting that Arkansas state law imposed a duty on a parent to protect his or her minor child from abuse or harm and provided that a parent must consent for the child in certain situations, such as marriage, and non-emergency medical treatment, found that a parent may vicariously consent to the interception of a child's conversations with the other parent if the parent has an objective "good faith belief

that, to advance the child's best interests, it was necessary to consent on behalf of his [or her] minor child".

In *Silas v. Silas,* 680 So.2d 368, 371 (Ala.Civ.App.1996) a state appellate court adopted the reasoning of *Thompson,* and held "that there may be limited instances where a parent may give vicarious consent on behalf of a minor child to the taping of telephone conversations where that parent has a good faith basis that is objectively reasonable for believing that the minor child is being abused, threatened, or intimidated by the other parent."

In *West Virginia Dep't of Health & Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), a state appellate court found that a father had violated the federal wiretapping statute when the father recorded conversations **10 between his children and their mother (his ex-wife) by virtue of a tape recorder secretly installed in the mother's home. Under the particular facts of the case, the state appellate court declined to find that the father could vicariously consent to the recording of the conversation; however, the court was not opposed to the concept of vicarious consent in a situation where a guardian, who lives with the children and who has a duty to protect the welfare of the children, consents on behalf of the children to intercept telephone conversations within the house where the guardian and the children reside. *West Virginia DHHR,* 453 S.E.2d 654 & n. 11.

We note that *West Virginia DHHR,* is clearly factually distinguishable from the case before this court. In this case, the child was residing equally with both Michaelle Duncan and Markus Smith on an alternating weekly basis, the child was residing with Markus Smith at the time the wiretapped conversation was recorded, and the conversation was recorded from a telephone in the house where Markus Smith and the child were residing. In *West Virginia DHHR,* the mother had been awarded custody and the father tape-recorded conversations between the child and the mother in the mother's home—not his own home. Thus, the father could not vicariously consent to the interception of the child's communications at the mother's home. This is an important difference.

Lastly, the only court that addressed the issue of vicarious consent and then declined to follow it was *Williams v. Williams,* 237 Mich.App. 426, 603 N.W.2d 114 (1999), wherein a state appellate court determined that, while controlling federal jurisprudence (*Pollock*) required it to consider the vicarious consent exception with regard to any violation of the federal wiretapping statute, there was no indication that its own state legislature intended to create such an exception to its state eavesdropping statute (wiretapping statute), and accordingly declined to extend such an exception under state law.

*740 [3] After thoroughly reviewing the facts, reasoning, and holdings of these cases, **11 we find *Thompson, Pollock, Campbell,* and *Silas,* persuasive authority with regard to whether, under certain circumstances, a parent should be able to vicariously consent on behalf of his or her minor child to an interception of a communication for several reasons. First, the federal wiretapping statute (18 U.S.C. § 2511 et seq.) is not only very similar to Louisiana's wiretapping statute, but it also contains a consent exception like that of Louisiana. Since all of the federal courts that have reviewed this issue have determined that the vicarious consent doctrine is applicable to the consent exceptions set forth in the federal wiretapping statute (when the parent has a good faith, objectively reasonable basis to believe that it is necessary and in the child's best interest), then this same doctrine should be applicable to the consent exception set forth in the Louisiana wiretapping statute, under the same, limited circumstances.

[4] Second, the standard set forth by these cases, which authorize a parent to vicariously consent on behalf of the child to an interception of the child's communications with the other parent (or a third party), is clearly limited to situations where a parent has good faith concern that such consent in necessary and in his or her minor child's best interest. Since Louisiana law provides that the paramount consideration in any determination of child custody is the best interest of the child,[3] we see no reason why, in the context of a child custody proceeding, a parent, who is in his or her own home, should not be able to consent to the interception of the child's communications with the other parent, if the parent has a good faith, objectively reasonable basis to believe that such consent to the interception is necessary and in the best interest of the child.

[5] Third, since Louisiana law provides that minors do not have the capacity to consent to juridical acts, such as marriage, contracts, matrimonial agreements, and likewise vests parents with the authority to protect their children, to make all **12 decisions affecting their minor children and to administer their minor children's estates,[4] it follows that a parent should have the right to consent, on behalf of a child lacking legal capacity to consent, to an interception of the child's communications, particularly if it is in the child's best interest.

In support of Michaelle Duncan's argument that Markus Smith's actions were illegal and that he could not consent on behalf of the child, Michaelle Duncan cites *Glazner v. Glazner,* 347 F.3d 1212 (11th Cir.2003). However, we do

not find this case to be persuasive authority in this regard, as the issue in *Glazner* pertained to inter-spousal wiretapping, which is "qualitatively different from a custodial parent tapping a minor child's conversations within the family home." *Newcomb v. Ingle,* 944 F.2d 1534, 1535–36 (10th Cir.1991), *cert. denied,* 502 U.S. 1044, 112 S.Ct. 903, 116 L.Ed.2d 804 (1992).

According to the record in this case, the parties were having problems with their custodial arrangement, and therefore, they agreed to the psychological custody evaluation to help them address these problems. Specifically, Markus Smith's desire to participate in the custody evaluation was due to concerns he had with regard to Michaelle *741 Duncan. He felt that Michaelle Duncan was constantly alienating him from their child, creating problems with visitation, and refusing to cooperate or consult with him regarding decisions affecting the child. These concerns were confirmed in the interview of Michaelle Duncan conducted by Dr. Pellegrin as part of the evaluation, as Michaelle Duncan was unable to identify any strengths that Markus Smith had as a parent, and admitted to telling the child everything about the custody battle, to giving Markus Smith information about the minor child only if he requested, to refusing to tell Markus Smith when she took the child to the doctor, and to withdrawing the minor child from the private school the child was enrolled in without consulting or discussing the matter with Markus **13 Smith (who had been paying the private school tuition). According to the custody evaluation and the testimony of Dr. Pellegrin, Michaelle Duncan's behavior was having such detrimental effect on the minor child, that she specifically stated that Michaelle Duncan had to cease such behavior and allow Markus Smith to maintain a positive relationship with the child, and if not, she recommended a modification of custody.

According to Markus Smith, it was this past detrimental behavior, as noted in the evaluation, that caused him shortly thereafter to install the tape recording device on his telephone, because he still had concerns that Michaelle Duncan would not refrain from this conduct, despite Dr. Pellegrin's recommendation. Thereafter, Markus Smith discovered the wiretapped conversation at issue that occurred between the child and Michaelle Duncan.

During this conversation, Michaelle Duncan criticized the child for being honest with Dr. Pellegrin, told the child that she had hurt her (Michaelle Duncan) with the things that she told Dr. Pellegrin, and that since the evaluation was not in her favor, they (Michaelle Duncan and the child) needed to strategize to salvage the situation. Michaelle Duncan recommended that the child not be honest in court, purposefully fail school to make Markus Smith look bad (since Markus Smith was going to be the one overseeing the child's studies, because Dr. Pellegrin believed he was more capable of assisting with her homework and studies), told the child to keep a log of every argument that occurred at Markus Smith's home as well as every punishment (so that the information could be used in court), and instructed the child to take pictures of Markus Smith's house whenever it was messy (so that the pictures could be used in court to show Markus Smith was unfit and kept a messy house).

Upon hearing this conversation, Markus Smith stated that he be became very concerned about the psychological damage that Michaelle Duncan was causing the **14 child in the child's conversations with her mother, and therefore, he brought the tape to Dr. Pellegrin. After Dr. Pellegrin reviewed the tape, she opined that the child was clearly being subjected to severe emotional abuse by Michaelle Duncan, in that Michaelle Duncan was clearly alienating the child from her father, encouraging the child to spy on her father and family, and asking her to perform poorly in school. This testimony was not contradicted by Michaelle Duncan or by any other evidence.

Therefore, based on the foregoing, we find that Markus Smith had a good faith, objectively reasonable basis for believing that it was necessary and in the child's best interest for him to consent, on behalf of the child, to the interception of the child's conversations with her mother. Consequently, we find that Markus Smith's actions fell under the consent exception *742 set forth in La. R.S. 15:1303(C)(4), and therefore, the wiretapped conversation was not a violation of La. R.S. 15:1303.

## ADMISSIBILITY OF THE WIRETAPPED CONVERSATION

[6] Generally, the trial court is granted broad discretion on its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. *Turner v. Ostrowe,* 2001–1935 (La.App. 1st Cir.9/27/02), 828 So.2d 1212, 1216, *writ denied,* 2002–2940 (La.2/7/03), 836 So.2d 107. Except as otherwise provided by law, all relevant evidence is admissible. La. C.E. art. 402.

Michaelle Duncan contends that the wiretapped conversation was intercepted in violation of La. R.S. 15:1303, and was hence, inadmissible evidence under La. R.S. 15:1307.

Louisiana Revised Statute 15:1307(A) provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of **15 the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this Chapter.

Accordingly, in order to be excluded from evidence under this statute, the wiretapped conversation must have been obtained in violation of La. R.S. 15:1303. Because we have already determined that Markus Smith's actions were not in violation of La. R.S. 15:1303, we find no abuse of the trial court's discretion in admitting the wiretapped conversation into evidence at the custody hearing. Accordingly, we find no merit in this assignment of error.

## EXPERT TESTIMONY

[7] [8] [9] The trial court has great discretion in determining the qualifications of experts and the effect and weight to be given to expert testimony. Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, an appellate court will not reject the testimony of an expert or find reversible error. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 92–1544 (La.App. 1st Cir.3/11/94), 634 So.2d 466, 477, *writ denied*, 94–0906 (La.6/17/94), 638 So.2d 1094.

Michaelle Duncan contends that the trial court erred in allowing Dr. Pellegrin to testify and in refusing to remove or disqualify Dr. Pellegrin as an expert, since she reviewed and rendered an opinion based on that allegedly illegal wiretapped conversation. Again having found that Markus Smith's actions were not in violation of La. R.S. 15:1303, and that the wiretapped conversation was admissible into evidence, we find no abuse of the trial court's discretion in allowing Dr. Pellegrin to testify and render an opinion in this matter based on that conversation. Accordingly, we find no merit in this assignment of error.

## SANCTIONS

[10] Michaelle Duncan further contends that the trial court erred in not sanctioning Markus Smith for his alleged violation of La. R.S. 15:1303 by ordering him to pay reasonable attorney fees and costs of the proceedings. However, in **16 order to impose sanctions against Markus Smith under La. R.S. 15:1303(B), his actions must have been in violation of La. R.S. 15:1303. Again having found that Markus Smith's actions were not in violation of La. R.S. 15:1303, we find no error in the trial court's refusal to impose sanctions *743 on Markus Smith. Accordingly, we find no merit in this assignment of error.

## CUSTODY

[11] Lastly, Michaelle Duncan has appealed the judgment awarding sole custody to Markus Smith and awarding her supervised visitation (which would be subject to modification after she obtains counseling), contending that this erroneous custody award arose from the erroneous ruling with regard to the wiretapped conversation.

[12] [13] [14] Every child custody case must be viewed in light of its own particular set of facts and circumstances. *Major v. Major*, 2002–2131 (La.App. 1st Cir.2/14/03), 849 So.2d 547, 550; *Gill v. Dufrene*, 97–0777 (La.App. 1st Cir.12/29/97), 706 So.2d 518, 521. The paramount consideration in any determination of child custody is the best interest of the child. *Evans v. Lungrin*, 97–0541, 97–0577 (La.2/6/98), 708 So.2d 731, 738; La. C.C. art. 131. Thus, the trial court is in the best position to ascertain the best interest of the child given each unique set of circumstances. Accordingly, a trial court's determination of custody is entitled to great weight and will not be reversed on appeal unless an abuse of discretion is clearly shown. *Major*, 849 So.2d at 550.

Louisiana Civil Code article 134 enumerates twelve non-exclusive factors relevant in determining the best interest of the child, which may include:

> (1) The love, affection, and other emotional ties between each party and the child.

(2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.

**17 3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.

(4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.

(5) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(6) The moral fitness of each party, insofar as it affects the welfare of the child.

(7) The mental and physical health of each party.

(8) The home, school, and community history of the child.

(9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

(11) The distance between the respective residences of the parties.

(12) The responsibility for the care and rearing of the child previously exercised by each party.

In modifying the parties' custodial arrangement in this case, the trial court clearly scrutinized the evidence and considered all of the above factors. The court heard testimony from Markus Smith, Michaelle Duncan, Dr. Pellegrin, the child's schoolteachers, a personal friend of Markus Smith, and Markus Smith's new wife. Additionally, the trial court considered the contents of the wiretapped conversation. After weighing all of the evidence, the trial court apparently concluded that an award of sole custody to the father was shown by clear and convincing evidence to serve the best interest of the *744 minor child.[5] In light of the evidence contained in this record and the trial court's broad discretion in making custody determinations, we do not find that the trial court abused its discretion in awarding custody to Markus Smith.

**18 **CONCLUSION**

Accordingly, the May 3, 2004 judgment of the trial court is affirmed. All costs of this appeal are assessed to the appellant, Michaelle Duncan.

**AFFIRMED.**

McCLENDON, J., concurs and assigns reasons.

**1 McCLENDON, J., concurs.

I respectfully concur with the result reached by the majority under the specific and limited facts of this particular case.

**Parallel Citations**

2004-2168 (La.App. 1 Cir. 9/28/05)

Footnotes

1 *See Markus Lee Smith v. Michaelle Lea Smith Duncan,* 2004–CW–1172, unpublished writ action.

2 *See Shields v. Shields,* 520 So.2d 416 (La.1988); *Benson v. Benson,* 597 So.2d 601, 603 (La.App. 5th Cir.), *writ denied,* 600 So.2d 627 (La.1992); *Briscoe v. Briscoe,* 25,955 (La.App. 2nd Cir.8/17/94), 641 So.2d 999, 1002–07; and *Brown v. Brown,* 39,060 (La.App. 2nd Cir.7/21/04), 877 So.2d 1228, 1235.

3 *See Evans v. Lungrin,* 97–0541, 97–0577 (La.2/6/98), 708 So.2d 731, 738; La. C.C. art. 131.

4 *See* La. C.C. arts. 28, 216, 221, 223, 235, 1918, and 2333; La. Ch.C. art. 1545; and La. R.S. 9:335.

5 *See* La. C.C. art. 132.

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# Exhibit 6

# Exhibit 6

893 So.2d 462
Court of Civil Appeals of Alabama.

Michael A. STINSON
v.
Jodie C. LARSON.

2020918. | March 19, 2004. | Certiorari Denied June 11, 2004Alabama Supreme Court 1031041.

**Synopsis**

**Background:** Mother moved to temporarily and permanently terminate children's visitation with father, based on her belief that father was trying to undermine her authority as custodial parent in violation of previous court order. The Baldwin Circuit Court, No. DR-1996-430.1, Carmen Bosch, J., found father in contempt of court and increased father's arrearage-payment schedule. Father appealed.

**Holdings:** The Court of Civil Appeals, Pittman, J., held that:

[1] mother's recording of minor child's telephone conversations with out-of-state father was proper under the Electronic Communications Privacy Act;

[2] recordings of minor child's telephone conversations with father were admissible under Alabama eavesdropping law;

[3] proper foundation under the "silent witness" theory was laid for admission of recordings;

[4] trial court did not abuse its discretion in finding that father was in contempt of court for undermining mother's authority as custodial parent; and

[5] trial court did not abuse its discretion by increasing father's child support arrearage payment from $100 to $250 per month.

Affirmed.

Murdock, J., concurred in the result.

West Headnotes (13)

[1] **Telecommunications**
⇐Persons Concerned; Consent

Former wife's recording of minor child's telephone conversations with out-of-state former husband was proper under the Electronic Communications Privacy Act, for purposes of determining whether recordings were admissible in contempt proceeding regarding whether former husband was trying to undermine former wife's authority as custodial parent in violation of previous court order, where minor child was in former wife's custody at the time of the recording, and recording was accomplished through the use of an extension telephone. 18 U.S.C.A. § 2510 et seq.

1 Cases that cite this headnote

[2] **Child Custody**
⇐Admissibility
**Telecommunications**
⇐Evidence

For purposes of determining whether recordings made by mother of minor child's telephone conversations with father were admissible under Alabama eavesdropping law in contempt proceeding against father for undermining mother's authority as custodial parent in violation of previous court order, evidence supported determination that mother had a good faith basis to believe that minor child was being intimidated by father; under Alabama law, a parent could give vicarious consent on behalf of a minor child to the recording of telephone conversations with the other parent when that parent had a good faith, objective reasonable basis for believing child was being intimidated, child was 15 years old and had not reached age of consent, and there was evidence that child was exhibiting significant behavioral problems and that child would become very upset at his mother and tell her he did not have to listen to her after talking to his father. Code 1975, §§ 13A-11-31(a), 26-1-1.

1 Cases that cite this headnote

[3] **Evidence**
⇐Photographs and Other Pictures; Sound Records and Pictures

Under the "pictorial communication" theory, an individual who was present at the time an electronic recording was made can authenticate that recording by stating that it is consistent with that person's recollection.

Cases that cite this headnote

[4] **Evidence**
⇐Photographs and Other Pictures; Sound Records and Pictures

In civil cases, under the "silent witness" theory, a foundation is laid for an electronic recording by offering evidence as to the following elements: (1) a showing that the device that produced the item was capable of recording what the witness would have seen or heard had the witness been present at the event recorded; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that no changes, additions, or deletions were made; (5) a showing of the manner in which the item was preserved; and (6) an identification of the speakers.

Cases that cite this headnote

[5] **Evidence**
⇐Determination of Question of Admissibility

Under either the "silent witness" theory or the "pictorial communication" theory for laying the foundation for admission of a sound recording, the trial court should listen to the recording in camera and should allow the party opposing admission to thoroughly cross-examine the witness.

Cases that cite this headnote

[6] **Evidence**
⇐Photographs and Other Pictures; Sound Records and Pictures

Proper foundation under the "silent witness" theory was laid for admission of recordings made by mother of minor child's telephone conversations with father, in contempt proceeding against father for undermining mother's authority as custodial parent in violation of previous court order, where mother produced, in advance, copies of audiotapes to father for his listening, examination, inspection, and review, mother testified that she had recorded the tapes on a device she bought from a retailer, mother testified that she knew how the recording device worked, mother denied splicing or falsifying the recordings in any way, mother testified that she recognized the voices of father and parties' child on the recorded conversations, trial court reviewed the tape recordings in camera, and father's attorney was allowed to thoroughly cross-examine mother regarding the recordings.

Cases that cite this headnote

[7] **Child Custody**
⇐Harmless Error

Even if tape recordings made by mother of minor child's telephone conversations with father had been improperly admitted into evidence, in contempt proceeding against father for undermining mother's authority as custodial parent in violation of previous court order, there was sufficient evidence from which trial court could have deemed father to be in contempt, where father admitted he had spoken to parties' children about court proceedings between the parties, and minor child testified he had spoken to his father about "court stuff."

Cases that cite this headnote

[8] **Contempt**
⇐Discretion of Court
**Contempt**
⇐Review

The determination of whether a party is in contempt of court rests entirely within the sound discretion of the trial court, and, absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, Court of Appeals will affirm.

Cases that cite this headnote

[9] **Child Custody**
⇐Weight and Sufficiency

Trial court did not abuse its discretion in finding that father was in contempt of court for undermining mother's authority as custodial parent in violation of previous court order; there was evidence that one of parties' minor children was exhibiting significant behavioral problems, minor child yelled at mother and said that he did not have to listen to her after talking to father on telephone, e-mail from father to minor child encouraged minor child to engage in "civil disobedience," and mother submitted tape recordings of minor child's telephone conversations with father.

Cases that cite this headnote

[10] **Child Support**
⇐Discretion
**Child Support**
⇐Discretion
**Child Support**
⇐Discretion
**Child Support**
⇐Modification

Matters related to child support, including subsequent modifications of a child-support order, rest soundly within the trial court's discretion, and will not be disturbed on appeal absent a showing that the ruling is not supported by the evidence, and, thus, is plainly and palpably wrong.

Cases that cite this headnote

[11] **Judgment**
⇐Prayer for Relief in General

A trial court has a duty to grant whatever relief is appropriate regardless of whether the party specifically demanded such relief in the party's pleadings. Rules Civ.Proc., Rule 54(c).

Cases that cite this headnote

[12] **Child Support**
⇐Judgment and Order

The trial court has discretion to set a reasonable child support arrearage payment schedule commensurate with the parent's ability to pay.

1 Cases that cite this headnote

[13] **Child Support**
⇐Judgment and Order

Trial court did not abuse its discretion by increasing father's child support arrearage payment from $100 to $250 per month, though father claimed he earned only $700 per year working for his wife and was partially disabled, where father was more than $13,000 in arrears, had been able to take several long plane trips, wrestled with his sons, was constructing an addition to his home, had designed award-winning Internet Web sites, and had an

apparent upscale lifestyle.

Cases that cite this headnote

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**Opinion**

PITTMAN, Judge.

This is an appeal from a judgment in a postdivorce proceeding in the Baldwin Circuit Court.

The parties were divorced in the State of Washington on January 8, 1992. Jodie C. Larson ("the mother"), who now resides in Baldwin County, was granted permanent custody of the couple's two minor children. Michael A. Stinson ("the father") presently resides in California.

In November 1996, the Baldwin Circuit Court ("the trial court") found that the father was in debt to the mother in the amount of $9,255.08. On June 1, 2001, the trial court entered a judgment determining that, as of May 25, 2001, the father was $20,000 in arrears in paying child support, day-care expenses, medical bills, and marital debts as required in the parties' divorce judgment.

In the years following the divorce, both parties have filed numerous motions and countermotions. In an attempt to curtail the fighting between the parties and its negative impact upon their minor children, the trial court, in its June 2001 judgment, directed the parties not to speak in a negative fashion about each other. On June 6, 2002, the trial court ordered "without exception that no conversations shall take place with the minor children concerning custody, proceedings, court hearing, child support issues, visitation issues, the payment of medical bills for the children, or any other subject concerning legal issues surrounding these children."

During the summer and fall of 2002, the mother began to believe that the father was violating the court's order during telephone conversations between the father and the parties' oldest child. The mother subsequently began recording those telephone conversations. She also downloaded an electronic-mail message that the father had sent to the oldest child. Based in part upon the content of the telephone conversations and the electronic-mail message, the mother became convinced that the father was trying to undermine her authority as the custodial parent. In May 2002, the mother filed motions to both temporarily and permanently terminate the children's visitation with the father. On June 4, 2002, the father filed his response to the mother's motions to terminate visitation, a motion seeking rule nisi, and a motion to modify custody. On July 10, 2002, the father filed a motion for contempt against the mother and sought an award of attorney fees. On February 27, 2003, the mother filed a motion for contempt against the father for his alleged violation of the court's June 1, 2001, judgment and its June 6, 2002, order; a motion to dismiss the father's petition to modify custody; and a motion seeking a recalculation of child support. On March 5, 2003, the father filed an motion to compel visitation instanter and a motion for an instanter psychological evaluation for the oldest child; the motion for a psychological evaluation was granted on April 11, 2003.

The trial court held an ore tenus hearing on May 12, 2003. The court heard testimony from the oldest child, the mother, the father, the father's current wife, the *466 maternal grandmother, a child therapist, and the oldest child's school headmaster. The trial court also admitted into evidence five audiotapes, an electronic-mail message, psychological reports, and various other exhibits. On June 4, 2003, the trial court entered its judgment. Based upon its findings of fact, the trial court determined (1) that the custody of the parties' minor children would remain with the mother; (2) that the father's monthly child support payment of $257 would not be increased; (3) that the father had incurred a child support arrearage of $13,000, and was thereby ordered to pay an additional $250 per month toward that arrearage; and (4) that, upon the trial court's review of audiotape recordings of conversations between the father and his oldest child, the father was in contempt for violating a previous court order and was ordered to serve 5 days in jail for each determined violation, for a total of 20 days.

The father appeals, raising four issues and several subissues that may be properly restated as presenting the following two questions for review: (1) whether the trial court erred in holding that the audiotape recordings of telephone conversations between the oldest child and the father were properly admissible into evidence; and (2) whether the trial court abused its discretion by increasing the father's arrearage-payment schedule.

The father first argues that the trial court erred when it

determined that five previously recorded telephone conversations could be admitted into evidence. Specifically, the father contends (1) that the recordings violated state and federal wiretapping statutes; (2) that the mother's vicarious consent to the recording of the conversations was unlawful; and (3) that the proper predicate was not made before the trial court admitted the recordings into evidence.

The father argues that the tape recordings of telephone conversations between him and the oldest child violated the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., and Ala.Code 1975, §§ 13A-11-30 and 13A-11-31(a). We note that the facts as to this specific issue are not in dispute. Therefore, the trial court's ruling carries no presumption of correctness, and this court's review is de novo. *Ex parte Graham,* 702 So.2d 1215, 1221 (Ala.1997).

The Electronic Communications Privacy Act of 1986, part of Title III of the Omnibus Crime Control and Safe Streets Act,[1] prohibits the interception of, and introduction into evidence of, telephone communications unless one party to the communications gives consent or a court order is obtained that authorizes the interception and recording of the telephone conversations. 18 U.S.C. §§ 2511 and 2515. However, the Act also contains an extension-telephone exception set out in 18 U.S.C. § 2510. A majority of the federal courts have held that 18 U.S.C. § 2510(5)(a)(i) exempts a parent's use of an extension telephone to audit a minor child's telephone conversation. *E.g., Janecka v. Franklin,* 843 F.2d 110, 111 (2d Cir.1988); *Newcomb v. Ingle,* 944 F.2d 1534, 1536 (10th Cir.1991); *Scheib v. Grant,* 22 F.3d 149, 154 (7th Cir.1994). Those courts have also held that the exemption applies to a custodial parent's use of an extension telephone *467 to record a child's telephone conversation with the noncustodial parent. The rationale behind these holdings is that a parent's recording of a telephone conversation from an extension telephone is a "distinction without a difference" from the parent's listening to a telephone conversation on an extension telephone. *Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir.1977).

Moreover, some federal courts have also found that the federal statute's one-party consent requirement is satisfied in circumstances whereby consent comes from the parent vicariously on behalf of his or her minor child. *E.g., Pollock v. Pollock,* 154 F.3d 601 (6th Cir.1998); *Thompson v. Dulaney,* 838 F.Supp. 1535, 1544 (D.Utah 1993). In *Pollock,* the court held that the secret recording of a 14-year-old girl's telephone conversations with the noncustodial parent by a custodial parent within the custodial parent's home was permissible if the consenting parent demonstrated "a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child." 154 F.3d at 610. The court stressed that it would be "problematic" for the defense to be limited to children of a certain age "as not all children develop emotionally and intellectually on the same timetable." *Id.*

[1] After *Pollock,* several other federal district and state courts have considered the question, and most have ruled that the custodial parent properly consented vicariously to the recording of their minor child's conversations when the recording was motivated by a genuine concern for the child's welfare. *E.g., Wagner v. Wagner,* 64 F.Supp.2d 895, 896 (D.Minn.1999); *March v. Levine,* 136 F.Supp.2d 831, 849 (M.D.Tenn.2000), aff'd, 249 F.3d 462 (6th Cir.2001); *see also State v. Morrison,* 203 Ariz. 489, 491, 56 P.3d 63, 65 (Ct.App.2002). In light of the fact that the minor child was in the mother's custody at the time of the recording and the recording was accomplished through the use of an extension telephone, we conclude that the recording of the minor child's telephone conversations was proper under the provisions of the Electronic Communications Privacy Act of 1986 as that statute has been interpreted by caselaw. Consequently, we find no violation of 18 U.S.C. § 2510 et seq.

[2] The father also contends that the mother's recording of the minor child's telephone conversations violated Ala.Code 1975, § 13A-11-31(a), which prohibits the use of any device to "eavesdrop" upon a private conversation. As under the federal Electronic Communications Privacy Act of 1986, consent of one or more of the parties is a defense to a charge of violating § 13A-11-31(a), Ala.Code 1975. Commentary to § 13A-11-31; *Alonzo v. State ex rel. Booth,* 283 Ala. 607, 219 So.2d 858, 869 (1969).

In a case of first impression, this court directly addressed the issue of "vicarious consent" in *Silas v. Silas,* 680 So.2d 368, 370 (Ala.Civ.App.1996). In that case, we held that under § 13A-11-31(a), a parent may give "vicarious consent" on behalf of a minor child to the recording of telephone conversations with the other parent where that parent has a good-faith, objectively reasonable basis for believing that the minor child is being "abused, threatened or intimidated" by the other parent. *Silas,* 680 So.2d at 372.

The father asserts that our holding in *Silas* is not applicable because the minor child in *Silas* was incapable of giving consent. Conversely, the father says, the parties' oldest child was capable of giving consent, and the oldest child testified that he believed that the recording of his

telephone conversations amounted to an invasion of privacy. The father further contends *468 that no evidence was presented to the trial court that showed the child was being "abused, threatened, or intimidated." Thus, the father argues that the mother failed to meet the narrow standards espoused in *Silas*.

In *Silas*, the child was 7 years old; the parties' oldest child in this case was 15 years old at the time that the recording began. However, that is a distinction without legal significance; under Alabama law, a person, who is under the age of 19 years, has not yet reached the age of majority so as to have the right to contract or otherwise give legally binding consent. *See* § 26-1-1, Ala.Code 1975. Moreover, notwithstanding the age of the child, a minor child's own ability to consent should not be viewed as "mutually exclusive" of a custodial parent's ability to "vicariously consent" on the child's behalf. *Pollock*, 154 F.3d at 608 (citing *Pollock v. Pollock* 975 F.Supp. 974, 978 n. 2 (W.D.Ky.1997)).

A review of the record reveals that no direct evidence was presented to the trial court that indicated the parties' oldest child was being specifically "abused" or "threatened" by his father, the noncustodial parent. However, we cannot agree with the father that no evidence indicated that the parties' oldest child was not being "intimidated." "Intimidate" is defined in *Merriam-Webster's Collegiate Dictionary* as "to make timid or fearful" or "to compel or deter." *Merriam-Webster's Collegiate Dictionary* at 656 (11th ed.2003). In this case, the mother testified that she believed the father was manipulating the oldest child and undermining her authority.

> "Q. Tell me why you felt it necessary to begin recording telephone conversations between [the father] and his son?
>
> "A. Because of [the child's] behavior, actions and words that he said while he was talking to his father. He would become very upset and he would yell at me. He would tell me he didn't have to listen to me. One particular phone conversation, and this is one that kind of spurred me that I need to find out what he is saying to him, he said, my dad pays you three thousand dollars a month child support, so I should get to talk to him as late as I want."

The mother also testified that the parties' oldest child had been exhibiting significant behavioral problems, and that she had had to file a petition to have him declared a child in need of supervision. The mother testified that the child had tested positive for marijuana; that he had taken her car without her permission and gone "joy-riding" one night; and that his behavior had become so disruptive on one occasion that the police had been telephoned to come out to the home. Testimony also showed that the child had gotten into trouble for "egging" a teacher's house and that his grades were spiraling downward. The following electronic-mail message from the father, which was intercepted by the child's mother and admitted into evidence, shows manipulation on the part of the father over the child:

> "Oh, word of advice, I would never tell you to stop going to school but if you were to tell everyone that you are old enough to stop going as of this coming spring break and told them so now I bet it would have an impact.
>
> "I'd just stop going period until she signs a piece of paper that says she will let you and your brother attend your dad's wedding. [I]f you do that I'll alert the lawyer that there's a problem in the household but you have to stick to it and if they let you go to [M]aui and our wedding then you need to go back to school like nothing happened.
>
> "It's called civil disobedience and it's been known to work."

*469 In light of evidence concerning the child's delinquent behavior and the written and oral communications directed to the child by the father, we conclude that the trial court could properly have determined that the mother had a good-faith basis to believe that the minor child was being "intimidated" by the father; therefore, it was permissible under § 13A-11-31(a), Ala.Code 1975, as interpreted in *Silas*, for the mother to "vicariously consent" on behalf of the child to the recording of his telephone conversations.

In addition, the father also argues that even if the mother could "vicariously consent" to the tape recordings of the telephone conversations between the father and the parties' oldest child, he contends that the mother failed to lay a proper predicate for the admission of the recordings.

[3] [4] [5] Our Supreme Court has recognized two distinct theories that are to be used in determining whether a proper foundation has been laid for the admissibility of photographs and electronic recordings: the "pictorial communication" theory and the "silent witness" theory. *Ex parte Fuller*, 620 So.2d 675, 677 (Ala.1993). Under the "pictorial communication" theory, an individual who was present at the time the recording was made can authenticate that recording by stating that it is consistent with that person's recollection. 620 So.2d at 678. "If there is *no* qualified and competent witness who can testify that

the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question, then the 'silent witness' foundation must be laid." *Id.* In civil cases, under the "silent witness" theory, a foundation is laid by offering evidence as to the following elements: (1) a showing that the device that produced the item was capable of recording what the witness would have seen or heard had the witness been present at the event recorded; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that no changes, additions, or deletions were made; (5) a showing of the manner in which the item was preserved; and (6) an identification of the speakers. 620 So.2d at 677. Under either the "silent witness" theory or the "pictorial communication" theory for laying the foundation for admission of a sound recording, the trial court should listen to the recording in camera and should allow the party opposing admission to thoroughly cross-examine the witness. *Id.* at 679; *see also* 1 Charles W. Gamble, *McElroy's Alabama Evidence* § 123.02 (5th ed.1996).

[6] Our review of the record reveals that the mother produced, in advance, copies of the audiotapes to the father for his listening, examination, inspection, and review. The mother testified that she had recorded the tapes on a device she had bought from a Radio Shack retailer. She testified that she knew how the recording device worked. She denied splicing or falsifying the tape recordings in any way. She testified that she recognized the voices of the father and the parties oldest child on the recorded conversations. In addition, the trial court reviewed the tape recordings in camera and the father's attorney was allowed to thoroughly cross-examine the mother regarding the tape recordings. Accordingly, we conclude that the mother's legal counsel did establish a sufficient predicate for the admission of the audiotape recordings into evidence under the "silent witness" theory set forth in *Fuller*.

[7] Moreover, even if the tape recordings had been improperly admitted into evidence, there was sufficient evidence from which the trial court could have *470 deemed the father to be in contempt. The father admitted that he had spoken with the children about the court proceedings. In addition, the parties' oldest child also testified that the father had spoken with him about "court stuff," although we note that the child stated that the mother had also spoken with him about court proceedings.

[8] [9] The determination of whether a party is in contempt of court rests entirely within the sound discretion of the trial court, and, " 'absent an abuse of that discretion or unless the judgment of the trial court is unsupported by the evidence so as to be plainly and palpably wrong, this court will affirm.' " *Gordon v. Gordon,* 804 So.2d 241, 243 (Ala.Civ.App.2001) (quoting *Stack v. Stack,* 646 So.2d 51, 56 (Ala.Civ.App.1994)). In light of the audiotape evidence, as well as other evidence adduced at trial, we find no abuse of discretion or palpable error on the part of the trial court in this regard.

The father next argues that the trial court abused its discretion when it increased his child support arrearage payments. Specifically, the father contends that no request for modification had been made, that the issue had not been tried by consent, and that no evidence was presented to support the modification.

[10] Our standard of review as to that issue is highly deferential. "Matters related to child support, including subsequent modifications of a child-support order, rest soundly within the trial court's discretion, and will not be disturbed on appeal absent a showing that the ruling is not supported by the evidence and thus is plainly and palpably wrong." *Bowen v. Bowen,* 817 So.2d 717, 718 (Ala.Civ.App.2001).

[11] The record reflects that the mother filed a motion for a child-support recalculation in February 2003. That motion remained pending before the trial court at the time of the ore tenus hearing on May 12, 2003. We note that the trial court has a duty to grant whatever relief is appropriate regardless of whether the party specifically demanded such relief in the party's pleadings. Rule 54(c), Ala.R. Civ. P.; *Johnson v. City of Mobile,* 475 So.2d 517, 519 (Ala.1985).

[12] [13] "The trial court has discretion to set a reasonable arrearage payment schedule commensurate with the parent's ability to pay." *Henderson v. Henderson,* 680 So.2d 373, 375 (Ala.Civ.App.1996). Indeed, this court has held that in cases where a substantial arrearage is owed, the trial court may abuse its discretion if it fails to order a payment toward that arrearage that is large enough to satisfy the debt within a reasonable period of time. *Id.* The father had previously been ordered to pay a sum of $100 per month toward the arrearage. At that rate, it would have taken the father more than a decade to discharge the $13,000 arrearage. The evidence at trial established that the father was disabled, although only partially (i.e., 5%). Even though the trial court did not impute to the father a larger amount of income than he claimed (i.e., $700 per year working for his wife), the trial court did take notice of his apparent upscale lifestyle, noting in its judgment that the father "can afford the 'extras' in life." Testimony

at the hearing also revealed that the father had taken several long plane trips, had wrestled with his boys, was constructing an addition to his home, and had designed award-winning Internet Web sites. Based upon the witnesses' testimony and the evidence presented, the trial court could have concluded that the father had vastly underestimated his income and his ability to earn a living to support the parties' two children. Consequently, we conclude that the *471 trial court did not abuse its discretion by increasing the father's arrearage payment to $250 per month. Based upon the foregoing facts and authorities, the trial court's judgment is due to be affirmed. The mother's request for an award of attorney fees on appeal is granted in the amount of $1,500.

AFFIRMED.

YATES, P.J., and CRAWLEY and THOMPSON, JJ., concur.

MURDOCK, J., concurs in the result, without writing.

Footnotes

1 Title III was enacted in 1968 to protect the privacy of wire and oral communications and to regulate the conditions under which interceptions of such communications would be allowed. The original act prohibited only the intentional interception of wire or oral communications. As other methods of communication became more commonplace, Congress adopted the Electronic Communications and Privacy Act of 1986 to prohibit the intentional interception of electronic communications.

# Exhibit 7

# Exhibit 7

64 F.Supp.2d 895
United States District Court,
D. Minnesota.

Lesa Marie WAGNER and Sandra M. Wagner,
Plaintiffs,
v.
Robert Allen WAGNER, Defendant.

No. 98–1704 (DWF/AJB). | Sept. 16, 1999.

Former wife and daughter brought action against former husband, alleging violations of federal and Minnesota wiretapping statutes. Plaintiffs moved for summary judgment. The District Court, Frank, J., held that: (1) guardian may vicariously consent to interception of telephone communication on behalf of his children as long as guardian has good faith, objectively reasonable belief that interception of conversation is necessary for best interest of children in his custody, and (2) genuine issue of material fact precluded summary judgment.

Motion denied.

West Headnotes (2)

[1] **Telecommunications**
⇐Persons Concerned; Consent

Guardian may vicariously consent to interception of telephone communication on behalf of his children, for purposes of determining guardian's liability under federal and Minnesota wiretapping statutes, as long as guardian has good faith, objectively reasonable belief that interception of conversation is necessary for best interest of children in his custody. 18 U.S.C.A. § 2510 et seq.; M.S.A. § 626A.01 et seq.

9 Cases that cite this headnote

[2] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Genuine issue of material fact as to whether father had good faith, objectively reasonable belief that interception and recording of telephone conversations between children and their mother and elder sister was necessary for children's best interests, precluding summary judgment in action brought by mother and sister against father under federal and Minnesota wiretapping statutes. 18 U.S.C.A. § 2510 et seq.; M.S.A. § 626A.01 et seq.

6 Cases that cite this headnote

**Attorneys and Law Firms**

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**MEMORANDUM OPINION AND ORDER**

FRANK, District Judge.

**Introduction**

This action arises under the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510–2521, and its Minnesota counterpart, Minn.Stat. § 626A.01, *et seq.* Two lawsuits were commenced and have been consolidated into the present proceeding. Plaintiff Lesa Wagner sued her former husband, Defendant Robert Wagner, for civil damages, alleging that Robert Wagner taped telephone conversations between Lesa Wagner and their two minor children. Plaintiff Sandra Wagner, the emancipated daughter of Robert and Lesa Wagner, also sued her father, alleging that Robert Wagner also taped telephone conversations between Sandra Wagner and the two minor

 

children.

The matter is currently before the Court on the Plaintiffs' Motion for Summary Judgment. The Plaintiffs assert that, as Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between the Plaintiffs and the two minor children, there is no issue of material fact and the Plaintiffs are entitled to judgment as a matter of law. Defendant Robert Wagner asserts that he vicariously consented to the interception and *896 recording of the telephone conversations on behalf of the two minor children in his custody.

[1] [2] The Court, addressing an issue that has not yet been resolved by the Eighth Circuit, adopts the vicarious consent doctrine, finding that as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children in his or her custody, the guardian may vicariously consent to the interception on behalf of the children. As there is a factual issue as to whether Defendant Robert Wagner had a good faith, objectively reasonable belief that the interception and recording of the Plaintiffs' telephone conversations with the children was necessary for the children's best interests, the Plaintiffs' Motion for Summary Judgment is denied.

**Background**

The facts are not in dispute. Robert and Lesa Wagner were married from 1977 until 1998 and have four minor children: J.W. (now 17), C.W. (now 13), and twins A.W. and T.W. (now 11). Their oldest child, Plaintiff Sandra Wagner, had been emancipated prior to the dissolution proceeding.

The dissolution proceeding came on for trial before the Honorable Mary L. Davidson in Hennepin County District Court. In its Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, entered on January 15, 1998, the court made the following findings regarding the determination of custody:

> 1. *Wishes of parents.* .... Respondent [Lesa Wagner] has not shown that she is willing to cooperate with Petitioner [Robert Wagner] in setting schedules for the children. Petitioner's [Robert Wagner's] proposal would allow the children to continue to have both parents substantially participate in their lives.
>
> 2. *Preference of children.* The children in this matter are old enough to express their preference for one parent or the other as their custodial parent. However, the children in this matter have been pressured, manipulated and influenced by both parents in regard to their preference for a custodial parent....
>
> ....
>
> 4. *Intimacy between parent and child.* .... Based on both custody evaluations the children seem to be more intimately attached to the Respondent [Lesa Wagner]. As one evaluator explained, this may be because she is less of a disciplinarian, and there is less structure in her home.... Respondent [Lesa Wagner] is unwilling or unable to see that the children are in need of counseling at this time.
>
> 5. *Interactions and interrelationship of children and parents, siblings and any other person.* .... Petitioner [Robert Wagner] has made it clear that he wants Respondent [Lesa Wagner] to be involved in the lives of the children and will encourage a relationship....
>
> ....
>
> 8. *Mental and physical health of all individuals involved.* The custody evaluator from Hennepin County found that, "[b]eneath the surface of the well-behaved and polite children is a family in crisis", and that, "[t]here is a great deal of emotional strain in the relationships between the parents and the children" ....
>
> ....
>
> 12. *Disposition of each parent to encourage and permit frequent and continuing contact by the other parent with children.* Testimony was heard regarding several incidents where Respondent [Lesa Wagner] undermined Petitioner's [Robert Wagner's] visitation with the children. She often enticed one or more of the children to stay back with her when they were to have visitation with their father. She has suggested moving out of state permanently, and took the children to Iowa for a period of time *897 without notifying Petitioner [Robert Wagner] of her intentions.
>
> Petitioner [Robert Wagner] suggests that the parties should have close to equal time with the children. There is no evidence that Petitioner [Robert Wagner] has undermined Respondent's [Lesa Wagner's] relationship with the children. Rather, Petitioner [Robert Wagner] has made efforts to ensure that the children will have continued interaction, support and guidance of both parties.

(Def.'s Ex. A, Amended Judgment and Decree, dated January 15, 1998, pp. 3–7.)

The dissolution matter was eventually appealed to the Minnesota Court of Appeals. *Wagner v. Wagner,* 1999 WL 431139 (Minn.Ct.App. June 29, 1999). The Court of Appeals set forth the remaining procedural history of the case as follows:

> [T]he district court initially awarded the parties joint physical custody of all four children. But after hearing the parties' post-trial motions, the district court altered the award to give respondent [Robert Wagner] legal custody of all four children and custody of the twins [A.W. and T.W.], then 9, while appellant [Lesa Wagner] had legal custody of J.W., then 15, and C.W., then 12 Appellant [Lesa Wagner] now seeks sole legal and physical custody of all four children.
>
> The district court acknowledged that split custody is not favored but found it to be in the best interests of these children because (1) appellant [Lesa Wagner] had turned J.W. and C.W. against respondent [Robert Wagner], (2) J.W. and C.W. refused to live with respondent [Robert Wagner], (3) the children assign primarily negative feelings toward one another....

*Wagner v. Wagner,* 1999 WL 431139 at *1.

The Minnesota Court of Appeals affirmed the district court's rulings. *Wagner v. Wagner,* 1999 WL 431139 at *1.

Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between Plaintiff Lesa Wagner and the twins, and between Plaintiff Sandra Wagner and the twins. It is undisputed that Defendant Robert Wagner used the information obtained in the dissolution proceeding.

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously interfered with his visitation with the two older children in her custody, thereby damaging his ability to maintain a relationship with the children. Defendant Robert Wagner additionally asserts that Plaintiff Lesa Wagner has consistently failed to comply with the court's orders regarding her visitation with the twins:

> Lesa has moved herself and the two older children to Alabama.... Lesa "concealed" the children by keeping her moving actions secretive and not informing me of her whereabouts once she had moved. She never communicated to me in any way that she was leaving to go to Alabama. She never provided her address to me once she did move, and left it to me to find her. Her phone is not listed with the local telephone company there either.
>
> Lesa "took" all the children, including the twins, to Alabama without permission. I specifically gave permission for Lesa to leave with the children, providing she would make suitable provisions for me to have visitation with [J.W. and C.W.] Lesa made no such provision, therefore no permission was granted.
>
> Lesa was allowed an extended visitation with the twins until August 16th at 7:00 p.m. at which time she was to return the children to me at my apartment in Minnesota....
>
> On the 16th at 6:30 p.m. Lesa called to say the kids would not be back at 7:00 p.m. ....
>
> On Monday, Lesa called at 9:30 a.m. to say she couldn't get the children on the flight. She also threatened to go to the local sheriff to have him talk to the children and hear her story because she didn't think she should have to send the children back. She did not call on Tuesday ***898** or Wednesday, and there was no answer when I called her.
>
> Given Lesa's dishonesty about the availability of flights and her lack of communication and cooperation regarding keeping her commitments to return the children on the 16th, I decided to drive to Alabama to pick up the children. I have since discovered that, during the time she was to be returning the kids to Minnesota, Lesa took [the twins] to see the elementary school they would go to in Prattville, AL.

(Def.'s Ex. C., Affidavit of Robert Wagner, dated August 26, 1998, ¶ 14 (emphases omitted).)

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously attempted to manipulate the twins' emotions and alienate the children from their father. Robert Wagner alleges that Lesa Wagner "continually is 'coaching' the twins to tell others that they want to live with her." (Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 33.)

Defendant Robert Wagner further asserts that Lesa Wagner participates in conversations between the twins and their sister, Plaintiff Sandra Wagner, and also uses those opportunities to manipulate the twins. Robert Wagner asserts that in a telephone conversation between Plaintiff Sandra Wagner and the twins, Plaintiff Lesa Wagner could be heard in the background coaching Sandra Wagner:

> Then both boys were coached to call 911 if I ever left them alone, even for a few minutes. When the boys asked what would happen? They were told the police would pick them up and they could come live at the house. They were also told to tell the neighbor mother that they want to go live at the house. Furthermore, they were told to tell everybody they meet they want to go live at the (Lesa's) house. At the end of the conversation they were told to "keep this very secret and be sure not to tell dad" ....

(Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 34.)

## Discussion

### A. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Enterprise Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir.1996). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enterprise Bank*, 92 F.3d at 747. However, as the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.' " Fed.R.Civ.P. 1, *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enterprise Bank*, 92 F.3d at 747. The nonmoving party must then demonstrate the existence of specific facts in the record which create a genuine issue for trial. *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986); *Krenik*, 47 F.3d at 957.

### B. Violation of Wiretapping Statutes

The relevant provisions of the federal wiretapping statute provide as follows:

> 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 or endeavor to *899 intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
>
> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire 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 the 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).

18 U.S.C.A. § 2511 (1999).

Recovery of civil damages for violation of the federal wiretapping statute is authorized as follows:

> Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C.A. § 2520(a) (1999).

Minnesota's wiretapping statutes are nearly identical to the federal wiretapping statutes. *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 406 (Minn.Ct.App.1995). Minn.Stat. § 626A.02 similarly provides that any person who intentionally intercepts and discloses any oral communication is subject to civil suit.

**C. Vicarious Consent Doctrine**

Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability. *Pollock v. Pollock*, 154 F.3d 601, 606 (6th Cir.1998), 18 U.S.C. § 2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C.A. § 2511(2)(d) (1999).

Minn.Stat. § 626A.02, subd. 2(d) contains the same consent exemption.

The Court is now confronted with an issue upon which the Eighth Circuit has not spoken, specifically, whether the exemption permits a custodial parent to "vicariously consent" to the recording of the minor child's telephone conversations.[1]

*900 Although the issue has not been explicitly addressed by the Eighth Circuit, federal courts in other circuits have examined the issue of the vicarious consent doctrine. *See, e.g., Pollock v. Pollock*, 154 F.3d 601 (6th Cir.1998); *Thompson v. Dulaney*, 838 F.Supp. 1535 (D.Utah 1993).

Most recently, the Sixth Circuit analyzed the vicarious exception doctrine in *Pollock*. *Pollock*, 154 F.3d at 607–10. The *Pollock* case, in which a non-custodial parent sued the custodial parent for recording telephone conversations between the non-custodial parent and their 14 year-old child, involved facts substantially similar to those in the present matter. As the Sixth Circuit noted, the basis of the case "occurred in the context of a bitter and protracted child custody dispute," and the custodial parent maintained that the non-custodial father was subjecting the child to emotional abuse and manipulation by pressuring the child regarding custodial matters. *Pollock*, 154 F.3d at 603–04.

After an in-depth analysis of the issue, including a thorough examination of the relevant case law from other jurisdictions, the Sixth Circuit adopted the vicarious consent doctrine and held as follows:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

*Pollock*, 154 F.3d at 610.

The court held that the issue of material fact as to the defendant's motivation in taping the telephone conversations precluded summary judgment. *Pollock*, 154 F.3d at 612.

In addition, another district court in the Eighth Circuit addressed the vicarious consent doctrine in *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998). In analyzing the issue, the court recognized that the "Eighth Circuit has not addressed whether parents may vicariously consent to the recording of their minor children's conversations" and noted that the court had "uncovered no cases rejecting a vicarious consent argument, and, furthermore, finds persuasive the cases allowing vicarious consent." *Campbell*, 2 F.Supp.2d at 1189. The court thus adopted the vicarious consent doctrine, holding that the custodial parent's "intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child." *Campbell*, 2 F.Supp.2d at 1191. In reaching its decision, the court noted that it "merely applied what it concludes to be the majority law on the subject...." *Campbell*, 2 F.Supp.2d at 1192.

Indeed, the only case in which the court explicitly declined to adopt the vicarious consent doctrine in

connection with Title III was that of *Williams v. Williams* ("*Williams I*"), 229 Mich.App. 318, 581 N.W.2d 777 (1998).[2] In rejecting the doctrine, *901 the Michigan court recognized that it was deviating from the majority. *Williams,* 581 N.W.2d at 780–81. The Sixth Circuit, in *Pollock,* observed of the *Williams* court that, "in declining to adopt the doctrine of vicarious consent, it was departing from the path chosen by all of the other courts that have addressed the issue." *Pollock,* 154 F.3d at 609.

In fact, the Michigan Supreme Court later remanded the *Williams* case back to the Michigan Court of Appeals for reconsideration in light of *Pollock*: *Williams v. Williams* ("*Williams II*"), 593 N.W.2d 559 (Mich.1999). On remand, the Michigan Court of Appeals reversed its earlier ruling regarding the vicarious liability exception to Title III liability. The court recognized that, "because the Sixth Circuit Court of Appeals has now spoken on the issue and no conflict among the federal courts exists, we are bound to follow the *Pollock* holding on the federal question in the case."[3] *Williams v. Williams* ("*Williams III*"), 603 N.W.2d 114, 1999 WL 692342 (Mich.App. Sept.3, 1999). Accordingly, the only case which had explicitly rejected the vicarious consent exception was subsequently reversed, and its decision was brought into conformity with all other federal decisions that have addressed the issue.

Finally, therefore, as the Court has uncovered no cases explicitly rejecting the vicarious consent doctrine, as there appears to be no conflict among the federal courts, and as the Court finds persuasive the cases adopting the vicarious consent doctrine, the Court determines that the vicarious consent doctrine should apply in the present matter.

**Conclusion**

This Court adopts the vicarious consent doctrine, which holds that, as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children, the guardian may vicariously consent to the interception on behalf of the children. As there is an issue of fact in the present matter regarding Defendant Robert Wagner's motivations in intercepting and recording telephone conversations between the Plaintiffs and the two minor children in his custody, the Plaintiff's Motion for Summary Judgment must be denied.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Plaintiffs' Motion for Summary Judgment (Doc. Nos.9, 16) is **DENIED.**

Footnotes

1 The Eighth Circuit has previously decided two cases involving facts similar to the present matter. In *Platt v. Platt,* 951 F.2d 159 (8th Cir.1989), a husband sued his estranged wife under Title III for recording his telephone calls with their minor daughter, allegedly to gain advantage in the parties' dissolution proceedings. Similarly, in *Rice v. Rice,* 951 F.2d 942 (8th Cir.1991), the plaintiff sued his former wife under Title III for recording telephone calls between the plaintiff and the parties' children. However, at the time both cases were decided, the federal courts were grappling with the issue of whether Title III applied to interspousal communications, and whether the statute necessarily required that the federal courts become involved in purely domestic conflicts. Consequently, the cases were decided on that basis, and the Eighth Circuit did not reach the issue of the vicarious consent doctrine in *Platt* or *Rice.*

Indeed, the defendant mother in *Platt* had asserted that, as the legal guardian of the minor children she "stood in the place of the minor child and consented to the recording." *Platt,* 951 F.2d at 160. Nevertheless, as explained by the Eighth Circuit, the district court had framed the issue as the extent to which Title III applied to interspousal wiretaps and, in dismissing the case, had declined to address the parties' arguments concerning the application of Title III's consent exemption. *Platt,* 951 F.2d at 160. On appeal, the Eighth Circuit held that, in light of the then-recently decided case of *Kempf v. Kempf,* 868 F.2d 970 (8th Cir.1989) (holding that Title III applies to domestic situations of interspousal wiretapping), the district court had relied on a nonexistent interspousal immunity. *Platt,* 951 F.2d at 160. The Eighth Circuit thus reversed the district court's dismissal and remanded *Platt* for further proceedings, including consideration of the consent issue. *Platt,* 951 F.2d at 161.

2 The case of *West Virginia Dept. of Health and Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), in which the Supreme Court of Appeals of West Virginia discussed and declined to apply the vicarious consent doctrine, is distinguishable from the facts of this case and the aforementioned cases which applied the doctrine. In the West Virginia case, a non-custodial father enlisted his mother to place a tape recorder in the home of his former wife, who had custody of their children, for the purpose of recording conversations between the mother and the children. *David L.,* 453 S.E.2d at 648. The non-custodial father argued that he had parental authority to give the children's consent. *David L.,* 453 S.E.2d at 653. The court acknowledged the holding of *Thompson v. Dulaney, supra,* which had adopted the vicarious consent doctrine, but held that "under the specific facts of the case

before us, we hold a parent has no right on behalf of his or her children to give consent...." *David L.*, 453 S.E.2d at 654. The court explicitly stated, "We do not disagree with the reasoning in *Thompson;* however, we determine the facts of the present case are different from the facts in *Thompson* in two significant respects." *David L.*, 453 S.E.2d at 654. The court noted in distinction that, first, the parent who procured the interception was not the custodial parent; and second, the recordings did not occur in the home of the parent who procured the interception, but rather the tape recorder had been surreptitiously placed in the other parent's home. *David L.*, 453 S.E.2d at 654. The court thus did not explicitly reject the vicarious consent doctrine, but rather declined to apply the doctrine to the circumstances of that case.

3 The Michigan court reaffirmed its ruling regarding the Michigan eavesdropping statute, however, noting that "this Court is not compelled to follow federal precedent or guidelines in interpreting the Michigan eavesdropping statute." *Williams III,* 603 N.W.2d at ——, 1999 WL 692342.

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DOCKETING STATEMENT ATTACHMENT 8

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DECL
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SEAN R. ABID

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| SEAN R. ABID,<br><br>Plaintiff,<br><br>vs.<br><br>LYUDMYLA A. ABID<br><br>Defendant. | CASE NO.: D424830<br>DEPT. NO.: B |

**DECLARATION OF PLAINTIFF, SEAN R. ABID, IN RESPONSE TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO CHANGE CUSTODY AND COUNTERMOTION TO STRIKE PLAINTIFF'S OPPOSITION AND TO SUPPRESS THE ALLEGED CONTENTS OF THE UNLAWFULLY OBTAINED RECORDING AND FOR SANCTIONS AND ATTORNEY FEES**

SEAN ABID, being first duly sworn, deposes and says:

1. That I am the Plaintiff in this action and I offer this declaration of my own personal knowledge and in response to Defendant's Opposition To Plaintiff's Motion To Change Custody And Countermotion To Strike Plaintiff's Opposition And To Suppress The Alleged Contents Of The Unlawfully Obtained Recording And For Sanctions And Attorney Fees.

2. Sadly, Lyudmyla did not take this opportunity to acknowledge her actions or have contrition for the emotional abuse that she is perpetrating on our son. Since she chose to tear apart my character for the better part of ten pages, I find it necessary to describe to the Court who

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I REALLY am. I am a 20-year educator. I have been a father figure to countless children throughout my educational career. (See **Exhibit "1"**) I was chosen as National Counselor of the Year in 2012. My career has been devoted to advocating for all children, but particularly children who may have been experiencing some form of neglect in their lives. I am a husband and a father to 3 beautiful boys. I am a devoted son to my elderly mother. I have never been convicted of a crime. I have never harassed anyone. It doesn't take much to extrapolate the kind of energy and passion I have to provide the best life for children, especially my own children.

3. A few prevailing themes are glaringly obvious in Lyudmyla's response to our countermotion: assignment of blame for everything that happens in her life to something outside of herself, excessive paranoia, and absence of responsibility for her own actions. I am sure there is some type of formal diagnosis for these symptoms. According to Lyuda, everything bad that happens in her life is my fault! Her house gets robbed? Must be my fault, or my teenager's fault. She gets junk mail with a typo on it? Phone solicitors? Must be my fault. Amazingly, based on her own words, her ex-husband is as disgusted by her choice in her current husband as I was and has cut her off ... also my fault. Her neighbors aren't comfortable with her choice in husband? My fault.

4. It is not my fault that she married a violent felon. Tragically, it's clear that she believes it's also my fault that she chooses to emotionally abuse her son. There is not one shred of evidence that she has any remorse or concern about the negative remarks she has made to her child. There is not the slightest bit of insight on her part that this behavior is hurtful to Sasha's emotional well-being. She seems incapable of ever understanding that making detrimental remarks to the child about the other parent IS child abuse. She can't understand that it doesn't matter if she truly believes what she is saying is factual and accurate. It is still child abuse! Sasha is being harmed emotionally in ways that are all too similar to the emotional effects of physical abuse. Unequivocally, she is engaging in the intentional infliction of harm, which is abuse.

5. The mental health community is absolutely clear about the damage that such disparaging comments have on children. Children who are placed in the middle of on-going parental conflict exhibit psychological symptoms similar to those who have been physically

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abused. Lyuda constantly makes negative comments about me TO Sasha and also within the presence of Sasha. She is not only diminishing me in his eyes, but actively seeking to destroy my relationship with him. She is also teaching him that half of him is not worthy of being loved, and that half is worthless. By doing so, her actions are tantamount to punching Sasha in the mouth over and over again. These actions, which she has been doing for five years, was recorded doing, and continues to do, are both wrong, hurtful and child abuse.

6. Please review the attached emails where I have pleaded with Lyuda to stop badmouthing me to our son. (See **Exhibit "2"**) You can see from one of her replies that she admits she uses my name as a punishment in her house. Not once in her reply did she admit that the things she said to Sasha in the recordings were wrong or hurtful to our son. Her words are not only hurtful, but they are diabolical, and a clear example of an ongoing pervasive pattern of child abuse. Those recordings, sadly, were not surprising to me. As horrible as they were to listen to and transcribe, they only confirmed what I have suspected has been occurring for the past five years. The fact is, Lyudmyla has actively tried to destroy my relationship with my son since he was born. The only thing that is off-setting the emotional damage that his mother is inflicting is the amount of time that I see Sasha. I have video evidence from 3 years ago that was included in our custody evaluation, and I have evidence from as little as one week ago (which Lyudmyla conveniently left out of her exhibit of her doctor visit) (see **Exhibit "3"**) that it is still occurring even after the filing of our countermotion. You will see in **Exhibit "3"** that there was a second page to the doctor's notes from March 9, 2015. In these notes, the doctor wrote: "Please see photos on her phone (mothers)," "Mother upset with ex" and "Mother has cream for application." So not only did Lyudmyla take Sasha to the emergency room at 8:30 pm on a school night for an erroneous reason, she needed the doctor to diagnose the rash from photos on her phone because there was no rash. According to the doctor's notes, she was continuing to badmouth me to the physician in front of Sasha. She even left the urgent care without medication, telling the doctor she had her own, making it evident that her purpose for the doctor's visit was not to get treatment, but to create this ridiculous and faulty theory that I neglect my son. I sent her a text on March 10, after Sasha told me he went to the doctor, asking

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She responded with information about a check that she owed me. She did not inform me of anything regarding Sasha's health.

7. Because Lyuda sees nothing wrong with the way she's talking to Sasha in her recordings, she believes that I recorded her to gain information about her husband. My only purpose in making those two recordings was to hopefully spare my son the abuse at the hands of a perpetrator who is unrepentant and completely unconcerned about the heinous damage she is doing to her son by badmouthing his father. Specifically, she is unable to reflect on the damage she is doing to her son by telling him that half of him is an idiot, half of him is a piece of shit, and that half of him should not be loved, that he should only love his mother. In the introductory paragraph of her response she claims that we have lied, but recordings don't lie. The recording was necessary so that the Court can hear plainly the emotional abuse that my ex-wife subjects our son to every day that he's with her.

8. When you listen to the recordings from Sasha's time with his mother, you will hear a boy who is constantly crying and feeling it necessary to defend his father from attack. No 6 year old should be in this position at the hands of his mother. Lyuda complains about the limited time she has with Sasha, but doesn't take advantage of the time when he is with her. Instead of using the time that she has Sasha to bond with him and form a loving relationship with him, she chooses to use all of the time that she actually does speak with him berating his father. Sasha is bonded to me because of the time that I spend with him on a daily basis. I don't throw him in front of a television or video games like his mother does. I actually spend time with him, playing baseball and doing activities. I NEVER speak badly about Sasha's mother to him because I understand that he is half of her and half of me, and I don't want my son to feel that stress. I never subject him to interrogation as his mother does. Sasha is being exposed to the worst type of emotional abuse and it has been going on for at least 5 years. He will need therapy to deal with what he has already experienced.

9. In her response, she makes many allegations, including that I neglect my son and that she suspects the student whom I've taken in, an all-star volleyball athlete seeking college scholarships who is highly regarded and respected by his teachers and our school community,

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robbed her home! This is a cogent example of the paranoia she lives with every day. This fuels her narrative that I am the source of every bit of pain and anguish in her life, and that her own poor decisions are not the cause of certain negative circumstances in her life. It is utterly pathetic that she would accuse this child of robbing her home, especially since in late August of 2014, he met Lyuda's daughter, Iryna, at our high school during the summer to help prepare her for her high school volleyball tryout that she had missed because of her late return from Ukraine. Not only that, but he rode his bicycle to school, nearly 10 miles away, to help out someone who he didn't know on my behalf. Quite honestly, he doesn't understand how someone that he selflessly gave his time to, out of sheer kindness, would turn around and accuse him of robbing their home. Perhaps Lyudmyla is again blaming someone else for her dire circumstances because her daughter did not make the team.

10. It's widely accepted in the mental health community that those who have been incarcerated for a long period of time, 10 years or more, leave prison highly paranoid. Ricky Marquez paired with Lyuda, who has paranoid features that were highlighted by Dr. Paglini, make a dangerous combination. Her words in her own response indicate that she is someone who is ruled by paranoia. In spite of how Lyudmyla wants to characterize Dr. Paglini's admonishments in his evaluation, what is on those recordings and transcribed is unequivocally parental alienation. Dr. Paglini told Lyudmyla that she must stop badmouthing me, but she's only ramped up her efforts.

11. Lyuda continually uses the word "harassment" in her writing. Is any communication regarding the well-being of my son considered harassment? How have I harassed Ricky Marquez? As concisely and succinctly as I can state this, I do not in any way harass Ricky Marquez. I have nothing to do with anything being mailed to Mr. Marquez. I have not disseminated any literature to the neighborhood where they live. If anything, she is showing in her writing that her neighbors have the same concerns that I did about Ricky Marquez. Also, just because there was a Court settlement in December doesn't mean that Ricky is not a concern. Bear in mind that federal law enforcement has been communicating with me, so naturally I hear information that continues to alarm me. I've given up on pursuing that issue, but that doesn't

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mean I have to like it. In my view, her new choice in husband just elucidates the continued trend of not putting her son's best interests as a priority in her life. Rather, it illuminates that her children are a very low priority when it comes to placing their well-being above her own.

12. I absolutely DID send an email to her first husband in Ukraine, as we had a prior relationship when I was Iryna's step-father. I felt I had a duty to warn him of who Lyuda had chosen as Iryna's new step-father, but also because I wanted him to be afforded the right that I wasn't given to know who is in our children's lives. Part of what Lyudmyla perceives as harassment of Ricky Marquez's probation officer was my disgust at the failure on her part to warn me of who was in my son's life. In particular, in the first conversation that I had with Ricky's probation officer, he told me that Ricky was "human garbage" and that I should seek full custody. What parent wouldn't be alarmed by this? What parent wouldn't want more answers, especially when Lyudmyla wouldn't provide those answers to me? Obviously, Lyudmyla's first husband was just as alarmed as I was about Ricky's past, or there wouldn't be strained communication between them now. I stand by my decision to warn him. I did so because, to this day, I love my former step-daughter.

13. Lyudmyla claims that we made a verbal agreement that she could pick up Sasha at 3 on her days. Why on earth would I vacate the most important part of our settlement, after going through the stress of the custody evaluation and hearing? And if I had agreed to this, I certainly wouldn't have made her wait outside to get him. Obviously, this was an agreement that never happened. The order of 5:30 is in place because we cannot negotiate pickups. Every day, I pick him up from the bus stop; I feed him, read his assigned school books, complete school work, and do structured sports activities. Sasha is now doing quite well with his reading and is performing extremely well on his baseball team because of this time we share together. I'm trying to teach him consistency and routine. I made it clear to his mother that I would return Sasha when we finish with the daily routine, which she had no respect for as you can tell from the text exchanges she included in her exhibits. When Sasha stays with me, we continue the nightly routine of bath time with his brother, brushing teeth together, and then reading stories before bed. "Call of Duty," "Grand Theft Auto," and hours in front of the television are not included in any part of

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our routine together, as they are at his mom's house.

14. Not only do I think that Lyudmyla should not get her time back, I think that she should have time removed in the form of me having full custody until she can show that she is going to STOP abusing our son. Without supervised visitation and Court-mandated therapy, how will Sasha ever be able to begin the healing process from this damage?

15. On page 4, Lyuda says the reason she sent a rude text was because she was so "emotionally destroyed." She admits that her emotions control her, not rational thinking. Notice from Lyudmyla's exhibits that we have only spoken once on the phone. How does that constitute harassment? Clearly, we are two people who do not get along. It's difficult to respect someone who has been on a five-year campaign to destroy my relationship with my son without the slightest bit of concern about the damage she is doing and has done to him. I don't know if he will ever completely recover from her quest to diminish me in his eyes. However, despite my feelings about Lyudmyla and her poor choices, I do not harass her. All of these old emails and texts that she is revisiting only further highlight two people who do not get along and are expected to co-parent. I do the best I can, but it is not easy to return Sasha to a home with a mother who makes his emotional well-being the lowest priority in her life.

16. On February 2nd, my infant son was rushed to the emergency room because he was having difficulty breathing. The reason that Lyuda couldn't pick Sasha up from my house until 5:30 was because he was with me at the hospital. I returned Sasha to the house around 5, picked up some clothes for my wife, and returned to the hospital. The babysitter was there to watch my one-year old, so she was there when Lyuda picked up Sasha. This was an isolated incident and was met with hostility from Lyuda, not understanding. I didn't have time to go into details with her over text, and shouldn't have had to if she were communicating reasonably with me.

17. On February 27th I did ask Lyuda to pick up Sasha from my house. There is nothing written in the agreement that says I need to bring Sasha to her every day, but for the most part, I do. If we are indeed to work reasonably with each other, wouldn't her picking him up once in a while fall into that category? If Lyuda were in fact being reasonable, she would still

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allow me the time with Sasha after school because she is unable to pick him up until 3:45 p.m. That is an hour and a half on her days that he would spend at Safekey instead of with his father. This is yet another example of how she hates me more than she loves her son. To punish me, she would make her son sit in Safekey instead of spending that time with his father.

18. Lyuda continues to lie to the Court in her own writing. For example, in our countermotion we brought up that Lyuda is in fact the one who told us to do what we want with Sasha on our days. In her Exhibit H, she actually included the text where she told us to do baseball on our days, and she would do Jiu Jitsu on her days. Also, In Lyuda's motion, she claims that I have been pulling papers out of Sasha's backpack, thus precluding her from being involved in his education. Yet, on page 5 of her response to our countermotion, she claims that she reviews the papers that I leave for her in the backpack each night. This is an example of why we clearly can't trust the veracity of anything that she's written in her response.

19. As Lyudmyla breaks down "False Statement on Sean Abid Behalf," I feel the need to address a few statements. #5. Lyudmyla failed to inform me of out-of state travel on two separate occasions, which was documented in our initial motion to change custody. This is a direct violation of our divorce decree. Also, all texts that Lyudmyla has produced were written prior to our last settlement and were addressed in Court in December 2013. Since that time, I have been civil to Lyuda. As you can see, she had to dig up old texts from 1-2 years ago because there is nothing recent to use. #7. In regards to the fighting school, no, I don't agree with Sasha being in the class, and I've given Lyudmyla my reasons. Just as a parent might have concerns about their son playing football and getting concussions, I have great fears about my son getting involved in fighting and MMA. Since then, she has not enrolled him in anything. Had she done that and provided me with a schedule, I would take him. In her text exhibit, she says that she would take Sasha to baseball ONLY if I agree to take him to fighting school. How does that benefit Sasha and all the work he's been doing in baseball? This is yet another example of her desire to exact revenge on me rather than do what is best for Sasha.

20. On page 7, all of those texts are prior to our agreement in December, which were already addressed in Court, but one that needs to be addressed is letter C. After my wife, Angela,

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met with Lyudmyla, we both realized and agreed that nothing productive comes from meeting with her. Lyudmyla spent 2.5 hours bashing me to my wife, just as she does to my son. She did the same thing on two prior meetings with my wife. She couldn't be redirected to talk about Sasha and his welfare.

21. On page 8, she details all the times she's done "favors" for me and given me extra time. Don't let her fool you; Lyudmyla has always been happy to give up her time with Sasha. She says that "not one favor was given to her." She has never asked me for extra time on my days to be denied. Also, does her giving me extra time to take my son to a football game give her the right or the excuse to abuse her son? Not one of her arguments addressed the issue, which is the emotional abuse of her son. She tries to deflect attention from the fact that she is harming our son.

22. If you were to interview our six-year old son, it would be clear to the Court the abuse that he endures from his mother. Sasha is a very open and honest boy, and clearly is tormented by the things his mother says to him about me. I am fearful that her behavior will change my boy's sweet nature and cause him to be distrustful and closed off emotionally. As a counselor, I see the effects that situations like these can have on children, and I do everything in my power to shield Sasha from this ugliness. I do not involve him in adult disputes. Any angry texts I may have sent to Lyuda in the past should have remained between adults, not read to a six-year old boy, as was evidenced in one of the recordings submitted. Regarding Iowa—we wanted to move to Iowa to give our kids a stable life, away from drama. After taking a close look at what a move would do to our financial situation (including years vested in retirement through CCSD), we realized that it wouldn't be a wise move financially and we recanted our position.

23. All the allegations of neglect are ridiculous. If my parenting were so concerning to her, why wasn't it brought up earlier? Why only now when she is at risk of losing custody? She had every opportunity, especially in the custody evaluation, to bring up her supposed concerns. We could produce the same number of receipts for purchase of clothing and school supplies as she can. She also receives child support which is meant for Sasha's care and well-being at her house. I give the best to my son, whether it's teaching him to read, to count, teaching

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him sports, feeding him, etc. It's spurious logic that I would fight to protect my son and his best interests but then would neglect him in other vital areas of his life. I am committed to his best interests 100%. Exhibit C is a salient example of how fictional these neglect allegations are, as she tried to conjure up an ailment for the specific reason that we were approaching our Court date. Also, regarding his clothing to school, his teacher is an eye-witness to the absolute falsehood that I would send my son to school with holes in his pants. Lyudmyla insists to me (in many texts that I can produce) that Sasha be returned to her in clothes that she has purchased, so I send him back to her in the clothes she has purchased, not always what he wore to school that day. Therefore, clearly, the clothes that have the holes in them are actually hers.

24. True neglect is that rather than spending true time with your son, you allow him to play violent and inappropriate video games and watch movies for the entirety of his visit. Sasha will freely tell any evaluator any of these things. I am the only one who reads to him. I am the only one who plays with him. My time with Sasha is spent engaged and in-tune with him. Therefore, the possibility of neglect is non-existent. It is this vigilance to his well-being that made it imperative for me to make a decisive act that would stop the bad-mouthing and alienation.

25. Lyudmyla has freely admitted in her closing argument that she does not want to participate in communication any longer regarding our son, which isn't in congruence with NRS 125.480. Lyuda may try to say that I only want primary custody so that we will get child support. In fact, I will be happy to take FULL custody and she won't have to pay me anything. I believe I should be granted full custody with only supervised visitation for his mother. If she can do this amount of damage on record in two days, what could she do with unfettered access to him in 6 weeks? There are no safeguards for Sasha as this custody currently stands, particularly in a foreign country.

26. Lyudmyla is not just unwell; she is sick. The things that she said to that child in those recordings should never be said in a lifetime. The fact that it occurred in only two recordings makes it all the more disgusting. Sasha was five years old when this occurred and this has been going on for his whole life. This is particularly troubling because badmouthing and

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parental alienation take ground with younger children so much easier than with older kids. Younger kids don't have the same conception of reality. Developmentally they are not ready yet. Sasha still believes in Santa and the tooth fairy. He will believe anything a parent tells him.

27. Distorting reality for a child this young is depriving them of the other parent's love; making them question the validity of this love is devastating and is going to have long-lasting effects. It is cruel. However, parents like Lyuda with this attitude do not solve problems by being rational. They have no internal conflict. It doesn't bother them that they are hurting their child, tearing them into a thousand pieces, causing them a lifetime of damage. As you can tell from her opposition, it's always someone else's fault. She took no responsibility for her actions. There is no protocol to fix a badmouthing parent like Lyuda because you cannot reason with them, and they find absolutely no fault in denigrating the other parent or destroying their child's self-esteem. This Court needs to act swiftly and take decisive action that will put Sasha on a path to recovery, to be spared.

Dated this 16 day of March, 2015.

SEAN R. ABID

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## CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of March, 2015 I served a copy of the **DECLARATION OF SEAN ABID IN RESPONSE TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO CHANGE CUSTODY AND COUNTERMOTION TO STRIKE PLAINTIFF'S OPPOSITION AND TO SUPPRESS THE ALLEGED CONTENTS OF THE UNLAWFULLY OBTAINED RECORDING AND FOR SANCTIONS AND ATTORNEY FEES** upon each of the parties by **electronic service** through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R. 9; and by depositing a true and correct copy of the same in a sealed envelope in the First Class United States Mail, Postage Pre-Paid, addressed as follows:

Michael R. Balabon, Esq.
5765 S. Rainbow Blvd., #109
Las Vegas, NV 89118
Email for Service: mbalabon@hotmail.com
*Attorney for Defendant*
*Lyudmyla Abid*

Cheryl Berdahl
an Employee of BLACK & LOBELLO

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# Exhibit 1

# Exhibit 1

# NOSCA: National Office for School Counselor Advocacy



# Awards

Each year, NOSCA recognizes exemplary service and advocacy efforts of individual school counseling professionals. These individuals are applauded for their outstanding contributions to the advancement of college and career readiness for all students.

2013 (/about/awards?quicktabs_awards_tabs=0#quicktabs-awards_tabs) |
2012 (/about/awards?quicktabs_awards_tabs=1#quicktabs-awards_tabs) |
2011 (/about/awards?quicktabs_awards_tabs=2#quicktabs-awards_tabs) |
2010 (/about/awards?quicktabs_awards_tabs=3#quicktabs-awards_tabs) |
2009 (/about/awards?quicktabs_awards_tabs=4#quicktabs-awards_tabs) |
2008 (/about/awards?quicktabs_awards_tabs=5#quicktabs-awards_tabs)

**Jill Zitt**
**Partnerships and collaboration**
K-8 School Counselor, Amberlea Elementary School
Pendergast School District, Phoenix, AZ

Jill Zitt is a true believer in the Kids at Hope concept that "All children are capable of success, no exceptions." That belief and passion inspires her to ensure that all students she comes into contact with, at whatever age level, understand the importance of college and career readiness. This belief is exemplified in the program and partnerships Jill has developed. For example, as the founder of "Amberlea is College Bound", Jill worked to ensure that the college-bound philosophy permeated the school. In the initial planning stages she involved all stakeholders to ensure school-wide buy-in.

In 2009 "Amberlea is College Bound" was introduced to the school community through parent assemblies. Parents who never considered the possibility of their children attending college were now filled with hope of a brighter future for their children. Data on parent/family surveys show an 87% increase in college knowledge. To mobilize these "College Bound" initiatives, Mrs. Zitt created partnerships with Educational Management Corporation who provided t-shirts for all the children that say "Amberlea is College Bound" and she garnered support from many colleges and universities. For example, the mascot and members of the women's basketball team from Arizona State University visited Amberlea and met with students, and in 2009 Clemson University sports home page featured a photo of the 4th grade class that "adopted" Clemson University. A total of thirty colleges and universities have been "adopted" by Ambertea.

Since 2004 she has been a K-8 counselor in the Pendergast School District where she currently serves the students and families at Amberlea Elementary School, a Title One School in Phoenix, Arizona. A school counselor for nine years in the Waupun Area School District in Wisconsin, Mrs. Zitt moved to Arizona in 2003 and became the school counselor at Crossroads School, an alternative school in the Deer Valley Unified School District. She earned her BS from the University of Wisconsin – Stout and her MS Ed in School Counseling from the University of Wisconsin – Oshkosh. She is a National Certified Counselor and a National Certified School Counselor. In addition, she is an adjunct professor in the School Guidance Counseling Program at Ottawa University.

Mrs. Zitt is an active participant in district level activities, including a past member of the district's Strategic Plan Design team, developing the school district's 5-year plan, mission, vision, and goals. A district trainer for the Boys Town Education Model and the Kids at Hope concept, she works with all district employees. In 2007, she was a member of the district counseling team that earned the "Superintendent's Award," the school district's highest honor. Mrs. Zitt and the Amberlea School College Bound initiative received the 2011 "Pathway to Postsecondary Education Award" given by the Arizona Commission for Postsecondary Education.

Mrs. Zitt is also an active member of the Arizona School Counselor Association, serving five years as the Middle School Vice President. In 2012 she represented Arizona school counselors on the Arizona Business and Education Coalition (ABEC) and is a member of the Arizona College Access Network (AzCAN). Her passion for seeing that all students have access and success in post-secondary education led her to serve as a mentor in the Friendly House Scholars Program which awards scholarships and support to Hispanic youth attending one of the ten Maricopa County Community College District schools. The current Director of AzCAN describes Jill Zitt as an exemplary leader and "staunch advocate for creating higher expectations for students and a belief that all students are capable of the highest levels of achievement. As a counselor in an urban school, Jill has advocated for her campus to incorporate a college focused philosophy that truly brings relevance, focus and desire to every student."

Married to Art Zitt, a retired school administrator, she is the mother of two grown sons and grandmother to three young boys. She is an avid college sports fan and can often be found cheering on the Wisconsin Badgers or other teams in the Big Ten conference!

### Kim Graham-Lawless

Increasing equity in college and career readiness
Student Services Chair, Student Services and College Counseling Department
KIPP, Washington, DC

Kim Graham-Lawless has dedicated her career to promoting equity in education, closing the achievement gap and helping all students reach their potential. She is committed to making college access and readiness a reality for every student.

After graduating with her Master's degree in School Counseling from the University of Maryland in 2009, Kim was hired to found and lead the Student Services and College Counseling Department at KIPP DC College Preparatory (KCP).

KCP is KIPP DC's founding high school located in the underserved Anacostia community in Washington, D.C. At KCP, 86% of students qualify for free and reduced meals and 86% of the students will be the first in their families to go to college. Kim works tirelessly to create and implement programs that ensure all students and families have access to the resources and preparation necessary to successfully apply to college. This work includes facilitating community partnerships, assisting students in finding and applying for internships, creating community service opportunities, supporting parents through the college application and financial aid process, organizing SAT/ACT prep for all students, and helping students and parents navigate the college application process. In addition, she fostered the growth of more than seventy extra-curricular and summer programs, leading to 100% student participation in each area. Kim assisted in securing over two million dollars in scholarships and grants for students, organized large-scale college tours, and helped establish the school's Honors College program. Kim's contributions have played a significant role in ensuring that 100% of KCP's current seniors, the school's founding class, successfully applied to and were accepted into college.

Kim's work at KIPP DC builds on a career focused on being a results-focused advocate for students and families. She began her work as a founding teacher in St. Petersburg, Florida at a charter school aimed at helping poor-performing, middle school students achieve success. As a teacher, she received praise for creating innovative experiential and classroom-based learning opportunities for students with alternative education needs. As the Director of Youth Ministries at Pasadena Community Church she continued her work in service. While in the position, she led numerous national and international mission trips, raised nearly $100,000 for student and community activities and created unique leadership development opportunities for youths in the community.

### Sean Abid

Increasing equity in college and career readiness
Chairperson for school Counseling
Desert Oasis High School, Las Vegas, NV

Sean Abid is the Department Chairperson for School Counseling at Desert Oasis High School in Las Vegas, NV, a high needs urban high school in the Las Vegas East Valley. Mr. Abid began at Desert Oasis in 2007 as a staff school counselor and Volleyball coach. His enthusiasm for volleyball and love for his student athletes was rewarded as he won Coach of the Year in 2008 for the division in which he competed (Northeast Sunrise Division – Las Vegas, NV). Now in addition to serving as department chair and coach he is the Clark County School District's NCAA Eligibility Liaison.

Throughout his career Sean has worked successfully with traditionally underserved populations students. Because of his genuine dedication to helping students in need Sean has built lasting relationships with students who relied upon him daily for counseling and guidance. He works tirelessly to guide students both academically and emotionally as they navigate

barriers and obstacles in order to achieve their goals. Because of his extensive expertise in both counseling and athletics, and eligibility requirements, he has motivated many athletes to perform well academically in order to earn both academic and athletic scholarships for college.

But his efforts have not only been at Desert Oasis. While at Desert Pines High School he worked with seniors committed to ensuring they graduated and significantly increased the college going rate. In one year he and colleagues increased the college acceptance rate to University of Nevada at Reno from three to fifty with twelve eventually enrolling. His former colleagues said he worked tirelessly to with students so that they could expand their life opportunities and "dream about a bigger future".

Sean was recently recognized in the Las Vegas Review Journal for a tremendous achievement involving one of the students he mentored at Desert Pines High School who went on to play football at the University of Utah. The time Sean spent working with students from challenging backgrounds has honed his skills as a school counselor and helped him to establish genuine relationships that focus on mutual respect and communication that empowers students to grow and aspire. As a result, Mr. Abid has become a positive role model to many.

Mr. Abid worked at the middle school level as well before transitioning to Rancho High School in 2002, a challenging urban location, in North Las Vegas. There Sean discovered a true passion for mentoring and guiding student athletes and underprivileged kids. It was at Rancho where he began to mentor groups of students striving to become college athletes. Sean guided many of these students through the tedious process of transferring to four year universities from community and junior colleges. The extensive time and dedication he provided has helped a number of students become the first people in their families to earn college degrees. From that time forward, a passion was ignited that propelled him to guide young men and women into better circumstances than they envisioned or believed possible.

Mr. Abid lives by the mantra first stated by Theodore Roosevelt: "No one cares how much you know until they know how much you care." This quote is brought to life by the words of a colleague who stated: Sean Abid personifies all that is right about an individual that is caring, compassionate and connected to the community in which he works. He is a wise counselor and a standard bearer of integrity and civility.

Mr. Abid grew up in Santa Barbara, California, and graduated from the University of California at Santa Barbara with honors in Sociology. He then obtained his Masters in Clinical Psychology at Antioch University. After his college experiences, he moved to Las Vegas to begin his career. He particularly enjoys watching former athletes compete in NCAA competitions. He is married with a four year old son named Sasha, and he and his wife are expecting another child.

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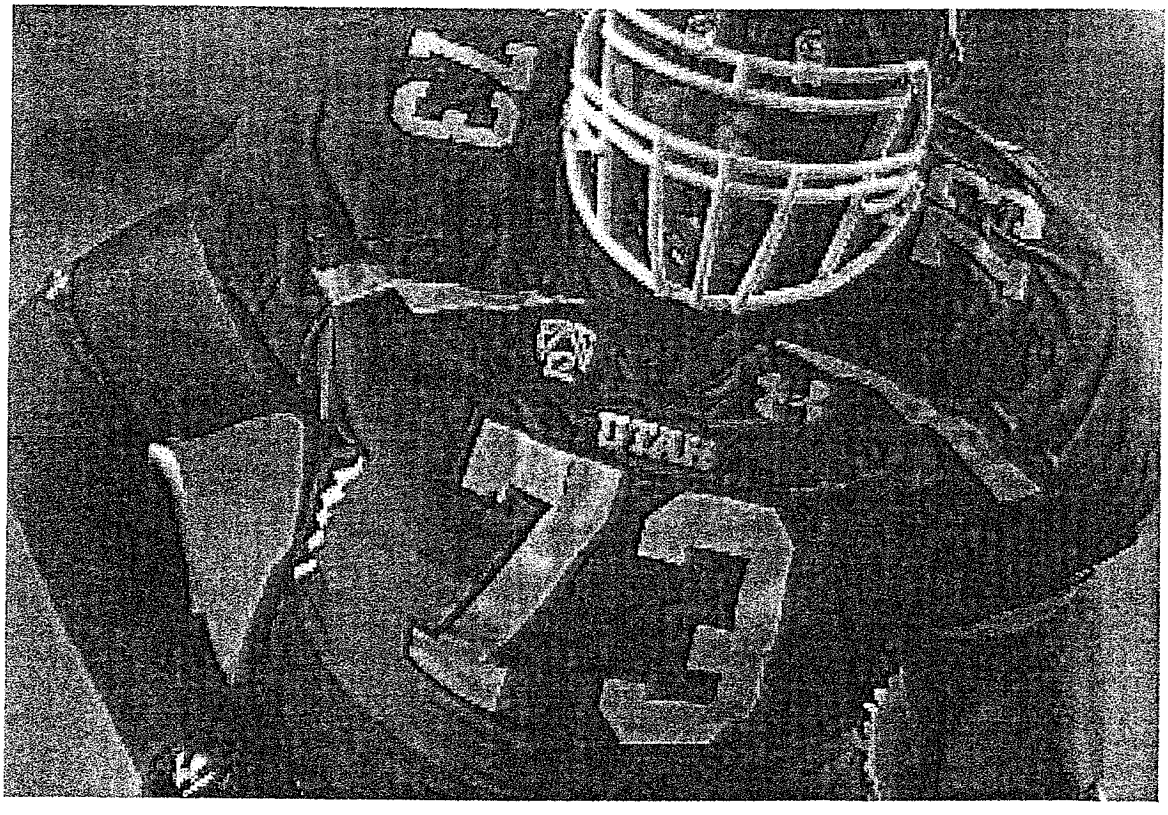
Mountain West pulls...

Empty month gets boost

Posted October 4, 2012 - 2:01am

# COUNSELOR INSPIRES DESERT PINES GRADUATE POUTASI



He was speaking from an office 425 miles away, but you could hear the anxiety in Jeremiah Poutasi's voice.

Poutasi is the starting right offensive tackle at Utah. Tonight, against mighty Southern California on national TV, he will be matched against a guy named Morgan Breslin. Breslin is the left defensive end for USC, which was ranked No. 1 at the start of the season. Breslin already has 9½ tackles for loss and 5½ sacks.

Breslin is a transfer from Diablo Valley (Calif.) Junior College. He stands 6 feet 2 inches tall, weighs 250 pounds. He looks mean in his photo. He can grow facial hair if he chooses. He does not speak to the media. Lane Kiffin, the USC coach, says the only words he has ever heard Breslin speak are "Fight On." Those are the first two words of the USC fight song.

Poutasi is a true freshman from Desert Pines High School. True, he stands 6-5, weighs 322 pounds. More or less. But some of that is baby fat. Last year at this time, Poutasi was getting ready to block the defensive ends from Valley High School. Not the same as blocking Morgan Breslin. That is why you could hear the anxiety in his voice.

This was Friday, a full six days before the Trojans would get off the bus at Rice-Eccles Stadium looking mean, because the last time they got off a bus, at Stanford on Sept. 15, they did not look so mean, and they lost, 21-14. So now, instead of No. 1, they are No. 13.

But then Poutasi said that Coach Abid was going to be there, that Coach Abid was always there for him. And then he forgot about trying to block Morgan Breslin, No. 91 on the Trojans. At least for a little while.

Poutasi told me the story about what Coach Abid - Sean Abid, his guidance counselor at Desert Pines, who is a volleyball coach, not a football coach - has meant to him.

Two days earlier, Abid told me the story about what Jeremiah Poutasi's progress in the classroom and on the football field - but mostly in the classroom - has meant to him.

The stories were identical.

When Poutasi transferred from Eldorado to Desert Pines, his grade-point average was slightly better than John Blutarsky's in "Animal House," which was 0.0. But only slightly.

It's not that Poutasi wasn't bright enough to do the work, it was that he chose mostly not to do it, because going to college was not in his future. Neither, for that matter, was

football. Despite his size, he just wasn't interested in blocking defensive ends who look mean and can grow facial hair.

But Coach Abid, the volleyball coach, saw how Poutasi moved his feet on Friday night. For a big kid, he sure could dance.

Big kids who can dance like that are offered scholarships to places such as Washington and Arizona State and Oregon and Utah and to all of those other Pac-12 schools, with the exception of USC, which Poutasi was.

But first, his academic record had to be "completely rebuilt." And so it was rebuilt, and that got Abid sideways with his supervisors, the ones with the patches on the elbows of their jackets, because they thought the big kid who could dance on the football field should be taking specialized classes, instead of core classes like basic English and math that would keep him eligible to play football, keep him eligible for a college scholarship.

So now, Sean Abid is the lead guidance counselor and boys volleyball coach at Desert Oasis High School.

I find this remarkable. Not that academic types and those who look after athletic-types would clash, because this happens a lot. But that guidance counselors actually counsel kids these days.

(When I was in high school, guidance counselors mostly were successful coaches who had gotten old, and when they got old, they would get cranky. And then when you sought them out for guidance, they would take one look at all those C-minuses on your transcript - and the D-plus in algebra - and suggest you forget college and get a job pouring slag at the steel mill like your old man.)

Before Jeremiah Poutasi received a scholarship to play football at Utah, he wrote an essay for an English course called "The Person I'll Never Forget." That person was his guidance counselor, Sean Abid.

"The only reason I am in class today is because of him," he wrote. "Mr. Abid is constantly on my case, always telling me to get to class, and as a person, I am tired of him telling me to get to class, so I might as well save both of us the trouble and get my butt to class."

Maybe it wasn't Hemingway, but it came from the heart. And that is where Abid holds it, thanks to the English teacher who thought he should have Jeremiah's essay.

The big kid who can dance in pass protection went on to write that Coach Abid was always there for him, just like he will be there for him tonight, when he's trying to block Morgan Breslin, No. 91 on the Trojans, who already has 9½ tackles for loss and 5½

sacks and looks mean and doesn't speak to the media. Not even the Los Angeles Times.

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Mountain West pulls... Empty month gets boost

The Salt Lake Tribune

# Utah football: Jeremiah Poutasi — almost a Duck — has become a force for the Utes

BY MATTHEW PIPER

THE SALT LAKE TRIBUNE

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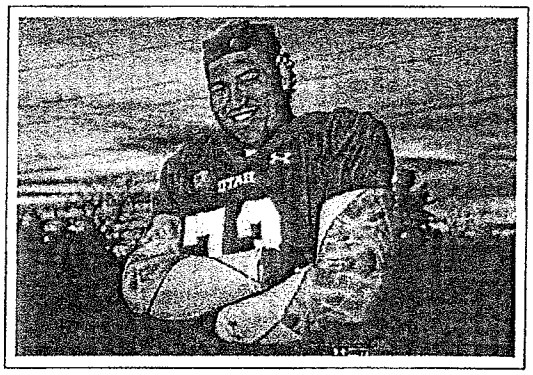
One way or another, Jeremiah Poutasi would've been readying for a balance-tipping game at Rice-Eccles Stadium, but he might have been doing so in Eugene.



Chris Detrick | The Salt Lake Tribune
Utah left tackle Jeremiah Poutasi poses for a portrait after a practice at the Eccles Football Center Tuesday November 4, 2014.

Utah's left tackle has started 30 games, and he's allowed just three sacks in 564 snaps this season. He's one of Utah's leading all-conference candidates.

And he was nearly a Duck.

But before it ever came to that, before Pac-12 suitors tripped over each other for his allegiance, he was also nearly an academic nonqualifier.

For guidance counselor Sean Abid, the story begins on a Thursday night at Desert Pines High, when he first watched the 6-foot-6 sophomore play not offensive line, but defensive line, in garbage time.

Abid was awed by the big kid's quick feet.

After the game, he said to the football coach, a friend of his, "Do you realize what you have here? That guy's a dancing bear. He looks like Fred Flinstone."

Abid oversaw counseling for athletes at the Las Vegas school and discovered that Poutasi — dancing bear or no — was unlikely to ever play Division I football. His transcript was in ruin.

So, with the support of Poutasi's parents, Abid set about "rebuilding" his transcript, opting for NCAA core classes instead of specialized classes preferred by the school district, and enrolling Poutasi in summer classes.

Poutasi would come over to Abid's house on fall Saturdays and watch college football between sections of the practice ACT, or they'd go to a sports restaurant with coaches and discuss his eligibility.

"There were times when I had to really get on him, but once we started working together, he did everything I asked him to do," Abid said.

Not just in the classroom — where Abid said Poutasi raised his GPA in NCAA core classes from 1.2 to 2.8 — but also in the weight room.

Abid lifts, and he'd compete with Poutasi. As a sophomore, Poutasi struggled to bench 185, and by his junior year, he was hitting 15 reps at 225 without breaking a sweat.

Others began to see it. Poutasi was rated a four-star prospect by Rivals.com. Offers poured in.

Abid emphasized schools' academic support and recalled a positive experience with former area safety Deshawn Richard at the U. He asked Poutasi which recruiter he felt most comfortable with. Poutasi told him it was then-Utah assistant Jay Hill.

But he was also enamored of the BCS runners-up: Chip Kelly's Ducks.

"I'm not going to lie, Oregon was a school that I always wanted to go to," Poutasi said.

In fall of Poutasi's senior year, Oregon persuaded him to schedule a trip the weekend of the ACT — against Abid's wishes — and then canceled on Poutasi the day prior.

They opted to bring in another lineman instead, Abid said. He was furious. Oregon gave Abid what he calls a "BS excuse" that Poutasi's transcript didn't cut it.

"I said, 'This is baloney. This kid's a hard-luck qualifier, and you just made it so he can't take this test.' "

Abid was born in Oregon and owned a Ducks helmet, but he was so fed up that he gave it to a student.

Oregon later re-entered the picture shortly before signing day. Poutasi visited Eugene, after all. Abid said the Ducks told him then that Poutasi's transcript — essentially no different from what they had seen in fall — was now up to snuff.

It was too little, too late, though.

"It wasn't the same as Utah," Poutasi said. "The family atmosphere, the coaches, the players — everybody's just one big family [here]."

So Poutasi stuck by Utah, and Utah, like Abid, stuck by him.

In July of Poutasi's senior year, Hill called Abid to say Poutasi had qualified. Abid considers it one of his fondest memories.

"He played a big role in my life," Poutasi said. "I think he's the reason why I'm here today."

He started at right tackle as a freshman, and then on the left side as a sophomore, when he was the target of criticism while trying to contain the likes of this year's No. 9 overall NFL draft pick Anthony Barr.

Abid said Poutasi was playing through multiple injuries, though he'd never talk about it, and offensive line coach Jim Harding feels Poutasi is probably more of a natural guard who happens to also be their best left tackle.

After dropping more than 30 pounds in the offseason, he's looked more at home on the outside.

"His footwork is amazing, he's a lot faster than he was last year, and he's just a powerhouse," said sophomore left guard Isaac Asiata. "Amazing strength."

Harding said that against ASU, Poutasi was beat for the first time this season on a speed rush. It happened once, and not again.

Poutasi still talks to Abid to calm his nerves before big games. Facing the No. 5 Ducks this Saturday, Poutasi admits, is about as big as it gets for him.

But Abid tells him he has nothing to worry about.

"You've won," he says, "because you're here."

mpiper@sltrib.com Twitter: @matthew_piper

—

Jeremiah Poutasi file

O Measurables • 6-foot-6, 330 pounds

Hometown • Las Vegas

In high school • Late bloomer became Desert Pines High team captain and was named the top offensive lineman at the 2012 Offense-Defense All-America Game in Dallas.

At Utah • Started at right tackle as a true freshman and was named honorable mention All-Pac-12.

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# 2015 Draft Interview: Jeremiah Poutasi, OL, Utah

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Scott Porter February 10, 2015
2015 Scouting Reports, Archives, Articles, Features, Interviews, NCAA, NFL Draft


Scott Porter: What do you feel are your greatest strengths?

Jeremiah Poutasi: My power and my footwork. I have quick feet and I am athletic for a big body guy.

Scott Porter: What factors led you to your decision to declare for the NFL draft?

Jeremiah Poutasi: It was just a decision I came upon. I had a great year and I had a chance to go early. I didn't think much about it during the season but after the season I started to think about it and got good feedback. It was a family decision. My family supported me and my fiancé supported me.

Scott Porter: What is the most satisfying aspect of football for you?

Jeremiah Poutasi: I'm not one of those people who it is all about me. The most satisfying aspect for me is being with my team and the team bonding. The waking up at 6 AM working our butts off together as a team, running, working hard, working to get better. Then we look at each other worn out and then we see the results on the field. It is great to see the hard work we do together pay off. It is a family like bond.

Scott Porter: What hobbies do you have off the field?

Jeremiah Poutasi: I like playing madden and bowling. I also like to shoot hoops.

Scott Porter: What type of person is an NFL team getting in Jeremiah Poutasi?

Jeremiah Poutasi: They are getting a person who is willing to work hard and never give up no matter what the score is. I am good at putting the negative aspect aside and going out there and doing my job and

helping my team work hard. I am positive and take everything in a positive manner to be successful. They are getting a guy who will represent his team in a positive way and stay humble.

Scott Porter: What goals do you have for yourself in the NFL?

Jeremiah Poutasi: My first goal is to make a team. If I make a team I want to be one of the bet OG's in the NFL. I want people to know my name as one of the elite OL in the NFL. I want people to remember me for being that guy who excelled at football. My most important goal is to be a good role model for those who look up to me like I did to others growing up playing the game.

Scott Porter: When did you realize you might have the potential to play in the NFL?

Jeremiah Poutasi: It has always been a dream of mine but I didn't know if I'd ever have an NFL future. Coming off my sophomore season I didn't feel that I played that well and I started thinking about what else I might like to do after I finished college. My junior year I had a much different mindset and the game became easier. I got much more comfortable and people started telling me I had a shot. I started believing in myself and my hard work was showing.

Scott Porter: Who has been your biggest influence throughout your career?

Jeremiah Poutasi: A few people. First my parents they have always pushed me and didn't want to see me fail. They have always been there for me and supported me through good and bad. There was a lot of tough love from them. My fiancé, she has been there for me through ups and downs and has been a huge support to me. It really falls back on my loving family. I do this for my family. Then there is my high school counselor. Sean Abid. He was basically the first person to believe in me. He pushed me to go to college when I had no intentions to go to college. He helped me a lot in high school and without him I would never be here.

Scott Porter: What is something about you that not a lot of people know?

Jeremiah Poutasi: I like to dance.

Quick Hits
Favorite Food: Chinese
Favorite Movie: Lion King
Favorite Fast Food: Jack in the Box

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# Exhibit 2

# Exhibit 2

The only time when I mention you if Sasha doesn't eat at my home I am telling him that he will go to your house. Your name is a punishment for Sasha in my house.

**Lyudmyla Abid**

Business Analyst

Freeman

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**From:** Sean R. Abid [mailto:abidsr@interact.ccsd.net]
**Sent:** Friday, January 11, 2013 9:27 AM
**To:** Lyuda Abid
**Subject:** Sasha

**I am very hurt by the things that are being said to Sasha in your home. He has repeated many things that you have said to him about me and he is very confused by what is being to said to him about his father. When you degrade his father you are telling him that 50% of him is bad and you are doing damage to his self-esteem and self-concept. I have never told Sasha a bad word about his mother or any member of his family. I only tell him that his mother and sister love him. If you continue to degrade me before Sasha's eyes then your hate for me is stronger than your love for your son and you will hurt him in ways that will damage him for a lifetime. I am pleading with to please do your best to raise Sasha to be a loving and kind boy who is proud of 100% of himself. I am his father. You cannot change that. He deserves to know that his father is a person worthy of respect and I do not deserve to be torn down in his eyes. You need to be aware that I will do everything in my power to save my son from what you are doing to him. I am**

## John Jones

**From:** Sean R. Abid <abidsr@interact.ccsd.net>
**Sent:** Sunday, March 15, 2015 8:58 AM
**To:** John Jones
**Subject:** Fwd: Disturbing Comments(exibit A part 3)

**Sean Abid MA NCC NCSC**
**CCSD NCAA Eligibility Liaison**
**Lead Guidance Counselor**
**Last Names A-C**
**Desert Oasis HS**
**702-799-6881 Ext. 4301**

----- Original Message -----

**In the past two weeks that Sasha has been with us, he has repeated some very disturbing things that he's heard from you. I have implored you in the past, for the sake of Sasha, to STOP bad-mouthing me to him, and yet it seems you are still doing it. You are putting Sasha in a horrible situation and damaging an innocent boy. A few things we've heard: "Momma says that you are a waste of life." "Momma says that you are stealing all of her money and that you are a bad guy." "Daddy, mommy cries a lot. She says it's because you are mean at her." How can you be so selfish to put a 4 year old boy in this situation? He deserves better. http://www.alllaw.com/articles/family/divorce/article20.asp**

**Sean Abid MA NCC NCSC**
**CCSD NCAA Eligibility Liaison**
**Lead Guidance Counselor**
**Last Names A-C**
**Desert Oasis HS**
**702-799-6881 Ext. 4301**

**"Better to fight on your feet than live on your knees!"**