A Yeah, yeah.

Q And did they tell you why they were callingyou?

A One of the persons was a -- you know, incharge of Eastern European crime in -- in Nevada -- in LasVegas.

Q And he indicated that they were--

A She. It was a she.

Q Okay. Did she indicate they were investigating Mr. --

A No, no.

Q Okay. Let me finish my question. Did she indicate that they wereinvestigating Mr. Marquez?

A No.

Q What was her name?

A I don't remember.

Q What was the name of the other individualyou spoke to?

A I don't remember. They were Agents something. I don't remember thenames.

Q Where did you visit -- did you plan during that conversation to have a meeting withthem?

A Well, they -- they had me come down totheir office.

Q So based on the conversation they had withyou, they directed you to come to their office?

A Uh-huh.

Q Yes?

A Yes.

Q Okay. And when was that meeting?

A August, Septem- -- maybe September 2014,the fall.

Q And it was in that conversation in Augustor September of 2014 with FBI agents at the FBI's officethat you learned of the one-party consent law,correct?

A No. I already knew about it. I just heard them talking about it.

Q In your previous convers- -- inprevious testimony on this record you testified that youlearned information about that issue, the one-party consentlaw, from an FBI -- or from a lawenforcement agent. You've identified that person as the FBIagent.

A No, I didn't learn about it. I knew -- I knew we were a one-party state. I knew California's atwo-party state. I knew this already.

Q Did you -- you said that you had overheardthem talking about one-party consent at the--

A I just heard them over -- I heard themtalking about the statute.

Q What statute were they referringto?

A They didn't refer to it by number, but Iassume they were referring to200.650.

Q Okay. And that's the one-party consent statute --

A Yeah.

Q -- correct? To your knowledge?

A It is, in fact.

Q Okay. And that's what -- that was the subject of the discussion with the FBI--

A No.

Q -- at the time of the meeting in--

A No.

Q Okay. What was the subject of the discussion?

A They wanted to know what I knewabout Mr.Marquez.

Q How did the conversation turn to theone-party consent statute?

A We're waiting -- I'm waiting for the meetingto start. They're talking.

Q And in that meeting while you were presentthey were talking about the one-party consentstatute.

A Yeah.

Q And then they began to ask you questionsabout Mr. Marquez.

A Then the formal meetingstarted, yeah. There was no more small-talk.

Q Did they ever indicate to you that they'd like you to take a tape-recording of Mr. Marquez?

A No.

Q Did they ever indicate to you that there was a-- based upon the one-party consent law and thevicarious consent provisions that you could place a tape recorderin a backpack and have Mr. Marquez's conversationsoverheard?

A Absolutely not.

Q But that's where you got theidea.

A No. I had the idea. I just -- they – they discussed the statute. That's all. I never bothered to look up the statute.

Q What were the agents' names that you spoke toat the FBI?

A I told you I don't know theirnames.

Q Did you have any written communication withthose agents?

A No.

Q Did you provide them anydocuments?

A No.

Q What did you tellthem?

A I told them what they -- what they -- whenthey asked me a question, Ianswered it. I don't remember the questions.

Q Do you recall anything that you told theFBI?

A No.

Q As you're sitting here today, not a single word -- you can't remember one word from thatconversation that occurred in -- I think you said September orOctober of 2014.

A No.

Q Did you have any further contact with theFederal Bureau of Investigation or any investigators, employeesor agents of the Federal Bureau ofInvestigation?

A Yes.

Q When was that?

A I don't know. They called me -- at somepoint called me a few othertimes.

Q Who called you?

A I don't remember the agent'sname.

Q Did you keep any notes of your conversationswith the FBI?

A No.

Q Was anyone else present other than the agentsand yourself at thesemeetings?

A Only one meeting. No.

Q At thatmeeting? At that meeting what did the FBI tell youabout Mr. Marquez?

A I don't remember. They don't tell youanything. They ask.

Q How long was themeeting?

A An hour, 45 minutes. A long time ago. Maybe it was a halfan hour. I don't know. I spent a lot oftime waiting.

Q Where was themeeting?

A I think it was down there on Lake Mead and -- wherever their headquarters are downthere.

Q Did they show you any material or documentsor other information at the time that you met withthem?

A No. They didn't show me anything.

Q Could you describe themale.

A No. He's -- well, he's a whitemale.

Q How tall?

A I don't know. He was sitting down.

Q What did he -- old? Young?

A I don't know. I'd say somewhere between -- I don't know. Less than -- he wasn't old. He was probably somewhere south of 40. I don't know.

Q Color of his hair?

A I don't know. I would not be able torecognize him.

Q And the woman, what did she looklike?

A Wouldn't recognize hereither.

Q Color of her hair?

A I don't know. They were all wearing the same suits. I don't know. Dark brown.

Q You don't remember?

A No. I couldn't distinguish her if she walked by me in the street. I only saw them once.

Q These -- was it the same individuals that spoke to you in September and you met with in -- or excuse me-- in August and you met with in either September or October that contacted you again?

A Yeah. One of the agents was in the room.

Q So I take it that the -- one of the agents that was in the room contacted you, correct?

A This is true.

Q And was that the female or the male agent?

A Female.

Q And you don't know her name.

A No.

Q But you knew it then, correct?

A No, not really. I mean I only talked to the people twice, and they're Agent whatever, and so...

Q Well, you indicated that they called you several times after the meeting --

A Not several. I told you once.

Q So you had a conversation in August, you had a conversation at their office, and one other phone call; that's your testimony now?

A The initial phone call, yes. As you said, initial phone call, meeting, follow-up phone call.

Q And what was the purpose of the follow-up phone call?

A I don't remember. They were -- they asked me a question. I don't remember what it was. It was brief, very brief.

Q What did you discuss with them?

A I didn't discuss anything. They asked me a question. I gave them the answer.

Q And you don't recall --

A No.

Q -- anything you told them?

A No, I don't recall anything.

Q And when you were at their offices, they never gave you a card; is that correct?

A Yes. But I don't have it, but they did.

Q They gave you a card with their names on it?

A No. One -- one person gave me their card, not multiple.

Q The female or the male?

A I think it was the female.

Q And you don't have that card any longer, correct?

A No.

Q Weren't you curious as to why FBI agents were calling you in regard to Mr. Marquez?

A Not really.

Q Never even came up as to why they were calling you? You said you had all this concern about Mr. Marquez and his activity.

A Well, I just -- I learned something in the process. They don't tell you anything. You can ask them a million questions. They don't tell you anything.

Q Did you ask them a million questions? Did you ask them any questions about why you were there?

A They just said they wanted information, but they told me they weren't going to tell me. They make it very clear when they interview you that they're not telling you shit.

Q That wasn't my question. My question is did you ask any questions during these interviews?

A It was one interview, and they told me I couldn't, so I didn't.

Q So they started with the conversation with you can't ask us any questions, or words to that effect, correct?

A No. Just don't try and get information, we can't give you anything, we're not going to tell you anything.

See Sean Abid's Deposition Pages, 133 – 160.

The presented at trial will show that Sean was not acting in good faith or under the belief that the child was being abused or neglected or that the Lyuda was engaging in parental alienation. Rather, Sean was acting out of spite, hatred and mistrust of Lyuda and Mr. Marquez, and a desire to harm Mr. Marquez.

B. The recording device picked up conversations to which the child was not a party, which in effect nullifies the implied consent/vicarious consent doctrine and makes the recording illegal pursuant to State and Federal Law.

In *Lewton v. Divingnzzo*, 772 F. Supp. 2d 1046 (D. Neb. 2011), The events giving rise to the plaintiffs' claims arose in conjunction with a dispute between William Duane ("Duke") Lewton and his ex-wife, Dianna Divingnzzo ("Dianna"), over the custody of their minor child, Ellenna Divingnzzo-Lewton ("Ellenna"). Shortly after the state court granted Duke the right to have unsupervised visits with Ellenna, Dianna inserted a recording device inside Ellenna's teddy bear ("Little Bear") and secretly intercepted communications between or among Ellenna and Duke and other parties such as Duke's friends and family. The recording device also recorded conversations and/or between or among Duke and other parties such as Duke's friends and family themselves without Ellenna's participation. The recordings were made without the Duke's or his friends and family members' knowledge or consent and occurred over a period of several months.

The Nebraska court held that Dianna, her father, and an attorney, violated the Electronic Communications Privacy Act of 1986 because, even assuming that the ex-wife could have legally given vicarious consent on her daughter's behalf, the bugging of a teddy bear accomplished much more than simply recording oral communications to which the daughter was a party because the device was intentionally designed to record absolutely everything that transpired in the presence of the toy, and defendants distributed and used the intercepted communications to bolster the ex-wife's arguments in a custody case.

Similarly here, even if the Court was to adopt the doctrine of vicarious consent, the recording will still be inadmissible because the recording captured conversations between Lyuda, her husband and her daughter without their knowledge or consent and in the absence of the child.

To that, Sean testified as follows –

Q But you understood that that backpack had the potential of picking up any conversation of anyonenear the backpack while at Lyudmyla's home,correct?

A Yeah. The stipulation would be you'd have to be near the backpack. That was the potential, yeah, that-- that -- that --yeah.

Q So the answer to my question is yes,you understood that anyone standing near that backpackwould be recorded if they had a conversation while -- duringthe time that it was in Lyudmyla's home,correct?

A Yes, that's correct.

Q Who else lived with Lyudmyla at thattime?

A I assume her daughter and herhusband.

Q Okay. And her daughter's name is?

A Iryna.

Q And her husband is Ricky Marquez,correct?

A Correct.

Q So you knew those individuals resided in the home in which you placed the backpack with therecording device, correct?

A That's true.

Q Was there any reason why you felt that the recording device would not pick up conversationsbetween Lyuda and Mr. Marquez or Lyuda and her daughterIryna?

A I tested it, and you had to be next to it. It's hard to hear. If you'll listen to the recordings thatdo exist, and you're next to it, it's hard tohear. To be honest, I don't -- I only harvested what involved Sasha in those time periods. And I didn't hunt around for anything cause I was only seeking when he walked in the door to when -- and when he was driven to school. So I don't speculate on anything in between, and I don't know anything about anything inbetween.

Q So it's your testimony that -- well, let meask you how many days did you dothat?

A Two.

Q Okay. So that would have been the 20th in your recollection or -- but -- so the record's clear, it'sthe day after Martin Luther King Day,correct?

A Correct, yes, sir.

Q When else did you doit?

A On the 25th, which would have been -- wasthe Monday. So Monday, the 25th. I'm -- I'm not sure if it was the 26th, butit's the Monday of that week, the very nextMonday.

Q Did Lyuda at any time give you permission totape any of her conversations in her home?

A No.

Q Did Mr. Marquez ever give you permission totape his conversations in hishome?

A No.

Q Did Iryna ever provide you permission to tapeany of her conversations in his -- herhome?

A No.

See Sean Abid's Deposition Transcript, page 133.

C. Sean's alteration of the tape causes the tape to be inadmissible under Nevada law.

Under NRS 52.235, Sean must produce the original tape to prove its contents.

NRS 52.235 states,

> To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this title.

Despite the Court's order that Sean produce the original audiotape, Sean has failed to produce the original audiotape or a certified transcript of the tape. In fact, Sean has engaged in deliberate and specific acts directed at destroying, modifying and altering the tape to include only those specific portions of the tape that serve his purpose to gain an advantage in this custody action.

At his deposition, when questioned about the alternation of the tape, Sean responded as follows –

Q After you received back the backpack into your home I would assume sometime on the 21st -- and again, it would be the Wednesday following the Tuesday following Martin Luther King Day, what did you do with therecording device?

A I -- I first found a program to look atit.

Q What was the program?

A I don't remember the name ofit.

Q Did you download that program to yourcomputer, or did you buy it in astore?

A I downloaded it.

Q And did you have to pay for thatprogram?

A No.

Q What site did you download itfrom?

A I don't even know.

Q Is that program still on yourcomputer?

A No.

Q When was it removed from yourcomputer?

A The 26th.

Q 26th of March?

A No. Of --

Q Or excuse me. January.

A Yeah. It was all removed that next day.

Q And why did you remove theprogram?

A Didn't have any use forit anymore. I wasn't doing any more recording. I thought I had what wasnecessary to provide the judge with a picture of whatwas going on, and I -- to be hon- -- to be quite frank,the other reason was it was too disgusting to even listento.

Q You indicated that you needed a program to download the information from the recordingdevice, correct?

A No, that's not correct. I needed a program to take out the sectionsthat I was going to use.

Q Okay. So when I asked you what you did with the device after you received it back in the backpack--

A Uh-huh.

Q -- you said you had to find a program, andI believe you used the word download it, but I couldbe wrong, but you said you had to find a program to workwith the device. What exactly did you do when yougot it? Did you stick it into your computerUSB drive? Was it a USB port -- dock --

A Yes.

Q -- recording device?

A Yes.

Q So you put it in your USB drive, right?

A Uh-huh.

Q And this is on -- is that a yes?

A Yes, yes.

Q And this was on January -- the day after --

A 21st or --

Q -- you received it back, right. And at that time what happened when you stuck it into the USB drive? What appeared on your screen?

A Just created a folder with the raw data.

Q Okay. The raw data was in what form?

MP4?

A No. .wav.

Q Okay. So you had a .wav file on the recording device.

A Yeah.

Q And what did you do with that .wav file?

A I put it into the program that I downloaded.

Q Okay.

A Which allows me to see the -- the recording's entirety in time so I could pick out the sections that I wanted.

> Q And let me guess, the sections that you wantedon this program you can't identify, still don't have, are sections that you say were only designed to pick up conversations between Lyuda and the child,correct?
>
> A Wasn't designed that way. The only way I could do it and be respectful of the statutes was to tryand harvest what was -- what I soughtto harvest. That's all I did, so...

See Sean Abid's Deposition, Pages 133 – 160.

Sean has even indicated he will not even be seeking to have the tape admitted. Yet, alleged excerpts of the tape have been submitted, made part of the record, and included in Sean's pleadings which the Court has not yet struck.

In summary, in violation of NRS52.235, Sean has been able to "prove the contents" of the tape, by including small excerpts of the tape that he deemed relevant in his pleadings and by inclusion of those portions of the tape in a selectively edited flash drive which he provided to Dr. Holland prior to the child interview and to Lyuda's counsel.

D. Sean's spoliation of relevant evidence in this case causes the evidence to be inadmissible

NRS 47.250 (3) creates a "disputable presumption" that evidence willfully suppressed would be adverse if produced. In *Bass-Davis v. Davis,* 122 Nev. 442, 134 P.3d 103 (2006), the Nevada Supreme Court held that willful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence. Thus, before a rebuttable presumption that willfully suppressed evidence was adverse to the destroying party applies, the party seeking the presumption's benefit has the burden of demonstrating that the evidence was destroyed with intent to harm. *Id.* When such evidence is produced, the presumption that the evidence was adverse applies, and the burden of proof shifts to the party who destroyed the evidence. To rebut the presumption, the destroying party must then prove, by a preponderance of the evidence, that the destroyed evidence was not unfavorable. *Id.* If not rebutted, the fact-finder then presumes that the evidence was adverse to the destroying party.

In the case of *Stubli v. Big D Int'l Truckers, Inc.* 107 Nev. 309, 810 P.2d 785 (1991), the owner of a big rig sued the manufacturer and repair shop for damages caused to his truck when earlier repairs failed. Prior to filing suit, the truck's owner saved the specific parts but did not preserve the entire trailer. The *Stubli* court noted, "The plaintiffs are not free to destroy crucial evidence because a court order was not issued to preserve the evidence." 107 Nev. at 313. The court found it significant that the loss of evidence was due wholly to actions taken by agents for the plaintiff prior to any involvement in the case by the defense. Like the *Zenith* case, the court would not allow one party to misappropriate crucial evidence and then reap the benefit by laying all the responsibility for an incident at the feet of the now-defenseless party.

Sean testified as follows –

Q Okay. So you can take sections out of the tape at -- or the recording at any point in therecording, correct?

A This is correct.

Q And you in fact did that.

A Yes, I did.

Q And you removed pieces of the tape fromthe recording.

A That's exactly what I did.

Q I'm calling it tape. I don't want the record to be unclear –

A The audio file.

Q Yeah. If I inadvertently refer to it as a tape or a recording, we know that we're talking about the .wav file that you had downloaded off of the recording device that you had placed in the backpack that went intoLyuda's home, correct?

A (Witness nodding head.)

Q You understand?

A Yeah.

Q Okay. So you have the .wav file on your computer. This would be the first day that you received the .wav file off of the firstrecording. How long was therecording?

A I don't know exactly. I know that between the two segments that -- that I truncated it was, youknow, 13 hours.

Q Okay. So you -- and if I understand your testimony, you removed 13 hours of the audiorecording.

A Approximately, yeah, that would becorrect.

Q How did you know where to stop in regard to the recording and what part to remove?

A I -- what's it called? Shows the equilibrium. I'm trying to think of the name ofit. But I could see the sound on the -- whenit's laid out, I can see -- I can see all -- I can see the sound and the section I'm looking at.

Q In the section that you removed from the tape, was there evidence in the -- what you're describing that showed that there had been conversations during that period as well that were picked up by thetape?

A No. I didn't even look. I just looked specifically at the beginning of the tape. I started at zero till when -- that -- that section. That was the only section I looked at on that portion of the tape.

Q So you made this truncation of the tape when? Before or after you listened to the tape?

A I listened to it first and transcribed it, and then I truncated it, saved it.

Q When you indicated that you truncated it, the program that you had had the ability to take outany portion of that file, correct, either one second or 13 hours, correct?

A That's correct.

Q If I understand your testimony, you received a graphic representation that showed the recordinglevels higher or lower depending on the time of therecording, correct?

A Yeah.

Q Did the recording have a time stamp on it? Did the graph that you looked at have a time stamp onit?

A It did.

Q How did you determine what portion of thefile that you would remove?

A Well, because the program -- when I put the recorder into the computer -- you know, there's a designation folder. It came in four files, so the -- the say 15 hours was divided in foursections. So I was only interested in the first sectionand the fourth section.

And I knew exactly -- well, Iguessed correctly exactly in the fourth section where the --where the -- the parlance in the car would takeplace.

Q Did you hear any other portions of the tape other than the ones that you've transcribed?

A No, I did not.

Q And you didn't bother to listen to any portionof it.

A No, for a variety ofreasons. Well, the main reason is that I wasonly interested in those sections. And I only believe the -- the way the recorder was positioned, it was only going to record when he was next to his backpack. So those were the only recordings I believedthat were going to be picked up were between Sasha andhis mother.

Q And that's because you knew the precise timeat which Sasha would only be with his mother,correct?

A Well, I knew because of the sign-in at Safekey. I knew when he signed in every day. So I could guess relatively within a few-minute window of when he would be in the car.

Q Did you alter in any fashion that portion ofthe tape that you didtranscribe?

A No, I didn't.

Q How would we know that, other than yourstatement that you didn't?

A That's all I can -- it's the only way you can know.

Q The program itself would tell us whatwas truncated and what was not,correct?

A I don't know if it would. I don't know if it saves that information or not.

Q The program that was using -- that you were using that had four separate .wav files, that you precisely determined the amount of time that you were going to cut out of these .wav files, did not preservethat information; is that what your testimonyis?

A Preserved the files that I saved, that's allthat remained.

Q Okay. The other files that you took out, or truncated, in your word, what did you do withthem?

A There wasn't anything that was takenout. The way it works is you put the original filein the program. You take out what you wishto preserve. It leaves the original file intact, which wasdeleted.

Q Why did you delete the entirety of theoriginal file?

A Well, at that time I believe that was the only thing that the judge would be interested in. I didn't think she'd be interested in listening to 15 hours ofdead air.

Q So it's your testimony that there was thegraphic representation between the time that you've prepareda transcript and the second transcript, all of that timewas dead air.

A Like I said, it downloaded into four sections. Two sections I never looked at. And I only looked at the start of the two remaining sections. And I knew within a two-minute window when he was being signed in at school for a several-month -- well, several-week period. So I had really good intel on what time I could go and find him being driven to school, and I was correct.

Q And you weren't concerned about any other period in which he may have had a conversation with Lyuda, correct?

A My goal is to save my son. My -- my goal is to preserve the information for the judge so that she can see what's going on with my son. There was no other motive. If there was another motive, I assume I would have been recording for months.

Q We don't know that you weren't--

A Well, it --

Q -- cause you destroyed all the tapes other than the transcript that you have, correct?

A That's true.

See Sean Abid's Deposition Transcript, Pages 166 – 172.

In this case, Sean purposefully and deliberately destroyed portions of critical evidence and his spoliation of the evidence should be construed as creating a presumption that the evidence willfully suppressed would be adverse to Sean if produced.

E. Sean should be sanctioned for spoliation of relevant evidence in this case.

In other cases in Nevada, the Nevada Supreme Court has upheld sanctions for spoliation of evidence *See Nevada Power Co. v. Fluor*, 108 Nev. 638, 837 P.2d 1354 (1992) (destruction of a cooling tower resulted in sanctions); *Reingold v. Wet 'N Wild Nevada, Inc.*, 113 Nev. 967, 944 P.2d 800 (1997) (failure to preserve incident reports more than two weeks after the close of the summer season resulted in sanctions); *Bass-Davis v. Davis*, 134 P.3d 103 (2006) (failure to preserve a surveillance tape resulted in sanctions). Lyuda seeks sanctions against Sean for his purposeful destruction of relevant evidence.

III.

LYUDA'S REQUEST TO MODIFY THE CURRENT TIMESHARE TO ALLOW HER TO PICK UP THE CHILD AFTER SCHOOL ON HER CUSTODIAL DAYS

NRS 125.510 states,

> 1. In determining the custody of a minor child in an action brought pursuant to this chapter, the court may, except as otherwise provided in this section, NRS 125C.0601 to 125C.0693, inclusive, and chapter 130 of NRS:
>
> (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.

Pursuant to the Order entered on September 9, 2014, the relevant provision regarding Lyuda's custodial timeshare is as follows –

> The parties shall maintain their time share of Monday and Tuesday to [Lyuda] and Wednesday and Thursday to [Sean], alternating weekends. The following modification will apply: [Sean] shall pick up the minor child after school on [Lyuda's] custodial days and shall keep him until 5:30 p.m. 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.

At the time the parties stipulated to Sean picking up the child after school on Lyuda's days and keeping the child until 5:30 p.m., Lyuda worked until 5:30 p.m. on most days and Sean, being a school teacher, was able to pick up the child after school. Lyuda's work hours have now changed because of which she is able to pick up Sasha after school on her custodial days. It does not make sense for Lyuda to wait until 5:30 p.m. on her custodial days and pick up the child from Sean's home.

Indeed, until Lyuda filed her motion asking Sean to be held in contempt for failure to provide her the child's passport to allow her to travel to Ukraine with the child, Sean under the terms of the order which required the parties to be "flexible with the exchange times," allowed Lyuda to pick up Sasha earlier than 5:30 p.m. The relevant excerpt from Sean's deposition transcript is as follows –

Q All right. And then prior to November 2014 you had regularly allowed her to pick up Sasha at 3:00 o'clock when she got off work, correct?

A I wouldn't say regularly. Never 3:00 o'clock, because I don't get home with him till -- till 2:50. So at that point, depending on what the --the demands were at kindergarten -- prior to October --I think it was the beginning of October when I met with the teacher, that's when things changed for me, and so --I didn't realize how serious it was. He was the lowest performing kid. And so at that point I just said I'm going to do everything I can in this window, and I -- I've--

Q Okay.

A That's -- that was it.

Q Again, that's not my question. Could you read back the question, Madam Court Reporter.

THE REPORTER: "And then prior to November 2014 you had regularly allowed her to pick up Sasha at 3:00 o'clock when she got off work, correct?"

THE WITNESS: That is not correct.

Q (BY MR. SMITH) Okay. So when did Lyuda pick up Sasha from school prior to -- excuse me -- from your home on her days prior to November of 2014?

A It would vary. Any time between 4:00 and 5:30 maybe.

Q But never before 4:00?

A I don't know if that happened on occasion. We were communicating then. Maybe it did, but --

Q But not regularly before 4:00.

A No, no, no.

Q And the fact that she picked up the child early, that didn't happen regularly either. It was just on occasion.

A Just during the time between school starting and probably October 19th, there was -- there was flexibility there. The -- the shape that it took, I can't tell you exactly.

Q But you do recall her even during that period of time picking up the child prior to 5:30 from you, correct?

A Yes, I do.

Q But it was only after November of 2014 that you began insisting that even when she came over to your home early that she wait until 5:30, correct?

A It was because of the animosity--

Q Okay.

A -- that we were --

Q Please --

A -- going to fall back to theorder. Well, you're trying to trap me, and I'm notgoing to do it. I mean...

Q I'm trying to ask you a question and have an answer to that question. You may perceive it as a trap because you may be concerned about your own behavior, but it's a question. So the question, Madam Reporter, if you'llread that back, I'd like an answer to.

THE REPORTER: "But it was only after November of 2014 that youbegan insisting that even when shecame over to your home early thatshe wait until 5:30, correct?"

THE WITNESS: Correct.

Q (BY MR. SMITH) And the sole reason that you did not have the flexibility that you showed before November of 2014 was based upon your concern about his school performance, correct?

A That, and the reason number two was hertelling me she was taking me to court and that as God is my witness. You can read the text. So at that time, with the animosity, and the fact that I wanted to address these things with school, it was -- it was in everybody's best interests, let'sjust follow the court order. If you're going to threaten to take me to court, then let's just follow the courtorder and not have anyissues.

See Sean Abid's Deposition Transcript, Pages 87 – 90.

IV.

LYUDA'S REQUEST TO SANCTION SEAN FOR HIS FAILURE TO PROVIDE HER THE CHILD'S PASSPORT TO ALLOW HER TO VISIT HER FAMILY IN UKRAINE DURING THE SUMMER OF 2015

EDCR 7.60 states in relevant part,

(b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

. . .

(3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.

. . .

(5) Fails or refuses to comply with any order of a judge of the court.

The Order entered on September 9, 2015 states in relevant part,

> The following schedule shall apply during the summer: in even years, beginning 2014, [Sean] shall have 6 weeks of summer vacation and [Lyuda] shall have 4 weeks of summer vacation with the minor child. In odd years, beginning 2015, [Lyuda] shall have 6 weeks of summer vacation and [Sean] shall have 4 weeks of summer vacation with the minor child.

Accordingly, Lyuda was to have Sasha for 6 weeks of summer break in the summer of 2015. Lyuda asked Sean to give her Sasha's passport to allow her to travel to Ukraine to visit her family and Sean refused to do so. Sean's refusal was without any reasonable basis and was only designed to preclude Lyuda from taking the child to visit her family. At his deposition, Sean testified as follows –

Q Did she indicate the reason why she wantedthe passport?

A Yes. She wanted to go to Ukraine.

Q Okay. And did she indicate that she was going anywhere else with your son other thanUkraine?

A In -- in the hearing she did. She said that before Judge Marquis, that she could go to Turkey,she could go to Bulgaria. So if you review the transcript, it willclearly state that she had plans to go to other places--

Q But at the time that you--

A -- or not had signatories.

Q But at the time that you refused to providethe passport, did you have any knowledge as to hergoing anywhere other than theUkraine?

A Absolutely, because I allowed him to go in2010, and I knew the countries that she took him to atthat point. So you can rest assured that was likely going to be a similar itinerary thistime.

Q But Lyuda had never expressed thatto you.

She'd never indicated to you it was her plan to travelto Bulgaria, Turkey or anywhere else other thanUkraine, correct?

A Well, somebody that's on an incessant campaignto badmouth me and doesn't communicate with me, I don'tthink there's any trust that whatever she told me--

Q Okay. Well, let's --

A -- would have any veracity toit.

Q Let's answer that questionthen. Let's answer the question as to whether ornot she ever indicated to you in 2014 that she wouldbe traveling to anywhere other than the Ukraine.

A We didn't have adiscussion.

Q Okay. But you knew that she was intending to travel to the Ukraine, that's why she told you sheneeded the passport, correct?

A I knew that she intended to go to Ukraineand then travel to other locations. That was my belief.

Q That was your belief. But my question was did she tell you? Did she communicate to you that she was going to travelto anywhere other than the Ukraine?

A She didn't tell me she was going totravel anywhere.

See Sean Abid's Deposition Transcript, Pages 184 – 186.

VI.

LYUDA'S REQUEST FOR ATTORNEY'S FEES AND COSTS

EDCR 7.60 states in relevant part,

(b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

(1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted.

(2) Fails to prepare for a presentation.

(3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.

(4) Fails or refuses to comply with these rules.

(5) Fails or refuses to comply with any order of a judge of the court.

In this case, Sean obtained the recording via a process that constitutes a Category D. felony pursuant to NRS 200.690. He then proceeded to submit only those portions of the recording that serve his purpose and that boost his request for modification of custody. He alleged that Lyuda is alienating th child, an allegation that is not supported by Dr. Paglini's or Dr. Chambers' observations. Indeed, the child is doing well in school and does not have any behavioral problems. Lyuda submits that Sean multiplied these proceedings by his illegal acts in this case. Lyuda should be awarded attorney's fees and

costs for having to litigate this action. Upon the Court's direction, Lyuda will submit a memorandum of fees and costs.

V.

LIST OF WITNESSES

Other than the parties and a resident witness, list all witnesses intended to be called by you. Further provide a brief summary of the witnesses' anticipated testimony.

1. Dr. Mark J. Chambers
   8275 S. Eastern, Suite 200
   Las Vegas, Nevada 89123
   (702) 614-4550

Dr. Chambers conducts child custody evaluations and assessments. He is expected to testify regarding Dr. Stephanie Holland's report and any other related matters pertaining to this case.

2. Susan E. Abacherli
   Neil C. Twitchell Elementary School
   2060 Desert Shadow Trail
   Henderson, Nevada 89012
   (702) 799-6860

Ms. Abacherli was the child's school teacher for school year 2014-2015. She is expected to testify regarding the child's progress and behavior in school.

3. Ms. Massa
   Neil C. Twitchell Elementary School
   2060 Desert Shadow Trail
   Henderson, Nevada 89012
   (702) 799-6860

Ms. Massa is the child's school teacher for school year 2015-2016. She is expected to testify regarding the child's progress and behavior in school.

4. Ricky Marquez
   5765 So. Rainbow Boulevard, #109
   Las Vegas, Nevada 89118

Mr. Marquez is Defendant's husband. He is expected to testify regarding the facts and circumstances of this case.

5. Svetlana Mundson

2437 Wrangler Lane
Henderson, Nevada 89002
(702) 884-6501

Ms. Mundson will testify regarding her knowledge of the parties and parent/child activities.

6. Iryna Nezhurbida
c/o Radford J. Smith, Chartered
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074

Ms. Nezhurbida is Defendant's daughter. She is expected to testify regarding facts and circumstances of this case.

IV.

LIST OF EXHIBITS

List and identify specifically each item of evidence intended to be introduced by you at the time of trial:

Any and all documents produced by either party during the discovery phase of this matter including, but not limited to the following:

1. All pleadings and papers on file in this matter, including all exhibits thereto;
2. Video transcripts of the past hearings in this matter;
3. Dr. Chambers' Report dated September 18, 2015;
4. The Financial Disclosure Forms of the parties;
5. Examples of child's schoolwork,
6. Sasha's school report card 2014-2015;
7. Phone message conversations between Angie and Lyuda, date range: February to October 2014,
8. Phone message conversations between Sean and Lyuda,, date range: December 2013 to May 2015,

9. Photographs of children,

10. Phone message conversations between Sean and Lyuda,, date range: December 2013 to January 2015,

11. Video clips of Aleksandr at school,

12. Video clips of Aleksandr at school award;

13. Video clips of Aleksandr playing with a scooter;

14. Video clips of Aleksandr snorkeling;

15. Video clips of Alexandr surfing;

16. Video clips of Alexandr playing by the beach;

17. Video of setting parental controls for X-box,

18. Student Progress Report for Aleksander Abid, generated 09-18-15,

19. Email exchange between John Jones, Esq. and Michael Balabon, date range: 07-10-14 through 08-11-14,

20. Attorney Fees summary from Radford J. Smith, Chartered, Attorneys at law,

21. Attorney Fees summary for Mr. Michael Balabon,

22. All documents produced through discovery,

23. Any and all documents admitted into evidence by Plaintiff,

24. Any and all rebuttal documents

V.

UNUSUAL LEGAL OR FACTUAL ISSUES PRESENTED

List all other unusual legal or factual issues that you anticipate will be raised at trial. Sufficiently explain the issues presented so that the Court may understand the issues presented clearly. Citations of authorities should also be provided.

The issue before the Court is whether a voice recording obtained illegally, with the intent of only harming Lyuda and her husband, and the voice recording has been subsequently altered resulting in spoliation of the recording is admissible.

VI.

LENGTH OF EVIDENTIARY HEARING

Length of trial: Three one-half (1/2) days.

Dated this 16 day of November, 2015

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada State Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Radford J. Smith Chartered ("the Firm"). I am over the age of 18 and not a party to the within action.

I served the foregoing document described as "DEFENDANT'S PRE HEARING MEMORANDUM – CHILD CUSTODY" on this 16 of ~~September~~ November 2015, to all interested parties by way of the Eighth Judicial District Court's electronic filing system.

Daniel Marks, Esq.

John Jones, Esq.
10777 W. Twain Ave., #300
Las Vegas, Nevada 89135

Janina Vanbrunt

An employee of Radford J. Smith, Chartered

DOCKETING STATEMENT ATTACHMENT 24

BREF

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, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B

PLAINTIFF'S BRIEF REGARDING RECORDINGS

COMES NOW Plaintiff SEAN R. ABID (hereinafter "Plaintiff"), by and through his attorney of record, JOHN D. JONES, ESQ., and hereby submits his Brief Regarding Recordings.

DATED this 4 day of December, 2015.

BLACK & LOBELLO

John D. Jones
Nevada State Bar No.: 6699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
Attorneys for Plaintiff,
SEAN R. ABID

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

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

I. INTRODUCTION

What has become more apparent over the course of the trial, and based upon the statements of Lyuda's counsel, is that Lyuda is intent on ignoring the rulings that this Court has already made thus far. The Court has already decided that the vicarious consent doctrine would apply in this case and that in order for the tapes to be received in evidence, Sean must only establish that his motives in placing the recording device were in good faith as required by the numerous case authorities submitted in support of the vicarious consent doctrine in the early stages of this litigation. (See Submission of Authorities attached as **Exhibit "1"**). It is for this reason that the first three days of the trial in this matter were limited to the issue of good faith.

Similarly, Lyuda seems to be under the impression that she can somehow challenge the Court's ruling on the issue of providing the recordings to the Court appointed neutral evaluator, Dr. Stephanie Holland. This issue has also already been briefed and decided by the Court. The Court did state that it could always strike the references to the recordings from the Dr. Holland report but already decided that Dr. Holland has not been so badly tainted from the recordings that she could not testify at trial. A simple review of the minutes from the hearings or the videos of the Court's statements and analysis would have significantly reduced the issues to be addressed in this brief. Because Lyuda has chosen to ignore the Court's prior rulings, this brief will address all possible arguments that Lyuda could make against the recordings.

In the end, the Court's rulings in which it accepted and adopted the vicarious consent doctrine, and the testimony elicited and evidence admitted thus far regarding Sean's good faith reasons for placing the recording devices, will necessarily result in the tapes being admitted.

Evidence of Good Faith

During the course of trial, Sean testified in detail regarding the reasons he placed the recording device. While the testimony regarding Sasha telling his father he wished he could love both of his parents but his mother tells him he can only love her, on its own, would be sufficient to meet the good faith burden, there was so much more evidence that prove Sean's actions and motives were in good faith. The device was placed in Sasha's backpack solely to record Sasha's conversations on the way to school and immediately following a custody exchange. Sean's

testimony regarding the periods of time he was hoping to capture and the way he calculated when the conversations between Sasha and his mother would take place on the recordings further establish that every aspect of Sean's decision to place the recording device was in good faith. Sean's specific, uncontroverted testimony which met the good faith burden was as follows:

15:04:19

Q: Now, since that time, since December 2013, I believe the order was entered sometime thereafter in March, but since the stipulation of December 2013, what issues have you encountered with Sasha as far as your relationship is concerned?

A: I'm continually having to hear from him things that he repeats that are said by his mother. Chiefly, things that...daddy...and almost always he's crying. Daddy, why are you nasty? Why are you mean? Why are you sneaky? Why do you put me in cheap clothes? Why do you feed me cheap food? Um, he still asks me if my name is "Piece of Shit," because that has a history that's gone back...that one's never stopped. He asks me, uh, "Daddy, why are you a waste of life?" Things that he couldn't possibly have come up with on his own. Things that could only have been told to him, and are just, as a parent, are just devastating. Obviously I don't...all I can tell him is, you know what? Mommies aren't always right.

15:06:55

Q: Now, when he says these things to you, what is his demeanor?

A: He's often crying. The worst one, the first time I heard this was in October 2014, I picked him up from the bus stop as I do every day. He gets in the car and starts crying and says, "Daddy, I wish I could love you. I wish I could love both of you. But momma says I can only love her." And, that was it for me. Because she's not just saying that he can't love me. She's saying that he can't love half of himself. That half of himself isn't good. Half of you is cheap. Half of you is nasty. Half of you is mean. I can't love you, and I can't love half of myself. As a counselor, as a human being, those words should never be said to a child. I don't care what the excuse it. It just should never happen. I would never dream of saying anything about his mother because that's half of who he is. It defies common sense and common decency that I even have to battle back these comments. And with reading, that's something that I do because it builds a child's self-esteem. Everything I do is to try and build his self-esteem.

15:09:07

Q: Now, as it pertains to Sasha and your personal experience with him, what does this, I guess, situation, do to him physically?

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

A: I think he's frustrated so he is angry, he's defiant towards me at home when we're trying to do school work. It's a commitment to be able to get him to sit down and read and do homework, and um, I have to remind myself that you know, he didn't create this situation for himself, so...it was my choice. If I didn't get involved with his mom, he wouldn't exist, so my job is the same. But it's a challenge because he's defiant and he's often repeating these things that indicate that he doesn't have to respect me or other adults. And you know, we've had trouble with baseball because he wasn't respecting some of the coaches, which I think is an extension of him not respecting me, so these things come up on a daily basis when I engage with him in school work and just in every day life.

15:11:37

Q: Now, what was...was there a specific instance that occurred that caused you to decide that you needed to obtain other evidence about what was going on?

A: It was a culmination of hearing these things, sometimes daily, sometimes weekly, that I could see what was happening to him. I could see pieces of his self-esteem falling off of him with each comment, with each statement that he's repeating that his mother has told him. I'm not going to sit back and let my son be destroyed and have no dignity left. And I grew up without a father. It's going to be like he's growing up without a father because there'll be no respect for me anymore. It's like a Lego castle. I can put the Lego's back on when he's in Kindergarten and 1st grade because I can read with him, and I can do these things. But there's going to come a point when I can't keep up anymore. I can't keep reattaching these Lego's to this little boy. He deserves to love who he wants and she will not permit it. She's sick. She's clearly sick and not well, will not seek help. She's unrepentant. In every one of these pleadings and everything she's said, she's unapologetic for what she's done to her son. She's not doing it to me. As much as she is destroying my relationship with him, she is destroying his self-esteem. She's caving in half of himself and doesn't see it, doesn't care, and as long as I get taken down in the process, that's a victory.

15:15:12

Q: Now, had you previously recorded the sounds of your custody exchanges?

A: Yes. In 2012 I would just leave my phone pointed at Sasha in the back seat at some exchanges.

Q: And, um, were the things captured by the recordings, um, similar to the things that Sasha's been saying to you recently?

A: Quite similar

Q: Were threats made in the presence of Sasha?

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

A: Yes

Q: Have threats been made during these proceedings? And when I say threats, I mean by Mom.

A: Yes. In text message, yes.

Q: Were there times where Mom's actions were consistent with the things that Sasha has said to you about cheap clothes? During the time leading up to the stipulation?

A: Yes

15:17:05

Q: Given what you were able to record prior to the initiation of those proceedings, did you understand that actually capturing Mom in her typical demeanor provided relevant evidence for the court?

A: Yes, particularly because it was in front of Sasha that she was saying these things to me.

Q: And was it based upon that history, and the statements made by Sasha to you in the fall of 2014 that you decided that you needed to try to record more of those interactions between Mom and Sasha?

A: It never stopped, so...there's a history, noted by Dr. Paglini, noted by myself, noted by my wife, that it never stopped.

15:23:25

Q: Now, those things that you heard from Sasha and his demeanor after the stipulation, were they far worse than anything you'd encountered before?

A: Far worse, because he's getting older and he has more language, and he understands more. Um, when he tells me that, if I loved him, I would make things equal, obviously he doesn't even understand the concept of equal, and he doesn't understand the concept of leveraging love, so they ramped up and everything he says that comes from his mom denigrates me and denigrates my relationship with him. It ramped up in 2014 and continues to this day.

Q: Now, when you decided to place the recording device, where did you place it?

A: In his backpack, there was a separate plastic container that held the sight words, and the little Reading A-Z books. It was placed in there.

Q: Was there a reason you chose the backpack, rather than any other attempt?

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

A: Because I knew it would be close to him, and I knew that the times that I expected that the badmouthing would occur, the backpack would be next to him.

Q: When you placed the recording device, did it have anything whatsoever to do with Ricky Marquez?

A: No No. As I said before, when he told me that he couldn't love me, he wished he could love both of us, but he could only love his mom...that, and the things that had gone on non-stop since the divorce, I wasn't going to stand by and let my son be destroyed. It's not going to happen. Whatever I have to do to show the court the monster, to show the court those words, because before, I don't think there's any other way to show somebody as a bad-mouther unless you can hear their words.

Q: Did you intend to record anyone besides Sasha and his mom?

A: No. I solely wanted to be able to show the court what's being said to my son so that the court could make a decision that's in his best interest.

Q: How many times did you put the device in the backpack?

A: Twice

15:26:33

Q: Did you record other noise on the recording device?

A: The only recording that I heard was Sasha and his mother.

Q: So how did that work when you got the device back?

A: The device recorded for 15 straight hours. The device is a flash drive put into the computer. It's uploaded into 4 separate wave files.

Q: So, how did you know what portion was Sasha and what portion was other ambient noise?

A: Well, oftentimes when Sasha would be crying and telling me these things that were said to him by his mom, I would ask him, you know, when did this happen? And he would tell me. And so it seemed to be a theme that it was happening two specific times. One, as soon as he walked in the door when I dropped him off, and two, when he was being driven to school in the morning by his mother. And I knew from the Safekey records precisely the time that he was checked-in consistently. So therefore, I knew in the recording there were two spots only that I was interested in: as soon as he walks in the door, and when he's being driven to school. That's it.

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

Q: And how were you able to segregate that as far as the wave files?

A: Because there's a time stamp that I could see what time the recording started and what time it ended.

Q: And are those the only recordings you listened to?

A: Yes

Q: And are those the only recordings that you preserved?

A: Yes

Q: Was any part of the recordings for those time stamps altered in any way by you?

A: No

Q: Was any part of the conversation between Sasha and his mother deleted that would have otherwise had positive references to you?

A: No

Q: Are the recordings that have been provided in discovery and have been provided to, um, Dr. Holland and apparently Dr. Chambers, all of the recordings that involve Sasha and his mother?

A: Yes

Q: Ok, let's talk briefly about the portions of the tape that you discussed with Mr. Smith yesterday, and how you determined which portions were Sasha. Um, yesterday you said something about Safekey records and I think you got cut off. I wanted to understand, or have the court understand, what Safekey had to do with your understanding of what portions of the tape would include Sasha and his mother?

A: During the school year, Sasha was in a.m. Safekey and every time he was brought there, he would be signed in. So, just after 7 o'clock was typical of when he would be dropped off. He was in afternoon Safekey as well when I would pick him up or drop him off myself in the morning, I could see the sign-in from the other parent.

Q: And what does that tell you?

A: It tells me what time he's dropped off by whoever brings him to school on her custodial days.

Q: And, by knowing what time he's dropped off, how would you know when the conversation between him and his mom would take place?

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

A: Because I knew it would take place before that time. So between, you know, 7:05 and 7:30 is when I expected there would be conversation between Sasha and his mom, or whoever took him to school. I was assuming his mom.

Q: With regard to the 1st section of tape recorded, how would you know how far into the tape Sasha and his mom would be?

A: I anticipated that the moment he walked into his door, he would have a conversation with his mom, and so that was a portion of time that I was interested in. I expected that he would have a conversation with his mom, and I anticipated that that's when the programming and bad-mouthing was occurring on a consistent basis.

Q: And, did you keep track of what time you turned on the recorder before you put it in his backpack?

A: Yes, because he was due at 5:30, so the moment that he was dropped off at 5:30, I turned the recorder on, placed it in the plastic bookbag with the sight words and the Reading A-Z books.

13:47:22

Q: Now, did you listen to anything on the recordings beyond the sections that you expected would have conversations between Mom and Sasha?

A: No. Based on what I heard, I was satisfied that these things were established, that this was enough to show that Sasha was being bad-mouthed. It was horrible to listen to, but those things I felt was enough to show what was happening, the programming , the bad-mouthing...it was all there. So I felt that that was all that was needed. I was satisfied.

Q: And, were the things that you heard on the tape consistent with things that Sasha has said to you as you testified to on Tuesday?

A: Eerily consistent, but then of course, even worse, absolutely worse than I could have imagined.

13:52:01

Q: When did you first start noticing changes, when if ever, did you start noticing changes in Sasha consistent with the things that you testified on Tuesday he began saying to you?

A: October 2014

Q: Now, have you reviewed the reports prepared by Dr. Holland and Dr. Chambers?

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

A: I have reviewed both

Q: Are the types of things that they reported consistent with the things that Sasha was saying to you, on or around October 2013?

A: They were consistent

Q: If you can sum up in one sentence why you placed the recording device in your son's backpack for the court, what would it be?

A: I have to save him from this emotional child abuse; that is my duty as a parent.

Q: Did you think it was in Sasha's best interest to find out what the source of his angst in statements to you were?

A: Yes, in his best interest, and in my obligation as a parent to protect

Q: Did you delete any of the audio files with the intent to harm the defendant?

A: No

Q: Did you replace your computer with the intent to harm the defendant in any way?

A: No

Q: How old was your computer?

A: Probably before 2008. I can't be certain, but it was definitely older.

Lyuda's approach to the overwhelming evidence that forced Sean to try to protect his son was to cross examine him for 3-4 hours about an alleged obsession with her husband. Sean's testimony was unequivocal that the placement of the recordings had nothing to do with Ricky Marquez. Lyuda attempted to confuse the Court by asking questions which predated the last custodial order, despite his own objections contrary to such evidence. The law of the case, however, reveals that Judge Harter had significant concerns about Mr. Marquez. Concerns which led to an order that Mr. Marquez not be left alone with Sasha. Lyuda, throughout these proceedings has never recognized this fact. Sean, however, cleared all of Lyuda's attempted confusion up in two simple answers as follows:

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

Syndrome, this case embodies the worst type of behavior by one parent either intentionally or negligently designed to destroy the relationship between the child and the other parent. Seldom does the Court experience alienation and programming at the level present in this case. A review of the current literature on this issue is therefore helpful.

Dr. Richard A. Warshak's scholarly writings regarding parental alienation are very instructive and should be reviewed by the Court to better understand what Sean is up against and what must be done. The following quotations from his well-known book, Divorce Poison: How to Protect Your Family From Bad-Mouthing and Brainwashing, Pincite (HarperCollins Publishers rev. ed. 2010), are enlightening and consistent with what Sean has experienced:

> [I]f your children are turning against you *with the support and encouragement of their other parent – **if they are withdrawing or expressing fear or hatred that is unjustified by anything you have done** –* the term brainwashing aptly describes what is happening to them.
>
> Every brainwashed child *once expressed love and affection for the target of brainwashing*; once felt safe with, looked forward to seeing, even craved attention from the target. Every such child had a history of gratifying memories that bound the child to the target. *All of that is gone – disconnected from the child's thoughts, feelings, and behavior.* In its place is a child *who spouts only fear and hatred for the formerly loved adult*; a child who recalls few of the good times, and defensively dismisses those that are recalled with some version of 'I was just pretending to enjoy myself with you.'

(Emphasis added). Id. at 29.

> Normally, children who treat a parent with gross disrespect understand that they are violating acceptable manners and rules; they feel guilty for their transgressions. *By contrast, alienated children engage in all sorts of sadistically cruel behaviors toward a parent without expressing the slightest bit of guilt.* The children act as if they are entitled to receive material benefits from the target parent while treating the same parent with malice, disregarding his or her feelings, and exhibiting no gratitude for past or current contributions to their welfare.

(Emphasis added). Id. at 35.

> Once the children are successfully poisoned, *the offending parent may, in fact, tone down the bad-mouthing, confident that the goal has been accomplished. **When the children object to seeing their other parent,** the favored parent can then pay lip service to the importance of the children's relationship with the rejected parent.*

(Emphasis added). Id. at 48.

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

> Divorce poison delivers a cruel blow to *the extended family*. In what Dr. Richard *Gardner* calls the "spread of animosity," children regard as enemies not only the hated parent but everyone associated with that parent, including grandparents, aunts, uncles, cousins, and friends.

(Emphasis added). Id. at 49.

> ***[I]t makes little sense to work exclusively with the child without reducing her exposure to the noxious environment***. . . . **Even the most skilled therapist will have a slim chance of reversing the alienation by meeting exclusively with the child for one forty-five-minute session a week, *and then returning the child to the brainwashing parent*.**

(Emphasis added). Id. at 64. This is why therapy alone is insufficient to reverse the alienation. Every time Sasha returns to Lyuda, the toxic environment, the alienation flourishes.

> [I]f the favored parent welcomes the child's allegiance *and fails to actively promote the child's affection for the other parent,* the child may cling to this maladaptive solution.

(Emphasis added). Id. at 121.

> *The importance of taking an active stance in the face of isolation tactics has been noted in several studies*. In his study of ninety-nine alienated children, Dr. Gardner found that ***every case in which the court decreased the child's time with the programming parent resulted in a reduction or elimination of the alienation***. By contrast, ***when the court did not reduce the child's time with the programming parent, nine out of ten children remained alienated.*** The largest study of brainwashed children was published by the American Bar Association. A husband-and-wife research team, Dr. Stanley Clawar and Dr. Brynne Rivlin, found that ***increasing the child's contact with the alienated parent was the most effective way to reverse alienation.*** Here is what they reported: 'Of the approximately four hundred cases we have seen where the courts have increased the contact with the target parent (***and in half of these, over the objection of the children***), *there has been positive change in 90 percent of the relationships between the child and the target parent*, including the elimination or reduction of many social-psychological, educational, and physical problems that the child presented prior to the modification.

(Emphasis added). Id. at 126.

Divorce Poison also includes, at page 122, a checklist of malignant motives for alienation, among the checklist: revenge, narcissism, insecurity, unwillingness to accept the end of the marital relationship, remarriage of one spouse. Each of these malignant motives applies under these facts.

///

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

Basically, this research gives the Court a roadmap on how to undo the damage that Lyuda has done to Sasha and Sean. Placing Sasha primarily with Sean coupled with therapy for Sasha as well as for Lyuda, will help restore the appropriate balance to Sasha's life.

THE BEST INTERESTS OF SASHA REQUIRE A CHANGE OF CUSTODY

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

Of the forgoing best interest factors the six which are highlighted overwhelmingly favor the change of custody sought by Sean.

Clearly, Lyuda is the parent least likely to allow the child to have a continuing relationship with Sean.

///

///

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

Clearly, Lyuda is the source of the conflict between the parties. There is not a single reference to Sean in any way contributing to her animosity toward him and his relationship with Sasha.

Clearly, Lyuda refuses to cooperate on things as simple as a 5 year old playing an M rated game.

Based upon the recordings, but to a larger degree upon the history of this case and the statements made by Sasha, Lyuda has some type of significant pathology that will not allow her to stop alienating Sasha from his father. The Court must conclude that absent some type of condition, no "normal" parent would program a six year old the way Lyuda has programmed Sasha. Lyuda needs intensive psychotherapy to get to the core of the problem and determine if it is treatable.

Finally, it is up to the Court to determine if the type of alienation proven in this case, rises to the level of abuse and neglect.

IV. ATTORNEY FEES

EDCR 7.60 addresses the award of attorneys' fees as sanctions in the case at bar. The rule states as follows:

Rule 7.60. Sanctions.

> (a) If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, at the time set for the hearing of any matter, at a pre-trial conference, or on the date of trial, the court may order any one or more of the following:
> (1) Payment by the delinquent attorney or party of costs, in such amount as the court may fix, to the clerk or to the adverse party.
> (2) Payment by the delinquent attorney or party of the reasonable expenses, including attorney's fees, to any aggrieved party.
> (3) Dismissal of the complaint, cross-claim, counter-claim or motion or the striking of the answer and entry of judgment by default, or the granting of the motion.
> (4) Any other action it deems appropriate, including, without limitation, imposition of fines.
> (b) The court may, after notice and an opportunity to be heard, impose upon an attorney or a party any and all sanctions which may, under the facts of the case, be reasonable, including the imposition of fines, costs or attorney's fees when an attorney or a party without just cause:

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

(1) Presents to the court a motion or an opposition to a motion which is obviously frivolous, unnecessary or unwarranted.
(2) Fails to prepare for a presentation.
(3) So multiplies the proceedings in a case as to increase costs unreasonably and vexatiously.
(4) Fails or refuses to comply with these rules.
(5) Fails or refuses to comply with any order of a judge of the court.
(Emphasis added)

NRS 18.010 states as follows:

NRS 18.010 Award of attorney's fees.

1. The compensation of an attorney and counselor for his or her 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 the prevailing party has not recovered more than $20,000; or

(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 and 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.

The entirety of this litigation and the costs associated therewith have been caused by Lyuda's bad faith. As such, Sean should be awarded his attorneys' fees.

///

///

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

V. CONCLUSION

Based upon the overwhelming evidence that will be presented at the trial of this matter, the Court, in order to ensure the best interests of Sasha are protected should enter the following orders:

1. Awarding primary physical custody of Sasha to Sean subject to Lyuda's visitation, on an every other weekend basis and subject to her receiving alienation based psychotherapy on an indefinite basis.
2. Entering specific orders regarding both parties' obligations to ensure Sasha attends his chosen extra-curricular activities.
3. Allowing Sean to take Sasha to therapy designed to instill in Sasha the right to love and respect his father.
4. Requiring Lyuda to be responsible for 100% of the costs of Dr. Holland and 100% of Sean's attorney fees.
5. Any other relief that this Court deems is appropriate.

RESPECTFULLY SUBMITTED this 16 day of November, 2015.

BLACK & LOBELLO

John D. Jones, Esq.
Nevada State Bar No. 6699
10777 W. Twain Avenue, Suite 300
Las Vegas, Nevada 89135
702-869-8801
Attorneys for Plaintiff,
SEAN R. ABID

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

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2015, a true and correct copy of **PLAINTIFF'S PRETRIAL MEMORANDUM,** was served 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 **hand delivery**, addressed as follows:

Radford J. Smith, Esq.
Radford Smith Chtd.
2470 St. Rose Pkwy. Suite 206
Henderson, NV 89074
Attorney for Defendant
Lyudmyla 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

DOCKETING STATEMENT ATTACHMENT 23

PMEM
RADFORD J. SMITH, CHARTERED
RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada Bar NO. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Telephone (702) 990-6448
Facsimile (702) 990-6456
rsmith@radfordsmith.com
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

SEAN R. ABID,

Plaintiff,

v.

LYUDMYLA A. ABID,

Defendant.

CASE NO.: D-10-424830-Z
DEPT NO.: B

FAMILY DIVISION

DEFENDANT'S PRE-HEARING MEMORANDUM

TO: SEAN R. ABID, Plaintiff

TO: JOHN D. JONES, ESQ., Attorney for Plaintiff

Defendant, LYUDMYLA A. ABID, by and through his attorney, RADFORD J. SMITH, ESQ., of the law firm of RADFORD J. SMITH, CHARTERED, and hereby submits her Pre-Hearing Memorandum Regarding Custody.

I.

STATEMENT OF ESSENTIAL FACTS

A. *Names and ages of the parties*:

Plaintiff, SEAN R. ABID ("Sean"), age 47.

Defendant, LYUDMYLA A. ABID ("Lyuda"), age 40.

B. *Last Custody Order*:

Amended Order re: December 9, 2013 Evidentiary Hearing filed on September 9, 2014.

C. *Names, birth dates, and ages of the children:*

The parties have one minor child: Aleksandr "Sasha" Abid ("Sasha"), born on February 13, 2009.

D. *Resolved issues, including agreed resolution*:

1. The Court has jurisdiction as to the subject matter of the post-divorce custody action, and to the parties.

E. *Statement of Unresolved Issues*:

1. Sean's request for primary physical custody of Sasha subject to Lyuda's specific visitation;

2. Lyuda's request to strike Sean's pleadings, to suppress the alleged contents of the unlawfully obtained, altered, and incomplete recordings;

3. Lyuda's request to strike the letter report of Dr. Stephanie Holland, and preclude the testimony of Dr. Holland tainted by the illegally obtained, altered and incomplete recordings;

4. Lyuda's request to modify the current timeshare to allow her to pick up the child after school on her custodial days as contemplated by the parties at the time of the September 2014 Order;

5. Lyuda's request for an Order sanctioning Sean for his failure to provide Lyuda the child's passport to allow Lyuda to take the child to Ukraine for the summer of 2015;

6. Both parties' request for Attorney's fees; and,

7. Lyuda's request for sanctions.

. . .

II.

SEAN'S REQUEST FOR MODIFICATION OF CUSTODY

Sean seeks a modification of custody by awarding him primary physical custody of Sasha based upon his allegation that Lyuda is alienating Sasha from him. His allegations stem from a recording that he illegally obtained by surreptitiously placing a recording device in Lyuda's home without her knowledge or consent. Lyuda seeks an order striking those recordings along with all portions of any and all pleadings and expert reports that reference the recording or the contents of the recordings.

Sean on three occasions placed a listening device in Sasha's school backpack and recorded the conversations that were occurring in Lyuda's home. None of the parties who were being recorded, Lyuda, her husband, Ricky, her daughter, Irena from a previous marriage, or Sasha knew of the recording device or consented to be recorded. The evidence demonstrates that the device recorded private conversations between Lyuda, Ricky and Irena, when Sasha was not a party to the conversation. Sean acknowledges that he deliberately and purposefully altered the recording by deleting portions of the recording by using software he cannot (or will not) name, and that he purposely destroyed. Sean's illegally obtained, altered, and ultimately destroyed recording is inadmissible, and the Court must strike the tape and the portion of all pleadings and reports that reference the tape or the contents of the tape.

Sean's motion to change custody is based solely upon the contents of the recording that was obtained in violation of Nevada (and federal) law, and unlawfully altered and destroyed. Because the content of the recording is Sean's primary basis for a change of custody, his motion must fail. Most important, Sean's "eggs in one basket" approach to his motion is not an adequate basis for a change of custody under any standard; no evidence Sean will produce at trial will not demonstrate that Sasha's best interest will be served by modifying his time with Lyuda. *See, Truax v. Truax*, 110 Nev. 437, 874 P.2d

10 (1994)(modification of joint custody requires showing that modification is in the best interest of the minor child).

I. Sean's Recording of Third Party Conversations without the Consent of any Party to those Conversations was Illegal, and Illegally Obtained Recordings are Not Permissible Under Nevada Law.

It is illegal in the State of Nevada to record any person's conversation without the consent of one of the parties to the conversation.

NRS 200.650 reads:

> 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.

Sean does not contend that any of the individuals in Lyuda's home, or Sasha, provided consent to be recorded, or that there conversations were not private. The evidence at trial will show that the device placed by Sean in Lyuda's home recorded conversations between all of the individuals in the home, but the recording was later altered by Sean. Sean's placing of a recording device in Lyuda's home was a violation of NRS 200.650.

The Court in *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998) dismissed the claim of an individual who illegally recorded conversations under NRS 200.620. The Nevada Supreme Court affirmed the district court findings in *Lane* stating,

> Plaintiff's conduct directly affected the discovery process and is an abuse of the litigation process. In an attempt to gather evidence, Plaintiff willfully tape recorded conversations without receiving the consent of any other participant. By engaging in such conduct, Plaintiff violated Nevada law and has forever tainted these proceedings.

The facts of that case are analogous to those presented here. Here, like in *Lane*, the Court found that a party had intentionally and illegally recorded third party conversations. Though it dealt with a different

statute, the *Lane* reasoning is applicable here – the illegal recordings have "violated Nevada law and [have] forever tainted these proceedings." The Court should find that the recordings were intentional, unlawful, recorded third party conversations of individuals that did not provide consent, and are inadmissible. Based upon the finding, the Court should deny Sean's motion to modify custody.

II. Nevada Statutory and Case Law has not adopted the "Vicarious Consent Doctrine" proposed by Sean as an excuse for his illegal activity.

In support of his illegal recording in Lyuda's home, Sean proffers the doctrine of "vicarious consent." Sean, citing law from other jurisdictions that has not been adopted in Nevada, he asserts that he could vicariously consent for Sasha in recording conversations in Lyuda's home. The doctrine of vicarious consent has been adopted in few jurisdictions whose statutory schemes protecting private conversations are different than Nevada. At least one jurisdiction has rejected the doctrine. *See*, e.g., *West Virginia Department of Health & Human Resources ex rel. Wright v. David L.*, 453 S.E.2d 646 (W. Va. 1994).

In the *David L.* decision, the West Virginia court was faced with a case regarding a parent's surreptitious recording in the home of the other parent. In that case, the father asked his mother, the paternal grandmother, to place a voice activated recording device in the children's bedroom at their mother's house to record conversations between the mother and the children (ages 3 and 5). After listening to the conversations on the tape, the father gave the tapes to his lawyer, who then provided them to child protective services. Child protective services sought and received an order changing custody of the children. The mother challenged the order, claiming that the evidence on the tapes (that included screaming by the children) was illegally obtained under West Virginia and federal law, and was thus inadmissible. The trial court ruled the tapes inadmissible, but certified the question of admissibility for appeal. *Id.* at 453 S.E.2d 646, 648 (1994).

Upon appeal, the West Virginia Supreme Court refused to adopt the vicarious consent doctrine the father argued upon appeal. The *David L.* court found that West Virginia's statute prohibiting electronic eavesdropping was clear and unambiguous, and was not subject to interpretation:

> Applying the language of 18 U.S.C. § 2510, *et seq.*, to the facts of the case at bar, we find there is no indication that Congress intended to create an exception for a husband, living apart from his wife, to procure a third person surreptitiously to tape record conversations between his wife and their children in the wife's house. We find it is insignificant that this case does not involve the interception of wire communications, i.e., telephone lines, in that 18 U.S.C. § 2511(1)(a) specifically applies to "any wire, *oral*, or electronic communication[.]" (Emphasis added). Similarly, we find W. Va. Code, 62-1D-3(a)(1), is clear and unambiguous and it, too, prohibits this type of conduct. Therefore, any recordings of conversations made in violation of W. Va. Code, 62-1D-3(a)(1), and 18 U.S.C. § 2511 (1)(a) are inadmissible under W. Va. Code, 62-1D-6, and 18 U.S.C. § 2515.

West Virgina's code is the same as NRS 200.650 in all material respects. Under W.Va. Code sec. 62-1D-3 it is a felony to intentionally intercept, disclose, or attempt to disclose any "wire, oral or electronic communication," except "where the person is a party to the communication, or where one of the parties to the communication has given prior consent to the communication." In Nevada, the rules of construction of a statute would preclude the Court from interpreting an implied consent when none is expressly permitted. In *Egan v. Chambers*, 299 P.3d 364 (2013), the Nevada Supreme Court held that when a statute is clear on its face, we will not look beyond the statute's plain language. (quoting *Wheble v. Eighth Judicial Dist. Court*, 128 Nev.__,__, 272 P.3d 134, 136 (2012); *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004)).

In *Weinstein v. Fox (In re Fox)*, 302 P.3d 1137 (2013), the Nevada Supreme Court indicated that courts in Nevada should concentrate on the plain language of statutes when examining issues of statutory construction. *See also J.E. Dunn Nw., Inc. v. Corus Constr. Venture, LLC*, 127 Nev.___,___, 249 P.3d 501, 505 (2011) ("[w]hen the language . . . is clear on its face, 'this court will not go beyond [the] statute's

plain language" (second alteration in original) (quoting *Great Basin Water Network v. State Eng'r*, 126 Nev.___,___, 234 P.3d 912, 918 (2010)).

Moreover, the West Virginia court addressed the principle of vicarious consent by citing and distinguishing the decision in *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993). In addressing that case, the *Daniel L.* court distinguished *Thompson* in that in the *Thompson* case the mother had tape recorded telephone conversations in her home during the time the children were with her. In the West Virginia case, the father put the recording device in the other parent's home. 453 S.E.2d at 653-654. That distinction is, for obvious reasons, extremely significant. There is a fundamental difference between a parent pinpointing specific conversations over the telephone that occur in that parent's home (which have no chance of intercepting another party's conversation), and recklessly and wilfully placing a device into the privacy of another's home where the conversations recorded are not known or can be determined.[1]

Should the Court allow this type of evidence simply based upon the word of an individual who claims that he thinks his spouse is badmouthing him to the children, the Court will effectively undermine NRS 200.650 in the context of custody actions. With the advent of spyware and other continuously more surreptitious ways to record communication, the amount of recording that will be done by vexatious parents in other parent's homes will be unlimited. Indeed, parents will be emboldened to invade the privacy of other parent's homes, where second families often reside, for the sake of protecting the best interest of the children. There is no reason why the Nevada legislature could not include such an exception, with reasonable guidelines (such as court approval) into the statute. This Court should not judicially legislate what should remain in the domain of the legislature, particularly with such dire

---

[1] Apparently aware of the gravity of this distinction, Sean has now claimed that the software (which he cannot identify) he used to modify and cut the recording allowed him to playback only portions when he claims he knew only Lyuda and Sasha to be speaking (going to and from school). The claims are both factually inaccurate (he could not have known only Lyuda would be present), and his claim is contrived. The Court would have to buy that in spite of his obsession with Lyuda's husband, Sean did not listen to any other parts of the recording. The convenient testimony defies belief.

consequences as a loss of freedom from invasion of privacy by all individuals who reside with a parent of minor children.

A. Sean's acts do not meet the elements of a claim of "vicarious consent" because his illegal wiretapping was not made in good faith to protect Sasha from any perceived threat of harm, and instead was designed to discover information about Lyuda's husband Ricky Marquez

Even in those jurisdictions that have accepted the vicarious consent doctrine, a party must demonstrate that the purpose for the taping was based upon a good faith reasonable belief that the child was being abused or neglected by the other party. For example, in *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993), the Utah court held that as long as a 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. *Thompson*, 838 F. Supp. at 1544. The court in *Thompson* stressed that the parent's purpose in intercepting the communications was critical to the application of the vicarious consent doctrine and denied the mother's motion for summary judgment as there existed factual issues about her motivation. *Id.*, at 1545, 1548.

In *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998), the court warned of the potential abuse of the "vicarious consent" doctrine: "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.'" *Pollock*, 154 F.3d at 610; *see also Cacciarelli v. Boniface*, 325 N.J. Super. 133, 737 A.2d 1170, 1171-1176 (N.J. 1999). *See also Silas v. Silas*, 680 *So.* 2d 368, 371-72 (Ala. Civ. App. 1996) (upholding a father's vicarious consent on behalf of his child to recording telephone conversations with the child's mother where he "had a good faith basis that was objectively reasonable for believing that the minor child was being abused, threatened, or intimidated by the mother").

In the present case, Sean did not have a good faith basis to place a recording device in Sasha's backpack. Sean does not allege that Sasha was experiencing psychological or emotional problems, that he was having problems in school, that the child was expressing negative feelings towards him, or some other manifestation of any problem that is commonly associated with parental alienation. His claims that his concerns were based upon a conversation with Sasha's teacher will be belied by the testimony of that teacher at trial.

Lyuda submits that the placement of the device was nothing more than a fishing expedition to cause Lyuda and her husband, Ricky Marquez, harm. Sean's behavior of planting the recording device is consistent with his continued attempts (including constant communication with Mr. Marquez's parole officers, and meetings with representatives of the Federal Bureau of Investigation a relatively short time before placing the recording device) to prove his unfounded belief that Ricky Marquez is engaged in criminal activity. His testimony at his deposition regarding his obsession with Mr. Marquez, that has continued before and after the Court's most recent custody order, evidenced his true motivation for placing a recording device into Lyuda and Mr. Marquez's home:

> Q (BY MR. SMITH) Why were you in court prior to 2013? Well, why were you in court in 2013?
>
> A (BY MR. ABID) The presenting issue was parental alienation and bad mouthing, along with concerns that I had about her marrying someone who was a convicted felon, drug trafficking, guns, and is a member of the Mexican Mafia.
>
> Q You're referring to her husband, Mr.Ricky Marquez?
>
> A Yes, sir.
>
> Q When did you first find out that Mr. Marquez was involved with Lyuda?
>
> A I was informed by an acquaintance in the – I can't tell you exactly. I'm guesstimating--
>
> Q Okay.
>
> A -- would be sometime in November of 2012.

Q Let me -- that's something I didn't cover with you in the initial statements is that I don't want you to just guess. I don't want you to take a wild throw at something. But if you have a reasonable basis to estimate something based upon your knowledge, information or belief, then that's perfectly okay. So the word guesstimate is really kind of confusing. Was that an estimate of what your recollection tells you, that it was about November of 2012?

A Correct.

Q And what did you learn in or about that time?

A I didn't learn anything about the background at that point.

Q Okay. Who was the friend that told you that Lyuda was involved with Mr. Marquez?

A I don't recall.

Q When did you learn more about his back ground that caused you to be concerned?

A I immediately -- because there was someone that was new in my son's life, I just did a little bit of research, didn't unearth much initially. Ostensibly this is a person who had had a business, lived in California, that she had seen suddenly after she had just broken up with somebody else two weeks later. That was the only thing that alarmed me initially. And I did just some cursory searches and didn't unearth anything at that point.

Q What is your understanding of the history of the relationship between Mr. Marquez and Lyuda?

A According to the only story that I am aware of is the one that was told in Dr. Paglini's report.

Q So prior to seeing Dr. Paglini's report, you were not aware of their relationship -- the history of their relationship. Excuse me.

A No. But I was still incredulous even after reading the report.

Q Why is that?

A I had been to Ukraine. I'm aware of the technology that was present in the home. I had sent Lyudmyla a web camera, so it doesn't jive with what-- I just -- it did not jive with what I knew about the circumstances in Ukraine or the timeline that I had --I had heard from Lyudmyla, so I just don't believe it.

Q Okay. What was it -- what is the understanding that you drew from Mr. -- or excuse me -- Dr.Paglini's report about the commencement of their relationship?

A That they had met online in the early 2000s and had an online relationship.

Q Is that the part that causes you to be incredulous?

A The whole story causes me to be incredulous.

Q Okay. How about that part, do you believe that there was some reason to believe that that didn't occur that way?

A Based on the things that Lyudmyla told me in our relationship about past relationships leads me to believe that that is not true.

Q What is it that she told you that causes you to believe it's not true?

A She never mentioned Mr. Marquez, and she didn't have access to that technology to have a video conferencing-type relationship.

Q What else about the statements made by Dr. Paglini in his report regarding the history of the relationship between Mr. Marquez and Lyuda did you find to be unbelievable?

A I don't -- I never -- I'm not nitpicking what she told me. In a general sense, it just seems to be --falls in line with her trend of being dishonest. As her -- as Sasha's father, if I were involved with somebody of that ilk, it would be incumbent upon me as his father to share that with the mother and provide all pertinent information. So I feel like that didn't happen. In my opinion --

Q Okay. We'll get to that. But my question was what is it about Dr. Paglini's statement in regard to the history of the relationship between Mr. Marquez and Lyuda that causes you to testify today that it was unbelievable?

A In a general sense, I found it unbelievable.

Q What was generally about it that you found to be unbelievable?

A When it happened --

Q The time frame?

A -- how it happened, the lawyer sending a letter to Lyudmyla saying that he had been incarcerated, that sounds unbelievable to me.

Q Why is that?

A I just -- doesn't pass my -- just didn't sound reasonable to me. That's all I -- that's all I can tell you, it does not sound reasonable.

Q Okay. So you don't have any facts, information or knowledge other than your--

A I do not.

Q -- gut feeling --

A I do not.

See Sean Abid's Deposition Transcript, Pages 9-14.

Q You said you did some research initially about Mr. Marquez and that didn't reveal anything. I assume later you learned more about Mr. Marquez, correct?

A This is correct.

Q Okay. And how did you learn information about Mr. Marquez?

A Are you talking about later?

Q Yes.

A On Memorial Day weekend of 2013, I – I was searching state records. I did my initial search, and those are difficult and -- and they require – a person could have lived in many different jurisdictions, it would require you to search each courthouse or -- individually, and that may -- they may or may not have online records. So I -- other than -- those were cursory searches, you know, just to be safe, because it was someone that suddenly she was engaged to on the day that she met him -- or the day that I -- that we knew about him, could only have been two weeks since the previous relationship with a gentleman named Eddie Ryan, so naturally I wanted to make sure that this person was going to be safe around my son. So after not -- and like I said, ostensibly, because he was living in California, had never met him, I'd asked to meet him, she didn't let me meet him, so I kept searching cause he was suspicious. I said if this was someone that was going to be around my son, I would like it if I could meet him, ask him some questions about his background, you know, make sure that he was no threat to my son. So she refused, only told me that he lived in California.

Q Was the conversation you've just described in--

A It was on text.

Q Via text. Thank you. And have you retained those texts?

A They're in the -- I believe they're inthe pleadings in the first go-around.

Q And when did you learn anything about Mr.Marquez that caused youconcern?

A Memorial Day weekend 2013.

Q What did you learn?

A I searched the federal inmates database, and I found out that he was in the middle -- he was released November 2nd, 2012, after serving 10 years.

Q What were the crimes for which he was convicted and served time in a federal penitentiary?

A I mean you're asking me because you don't know, or are you asking me because you want me to show you that I know? I'm confused.

Q Did you think this was my deposition?

A Well, I just -- no.

Q Are you confused about the process?

A I'm confused about the question. You just want to know what I know?

Q What is it about the question that you're confused about? I've asked you what is your knowledge of the crimes for which Mr. Marquez was committed to the federal penitentiary. Can you answer thatquestion?

A Just the charges -- you want the charges or the crime? I'm...

Q I'm asking you -- is there something you don't understand about the crime as -- what would you like me to explain to you?

A There's a difference, right, between being accused of a crime and what he was charged–

Q Right.

A -- and what he served for, what he pled to. I mean I don't know what you're asking.

Q No. My question was what is the crime for which – to your understanding for which he served time in a federal penitentiary?

A Drug trafficking, ecstasy.

Q How did you learn about that?

A By speaking to the probation officer. And weapons trafficking and a prior for marijuana trafficking, his previous sentence, felony.

Q Was that a federal or state charge, the marijuana trafficking?

A State.

Q Did you understand that he was in a federal penitentiary as a result of the marijuana trafficking or as a result of the other two charges you've identified?

MR. JONES: Objection, I think the question misstates the testimony. You said marijuana.

MR. SMITH: That's right, that's exactly what I said.

Q You can answer the question.

A I assume they were related to the weapons and the ecstasy but influenced by the prior.

Q When did you first speak to Mr. Marquez's probation officer?

A The very day that I found out.

Q So that would have been Labor Day of – or excuse me -- Memorial Day 2013?

A It would have -- yeah. So it would have been the Tuesday when he would have been answering his phone.

Q What's his name?

A Scott Bawden.

. . .

Q Okay. Have you ever communicated with Mr. Bawden by any means other than telephone?

A Yes.

Q So your initial conversation was via telephone, correct?

A That's correct.

Q How did you come by Mr. Bawden's telephone number?

A Well, I -- I knew where he was living, so I just searched the federal probation office closest to that location.

Q And when you say you knew where he was living, you knew where Mr. Marquez was living, correct?

A Yeah.

Q Okay. And does the public information provide the information about probation officers?

A It provides the office and the phone number.

Q Does it provide information about a probation office particular to a particular individual, or does it just provide information about a probation office in a particular area?

A Probation office in a particular – not individual.

Q Did you call more than one probation office?

A No.

Q And so the first office you called, you asked them to speak to Mr. Marquez's probation officer?

A This is correct.

Q And that's when they connected you with Mr. Bawden?

A Bawden, yeah, this is correct.

Q What do you recall from the substance of your first conversation with Mr. Bawden?

A He was surprised to hear from me because he was under the impression that both of the children were Mr. Marquez's.

Q By both of the children, are you referring to your son and Lyuda's daughter?

A That's correct.

Q And he told you that.

A Yes.

Q What else do you recall from that conversation?

A The initial conversation, he gave me background on the charges.

Q What did he tell you?

A He told me what he was -- what he was in for and that his brother was currently serving time in a federal penitentiary for killing 20 people.

Q What is his brother's name?

A His nickname is Bat. I believe it's Jose, but I'm not exactly sure.

Q What else did Mr. Bawden tell you?

A As I mentioned, he had said that he thought that these children were Mr. Marquez's children, and then he told me about the charges. And that was -- that was the gist of the initial conversation.

Q What did you tell Mr. Bawden?

A I don't recall. I just wanted information. I was shocked to be -- I was very shocked that -- I was not yet over the initial shock.

Q Why was he forth coming with this information to you?

A It's required by law.

Q So anybody that calls a probation officer can get all that information to your knowledge.

A You can tell -- they -- he can tell you what they're in for.

Q Okay. Did he provide you any other information other than what you've described--

A Not at that time.

Q -- in your initial conversation?

A Not at that time.

Q When was your next contact with Mr. Bawden?

A I'm going to be guessing here on the date cause I don't have the date exact, but in--

Q I don't need an exactdate.

A -- in the month -- I believe in the –towards middle of -- no, early June, most likely, I believe. I can't be precise, but in June, I'm guessing early June.

Q June of2014?

A No. June of2013.

Q Okay. And how did that conversation get initiated?

A I don't remember what he was calling back about.

Q He called you?

A He called me.

Q Okay. So you'd provided him your number at the first meeting, first telephone conversation.

A Correct. And my wife and I were in the car and both were listening in.

Q In the first conversation--

A Second conversation.

Q -- or in the conversation in June 2013?

A June.

Q And what was the substance of that conversation?

A I was concerned for my safety because I was-- and my son's, but first -- my initial thought was that she was trying to kill me, like she was trying to have me killed, because in the initial court proceedings in 2012, there was a lot of hostility, I think she was unhappy with -- very unhappy with the result. And so I just -- the whole thing -- the –this new person, I didn't know why -- who, what, where or why. I thought, you know -- you know, maybe she was going to try and get this guy to hurt me or somebody with hisgang affiliations would hurtme.

Q Okay.

A So I wanted to make sure that Mr. Bawden could mollify those concerns.

Q So what did Mr. Bawden tell you in the conversation in June 2013?

A He said that this was someone that you didn't want around your child.

Q Did he explain?

A Yes.

Q What did he say?

A He referred to him as human garbage. Those are his words.

Q Did he explain why he referred to him as human garbage?

A He spoke about the gang affiliations with the Mexican Mafia.

Q And what gang affiliations did Mr. Bawden tell you that Mr. Marquez had?

A Mexican Mafia.

Q And that's a gang? That's the name of a gang to your understanding, the Mexican Mafia?

A It is the name of a prison gang.

Q A prison gang. All right. Did Mr. Bawden tell you that Mr. Marquez was involved with the Mexican Mafia in prison or in other contexts as well?

A He said that it's a blood in/blood out gang affiliation.

Q Those are his words.

A These are his words.

Q And what did he tell you about the Mexican Mafia?

A Watch yourself, he'll have you killed.

Q Did he tell you anything else about Mr. Marquez during the June 2013 conversation, speaking of Mr. Bawden?

A He did say that he supervised the worst federal criminals in his district and that this was --this Mr. Marquez was one of them.

Q Did he give you any specific examples of behaviors or actions by Mr. Marquez that led him to his conclusions that you've listed today?

A He said his prior for drug trafficking -- for marijuana trafficking, all the codefendants were Mexican Mafia, and that the bringing drugs into the United States from Mexico and bringing guns into the United States from Mexico required the assistance of the Mexican Mafia, and that he had no history of any meaningful employment. And he went on to say that -- he said -- he said I don't know what your circumstances are, but youshould hire an attorney and seek full custody, and he repeated the statement about him being human garbage. So as a parent that had just found out, I would have rather have found this out from Lyudmyla and be -- and put it out there.

Instead, I had to unearth it on my own. And the very next day that I found out, she married him. That's probably I'm assuming some sort of tactic, but... So I just -- I never felt like there was any honesty about any of his background. If I don't find out, I'll never know.

Q You indicated that her marriage to Mr.Marquez was some sort of tactic.

See Sean Abid's Deposition Transcript, Pages 15 – 28.

Q Do you -- did you have any further conversations with Mr. Bawden?

A Yes.

Q When did that occur?

A I don't recall the exact date, but we had many conversations.

Q Okay. When were the conversations, over what period of time?

A The last -- I'd say the last time I ever spoke with Mr. Bawden was probably the time that the hearing commenced and ended.

Q So when was that to your recollection?

A Well, sometime around December, Jan--- January 2014, December 2013, I believe, somewhere in that time frame, but I don'tknow.

Q Have you had any conversations with Mr. Bawden or any other parole officer of Mr. Marquez other than in the time period between July 200- -- excuse me -- June2013 and approximately January 2014?

A Well, yeah. I spoke to the probation officer here cause -- I don't know the exact time frame, but when he had his probation suddenly transferred here, he had a new probation officer, and I -- I was in touch with that one to find out what happened.

Q And who is the probation officer that youspoke to here?

A Elizabeth Olson.

Q How did you learn that Miss Olson was Mr. Marquez's --

A Mr. Bawden.

Q -- probation officer? Mr. Bawden told you that?

A (Witness nodding head.)

Q When is your understanding that Mr. Marquez's probation was transferred to Nevada?

A I don't know exactly. If I had to guess, it would have been maybe October of2013.

Q So that was prior to the time of the December 2013 hearing at which you resolved the issue of custody, correct?

A This is true.

Q Did you have reason to believe that his transfer of probation to Nevada was contingent upon any resolution in the custody matter that was on going at that time?

A No. I do not know anything that factored into that decision. I have no insight.

Q By "that decision," you're referring to the decision to allow him to--

A Yes.

Q -- transfer his probation to Nevada, correct?

A Yes.

Q So you have no knowledge as to how that came about, correct?

A No. And I asked Scott Bawden, and he did not tell me. And I had concerns -- I had concerns with Mr. Bawden at that time also because I felt like there was a duty to warn that -- that he didn't fulfill. He didn't go very far to confirm that I was the biological father of that child. If he thought it was Mr. Marquez's child, it would be kind of difficult since he was in prison when this all could have taken place, so...

Q So you thought Mr. Bawden's reasoning or insight or investigation was faulty; is that a fair statement?

A Yes, because if I only had to rely on Lyuda to give me the information, I never would have had it, and I would have felt a lot more comfortable if he had reached out to me and said okay, you know, you're -- this –this person has been incarcerated for these reasons, and then I could have gone forward with it. I felt like it was all very surreptitious and stealth, and I only -- they only would confirm things that I already knew that would not give me any information. So I was frustrated with Mr. Bawden because of the duty to warn, that I felt like he'd failed inthis duty.

Q Were there any actions by Mr. Marquez between the time that you first learned of his involvement to Lyuda through December 2013 that caused you any concern?

A One of them was the flower business that he had, he ran that with another felon named Tim Pentaleri,who was in prison for conspiring to abduct, kidnap and murder his girlfriend at the Minneapolis airport. So -- and I had asked Mr. Bawden that this seems an odd choice in supervision to allow the formation of a -- of a flower outfit with two individuals that are serious felons. His response was do I think the flower show is a front? Yes. Can I prove it? No. Those were his exact words when I asked him that.

Q How did you learn that Mr. Pentaleri was Mr. Marquez's partner in a flower business?

A It's -- it's -- it's available online. California, you know, business licenses, they're readily available, and his own website, the flower website, referred to him and Tim together.

Q So there was no attempt to hide the identity of his partner, correct?

A Well, the issue is not with whether Ricky was going to hide it. It's whether Scott Bawden felt that was appropriate supervision to have him enter into a business with a serious felon.

Q Okay. But the answer --

A That was -- that was --

Q The answer to my question is yes, he didn't attempt to hide it to your knowledge.

A I don't know.

Q Okay. But it was on a public website and contained in the corporate documents that were filed with the Secretary of State of California, correct?

A Yeah. Well, I don't know if that was his intent or not.

Q Do you know how long, if at all, Mr. Pentaleri was incarcerated?

A The precise amount of time I'm going to say was -- I'm going to guess that it was somewhere earound four to five years, but I don't know for sure. That's -- I -- from what I recall, somewhere in that time period, maybe more.

Q When you say you recall, what information did you use to make that determination?

A Looked on the federal inmate search, and there's many pretty disturbing news articles about the –the situation that contain the police report and what they found. And so there's a lot out there with a couple clicks of the mouse.

Q So the information that you learned was on the Internet, correct?

A This is true.

Q All right. Did anyone else provide you information about Mr. Pentaleri?

A No.

Q So all of the information you have from –about Mr. Pentaleri is from the Internet?

A Yeah.

Q And when was Mr. Pentaleri incarcerated? When did he get out of jail to your knowledge?

A He was incarcerated sometime after Mr. Marquez,I believe. I mean I think he didn't serve quite as much time, but he was released in the same window of, you know, probably 12 months, I'm guessing.

Q Well, are you guessing, or are you basing that on Internet --

A I don't have it --

Q -- research?

A I don't have it in front of me. I'm just -- at the time that -- I remember reading it, and that's what I remember. Obviously they must have met in prison and decided to hatch this business, and so naturally one would assume that their release dates were somehow synchronized.

Q Do you believe that the flower shop was afront for illegal activity?

A I don't have any knowledge to prove or deny that.

Q So you don't know. You don't have an opinion?

A Not that's informed. I don't have an informed opinion. I don't know any of the circumstances other than the two people that were running it.

Q Do you know whether or not Mr. Pentaleri has been charged with a crime since being released from prison?

A No.

Q No, you do not or no, he has not?

A I do not know. I do not know anything about him post-release.

Q Have you ever met Mr. Pentaleri?

A No.

Q Okay. Other than the fact that Mr. Marquez was in a flower business with Mr. Pentaleri, were there any actions, statements or deeds by Mr. Marquez that caused you concern between June of 2013 and December of 2013?

A There were unauthorized visits to San Diego where I was not informed, to Lake Havasu, also not informed. The Lake Havasu trip, I think he was with --she brought him there with Mr. Marquez and his other brother, who's a felon as well. I think his name's Ernesto. And there was -- I believe there was a daughter of Bat Marquez that was there, which, you know, less than ideal, but I would have liked to have been informed. So those were actions that I deemed not in the spirit of coparenting.

Q Okay. But you wouldn't -- I was -- my question addressed actions of Mr. Marquez. Is it your understanding that Mr. Marquez would have a duty to advise you of his trips that he takes with Lyuda?

A It would be respectful. I think any reasonable person would want to be informed if you were going to take your son around another felon, and that he could have been -- he had the choice to also allay my fears. You know, this could have been different if from the beginning there was a spirit of honesty and disclosure. So that to me is an action that ramps up the hostility when there's secrecy and bringing my child around people that you

Q Has Mr. Marquez ever made a false statement to you?

A Yes.

Q And when was that?

A When we were in -- I have only spoken to him once, and that was during the negotiation settlement. He said he didn't commit these crimes.

Q Is there any other statement made by Mr. Marquez to you that you believe was false?

A I believe everything he said to me that day was false, and I don't -- I didn't write it down or transcribe it. But my general impression that I left that meeting with is -- I'm a guidance counselor, and it reminded me of talking to a -- you know, a 13-year-old boy who has a long history in the dean's office, and it's always somebody else's fault. That was my general impression.

See Sean Abid's Deposition Transcript, Pages 41 – 49.

Q Okay. And then you said that your concerns that you've stated here today subsided for a while. When did your concerns start again about Mr. Marquez?

A I think that -- they just never -- never went away because I didn't have anything that led me to believe that this person had accepted responsibility and acknowledged his crimes. I had no evidence that he'd ever been in drug treatment that I knew of, AA meetings, anything. And in speaking with him, and I'm -- you know, this is my profession, you know, I have -- I've got a very strong impression that this was someone that just wasn't there yet, that this wasn't my fault. So going away from the settlement, I mean it's a big relief, hey, it's over for now, you know, let's breathe deep. I can't live in that place forever. So -- but my duty to protect my son, my duty to keep my eyes open, my duty to trust my gut's still there.

Q So in regard to your belief that Mr. Marquez may be still selling drugs or engaging in illegal activity, that never subsided, correct?

A There was no specifics about what I felt he was doing. My belief that he still was at risk to commit crime was there.

Q Okay.

A The risk that he still was a member of the Mexican Mafia that could produce a dangerous situation for my son didn't go away.

Q Okay. And that's -- that's continued even through today, correct?

A Yes and no, because yes, he is what he is, and I can't change that. I don't have a lot of faith in the family court process, that unless somebody's a murderer or child molester that they're going to do anything. So -- that doesn't mean that -- that, you know, it was Kumbaya and, you know, I wanted to, you know, embrace him as -- as my peer. There's a reason I don't have any peers that have been in prison, in jail, sold drugs, sold guns. We can have a settlement. That doesn't mean I acquiesce my concern for my son.

Q Okay. My question was -- and we'll -- let's go back to the question. The question was whether or not your concerns about Mr. Marquez have continued through today, or have you -- now your concern's subsided?

A I'll always be concerned about that influence.

Q All right. And after December 2013, leading up to the present litigation that I believe was filed in November of 2014--

A January of 2015.

Q January 2015, you continue to maintain that concern about Mr. Marquez and his ability to be --commit crimes and be a member of the Mexican Mafia, correct?

A Concern's not the right word, I guess. The word is that it just -- I'm not at peace with the fact that he poses no risk. That's all.

Q Okay. Do you believe he's a member of the Mexican Mafia today?

A Yeah.

Q Okay. And do you believe that he's engaged in illegal activity today?

A I don't know.

Q But you suspect he may be.

A No. I don't know the man, and I don't know his comings and goings. I don't -- I can't -- I don't suspect anything. I know that the word Mexican Mafia and felon scare me.

Q In regard to the -- again, I just want to make sure that we have covered all of his actions that caused you to believe or have any concern since the time of-- that you became aware of him until now. Is there anything other than his statements at the settlement conference and the fact that he took trips with Lyuda without advising you that causes you concerns about Mr. Marquez?

A It's not anything personal with Mr. Marquez, let me make it very clear. I don't know him.

Q Okay. Again, Mr. Abid, I'm looking for--

A I'm trying to answer your question.

Q -- your -- I'm looking for your knowledge of actions, statements, words, deeds that cause you concern, not your general opinion about Mr.Marquez.

A It is -- my concerns are -- are based on who he is, what he's done and what his background suggests he may do. That's it.

Q Okay. So you're not aware -- in answer to my question, you're not aware of any statements, deeds, actions by Mr. Marquez since the time he came into Lyuda's life other than his statements at the settlement conference and the fact that he's taken trips with Lyuda that cause you any concern.

A Well, I don't communicate with Mr. Marquez,so how would I speak to him? How would I communicate with him? So you're asking me things that -- he very well could be doing whatever. We don't talk. We don't communicate. I don't have any contact with Mr. Marquez, so I can't possibly know what he's up to.

Q I'm not asking you things that you don't know, which is what you answered. I'm asking things that you do know. So are there any facts, information, knowledge, deeds, statements by Mr. Marquez since the time of 2013 when you became aware of him until we sit here today other than his statements at the settlement conference and other than his trips with Lyuda that cause you any concern?

A Specifically, no.

Q Is there something generally that he's done that causes you concern?

A As I said before, Mexican Mafia, decade in prison --

Q Okay.

A -- that -- that -- that concerns me and always will. You just asked me what concerned me.

Q The concerns are related to the previous question, so let me just make this crystal clear to you, Mr. Abid. I want to know if you're aware of anything he's done, said or any act by Mr. Marquez since the time you were aware he was in Lyuda's life until today, other than what I previously mentioned, that causes you concerns about Mr. Marquez.

A No.

Q Okay. You had indicated you had conversations with his probation officer, Miss Olson, correct?

A Correct.

Q Have you ever had any conversations with prosecutors involved in Mr. Marquez's case?

A Never.

Q Have you ever had any conversations with other federal authorities or officials in regard to Mr. Marquez other than the probation officers you've referenced?

A Just the probation office in the southern district and then some other probation officers in this district.

Q Okay. Who were the probation officers in this district that you've spoken to?

A I don't recall their names.

Q When did you speak to them?

A I don't recall. Would have been somewhere in that litigation process.

Q So it would have been prior to December 2013?

A I think so. It was one conversation, so I don't know exactly when it happened.

Q And do you recall the substance of that conversation?

A No.

Q Don't recall anything about it?

A No.

Q Okay. When you spoke to -- I believe her name is, and correct me if I'm wrong, Miss Olson; is that correct?

A Yes.

Q Okay. Miss Olson is who you understand to be Mr. Marquez's probation officer, correct?

A At that time, yeah.

Q Okay. And at that time would have been sometime in early 2014 or would have been earlier than that?

A I didn't speak with her until when the -- I had the initial conversation with her. I didn't speak with her again until last year, Septem- -- August, because Lyuda was going to vacate her portion of the agreement. She wanted to vacate her portion of the agreement that said I could pick Sasha up at 5:30. So I called the probation officer and said if that's the case, I'm going to vacate my agreement to lift supervised contact. And that was the only conversation I've had with them since. I haven't talked to them since.

Q What did you think that you would accomplish by contacting Miss Olson in August of 2014?

A State my position that -- that I would pursue with my attorney.

Q And what did you think that was -- why do you think it was important or it was necessary to contact Miss Olson?

A Because if the order -- if she was not going to follow -- she was talking about not following the order. Then there -- there were other parts to that order, you know, that that was -- those were the key factors involved in that settlement. If you don't -- if you're not going to follow yours, I'm going to pursue that the whole order...

Q Okay. But why do you think that you -- you can pursue that order through litigation, which is subsequently what happened. But the -- why did you think it was necessary to contact Mr. Marquez's probation officer?

A Because the order involved his super-- unsupervised contact around my son, so that's why.

See Sean Abid's Deposition Transcript, pages 53 – 61.

Q Do you have any facts, information or beliefthat suggests to you that Mr. Marquez has ever been in possession of a firearm since the time of his release from the federal penitentiary?

A No, I don't have anyfacts.

Q Do you have any information or suggestion to you made by others that Mr. Marquez is in possession of agun?

A No.

Q Other than the statement that you recall about guns, do you recall Mr. Harter making any otherstatement about Mr. Marquez or his involvement in yourlitigation?

A Said that if he found the child to be with Mr. Marquez unsupervised, he would changecustody.

Q And that was at the December 2013hearing, correct?

A He said that even inOctober.

Q But the answer is he also said that to your recollection at the December 2013 hearing.

A He absolutely did.

Q All right. Why did you agree tounsupervised visitation for Mr.Marquez?

A Because to be able to be with my son after school and assist him with the schoolwork, have him aroundhis brothers, play sports, and I felt like that was going to provide as much stability asI could. And if I had to sit with an un- -- a situation that's less than ideal,that was a negotiation that I was willing to -- toaccept because I felt that was the most valuable to me giventhe circumstances.

Q But that didn't alleviate your concernsabout Mr. Marquez, correct?

A I had to accept that--

Q Is the answer yes or no tomy question?

Did it alleviate your concerns--

A No.

Q -- about Mr. Marquez?

A No, it did not, no.

Q And today do you believe that Mr. Marquez's contact with Sasha should be supervised?

A I don't think about it. I can't answer that question because it's not something I consider causeit's not something that's going to happen, so I don't havean answer for that.

Q But in fact you did think itcould happen. You in fact called your -- Miss Olson and advised her thatyou thought it couldhappen. Why are you saying you don't think it can happen today?

A I didn't say itthat couldn't. I just – I wrote -- I said I don't think the court is going todo anything. That's what I believe. The court won't do anything. So why hope for something the family court's never going to deliveron?

Q Okay. I'm not asking you if you believe that the court will supervise hisvisitation. I'm asking you if you believe as a father, and based upon your concerns that you've expressed heretoday, that Mr. Marquez's contact with your son shouldbe supervised.

A I do.

Q And as you sit here today, you believe he's a member of the Mexican Mafia, correct?

A I know he is.

Q Okay. And you believe that he's adangerous person?

A I believe that anyone affiliated with theMexican Mafia by the -- themselves are a risk, but alsothe problems that can bring to a family, and so--

Q But you believe that Mr. Marquez is adangerous person.

A I believe that his background makeshim dangerous.

Q And that's because of his involvement withpeople who are also dangerous.

A Because of his membership in the MexicanMafia.

Q And you suspect that he's still engagedin criminal activity as you sit here today, correct?

A No.

Q You do not suspectthat?

A I don't know.

Q That would be something that you would bevery interested in to know,correct?

A If he was involved in criminal activity--

Q Yes.

A -- I would like to know that,yeah.

See Sean Abid's Deposition Transcript, Pages 67 – 70.

Not only did Sean take the numerous above-referenced steps to dig up information regarding Ricky in hopes of finding something that would get Ricky in trouble, he even ensured that everyone around Sasha, including his school Principal was aware of Ricky and his past actions. The relevant excerpt from Sean's deposition transcript is as follows –

Q Did you ever provide her any pleadings ororders from the litigation in 2013 or -- yes.

A No. I provided them to the principal, who may have shared them.

Q Okay. And that's Miss Beckstead?

A No. This would be Mrs. Wooldridge. This is now --

Q Oh, that'sright.

A -- Twitchell ElementarySchool.

. . .

Q Okay. When did you have a conversation with Miss Wooldridge about your divorceaction?

A When school started, I provided them a copyof the -- the latestorder.

Q All right. Did you have any conversation with Miss Wooldridge about Mr. Marquez?

A Yes.

Q And what was the substance of thatconversation?

A I shared -- what did I share? Just that this -- he was not, you know, authorized to come get himfrom school. He's not -- and they -- and they needed to know who could pick him up, it was me and his mom, because Lyuda went down to the school and put him down asthe father first, and because I work at the school district, I saw that. So the school wouldn't correct it until I provided documentation that I was indeedthe father. And at that point I shared the pleadings, and I sharedthe case notes on Mr. Marquez.

Q Is there any prohibition from Mr. Marquez –you shared -- excuse me. Let me back up a second. What case notes about Mr. Marquez did youshare?

A The -- the files related to his courtcase.

Q His criminal action.

A Yeah, his criminal case.

Q Did you provide Dr. Paglini's report?

A No. I don't have it. It's confidential.

Q What was the substance of the conversation about Mr. Marquez with Miss Wooldridge?

A She just wanted to be clear on what theorder was, and I told her I didn't want the order enforced. I just wanted to know if -- if anybody other than myself or the mother attempted to pick him up fromschool.

Q What order were you referring to?

A The order from the December hearing.

Q But specifically what portion of the orderwhen you said you didn't want the order enforced?

A The picking up, like the -- I didn't want themto think that she couldn't come get him as hismother.

Q Okay. Is there a restriction in that order to your understanding on Mr. Marquez picking upSasha?

A In that order?

Q Yes.

A No.

Q In any order.

A Well, in that order, no. So no, to answer your question, no, thereisn't.

Q As it stands right now, do you -- do you believe that there is a legal restriction on Mr. Marquez--

A There is not.

Q Okay. I'm going to finish my question, then you can answer again. Do you -- as you sit here today, do you understand that there's any legal restriction on contact, including picking up from school, between Mr. Marquezand Sasha?

A No, there's not.

See Sean Abid's Deposition, Pages 93 – 97.

Sean even called the FBI regarding Ricky. The relevant excerpt of his deposition transcript regarding his conversations with the FBI are as follows –

Q What was the basis of the conversation withthe FBI in August of2014?

A They were asking me questions of what Iknew about Mr. Marquez. And at that time they were talking -- we -- they were just talking, and the subject came up.It had nothing to dowith me. That was the first time Iever had heard anything about statutes and recordings,so...

Q Okay. Let me get this straight. In August of 2014 an FBI agent calledyou, correct?

A They -- they made contact with me,yes.

Q How did they have yournumber?

A I don't know.

Q So out of the blue you received a conversation for someone who identified themselves as an FBIagent.

A Uh-huh.

Q Yes?

A Yes.

Q And this was on a telephone call in your homeor your cell phone or your wife's cellphone?

A My cell phone.

Q What's your cell phone number?

A 290-7406.

Q 702 area code?

A Yeah.

Q Has that changed since August 2014?

A No.

Q So you received a phone call from an FBI agent on your cellular telephone call – phone in August of 2014?

A Yeah.

Q And in that conversation youdiscussed Mr. Marquez, correct?

A No. I went down to the FBI headquarters, and then I did.

Q Okay. So in that conversation with -- in August of 2014, as you've identified as the basis for your knowledge about the vicarious consent doctrine, you didn't discuss Mr. Marquez?

A We didn't discuss vicarious consent. All they were talking about, one party. I was just listening. I don't -- that's the only time I'd ever even heard ofthe word, so...

Q You were listening towhom?

A The agents that weretalking.

Q Okay. The agents that were talking were talking to you on your cell phone in August of2014?

A No. I was down -- I went to the headquarters. I went down there. They invited me downthere.

Q What was the substance of the conversationyou had with FBI agents in August of 2014?

A They were just asking me what I knew aboutthim.

Q Asking what you knew about RickyMarquez?

A Yeah.

Q And what did they tell you about RickyMarquez?

A They didn't tell meanything.

Q How did they identifythemselves?

A As FBI agents. I mean...

Q They said we're so-and-so from the FederalBureau of Investigation?

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March, 2014 I served a copy of the NOTICE OF ENTRY OF ORDER RE: DECEMBER 9, 2013 EVIDENTIARY HEARING upon each of the parties by facsimile 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
Facsimile: (702) 314-2811
Attorney for Defendant
Lyudmyla Abid

Cheryl Berndall
an Employee of BLACK & LOBELLO

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

Electronically Filed
03/12/2014 03:46:48 PM

CLERK OF THE COURT

ORDR
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, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: N

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 his 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;

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

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 11th day of March, 2014.

DISTRICT COURT JUDGE
MATHEW HARTER

DATED this ____ day of February, 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 _____ day of February, 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

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

DOCKETING STATEMENT ATTACHMENT 18

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

Electronically Filed
07/14/2015 05:40:46 PM

CLERK OF THE COURT

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

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

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

3. That Dr. Holland's letter and contemplated subsequent report, be stricken and that she excluded as a witness in this case.

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

DATED this 14th day of July, 2015.

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

POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

1. This matter was last heard on June 25, 2015. At that hearing, the Court ordered Sean to produce the "original audiotape" if it exists. It was intimated although not stated conclusively by Sean's counsel at the hearing that Sean may have only included those portions of the tape that he deemed relevant and he destroyed the original. Based upon the Court's Order mandating the production of the original audiotape, an email correspondence was sent to Sean's counsel dated 06/30/15 inquiring about whether or not Sean intended to comply with the Court's Order or if the original tape had been destroyed. To date, Sean has failed to address the issue or otherwise reply to the email request. (See attached email correspondence, Exhibit A).

2. Counsel for Defendant then waited for Sean's promised Opposition (filed 2 days before the next scheduled hearing on 07/16/15) to ascertain Sean's stance in this case relative to the production of the original audiotape. A review of that pleading reveals that Sean again ignored the issue of the destruction of the original audiotape and the provision of an edited tape to Dr. Holland.

3. It is now clear that Sean had provided Dr. Holland and opposing counsel Sean's "sliced and diced" version of the audiotape, his selectively edited version of the audiotape.

4. By way of background, this Court appointed Dr. Holland to conduct a child interview (not a custody evaluation). At issue was whether or not Dr. Holland should be provided with the audiotape or a transcript thereof prior to the hearing. It should be pointed out here that at no time did Plaintiff reveal to this Court or to opposing counsel that the tape he intended to provide Dr. Holland was his selectively edited version of the tape and that the original audiotape had been destroyed.

5. The Court stated that counsel shall submit supplementary points and authorities it would like the Court to consider regarding the expert examining "the audiotape" by March 23, 2015. The Court set a return date on the issue for April 2, 2015.

6. Both parties filed Points and Authorities to the Court regarding this issue. However, Defendant e-filed her points and

authorities on March 23, 2015, but the same was not entered into the record by the Clerk until the following day.

7. Prior to the Defendant's Points and Authorities being entered into the record by the Clerk, this Court entered a Minute Order, vacating the April 2, 2015 hearing date, and allowing Dr. Holland to review the tape (and any other relevant pleadings filed in this case). It must be presumed that the Court did not intend to allow Plaintiff to submit a selectively edited version of the tape to Dr. Holland. This because at no time did Plaintiff reveal to opposing counsel or this Court that he had destroyed the original.

8. In Defendant's Points and authorities filed herein regarding the issue of allowing Dr. Holland to listen to the tape prior to the child interview, Defendant expressed concerns about the tape. Defendant alleged as follows:

"To date, no valid transcript of the tape has been provided by the Plaintiff. Nor has Plaintiff provided the tape to Defendant for examination. The tape has not been authenticated. Defendant is entitled to be provided with the tape and have it forensically examined to determine its authenticity and to determine if the contents have been altered or doctored. Defendant is entitled to examine the tape to determine if conversations that occurred in her home to which the child was not a party were recorded by the device. If this is the case, the tape absolutely would constitute violation of both State and Federal anti wiretapping Statutes and the "vicarious consent doctrine" will not apply thereby requiring the exclusion of the tape. The only evidence of the contents of the tape are statements of the Plaintiff allegedly detailing what was on the tape. It is obvious based upon a review of Plaintiff's recitation of the tape contents, that Plaintiff selectively edited the tape and only chose to reveal those portions of the recoding that he believed supported his case."

9. Subsequent to the March 18, 2015 hearing, counsel for Plaintiff provided Defendant's counsel with a flash drive which was purported to be a duplicate copy of the original audiotape. In fact, the flash drive was an edited/altered version of the original tape. We now know that the edited/altered flash drive was also provided to Dr. Holland for review prior to her interview with the parties and the minor child.

10. A review of the flash drive provided by Plaintiff revealed that it contains only a fraction of what had to have been actually recorded in Plaintiff's home (or car) for 3 consecutive days. Based on 3 days of recording, there should have been approximately 30 hours of recordings. The combined running time of the tape that was provided by Plaintiff was 60 minutes on day one, 10 minutes on day two, and 22 minutes on Day three.

11. It is therefore clear that Plaintiff in fact altered the actual recording, and he has refused and continues to refuse to provide the original recording to Defendant despite this Court's Order that he produce the original tape. It is also clear that Plaintiff provided an altered recording to the evaluator Dr. Holland prior to the child interview.

12. Dr. Holland then proceeded with the interview process. Again, her role was to interview the child and not conduct a custody evaluation. Nor was Dr. Holland assigned to render an opinion about the summer vacation issue.

13. Dr. Holland then issued a "letter" to the Court suggesting that the Court consider whether allowing Lyuda to have 6 weeks vacation is in the child's best interest. Included in the letter were direct quotes obtained from the altered audiotape. Based on that letter, Plaintiff proceeded to move the Court to restrict Lyuda's six week summer vacation with the child.

14. Dr. Holland then issued a subsequent report at the day of the last hearing on 06/25/15 that included more direct quotes obtained from the altered audiotape provided by Sean.

II

LEGAL ARGUMENT

1. **NRS 52.235 REQUIRES PRODUCTION OF THE ORIGINAL TAPE TO PROVE ITS CONTENTS; THE EDITED VERSION OF THE AUDIOTAPE MUST BE SUPPRESSED AND ASSOCIATED PLEADINGS MUST BE STRIKEN FROM THE RECORD, INCLUDING THE REPORTS OF DR. HOLLAND**

NRS 52.235 Original required. To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this title. (Added to NRS by 1971, 800)

(Defendant incorporates herein in its entirety the law and argument as stated in her previous motions to suppress the tapes and issues related to Dr. Holland).

As stated, to date, Plaintiff has failed to produce the original audiotape or a certified transcript of the tape. This despite this Court's Order that he do so. And, Plaintiff has indicated he will not even be seeking to have the tape

admitted. And why should he. Alleged excerpts of the tape have been submitted in this case and made part of the record by their inclusion in pleadings, which to date, the Court has refused to strike.

And alleged excerpts off the tape have come into this case by their inclusion in the reports from Dr. Holland.

In summary, Sean has been able to "prove the contents" of the tape by including small excerpts of the tape that he deemed relevant in his pleadings and by inclusion of the those portions of the tape in a selectively edited flash drive which he provided to Dr. Holland prior to the child interview(s) and to Defendant's counsel. This process has proceeded in this Court over the repeated objections of the Defendant.

This method of "proving the contents" of what was on the audiotapes violates Nevada law, cited above, and fundamental notions of fairness and justice.

By producing only those conversations on the tape that supported his case and thereafter claiming that he destroyed the original affords Sean the opportunity to alter what was actually on the tape and to also delete conversations that may have not have supported his case or in fact may have favored the Defendant.

The destruction of the original tape also affords Sean a defense to the claim that the recording device picked up

conversations to which the child was not a party which in effect nullifies the implied consent doctrine and makes the recording illegal pursuant to State and Federal Law. See Lewton vs. Divingnzzo, the United States District Court for the District of Nebraska, 8:09-cv-0002-FG3 (2011).

Certainly this opportunity to alter a tape or delete those portions of the tape that do not support your case is one reason why Nevada law requires production of the original.

Accordingly, the only remedy available under the circumstances of this case is to grant Defendant's request to strike the pleadings which are based solely on the alleged contents of the audiotape and which contain direct alleged quotes from the tape, strike the reports of Dr. Holland which contain alleged quotes from the tapes, and to exclude Dr. Holland as a witness in this case.

To not grant this request would in effect be allowing Plaintiff to circumvent the Nevada statute which requires production of the original tape in order to prove the tape contents.

2. DR HOLLAND MUST BE EXCLUDED AS A WITNESS AND HER REPORTS SUPPRESSED

When the Court granted Plaintiff's request to have Dr. Holland listen to the "tape" obtained by the Plaintiff prior to the child interview, it did so without the specific knowledge

that 1) the original tape had been destroyed by Plaintiff, and 2) that the audiotape being provided to Dr. Holland was an altered, selectively edited version of the original tape.

Defendant objected to Dr. Holland reviewing the tape for this very reason. That the tape had not been authenticated. No transcript had been provided. At a minimum the Court should have inquired as to what exactly was being provided to Dr. Holland.

Given the fact that Dr. Holland was provided with an altered tape prior to her interview with the child without this Court's knowledge or consent, her reports should be stricken and she should be disallowed as a witness in this case.

The issue of unfair prejudice cannot be understated. Dr. Holland was provided with a tape that had been altered by the Plaintiff. The original has been destroyed.

After listening to the altered tape, (or maybe she just reviewed Sean's pleadings that contained the same quotes that were included in her reports) Dr. Holland was prejudiced from the beginning. She no doubt then proceeded with the interview process with a goal of substantiating or looking for effects of alleged parental alienation that allegedly was occurring in Defendant's home. (Effects which the Defendant strongly asserts do not exist).

This result cannot be allowed to stand. Defendant

respectfully submits that had Dr. Holland not been provided with the altered tape and had Sean not been allowed to lobby and argue his position based solely on the altered tape the reports that were generated by Dr. Holland would have been completely different. The only remedy under these circumstances is exclusion.

CONCLUSION

Based upon the foregoing facts, Memorandum of Law and Legal Argument, and based upon Defendant's previously filed Motions to Suppress, 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 14th day of July, 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 SUPPLEMENTARY POINTS AND AUTHORITIES

I, Michael R. Balabon, Esq., hereby certify that on the 14th day of July, 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 14th day of July, 2015

MICHAEL R. BALABON, ESQ.

EXHIBIT "A"

Print Close

RE:

From: **michael Balabon** (mbalabon@hotmail.com)
Sent: Tue 6/30/15 5:46 PM
To: John Jones (jjones@blacklobellolaw.com)
1 attachment
20150630_172951_f6f45d067c14.pdf (60.5 KB)

John:

Attached please find our list of witnesses. We will only be calling Mr. Marquez.

Lyuda is requesting that her vacation be extended to Monday, July 6, as we miscalculated the start time of her vacation, which commenced on June 8. This would give her the 4 weeks to which she is entitled. Please advise ASAP.

The Court specifically ordered the production of the original audiotape. Will it be produced? Or has it been destroyed?

Michael R. Balabon, Esq,
5765 So. Rainbow Blvd., #109
Las Vegas, NV 89118
(702) 450-3196
Fax: (702) 314-2811

From: jjones@blacklobellolaw.com
To: mbalabon@hotmail.com
CC: cberdahl@blacklobellolaw.com
Subject: Re: RE:
Date: Mon, 15 Jun 2015 20:41:33 +0000

Yes that is fine

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

Sent from my iPhone

DOCKETING STATEMENT ATTACHMENT 19

FILED IN OPEN COURT
7/16/, 20 15
STEVEN D. GRIERSON
CEO / CLERK OF THE COURT
By: KBoyle Deputy
KATHLEEN BOYLE

OFFM

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

SEAN R. ABID, Plaintiff
-vs-
LYUDMYLA A. ABID, Defendant

Case No. D-10-424830-Z
Department B

ORDER FOR FAMILY MEDIATION CENTER SERVICES

IT IS HEREBY ORDERED that, in the spirit of preserving the parents' right to make decisions about the future best interest of their child(ren), the above-named parties will make every attempt to resolve their disputes.

IT IS FURTHER ORDERED that, if a Court Interpreter is needed, it is the parties responsibility to pay the interpreter at the time services are rendered, and the language needed is: _____

IT IS FURTHER ORDERED by the Court that, regarding the child(ren) at issue, the Family Mediation Center (FMC) shall:

____ Provide Confidential Mediation _____
(When telephone mediation is ordered, one or both parties must reside out-of-state.)

____ Include a Domestic Violence Protocol

✓ Interview Child(ren) ALEXANDR (2/13/09)

Issues: TO BE CONDUCTED ONLY IF INTERVIEW CAN BE RECORDED BY FMC.

____ Reunify Parent/Child(ren) _____

IT IS FURTHER ORDERED that the cost of mediation will be assessed using a sliding scale based on each litigant's individual financial status with a maximum cost of $300.00 per person. Child(ren) interviews are $50.00 per child per litigant. Parent/Child(ren) reunifications are $50.00 per litigant.

IT IS FURTHER ORDERED that the parties and/or their attorneys must report to the Family Mediation Center at 601 N. Pecos Road, Las Vegas, NV 89101, phone (702) 455-4186.

DATED this 16 day of JULY, 20 15.

This matter is reset for

Date: 8/14/15 Time: 10:30 AM

District Judge
LINDA MARQUIS

Attorney for Plaintiff: JOHN JONES

Attorney for Defendant: MICHAEL BALABON

Rev. 6-11

DOCKETING STATEMENT ATTACHMENT 20

Register of Actions

Case No. D-10-424830-Z

In the Matter of the Joint Petition for Divorce of: Sean R Abid and Lyudmyla A Abid, Petitioners.

§
§
§
§
§
§
§
§

Case Type:	**Divorce - Joint Petition**
Subtype:	**Joint Petition Subject Minor(s)**
Date Filed:	**02/04/2010**
Location:	**Department B**
Cross-Reference Case Number:	**D424830**
Supreme Court No.:	**69995**

Party Information

Petitioner	**Abid, Lyudmyla A** 2167 Montana Pine DR Henderson, NV 89052		**Lead Attorneys** **Radford J Smith, ESQ** *Retained* 702-990-6448(W)
Petitioner	**Abid, Sean R** 2203 Alanhurst DR Henderson, NV 89052	Male 6' 5", 230 lbs	**John D. Jones** *Retained* 702-869-8801(W)
Subject Minor	**Abid, Aleksandr Anton**		

Events & Orders of the Court

07/16/2015 **All Pending Motions** (9:00 AM) (Judicial Officer Marquis, Linda)

Minutes

07/16/2015 9:00 AM

- 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 FEES...HEARING: ARGUMENT OF COUNSEL RE: ADMISSIBILITY OF DR. HOLLAND'S REPORT
Mr. Balabon asked whether Plaintiff intended to introduce the tape into evidence in these proceedings, and if so, was he going to attempt to produce the flash drive which contained an edited version of the tape, or was he going to produce the original. The Court said its understanding of the facts was that Plaintiff had placed a recording device in the minor child's backpack, and the minor child had gone for his regularly scheduled visitation to Defendant's residence. During the course of the visitation the recording device remained in the child's backpack and recorded for approximately three (3) days, picking up sounds or conversations between numerous people who were in the home, including the child. When the child returned to Plaintiff's residence he took the recording, which was not made at the suggestion, consent, or upon the advice of Mr. Jones, it only came to the attention of Mr. Jones after the recording had taken place, and at some point Plaintiff erased or destroyed portions of the tape or the recording, which did not include the child, so if the child was engaged in a conversation, the conversation was kept, if the child was not included in a conversation the conversation was erased or destroyed. The destruction of the recording was not upon the advice, suggestion, or consent of Mr. Jones, who was only made aware of the destruction after it had taken place. The portion of the recording which was provided to Defendant is the entirety of what remains. Mr. Jones agreed these were the facts. Mr. Balabon said he agreed all of the portions remaining were produced. Mr. Jones said he had not decided whether or not to admit the tape into evidence. The Court said it was going to treat Defendant's Motion and Mr. Balabon's argument as a Motion in Limine. The Court believed Mr. Balabon was asking the Court

not to admit the recording at trial, and to strike any reference to the recording, or any quote from the recording from all of the pleadings ever filed in this case, and strike the portions of the recording from Dr. Holland's Report, and to not allow Dr. Holland to testify at the time of trial because she was tainted by the recording. Mr. Balabon said he was requesting a ruling from the Court as to the legality of the tape, and as to whether or not the Court was applying the Implied Consent Doctrine to the Statute, and a ruling as to whether or not Plaintiff had satisfied his burden for admissibility, if the Court did adopt the Doctrine. Argument by Mr. Balabon. Response by Mr. Jones. Argument by Mr. Balabon. As to the facts the Court is FINDING this date in considering the Motion in Limine, at a certain point in time Plaintiff contacted Defendant regarding the minor child's exposure to violent video games, after which time Plaintiff concedes he placed a recording device in the minor child's backpack resulting in conversations being recorded while the minor child was with the Defendant. Defendant believes there were three (3) consecutive days of recording. Plaintiff maintains he deleted portions of the audio recording. Plaintiff field a Motion for a Change of Custody and relied in part on those recorded conversations. The Court reiterated Mr. Jones was in no way a participant in the recording, did not advise Plaintiff to make those recordings, and did not know about the recordings until after the fact, and did not know portions of the recordings had been deleted until after the fact. The Court previously ordered a child interview through Dr. Holland, and Dr. Holland reviewed numerous documents in preparation for her interview, including a transcript of a portion of the audio recordings, and portions of the actual audio recordings. Plaintiff turned over a digital recording of all of the remaining portions of the recording. Defendant moved today to strike portions of the pleadings that discuss or incorporate the recordings, strike Dr. Holland's report, strike Dr. Holland from the witness list, not allow her to testify, and deny admission of the audio recording at any time during the Evidentiary Hearing in this matter. The Court FINDS this is a recording by a recording device as defined in NRS 200.650, and as such it is a one party consent, which does not fall under the wire communication definition. While Plaintiff has not yet sought to introduce the audio recording or any portion of the audio recording into evidence, the Court is inclined to adopt the Vicarious Doctrine; therefore, Mr. Jones needs to prove much more than he is able to via a Motion in Limine. Dr. Holland's report does not deal with the recording, the vast majority, and her biggest area of concern, and the Court's biggest area of concern in this case continues to be, and originated with, the child's exposure and preoccupation with violent video games. The Court will strike portions of Dr. Holland's report which deal with the audio recording; however, the Court FURTHER FINDS Dr. Holland has not been tainted so badly from exposure to that recording that she is unable to testify at the trial, since the vast majority of her report deals with issues wholly separate to the recording, and should the parties stipulate to the introduction of her report in lieu of her live testimony, the Court will strike the portions of the report dealing with the audio recording; however, should the parties not stipulate to the introduction of her report, the Court will allow Dr. Holland to testify, and the Court will allow the Defendant to ask Dr. Holland questions as to her reliance upon the audio recording as part of her ultimate expert opinion, if the Defendant wants to. Plaintiff will not be allowed to question Dr. Holland regarding the audio recording, unless Defendant opens the door. COURT ORDERED, the following: 1. With regard to the school issue, the matter will be dealt with at trial, once the custody issue has been resolved. 2. The defense may retain their own expert, who does not need to rely on the audio recording. However, if the defense does not have the money to employ an expert with Dr. Holland's credentials, a forty-five (45) minute routine interview can be conducted at the Family Mediation Center, PROVIDED the Family Mediation Center has the ability to record the interview, so it can be reviewed. The Court FINDS NRS 50.285 applies and experts can rely upon inadmissible information to make their determination. The Court further explained its ruling in this matter with regard to the admissibility of the audio recording at trial. 8/14/15 10:30 A.M. RETURN: FMC CHILD INTERVIEW CLERK'S NOTE: After the hearing, the FMC referral was placed in the attorney bins of Mr. Jones and Mr. Balabon. KB 7/17/15

Parties Present
Return to Register of Actions

DOCKETING STATEMENT ATTACHMENT 21

Electronically Filed
09/01/2015 03:09:55 PM

CLERK OF THE COURT

NEOJ
RADFORD J. SMITH, CHARTERED
GARIMA VARSHNEY, ESQ.
Nevada Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Telephone: (702) 990-6448
Facsimile: 1 (702) 990-6456
gvarshney@radfordsmith.com
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

SEAN R. ABID,

Plaintiff,

vs.

LYUDMYLA A. ABID,

Defendant.

CASE NO.: D-10-424830-Z

DEPT NO.: B

FAMILY DIVISION

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 31st day of August 2015, the Honorable Judge Linda Marquis entered an Order, a copy of which is attached hereto.

Dated this 1st day of September, 2015.

RADFORD J. SMITH, CHARTERED

GARIMA VARSHNEY, ESQ.
Nevada Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of RADFORD J. SMITH, CHARTERED ("the Firm"). I am over the age of 18 and not a party to the within action. I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. Under the Firm's practice, mail is to be deposited with the U.S. Postal Service on the same day as stated below, with postage thereon fully prepaid.

I served the foregoing document described as "NOTICE OF ENTRY OF ORDER" on this 1 day of September, 2015 to all interested parties as follows:

☐ BY MAIL: Pursuant To NRCP 5(b), I placed a true copy thereof enclosed in a sealed envelope addressed as follows;

☐ BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below;

☒ BY ELECTRONIC MAIL: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via electronic mail to the electronic mail address shown below;

☐ BY CERTIFIED MAIL: I placed a true copy thereof enclosed in a sealed envelope, return receipt requested, addressed as follows:

John Jones, Esq.
10777 W. Twain Ave., #300
Las Vegas, Nevada 89135

An Employee of Radford J. Smith, Chtd.

ORDR
RADFORD J. SMITH, CHARTERED
RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada Bar NO. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Telephone (702) 990-6448
Facsimile (702) 990-6456
rsmith@radfordsmith.com
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

SEAN R. ABID,

Plaintiff,

v.

LYUDMYLA A. ABID,

Defendant.

CASE NO.: D-10-424830-Z
DEPT NO.: B

FAMILY DIVISION

ORDER FROM THE HEARING

DATE OF HEARING: August 10, 2015
TIME OF HEARING: 8:45 a.m.

This matter, having come on for hearing on the 10th day of August 2015, on Defendant, LYUDMYLA A. ABID's ("Lyuda") Motion to Continue Evidentiary Hearing, Lyuda being present and represented by Radford J. Smith, Esq. of Radford J. Smith, Chartered; and Plaintiff, SEAN R. ABID ("Sean"), being present and represented by John D. Jones, Esq. of Black & LoBello, the Court, having heard the arguments of counsel and the testimony of the parties, having reviewed the pleadings and papers on file in this matter, and being fully advised, enters the following orders:

1. Lyuda's Motion to Continue Evidentiary Hearing is GRANTED. The Evidentiary Hearing currently set for 8/14/15 at 10:00 AM shall be VACATED, with a two-day Evidentiary Hearing SET for

10/5/15 at 9:00 AM (full day) and 10/12/15 at 9:00 AM (full day). Court will prepare the Case Management Order to be placed in the attorney bins of respective counsel.

2. By stipulation, Lyuda may include any of her witnesses, including the child's teacher(s), to testify at the Evidentiary Hearing.

3. By stipulation, the child may participate in Judo provided it does not interfere with the child's baseball activities. Further, the child must not participate in activities past 8:30 PM on any day prior to a school day.

4. By stipulation, the parties may retain either Nick Ponzo or Jamil Ali to provide counseling for the minor child, and that the counselor will receive a copy of Dr. Holland's Report, Dr. Paglini's Report, and copies of relevant pleadings.

5. Lyuda's request to retain Dr. Mark Chambers as an expert and re-interview the child is GRANTED. Dr. Chambers shall have discretion on whether to videotape the interview. Sean shall be given the opportunity to retain his own expert to re-interview the child, who shall also have discretion on whether to videotape the interview. Dr. Chambers and Dr. Holland may speak and mutually agree that it is appropriate for Dr. Holland to be present for the child interview. Dr. Chambers may interview any witnesses, including teachers.

6. The Court clarifies its prior Order in that, not only shall the minor child not be allowed to play any video game not rated appropriate for his age, he shall further not be allowed to watch any other person play "mature" rated games, nor shall he have any exposure whatsoever by any and all means, such as to "mature" rated games.

Mandatory provisions: The following statutory notices relating to custody/visitation of the minor child is applicable to the parties herein:

Pursuant to NRS 125C.200, the parties, and each of them, are hereby placed on notice that if either party intends to move their residence to a place outside the State of Nevada, and take the minor child with them, they must, as soon as possible, and before the planned move, attempt to obtain the written consent of the other party to move the minor child from the State. If the other party refuses to give such consent, the moving party shall, before they leave the State with the child, petition the Court for permission to move with the child. The failure of a party to comply with the provision of this section may be considered as a factor if a change of custody is requested by the other party. This provision does not apply to vacations outside the State of Nevada planned by either party.

The parties, and each of them, shall be bound by the provisions of NRS 125.510(6) which state, in pertinent part:

> 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 by a category D felony as provided in NRS 193.130.

Pursuant to NRS 125.510(7) and (8), the terms of the Hague Convention of October 25, 1980, adopted by the 14th Session of The Hague Conference on Private International Law are applicable to the parties:

> Section 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 purpose of applying the terms of the Hague Convention as set forth in Subsection 7.

> (b) Upon motion of the parties, the Court may order the parent to post a bond if the Court determines that the parents pose 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 him to his 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."

The State of Nevada in the United States of America is the habitual residence of the parties' child.

The parties, and each of them, are hereby placed on notice that, pursuant to NRS 125.450, a parent responsible for paying child support is subject to NRS 31A.010 through NRS 31A.340, inclusive, and Sections 2 and 3 of Chapter 31A of the Nevada Revised Statutes, regarding the withholding of wages and commissions for the delinquent payment of support, that these statutes and provisions require that, if a parent responsible for paying child support is delinquent in paying the support of a child that such person has been ordered to pay, then that person's wages or commissions shall immediately be subject to wage assignment and garnishment, pursuant to the provisions of the above-referenced statutes.

The parties acknowledge, pursuant to NRS 125B.145, that an order for the support of a child, upon the filing of a request for review by:

> (a) The welfare division of the department of human resources, its designated representative or the district attorney, if the welfare division or the district attorney has jurisdiction in the case; or,

. . .

. . .

. . .

. . .

. . .

. . .

(b) a parent or legal guardian of the child, must be reviewed by the court at least every 3 years pursuant to this section to determine whether the order should be modified or adjusted. Further, if either of the parties is subject to an order of child support, that party may request a review pursuant the terms of NRS 125B.145. An order for the support of a child may be reviewed at any time on the basis of changed circumstances.

Dated this ____ day of AUG 2 8 2015, 2015.

DISTRICT JUDGE

Submitted by:

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.
Nevada State Bar No. 002791
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Office No: (702) 990-6448
Attorney for Defendant

Approved as to form and content:

BLACK & LOBELLO

JOHN D. JONES, ESQ.
Nevada State Bar No. 006699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
Office No.: (702) 869-8801
Attorney for Plaintiff

DOCKETING STATEMENT ATTACHMENT 22

PMEM
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, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B Dates of Trial: November 17, 18, 19, 2015 Time of Trial: 1:30 p.m.

PLAINTIFF'S TRIAL MEMORANDUM

COMES NOW Plaintiff SEAN R. ABID (hereinafter "Plaintiff"), by and through his attorney of record, JOHN D. JONES, ESQ., and hereby submits his Pretrial Memorandum in accordance with EDCR 7.27.

DATED this 16th day of November, 2015.

BLACK & LOBELLO

John D. Jones
Nevada State Bar No.: 6699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
Attorneys for Plaintiff,
SEAN R. ABID

I. INTRODUCTION

While it is likely that Plaintiff, Lyudmyla A. Abid ("Lyuda") will try to convince this Court that this case is about something other than her own deplorable behavior, the evidence is overwhelming and cannot be overcome by her misrepresentations. This case is about one thing and one thing only; the need for this Court to step in and protect Sasha and preserve the relationship between Sasha and his father. Given the pervasive pattern of conduct on the part of Lyuda over the past several years, the only way to do so is to change custody. Such an order will ensure that Lyuda's ability to continue her pattern of alienation is reduced while also ensuring, that by having more time with Sasha, Sean can try to undo the damage Lyuda has already done.

II. FACTS

HISTORY

The parties originally resolved the issue of custody via stipulation granting them joint physical custody of Sasha on an equal timeshare basis. In 2013, in response to Lyuda's sudden marriage to a man newly released from prison after serving 10 years on gun and drug charges, and as a result of Lyuda continuing to bad mouth Sean to Sasha, Sean filed a Motion to Change Custody. Dr. Paglini was appointed to do an evaluation. His report revealed Lyuda's ongoing willingness to bad mouth Sean to Sasha and stated that it needed to stop. At the time the Motion went to trial, there was an order in place that Sasha was not to be left unsupervised with Lyuda's husband Ricky. During a break in the evidentiary proceedings the parties and their spouses met and in the spirit of cooperation and moving things forward in a more positive way, resolved the pending Motion to Change Custody. The terms of the stipulation provided that on Lyuda's custodial days, during the school year, Sean would have custody of Sasha from after school until 5:30 p.m. The stipulation also specified that Sasha would attend School in Sean's zone. The consideration that Lyuda received was that the order for supervision for Ricky was lifted.

In the months following the resolution, Lyuda immediately changed her work schedule and began demanding to pick up Sasha before 5:30 p.m. as specified in the order. What the Court must recognize is that had Sean believed that he would not have the extra 2 -3 hours each day on Wednesday, Thursday and every other Friday, he would have never settled. While

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

Lyuda's demands which were contrary to the order were problematic, it was Sasha's behavior which caused Sean concerns about what Lyuda was doing to Sasha. Sasha made the following statements to Sean:

> 1. I wish I could love both of you. I want to love you daddy, but Mama says I can only love her.
>
> 2. Why are you trying to steal me from Mama? Why are you a bad guy? Mama says you are sneaky and nasty and you are trying to steal me.
>
> 3. Mama says I cannot listen to you because you are an idiot. Why are you an idiot?
>
> 4. Mama says you are a bad guy and you want to hurt me and Mama. Mama says you have been a bad guy since you were a little boy.
>
> 5. Why do you send nasty texts to my Mama? Mama reads them to me when you are being mean.
>
> 6. Mama says I need to be with only her or she will be crying forever.

These statements were eerily similar to those that Sean had experienced prior to filing his 2013 Motion.

Even though one would think that Lyuda would have stopped her campaign of alienation, even during these proceedings, Sasha said:

> Daddy you need to stop being mean and let Mama pick me up from school. If you loved me you would give Mama equal days.

It was based upon these types of statements that Sean knew he needed to take action to protect his son and preserve their relationship.

REASON FOR RECORDINGS

The forgoing statements and the fact that Sasha was sobbing when he made them are the reason Sean attempted to obtain more evidence via the placement, on two separate days, of a recording device. There can be no better example of good faith on the part of a parent than to attempt to bring an end to his child's suffering. Suffering which in this case is at the hands of the child's mother.

DR. HOLLAND'S CHILD INTERVIEW

As a result of the concerns the Court had at the initial hearing about the terrible things

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

that Lyuda had been saying to Sasha, the Court ordered a focused child interview and appointed Dr. Holland as the Court's expert. It is important to note that the initial interview of Sasha occurred on May 12, 2015, over 3 months after Lyuda's terrible attempts at alienation had come to light.

Sasha was interviewed 4 times over the course of 2 ½ weeks. Even though Lyuda could have done damage control by telling Sasha positive things about Sean and by stopping her alienating and programming ways, Sasha's statements proved that the alienation was ongoing and would never stop.

Dr. Holland's report was also very revealing about how much Lyuda's unwillingness to co-parent has harmed Sasha. Despite Sean reasonably asking her to reconsider allowing Sasha to play Call of Duty, she did just the opposite and the negative effects were apparent in the interview.

Nothing in Dr. Holland's report suggested any attempt at alienation or programming on the part of Sean.

DR. CHAMBERS' REPORT

Because Lyuda was unhappy with the fact that Sasha told Dr. Holland the truth (something Sasha told Sean about in a fit of tears), Lyuda hired her own expert to further involve Sasha in this litigation she had created. Dr. Chambers interviewed Sasha on September 16, 2015. He only interviewed Sasha once. Sasha was taken out of school and delivered to the interview by Lyuda. Sean was never made aware of the appointment or that Sasha would be taken out of school.

Even though Lyuda had now had an additional 4 months (seven months total) to try to undo her negative programming of Sasha against his father, it was clear from Dr. Chambers' report that she continues to bad mouth Sean to Sasha. Sasha also revealed a disturbing level of understanding of the ongoing custody litigation.

Probably the most important conclusion Dr. Chambers made was that Lyuda's negative comments about Sean to Sasha could result in alienation. Clearly, Dr. Chambers was not aware that Lyuda's campaign of denigration and programming has been going on for years.

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

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

PERVASIVE PATTERN OF ALIENATION

While this Court could certainly look to Dr. Paglini's report of prior litigation, it will hear multiple examples of how the statements reflected in the recent recordings and in the reports of both Dr. Holland Dr. Chambers have been going on for years. Sean will provide examples of the pervasive pattern of conduct on the part of Lyuda that has been consistent and will not end. The court will be appalled by Lyuda's absolute willingness and commitment to destroy Sean's relationship with Sasha and destroy Sean, as her many threats over the past several years have made clear.

LYUDA'S LACK OF CREDIBILITY.

As this Court considers the testimony of the parties it must necessarily weigh each parties' credibility. While Sean was absolutely candid and truthful in his deposition, Lyuda was evasive and dishonest. When asked specific questions about things that she has said to Sasha about Sean as reflected in the reports of Dr. Holland and Dr. Chambers, her answer, on over a dozen pointed questions was "I don't recall." Assuming her testimony is consistent with her deposition testimony, this Court will learn very quickly that anything Lyuda says is not to be trusted.

III. POINTS AND AUTHORITIES

EVIDENTIARY ISSUES

The Court has made it clear that in order to have the recordings admitted, Sean must first establish that his decision to consent to the recordings on behalf of his minor child was made in good faith. To do so, Sasha's behavior, and statements will need to be discussed. This Court should expect arguments regarding hearsay and hearsay exceptions. In reality, the statements made by Sasha will not be offered for the truth of the matter asserted, but rather to establish the effect on the listener and as such will not be hearsay, but an evidentiary debate is likely. Moreover, based upon the emotional state that Sasha was in when he made the statements to Sean, the statements would qualify for at least two hearsay exceptions. Sean will establish that he acted in good faith in placing the recording device. As such, the recordings should be received into evidence by this Court.

It is likely that Lyuda will argue that Dr. Holland has been tainted by the recordings in the event the recordings are not received into evidence. This position ignores NRS 50.285 which allows experts to rely on any information which is routinely relied upon by experts in the field even if the information or evidence is not admitted at trial. More importantly, a majority of the relevant data contained in the report comes from the interview and Sasha's statements and demeanor, not the tapes. The tapes merely verify that which Sasha told both Dr. Holland and Dr. Chambers.

ADMISSIBILITY OF PRIOR ACTS OF ALIENATION

While Lyuda may argue that her long history of alienation should not be considered by the Court because it pre-dates the most recent custody order, The Nevada Supreme Court, in Castle v Simmons, 120 98, 86 P3d 1042 (2004) held as follows:

> The district court has an obligation to make a sound decision on the paramount concern in custody cases—the child's best interests. Although the res judicata doctrine, as articulated in *Murphy's* "'changed circumstances" requirement, serves an extremely important function in preventing dissatisfied parties from filing repetitive, serial motions in an attempt to manipulate the judicial system, res judicata principles should not prevent a court from ensuring that the child's best interests are served. As our Legislature has recognized, domestic violence poses a very real threat to a child's safety and well-being. The court must hear *all* information regarding domestic violence in order to determine the child's best interests. Domestic violence, by its very nature, may be difficult to discover. Once it is discovered, the court should not be precluded from considering it simply because it was not previously raised. Consequently, evidence of domestic violence that was not previously discovered, or the extent of which was unknown, when the prior custody order was entered is properly considered by the district court in determining custody, along with any post-order domestic violence. Even previously litigated acts of domestic violence may need to be reviewed if additional acts occur.

Obviously, Lyuda has perpetrated an escalating course of conduct that has been harmful to the child. While not domestic violence, Lyuda's alienation and bad mouthing are abuse, plain and simple. As such, Sean's testimony about Lyuda's statements to Sasha in his presence must be considered by this Court.

CURRENT SCHOLARLY RESEARCH ON ALIENATION

While many litigants come before this Court alleging alienation or Parental Alienation

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

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

*416 W. Andrew Fox, Knoxville, Tennessee, for the appellant, Chris Lawrence.

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.

End of Document

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.

End of Document

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

Attorneys and Law Firms

*465 Ian F. Gaston of Gaston & Gaston, Mobile, for appellant.

Oliver J. Latour, Jr., Foley, for appellee.

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.

End of Document

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

*895 David Gronbeck, Gronbeck Law Office, Minneapolis, MN, for plaintiffs.

Ellen Dresselhuis, Dresselhuis Law Office, New Hope, MN, for defendant.

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

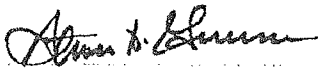
before us, we hold a parent has no right on behalf of his or her children to give consent...." *David L.*, 453 S.E.2d at 654. The court explicitly stated, "We do not disagree with the reasoning in *Thompson;* however, we determine the facts of the present case are different from the facts in *Thompson* 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.

End of Document

Exhibit 2

Exhibit 2



NOTC

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

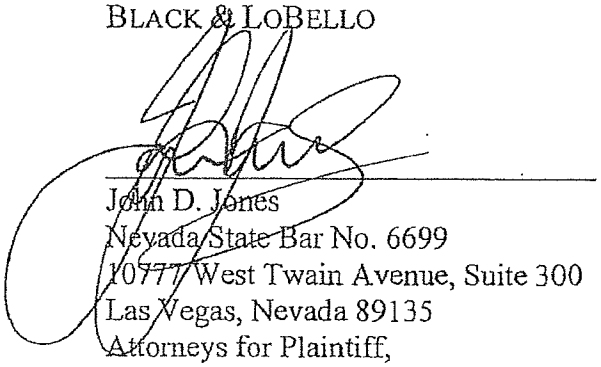
SEAN R. ABID, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: N

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

PLEASE TAKE NOTICE that an Order re: December 9, 2013 Evidentiary Hearing was entered in the above-entitled matter on the 12th day of March, 2014, a copy of which is attached hereto.

DATED this 17th day of March, 2014.

BLACK & LOBELLO



John D. Jones
Nevada State Bar No. 6699
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
Attorneys for Plaintiff,
SEAN R. ABID

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

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

I. INTRODUCTION

It was Sean's belief that this Court had already ruled on the issue of Dr. Holland receiving the taped conversations. The pending motion filed by Defendant can only be viewed as a motion for reconsideration which is without merit for the reasons set forth hereinafter. Defendant continually refers this Court to wiretapping cases. This is not a wiretapping case. This is a case in which an in-person conversation was recorded which only requires 1 party consent. Sean, as a parent to Sasha, gave that consent for the minor child. Defendant's consent was not required under the laws of the state of Nevada and the authorities cited herein and already provided to the Court. (see Submission of Authorities attached as **Exhibit "1"**). Regardless of how often Defendant tries to get the Court to ignore her horrible behavior, the majority rule throughout the country not only allows the Court to consider the tapes, the best interests of Sasha requires it.

A new issue was raised at the most recent hearing of which the Court can summarily dispose. Defendant raised the issue of school selection for the coming year. This issue has already been decided as well. When the parties resolved Sean's then pending motion to change custody in March of 2014, it was agreed that Sasha would attend school in Sean's zone on a going forward basis. (see order attached as **Exhibit "2"**) There is no legal basis to change this. Moreover, when Sasha's school shifted to year round, Sean was able to get Sasha into track 5 which most closely resembles a 9 month school. Most importantly, Twitchell Elementary, which Sasha will be attending, lets out at 2:08 rather than 3:20. This mirrors Sean's own work schedule and will allow Sasha and Sean more time to complete homework and spend quality time together. There is no argument that Defendant can make that would allow this Court to ignore the best interests of Sasha.

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 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

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

> 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. Nothing Precludes a Court Appointed Expert from Considering the Recordings, Even if they were Illegal.

The issue of whether or not an expert can rely on potentially inadmissible information is really quite a simple one. Far more simple than Defendant is making it out to be.

NRS 50.285 states as follows:

50.285 Opinions: Experts.

> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
> 2. **If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence**.
>
> (emphasis added)

Whereas, Sean is confident that this Court will admit the recordings into evidence, for the purposes of the forensic child interview, Dr. Holland should absolutely have the recordings so

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

that she can craft the nature of the interview. Defendant's desperate attempt to hide the truth from the Court should have nothing to do with Dr. Holland being fully informed before interviewing Sasha.

III. 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 his attorneys' fees.
3. Any other relief that this Court deems just and proper.

DATED this 13 day of July, 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
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of July, 2015 a true and correct copy of the 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 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 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 Berdahl
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

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, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B **Date of Hearing: March 18, 2015** **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

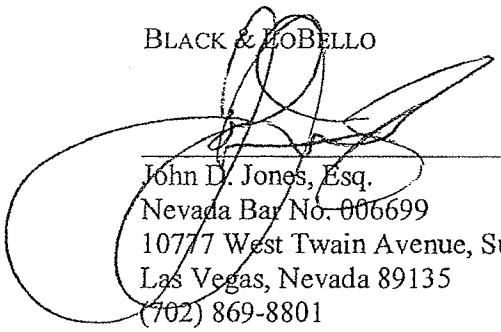
///

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

Cheryl Berndel
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, 374 (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.

End of Document

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.

End of Document

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.").[8] Accordingly, the district court's adoption of the concept of **vicarious consent** is **AFFIRMED**.

IV.

[12] 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.

DOCKETING STATEMENT ATTACHMENT 14

Electronically Filed
06/10/2015 09:41:18 AM

CLERK OF THE COURT

MOT

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, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B

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.

PLAINTIFF'S EMERGENCY MOTION REGARDING SUMMER VISITATION SCHEDULE

Plaintiff, SEAN R. ABID ("Sean") by and through his attorneys of record, John D. Jones, Esq. of BLACK & LOBELLO, hereby submits his Emergency Motion Regarding Summer Visitation Schedule.

///

///

///

///

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

This Motion is made and based upon the interim report of Dr. Stephanie Holland, the attached Points and Authorities, the Exhibits and evidence attached hereto, the papers and pleadings on file herein, and any oral argument and evidence to be adduced at the hearing in this matter.

DATED this 10 day of June, 2015.

Respectfully submitted:

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 MOTION

TO: ALL INTERESTED PARTIES:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **EMERGENCY MOTION REGARDING SUMMER VISITATION SCHEDULE** on for hearing before the above-entitled Court on the 14 day of July, 2015 at the hour of 9:00 o'clock A.m., of said date, in Dept. B.

DATED this 10 day of June, 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
10777 West Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801 FAX: (702) 869-2669

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

I.

INTRODUCTION

Based upon Sean's Motion to Change Custody, this Court found adequate cause for an evidentiary hearing and referred the matter to Dr. Stephanie Holland to conduct a child interview of Sasha. Dr. Holland has not completed her report. Based upon her interviews of Sasha and the parties, Dr. Holland did submit a letter to the Court specifically directed at the summer timeshare arrangements. The parties have an unorthodox summer schedule which this year gives Lyudmyla the first 6 weeks of summer with no contact at all between Sasha and Sean. Dr. Holland has specifically identified a pervasive pattern of programming and alienation which establish that extended periods of time with no contact between Sean and Sasha are not in Sasha's best interests. Specifically, Dr. Holland stated that "It is strongly recommended that the Court consider whether allowing Ms. Abid to have custody of Sasha for six weeks this summer is in Sasha's best interests." Because the preliminary findings of Dr. Holland are exactly what Sean has been concerned about and the primary basis of his Motion, this Emergency Motion follows Dr. Holland's recommendations.

II.

LEGAL ANALYSIS

Under Truax, a joint custody order may be modified or terminated by the Court on the petition of one or both of the parents or on the Court's own Motion, "if it is shown that the best interest of the child requires the modification or termination." Clearly, the disturbing findings of Dr. Holland require that this Court change custody on a temporary basis pending the evidentiary hearing. Basically, any doubts about Sean's Motion that this Court had, have been removed by Dr. Holland's letter. It is even more likely that the final report will confirm more disturbing facts. This Court is well aware that one of the only ways to combat alienation and programming is to remove the child from the alienating parent and place the child with the alienated parent.

Under NRS 125.480, there are several considerations for this Court in determining the best interest of the child. NRS 125.480(4) states as follows:

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)

Obviously, only certain of these considerations apply to this case. The following is an analysis of the most applicable factors:

Subsection (c) which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent, may be the most helpful subsection for this Court in making its decision. As set forth above, Lyudmyla will stop at nothing to destroy Sean and his relationship with Sasha. The contents of Dr. Holland's letter tells the Court all it needs to know about this factor.

Subsection (e): The ability of the parents to cooperate to meet the needs of the child.

Sean desperately tries to cooperate and coparent with Lyudmyla only to be faced with absolute disdain. Lyudmyla will not co-parent in any way.

Subsection (f) The mental and physical health of the parents.

The recordings and the confirmation of a pattern of alienation by Dr. Holland make it clear that Lyudmyla has some type of pathology that leads her to do and say the outrageous and irresponsible things she does.

///

///

///

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

Subsection (g) The physical, developmental and emotional needs of the child.

Sasha is bonded to both parents, so this consideration deals with which parent supports the relationship between Sasha and the other parent. Lyudmyla can never meet Sasha's needs while she continues to denigrate Sean to Sasha.

III.

CONCLUSION

Based upon the foregoing, Sean respectfully requests that the Court enter the following orders:

1. Changing custody on an interim basis to Sean having primary physical custody.
2. Awarding Lyudmyla visitation, pending the evidentiary hearing on an every other weekend basis.
3. Confirming Sean's right to have Sasha for his 4 weeks of vacation.
4. Awarding Sean his attorneys' fees.
5. Any other relief this Court deems just and appropriate.

RESPECTFULLY SUBMITTED this 10 day of June, 2015.

Respectfully submitted:

BLACK & LOBELLO

John D. Jones, Esq.
Nevada State Bar No. 6699
10777 W. Twain Avenue, Suite 300
Las Vegas, Nevada 89135
(702) 869-8801
Attorneys for Plaintiff,
SEAN R. ABID

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

DECLARATION OF SEAN R. ABID IN SUPPORT OF HIS MOTION REGARDING SUMMER VISITATION SCHEDULE

Sean R. Abid, being first duly sworn, deposes and says:

That I am the Plaintiff in the above-entitled action. I have personal knowledge of the facts and circumstances set forth in this Declaration.

That I have read the foregoing EMERGENCY MOTION REGARDING SUMMER VISITATION SCHEDULE and know the contents thereof; that the same is true of my own knowledge except for those matters therein stated on information and belief and as to those matters, I believe them to be true. The allegations contained in the Motion are adopted as if fully set forth in this Declaration.

Signed under the pains and penalties of perjury this _____ day of June, 2015

SEAN R. ABID

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

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

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

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

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

MOTION FOR/OPPOSITION TO: Plaintiff's Emergency Motion Regarding Summer Visitation Schedule

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: June 10, 2015
Cheryl Berdahl
Print Name of Preparer

Signature of Preparer

DOCKETING STATEMENT ATTACHMENT 15

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

Electronically Filed
06/23/2015 07:03:02 PM

CLERK OF THE COURT

DISTRICT COURT, FAMILY DIVISION

CLARK COUNTY, NEVADA

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

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 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 modification of the summer visitation schedule, 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. That Dr. Holland's letter and contemplated subsequent report, be stricken.

5. That Plaintiff be ordered to provide the original audiotape to Defendant.

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

DATED this 23 day of June, 2015.

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

POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

1. This matter was last heard on March 18, 2015. At that hearing, and in pleadings filed in response to Plaintiff's Motion to change custody, Defendant sought specifically to strike Plaintiff's pleadings, to suppress the contents of the alleged audiotape, and for sanctions.

2. The Court held that the custody issue shall be deferred to the evidentiary hearing scheduled for August 14, 2015. The Court refused to modify the existing timeshare as requested by

Plaintiff.

3. The Court appointed Dr. Holland to conduct a child interview (not a custody evaluation). At issue was whether or not Dr. Holland should be provided with the audiotape or a transcript thereof prior to the hearing.

4. The Court stated that counsel shall submit supplementary points and authorities it would like the Court to consider regarding the expert examining the audiotape by March 23, 2015. The Court set a return date on the issue for April 2, 2015.

5. Both parties filed Points and Authorities to the Court regarding this issue. However, Defendant e-filed her points and authorities on March 23, 2015, but the same was not entered into the record by the Clerk until the following day.

6. Prior to the Defendant's Points and Authorities being entered into the record by the Clerk, this Court entered a Minute Order, vacating the April 2, 2015 hearing date, and allowing Dr. Holland to review the tape (and any other relevant pleadings filed in this case).

7. In Defendant's Points and authorities filed herein regarding the issue of allowing Dr. Holland to listen to the tape, Defendant expressed concerns about the tape. Defendant alleged as follows:

"To date, no valid transcript of the tape has been provided by the Plaintiff. Nor has Plaintiff provided the tape to Defendant for examination. The tape has not been authenticated. Defendant is entitled to be provided with the tape and have it forensically

examined to determine its authenticity and to determine if the contents have been altered or doctored. Defendant is entitled to examine the tape to determine if conversations that occurred in her home to which the child was not a party were recorded by the device. If this is the case, the tape absolutely would constitute violation of both State and Federal anti wiretapping Statutes and the "vicarious consent doctrine" will not apply thereby requiring the exclusion of the tape. The only evidence of the contents of the tape are statements of the Plaintiff allegedly detailing what was on the tape. It is obvious based upon a review of Plaintiff's recitation of the tape contents, that Plaintiff selectively edited the tape and only chose to reveal those portions of the recoding that he believed supported his case."

8. Subsequent to the March 18, 2015 hearing, counsel for Plaintiff provided Defendant's counsel with a zip drive which was purported to be a duplicate copy of the original audiotape. Presumably, the contents of the audiotape provided to Defendant were then also provided to Dr. Holland for review prior to her interview with the parties and the minor child.

9. A review of the zip drive provided by Plaintiff reveals that it contains only a fraction of what had to have been actually recorded in Plaintiff's home (or car) for 3 consecutive days. Based on 3 days of recording, there should have been approximately 30 hours of recordings. The combined running time of the tape that was provided by Plaintiff was 60 minutes on day one, 10 minutes on day two, and 22 minutes on Day three.

10. It is therefore clear that Plaintiff in fact altered the actual recording, and he has refused and continues to refuse to provide the original recording to Defendant. It is also clear that Plaintiff provided an altered recording to the evaluator Dr.

Holland prior to the child interview.

11. Dr. Holland then proceeded with the interview process. Again, her role was to interview the child and not conduct a custody evaluation. Nor was Dr. Holland assigned to render an opinion about the summer vacation issue.

12. Dr. Holland then issued a "letter" to the Court suggesting that the Court consider whether allowing Lyuda to have 6 weeks vacation is in the child's best interest. Included in the letter were direct quotes obtained from the altered audiotape. Based on that letter, Plaintiff proceeded to move the Court to restrict Lyuda's six week summer vacation with the child.

13. In late March, 2015, Lyuda informed Sean that she would commence her summer vacation with the child on June 8, 2015. June 5, 2015, was a Friday and it was Lyuda's custodial weekend. On June 5, 2015, Sean indicted to Lyuda for the first time that he was commencing his summer vacation with the child that day and that he was refusing to allow Lyuda to have the child. In email exchanges with Sean's counsel, it was revealed that Dr. Holland would be issuing a letter to the Court regarding Lyuda's summer vacation. Therefore, Sean had advance knowledge of the contents of Dr. Holland's letter before the letter was even issued to the parties or to this Court.

14. Ultimately, Sean relented, and he allowed Lyuda to pick up the child at 5:30 p.m. on Friday, June 5, 2015. Lyuda has

enjoyed her vacation with the child since that time.

15. Lyuda has recognized that she is an imperfect human being and that she has made mistakes in the past with regard to Sasha. She understands that Sean can make her very upset and at isolated times she has reacted inappropriately. This fact was revealed in Dr. Paglini's report resulting from his extensive child custody evaluation.

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>."

16. Lyuda also recognizes that Sean's contempt for her and her Husband Ricky will not go away, despite how many attempts she makes to co-parent and cooperate with Sean in a fair and reasonable manner. Accordingly, on her own volition, Lyuda enrolled in and completed the UNLV Cooperative Parenting Program. (See Certificate of Completion, Exhibit "A"). In that program, Lyuda learned how to deal with Sean and his continued animosity

towards her, and more importantly Lyuda has learned to completely shield Sasha from the adult issues that she has with Sean. The Court can be assured that Lyuda will continue to shield Sasha from the conflict that she has with Sean.

II

LEGAL ARGUMENT

1. **THE AUDIOTAPE MUST BE SUPPRESSED AND ASSOCIATED PLEADINGS MUST BE STRIKEN FROM THE RECORD**

Lyuda has previously filed a Motion with this Court to suppress the audiotape and to strike the associated pledings that refer to the tape and/or incorporate alleged statements that are on the tape.

Defendant incorporates herein in its entirety the law and argument as stated in her initial motion to suppress the tapes.

In summary, the audiotape and all associated pleadings must be stricken and the tape suppressed because the tape was acquired by the Plaintiff in a manner that violates both State and Federal law.

The tape intercept violates the provisions of NRS 200.650.

The tape intercept violates 18 USC sec. 2511(2)(d)(2000).

The so-called "vicarious consent" doctrine does not apply for a number of reasons.

First, pursuant to Mclellean vs. State, 124 Nev. 263 267, 182 P.3rd 106, 109 (2008), the Nevada Supreme Court has held that

Nevada is a two party consent State. In a two party consent state the vicarious consent doctrine cannot logically apply. The Court held as follows:

"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."

Second, and pursuant to the Court decisions in other states that have adopted the doctrine, the "consenting parent" is required to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. See Pollock v. T.Pollock, 154 F.3rd 601 (1998). In this regard, Plaintiff has not filed a motion to admit the tape nor has Plaintiff submitted any evidence that demonstrates a good faith, objectively reasonable basis for believing that consent was necessary for the welfare of the child.

Third, the "vicarious consent doctrine" does not apply because of the manner in which Plaintiff placed the tape in Lyuda's home. 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 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 indicates 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.

Next, for the tape to come in this Court must make an express finding that the "vicarious consent doctrine" specifically applies to the Nevada Statute. (NRS 200.650). As stated in our earlier brief regarding this issue, there have been no Court decisions in the State of Nevada or in the Ninth Circuit that have adopted this doctrine to the Nevada Statute. If the doctrine does not apply, the tapes are per se illegal, and subject to the sanctions as detailed below.

2. **THE REMEDY FOR THE WIRETAP VIOLATION IN THIS CASE REQUIRES SUPRESSION OF THE TAPE, THE STRIKING OF PLAINTIFF'S PLEADINGS, AND THE REPORT(S) OF DR. HOLLAND MUST BE STRICKEN/SUPPRESSED**

The Nevada Supreme Court dealt with the issue of appropriate sanctions to be imposed when a party attempts to introduce into

pleadings evidence obtained in violation of the Nevada wiretap statute in the case entitled Lane vs. Allstate Ins. Co., 114 Nev. 1176, 969 P.2d 938 (1998). *Lane* dealt with telephone intercepts alleged to be in violation of NRS 200.620.

Lane sued Allstate for constructive discharge among other requests for relief. Allstate filed a motion to dismiss (or in the alternative for summary judgment) alleging that Lane illegally tape-recorded over 700 phone conversations with two of the individual defendants and at least 180 witnesses in violation of NRS 200.620.

The district court dismissed Lane's complaint. The Nevada Supreme Court reversed the dismissal, but in doing so it stated as follows:

"Thus the judgment of the district court is reversed and remanded with instructions that the claim proceed to trial, but that all of the evidence gathered via the intercepts be excluded and no reference by Lane to any statements made during the interceptions will be allowed."

In footnote 4, the Court went on:

"Lane may not, in any fashion, use or refer to the information gathered via the taped conversations. Further, if it appears he is relying on the tapes to elicit testimony from any witness, the defendants may apply to the district court for protective relief."

Applying Lane to the instant case makes clear that the remedy of suppression of the tape and the striking of Plaintiff's pleadings is the appropriate sanction to deal with the unlawful intercepts that occurred in this case.

And, as Plaintiff's entire motion to change custody is based upon the tapes, the Court should deny Plaintiff's motion and proceed to evidentiary hearing on Defendant's claims for relief only as asserted in her initial motion filed herein.

Further, Dr. Holland has been provided the tapes and has incorporated alleged portions of the tape into her letter submitted to the Court to support her conclusions. Presumably, additional portions of the tape will be incorporated into her final report which has yet to be issued.

Under these circumstances, it cannot be reasonably argued that Plaintiff will not rely on the tapes to illicit testimony from Dr. Holland as the tapes obviously form a primary basis of Dr. Holland's report.

And, as Dr. Holland's letter contains direct alleged quotes from the illegal tape, any such letter or report must be stricken pursuant to the mandate of *Lane* that all evidence gathered via illegal intercepts be excluded and that no reference can be made at trial to any statements made during the interceptions.

As such, Dr. Holland must be excluded as a witness and her report(s) suppressed.

3. **PLAINTIFF SHOULD BE COMPELLED BY ORDER OF THIS COURT TO PRODUCE THE ORIGINAL TAPE TO DEFENDANT FOR INSPECTION**

The Federal Wiretap statute, made applicable to State Courts by its express terms, specifically provides that in addition to suppression, the Court may compel production of the intercepted

communication.

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.

Plaintiff's counsel stated in open Court that he would produce the audiotape.

The tape produced by Plaintiff and provided to Defendant and to Dr. Holland was a selectively edited version of the original tape. Under these circumstances, the Plaintiff is entitled to an order from Court compelling Plaintiff to produce the original tape.

4. THE SUMMER VACATION ISSUE

(See Lyuda's affidavit attached hereto, dealing with this issue).

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 23rdth day of June, 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 23rd day of June, 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 23rd day of June, 2015

MICHAEL R. BALABON, ESQ.

AFFIDAVIT OF LYUDMYLA A. ABID

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.Sean has filed a motion to restrict my vacation time with my son Sasha. As of this writing I have had more than 2 weeks of my 6 week summer vacation. We recently returned from a trip to San Diego, and Sasha and our entire family had a great time.

3. In support of that motion is the letter written to the Court by Dr. Holland wherein she indicates they may be some parental alienation on my part that is having an effect on Sasha.

4. For the record, I strongly deny engaging in systematic parental alienation in my home against Sean.

5. In this regard, the Court should be aware of the following facts. I have enjoyed, at a minimum, joint physical custody of Sasha since the date of entry of our Decree back in 2010.

6. In late 2013, Dr. Paglini conducted a full outsource

evaluation as ordered by Judge Harter. Dr. Paglini interviewed many individuals and considered all of the collateral material Sean submitted to him in support of his allegation of parental alienation. In Dr. Paglini's report, he revealed that when excited or under great stress, I admitted that I have said inappropriate things to Sasha regarding Sean, but he found specifically that my conduct did not amount to parental alienation. It is important to point out that Dr. Paglini found that Sean too had problems that needed to be addressed.

7. My biggest problem is dealing with Sean is his continued hatred and contempt he bears for me and my Husband Ricky.

8. I have no intent or desire to manipulate Sasha into hating his father.

9. I strongly disagree with the letter written by Dr. Holland. I know that Sasha loves his Father and his Father's family and enjoys a close relationship with him and his family. I know that Sasha loves me and my family as well. Sasha is a happy, well adjusted child who performed well in his first year in school. (See Sasha's kindergarten report, Exhibit 2). Sasha gets long well with his peers and his teacher. There has never been a time when Sasha has refused to go to his father's home over the past 4 or more years. I have never denied Sean custody on his scheduled time nor have I petitioned the Court multiple times to try to restrict Sean's timeshare. Sasha has never told

me that he hates his dad or does not want to see him which may be expected if I was engaging in a concerted effort to destroy Sasha's relationship with Sean. Sean knows this and is using the parental alienation allegation because he has nothing else that can possibly justify a change in custody.

10. Unlike Sean, I believe that Sasha's best interest requires equal participation of both parents and their families. This is the second time Sean has petitioned the Court to try and change custody. Sean feels like he is the superior parent and he wants total control.

11. Since the last hearing in December, 2013, I can cite several examples where I have actively tried to effectively co-parent with Sean in a fair an reasonable manner. Despite my attempts, I continued to be met with open hostility.

12. I am sure that Sean has said bad things to Sasha about me and my Husband Ricky in his home. I have heard Sasha say that daddy says Ricky is a bad guy or criminal. I am sure that Sean has interrogated Sasha about what goes on in our home. I just don't have the benefit of a tape recording that was surreptitiously placed in his home because I would never think to go to such lengths. The placement of the recording device in Sasha's backpack is evidence of Sean's obsession to try to get primary custody.

13. I recognize that I am not a perfect human being and that

I have made mistakes. I recognize now that Sean can "push my buttons" challenging my parenting style and ability and I get angry and defensive and, in the past, I responded in a negative manner. But I can say with certainly that if Sean treated my family and I with dignity and respect, that there would be no such occurrences. I can also state with certainly that it never has been and never will be my intent to destroy Sasha's relationship with his father.

14. I recognize that Sean's and my relationship probably will never improve despite my sincere desire for improved co-parenting and communication. But effective co-parenting and communication is a 2-way street and requires mutual consideration and respect. I know Sean will never respect me or my Husband Ricky and I am concerned about how our strained relationship will negatively affect Sasha.

15. Accordingly, in order to become a better parent and to learn how to deal with the situation so as to minimize the impact on Sasha, I voluntarily enrolled in and completed the UNLV Cooperative Parenting Program. That Program was very helpful to me and I learned several techniques and strategies to manage my issues with Sean and to absolutely shield Sasha from any further conflict that I may have with Sean. Since my vacation began, we have enjoyed our family time together and Sean's name has never been mentioned. I can assure the Court that any mention of Sean

in our home will be nothing but positive reinforcement and I ask the Court to allow me to finish my summer vacation with my son.

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

DATED this 25 day of June, 2015.

LYUDMYLA A. ABID

EXHIBIT "A"

UNLV | CONTINUING EDUCATION
DIVISION OF EDUCATIONAL OUTREACH

June 13, 2015

Judge Linda Marquis
Family Court Division, Department B
Family Courthouse
601 N. Pecos
Las Vegas, Nevada 89155

Re: Lyudmyla Abid, nka Lyudmyla Pyankovska
In the Matter of the Joint Petition for Divorce of Sean R. Abid and Lyudmyla Abid, Petitioners.
Case No. D-10-424830-Z

Dear Judge Marquis,

This letter is to confirm that the following individual has completed the UNLV Cooperative Parenting Program, offered through the UNLV Division of Educational Outreach:

Lyudmyla Pyankovska

Please do not hesitate to contact me if you need additional information. Thank you for your referral to this program.

Sincerely,

Margaret E. Pickard, J.D.
Program Facilitator
702.373.1566
margaretpickard@aol.com

EXHIBIT "B"

Mother

Progress Report

Dear Parents,

Attached you will find the "Essential Skills" report. It has been update to include all areas. If your child did not receive a checkmark in an area, it is because they have not *consistently* demonstrated mastery in this area. For example, in handwriting, the student may still be struggling with letter size, proper formation, etc.

Thank you so much!

Mrs. Abacherli

Aleksandr

Essential Skills

Word

Capital Letters	Recognizes	Writes	Lowercase Letters	Recognizes	Knows Sounds	Writes
A	✓	✓	a	✓	✓	✓
B	✓	✓	b	✓	✓	✓
C	✓	✓	c	✓	✓	✓
D	✓	✓	d	✓	✓	✓
E	✓	✓	e	✓		✓
F	✓		f	✓	✓	✓
G	✓		g	✓	✓	
H	✓	✓	h	✓	✓	
I	✓	✓	i	✓	✓	✓
J	✓		j	✓	✓	
K	✓	✓	k	✓	✓	✓
L	✓	✓	l	✓	✓	✓
M	✓	✓	m	✓	✓	✓
N	✓	✓	n	✓	✓	
O	✓	✓	o	✓	✓	✓
P	✓	✓	p	✓	✓	
Q	✓	✓	q	✓		
R	✓	✓	r	✓	✓	
S	✓	✓	s	✓	✓	✓
T	✓		t	✓	✓	
U	✓	✓	u	✓	✓	
V	✓	✓	v	✓	✓	✓
W	✓	✓	w	✓	✓	
X	✓	✓	x	✓	✓	
Y	✓	✓	y	✓	✓	
Z	✓		z	✓	✓	

Phonological Awareness	
Rhyme	✓
Isolation	✓
Blending	✓
Segmentation	✓

Numbers

Numbers	Recognizes	Writes	Represents Quantity with Numeral
0	✓	✓	✓
1	✓	✓	✓
2	✓	✓	✓
3	✓	✓	✓
4	✓	✓	✓
5	✓	✓	✓
6	✓	✓	✓
7	✓	✓	✓
8	✓	✓	✓
9	✓	✓	✓
10	✓	✓	✓
11	✓	✓	✓
12	✓	✓	
13	✓	✓	
14	✓	✓	
15	✓	✓	✓
16	✓	✓	
17	✓	✓	
18	✓	✓	
19	✓	✓	✓
20	✓	✓	✓

Counting

	By Ones	By Tens
0–100	✓	✓

Phonological Awareness is the ability to hear, identify, and work with the sounds in spoken words

Rhyme is identifying words with identical or similar sounds, especially with respect to the last syllable
Example Do these words rhyme? hat, mat What words rhyme with bed?

Isolation is recognizing individual sounds in words
Example What is the first sound you hear in the word bed? What is the last sound you hear in hat?

Blending is putting sounds together to make words
Example What word am I saying /s/ /u/ /n/?

Segmentation is breaking words into their separate sounds
Example How many sounds do you hear in the word bat? Say each sound you hear in the word late

Learner Progress Scales

Essential Skills

✓ - Proficient in skill

MOFI

DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

Sean R. Abid
Plaintiff/Petitioner

-vs-

Lyudmyla A. Abid
Defendant/Respondent

CASE NO. D-10-424830-D

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: 6-23, 2015

Michael Balaban
Printed Name of Preparer

Signature of Preparer

DOCKETING STATEMENT ATTACHMENT 16

Register of Actions

Case No. D-10-424830-Z

In the Matter of the Joint Petition for Divorce of: Sean R Abid and Lyudmyla A Abid, Petitioners.

§
§
§
§
§
§
§
§

Case Type:	**Divorce - Joint Petition**
Subtype:	**Joint Petition Subject Minor(s)**
Date Filed:	**02/04/2010**
Location:	**Department B**
Cross-Reference Case Number:	**D424830**
Supreme Court No.:	**69995**

Party Information

Petitioner	**Abid, Lyudmyla A** 2167 Montana Pine DR Henderson, NV 89052		**Lead Attorneys** **Radford J Smith, ESQ** *Retained* 702-990-6448(W)
Petitioner	**Abid, Sean R** 2203 Alanhurst DR Henderson, NV 89052	Male 6' 5", 230 lbs	**John D. Jones** *Retained* 702-869-8801(W)
Subject Minor	**Abid, Aleksandr Anton**		

Events & Orders of the Court

06/25/2015 **All Pending Motions** (11:00 AM) (Judicial Officer Marquis, Linda)

Minutes

06/25/2015 11:00 AM

- PLAINTIFF'S EMERGENCY MOTION REGARDING SUMMER VISITATION The Court noted the parties shared joint legal custody and joint physical custody, there was a visitation order in place, and an Evidentiary Hearing was scheduled for 8/14/15. The Court said it had received a letter from Dr. Holland, including parts of the interview she had conducted. The Court said it had received Dr. Holland's full report this morning, and had not had an opportunity to review the report,, which had been released to counsel. The Court met with counsel OFF THE RECORD. The Court said it had had an opportunity to review Dr. Holland's report, and discuss it with counsel, off the record. The Court reminded the parties the 8/14/15 Evidentiary Hearing would start at 10:30 a.m. The Court said opposing counsel had a Motion to Suppress pending and Plaintiff's counsel wanted an opportunity to Oppose that Motion, and, therefore, a date would be set for argument on that issue prior to trial. Argument by Mr. Jones. Mr. Jones asked for Plaintiff to have six (6) weeks with the minor child this summer, and for Defendant to have four (4) weeks this year, in order to protect the child. Mr. Jones said Dr. Holland would be testifying at the trial. Mr. Balabon said Defendant had completed the Cooperative Parenting Classes at UNLV. Mr. Balabon objected to Dr. Holland's report, and objected to the tape, which he believed had prejudiced the evaluator. The Court said it was concerned about the child moving into first grade. Response by Mr. Jones. The Court read a portion of Dr. Holland's report into the record, which discussed the minor child playing violent video games. Mr. Jones said only the portion of the recordings containing Sasha were retained, the rest of the tape had been erased. Mr. Jones said the custodial order gave Plaintiff the choice of which school the minor child would attend. COURT ORDERED, the following: 1. The minor child, Sasha, shall no longer be allowed to play "Call of Duty" or "Five Nights at Freddy's", and he is not allowed to play X-Box Live. In addition, he is not allowed to play any game that is rated above what is appropriate for kindergartners or first graders at either home. The Court is concerned about the child's violent behavior, and he must be monitored to make sure he is not allowed to have access

to these violent games going forward. 2. The Motion to Suppress will be argued on July 16, 2015 at 9:30 a.m., and Defendant's Countermotion will be deferred to that date. 3. Dr. Holland and Plaintiff's counsel had requested the Court make a change to the summer schedule; therefore, since Defendant has had three (3) of her six (6) weeks of summer vacation with the minor child, and Dad is entitled to four (4) weeks under the visitation schedule, this year the summer schedule shall be reversed, and Defendant will be allowed to finish one more week with the minor child, and she will then return the child to Plaintiff two (2) weeks early. The child shall be returned to Plaintiff on July 4, 2015 at 9:00 a.m., which will reverse the current visitation order. If at the Evidentiary Hearing a decision is made that does not change custody or visitation, the summer schedule will be switched next year so that Defendant gets six (6) weeks and Plaintiff gets four (4) weeks. 4. TEMPORARILY until trial, the parties will have Skype or Facetime contact with the minor child on Mondays, Wednesdays, and Fridays. 5. The school issue is not on calendar this date; however, counsel will discuss the matter and exchange calendars, and the matter can be argued at the 7/16/15 hearing. 6. Counsel may retain Dr. Holland's report; however, the report must remain in their possession. 7. Moving forward counsel will not quote directly from Dr. Holland's report or Dr. Paglini's report in their pleadings. 8. If the original recording is available, it shall be produced. 7/16/15 9:30 A.M. ARGUMENT RE: MOTION TO SUPPRESS

Parties Present
Return to Register of Actions

DOCKETING STATEMENT ATTACHMENT 17

Electronically Filed
07/13/2015 04:13:27 PM

CLERK OF THE COURT

RPLY
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, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B

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 FEES

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 REPLY 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 FEES.

///

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

Exhibit 3

Exhibit 3

[redacted] ARIP ALEXANDR

PEDIATRIC PROGRESS NOTE: AUC-PPN

PHYSICAL EXAM: 2 Systems: Level IV (Established) or Level III (New)/B+ Level IV (New)

GENERAL:
☐ Alert ☐ Non-Toxic ☐ Comfortable
☐ Easily consoled ☐ Engages well
☐ +Tears ☐ Well-nourished
Distress: Mild / Mod / Severe Lethargic
Inconsolable
Poor skin turgor

HEAD:
☐ Scalp Atraumatic
☐ Fontanelle Flat
Hematoma Step-off Battle's Sign
Fontanelle: Bulging / Depressed
Acuity OD OS Hyphema

EYES:
☐ PERRL
☐ EOMI
☐ Conjunctivae Clear
☐ Cornea Clear Blot
☐ Fundi Normal
Unequal
Nystagmus Dysconjugate Gaze
Injected Chemosis Icteric D/C
Abrasion FB Dendrite Ulceration
Papilledema Retinal Hemorrhage

ENT:
☐ External Auditory Canals Clear
☐ TMs Normal
☐ Nares Normal
☐ Mucous Membranes Normal
☐ Posterior Oropharynx Normal
☐ Tonsillar Pillars Well-Demarcated
Cerumen D/C Inflammation
Erythema Bulging Effusion Purulence
Epistaxis Septal Hemorrhage D/C
Tacky Dry Vesicles Palatal Petechiae
Exudates Erythema Tonsillar Enlargement
Asymmetry Trismus

NECK:
☐ Normal Voice / Cry
☐ Supple, Full ROM
☐ No Lymphadenopathy
☐ No Midline Tenderness
Muffling Hoarse Weak
Meningismus Thyromegaly
Cervical LAN: Anterior Posterior
Tender: Paracervical Trapezius

CARDIOVASCULAR:
☐ Regular Rate / Rhythm
☐ No Murmurs / Rubs
☐ Brisk Cap. Refill ☐ Radial Pulses 2+ Symm ☐ Femoral Pulses 2+ Symm
Irregular Tachycardic Bradycardic
Murmur /VI sys / dias S3 S4

RESPIRATORY:
☐ Clear & Equal BS
☐ Easy & Non-Labored
☐ Chest Wall Atraumatic / Non-tender
Wheezes Rales Rhonchi
Accessory Muscles Stridor
Tender to Palpation

GASTROINTESTINAL:
☐ Abdomen Non-Tender
☐ No Hepatosplenomegaly
☐ Normoactive BS
☐ Non-distended
☐ Stool Hemo Neg
Rebound Guarding Murphy's Sign
Hernia Mass
↑ / ↓ BS Peristaltic Rushes
Distended

GENITOURINARY: ☐ Chaperone present at bedside during exam
☐ No CVA Tenderness
☐ No Inguinal Lymphadenopathy
☐ Normal External Genitalia
☐ Normal Testes ☐ + Cremasteric Reflex
☐ Normal Cervix, no D/C, no CMT
☐ No Adnexal Masses or Tenderness
+ CVA Tenderness
Circumcised / Uncircumcised
Tender
D/C

SKIN:
☐ Warm and Dry; Normal Color
☐ No Rash
Diaphoretic Pale Cyanotic Jaundice
Petechiae Ecchymoses Urticaria

MUSCULOSKELETAL:
☐ Extrem. Well-Perfused; Cap. Refill < 2 sec
☐ Full ROM Without Tenderness
☐ No Edema
☐ FDP, FDS, EDC Intact ____ Hand
☐ Compartments Soft, Without Tension
Edema Tender
☐ Rad/Med/Ulnar Nrv Intact M/S ____ Hand

NEUROLOGIC / PSYCH.:
☐ Alert ☐ Active ☐ Age-appropriate
☐ CN II - XII Intact
☐ Normal Tone ☐ Strong Suck ☐ + Moro ☐ + Root
☐ Normal Sensation ☐ 2+ DTRs Symm.
☐ 5/5 Strength x 4 Extremities
☐ Baseline strength / behavior per family.
☐ Patient contracts to safety of self/others.
Lethargic Hypotonic Delirium
Suicidal Ideation Psychosis

DIAGNOSTICS / INTERPRETATION:

PULSE OXIMETRY: % ON RA / O_2 Normal / Low

X-RAY:
CXR ☐ Normal ☐ CHF ☐ Effusion ☐ CM ☐ COPD ☐ Mass
☐ Infiltrate
Other:

EKG:
Rhythm Rate Axis: ☐ Normal ☐ LAD ☐ RAD
QRS: ☐ Normal ☐ Less ☐ Wide AVB QTc: ☐ Normal ☐ Prolonged
ST Segments: Normal
OVERALL INTERPRETATION: ☐ Normal ☐ Unchanged from Prior ☐ Non-Specific Changes
Acute Injury Pattern / Ischemia

LABORATORY: Checked labs are normal or unremarkable.

☐ CBC	☐ Chem. Panel	☐ UA	HCG:
☐ WBC	☐ Na:	☐ Sp. Grav.:	
☐ Hgb:	☐ K:	☐ Ketones:	Accu/
☐ Hct:	☐ Cl:	☐ Urobil.:	
☐ Plts:	☐ CO_2:	☐ Protein:	Mono:
☐ PMNs:	☐ BUN:	☐ Glucose:	
☐ Bands:	☐ Creat:	☐ Blood:	Strep:
☐ Leuks:	☐ Gluc.:	☐ Nitrites:	
		☐ Leuk. Est.:	RSV:

IMPRESSION / DIAGNOSIS / PLAN:

* Is history and/or described MOI consistent with physical exam findings?
☐ Yes ☐ No → CPS contacted? ☐ Yes ☐ No

☐ Patient verbalizes understanding of discharge instructions and agrees with plan.
☐ R/B/A discussed with patient re: medications, +informed consent given.

Discharge Condition: ☐ Improved ☐ Good ☐ Unchanged ☐ Stable
☐ Transferred to Hospital:

HEALTH EDUCATION / COUNSELING:
Cessation of: ☐ Tobacco Use ☐ ETOH Use ☐ Drug Use
☐ Preventative Health ☐ Seatbelt Use ☐ Safe Sex ☐ Weight Loss
☐ Balanced Diet & Exercise ☐ Medication Compliance

☐ Coordination of Care Reviewed: ☐ Lab Studies ☐ X-Rays ☐ Records

Face-to-Face Time Minutes ☐ >50% Counseling / Coordinating Care

DOCKETING STATEMENT ATTACHMENT 9

Register of Actions

Case No. D-10-424830-Z

In the Matter of the Joint Petition for Divorce of: Sean R Abid and Lyudmyla A Abid, Petitioners.

§
§
§
§
§
§
§

Case Type:	**Divorce - Joint Petition**
Subtype:	**Joint Petition Subject Minor(s)**
Date Filed:	**02/04/2010**
Location:	**Department B**
Cross-Reference Case Number:	**D424830**
Supreme Court No.:	**69995**

Party Information

Petitioner	**Abid, Lyudmyla A** 2167 Montana Pine DR Henderson, NV 89052		**Lead Attorneys** **Radford J Smith, ESQ** *Retained* 702-990-6448(W)
Petitioner	**Abid, Sean R** 2203 Alanhurst DR Henderson, NV 89052	Male 6' 5", 230 lbs	**John D. Jones** *Retained* 702-869-8801(W)
Subject Minor	**Abid, Aleksandr Anton**		

Events & Orders of the Court

03/18/2015 **All Pending Motions** (10:00 AM) (Judicial Officer Marquis, Linda)

Minutes

03/18/2015 10:00 AM

- LYUDMYLA A. ABID'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 CHILDS' PASSPORT AND FOR ATTORNEY FEES...SEAN R. ABID'S OPPOSITION AND COUNTERMOTION TO CHANG CUSTODY AND FOR ATTORNEY'S FEES AND COSTS Argument by counsel regarding Defendant's motion and Plaintiff's opposition and countermotion. Attorney Jones stated he would provide counsel with a copy of the audio recording. COURT ORDERED: 1. The CUSTODY issue shall be DEFERRED to the Evidentiary Hearing. 2. Temporarily, the VISITATION schedule shall remain the same. 3. Defendant's travel with the child to the Ukraine shall be DEFERRED. Per STIPULATION of counsel, if Defendant wishes to travel to a HAGUE SIGNATORY country that has not been issued a travel warning by the U.S. Department of State, Plaintiff shall provide Defendant with the child's passport so she may exercise her six week s vacation and Defendant shall return the child's passport to Plaintiff upon her return from vacation. 4. The entire packet of the child's HOMEWORK, the books and the flashcards, shall remain in the child's backpack. 5. Per STIPULATION of counsel, Dr. Stephanie Holland shall perform the CHILD INTERVIEW. At this time, the parties shall spilt the cost of the CHILD INTERVIEW 50/50. However, if one party should overwhelmingly prevail at the EVIDENTIARY HEARING, the non-prevailing party shall be responsible for reimbursing the other party their cost. Referral Order for Outsourced Evaluation SIGNED AND FILED IN OPEN COURT and a copy was provided to both counsel. 6. Counsel shall submit as a supplement any POINTS AND AUTHORITIES it would like the Court to consider regarding the expert examining the audio tape by Monday, March 23, 2015. 7. Case and Trial Management Order SIGNED AND FILED IN OPEN COURT and a copy was provided to both counsel. 8. Status Check SET for April 2, 2015 at 11:00 A.M. Judges decision re: audio tapes. 9. Evidentiary Hearing SET for August 14, 2015 at 9:00 A.M.

Parties Present
Return to Register of Actions

DOCKETING STATEMENT ATTACHMENT 10

ORDR

FILED IN OPEN COURT
3/18, 2015
STEVEN D. GRIERSON
CLERK OF THE COURT
By: Helen F. Green
HELEN F. GREEN, Deputy

DISTRICT COURT
FAMILY DIVISION
Clark County, Nevada

ABID, Sean R.
Plaintiff

-vs-

ABID, Lyudmyla
Defendant

Case Number D-10-424830-Z
Department B

REFERRAL ORDER FOR OUTSOURCED EVALUATION SERVICES

In accordance with EDCR 5.70, the Court may order family evaluations of those parties appearing before the Court that have been unable to mutually resolve their custody and access issues, and where the Court may require additional information prior to making a judicial decision in the matter. Once ordered, the family evaluation shall be completed by a qualified individual or agency, as defined by EDCR 5.70. The selection of this evaluator may be by mutual agreement of the parties, or absent this agreement, by judicial decision.

IT IS HEREBY ORDERED that the following individual/agency shall provide a family evaluation:

Individual/Agency: Dr. Stephanie Holland

Telephone Number: _____

IT IS FURTHER ORDERED that the above-referenced evaluator shall provide the following services with ☐ or without ☐ recommendations:

- ☐ Substance Abuse Evaluation
- ☐ Child Custody Evaluation
- ☐ Child Custody Evaluation with OTI*
- ☑ Child Interview
- ☐ Child Reunification
- ☐ Emergency Evaluation
- ☐ Protective Order Evaluation
- ☐ Other _____

IT IS FURTHER ORDERED that the parties are responsible for all fees; that the fees shall be paid directly to the evaluator prior to the commencement of the family evaluation services.

✓ Each party shall pay 50% of the cost for this service.
___ _____ shall pay 100% of the cost.

ORDERED AND DATED this 18th day of March, 2015.

This matter is reset for:
Date 8/14/15 Time 9:00 AM

DISTRICT JUDGE
LINDA MARQUIS

Report Due Date: _____
Attorney for Plaintiff: John Jones
Attorney for Defendant: Michael Balabon

*Out of Town Investigation – Courtesy home study from another jurisdiction.

OutSrcOrder (Rev. 10/04)

DOCKETING STATEMENT ATTACHMENT 11

Electronically Filed
03/19/2015 12:15:40 PM

CLERK OF THE COURT

PTAT
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, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	CASE NO.: D424830 DEPT. NO.: B

POINTS AND AUTHORITIES REGARDING DR. HOLLAND RECEIVING RECORDINGS

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 submits his POINTS AND AUTHORITIES REGARDING DR. HOLLAND RECEIVING RECORDINGS.

I. POINTS AND AUTHORITIES

The issue of whether or not an expert can rely on potentially inadmissible information is really quite a simple one. Far more simple than Defendant is making it out to be.

NRS 50.285 states as follows:

> N.R.S. 50.285
>
> 50.285. Opinions: Experts
>
> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

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

> **2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.**
>
> (emphasis added)

Whereas, Sean is confident that this Court will admit the recordings into evidence, for the purposes of the forensic child interview, Dr. Holland should absolutely have the recordings so that she can craft the nature of the interview. Defendant's desperate attempt to hide the truth from the Court should have nothing to do with Dr. Holland being fully informed before interviewing Sasha.

II. CONCLUSION

Based upon the foregoing the Court should enter the following orders:

1. Dr. Holland is allowed to review the recordings.
2. Any other relief that this Court deems just and proper.

DATED this 19 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

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

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of March, 2015 a true and correct copy of the POINTS AND AUTHORITIES REGARDING DR. HOLLAND RECEIVING RECORDINGS 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 Berdahl
an Employee of BLACK & LOBELLO

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

DOCKETING STATEMENT ATTACHMENT 12

0001
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, Plaintiff,		
vs.	CASE NO.	D-10-424830-Z
	DEPT. NO.	B
LYUDMYLA A. ABID, Defendant.		

POINTS AND AUTHORITIES IS SUPPORT OF DEFENDANT'S OBJECTION TO PROVIDING CONTENTS OF ALLEGED TAPE RECORDING TO DR. HOLLAND

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 the expert designated by the Court to interview the subject minor child not be provided with the alleged contents of a tape recording that Defendant alleges was obtained in violation of both State and Federal Law.

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

This Brief is based upon all papers and pleadings on file, the attached points and authorities, and oral argument to be

adduced at the time of hearing of this cause.

DATED this 23rd day of March, 2015.

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

POINTS AND AUTHORITIES

I

1. At the hearing held on March 18, 2015, this Court designated Dr. Holland to conduct a child interview.

2. At issue in this case, and sole basis of Plaintiff's Motion to Change custody, is a tape recording surreptitiously obtained by Plaintiff when he placed a recording device in the minor child's backpack and recorded private conversations in Defendant's home.

3. Defendant has objected to admission of the tape in this proceeding based upon alleged violations of both State and Federal Law. Both State and Federal Law require absolute exclusion of any recording and contents thereof if the Court finds there was a violation of the relevant wiretapping statutes.

4. This Court ruled that the issue of the admissibility of the tape recording will be determined at the evidentiary hearing.

5. To date, no valid transcript of the tape has been provided by the Plaintiff. Nor has Plaintiff provided the tape to

Defendant for examination. The tape has not been authenticated. Defendant is entitled to be provided with the tape and have it forensically examined to determine its authenticity and to determine if the contents have been altered or doctored. Defendant is entitled to examine the tape to determine if conversations that occurred in her home to which the child was not a party were recorded by the device. If this is the case, the tape absolutely would constitute violation of both State and Federal anti wiretapping Statutes and the "vicarious consent doctrine" will not apply thereby requiring the exclusion of the tape. The only evidence of the contents of the tape are statements of the Plaintiff allegedly detailing what was on the tape. It is obvious based upon a review of Plaintiff's recitation of the tape contents, that Plaintiff selectively edited the tape and only chose to reveal those portions of the recoding that he believed supported his case.

6. Under these facts, it would be patently unfair and equitable to provide Plaintiff's pleading to the evaluator that allegedly details what was on the tape when the alleged contents have not been authenticated and subject to forensic examination.

7. The issue of providing the contents of an illegally obtained evidence to custody evaluators or other experts appointed by the Court was dealt with extensively in a scholarly article entitled "War of the Wiretaps: Serving the Best Interests

of the Children?", published in the *Family Law Quarterly*, Vol. 47, No. 3 (Fall 2013). (See attached).

This article addresses all the valid reasons why this Court should not allow Dr. Holland to be provided with the alleged contents of the illegally obtained tape recording and Defendant encourages the Court to carefully review it.

CONCLUSION

The tape recording in this case has not been properly authenticated, has not been forensically examined, and is unreliable. We certainly cannot rely on what Plaintiff indicates is on the tape. Nor has the Court made a ruling on its admissibility.

The child interviewer appointed by the Court is an expert, trained to identify the signs of parental alienation or other emotional or psychological issues that may be affecting the child. Defendant seeks an initial, independent, unbiased examination of her son by this Doctor so this Court can make an informed decision as to what is in the best interests of Sasha. Plaintiff is adamant that the Doctor review the recordings because he knows Sasha is a happy, well adjusted child who loves both parents and his whole case rests on his unfounded parental alienation allegations. If there were indicated emotional or other problems with Sasha, certainly those issues would have been detailed with specificity in the extensive pleadings filed in

this case. Plaintiff wants to prejudice Dr. Holland before the interview with the hope that the tape predisposes the Doctor to find parental alienation. Certainly, if the parental alienation is as pervasive and outrageous as Plaintiff alleges, it should be readily identifiable by this expert.

For the reasons stated herein and in the Article attached hereto, Defendant specifically objects to Dr. Holland being provided with the tape prior to her interview with Sasha.

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

I, Michael R. Balabon, Esq., hereby certify that on the 23rd day of March, 2015, a true and correct copy of the foregoing **POINTS AND AUTHORITIES IS SUPPORT OF DEFENDANT'S OBJECTION TO PROVIDING CONTENTS OF ALLEGED TAPE RECORDING TO CHILD INTERVIEWER** 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.

DATED this 23rd day of March, 2015

MICHAEL R. BALABON, ESQ.

Published in *Family Law Quarterly*, Vol. 47, No. 3 (Fall 2013) p. 485–504.

War of the Wiretaps: Serving the Best Interests of the Children?

ALLISON B. ADAMS*

I. Introduction

Technological advancements not only contribute greatly to society, but also enable the significant erosion of individuals' privacy. Both courts and lawmakers frequently wrestle with issues regarding what types of protections the legal system should provide in order to safeguard privacy.[1]

The enactment of the Wiretap Act of 1968 represents a critical congressional response to the need to protect individuals' privacy in the face of rapidly advancing technology.[2] The Wiretap Act protects against "interceptions of oral and wire communications,"[3] such as covertly recorded telephone conversations. Today, all states except for Vermont, have also enacted their own wiretap statutes, many of which are more restrictive than the federal statute.[4]

In order to effectuate their purpose of protecting privacy, the Wiretap Act and its state counterparts contain a harsh exclusionary rule, in addition to criminal and civil penalties, for their violation.[5] The exclusionary rule bars recordings obtained in violation of the wiretap statutes from being admitted as substantive evidence in any legal proceeding.[6]

* Third-place winner, 2013 Schwab Essay Contest, and third-year student at Chicago-Kent College of Law. Currently is an associate at Schiller, DuCanto & Fleck LLP in Chicago.

1. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001) (stating that "the question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy").

2. *See* Gelbard v. United States, 408 U.S. 41, 48 (1972) (citing the Senate committee report that accompanied Title III).

3. United States v. Giordano, 416 U.S. 505, 515 (1974).

4. *Electronic Surveillance Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2012), *available at* http://www.ncsl.org/issues-research/telecom/electronic-surveillance-laws.aspx#VT.

5. *See* S. REP. No. 1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2156.

6. 18 U.S.C. § 2515 (2012). Most state statutes also contain such an exclusionary rule.

Despite the importance of the exclusionary rule for enforcing state and federal wiretap statutes, parties to child custody cases have found a loophole that enables illegally obtained wiretap evidence to be considered in child custody determinations. Some judges have permitted guardians *ad litem* (GALs) to review and rely on illegally obtained wiretap evidence in making child custody recommendations to the court.[7] GALs serve as the court's witness with an expertise in child custody.[8] Permitting GALs to review and rely on illegally obtained wiretap evidence, however, effectively creates a loophole that allows the court to rely on otherwise inadmissible evidence through the recommendation of its expert witness.

In *In re Marriage of Karonis*,[9] a highly contentious custody battle, the trial court appointed two GALs to help determine the custody arrangement for the parties' three children, which would serve their best interests.[10] Prior to trial, the father sought to bar the use of recordings the mother made of telephone conversations between the father and the parties' children because they were obtained in violation of the Illinois eavesdropping statute.[11] The trial court barred all information on the tapes from being used as evidence at trial, but permitted the GALs to listen to the tapes.[12] Ultimately, the trial court awarded the mother sole custody of the parties' three children.[13]

On appeal, the father alleged that, while the recordings were barred from being used as evidence at trial, he suffered prejudice because the trial court improperly permitted the GALs to rely on the tapes in making their child custody recommendations.[14] The appellate court affirmed the trial court's custody determination, reasoning that GALs must be permitted to consider even inadmissible evidence, including the recordings at issue, in order to determine the children's best interests.[15]

---

7. *Compare In re* Marriage of Karonis, 693 N.E.2d 1282 (Ill. App. Ct. 1998), *with* Lewton v. Divingnzzo, 772 F. Supp. 2d 1046, 1051 (D. Neb. 2011) (court excluding recordings from custody case where the mother covertly recorded the father by using a recording device in the child's teddy bear). The father then sued under state and federal wiretap statutes, and the court stated that the mother had no justifiable reason for distributing recordings to the GAL and other child experts in the child custody case before the judge ruled on the admissibility of such recordings. *Id.* at 1058. Accordingly, the court held the defendants liable for violating the Federal Wiretap Act. *Id.* at 1059.

8. *See, e.g.*, *In re* Marriage of Wycoff, 639 N.E.2d 897, 904 (Ill. App. Ct. 1994) (holding that the "GAL is the 'eyes and ears' of the court"); Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998); Collins v. Tabet, 806 P.2d 40, 44 (N.M. 1991).

9. 693 N.E.2d 1282 (Ill. App. Ct. 1998).

10. *Id.* at 1284.

11. *Id.* at 1285.

12. *Id.*

13. *Id.* at 1283–84.

14. *Id.* at 1285.

15. *Id.* at 1286.

The court noted that it is the GAL's duty to make child custody recommendations to the court based on what the GAL determines to be in the children's best interests.[16] Permitting GALs to rely on illegally obtained wiretap evidence, however, creates a perverse incentive for parents in vicious custody battles to violate the statutes. New technology, such as smartphones, now enables a parent to easily obtain recordings of the other parent in order to gain an advantage in child custody litigation. Yet, this incentive to violate the statutes is precisely what the statutes' harsh exclusionary rules were designed to prevent. Permitting GALs to review and rely on such illegally obtained recordings essentially allows inadmissible evidence in through the back door. Ultimately, this practice raises the question of whether the final child custody determination truly serves the children's best interests.

This article argues that GALs should not be permitted to review and rely on recordings obtained in violation of either state or federal wiretap statutes. Part II provides an overview of federal and state wiretap statutes as a backdrop to this discussion. Part III discusses the role of GALs in child custody proceedings. Part IV advances the following three reasons why GALs should not be permitted to rely on evidence that violates state or federal wiretap statutes in making child custody recommendations to the court: (1) limits on expert witness's ability to rely on inadmissible evidence should bar GALs, as the court's expert witness, from relying on illegally obtained wiretap evidence; (2) permitting GALs to rely on inadmissible wiretap evidence exacerbates the concerns with conflicts in the GAL's role; and (3) permitting GALs to rely on inadmissible wiretap evidence frustrates the purpose of the wiretap statutes.

II. Overview of Federal and State Wiretap Statutes

In order to understand the implications involved when courts allow GALs to rely on covertly recorded communications, it is important to first understand the structure of the federal and state wiretap statutes which regulate such communications. While there is a circuit split as to whether the federal Wiretap Act applies in domestic cases, such as child custody cases,[17] "nearly 80% of reported wiretapping matters involve wiretaps within the family context."[18]

16. *Id.* at 1284.

17. Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 964 n. 55 (2005).

18. Allan H. Zerman & Cary J. Mogerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating to Electronic Eavesdropping and Their*

A. The Federal Wiretap Act

The federal statute regulating electronic surveillance of communications, commonly referred to as the "Wiretap Act," is found in Title I of the Electronic Communications Privacy Act (ECPA) of 1986.[19] The ECPA of 1986 amended the original Wiretap Act found in Title III of the Omnibus Crime Control and Safe Street Acts of 1968.

1. The History of the Wiretap Act

The Wiretap Act of 1968 was Congress's response to changing conceptions of privacy in the face of advancing technology.[20] In 1934, Congress enacted the Federal Communications Act (FCA) as a response to the United States Supreme Court's decision in *Olmstead v. United States*.[21] In *Olmstead*, the Court upheld the constitutionality of a government wiretap under the Fourth Amendment to the United States Constitution.[22] The FCA protected individuals' privacy by prohibiting interceptions of communications, such as the government wiretap in *Olmstead*.[23] In 1967, with its seminal decision in *Katz v. United States*,[24] the Court expanded its notion of privacy under the Fourth Amendment to protect individuals' reasonable privacy expectations where new technology in the form of an eavesdropping device threatened to erode that privacy interest.[25]

The expansive notion of privacy, together with the limitations of the FCA, led Congress to enact the Wiretap Act of 1968.[26] The purpose of the Wiretap Act was "to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act."[27] Congress amended the Wiretap Act in 1986 to account for the rapid technological advancements that had occurred since passage of the original Wiretap Act in 1968.[28]

Application in Matrimonial Cases, 12 J. Am. Acad. Matrimonial Law. 227, 228 (1994) (citing National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Electronic Surveillance 160 (1976)).

19. 18 U.S.C. §§ 2510–2522 (2012).

20. Gelbard v. United States, 408 U.S. 41, 48 (1972) (citing the Senate committee report that accompanied Title III).

21. 277 U.S. 438 (1928); Richard C. Turkington, *Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Stored Communications Acts and the Common Law Privacy Intrusion Tort*, 82 Neb. L. Rev. 693, 701 (2004).

22. 277 U.S. at 469.

23. Turkington, *supra* note 21, at 701.

24. Katz v. United States, 389 U.S. 347 (1967).

25. *Id.*

26. Turkington, *supra* note 21, at 701–02.

27. United States v. Giordano, 416 U.S. 505, 515 (1974).

28. Turkington, *supra* note 21, at 703.

2. COMMUNICATIONS REGULATED BY THE WIRETAP ACT

The Wiretap Act regulates interceptions of "wire, oral, or electronic communication."[29] Primarily, the Wiretap Act only regulates "interceptions" of communications, defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[30] Accordingly, the Wiretap Act only applies to audio recordings captured while the communication is being transmitted. For example, the Wiretap Act applies when a person records a telephone conversation.[31] It likewise applies when a person captures a conversation on video that includes audio, as opposed to video recordings that solely record images without audio, such as closed-circuit video cameras.[32]

Additionally, the Wiretap Act only applies when the audio recording is captured while the communication is being transmitted. Once the transmission is complete, the recording is governed by the Stored Communications Act.[33] Hence, covertly obtaining copies of e-mails, once stored, is regulated by the Stored Communications Act, not the Wiretap Act.[34]

The Wiretap Act only regulates interceptions of "wire, oral, or electronic communication."[35] The Wiretap Act defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[36]

Finally, the Wiretap Act's reach is limited to the regulation of "intentional" interceptions.[37] A person who acts negligently does not violate the Wiretap Act. Courts have found that the requirement that the act be "intentional" is satisfied when a person intercepts a communication "without justifiable excuse[,] stubbornly, obstinately, perversely . . . without ground for believing it was lawful . . . [or with] careless disregard whether or not one [had] the right to act."[38]

29. 18 U.S.C. § 2511(1)(a) (2012).

30. *Id.* § 2510(4).

31. Turkington, *supra* note 21, at 705.

32. *See, e.g.*, United States v. Falls, 34 F.3d 674, 679–80 (8th Cir. 1994); United States v. Torres, 751 F.2d 875, 885–86 (7th Cir. 1984); State v. O'Brien, 774 A.2d 89, 96–97 (R.I. 2001).

33. 18 U.S.C. §§ 2701–11.

34. *See* Konop v. Hawaiian Airlines, Inc., 236 F.3d 1035 (9th Cir. 2001), *withdrawn by* 262 F.3d 972 (9th Cir. 2001); Steve Jackson Games, Inc. v. U. S. Secret Serv., 36 F.3d 457 (5th Cir. 1994).

35. 18 U.S.C. § 2511(1)(a).

36. *Id.* § 2510(2).

37. *Id.* § 2511(1).

38. Citron v. Citron, 722 F.2d 14, 16 (2d Cir. 1983) (internal citations omitted); *see* Heggy v. Heggy, 944 F.2d 1537, 1542 (10th Cir. 1991); Kratz v. Kratz, 477 F. Supp. 463, 478–79 (E.D. Pa. 1979).

As technology continues to advance, the application of the Wiretap Act to new forms of communication will need to be examined. For example, new technology relevant to child custody litigation includes real-time video chats, such as the FaceTime[39] application for iPads and iPhones, Skype video calls,[40] and Google Voice.[41] Visitation between children and their parents more frequently includes virtual visitation, which "refers to the use of e-mail, instant messaging, webcams, and other Internet tools to provide regular contact between a noncustodial parent and his or her child."[42] By increasing access to and use of communication tools within the family context, this new technology increases the likelihood that parties to a vicious custody battle will covertly record such conversations to use as ammunition against the other party in court. Real-time recordings of the audio portions of video chats while they are in progress, as opposed to a copy of the video stored on a computer, are regulated under the Wiretap Act. Consequently, courts are likely to deal with issues regarding the admissibility of such recordings on an increasingly frequent basis.

3. Penalties for Violating the Wiretap Act

A person, whether or not a government actor, may violate the Wiretap Act through a number of different actions. This section discusses only those actions pertinent to the present subject and does not represent an exclusive list of actions that violate the Wiretap Act.

Primarily, a person violates the Wiretap Act by intercepting communications governed by the Act.[43] Even if individuals do not intercept communications themselves, they still violate the Wiretap Act by intentionally disclosing such interceptions to others or using the contents of an interception when they "kn[ew] or ha[d] reason to know" that such interception violated the Wiretap Act.[44] Accordingly, individuals who attempt to submit recordings into evidence in court that were obtained in violation of the Wiretap Act still violate the Act regardless of whether they intercepted the communications themselves or engaged others to act on their behalf. A party cannot evade the reach of the Wiretap Act by engaging another person, such as a private investigator, to covertly intercept communications on that party's behalf.

A person escapes liability under the Wiretap Act, however, where one

39. Apple, iPhone, http://www.apple.com/iphone/features/ (last visited Apr. 6, 2013).

40. Skype, http://www.skype.com/en/features/video-chat/ (last visited Apr. 6, 2013).

41. Google Voice, http://www.google.com/googlevoice/about.html (last visited Apr. 6, 2013).

42. Elisabeth Bach-Van Horn, *Virtual Visitation: Are Webcams Being Used as an Excuse to Allow Relocation?*, 21 J. Am. Acad. Matrimonial Law. 171, 172 (2008).

43. 18 U.S.C. § 2511(1)(a) (2012).

44. *Id.* § 2511(1)(c), (d).

party to the communication consented to the interception.[45] The federal Wiretap Act is a one-party consent statute. As long as the person intercepting the communication is a party to the communication, the consent requirement is met and the person is not liable under the Wiretap Act.[46]

The Wiretap Act imposes criminal, civil, and evidentiary penalties. Subject to exceptions, "whoever violates subsection (1) . . . shall be fined under this title or imprisoned not more than five years, or both."[47] Specifically, the Wiretap Act provides for civil remedies, which include compensatory damages, punitive damages, equitable or declaratory relief, and reasonable attorney's fees and litigation costs.[48]

Critically, the Wiretap Act also includes an expansive exclusionary rule. The rule prohibits the introduction into evidence of interceptions obtained in violation of the Wiretap Act in any proceeding, whether criminal or civil.[49] The Act's exclusionary rule states as follows:

> 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 the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.[50]

The vast penalties imposed for the violation of the Wiretap Act reflect the importance Congress placed on protecting individuals' privacy in the face of rapidly advancing technology.[51] Accordingly, the many penalties, including the exclusionary rule, are intended to be strictly enforced to give effect to the purpose of the Wiretap Act.

B. State Wiretap Statutes

In addition to the federal Wiretap Act, all states, except for Vermont, have enacted their own wiretap statutes.[52] While some state statutes mirror the federal Wiretap Act, other states' statutes are more restrictive. No state statute is less restrictive than the federal Wiretap Act.[53]

---

45. *Id.* § 2511(2)(d).
46. *Id.*
47. *Id.* § 2511(4)(a).
48. 18 U.S.C. § 2520(b).
49. 18 U.S.C. § 2515.
50. *Id.*
51. *See* S. REP. No. 1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2156 (stating that "[c]riminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for dangers. The perpetrator must be denied the fruits of his unlawful action in civil and criminal proceedings").
52. NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 4.
53. "Generally speaking . . . states are free to superimpose more rigorous requirements upon

Two-party consent statutes represent the most impactful way in which many state wiretap statutes are more restrictive than the federal Wiretap Act. Eleven states' statutes include a two-party consent requirement.[54] Additionally, the Nevada Supreme Court held that its statute requires two-party consent.[55]

Two-party consent statutes require the consent of all parties to a communication to avoid liability under the statute. Therefore, while a person who intercepts a communication does not violate the federal Wiretap Act, if that person is a party to the communication, that person still violates a state statute in a two-party consent state if the other parties to the communication do not consent. Alternatively, where a person's actions run afoul of the federal Wiretap Act, they will violate a state statute as well.

C. Evidentiary Issues Implicated by Federal and State Wiretap Statutes

The above is an overview of the reach of the federal and state wiretap statutes and the exclusionary rules imposed as a penalty for their violation. Given the above, there are a number of evidentiary issues that arise in the context of child custody litigation.

1. Two-Party Consent Statutes

In two-party consent states, covert interceptions of communications violate the state statute. The majority of statutes in two-party consent states contain exclusionary rules like that in the federal Wiretap Act.[56] Therefore, if a party to child custody litigation in a two-party consent state covertly records the telephone conversation of his or her spouse, such a recording is not admissible as substantive evidence in the child custody proceeding. Video recordings with audio would likewise be inadmissible.

Recent advancements in technology make covert video recording easier to obtain. Smartphones, such as iPhones, are now owned by 45% of adults in the United States[57] and contain the ability to record video with

those mandated by the Congress, but not to water down federally-devised safeguards." United States v. Mora, 821 F.2d 860, 863 n. 3 (1st Cir. 1987) (internal citations omitted).

54. Cal. Penal Code § 632 (West 2013); Conn. Gen. Stat. § 53a-189 (West 2013); Fla. Stat. Ann. 934.03 (West 2013); 720 Ill. Comp. Stat. 5/14-2 (West 2013); Md. Code Ann., Cts. & Jud. Proc. § 10-402 (West 2013); Mass. Gen. Laws ch. 272, § 99(c)(1) (West 2013); Mich. Comp. Laws § 750.539c (West 2013); Mont. Code Ann. § 45-8-213 (West 2013); N.H. Rev. Stat. Ann. § 570-A:2 (West 2013); 18 Pa. Cons. Stat. Ann. § 5703 (West 2013); Wash. Rev. Code § 9.73.030 (West 2013).

55. *See generally* Lane v. Allstate Ins. Co., 969 P.2d 938 (Nev. 1998).

56. Cal. Penal Code § 632(d) (West 2013); Fla. Stat. Ann. § 934.06 (West 2013); 720 Ill. Comp. Stat. § 5/14-5 (West 2013); Md. Code Ann., Cts. & Jud. Proc. § 10-405 (West 2013); Mass. Gen. Laws ch. 272, § 99 (West 2013); N.H. Rev. Stat. Ann. § 570-A:6 (West 2013); 18 Pa. Cons. Stat. Ann. § 5721.1 (West 2013); Wash. Rev. Code § 9.73.050 (West 2013).

57. Lee Rainie, *Two-Thirds of Young Adults and Those with Higher Income Are*

one touch of the screen.[58] Hence, parents seeking an advantage in child custody proceedings may use their smartphones to record video that captures the other party in a negative light. While such covert recordings may seem like a tempting way to gain an advantage in court, parties in two-party consent states cannot use such recordings to bolster their cases even where they are a party to the communication. Where the recording contains audio, it violates the state wiretap statute. As a result, the recording is subject to the exclusionary rule, rendering it inadmissible in court. Further, the party who covertly recorded the communication could be held criminally or civilly liable under the state wiretap statute.

2. ONE-PARTY CONSENT STATUTES AND THE VICARIOUS CONSENT DOCTRINE

Even under one-party consent statutes, including the federal Wiretap Act and the majority of state wiretap statutes, a party's covert recording of a telephone conversation between his or her spouse and a third party would be inadmissible in the child custody proceeding where no party to the conversation consented to its recording. By contrast, if the person recording the communication is a party to the telephone conversation, this recording does not violate one-party consent statutes. Therefore, the applicable state or federal wiretap statute would not serve to exclude such a recording from being admitted into evidence at trial.

In one-party consent states, however, the vicarious consent doctrine may enable a person to admit a recording into evidence even where the person intercepting the communication is not a party to the communication. In the context of wiretap statutes, vicarious consent refers to the ability of parents to consent on behalf of their children to interceptions of communications.[59] The requirement to obtain the consent of one party to the communication is satisfied since the parent can consent on behalf of the child. Consequently, as one legal scholar summarized, "[t]he basic premise of the doctrine of vicarious consent is that a parent can avoid liability for violations of the federal wiretap statute or its state law counterparts that might otherwise attach when he or she surreptitiously records a minor child's telephone conversations with a third party without gaining prior consent from the child or the third party."[60]

For example, in a one-party consent state, the vicarious consent doctrine allows a parent to record a telephone conversation between his or her

Smartphone Owners, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT 2 (2012), *available at* http://pewinternet.org/~/media/Files/Reports/2012/PIP_Smartphones_Sept12%209%2010%2012.pdf.

58. IPHONE, BUILT-IN APPS, http://www.apple.com/iphone/built-in-apps/ (last visited Apr. 6, 2013).

59. *See* Thompson v. Dulaney, 838 F. Supp. 1535, 1544 (D. Utah 1993).

60. Dinger, *supra* note 17, at 968.

child and the child's other parent without violating the state or federal wiretap statutes. Likewise, the vicarious consent doctrine would allow a parent to use current technology to video tape a video chat between the other parent and their child in real time without violating the wiretap statutes. Because the recordings would not violate the wiretap statutes, the applicable exclusionary rule would not operate to exclude such a recording at trial. Hence, a parent could covertly record the telephone conversation between his or her child and spouse and then use it against the spouse in a child custody proceeding.

The doctrine of vicarious consent developed primarily through case law for the purpose of protecting the welfare of children. As such, the doctrine is only available in certain jurisdictions and as applied to specific fact scenarios that effectuate this purpose. In *Thompson v. Dulaney*, the United States District Court for the District of Utah held that "[a]s 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."[61] The court stressed that the parent's purpose in intercepting the communications was critical to the application of the vicarious consent doctrine and denied the mother's motion for summary judgment as there existed factual issues about her motivation.[62]

Additional courts have adopted the vicarious consent doctrine, in limited contexts, in order to protect the welfare of children.[63] Georgia codified the vicarious consent doctrine in its wiretap statute.[64] By contrast, some courts have rejected the doctrine of vicarious consent.[65] Other jurisdictions have yet to reach the issue. Consequently, the applicability of the vicarious consent doctrine to allow a parent to intercept communications between his or her child and a third party without violating the applicable federal or state wiretap statutes varies greatly by both the jurisdiction and the specific facts involved in each case.

Overall, there are many contexts in both two-party and one-party con-

61. 838 F. Supp. 1535, 1544 (D. Utah 1993).

62. *Id.*, at 1545, 1548.

63. *See, e.g.*, Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998) (adopting the vicarious consent doctrine determined in *Thompson* as applied to older children); Silas v. Silas, 680 So. 2d 368, 371–72 (Ala. Civ. App. 1996) (upholding a father's vicarious consent on behalf of his child to recording telephone conversations with the child's mother where he "had a good faith basis that was objectively reasonable for believing that the minor child was being abused, threatened, or intimidated by the mother").

64. GA. CODE ANN. § 16-11-66(d) (2012).

65. *See* Williams v. Williams, 581 N.W.2d 777 (Mich. Ct. App. 1998); W. Va. Dep't of Health & Human Res. *ex rel.* Wright v. David L., 453 S.E.2d 646 (W. Va. 1994).

sent states in which evidentiary issues arise regarding the admissibility of evidence obtained in violation of state or federal wiretap statutes.

III. The GAL's Role in Child Custody Proceedings

Given the contexts in which the exclusionary rule applies to evidence obtained in violation of state or federal wiretap statutes, issues arise in child custody proceedings regarding whether GALs should be allowed to review and rely on such evidence in making child custody recommendations to the court. It is first important to understand the role that GALs play in child custody proceedings.

A. The Development of the GAL's Role in Child Custody Proceedings

GALs represent the best interests of children in court proceedings, including child custody litigation. In the seminal case of *In re Gault*, the United States Supreme Court in 1967 first recognized the need for an attorney to represent children in court proceedings, independent from the representation of their parents' interests.[66] Shortly thereafter, Wisconsin became the first state to require GALs to represent children in child custody litigation.[67] This initiated a movement across the United States, which urged the appointment of attorneys, such as GALs, to represent children in all child custody proceedings.[68]

A significant number of attorneys, many in the capacity of GALs, are appointed to represent children each year in proceedings that deal with child custody issues.[69] While family law statutes differ from state to state, there are generally three types of attorneys who represent children in child custody proceedings: (1) an Attorney for the Child; (2) a GAL; and (3) a Child's Representative. Each type of attorney serves a different role with regard to the child's representation. Generally, the role of an Attorney for the Child is to advocate for the child's interests, just as any attorney advocates for a client's interests.[70] In contrast, the role of both the Child's

66. 387 U.S. 1 (1967); Richard Ducote, *Guardians ad Litem in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 109–10 (2002).

67. *Id.* at 110.

68. This movement is evidenced by the fact that in 1972 the American Bar Association Family Law Section proposed an amendment to the Uniform Marriage and Divorce Act, which required that all children in custody proceedings have an attorney. ABA, *Proposed Revision of the Uniform Marriage and Divorce Act*, 7 FAM. L.Q. 135 (1972).

69. Approximately 3.6% of the population gets divorced each year, representing more than one million people. CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS SYSTEM: NATIONAL MARRIAGE AND DIVORCE RATE TRENDS, *available at* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm. As many of these divorces include children, a significant number of child custody determinations are made each year in divorce cases.

70. *See, e.g.*, 750 ILL. COMP. STAT. 5/506 (2013).

Representative and the GAL is to advocate for the best interests of the child, independent of the child's wishes.[71] One legal scholar described this network of differing roles as "falling on a continuum, with the lay guardian *ad litem* committed to protecting the children's interests at one end of the spectrum, the zealous attorney committed to advocating the children's wishes at the opposite end, and various hybrid models falling at different points in between."[72]

GALs are distinguished from both Attorneys for the Child and Child's Representatives because GALs serve as the court's witness, whereas Attorneys for the Child and Child's Representatives represent children independent of the court. The GAL is often referred to as "the arm of the court"[73] and "the eyes and ears of the court."[74] In this capacity, the GAL's role includes conducting an investigation to determine the children's best interests, serving as an expert witness, and advising the court.[75] GALs often conduct "interviews with parties and others knowledgeable about the child, review . . . relevant records, participat[e] in court proceedings and settlement discussions, and repor[t] findings and recommendations to the court."[76]

Furthermore, in Illinois, as in many states, the GAL "serves as a court-appointed quasi-expert."[77] Of the three types of attorneys who may represent children in custody proceedings, only the GAL can be called as a witness.[78] As such, GALs are generally also subject to cross-examination at trial regarding their recommendations to the court.[79]

B. Scholarly Criticisms of the GAL's Role in Child Custody Proceedings

The GAL's role as the court's witness has elicited significant criticism from legal scholars. First, "critics argue that courts give too much weight to recommendations by guardians *ad litem* and that reliance on the rec-

71. *Id.*

72. Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIMONIAL LAW. 183, 193 (2005) (citing Rayen C. Lindman & Betsy R. Hollingsworth, *The Guardian ad Litem in Child Custody Cases: The Contours of Our Legal System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255 (1998)).

73. *See, e.g.*, Clark v. Alexander, 953 P.2d 145, 152 (Wyo. 1998); Collins v. Tabet, 806 P.2d 40, 44 (N.M. 1991).

74. *See In re* Marriage of Wycoff, 639 N.E.2d 897, 904 (Ill. App. Ct. 1994).

75. *In re* Marriage of Karonis, 693 N.E.2d 1282, 1286 (Ill. App. Ct. 1998); Atwood, *supra* note 72, at 196 (citing Lindman & Hollingsworth, *supra* note 72).

76. Atwood, *supra* note 72, at 196 (internal citations omitted).

77. Carl W. Gilmore, *Understanding the Illinois Child's Representative Statute*, 89 ILL. B.J. 458, 460 (2001).

78. 750 ILL COMP. STAT. 5/506(a) (2013).

79. Gilmore, *supra* note 77, at 460; *see* 750 ILL. COMP. STAT. 5/506(a) (2013).

ommendations amounts to an abdication of judicial responsibility."[80] Where judges simply defer to the GAL's recommendation, this deference means that, practically speaking, the GAL is making child custody determinations instead of the judge.

Second, "serious due process concerns are present when guardians' reports and recommendations have been considered by courts without an opportunity for cross-examination by the parties."[81] As such, many due process challenges have proven successful when a trial court judge relied on the GAL's recommendations without providing the adverse party the opportunity to cross-examine the GAL.[82]

Finally, given the vast disparity in roles for GALs and other types of attorneys who represent children, "commentators worry that the absence of clear standards for guardians *ad litem* permits them to act on the basis of subjective, unconstrained bias."[83] As the court's witness, GALs, like judges, are generally immune from civil liability.[84] Consequently, GALs lack accountability for their recommendations. This lack of accountability raises concerns that courts may rely on biased recommendations by GALs in making child custody determinations without any requirement for consistency or accountability.

IV. Why GALs Should Not Be Permitted to Rely on Evidence Obtained in Violation of State or Federal Wiretap Statutes

Based on the GAL's role in child custody litigation, there are three reasons why GALs should not be permitted to rely on evidence that violates state or federal wiretap statutes. First, limits on expert witnesses' abilities to rely on inadmissible evidence should bar GALs, as the court's expert witness, from relying on illegally obtained wiretap evidence. Second, permitting GALs to rely on inadmissible recordings exacerbates concerns with consistency and accountability surrounding the GAL's role in child custody proceedings. Third, relying on such evidence frustrates the purpose and policy of state and federal wiretap statutes.

---

80. Atwood, *supra* note 72, at 198.

81. *Id.*

82. *See, e.g.*, *Ex parte* R.D.N., 918 So. 2d 100 (Ala. 2005); *In re* Marriage of Bates, 819 N.E.2d 714 (Ill. 2004); Pirayesh v. Pirayesh, 596 S.E.2d 505 (S.C. Ct. App. 2004).

83. Atwood, *supra* note 72, at 198.

84. Ducote, *supra* note 66, at 148 (internal citations omitted); *see, e.g.*, Scheib v. Grant, 22 F.3d 149, 157 (7th Cir. 1994) (holding that the guardian *ad litem* had absolute immunity from liability pursuant to Illinois's eavesdropping statute); Paige H.B. by Peterson v. Molepske, 580 N.W.2d 289, 296 (Wis. 1998) (holding that guardians *ad litem* are entitled to absolute quasi-judicial immunity).

A. GALs Should Not Be Permitted to Rely on Inadmissible Evidence

GALs should not be permitted to rely on evidence that would otherwise be inadmissible because it was obtained in violation of state or federal wiretap statutes. Both federal and state rules of evidence contain limitations on an expert witness's ability to rely on inadmissible evidence in forming an opinion and presenting it to the court. Such limitations should bar GALs, as expert witnesses, from relying on illegally obtained wiretap evidence. Even where such evidence is admissible, GALs, as the court's expert witness, should not be permitted to rely on such evidence in the same manner as a normal expert witness who is not controlled by the court.

Federal Rule of Evidence 703 permits experts to rely on inadmissible evidence in forming an opinion. However, the rule does not "function as an exception through which otherwise inadmissible evidence could be admitted."[85] Rule 703 states as follows:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.[86]

Rule 703 contains the following two limitations: first, in order for an expert to rely on inadmissible evidence, it must be of the type of evidence reasonably relied upon by experts in that particular field.[87] Second, it is impermissible for an expert to testify regarding an opinion that is based on inadmissible evidence if such evidence is unfairly prejudicial.[88] While Rule 703 makes specific reference to the jury, not the judge, as fact finder, Federal Rule of Evidence 403 provides for the exclusion of evidence in all circumstances where it is unfairly prejudicial.[89] As such, this exclusion for unfair prejudice also applies to the issue at hand where it has the potential to prejudice the GAL and the judge against one party to the child custody proceeding. The majority of states have rules of evidence similar to the federal rules of evidence with regard to the limitations on the ability of expert witnesses to rely on inadmissible evidence.[90]

---

85. Ian Volek, Note, *Federal Rule of Evidence 703: The Back Door and the Confrontation Clause, Ten Years Later*, 80 FORDHAM L. REV. 959, 963 (2011) (citing FED. R. EVID. 703 advisory committee's note on 2000 amendment).

86. FED. R. EVID. 703.

87. *Id.*; *see* Volek, *supra* note 85, at 982–83.

88. FED. R. EVID. 703; *see* Volek, *supra* note 85, at 982–83.

89. FED. R. EVID. 403, 703.

90. ALASKA R. EVID. 703; ARK. R. EVID. 703; ARIZ. R. EVID. 703; CAL. EVID. CODE §

1. AN EXPERT CAN RELY ON INADMISSIBLE EVIDENCE IF IT IS THE TYPE OF EVIDENCE REASONABLY RELIED UPON BY EXPERTS IN THE FIELD

First, an expert witness may only rely on inadmissible evidence to the extent that it is of the type of information reasonably relied upon by experts in the particular field at issue. The justification for this rule is that allowing experts to rely on such evidence promotes judicial efficiency and mirrors the expert's practice in his or her profession.[91] Furthermore, the expert's own testimony validates the evidence the expert relies on.[92] Where these justifications are not served, the court should bar the expert from relying on the inadmissible evidence.

Reasonable reliance by the expert's field requires that the reliance is "both customary in [the expert's] field and reasonable."[93] The requirement that inadmissible evidence pass this test prevents any party from circumventing the exclusion of evidence by finding an expert to rely on that evidence in presenting an opinion to the court.[94] In determining what is reasonable, the Illinois Supreme Court noted that it is important to examine the reason the evidence relied upon is inadmissible for its substantive value.[95] The court held that "if another rule of law applicable to the case excludes the information sought to be relied upon by the expert, the information may not be permitted to come before the jury under the guise of a basis for the opinion of the expert."[96]

In the context of wiretap evidence, such evidence is not merely inadmissible evidence, it was also obtained illegally. Regardless of whether a GAL or other child expert would customarily rely on such evidence, its illegal nature should render it unreasonable.

Furthermore, illegally obtained wiretap evidence is unreasonable for an expert to rely on because such reliance frustrates the purpose of the rules

---

801(B) (West 2013); COLO. R. EVID. 703; CONN. CODE EVID. § 7-4; DEL. R. EVID. 703; FLA. STAT. § 90.704 (West 2013); HAW. REV. STAT. § 626-1 (West 2013); IDAHO R. EVID. 703; ILL. R. EVID. 703; IND. R. EVID. 703; IOWA R. 5.703; KY. R. EVID. 703; LA. CODE EVID. ART. 703; ME. R. EVID. 703; MD. RULE 5-703; MISS. R. EVID. 703; MO. ANN. STAT. 490.065 (West 2013); MONT. R. EVID. 703; NEB. REV. STAT. § 27-703; NEV. REV. STAT. 50.285 (West 2012); N.H. R. EVID., 703; N.J. R. EVID. 703; N.M. R. EVID. 11-703; N.Y.C.P.L.R. 4515 (McKinney 2013); N.C. R. EVID., G.S. § 8C-1, RULE 703; N.D. R. EVID. 703; 12 OKLA. STAT. ANN. tit. 12 § 2703 (West 2013); OR. REV. STAT. ANN. § 40.415 (West 2013) (RULE 703); PA. R. EVID. 703; R.I. R. EVID. 703; S.C. R. EVID. 703; S.D. CODIFIED LAWS § 19-5-3 (West 2013); TENN. R. EVID. 703; TEX. R. EVID. 703; UTAH R. EVID. 703; VT. R. EVID. 703; VA. CODE ANN. § 8.01-401.1 (West 2013); WASH. R. EVID. 703; W.VA. R. EVID. 703; WIS. STAT. ANN. § 907.03 (West 2013); WYO. R. EVID. 703.

91. Volek, *supra* note 85, at 968.

92. *Id.*

93. Connelly v. Gen. Motors Corp., 540 N.E.2d 370, 378 (Ill. App. Ct. 1989).

94. *Id.*

95. City of Chicago v. Anthony, 554 N.E.2d 1381, 1389 (Ill. 1990).

96. *Id.*

of evidence. The purpose of the Federal Rules of Evidence, like those of the states, is "to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[97] Yet, permitting GALs to rely on illegally obtained wiretap evidence encourages illegal activity, thus undermining the fairness of child custody proceedings. Also, by relying on a communication obtained in violation of a wiretap statute, the GAL, save for a provision imposing immunity from liability, could also be held criminally or civilly liable under such statute.[98] Because of its illegal nature, wiretap evidence should not be deemed to be the type of evidence reasonably relied upon by experts in the field of child custody. Consequently, GALs, as experts, should not be permitted to rely on otherwise inadmissible wiretap evidence.

2. It is Impermissible for an Expert to Testify Regarding an Opinion Based on Inadmissible Evidence That Is Unfairly Prejudicial

Where an expert witness's opinion relies on inadmissible evidence, the expert may only testify regarding that opinion if the inadmissible evidence relied on is not unfairly prejudicial.[99] Federal Rule of Evidence 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[100] "Rule 703 thus reverses the default presumption of disclosure under Rule 403 to create a presumption against disclosure even for the limited purpose of explaining the expert's opinion."[101]

In order to test the validity of a GAL's custody recommendation, it is important for the GAL to testify and be cross-examined regarding the basis for the recommendation. Where a GAL relies on illegally obtained wiretap evidence in making a custody recommendation, the GAL will necessarily need to testify regarding this otherwise inadmissible evidence, at least on cross-examination. The potential for this testimony to be unfairly prejudicial to the adverse party is high when GALs rely on illegally obtained wiretap evidence. This risk of unfair prejudice due to a GAL's inevitable testimony regarding the illegally obtained wiretap

97. Fed. R. Evid. 102.

98. 18 U.S.C.A. § 2511(1)(d) (West 2012) (stating that a person is liable under the Wiretap Act who "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").

99. Fed. R. Evid. 403, 703.

100. Fed. R. Evid. 403.

101. Volek, *supra* note 85, at 963.

evidence should serve to bar GALs from relying on such evidence in making custody recommendations.

On balance, the risk of prejudice outweighs the probative value of the evidence. It is important for GALs to have broad investigatory powers to carry out their duty of making child custody recommendations to the court.[102] Recordings obtained in violation of state and federal wiretap statutes have the potential to prejudice the GAL against one parent from the outset in a way that could bias the GAL's recommendations. The recording could have been the result of any number of circumstances that do not accurately reflect the recorded party's normal temperament or relationship with the child. For example, one spouse may purposely incite the other spouse to obtain an advantage in a child custody proceeding by recording a communication that is severely out of character for the recorded spouse. Yet, it is well-established that listening to a recording or watching a video can have an immensely persuasive impact on an audience, the GAL in this case.[103] Hence, the adverse party will face an uphill battle trying to reverse the impact the illegally obtained wiretap evidence had on a GAL.

For this same reason, this risk of prejudice is not remedied by affording the adverse party the opportunity to cross-examine the GAL with regard to the GAL's reliance on the recording. In order to cross-examine the GAL in this regard, it would be critical to play the recording. While the recording would be reviewed solely to determine the credibility of the GAL's recommendation, it would likely be difficult for the judge, as the fact finder, to separate the substantive value of the recording from its purpose in determining the credibility of the GAL's recommendation. Inevitably, judges will rely on the evidence for its substantive value because "[i]n evaluating the expert's opinion, 'one cannot accept an opinion as true without implicitly accepting the facts upon which the expert based that opinion.'"[104] Again, because of the great impact that audio and video recordings have on an audience, in this case the judge, the adverse party's ability to cross-examine the GAL is just as likely to harm that party as it is to correct the risk of prejudice.

Further, the probative value of the recording is minimal in comparison

102. *In re* Marriage of Karonis, 693 N.E.2d 1282, 1286 (Ill. App. Ct. 1998).

103. *See* Sonja R. West, *The Monster in the Courtroom*, 2012 B.Y.U. L. REV. 1953, 1966 (2012) (analyzing how video has a greater impact on an audience than "any other form of presentation"); *see also* Bradley Parker, et al., *The Paperless Deposition*, UTAH BAR J. 36, 37 (Jan.–Feb. 2007) (stating that "[t]he impact of the video testimony in settlement discussions, hearings and trials is much greater than printed testimony").

104. Volek, *supra* note 85, at 974 (citing Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 585 (1987)).

to its prejudicial effect. For example, if one party to a child custody battle contends that the other party is harmful to the child, there will likely be other evidence and testimony to support this contention. This evidence could be introduced in court or relied on by the GAL in making a recommendation to the court without the need to also rely on an illegally obtained recording that could prejudice the GAL against one party. Since illegally obtained recordings are likely to be unfairly prejudicial, GALs, as expert witnesses, should not be permitted to rely on such inadmissible evidence.

3. Because of Their Distinct Role as the Court's Witness, GALs Should Be Prohibited from Basing Their Opinions on Inadmissible Wiretap Evidence Even if a Normal Independent Expert Witness Is Not

The GAL, unlike a normal expert witness, serves as the court's witness. Even if evidence obtained in violation of state or federal wiretap statutes could be relied on by a normal expert witness in forming an opinion, GALs, as the court's expert witness, should nevertheless be barred from reviewing and relying on such evidence in making a child custody recommendation.

GALs are not expert witnesses independently hired by one party to testify regarding an expert opinion. Rather, GALs are appointed by the court to investigate and make a recommendation to the court regarding the custody arrangement that would serve the children's best interests. Since GALs are meant to serve as neutral parties, unlike normal expert witnesses retained by one party, the court heavily relies on the GAL's recommendation. By allowing GALs to rely on inadmissible and illegally obtained recordings, the court is essentially circumventing the wiretap statutes' exclusionary rules. Consequently, GALs, as the court's expert, should be treated differently than normal experts with regard to their reliance on inadmissible evidence. GALs should not be permitted to circumvent an exclusionary rule by relying on illegally obtained wiretap evidence.

B. Permitting GALs to Rely on Inadmissible Wiretap Evidence Exacerbates the Concerns with Consistency and Accountability Regarding the GAL's Role

The concerns raised by many legal scholars regarding conflicts with the GAL's role are exacerbated by allowing GALs to review and rely on recordings obtained in violation of state or federal wiretap statutes. The role of the GAL enables the court to rely on the GAL's recommendation without a clear mechanism in place to ensure consistency or accountability for child custody determinations. Yet, critics repeatedly express con-

cern that lack of regulation of GALs "permits them to act on the basis of subjective, unconstrained bias."[105]

Given the great persuasive impact of audio and video recordings,[106] permitting GALs to rely on illegally obtained recordings increases the risk that a GAL's subjective bias will enter into the GAL's child custody recommendation. Because judges many times defer to the GAL's recommendation for what is in the best interests of the children, this bias is also more likely to enter into the final custody determination. Permitting GALs to review inflammatory recordings potentially has the effect of enabling the court to rely on the GALs' biases in making child custody determinations.

C. Permitting GALs to Rely on Inadmissible Wiretap Evidence Frustrates the Purpose of the Wiretap Acts

Permitting GALs to review and rely on illegally obtained wiretap evidence in making child custody recommendations to the court also frustrates the purpose of the wiretap statutes. The purpose of the Wiretap Act of 1968 was to protect individuals' privacy in the face of advancing technology.[107] This protection was critical to encourage society's interest in "the uninhibited exchange of ideas and information among private parties."[108] Congress was concerned about the ability of new technology to jeopardize "privacy of communication" among all individuals.[109] This same purpose also generally applies to state wiretap statutes.[110]

Significantly, "nearly 80 percent of reported wiretapping matters involve wiretaps within the family context."[111] The Wiretap Act protects against these violations of communication privacy by imposing harsh civil, criminal, and evidentiary penalties for its violation.[112]

105. Atwood, *supra* note 72, at 198.

106. *See* West, *supra* note 103, at 1966; *see also* Parker et al., *supra* note 103, at 37.

107. Gelbard v. United States, 408 U.S. 41, 48 (1972) (citing the Senate committee report that accompanied Title III).

108. Dorothy Higdon Murphy, *United States v. Councilman and the Scope of the Wiretap Act: Do Old Laws Cover New Technologies?*, 6 N.C. J. L. & TECH. 437, 441 (2005) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) (quoting the Brief for the United States)).

109. S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2154 (noting that "widespread use and abuse of electronic surveillance techniques" can jeopardize "privacy of communication"); *see* 18 U.S.C.A. § 2511 (West 2012) (prohibiting interceptions of communications by "any person").

110. *See* Travis S. Triano, *Who Watches the Watchmen? Big Brother's Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 416 (2012) (noting that the majority of states "tailor their statutes after the Federal Wiretap Act" and the other states' statutes are more rigorous).

111. Zerman & Mogerman, *supra* note 18, at 228 (citing NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE, ELECTRONIC SURVEILLANCE 160 (1976)).

112. 18 U.S.C. §§ 2511(4)(a), 2515, 2520(b).

DISC
RADFORD J. SMITH, CHARTERED
RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
MATTHEW FEELEY, ESQ.
Nevada State Bar No. 013336
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Telephone: (702) 990-6448
Facsimile: (702) 990-6456
rsmith@radfordsmith.com
Attorneys for Defendant

DISTRICT COURT
CLARK COUNTY, NEVADA

JUNE ALICE BINICK, Plaintiff, v. ROBERT JOSEPH BINICK, Defendant.	CASE NO.: D-14-506430-D DEPT NO.: H **FAMILY DIVISION**

PLAINTIFF'S SECOND SUPPLEMENTAL PRODUCTION OF DOCUMENTS PURSUANT TO NRCP 16.2

COMES NOW, Plaintiff, JUNE ALICE BINICK, by and through her attorney of record, RADFORD J. SMITH, ESQ., of RADFORD J. SMITH, CHARTERED, and hereby submits the following First Supplemental Production of Documents pursuant to NRCP 16.2.

Exhibit Number	Description	Bates Number
	Citi Bank Subpoena Response	
1.	Letter and Affidavit from Custodian of Records for Citibank, dated: 07-23-15	5334-5336

DOCKETING STATEMENT ATTACHMENT 13

Register of Actions

Case No. D-10-424830-Z

In the Matter of the Joint Petition for Divorce of: Sean R Abid and Lyudmyla A Abid, Petitioners.

§
§
§
§
§
§
§
§

Case Type:	**Divorce - Joint Petition**
Subtype:	**Joint Petition Subject Minor(s)**
Date Filed:	**02/04/2010**
Location:	**Department B**
Cross-Reference Case Number:	**D424830**
Supreme Court No.:	**69995**

Party Information

Petitioner	**Abid, Lyudmyla A** 2167 Montana Pine DR Henderson, NV 89052		**Lead Attorneys** **Radford J Smith, ESQ** *Retained* 702-990-6448(W)
Petitioner	**Abid, Sean R** 2203 Alanhurst DR Henderson, NV 89052	Male 6' 5", 230 lbs	**John D. Jones** *Retained* 702-869-8801(W)
Subject Minor	**Abid, Aleksandr Anton**		

Events & Orders of the Court

03/24/2015 **Minute Order** (1:15 PM) (Judicial Officer Marquis, Linda)

Minutes

03/24/2015 1:15 PM

- Upon review, the Court determines that Dr. Holland, or any other expert retained in this matter, may review the January 2015 audio recording and/or a transcript of the audio recording before conducting interviews in this matter. Dr. Holland may also review other relevant pleadings filed in this matter. The Court will make a determination as to the admissibility of the audio recording and/or transcript of the audio recording, in the event either party moves for its admission. Accordingly, the STATUS CHECK scheduled for 4/2/2015 at 11:00 a.m. is VACATED. A copy of this minute order shall be provided to both parties.

Return to Register of Actions