IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID, Appellant, v. SEAN ABID, Respondent.	Supreme Court No. 69995 District Court Case No. D-10-424830-Z

Appeal from the Eighth Judicial District Court

APPELLANT'S APPENDIX

VOLUME 10

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TRANS

EIGHTH JUDICIAL DISTRICT COURT

FAMILY DIVISION

CLARK COUNTY, NEVADA

In the Matter of the Joint Petition for Divorce of:	
SEAN R. ABID and LYUDMYLA A. ABID,	Case No. D-10-424830-Z
Petitioners.	Dept. F

BEFORE THE HONORABLE LINDA MARQUIS
DISTRICT COURT JUDGE

TRANSCRIPT RE: ALL PENDING MOTIONS

THURSDAY, JUNE 25, 2015

APPEARANCES:

THE PETITIONER:	SEAN R. ABID
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THE CO-PETITIONER:	LYUDMYLA A. ABID
FOR THE CO-PETITIONER:	MICHAEL BALABON, ESQ. 6260 S. Rainbow Blvd., Ste. 100 Las Vegas, Nevada 89118 (702) 450-3196

LAS VEGAS, NEVADA THURSDAY, JUNE 25, 2015

PROCEEDINGS

(PROCEEDINGS BEGAN AT 11:18:26)

MR. BALABON: Good morning.

THE COURT: Good morning. This is the matter of Sean Abid vs. Lydmya (sic) Abid, D-10-424830-Z. The parties are present. I apologize for mispronouncing your name again. I'm sorry. Counsel is present. Counsel, your appearances for the record.

MR. JONES: John Jones, bar number 6699, appearing on behalf of the Plaintiff.

MR. BALABON: Michael Balabon, bar number 4436, appearing on behalf of the Defendant.

THE COURT: All right. This is Dad's motion regarding the summer visitation schedule. And you can have a seat. Dad's requesting primary physical custody and summer visitation with a visitation schedule for Mom. Currently the parties have joint legal custody and joint physical custody and there's a visitation order set out in the meantime.

We have an evidentiary hearing that is scheduled for August 14th already. And what we received and what was attached, the Court received from Dr. Harland -- Holland, and what was attached to counsel's request was a letter from Dr.

Holland regarding parts of her interview that she conducted.

Now just this morning I was handed Dr. Holland's full report and I have not had an opportunity to read it because I -- they -- I was already on the bench doing cases when it was received via fax this morning and they brought it down to me, so I haven't looked at it.

Counsel, I understand that you were both provided with that document this morning as well --

MR. BALABON: Yes, Your Honor.

MR. JONES: Yes, Your Honor.

THE COURT: -- by my department. Have you -- and I'm going to -- it -- it's pretty long. It looks like it's 15 pages. Have you had the opportunity to read it?

MR. JONES: I have.

THE COURT: All right. And have you, coun --

MR. BALABON: We've had just a cursory review, Your Honor.

THE COURT: Okay. All right. I'm going to talk to counsel briefly in the hallway and then we'll come back on the record.

(COURT RECESSED AT 11:20 AND RESUMED AT 11:53)

THE COURT: We're back on the record in the Abid matter -- Abid matter. I had the opportunity to review Dr. Holland's report and to speak with counsel in the hallway.

First, there's some administrative issues we need to deal with. The -- there is a evidentiary hearing date scheduled in this matter and that is for August 14th. I'm asked to remind you that that trial is set to start at 10:30 so that counsel -- it's a strange start time, but I wanted to remind you of that.

We have Defendant's motion to suppress pending. Plaintiff's counsel wants an opportunity to oppose that and I'm going to set a time for arguments on that motion now. I -- my intention to set that certainly before the trial date. I'd like to set it at a time where counsel has sufficient time to argue that motion. I am going to set it for Thursday, August 13th. Counsel -- or, oh, I'm sorry, no, no, no, the trial's on the 14th. I don't want to do that. Sorry. I'd like to set it for Thursday, July 16th at 9:30.

Will you block out all of the nines and all of the tens after we add that? All right.

And I'm blocking out some time afterwards so that we -- we have some additional time to argue that, that motion to suppress. Today pending is Dad's motion regarding summer visitation and Mom's opposition and countermotion. The countermotion deals with those issues of suppression and -- regarding the recording, and so those will be deferred to that July 16th where we have more time to get into that.

Now as to Dad's motion regarding summer visitation, I

had the opportunity to review Dr. Holland's report in its entirety. Counsel, is there anything in addition to Dr. Holland's report in your motion that you want to let me know today and what's your proposal?

MR. JONES: Well, Your Honor -- and I know you've read everything else, so thank you for that. The only way to prevent the further erosion of the relationship between the child and the dad in this case is to alter the time share. All of the studies, all of the psychological journals, they talk about in cases of -- and you don't have to call it alienation, you could call it programming, you could call it de-programming, you could call it manipulation. In all of the cases involving studies of that type of behavior on a child, the answer is to remove the child as much as possible from the alienating environment and place the child in the alienated environment. I mean, in many cases, when it's really bad, the -- the alienated parent gets six months of contact before the other side even starts getting visitation back to recover the relationships that's been destroyed.

When I read this report, it seems like you would have to, even between now and August -- I mean, Dad's got his block of -- of vacation, Mom's almost used up the same amount that Dad's going to get.

THE COURT: And tell me, under the current visitation

agreement, Defendant's entitled to six weeks of summer vacation.

MR. JONES: Six weeks consecutive; Dad --

THE COURT: And --

MR. JONES: -- four.

THE COURT: -- four weeks, okay.

MR. JONES: This year, in even numbered years, I think Dad gets six and Mom gets four.

THE COURT: Oh, all right. I understand.

MR. JONES: So from the standpoint of ensuring that no further erosion can take place, you know, the proposal I believe we made was, you know, Mom having every other weekend. Certainly another three weeks in this environment can only do more damage. And -- and the thing that maybe got lost in the whole recordings mess is probably the single greatest point of alienation in this relationship is that Dad's rules don't permit Call of Duty, Mom's rules permit Call of Duty for a five year old, now six, and she's used that, that don't tell him what we do in our house and we'll do whatever we want versus the rules in Dad's house as a means to put a wedge between the child and Dad.

So -- and that's ignoring the negative impacts of Call of Duty, which are clearly reflected in the report. I mean, when my client sends a text and says, hey, he said something about playing Call of Duty at your house. I really think you

should read this article. I don't think it's in his best interest, you know, we should talk about this. And for her to say too bad I'm doing it anyway. And now for the child to be exhibiting the behavior that the studies warn about at age six, I'm sorry, that's a basis -- ignore the alienation, the fact that Mom allows Call of Duty is a basis to alter the time share so that the damage can't be done to the child on that issue as well. And sure, Mom will stand up and say, oh, I'll stop letting him play Call of Duty, but then again, what she would -- could do or what she has done is allow him to play and tell him not to tell his dad, and not to tell anyone else -- more likely than not, including Dr. Holland.

Obviously the Court has broad discretion in trying to protect the child's best interest. It certainly could not be prejudicial to say, all right, until we get to trial, we're going to give Dad his time, his four weeks, but we're going to cut Mom's time short by two weeks. And that way Dad would have six, Mom would have four. And if you determine that we are not successful in our motion to change custody, you change the order so that she gets six weeks in even number years and he gets four weeks in even number years.

I mean, there are ways to protect this child without prejudicing Mom. I think we will prevail in our motion at the time of trial, but if you alter the time share, you could make

it up next summer. So it's not really earth shattering, but it could be earth shattering to allow Sasha to remain in that environment.

And, you know, whether you alter the time share so that it's every other weekend for the next three weeks or two weeks until Dad takes his vacation, or whether you change it to four to six, either way, the reduction of time in the alienating environment and the immersion in the alienated environment is necessary based upon this report, regardless of the tapes. And believe me, when Dr. Holland testifies on August 14th, I'm going to ask her questions regardless of the tapes, regardless of whether you reviewed those. Based solely upon what Sasha told, based solely upon Sasha's behavior, what are your concerns. What is this, what is that.

So I believe you'll allow the tapes in and I believe she'll get to talk about the tapes. But even if she doesn't, this report makes clear that the tapes are just a microcosm of what's really going on. And I guess it's up to you -- I understand that we're this far from trial and we're this far from Dad getting his vacation, but after getting the letter from Dr. Holland, which she felt strongly enough to send you a letter, even though her report was coming two weeks early -- you know, later, she felt strongly enough about it to do that.

If we wouldn't have filed a motion, you might sit on

the bench when we come here August 14th and say, gee, this is pretty bad. Why didn't Dad come into court and ask for emergency relief; does he really not care? I -- I took the letter as a -- a request by Dr. Holland for you to act to stop the alienation from going forward. I'm sure she'll clarify that at her -- at her testimony I think she very clearly clarified it in this report. She wasn't asked for recommendations, but she'll certainly get to talk about what her findings are and what the, you know, pathological issues and concerns are.

So the request is simply for you to choose how we limit the contact with Mom and increase the contact with Dad between now and the time he takes his vacation. There are lots of options, but I think the only way, having six weeks of contact without contact with Dad -- meaning without physical contact, in his home -- the fake house, in the fake house -- not having contact, is just going to cause more damage.

And it may already be irreparable. I mean, this is pretty disturbing, but it's only going to get worse if she's allowed to have three more weeks after she's already had three weeks.

THE COURT: Thank you, counsel. Counsel?

MR. BALABON: Well, Your Honor, I think a question that needs to be answered is, let's assume that there is some sort of parental alienation that was going on back in January.

Does -- is -- is it the Court's position in terms -- to remedy that situation -- it's kind of like drug use, when you have drug cases that come before you. Are you just going to terminate the drug users rights or are you going to -- are you going to give that drug user a chance to go into counseling, to be tested, and to get clean, and then restore him back to his rights? Does the Court believe in any kind of redemption or that people are incapable of changing?

In this case, without going into the report at least initially, I think the Court really needs to take notice of the fact that Lyuda recognizes that she's in a high conflict situation. Lyuda is faced with a -- an opposing parent that literally despises her and literally despises her husband Ricky. So she's met with contempt in any type of communication that -- that she has with him.

I think if you look at Dr. Paglini's report -- at Paglini's report, it indicates that Mom, when excited or emotional, had admitted to making inappropriate statements. I don't know that the situation was necessarily changed in January of 2015 as that which existed in -- in 2013. He found that -- he -- he did an extensive review of this case and he found that although these -- these statements were made, they never amounted -- he didn't find that Mom specifically intended to try to alienate Sasha from his father. And that's our position now.

Lyuda is in a situation, as I said, in a high conflict case. There's fault to go around to both parties. I don't think there's any question, and I don't think there's any question that you're going to see that at the evidentiary hearing. When you hear her testimony as to what she's had to deal with, we will detail several instances where Lyuda has -- has -- has actively sought to co-parent in a fair and reasonable manner with Sean.

The only reason we're here is because for the past -- in -- in 2014, up until November, when she got off early, he allowed to pick up the child when she got off work, and then all of a sudden in November he gets angry and he terminates that right and says you come back at 5:30. Is that reasonable on his part? Is that reasonable co-parenting? This is what she's dealing with.

So she understands and I explained it to her that she's in a high conflict situation with her ex. She needs to do something so that she can learn how to deal with that effectively. So that's why she voluntarily, not a -- not a demand of this Court or order of this Court, voluntarily enrolled in and attended every session of the UNLV cooperative parenting program. This has a mitigating effect on the type of emotional behavior that we might see present or -- or that was present in this report.

For the record, we object to the report, we object to the tape, and we object to this report on the basis that the report was based primarily or the -- on evidence that was obtained illegally. So just for the record, we object to the report. We believe that the report unnecessarily prejudiced the evaluator and made her seek out behavior that she felt was consistent with the -- with the information that she heard on the report.

We further object to the report on the basis that now we're told that the balance of the tape, other than what he was provided, other than what he provided to me and what he provided to Dr. Holland, the balance of it has all been erased, so there's not context. That is fundamentally unfair to my client. Fundamentally unfair. The tape was illegal. It has prejudiced this evaluator and I -- it's our position, we can argue it at trial or at -- at the suppression hearing, but it's our position that this can't come in. I would be -- I strenuously object to any action being taken adverse to my client until this Court makes a determination as to the legality of the tape and the legality of allowing Dr. Holland to testify in this case. I understand the issues from their perspective; we respectfully disagree.

My client has successfully completed that UNLV cooperative program, Your Honor. Judges don't send people there

for no reason; they send them there so they can learn how to deal with the situation where you have a high conflict case, and that's what we have in this case. She's completed that program. So unless you feel that the program is useless, I think any kind of behavior that they're so concerned about is mitigated.

What would you do in a situation if she didn't go and you find that there is substantial parental alienation? Do you -- do you just punish the alienator and just terminate her rights or severely restrict her rights, or is the best interest of the child better served by maintaining contact with both parents, but yet deal with the conduct by the offending parent getting counseling to deal with it so that you can maintain contact with both parents. It's the stated policy of the state of Nevada that both parents have equal contact, joint legal, joint physical custody. These parties have had joint legal, joint physical custody for four years. In fact, for a year and a half or two, according to my client, she had primary physical custody. How is this all of a sudden now such a huge issue? This was an isolated incident that occurred that's reflected on that tape. There is not any systematic parental alienation going on in that home.

I think the Call of Duty thing is kind of a red herring, Your Honor. Really? We're going to -- we're going to change custody because one parent allows a video game and the

other doesn't? Notwithstanding the fact that there's a factual dispute on that issue because he initially found about Call of Duty while he was playing with the friend of the son of the Plaintiff's friends. That's how he even found out about it; he was playing it there.

There's a factual dispute. We can't draw any kind of conclusions based on this report, based on what this child said, that Dad's house is a sand house or it's the fake house but Mom's house is the mountains. Mom's (sic) doesn't live in the mountains. Does that mean that the mountains are better than the sand house? Are we going to draw any conclusions today and -- and change her custody rights based on that? I don't think so, Your Honor.

It's indicated in the report that the child has indicated he likes going over to his Dad's house. There -- he's doing well in school. He's well-adjusted. There's -- there's no --

THE COURT: He's starting first grade in the --

MR. BALABON: He's in kindy-garden (ph) but --

THE COURT: He's starting --

MR. BALABON: -- he's mastered --

THE COURT: He's starting first grade in --

MR. BALABON: Yes.

THE COURT: -- the fall? Okay.

MR. BALABON: He's mastered all of his subjects. There's no indications of behavior problems.

THE COURT: Well, there certainly is --

MR. BALABON: Well, not --

THE COURT: Well --

MR. BALABON: -- severe.

THE COURT: He could only sit still for 15 second and had to be re -- redirected.

MR. BALABON: Can we --

THE COURT: I --

MR. BALABON: Can the --

THE COURT: I'm conc --

MR. BALABON: I'm sorry.

THE COURT: I'm concerned about him moving into fist grade. I'm concerned about this child. I'm concerned about developmentally where he's at.

MR. BALABON: Well, and I -- my client is concerned as well, which is why she sought training to deal with a high conflict resolution. I think the Plaintiff should be ordered too to complete the -- the UNLV cooperative parenting program. Maybe if he does that we won't be back here next year. So that he can learn how to deal in a conflict resolution -- a high conflict case where he literally despises the -- the biological mother and her new husband. I think he needs to learn how to

deal with that, like my client has learned to mitigate the behavior, to shield the child from the conflict. That's the purpose of that program, Your Honor. It is an effective program and all the judges use it and there's a reason for that. And she's completed that program since the date of the offending -- allegedly offending comments that were made. My client alleges these are isolated incidents, that there's no systematic pattern or attempt. I think at this stage in the proceedings, it's way -- it's -- it's too early to restrict my client's contact.

The -- the -- with regard to her vacation, she's got three weeks left. My client agrees is what it says is additionally during an extended stay with either parent, Sasha should be allowed daily contact with the other parents via video conference. We're happy to do that. That's not a fundamental change to her custody rights without a full hearing, which is what they're asking for.

And we need to make a ruling on the admissibility of the report --

THE COURT: And I've set --

MR. BALABON: -- and the admissibility of the tapes.

THE COURT: I've set the time for that -- that to happen. As to today, we're talking about his motion regarding --

MR. BALABON: I think that --

THE COURT: -- summer schedule.

MR. BALABON: -- it's premature. I think --

THE COURT: Okay.

MR. BALABON: -- the fact that she has -- has completed the UNLV cooperative parenting program is something that the Court strongly needs to consider. You can't call it a band-aid. That's not just a band-aid, Your Honor, that's an extensive course. How many --

MS. ABID: Sixteen hours.

MR. BALABON: Sixteen hour --

MS. ABID: It's eight weeks.

MR. BALABON: -- course.

MS. ABID: Eight weeks class.

THE COURT: I understand. All right. Counsel, did you -- briefly.

MR. JONES: I just had one comment. This whole idea that the report's tainted by the tapes, what you had was the roleplaying with figures, paragraph at the bottom of Page 4. He was presented with figures and asked to select ones that represent his family members. I think it's interesting that he doesn't even select one for my client's wife, but that's a whole different aspect of the alienation. But then asked questions. Not -- not questions like does your mom say bad things about your dad.

MR. BALABON: Because he delet -- he deleted it.

MR. JONES: Nothing leading. I mean, I didn't see any questions asked based upon what was on the tapes, not once by Dr. Holland. But here's the most important part, Sasha identified his father as a person who likes the cat and dislikes no one. He's saying that my client despises Mom. Okay. Conversely, when asked to identify who his mother dislikes, Sasha's spontaneously responded my real dad. But prior to that I -- I left out a sentence. Sasha identified his mother in an overly positive light, acknowledging that she is the person who listens, who gives him affection, who helps him, and with whom he would like to spend all of his time. I'm sorry.

THE COURT: Thank -- thank you, counsel. I've read the report. I -- I take it into consideration and it weighs heavily with the Court that the Defendant has completed that program. It's a good program and I'm happy that she on her own volition went to do that.

Nobody is make -- asking me to make this order today, but I'm making it until August 14th. At either house, Sasha will not be allowed to play Call of Duty. Mom acknowledges in her interview that she allows Sasha to play Call of Duty online for about 30 minutes a day.

There was reference to another video -- another video game --

MS. ABID: There is no (indiscernible).

MR. BALABON: Shh, shh.

THE COURT: Oh, no, no, no.

MR. BALABON: Don't interrupt.

THE COURT: A night at Freddy's?

MR. JONES: Five Nights at Freddy's. So let me -- let me say this. The Court is very concerned that -- and I think Dr. Holland sums it up well in that it's not uncommon for young boys to want to play video games, and that, you know, Sasha is very young, he's going into first grade next year. His preoccu -- that's me speaking -- his preoccupation with fantasy and violence was considered excessive and inappropriate for his developmental level. Research supports that chronic exposure to violent video games is associated with behavioral and emotional difficulties and this is concerning given his difficulties with sustained attention -- remember he couldn't sit for long than 15 seconds -- and aggression, his struggles remaining on-task during non-preferred activities, and his current exposure to significant familial discord.

Furthermore, spending too much time playing video games limits opportunities for developing age appropriate social and emotional regulation skills needed for coping with life stressors, as well as imag -- managing emotional responses to associate it with such stressors. Case in point, when he was

asked to stop playing imaginary Call of Duty during the evaluation he refused and became physically aggressive, kicking the playhouse and throwing toys.

Now I understand that he is a -- a young boy who's going into first grade, and I understand that boys going into first grade, and girls going -- that at that age they play -- play a lot of fantasy. And they may call that game Call of Duty even though they don't really understand what that means. But by Mom's own admission, she's allowing him to play it 30 minutes per day here -- and that he's playing Xbox Live.

From now until the date of the evidentiary hearing, he is only -- he's not allowed to play Xbox Live, any game. He's not allowed to play Call of Duty or Five Nights at Freddy's House (sic) or whatever it is. He's not allowed to play any game that's rated any rating above what is appropriate for kindergartners and first graders.

So he can be allowed to play those developmentally appropriate video games or iPad apps that deal with words and letters and games and reading and all of those things, but he may not -- I'm very concerned about the violent video games.

I am not taking into consideration the portions of this report that deal with the recording. At this point, because that issue is -- is still out there and I understand that you're concerned that perhaps that recording tainted Dr.

Holland's view in all of this case, but I'm very concerned with his aggressive behavior and the violent video games at that point.

And so, Dad, I'm going to ask you, even when Sasha is with you, he's not to be allowed any access to violent video games. That's at both houses, all right? And if that means that while he's with friends -- that you have strictly monitor that. And if he goes on a play date or he's at a family member's home, that each -- each party ensure and make that supervising adult understand that he's simply not allowed to have access to these games moving forward. All right?

So that's the easy part. I -- there's been a request by Dr. Holland and by Plaintiff's counsel to change the summer visitation schedule. And I don't think that any request to change that is terminating the Defendant's rights or severely impacting her visitation rights. She's finished three of her weeks of her six. Defendant's enti -- Plaintiff's entitled to four weeks under the visitation agreement and then next summer that reverses.

What I am going to do is this. I am going to -- she's finished three weeks. She has an additional three weeks. I am going to allow her to finish one more week. She's going to return Sasha two weeks early, so that would reverse today's -- the current visitation order. If at evidentiary hearing I make

a decision that does not change custody or visitation, I would switch that back so that next summer Mom would have six weeks and Dad would have the four weeks. And so she'll be allowed the additional one week so that she has a total of four weeks.

What I am going to do is make a order regarding contact between the parties. And -- and I recognize this is a high conflict case and I do not -- and I generally don't like making a specific order about Skype or Facetime contact, but I think that we need it in this case. But I want counsel and the parties to understand that I know Sasha can't sit still, he's a little boy. All right?

MS. ABID: Yeah, he can.

THE COURT: But he -- it -- that a Skype or Facetime visit is not going to be 20 minutes long. Okay? And that sometimes it might be two minutes and sometimes it might be five minutes and one day you might get 10 minutes. I get that, all right. So --

MS. ABID: Your Honor, can I ask question?

THE COURT: Hold on. Hold on. So that -- three times per week, all right? And on -- you know, three times per week. Let's set it on Monday, Wednesday, Friday, Sasha is going to have some Facetime contact with the other parent.

I find it helpful, especially for children at this age who it's difficult to sit down and have that Facetime contact,

that sometimes that be done in the car while you're driving because Sasha is in his car seat and he can't go anywhere and there's not toys and the TV in his playroom and all that stuff. You know, that's a good time to force him to have that Facetime contact. Now I understand that the other parent's going to be in the car and that may be uncomfortable for you, but that's what we're going to do. So if you can't do it another way, you'll do it in the car. All right?

Okay. Anything -- and that -- that's going to be a temporary order --

MR. JONES: Right.

THE COURT: -- just through the time of the evidentiary hearing. Yes, ma'am?

MS. ABID: Your Honor, I find out recently that our school where Sasha going today is going to change nine months to 12 months.

THE COURT: Okay.

MS. ABID: And Sean and me, we live five minutes away from each other, it's the same zip code. And I used to live with him, and the school which is today attached to my house, used to be attached to his zone. So school which is zoned to my house is going to stay nine months. And school where he is today is going to be 12 months. And I asked Sean, I sent him message, said listen, (indiscernible) is very material

basically. Next year four weeks vacation or six weeks vacation will not be able to --

THE COURT: Won't happen because of the --

MS. ABID: Yeah.

THE COURT: -- 12 month --

MS. ABID: So my question is today, if we're going to have hearing on 14, it's going to be too late to register Sasha in nine month school. And I believe it's beneficial for both of us. Sean's going to have nine -- six weeks next year, so he's going to go to Iowa. If we have 12 months school, he'll be stuck in Las Vegas.

THE COURT: Mr. Jones, is -- isn't your client a counselor in a nine month school?

MR. JONES: Are you nine months now?

MR. ABID: Yes.

THE COURT: All right. So is it beneficial for your client? Does he prefer a nine month school? I mean, you know that the year-round school makes things much more difficult.

MR. JONES: I think the only reason that he was inclined to have Sasha attend the school in his zone is he's got two other children who will eventually --

THE COURT: Attend the same school.

MR. JONES: -- be attending the same school and if you're picking up --

THE COURT: All right. This -- this issue is not on calendar today, however, I -- I see that it is a problem and it --

MS. ABID: Yes.

THE COURT: -- is an issue. So I'm --

MR. JONES: I would be happy to --

THE COURT: So --

MR. JONES: -- discuss it with him.

THE COURT: -- we'll talk some more, we'll get those calen -- exchange those calendars. The 12 month school also changes some, you know, other issues of what track you're on and --

MR. JONES: Right, right, right.

THE COURT: -- all -- you know, all those things and what date we start. Let's confirm that it is in fact for this school year -- or is it next school year?

MS. ABID: It's this coming next school year -- year.

THE COURT: This school year --

MR. BALABON: This August, yes.

THE COURT: -- is going to 12 months.

MS. ABID: This Septem -- yes, this 12 months is coming this August, yes, correct.

MR. JONES: How about if we do this, Judge.

THE COURT: Can we -- if --

MR. JONES: Since this has just been raised, I'll be happy to talk to him, get the data on the two schools, and if we need to come in and argue it on July -- or on --

THE COURT: On the date that I gave you for the --

MR. JONES: -- on the --

THE COURT: -- suppression motion?

MR. JONES: -- on the suppression motion, July 16th, that will still give us enough time.

THE COURT: All right. So that you can get the school schedules --

MR. BALABON: I'm good with that.

THE COURT: Is that all right? And --

MS. ABID: Yes.

THE COURT: -- perhaps counsel might be able to work this out --

MR. BALABON: Hopefully.

THE COURT: -- we'll see, because --

MR. JONES: Oh, my client -- I like clients who are aware of the contents of the order. He says that our current custodial order gives him choice of school, period. So I guess they'd have to file a motion to change that.

THE COURT: Well, it may change the visita --

MS. ABID: But we live in the same --

THE COURT: Okay.

MS. ABID: -- zip code.

THE COURT: No, no, but it affects the visitation schedule later. So this is good information --

MR. JONES: We can --

THE COURT: -- that we all need.

MR. JONES: Right.

THE COURT: So I appreciate that.

MR. JONES: And we can address that on the 16th, Judge.

THE COURT: So, counsel, we'll talk about that and with -- keeping in mind that the Clark County School District is changing in -- in -- dramatically in the next couple of years.

MS. ABID: Yeah.

THE COURT: All right.

MR. BALABON: Just one more issue, Judge. Is it their offer of proof today that the original tape has been deleted and that the only tapes that are going to be the subject matter of a -- of -- of suppression or admission at the hearing is going to be the tapes that he has selectively --

THE COURT: Let me --

MR. BALABON: -- edited.

THE COURT: -- ask another question. Does the full tape exist, counsel?

MR. JONES: I don't -- it's my understanding it does not. Meaning when he got the recording device and he played it, he only preserved the things that Sasha was on because that's what he believed --

THE COURT: Okay.

MR. JONES: -- he was allowed to record.

THE COURT: Has everything that Sasha is on been produced?

MR. JONES: Yes.

THE COURT: Everything Sasha is on has been produced.

MR. JONES: Correct.

THE COURT: The remaining parts of the recording do not exist.

MR. JONES: Right.

MR. BALABON: They've been deleted and --

MS. ABID: Your Honor --

MR. BALABON: -- we obviously have a huge problem with that --

MS. ABID: Yes.

MR. BALABON: -- because then --

MR. JONES: They were deleted before the pleadings --

MS. ABID: Your --

THE COURT: No, no, no.

MR. JONES: -- were even filed.

THE COURT: So -- so that we have fact -- so we understand that facts and we're prepared to --

MS. ABID: Yes.

THE COURT: -- argue moving forward.

MR. BALABON: And so then I don't --

MS. ABID: Yes.

MR. BALABON: -- need to do discovery to -- for -- to produce --

MR. JONES: No.

MR. BALABON: -- the original tape. It's -- they've admitted that it has been --

MS. ABID: Altered.

MR. BALABON: -- deleted, altered --

THE COURT: If it exists --

MR. BALABON: -- period.

THE COURT: -- Mr. Jones, if the full tape exists, I'm ordering that it be produced.

MR. JONES: Absolutely.

THE COURT: All right? But it's our understanding it doesn't exist.

MR. JONES: Right. The -- so with it being four weeks, the exchange, would that be July 3rd because June 5 was when vacation started. I just want to make sure that we have an understanding as to when --

THE COURT: June 5 vacation started. One, two, three, four. So the morning of Saturday the 4th.

MR. JONES: Okay. And I'm going to mention this on the record now and maybe Mr. Balabon can -- can speed up the process. I'm going to want to know the Xbox Live gamer tags and/or login information for I'm assuming everybody in that house who has access to the Xbox. So if that's something he can eventually inquire of other people in the house, that would be great. I'll do a --

THE COURT: Thank you.

MR. JONES: -- formal request.

MR. BALABON: Say what?

THE COURT: So Xbox --

MR. BALABON: I don't understand.

MR. JONES: I want to be able to --

MR. BALABON: I'm sorry, I don't play Xbox. I don't know --

MR. JONES: I want to send a subpoena --

MR. BALABON: -- what any of that means.

MR. JONES: -- to Xbox. Xbox meticulously tracks when you log on and when you log off.

THE COURT: It's an inter --

MR. JONES: And when a representation is made that anybody in the whole world, in the history of the world, only

plays Xbox for 30 minutes, I know it's not possible. I mean, I know it's never only been 30 minutes, so I want to prove that certain representations were false, and the way I do that is send a subpoena to Xbox.

MR. BALABON: Well, that's just a waste of time and money because she has other people in the house that play Xbox.

THE COURT: All right. Okay. So Xbox --

MS. ABID: Yeah.

THE COURT: -- Xbox Live is internet based. When a user goes on, they go on under their profile --

MR. JONES: Uh-huh (affirmative).

THE COURT: -- right -- and it has a password --

MS. ABID: It's my daughter.

THE COURT: -- and all those things.

MS. ABID: It's my daughter's

MR. BALABON: Does your son --

THE COURT: And so --

MR. BALABON: -- even have --

MR. JONES: Oh, he only uses --

MR. BALABON: -- a profile?

MS. ABID: No --

MR. JONES: -- the daughter's?

MS. ABID: -- he doesn't.

MR. BALABON: He doesn't even have a profile.

MS. ABID: He doesn't have profile.

MR. JONES: Okay. Well, then I'd like the daughter's name and I'll just get that data and the Court can --

MS. ABID: I'm sorry, but my daughter has rights to play.

MR. BALABON: Shh, shh, shh, shh, shh.

MS. ABID: Right?

MR. BALABON: Shh, shh.

MS. ABID: When he's not home.

MR. JONES: The -- the Court can then glean --

THE COURT: Hold on. That will be the subject of any discovery requests --

MR. JONES: Okay.

THE COURT: -- that you're making, just a --

MR. JONES: Thank you.

MR. BALABON: Thank you, Judge.

THE COURT: Thank you. Thank you.

MR. BALABON: Did you want this back, the report?

MR. ABID: No, the judge -- judge said go ahead and keep the (indiscernible).

THE COURT: You know what, I'm going to allow Mr. Jones and counsel to keep Dr. Holland's report.

MR. ABID: Thank you very much.

THE COURT: All right. They'll keep it in --

MR. JONES: (Indiscernible) and --

THE COURT: They'll keep it in their possession. They will --

MR. JONES: -- while we're still on the record, I don't know if the Court cares or if Mr. Balabon cares, there were quotes from the Paglini report in the opposition that was filed. The -- the rule, the local rule about reproducing reports actually says and no part thereof. So I just -- I've had (indiscernible). The reason I know this is someone chastised me and asked for sanctions because I put one quote from a report in a pleading. I just -- I don't know how the Court feels about whether that paragraph should be stricken, but I also wanted to make sure Mr. Balabon knew that the rule is -- is far more broad than we would otherwise think.

THE COURT: I understand that and I understand the rule might be poorly worded, but for this case, moving forward in this case, let's not quote directly from any of Paglini's or Holland's report moving forward.

MR. JONES: Thank you.

THE COURT: Thank you.

(PROCEEDINGS CONCLUDED AT 12:27:54)

****

ATTEST: I do hereby certify that I have truly and correctly transcribed the digital proceedings in the above-

entitled case to the best of my ability.

/s/ Kimberly C. McCright
Kimberly C. McCright, CET
Certified Electronic

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID, Appellant, v. SEAN ABID, Respondent.	Supreme Court No. 69995 District Court Case No. D-10-424830-Z

Appeal from the Eighth Judicial District Court

APPELLANT'S APPENDIX

VOLUME 9

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TRANS

EIGHTH JUDICIAL DISTRICT COURT

FAMILY DIVISION

CLARK COUNTY, NEVADA

In the Matter of the Joint Petition for Divorce of:	
SEAN R. ABID and LYUDMYLA A. ABID,	Case No. D-10-424830-Z
Petitioners.	Dept. F

BEFORE THE HONORABLE LINDA MARQUIS
DISTRICT COURT JUDGE

TRANSCRIPT RE: ALL PENDING MOTIONS

WEDNESDAY, MARCH 18, 2015

APPEARANCES:

THE PETITIONER:	SEAN R. ABID
FOR THE PETITIONER:	JOHN JONES, ESQ. 10777 West Twain Ave., Ste. 300 Las Vegas, Nevada 89135 (702) 869-8801
THE CO-PETITIONER:	LYUDMYLA A. ABID
FOR THE CO-PETITIONER:	MICHAEL BALABON, ESQ. 6260 S. Rainbow Blvd., Ste. 100 Las Vegas, Nevada 89118 (702) 450-3196

LAS VEGAS, NEVADA WEDNESDAY, MAY 18, 2015

P R O C E E D I N G S

(PROCEEDINGS BEGAN AT 10:53:50)

THE MARSHAL: On record in the matter of Abid.

THE COURT: Good morning, good morning.

MR. BALABON: Good morning.

THE COURT: This is the matter of Sean Abid vs. Lydumyla (sic) Abid -- and I apologize, I mispronounced that -- D-10-424830-Z. Counsel, please correct me.

MR. BALABON: Lyudmyla.

THE COURT: Say it again.

MR. BALABON: Lyudmyla.

THE COURT: Oh, my goodness. Beautiful, and I apologize. Counsel, your appearances for the record.

MR. JONES: John Jones, bar number 6699, appearing on behalf of the Plaintiff, who's also present.

MR. BALABON: Michael Balabon appearing -- 4436 -- appearing on behalf of the Defendant, who is present.

THE COURT: Good morning, counsel.

MR. BALABON: Good morning.

THE COURT: Good morning. I read all of your pleadings, submissions of authorities, declarations. So, counsel, it's your motion, go ahead.

MR. BALABON: Thank you, Your Honor. How this case proceeds necessarily depends upon this Court's ruling on the -- on the alleged tape. As a preliminary matter, we have not been provided with a copy of the tape. We have not been provided with an actual transcript of the tape. We believe the -- the taping -- the placement of a recording device in the Defendant's home by the Plaintiff was a violation of both federal wire tap laws, it's also a violation of the Nevada statute.

THE COURT: Can I ask you this? Do wire tap laws apply only to wires?

MR. BALABON: Well --

THE COURT: So telephone. I'm just asking. Maybe it doesn't. That's my question to you.

MR. JONES: I believe it does. There is a separate statute for surreptitious recordings --

THE COURT: Recording, sure.

MR. JONES: -- of -- of --

THE COURT: In Nevada.

MR. JONES: -- conversations you're not a party to.

THE COURT: Yeah, on the telephone.

MR. BALABON: It's -- it's NRS 200.650.

THE COURT: Now, I'm -- I'm really familiar with all this stuff.

MR. BALABON: Okay. Well, that law prohibits the placement of a recording device in a party's home without the party's consent. The issue -- one issue that needs to be resolved by the Court is whether or not 200.650 is a two-party consent statute or a one-party consent statute. I think counsel would agree, the Court should probably agree as well, that the vicarious --

THE COURT: Well, on the telephone it's two-party consent. We can agree as to that, right?

MR. JONES: I absolutely agree that --

THE COURT: Counsel, you can agree that -- and I'm sorry to interrupt you, that's how I am. I just --

MR. BALABON: That's fine, Your Honor.

THE COURT: I just apologize for myself all the time.

MR. BALABON: Our state provides that the -- the telephone tapping -- and I believe that's NRS 620 --

THE COURT: Is a two-party con --

MR. BALABON: Is a two-party consent.

THE COURT: Or it's a felony.

MR. BALABON: Correct.

THE COURT: Okay. Now in-person --

MR. BALABON: Well, the issue -- that's the issue. Is -- does -- 650, is it a one-party consent statute or is it

a two-party consent statute. If it's a two-party consent statute, our analysis ends there with regard to whether or not the Court's going to adopt the Vicarious Consent Doctrine. The only way that this comes in, Your Honor, is if the Court adopts the doctrine and other conditions are satisfied. We -- we allege that those conditions are not satisfied. We allege that 650 is a two-party consent doctrine. I cited the -- the cases. You've got the Mclellan vs. State case, it's 124 Nev. 263.

THE COURT: Do you know who the lawyer was on that case?

MR. BALABON: I do not.

THE COURT: It might have been me. Shaun (ph) Mclell --

MR. BALABON: Well --

THE COURT: Yeah, that's all right.

MR. BALABON: Under Mclellan, although the language isn't absolutely clear, it just says Nevada law there are two methods by which a communication may be lawfully intercepted and this admissible. First, both parties to the communication consent. Well, they didn't make a differ -- they didn't make a distinction in -- in Mclellan between intercepted wire or an intercepted in-person communication. So there therefore, consistent with the reasoning in Allstate, this Court needs --

we request a ruling that Nevada is a two-party consent state and therefore the vicarious doc -- Vicarious Consent Doctrine does not apply.

What I was trying -- what I was going to say is I think we will all agree the Vicarious Consent Doctrine only applies in one-party consent statutes, which obviously the federal courts have deemed that the federal statute is a one-party consent statute.

And in all of the cases cited by the Plaintiff, you're dealing with intercepted wire communications construed under the -- under the federal statute. All of those statutes are one-party consent statute. If -- if he intercepted a wire, a telephone call in this case pursuant to Lane vs. Allstate, it would have been absolutely illegal because it requires two-party consent. So even if the Court implies consent on behalf of the custodial parent to the child, the other party would still have to consent in order for it to be legal.

So if -- if -- this Court needs to make a determination first if Nevada is a two-party consent statute with regard to the application of 200.650

THE COURT: Okay. Do I or can I disregard the recording in its entirety for purposes of this motion, make a ruling as everything else, and then deal with it at the

evidentiary hearing if they seek to introduce it? Or no?

MR. BALABON: Well, I think the scope of the evidentiary hearing needs to be defined because they -- they filed --

THE COURT: Custody.

MR. BALABON: -- a motion to change custody. The sole basis for the alleged change in custody is the recording.

THE COURT: Is that the sole basis?

MR. BALABON: Yes.

THE COURT: Okay.

MR. BALABON: Without the recording, there is not basis. So a factual determination -- first -- first you need to make legal determinations. The first legal determination that this Court has to make, to -- to determine whether or not this tape comes in, you have to determine if -- if it's a two-party consent statute.

Secondly, if the Court determines that it's a one-party consent statute, then the Court has to make the determination that the Vicarious Consent Doctrine applies in this state and applies to that statute. We say that it doesn't. We say that legislative intent is clear. There's no ambiguity in 200.650; therefore this Court can't legislate from the bench and imply some sort of an exception to the statute that's not incorporated into the statute.

I cited cases in my brief. The Michigan case, a case out of Georgia, that refused to apply the doctrine citing legislative intent. In fact, in the case in Michigan, even though the -- the federal district had -- had approved this things, they said, well, okay, we understand pursuant to federal law -- you know, it's applicable to the federal statute, but we don't believe it applies to the Michigan statute, so therefore they didn't apply it as -- as it regarded to the state statute involved in that case. The Georgia Bishop case is the same thing. That was an atrocious case where apparently some sexual abuse allegations were going on that the district court in Bishop refused to adopt the doctrine, and as a result, the Georgia legislature amended their statute to -- to include it.

So our position is the statute is not ambiguous, you can't imply this exception to the statute. So those are the two determinations legally that need to be made that really aren't fact-based.

This -- and then thirdly, in the event that the Court adopts the doctrine, it rules that Nevada is a one-party consent state, it rules that the exception applies to the Nevada statute, then a factual determination -- if you look at the Vicarious Consent Doctrine, this Court needs to make a factual determination that the placement of the device, that

the -- the reason for it, the intention, was based on a good faith, objectively reasonable belief that it was necessary in order to protect the best interest of his child. So a factual determination needs to be made regarding that very specific issue. And if the Court rules that there was no objectively reasonably basis for the placement of -- of this tape, which is a huge intrusion on my client's privacy, it has -- it has to make a ruling on that. If it finds that there was no objectively reasonable basis to place the recording, it can't allow the tape, it has to be excluded, pursuant to the rule itself.

So these are the things that need to be determined, I think, before we set an evidentiary hearing on -- on the other issues.

THE COURT: Okay.

MR. BALABON: Because that necessarily frames the issues that have to be resolved at an evidentiary hearing. Our -- our underlying motion is relatively simple. My client wants the Court to know that the last thing that she wanted to do was to file a motion in this court. She doesn't want this. She doesn't want this war that's going on, that -- that has been started now. Our -- our motion was relatively innocuous. She was simply seeking the restoration of her time based on a change in her work schedule so that she could pick up the

child when she gets off from work. And this -- the change in work schedule occurred in August of 2014. Certainly communications were made to Sean's counsel requesting that they stipulate to modify the order. It was then in the context of counsel contacting me to let me know that the order from the December hearing was incorrect, it contained a typo. I acknowledged that it contained a typo, but I had requested at that time, he work schedule has changed, so therefore there's no longer a need for Sean to watch the child until 5:30. She got off at five, hence the 5:30 exchange time that was stipulated to at -- at the December hearing.

The December hearing provided that the parties will be reasonable and flexible with each other with regard to exchange times. And prior to November Sean was being reasonable and flexible. There was some times when he would insist upon the 5:30. I think that occurred in April or May or something like that, when they have a conflict. So when they had a conflict, what happens is Sean retaliates. Well, the order says it's 5:30, so you're going to wait. You're not picking up your child. Even though you're off work, the order says it's 5:30, so therefore you have to come at 5:30.

And he relaxed that a little bit as time went on, so hence we didn't have to file any kind of a motion with the Court to try to deal with the issue. Then -- then was an

incident in November where she challenged something about his parenting abilities. It's not really relevant what it was at that time. But he became angry about it and then started in November, boom, you don't get to pick up the child. She comes -- arrives at his home, you're waiting until 5:30.

So it's not out of any interest of -- the best interest that he's doing this; he's doing this to punish her and to retaliate against her by denying her time with her child. That's what's happened in the case. That's why we have multiple emails going back and forth.

I think it's instructive, Your Honor, that one of the emails, one of the first emails I got from counsel, if her hours change, obviously that changes the need for Sean to watch Sasha; however, we still need to sign off on this order so that it reflects what -- the agreement that was made in December. I certainly couldn't argue with that.

But there was no indication initially -- and -- and when they opposed our request for a simple modification for a couple of hours on her days, there was no indication that, oh, no, this was the fundamental basis of the -- of the deal that was made in return for Sean alleging that -- or Sean agreeing to drop any restrictions regarding Ricky (ph), that this was the fundamental basis, this was the fundamental consideration. That is absolutely false and he -- they know it. If that was

the case, certainly that would have been alleged initially when I made this first request.

So she's -- Lyuda (ph) wants her time back with her son. What has happened with regard to this, you know, he denies it, but she -- she doesn't have the opportunity to participate in the child's homework. According Lyuda, he's taking the homework out. She gets it after it's been graded. And even --

THE COURT: Can I ask -- can I ask this question about homework, because it --

MR. BALABON: Yes.

THE COURT: -- I'm a homework person. So is it a packet that goes home on Monday that's due on Friday?

MS. ABID: Yes.

THE COURT: Okay.

MS. ABID: And they keep this package (sic) all the way, so I will get homework which is already marked by teacher.

MR. BALABON: Stand up.

THE COURT: Oh, that's okay. So it's already --

MS. ABID: Yes.

THE COURT: It's already --

MS. ABID: They --

THE COURT: -- been --

MS. ABID: They --

THE COURT: -- turned in --

MS. ABID: Yes. They only will give you --

THE COURT: -- and the teacher's marked --

MS. ABID: -- what already is old, like two week sold. But the one, what she had today, they keep it in this -- in this home and if any psychiatrist will talk to my son, they can ask him. He's six years old, he's --

THE COURT: Okay.

MS. ABID: -- capable of answering this.

THE COURT: That all, I just -- I didn't know if it was a day-to-day or if it was a packet.

MS. ABID: Package (sic).

MR. BALABON: And --

THE COURT: Okay.

MR. BALABON: -- even if it's true that Sean is in fact providing what she says he's not, he's doing the homework with the boy after school. He has the child every day after school pursuant to this schedule. So therefore if she wants to do homework with him, I mean how much homework can a child do?

THE COURT: Oh, geez, you don't --

MR. BALABON: So if he's doing --

THE COURT: I got some kids. I know about --

MR. BALABON: She's not getting --

THE COURT: -- the homework.

MR. BALABON: -- her son back until a little bit before 6 p.m.

THE COURT: Okay.

MR. BALABON: They have to have dinner and they have -- gets ready for bed basically. So she's at a significant disadvantage and it's not unreasonable for her. There's been a material change in circumstance; her schedule has changed. She specifically requested the schedule change so that she could pick up her son after school so that she could enjoy her days. Certainly the law in the state of Nevada is, pursuant to the Mosely case and other cases, that both parties should have equal access and equal opportunity to spend time with their children and she's not provided that now.

We don't believe that Sean is being reasonable and flexible within the framework of the stipulation that was entered by this -- entered by the Court, by Judge Harter, from the December hearing. There's no reasonableness here, there's no flexibility. So that's why we filed our motion, to simply restore her time after school. We're not seeking to change custody.

You know, there's a lot of allegations in the declarations about who's who and who has bad faith and who's

doing this or that. You need to read between the lines. Who is the party that has come to this Court twice now within the last year, year and a half, and sought to change custody, sought to remove the child from the state to the state of Iowa? We file a simple motion; what do we get in return? We get this placement of a recording device, based on spurious reasons, in her home. That's what we get. And another request to change in custody and to restrict her time to four days a month of supervised visits.

Who's the party that wants to obstruct and who's the party that wants to -- to hinder the relationship. She's never taken any action to -- to -- for a substantive modification of her custody rights, she never has, since this order's been entered, never. He's done it twice now. And as a result of this, she's spent tens of thousands of dollars having to defend these motions. The last one, I know that you weren't the judge, it was resolved after Dr. Paglini testified for two and a half hours in the morning. It was just, oh, okay, sorry, forget it. And that's after a 13, $14,000 evaluation, attorney fees to prepare for an evidentiary hearing. And for what? What was accomplished? There was no modifications to the time share, there were no restrictions placed upon Ricky as a result of that hearing.

A lot of allegations were made in declarations about

Ricky. Pursuant to McMonigle, all of those allegations are absolutely barred. But I will say for the record that Ricky has been involved -- I don't know if the Court's read it and has concerns about Ricky -- for the record, Ricky has been involved in -- in this child's life almost for three years. There have been no incidences alleged that Ricky has been a danger to anybody. There's no evidence to support --

THE COURT: I'm not that concerned about -- what's his last name?

MR. BALABON: Mr. Marquez.

THE COURT: I'm not -- kind of like mine, that's why don't want to mispronounce it.

MR. BALABON: Well, that's relevant because, Your Honor, if you look at the reasons why --

THE COURT: On, no, I wasn't conc -- I -- I read it but that issue was a past issue, it's -- it's not a big concern for me. I did have a question about the trip to the Ukraine.

MR. BALABON: Okay. Well, that's -- that's relevant. Okay. If you're not concerned about Mr. Marquez, that's great, I'm glad to hear it, because the Court doesn't need to be concerned about it.

THE COURT: Not that I'm not concerned. I don't want that to sound bad. Does that sound bad, like I'm not

concerned --

MR. BALABON: Mr. Marquez enjoys --

THE COURT: -- but it wasn't a big issue here, so --

MR. BALABON: He -- he enjoys --

THE COURT: -- that's fine.

MR. BALABON: -- a close and loving relationship with this boy --

THE COURT: Okay. So as to --

MR. BALABON: -- to -- to --

THE COURT: -- the Ukraine --

MR. BALABON: -- to Sean's dismay. And so the Ukraine, I don't know if you're -- certainly you're up on current events. Obviously they've made --

THE COURT: A couple of problems.

MR. BALABON: -- they made peace deal and they've withdrawn their heavy weapons, but regardless, even if they didn't -- you know, it's 8 -- 7 hun -- 8 -- 700 miles away -- there's never been any violence. And this goes --

THE COURT: There's never been any violence in the Ukraine?

MR. BALABON: Not in -- not in -- not in the western Ukraine where her parents live.

MS. ABID: Your Honor --

MR. BALABON: Shh, shh.

THE COURT: That's okay.

MS. ABID: Can I ask --

THE COURT: Tell me.

MS. ABID: -- you something?

THE COURT: So it -- she's proposing one month, is that what it is, in the Ukraine?

MR. BALABON: We have a court order, Your Honor, that allows her to do this.

MS. ABID: Every year.

MR. BALABON: That's --

THE COURT: Take vacation for one month.

MR. BALABON: Yes. Yes.

MS. ABID: Every year.

MR. BALABON: We have a court order.

THE COURT: But where it is, if they object and --

MR. BALABON: To the Ukraine --

THE COURT: -- bring it --

MR. BALABON: -- that's what it says.

MS. ABID: To the Ukraine.

MR. JONES: Where does it say the Ukraine? I -- I must have missed it.

MR. BALABON: I don't know.

MS. ABID: Can --

MR. BALABON: Let me look.

MS. ABID: Your Honor, can I say something?

THE COURT: Well, that's all right. I don't want -- your lawyer told you to be quiet, so I don't want to get in between you two. That's a bad place for me to be. I just needed to hear more about it.

MR. BALABON: It -- it's -- it's an order that was filed on 12/3/12. It is further stipulated that each party shall be entitled to four weeks of vacation. Lyudmyla shall be entitled to take Sasha to the Ukraine during her vacation period, provided she maintains -- stay with Sasha --

THE COURT: 12/3/12.

MR. BALABON: -- the entire time.

THE COURT: Stip and order.

MR. BALABON: I don't know --

MR. JONES: That was -- that --

MR. BALABON: -- do you not have this order?

MR. JONES: That's pre-dated the -- the --

MR. BALABON: And you --

MR. JONES: -- 2013 --

MR. BALABON: -- prepared it.

MR. JONES: -- order.

MR. BALABON: That's the order I pulled from the record.

MS. ABID: We just changed the schedule six weeks

now instead of four weeks.

MR. BALABON: Yeah, they changed the date -- they -- they changed the --

MS. ABID: The (indiscernible).

MR. BALABON: -- schedule but they didn't change her right to take the trip to the Ukraine. But it's a court order --

THE COURT: Okay.

MR. BALABON: -- so for him to deny it, which he continues to this day to deny it, is contempt of court. He -- he is denying providing her with the passport with the express intent to deny her ability to take the child for her court-ordered, authorized vacation to the Ukraine.

THE COURT: Has she taken Sasha to the Ukraine before --

MS. ABID: Yes.

THE COURT: -- previously?

MS. ABID: Yes.

THE COURT: How -- how old was he when he went before?

MS. ABID: He was one year old. It was 2010, summer. And also my ex tooks (sic) my next summer, '11, to Mexico and I allow him, no problem. Ever since, he keeps my son's passport. And, Your Honor, I did not see my parents the

last five years because of those courts. I can go visit my parents in Bulgaria, in Turkey, in Greece, in Italy, just because they're my parents. The issues here, we will not give you passport, period.

THE COURT: Okay.

MS. ABID: I mean --

MR. BALABON: Yes.

THE COURT: Okay.

MR. BALABON: And they -- they cited the travel restrictions to Eastern Ukraine, which are completely inapplicable and they know it. And then they cite that Ricky is some sort of international money launderer or conspirator and that there's a --

THE COURT: Does he have tie --

MR. BALABON: -- conspiracy to --

THE COURT: Well, does --

MR. BALABON: -- kidnap.

THE COURT: Here -- here -- no, no, no. Here's my -- here's my question. So, Mom, are you a citizen of Ukraine and --

MS. ABID: No, I'm only U -- US citizen.

THE COURT: All right.

MS. ABID: I lost my Ukraine citizenship.

THE COURT: All right. And her significant other is

a citizen of where?

MS. ABID: Uk -- America also.

MR. BALABON: United States.

THE COURT: Okay.

MS. ABID: Yeah.

THE COURT: And does he have family or any connections in the Ukraine?

MS. ABID: No.

MR. BALABON: No.

THE COURT: Okay.

MR. BALABON: Yeah, no, no.

THE COURT: I mean --

MR. BALABON: I'm sorry.

THE COURT: -- that's not a ridiculous question. That's --

MR. BALABON: No, I didn't --

THE COURT: -- kind of a --

MR. BALABON: -- mean for -- to imply that my response was that --

THE COURT: -- normal question.

MR. BALABON: -- the question was ridiculous.

THE COURT: Okay.

MR. BALABON: I -- I apologize if the Court construed it as that. And I didn't --

THE COURT: All right.

MR. BALABON: -- intend for that.

THE COURT: Keep going.

MR. BALABON: But there's no basis for them to deny it. Now they're -- they were, in email correspondence -- you know, this is what put us into court. What choice did Lyuda have? He refuses to be reasonable and flexible with regard to the exchane (sic) time -- exchange times, and then multiple requests were made to counsel for the production of the passport. And then we get the -- you know, he submitted it as an exhibit in -- in his opposition. We get an email from -- from Mr. Jones, you know, saying that we're not going to provide it, he needs to post a bond, he -- he represents a kidnapping risk. A flat-out denial, so it's almost like bullying. You know, we're not going to comply and if you -- if you don't like it, take us to court. And if -- and if you do take us to court, we're going to -- if we lose, we're going to seek appellate relief. That's bullying, is what it is.

THE COURT: Or just being lawyers.

MR. BALABON: I understand that, but it's still bullying. It's -- it's trying to intimidate her to not assert her rights that she has pursuant to a valid court order because in order to do so is going to cost her tens of thousands of dollars. That's the implication in my opinion.

There's no question, they're going to seek appellate relief regardless of what this Court does, and so it's expensive. But what -- what choice did she have but to come to court.

THE COURT: Okay.

MR. BALABON: If we go back to the wiretapping issue, Your Honor.

THE COURT: Uh-huh (affirmative).

MR. BALABON: The other issue is, he placed a recording device in the minor child's backpack. The minor child's backpack was placed inside Lyuda's home. This -- we -- we are almost absolutely certain that this backpack, this recording device in this backpack, picked up conversations in the home between Lyuda and Ricky, between Lyuda and her mother via Skype, between Lyuda and her daughter Irena (ph), between Ricky and the daughter Irena. We don't know that for a fact because we never -- there's been no transcript provided. All we know is what --

THE COURT: Right. You're just guess --

MR. BALABON: -- he says is on --

THE COURT: Okay.

MR. BALABON: -- the tape. Which is why it can't be admissible today and nor should any arguments be allowed to be made about it until the Court makes a ruling on its admissibility. But the fact that it picked up recordings, if

you look at the case out of Nebraska, the Nebraska teddy bear case, that was a federal district court case that was decided after Pollock. And in that case, the minor -- the -- the mom placed a recording device in a teddy bear and the district court rejected the application to the Vicarious Consent Doctrine in that case because it recorded conversations to which the minor child was not a party.

Therefore, it abs -- the -- the Vicarious Consent Doctrine absolutely did not apply. She tried to allege the Vicarious Consent Doc -- that was a federal district court case, Your Honor, decided after Pollock. Vicarious consent does not apply because she placed the recording device in a place that could pick up conversations between persons, including the two, the married couple in that case, that the minor child was not a party to. So therefore -- I mean, that's a critical issue that needs to be determined. Because if in fact that recording picked up conversations in Lyuda's home -- and she's absolutely convinced, based on the declaration of Sean, wherein he describes the fact that Ricky is planning a business venture with her brother-in-law -- correct --

MS. ABID: Uh-huh (affirmative).

MR. BALABON: -- in the Ukraine. The only way he could know that would be if he intercepted that conversation

that occurred between Ricky and Lyuda in their home after the child was asleep. That is an unlawful intercept. It's a Category D felony under Nevada law. It also, pursuant to the Nebraska teddy bear decision, violates federal law, and the Vicarious Consent Doctrine would not apply.

We are entitled, pursuant to the federal statute that I cited, to be provided -- you -- you have in your discretion to order him to provide us with the tape, and we request that you do that.

MR. JONES: We fully intend to give it to them, Judge.

THE COURT: Okay.

MR. BALABON: So --

THE COURT: All right. Thank you, counsel. Mr. Jones.

MR. JONES: Yes, Your Honor. First of all, I'll address the motion first. I was going to ask for protocol initially that we adjudicate or argue Defendant's motion and then argue my motion, but you seem more interested in the vicarious consent issue, so I just kind of --

THE COURT: I'm not really.

MR. JONES: -- let it go with --

THE COURT: Here --

MR. JONES: -- the flow.

THE COURT: And let me tell you where I'm at and I -- on this issue. I feel like I have sufficient information if I -- on the motions and in arguments today to make a decision without considering the material contained on the recording to set an evidentiary hearing. At the time of the evidentiary hearing, counsel, I would suspect, would try to introduce the recording. And at that time, I would make an evidentiary ruling, because this is an evidentiary issue. And at that time, I would hear arguments from counsel on the order to show cause and as to the Ukraine and as to everything.

That's kind of where I'm at, because I would have to make a more specific finding regarding it, and I don't know that -- I'm just not going to make that finding today --

MR. JONES: And I don't think --

THE COURT: -- based on --

MR. JONES: -- you can.

THE COURT: -- what I have.

MR. JONES: I think you actually have to take evidence regarding the bona fides of Dad. And I can tell you --

THE COURT: There's no foundation, there's no -- all of these things to get me there, counsel, evidentiary-wise. And please understand -- and counsel, so that you -- I -- I was a criminal defense attorney for many, many years, so these

are the type of things that I was trying to fight all the time. Everybody was trying to record all the time. So I -- I'm up-to-date on -- on the law, but it is not for me to make a decision until such time as it's presented to me --

MR. JONES: Well, and -- and I think -- I think you hit --

THE COURT: -- in the fashion of evidence.

MR. JONES: -- hit the nail right on the head. The one thing I think that I'm surprised about, because pretty much every child custody case that has ever been heard in any of these courtrooms, a parent has recorded a custody exchange and it's never been kept out of evidence. Meaning I turn on my iPhone, I put it on top of my car, it's on voice memos, Mom calls me an SOB in front of the kid, I play it for the Court and it's admitted. So it's clearly a one-party statute as it pertains to surreptitious recordings, period. that -- that's not even an issue --

THE COURT: Was it --

MR. JONES: -- legally.

THE COURT: -- bad form and kind of a jerk move? For sure.

MR. JONES: Well -- well, Judge, here's -- let -- let's talk about that for a minute, because when we get to the evidentiary hearing, okay, you're going to probably hear from

Dr. Paglini, or you'll look at his report in detail, because issue number one from the last motion to change custody -- which I'll get to this whole -- their motion and the material terms of the settlement -- but we had an evidentiary hearing on Dad's motion to change custody. We have recommendations from Dr. Paglini that the child should not be unsupervised with Defendant's mom for three years. We had Judge Harter saying, well, you know, if -- if there's going to be an issue where he wants to be unsupervised with the child, he's going to have to have this assessment and that assessment. These were serious issues, that Dr. Paglini found all of Dad's concerns were legitimate. The reason he brought his motion, A, because she married an ex -- or a felon within months of him getting out of jail after 10 years, and his links to the organized crime syndicate were -- were well-established --

MR. BALABON: Your Honor, I'm --

MR. JONES: -- in the criminal --

MR. BALABON: Objection.

MR. JONES: -- documents.

MR. BALABON: That's not a --

MR. JONES: No --

MR. BALABON: That's not an accurate reflection of what the report said, so I object, okay.

THE COURT: Okay. There were concerns.

MR. JONES: Okay. But relevant issues -- part one of Dr. Paglini's report. Mr. Abid was --

MR. BALABON: Your Honor, I object to this --

MR. JONES: No --

MR. BALABON: -- reference to Dr. Paglini. This is more -- should be reserved for --

MR. JONES: No, no. This is all --

MR. BALABON: -- argument at --

MR. JONES: Counsel -- I didn't interrupt him once and he said --

THE COURT: I'll allow it.

MR. JONES: -- a lot of --

THE COURT: Go ahead.

MR. JONES: -- offensive stuff. Number one concern of Dad, parental alienation. Mr. Ab reported that Lyudmyla continued to use Sasha as a sounding board for her feelings about him, which Sasha repeats to him and his wife on a daily basis. Mr. Abid believes this placed incredible stress on Sasha when he feels the need to defend him to his mother. Mr. Abid perceives this is brain-washing and believe Lyudmyla is trying to poison Sasha so that he will reject him later in life.

Okay. This was the whole basis, Mr. Marquez, and the alienation issue, which was determined by Dr. Paglini to

have occurred. Mom admitted this occurred. The thing you haven't heard yet today, and maybe you'll ask Mom, is did you say all this stuff to your kid? The fact that you can come in here and be indignant about anything for one minute when you have -- he used the word bullying. Do you want me to quote some of what Mom said to the child and we can decide --

MR. BALABON: Your Honor, I'm --

MR. JONES: -- who's bullying?

MR. BALABON: -- going to object to any reference to the tape until such time as this Court determines that the tape is admissible.

MR. JONES: Well, and -- then let's -- let's get back to that issue. But to use bullying, I'm sorry. I -- I was -- when I prepared for today's hearing, I was sickened by what I reread because I've never -- been doing this for 20 years. I've seen some of the worst cases of alienation probably in the history of the world. I've never seen anything like this.

MR. BALABON: Again, I object.

MR. JONES: So -- I'm not saying what the contents of the tape are.

MR. BALABON: He's --

MR. JONES: But --

MR. BALABON: He's reacting to the contents of the

tape by implication. He's -- I object. Until that tape is determined to be admissible, I object to any argument --

MR. JONES: Here's --

THE COURT: I'm going to allow it. And counsel, can you not object during his argument and just let's go forward.

MR. JONES: Here's my question, because this is the one thing I didn't see any authority of. And I've had it other cases. I had a similar case where -- that actually involved wiretapping. And I said to the client you violated Nevada law. If you try to use these tapes, you could be prosecuted.

THE COURT: Right.

MR. JONES: He said my child's best interest is far more important than whether I get a misdemeanor or a felony or go to jail.

THE COURT: Okay.

MR. JONES: So what happened was, the judge said I'm not sure about whether I would let them in, but since I'm ordering a custody evaluation, the evaluator can rely on information and evidence that's not admissible. They can rely on hearsay, they can rely on anything.

THE COURT: Okay.

MR. JONES: And so it ends up that the tapes come in regardless if there's a professional involved. But let's not

talk about that. There's no citation to authority that says an illegally obtained recording would not be admissible independently. It might be a crime, but evidentiary, for your determination, I didn't see any authority in the opposing papers.

THE COURT: Not a criminal court.

MR. JONES: Correct. And you have something that's a little more important than posturing and pointing fingers as your obligation. You have best interest of this child. And when you hear the tapes, I'm sorry, you will be disgusted. And the fact that there wasn't, in any of the pleadings, there wasn't a single, gee, I need help, I'm going to get it, Judge, but don't take my kid away, I'll go into intensive therapy. You didn't see any remorse. You just saw attitude, reference of things that pre-dated the last order. I was shocked by that.

But the one thing that I think is very clear is that the surreptitious recording not by -- not over a wire is a one-party statute. I think every judge here will agree that those recordings that parents make of conversations they have at the dinner table when they're talking about divorce, or those recordings at custody exchanges, are absolutely legitimately admissible. So then the question comes in, do we -- do we convince you at the time of the evidentiary hearing

that Dad's good -- you know, of Dad's good faith, that he was trying to protect his son, that he had a legitimate reason. You will hear from Dad Sasha's behavior and Sasha's statements to him that led to his decision to put this recording device in his backpack. And that's important because he figured his backpack would always be with the child and therefore the child would be part of the conversation. We have no -- no interest and no inclination to use any recordings from anybody that's not the child and Mom, really. I don't really care if other people are badmouthing Dad in the household, the issue is Mom.

Because Dr. Paglini already found that Mom had a problem. So the fact -- that fact alone establishing good faith. I mean, I think when you look at the totality of the case authority in the United States, and you got citations to two cases I provided, and that was just a quick look on Westlaw, again, because the -- because of the argument that these were just federal circuit cases. I gave you state cases in criminal court, state cases in family court. The trend and the controlling, overwhelming amount of authority is that vicarious consent allows, A, for no criminal prosecution -- and here's another interesting thing about the Defendant. Her most -- the most important thing to her right away wasn't, gee, I need to get therapy for my obvious alienation, it was

to go and report it to Henderson PD and to try to have him arrested. Henderson PD was referred to me. I explained to him the concept. I gave him the case authority. I said when you take this to city attorney, please given him this case authority. No arrest. No further contact from the police department. They know he was acting in good faith, particularly based upon the contents of the recording. I think when they read the contents of the recording they were like there's no way we would ever prosecute a dad for doing this. Maybe they'll put further pressure. Maybe these other people who were part of the conversations will hound the Henderson Police Department and they'll do something different, but thus far no criminal prosecution.

The next thing she did was to file a bar complaint against me because somehow I must have told him to do this, which I can tell you that I didn't know anything about it. I -- I had already -- if you notice in the pleadings, I had already prepared a declaration in response to their motion before this issue came up and that's why there's a subsequent declaration that deals with the countermotion. So that's how things evolved.

So I think you're absolutely right to set an evidentiary hearing. I think you're right to determine the evidentiary issue at the time once -- because first thing I

need to do at the beginning of the case is to put my client on the stand and try to establish that it was a good faith reasons for the best interest of the child to protect him. I -- I know what the case law says and that's how I'm going to put on my case.

And then I'll try to play the tapes, you'll get an objection, you'll make the ruling. At that point maybe it changes the -- the complexion of going forward, but I think between now and then you will likely have the child interviewed and you'll probably learn that this is a daily occurrence. Because even after this motion is filed, the child comes and reports to Dad what Mom is saying to him. He's not recording anymore, but he's hearing from his son the terrible, terrible things, trying to destroy the relationship between Dad and son.

The request is absolutely appropriate just based upon what the child is telling Dad as far as, A, the change of custody; but B, the child interview to try to establish it. Although, given Mom's history, Mom is going to tell the child what to say, so we probably need a PhD rather than an FMC to get to the bottom of all that. And obviously consider the papers and pleadings while interviewing the child to know what the issues are. So that covers that evidentiary issue and I think you've already determined to set an evidentiary hearing.

On the issue of Defendant's motion, I was there and so was Mr. Balabon. We were going to trial. We were going for lunch --

MS. ABID: And you stop it.

MR. BALABON: Shh, shh.

MS. ABID: You stop it.

MR. BALABON: Lyuda --

MS. ABID: That's wrong.

MR. BALABON: -- don't interrupt him. Please.

MR. JONES: She cannot control herself. Are you doing anything?

MR. ABID: (NODDED IN THE UNAFFIRMATIVE)

MR. JONES: We were going to trial on Dad's motion to change custody based upon legitimate things that the Court found a trial was necessary for. The parties decided to meet in an anteroom to try to say, listen, can we put all this behind us, can you try to do this and you try to do that, can we try to get along.

THE COURT: Mr. Jones, I'm just going to stop you only because I -- I read this in the motion. I'm not inclined, so the parties know, to go behind the settlement negotiations. There is nothing on the record as to why this was done or who did what or what the motivation is at this point and I wasn't the judge that day. But these are

settlement negotiations.

MR. JONES: Well, and I'm not talking about the contents.

THE COURT: I know, but --

MR. JONES: I'm talking about the --

THE COURT: -- but I'm telling you what -- the reason why she did what she did with the after school pick-up and drop-off --

MR. JONES: Not relevant. Well, and --

THE COURT: -- is settlement negotiation.

MR. JONES: Well, and you're right and you're --

THE COURT: And I'm inclined --

MR. JONES: -- bound by --

THE COURT: I'm telling you that I'm inclined, absent some like, you know, real evidence, you know, of why this happened, not to grant any motion to change that afternoon pick-up because that was settlement. That's what the parties did. That's their stipulation.

Now we have this motion to change custody, so maybe -- I'm not going to deny that part of their motion today, I'm going to set it all for the evidentiary hearing, but I don't need to hear necessarily today anymore about that.

MR. JONES: Okay. Okay. And then -- yeah, and I think you'll probably do -- treat this -- treat the Ukraine

issue as well. Obviously there have been a lot of changes in the Ukraine since 2012.

THE COURT: The Ukraine issue, I'd like to resolve today only because if I give you an evidentiary hearing date, I'm going to give you a full day, and that would be in the summer.

MR. JONES: Right.

THE COURT: And so I'd like to resolve the Ukraine --

MR. JONES: Okay.

THE COURT: -- issue today so that she can make whatever plans she needs to make for the summer and the parties have a game plan going forward, and temporary. I see that the order regarding the Ukraine is dated 12/3/2012. I see that page. There is another stipulation and order from that December --

MR. BALABON: Right.

MS. ABID: It's my six weeks this summer.

THE COURT: That gives her six weeks, but that order does not list the Ukraine.

MR. JONES: Right.

THE COURT: So tell me what are your considerations about her traveling to the Ukraine?

MR. JONES: The issue is this. First of all, she

would absolutely -- and we still haven't gotten any assurances that -- because her original plan and the reason for the 2012 language, would require her to be there, was to fly there -- because she has a job. She has a full time job. I don't know any full time job that lets you take six weeks off, but at least not unless she lived in Europe -- but in the United States. So the concern and the reason the language says that Mom would have to be with the child at all times was she was going to fly over, drop the kid, and fly back, work, and then fly back at the end of the six weeks and pick up the kid.

THE COURT: Okay.

MR. JONES: Now there have been significant changes in the --

MS. ABID: Absolutely --

MR. JONES: -- Ukraine.

MS. ABID: -- not true. This is lie.

MR. BALABON: Shh. Let him finish. Please. Let him rest.

MR. JONES: There have been significant changes in the Ukraine since then. I don't know of a major airport that she would fly into that's solely in that section of the Ukraine. If you look at -- and I looked today at the travel advisories, the US one was last updated in January. The UK one was updated a week ago saying any citizens of the UK who

are in the U -- in the Ukraine should come home. You should not be there under any circumstances. They didn't say a specific area. They didn't say a specific city. They said the Ukraine.

So my client's concerns are legitimate. Here's the bigger issue, which is in part created by the obvious, pervasive pattern of behavior on the part of Mom to destroy his relationship with the child. You just heard her say, well, we could go to Italy, we could go to Turkey, we could go anywhere and be with my parents. She can go anywhere that's not a Hague signatory too just by getting to the Ukraine and then her pattern of destruction of my client's relationship is really done. My client never gets the child back, ever, if she's not -- if she's in a non-Hague signatory country.

Mr. Marquez, I -- I -- not concerned about whether he would go with her or not. Obviously he's got his own issues here in the United States. I'm not sure he's allowed to leave the country. But the concern is now with this issue of obvious attempts to destroy his relationship, the threat of going to a non-Hague signatory, all of the surrounding countries to the Ukraine basically, is even bigger. She's -- she -- I mean, obviously I'm not going to read the quotes, but she makes it very clear that this child should have no relationship with his father, and giving her the right to go

to the Ukraine with the child -- and certainly, you know, certainly until you hear all the evidence, I'm sorry, that would be a risk that I don't think this Court should take and my client isn't willing to stand by and allow because it's permanent. It's not something that Your Honor can undo. It's not something United States Federal Court can undo. If the child is gone to the Ukraine -- to the Ukraine and then to a non-Hague country, it's over. These are the things you read about in the paper, in the law journals about family law and the risk of Hague issues.

So from that standpoint, I guess my question is this, Judge. The boy is six. If you hear all of the evidence -- even if I think your ordinary course for a full day yesterday was July, so today maybe it's still July, maybe it's early August. But if you hear all of this in July and you decide it's okay for Mom to go, she can still go for a large portion of August. Or if it was too late for her to go for six weeks, she can go next year for six weeks. Dad would agree to swap the four weeks, six weeks, if that became an issue.

The real issue, Judge, is right now with the posture of this case, with the issues that are going to have to be addressed at the evidentiary hearing, with the obvious unabashed, non-apologetic attempt to destroy Dad's

relationship with his son, that's not a risk that anybody in this room should want to take.

So that's my issue on the Hague -- or on the Ukraine. I think you've already determined and set the evidentiary hearing. Obviously discovery would be open. The only question I have and further argument is that in the interim between now and July, I know you're not going to change the -- the pick-up from the prior order. The question is, what do you put in place to try to protect this child? Do you modify the time share between now and then? Do you order the child interview with say Dr. Holland? Recently I've had experience where Dr. Paglini, after doing an report, doesn't want to do a subsequent report. That may be his position on this case as well. It just happened in another case that was referred from Department N. He said I did the eval two years ago, so I don't want to do the eval now just because of familiarity. I was surprised too --

THE COURT: Okay.

MR. JONES: -- but he did and --

THE COURT: Perhaps it was just that case.

MR. JONES: It could have been just that case.

THE COURT: I was hoping to save you some money.

MR. JONES: It was a rather contentious case and a lot of hairy issues. But if he wanted to do the child

interview, he might be willing to do that as a first choice. Next choice I would probably suggest would be Dr. Holland, followed thereafter by Dr. Lenkeit as my tier of -- of who I think probably should do the forensic interview.

I think the -- the question of who bears the cost is simple. Mom is trying to destroy this child's relationship, she should bear the cost of the PhD who has to do the interview to try to get to the bottom of what is going on in that household and how frequently this stuff occurs.

So that being said, if we have the child interview, obviously it's within the Court's discretion to decide whether or not it will modify the time share in the interim to restrict Mom's contact, to try to get some protection in place for this child. Because in the end, there's no prejudice. If it's a temporary order and we're going to have a trial where you determine what evidence gets in and determine whether or not it's in the child's best interest to continue to have joint custody. I don't need to go through the 480 factors that would indicate that if this evidence comes in, which I believe this Court will eventually let this in, that virtually every 480 factor that matters or applies to this case favors Mom not having joint custody. Period, end of story. It is clearly no in the child's best interest.

So from that standpoint, obviously, I would defer to

the Court's feeling on whether or not this child should continue between now and July to be exposed to what is going on, because it's clearly going on.

MS. ABID: It's not true.

MR. JONES: And Dr. Paglini's --

MS. ABID: Can I --

MR. JONES: -- report confirmed that it was going on, and Mom admitted that it was going on, but part of the promise was I won't do it anymore. Well -- actually, if she's saying it's not true, maybe she'll say the things that are reflected in Dad's declaration didn't happen. That the recording was somehow fabricated. She hasn't once said I never said those things in that declaration.

THE COURT: Counsel, do you mind if I ask her where her family home is in the Ukraine?

MR. BALABON: Your --

THE COURT: Is that --

MR. BALABON: Your Honor, apparently because the window has closed in order for her to obtain less expensive tickets --

MS. ABID: Tickets.

MR. BALABON: -- she doesn't even intend to go this summer, but I guess a ruling does need to be made as to whether or not she can do that --

THE COURT: Next summer.

MR. BALABON: -- next summer.

MS. ABID: Yes.

THE COURT: Oh, okay. All right. Well --

MR. BALABON: You know, the arguments -- do you want me to address the arguments regarding the -- the vacations that he just made, please?

THE COURT: Well, I mean --

MR. BALABON: Your Honor, there -- there's no --

THE COURT: -- if it --

MS. ABID: Michael, can I say --

THE COURT: -- if it's not an issue this summer --

MS. ABID: Can I please say one word? Your Honor, can I please --

THE COURT: Sure. I don't -- counsel --

MR. BALABON: Stand up.

THE COURT: -- I don't --

MS. ABID: Please.

THE COURT: -- want to get in --

MS. ABID: I -- before we go into the trial -- I know you already set up the trial. We've been there last time and I never -- parent alienation -- I did not perform parental alienation against Sean. In the history of events of this year, not only Sean was taking son on my days, on my custodial

days after the school, he always allowed him to go to the California vacation to see his father, to see -- to go to Legoland, to go to the football game, to go to the -- his friends come over and we have kids, you know, at house, can he just stay later. Every single -- every single demand which they ask I always was reasonable, I said of course, absolutely. There was -- there was never an example when I said no, it's not going to happen. What happened during this -- when I filed to the court right now, I said I cannot do it anymore. This -- this person is looking constantly for harassment, argument and abuse. And I said, Michael, in August, I said you either change it right now -- I cannot do that. Sean and Angie (ph) call me. It was August 20. It was a phone conversation. Lyuda --

THE COURT: Who's Angie?

MS. ABID: His wife.

THE COURT: Okay.

MS. ABID: And she actually was helping me, because in April when we have issues and -- she did step in and she helped me. She's like, Lyuda, I agree, he's not reasonable. And, look, he will tell me pick up Sasha today from my work, from my mom, from my aunt. I will drive all over Las Vegas for my son after this -- after my work. And she did help me in August when my aunt was here, because I was going to

California vacation in San Diego and I said, Sean, I pick up Sasha right now, it's Friday, it's my day. We're leaving, it's driving four hours, you have to bring him back to me. You cannot leave until 5:30. I contact Angie. I said, Angie, it's again out of control. I mean, help me. And Angie sent me message, Lyuda, have a great trip in San Diego, don't worry about it. She did help me.

So when I filed right now in February, in November I was going to Sean's house and we have issue. My son could not pee, I mean literally, he was -- completely. And I have a conversation with Sean outside of his house. I said you are a man, please give him a bath. He run outside, started calling me names, you a stupid moron, I'm going to take pri -- primary custody away, you -- your attorney is a joke. My John Jones is the best attorney. I was so --

THE COURT: John John?

MS. ABID: John Jones. I was so intimated, you know. I mean, I was -- I was like -- I was shaking. And his wife was pulling her car to the house from work and I said, Angie, help me. He said ignore you. I said to my attorney I cannot put myself in this every day stress. I said file my time, my time; his time, his time. When I filed, Sean sent me message. Lyuda you bought our son an Xbox and a game, is a violent game, you are such a bad mother. I don't play games.

My son was asking for this game because he was playing with his best friend's son, Riley (ph). This is where he find out about this game. I had no idea what this game about. As a mother, got him Xbox, I got him games. And what I got, harassment. You -- you got him this violent game, you -- which kind of mother is this that have games in my house. And I said, Sean, I never brought it up. I know he learned about this game in your house with Riley. And he started harassing me. My husband asked him, Sean, stop writing Lyuda.

Your Honor, it makes my -- myself shaking. This abuse -- I mean, affecting my -- my -- my performance. You know, like it's really affecting me. And I -- I was upset about it because he was harassing me. You bought him this game. So one week later he sends son to my house and this (indiscernible) my son came to me and says, Mama, Daddy said it is your choice if you allow me to play this game. Mama, what is your choice? And I said, my choice, you're not going to play this game today. He started crying. You know, I said -- why, why? I said because your daddy does not allow you to play this game because you tell everything what happen in our house to your daddy and now I have problems. You're not allowed to play this game moving forward. My dad has stepped in, Sasha, you're not going to play this game. And this is what they recorded. This was one time and Sean knew what he

was doing.

I'm an emotional person. I -- if one week before somebody harassing me how bad mother I am and one week later send my child with a message, Mama, what is your choice, Daddy is okay if you allow me to watch this games on your days. To me, I blew up, Your Honor. You know, I just -- I was -- like -- like, you know -- you know, one time he's harassing me how bad I am and next day he's -- my son tells me, oh Daddy is okay.

And this conversation was a one-time event. And this conversation I told my son, he told me, I said you should tell your daddy stop being mean. I mean, tell your daddy you love your mom. He started crying. I cannot tell my daddy I love you, it's going to hurt his feelings. And my son on many occasions told me that Angie will say to him do not tell your daddy that you miss your mom, it's going to hurt Daddy's feelings.

These people are the ones who performing parental alienation every single day. I give them so many favors. This is documented every day. We want to go to gym. Of course, go for it. We're going to go to Utah. Go for it. For him today to -- attorney stand up and just lying. They have no respect for you, Your Honor. I mean, for me this is perjury. It's completely disrespectful to this Court.

I did file against -- a bar. This attorney, is my third time I'm dealing with -- with this person. In 2012 my ex did owe me child support and I explain Paglini why he owe me child support, because my son lived with me until 2012, June, full time. Sean was chasing his freedom, you know. My son lived with me every day, but -- but we have custody order which was not primary. So when Angie came to picture, they took my child and starting assessing schedule which was there, and I didn't realize how bad it was.

So when we -- when I went to the court, basically adjusted. And John Jones, we had a settlement with O'Reilly (ph) and John Jones, and John Jones told me, I said let's meet on January, let's put your income -- my income. Let's do fair, what child support are you going to pay. John Jones turned around, filed completely different order, which he completely reduced his client's income, make him look like he is making same money as me. And I did not bother to file, complain to Court and say they robbed me or they -- they lied to this Court, but enough is enough. I want -- I want Judge, I'm begging you Judge, just recognize the lies. Before we go to this trial -- we've been there. That's what Paglini told them. They show him all those video tapes, do the screaming, he was in my house. I do not hate this man. I mean, he is father of my child. And I have history with Irena's dad. She

goes there to Ukraine, she -- she is having her -- I mean, she is spending time with her dad. I already proved myself. I'm not parenting alienation parent. I'm normal, regular person. I want peace, I want predictable, normal life. I -- for me, when somebody knows that mother is off from work at three o'clock and they tell her you have to wait till 5:30, this is cruel. If you are mother, this is cruel.

THE COURT: Thank you. I understand. This is what we're going to do. I'm not going to decide then on the Ukraine issue today, but I will take that up at the evidentiary hearing. Certainly the travel warnings for Ukraine and the Crimea Peninsula concern me. It is a small country and I wouldn't want Sasha to be in harm's way in any way. I understand that the Defendant has family there, and perhaps in the future, next summer, more of those warnings will be lifted and it will be safer for Sasha to go and that will be a better circumstance. So I'll make that ruling --

MS. ABID: Your Honor, what if I go to Mexico for vacation? Bahamas vacation? I -- I cannot get my son's passport?

THE COURT: Are you fine with the passport and --

MR. JONES: If she's going there --

MS. ABID: Yeah, I want passport.

MR. DAVIS: -- a Hague -- a Hague signatory country

that's not a war zone --

THE COURT: All right.

MR. JONES: -- I don't think --

THE COURT: Then we can --

MR. JONES: -- there's a problem.

THE COURT: -- stipulate if there's a -- it's a Hague signatory and there's no travel restrictions or travel warnings by the US Department of State, then counsel stipulates that the passport will be provided in the interim so that she can exercise her six week vacation.

As to the other temporary orders, the visitation schedule will remain the same but I'm going to make an order regarding homework moving forward. So Dad, can I ask you a couple questions about the homework?

MR. ABID: Certainly.

THE COURT: So does she (sic) get a -- your son Sasha get a packet on Monday coming home; is that right?

MR. ABID: Yes. And he gets a packet of books he's to read.

THE COURT: That he has to read.

MR. ABID: Yeah, has to read.

THE COURT: Okay. And so is he like --

MR. ABID: And -- and sight words.

THE COURT: Okay. So -- and I thought about the

sight words flash cards that you made and provided. Did you provide a separate set for Mom?

MR. ABID: They've been in there. She never saw them.

THE COURT: Okay. So they're in the backpack? Okay.

MS. ABID: Absolutely not.

THE COURT: All right. I just want to know the information. I'm going to make a specific order going forward. So the sight words that he has to work on for the week, are there specif --

MR. ABID: She's been -- and she's been emailed the list three or four times.

THE COURT: Okay. So what I want to do now, it's just kind of a clean slate, I want my order to be specific moving forward, okay. So Mom, on her days, is -- those sight words are going to be in the backpack.

MR. ABID: They've been in there.

THE COURT: Okay. So just as of today, they'll be in the backpack, Mom can work on the sight words. Coun -- the books, does he have to read a separate book every day or is it like one book till he master's that book, or how does --

MR. ABID: Two books every day and it's in there every day. The stuff's never been moved.

THE COURT: Okay.

MR. ABID: She's never looked.

THE COURT: So the -- the books that he's supposed to read are going to be in the backpack every day so that she can read the books and the sight words with him. Now as to his homework packet, how many pages does he have a day, about two you think, or --

MR. ABID: One page.

THE COURT: One page.

MR. ABID: Three pages total.

THE COURT: Three pages total for the week.

MR. ABID: Uh-huh (affirmative).

THE COURT: And he's supposed to do one page per day. Okay. Is that how it works or --

MR. ABID: Well, we only do it on Wednesdays.

THE COURT: You do the pages on Wednesdays?

MR. ABID: Because I leave it in the backpack and it comes back from her house undone, so I complete it on my day, Wednesday, to turn it in Thursday.

THE COURT: Okay.

MR. ABID: So it's been in there. It's never not been in there.

THE COURT: Okay. So moving forward, the order of this Court is that, ma'am, the entire packet of homework --

MS. ABID: Thank you.

THE COURT: -- the books, the flash cards remain in Sasha's backpack.

MS. ABID: Thank you so much.

THE COURT: All right. So you have an opportunity to do those with him.

MS. ABID: Him -- yes, of course, but can I please pick up my son at 3:30, I mean --

THE COURT: The temporary order of this Court will be that it remain as it is --

MS. ABID: Well, I have to wait -- you see the problem is when he gets home 5:30, he needs to eat, take bath --

THE COURT: I to --

MS. ABID: I --

THE COURT: I totally get you.

MS. ABID: I can only read books with him --

THE COURT: I totally understand. I'm with you. I -- I get that, okay. It's a busy time. I call it the witching hour, and it is horrible, and I get it. But perhaps the best idea -- and it's not an order, but it's just a suggestion, that during bath time you work on those sight words, and before he goes to bed, you read --

MS. ABID: Sure.

THE COURT: -- have that opportunity to read that book with him that he's supposed to read, okay?

MS. ABID: Yes.

THE COURT: All right. And that -- that will be the order going forward, because that's a special time for you too. And I think that you'll both enjoy that time together. But I will reconsider it at the time of trial, okay.

MS. ABID: Sure.

THE COURT: So this is the temporary order. Is there anything else that I can do for the parties other than my scheduling order? Other than -- first -- and counsel, ask -- let me know how you feel about asking Paglini first to do the child interview since he did the previous. The -- my only motivation --

MS. ABID: No.

THE COURT: -- in requesting that is to save the parties money.

MS. ABID: No, he's -- no.

THE COURT: Oh, counsel, is that a --

MR. BALABON: Well, in light of his costs, what do you think?

MS. ABID: Dr. Ponzo.

MR. BALABON: I -- who?

MS. ABID: Ponzo.

MR. BALABON: Huh?

MS. ABID: Dr. Ponzo.

THE COURT: Who?

MR. JONES: He's not a PhD.

MR. BALABON: He's not a PhD.

MS. ABID: I --

THE COURT: There will only be a --

MS. ABID: This is so much money we're spending.

THE COURT: No, no, and I get it, but I'm not sending Sasha to FMC to do a rinky-dink evidentiary hearing. Okay? There's too much going on her here. And let me be clear, we're doing one evidentiary hearing. It will stick, okay. Whatever stipulation, agreement, decision I make, that's the plan for this family moving forward, okay. If there's one more problem after that, one more tiny little problem, it's a parenting coordinator and you're splitting the costs and we're moving forward, okay. So I understand that there's been other judges and we've been back, so there's nothing I hate more than seeing people more than four times in a year on one case, okay. So that's why we're going all out doing it --

MS. ABID: Your --

THE COURT: -- so that it's my order and I have more control going forward, okay.

MS. ABID: Your Hon --

THE COURT: And that's not your fault, I mean, the judge retired.

MS. ABID: I just want --

MR. BALABON: I think that --

MS. ABID: I'm just going to ask a question.

MR. BALABON: -- Harter had recommended Ponzo before, and he'd be way less expensive than Paglini.

THE COURT: Is he a psych --

MR. BALABON: Paglini was --

THE COURT: -- a psychologist?

MR. BALABON: -- $14,000.

MR. JONES: I --

MR. ABID: I don't --

MR. JONES: I --

MR. ABID: -- (indiscernible).

MR. JONES: Yeah, he -- he's not a PhD and I -- I --

MS. ABID: And he was -- he is a recommended client. I don't want this -- John Jones recommended him already. It's to me is unacceptable and Dr. Paglini completely --

MR. BALABON: All right.

MS. ABID: -- disregard --

THE COURT: Okay.

MS. ABID: -- that police was in --

THE COURT: If we can't --

MS. ABID: -- my house --

THE COURT: -- agree on Dr. Paglini --

MS. ABID: No.

THE COURT: -- only because I was trying to save the parties money --

MS. ABID: No.

THE COURT: -- because he had previously worked on this case before --

MR. BALABON: I don't know.

THE COURT: -- that's fine with me. I'm not married to Dr. --

MR. JONES: Well, I threw out three, Judge. I -- I -- I'm --

THE COURT: Okay. So I'm okay with either Dr. Holland or Dr. -- the other one?

MR. JONES: Lenkeit was the third.

THE COURT: Lenkeit. Counsel, are you okay with either of those? Do you --

MR. BALABON: Holland.

THE COURT: -- want to get -- Holland?

MR. BALABON: Holland would be okay --

THE COURT: Okay.

MR. BALABON: -- yes.

THE COURT: Dr. Holland. Okay.

MR. BALABON: Now the issue is what materials --

THE COURT: The cost.

MR. BALABON: -- are going to be provided to him --

THE COURT: Ah.

MR. BALABON: -- and the cost.

MR. JONES: Her.

THE COURT: Her. Stephanie.

MR. JONES: I'm sorry.

THE COURT: That's okay. Well --

MR. BALABON: He -- he cannot be provided with the pleading because the pleading contains an unverified recitation to an alleged --

MR. JONES: And --

MR. BALABON: -- video tape. I mean, if the video tape is going to be suppressed, I mean, there -- there's -- there's --

THE COURT: Video or audio?

MR. BALABON: -- certainly debate --

MR. JONES: Audio.

THE COURT: I'm going to ask --

MR. BALABON: Audio tape. I'm sorry.

THE COURT: Okay. Well, this -- this is what I'll do.

MR. BALABON: It cant' come in.

THE COURT: Counsel, you really think he needs the audio tape?

MR. JONES: I think in order to -- to understand what types of questions need to be asked of Sasha, there either has to be the declaration or there has to be the audio tapes, not neither --

MR. BALABON: And I --

MR. JONES: -- because --

MR. BALABON: -- strenuously object to the provision of a tape that was obtained, in our opinion, in violation of federal law, in violation of state law, to be provided in this case. They take -- we -- we -- we continue to press for suppression of the tape. And I think it would -- I -- I think -- I think the doctor could be very well able to make a determination based on his examination as -- as a professional, an independent evaluation as to --

THE COURT: The issue of --

MR. BALABON: -- the extent of --

THE COURT: -- alienation.

MR. BALABON: -- any alleged parental alienation. And it needs to be in both parties' homes, Your Honor.

MS. ABID: Yes.

MR. BALABON: Both parties.

MR. JONES: Sure.

THE COURT: Sure. No, I think that -- I -- that's only fair and it gives --

MR. BALABON: I mean, Ricky advised --

MR. JONES: But --

MR. BALABON: -- me yesterday that the child asked him, Rick, what is a gangster? Well, my daddy said that you're a gangster. Ricky --

THE COURT: Maybe that means --

MR. BALABON: -- my daddy says you're a bad man.

THE COURT: Oh.

MR. JONES: He knows what a fif --

MR. BALABON: He's -- he's --

MR. JONES: He knows what a Barrett 50 caliber --

MS. ABID: My daddy says --

MR. JONES: -- machine gun --

MS. ABID: -- you were in jail.

MR. JONES: -- is though because he plays Call of Duty at age six.

THE COURT: Okay. Well, let's do this. If the parties are inclined to stipulate that we're just going to ask about his -- Sasha's relationship with his parents --

MS. ABID: Okay.

THE COURT: -- and the extent of alienation and then

I'll allow Dr. Holland in -- the ability to ask all of those questions and spend time with him, that's fine.

MR. JONES: But the issue --

MR. BALABON: And we're --

MR. JONES: -- Judge --

MR. BALABON: -- good with that, Your Honor.

MR. JONES: -- though is experts. Let's say that you make a determination and the federal government comes in and arrest -- arrests him and Henderson PD arrests him and he's prosecuted and he's convicted and this was an illegally obtained tape recording. Without -- outside of any exception --

MS. ABID: It's crime.

MR. JONES: -- an expert can still review it and rely upon it.

THE COURT: Well --

MR. JONES: There is --

THE COURT: -- I understand.

MR. JONES: -- nothing --

THE COURT: I was hoping --

MR. JONES: -- an expert can't --

THE COURT: -- for a stipulation, Mr. Jones, but you know, if we're not going to have a stipulation, then I will just have to write an opinion as to the -- let's set a status

check, Judge's opinion, two weeks. I'll either write it by then and take it off calendar and call counsel that I've written it --

MR. BALABON: If you're opinion is going to -- you're saying that it's an opinion as to whether or not the tape is going to be admissible?

MR. JONES: No. About that --

MS. ABID: Yes.

MR. JONES: Whether the expert --

MS. ABID: I want this opinion --

MR. JONES: -- gets it --

MS. ABID: -- please.

MR. JONES: -- right?

MS. ABID: Please, make this --

THE COURT: As to --

MS. ABID: -- opinion.

THE COURT: Just to the expert, okay. And then I'm going to make the -- listen, I'm not making -- making a -- going to -- first of all, that's subject for a motion in limine, not for a motion now.

MR. JONES: Right.

THE COURT: If hadn't set the evidentiary hearing. I set the evidentiary hearing and I said I'm going to rule on evidence as it comes. I also said that there's -- it's

sufficient, without me looking at any of the transcripts of any alleged recording, to grant the evidentiary hearing, which I'm doing.

MS. ABID: Tapes. The new tapes.

THE COURT: So I will make in two weeks -- within two weeks a determination as to whether or not it's going to the expert for the evidentiary hearing.

MR. BALABON: But if you -- if you provide it to the expert, Judge, and then you ultimately rule that -- that it has to be suppressed because it viol -- I mean, we're talking about federal law, we're talking about state law.

THE COURT: But -- I --

MR. BALABON: And then it's going to --

THE COURT: -- get it.

MR. BALABON: -- by -- in the backdoor --

THE COURT: That's not saying that it's going to come -- it's going to say that an expert reviewed it.

MR. BALABON: And if the expert --

THE COURT: That's what I'm going to do.

MR. BALABON: -- is called to testify, and it's obviously going to cloud -- it could cloud his conclusions.

MR. JONES: I -- I --

MS. ABID: Yes.

MR. BALABON: I mean, if it's going to be

suppressed, it can't be provided to the expert.

MR. JONES: I just want the --

MR. BALABON: That's a backdoor way of getting it in.

MS. ABID: Absolutely, Your Honor.

MR. JONES: I want the expert to under -- I'm not asking to try to get it in through the expert, because --

THE COURT: You're not going to --

MR. JONES: -- this is a child interview.

THE COURT: -- ask the expert to read it in. What you're --

MR. JONES: No.

THE COURT: -- asking for is the expert to have --

MR. JONES: To have the background when --

THE COURT: -- to understand what the allegations are so that in formulating her questions, she is going to ask questions about this.

MR. JONES: Correct.

THE COURT: Okay. She's not going to say to the child, well, I reviewed the recording and -- and she's not going to say me -- to me -- and Mr. Jones is not going to ask the question did you review the recording and what did the recording say. You can say can -- did you review the recording, you reviewed this, you reviewed ba-ba-ba-ba-ba, all

this -- expert questions. But I'm not going to let her testify. And I don't think that Mr. Jones is going to say --

MR. JONES: That's not what I'm asking for.

THE COURT: -- well, tell us about the recording. Do you think that was bad, what Mom said. Do you think --

MR. JONES: No, because --

THE COURT: -- this is this.

MR. JONES: -- that's not her role. Her role is the child --

THE COURT: No.

MR. JONES: -- interview.

THE COURT: Is to talk to the kid and tell us what the kid thinks and what the kid understands and what the kid has heard and how that is affecting the kid, correct?

MR. JONES: Correct.

THE COURT: And so --

MR. BALABON: If there -- there if there is any effect, which we say of course there isn't --

THE COURT: And there --

MR. BALABON: -- because there isn't.

THE COURT: -- may not be. Okay.

MR. JONES: Because the --

THE COURT: And he may --

MR. JONES: -- the crying --

THE COURT: -- say no big deal.

MR. JONES: -- pursuant to interrogation clearly is not an effect, Judge.

THE COURT: My kid cries all the time.

MR. JONES: When you tell --

MR. BALABON: I agree.

MR. JONES: When -- when you tell --

MR. BALABON: It's ridiculous.

THE COURT: No, no, no, but I'm just saying, okay, like you know, it goes both ways. We'll find out from the expert, okay. And so --

MR. JONES: I have the authority about the expert being able to review this stuff, because I actually had to use that in the other case. I'm happy to submit it to Mr. Balabon and the Court.

MR. BALABON: And there -- there's contrary authority that says that it shouldn't be allowed.

THE COURT: Sure. Absolutely.

MR. JONES: No, joint expert, you know. To an expert.

MR. BALABON: I understand what you're saying.

MR. JONES: There is no authority in the world that says an expert --

THE COURT: Okay.

MR. JONES: -- can't review anything it wants.

THE COURT: Okay. And what I'm going to --

MR. JONES: I can find Mr. Balabon --

THE COURT: What I'll ask is be --

MR. BALABON: (Indiscernible) --

MR. JONES: -- (indiscernible).

THE COURT: -- before Monday, counsel, if you have any points and authorities that you want me to look at as to the expert --

MR. JONES: Just on the expert.

THE COURT: Just on the expert. I don't need the world of authorities. That will -- get that to me by Monday and you can just simply put that in a -- a supplement and list them out. You don't need to give me a brief. Certainly I'll have my office already working on this issue this afternoon, and so I'm certain that a lot of what you will give me we will already have, but I will be working on that.

So let's do a two-week status check for decision.

THE CLERK: April 2nd at 11 a.m.

THE COURT: All right. And is that date good with counsel? Counsel, is that date okay for you?

MR. BALABON: Yes.

THE COURT: All right. Mr. Jones, that date is okay for you?

MR. JONES: Yeah, I -- I have to go to spring break a week before the Clark County spring break because my daughter is in college now and for some reason her spring break is the week before Clark County schools, so.

THE COURT: But -- but can you --

MR. JONES: So I'll be back in time.

THE COURT: You will? Are you sure?

MR. JONES: Yeah.

THE COURT: Okay. And then I've set -- the next full day is August 14th at 9 a.m. Please check and see if that date works for the parties.

MR. JONES: I'll make it work.

MR. BALABON: I can do that, Your Honor.

THE COURT: All right. Wonderful. Okay. And then we'll go from there. I'll defer ruling on the Ukraine issue as we've talked about, just for the future, till then.

MR. BALABON: I thought we had a stip on that.

THE COURT: For this --

MS. ABID: Yes.

THE COURT: -- year. For this summer.

MS. ABID: I'll go to Mexico.

MR. JONES: No, she wanted to go to a -- a Hague signa -- you've already --

THE COURT: Any --

MR. JONES: I've already said --

THE COURT: Yeah, any Hague --

MR. JONES: -- a Hague signatory that's not a --

MR. BALABON: Thought so.

MR. JONES: -- war zone and there's not problem with travel.

THE COURT: And no travel advisory.

MR. BALABON: So we have a stip on that, so.

MR. JONES: And the -- and the passport will be provided and then returned.

THE COURT: Correct. And then --

MS. ABID: What -- what is returned?

THE COURT: That's what we're going to do. And then I'll make any decision on future years or anything else at the evidentiary hearing, as well as the visitation issue, as well as the custody issue. All right?

MR. BALABON: Are you going to issue an minute order on the -- is that --

MR. JONES: Yeah, if -- if we don't come for the decision, you'll have already made the decision on the expert --

MR. BALABON: What is the date --

MR. JONES: -- getting the tapes.

MR. BALABON: -- on the decision? Does that require

a court appearance or just --

MR. JONES: April 2 at 11.

MR. BALABON: April 2.

THE COURT: What I will do is, sometimes I'll issue the decision at the bench or I'll write it. If I have it -- if I've written it, I will -- if I've written it, I will have my office call you and tell you you don't need to appear --

MR. JONES: Okay. Very good.

THE COURT: -- and I'll vacate the date. If I haven't written it but I'm prepared to give it at that status check date, I'll give it at that status check. And the parties don't need to appear; attorneys can appear, that's fine, and then we'll move from there.

If -- you can go ahead and go. I'm just going to give -- give me two minutes and I'll do the scheduling order for the evidentiary hearing now.

MR. JONES: Okay. Are we off?

THE COURT: We are off.

(COURT RECESSED AT 12:02 AND RESUMED AT 12:08)

THE COURT: We're back on the record in Sean Abid vs. Lyudmyla Abid, D-10-424830-Z. As to the cost, it will be split at the beginning; however, should one party prevail overwhelming at the evidentiary hearing, they'll be responsible to pay back the other party for the cost of the

expert. All right?

MR. JONES: Not the prevailing party, the non-prevailing party.

THE COURT: I'm sorry.

MR. JONES: That's okay. I -- I knew what you meant but --

MR. BALABON: We understand what you mean by that.

THE COURT: Thank you. I apologize.

MR. JONES: Thanks, Judge.

THE COURT: Thank you.

(PROCEEDINGS CONCLUDED AT 12:09:09)

****

ATTEST: I do hereby certify that I have truly and correctly transcribed the digital proceedings in the above-entitled case to the best of my ability.

/s/ Kimberly C. McCright
Kimberly C. McCright, CET
Certified Electronic

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID, Appellant, v. SEAN ABID, Respondent.	Supreme Court No. 69995 District Court Case No. D-10-424830-Z

Appeal from the Eighth Judicial District Court

APPELLANT'S APPENDIX

VOLUME 8

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TRANS

EIGHTH JUDICIAL DISTRICT COURT

FAMILY DIVISION

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE MATTHEW HARTER
DISTRICT COURT JUDGE

TRANSCRIPT RE: EVIDENTIARY HEARING

MONDAY, DECEMBER 9, 2013

APPEARANCES:

The Plaintiff:	SEAN R. ABID
For the Plaintiff:	JOHN JONES, ESQ. 10777 W. Twain Avenue Suite 300 Las Vegas, Nevada 89014 (702) 869-8801
The Defendant	LYUDMYLA A. ABID
For the Defendant:	MICHAEL BALABON, ESQ. 5765 S. Rainbow Boulevard Suite 109 Las Vegas, Nevada 89118 (702) 314-3196

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* * * * * *

EXHIBITS

LAS VEGAS, NEVADA WEDNESDAY, MARCH 13, 2013

PROCEEDINGS

(THE PROCEEDINGS BEGAN AT 10:12:10)

THE COURT: All right. This will be case D-424830 the Abid case.

Counsel, appearances for the record.

MR. JONES: John Jones, Bar Number 6699, appearing on behalf of the plaintant (sic) -- movant -- Plaintiff, new movant.

MR. BALABON: Michael Balabon, Bar Number 4436 on behalf of the Defendant, Lyuda who's present.

THE COURT: Okay. We are here on an evidentiary hearing regarding the Plaintiff's motion to -- it was originally for relocation, that was retracted and then he wanted to continue on with the motion to modify custody.

MR. JONES: It was pled in the alternative.

THE COURT: Right. Well technically he needed to do that anyway, right? I mean, motion --

MR. JONES: Right.

THE COURT: -- primary and relocate and he just took the relocation portion off that. So I believe both Counsel have had trials in here, so I know your clients haven't. I keep copious notes during trial, so you'll see me typing a

lot. The only thing I have up here is your paperwork. I have the JAVS system going, which I keep internal notes about when stuff is said, so I can look at it later on if I end up taking the matter under advisement.

Ninety-eight percent of the times lately I'm taking it under advisement, issuing a decision within the next -- I'll have a better idea at the end of the day, but usually 14 days, tops. Okay?

On the forefront, I'll ask if we have stipulations, housekeeping stuff, but I want to set the tone in that I reviewed the pretrials again this morning. I just want to comment, I guess, on yours Mr. Jones, your -- in your analysis portion of your pretrial memorandum, starting on page three of it says, quote, as this Court has stated, the legal standard is a pure best interest Truax standard.

I absolutely did not say that, because that's not the case. I indicated 125.490(1) which is an elevated burden in Moseley case cited by Mr. Balabon is the more apropos, because they agree, they agreed to joint physical custody.

Now, that being said, I'd love nothing better, unlike some of my colleagues who fear appeals, I love -- there needs to be clarification on what that means, because I would think if it was clear and convincing, which would be the next stage up, as we all know, they would say, it has to be clear

and convincing, they didn't say that. They just said it's an elevated burden from preponderance. So I'll throw that out there.

MR. JONES: That's fine, Judge.

THE COURT: And it's your burden.

MR. JONES: It is.

THE COURT: So that being said, do we have any stipulations regarding -- or I guess we should say last minute objections regarding proposed witnesses and/or documents? Because I -- when I set the trial I indicated I was going to follow 16.2 regarding disclosure, so --

MR. JONES: Well I don't think there is a -- I've looked at Mr. Balabon's proposed exhibits, and I'm sure he's looked at mine. He did ask me if there was something -- anything we could just stipulate to coming in. I don't have any objection to his exhibits. I don't know if he has any objections to mine.

MR. BALABON: The objections that I would have to his exhibits would be the voluminous documents pertaining to Mr. Marquez's convictions.

MR. JONES: Well --

THE COURT: Well if there -- if you're saying they're -- first of all, were they timely disclosed, because 16.2 --

MR. BALABON: It's not a timeliness issue. We --

THE COURT: If it's not timely, then we're --

MR. BALABON: -- there's actually no deadline stated in the scheduling order, that we had to produce exhibits by a specified date, so we agreed to exchange them on Friday. But that's neither here nor there. It's a --

THE COURT: If it's repetitive, absolute -- you know, that kind of stuff, surely.

MR. JONES: Well, and Judge, really the exhibit is proposed Exhibit 18 was provided to Dr. Paglini, so to the extent that some of his opinions are based upon any documents, they would come in by virtue of the fact that they are the types of evidence routinely relied on by experts.

THE COURT: Okay.

MR. JONES: So my intention was merely to move Exhibit 18 in through Dr. Paglini, based upon the fact that this was something that he had reviewed as it pertains to the truth regarding Mr. Marquez's history.

THE COURT: Okay.

MR. BALABON: So I would stipulate to the admissibility of the convictions, we acknowledge that there were convictions. I don't stipulate to the admissibility of the actual indictment, which contained allegations.

THE COURT: Okay. At this juncture, all I'm asking

for is whether you have stipulations. You have every right to object.

I would submit, if you've waived the time and didn't file a written objection, we may -- it may come in. Like, at the end of the day, if he's got the convictions, he's got the convictions. But if you guys stipulated to waive time frames, that kind of puts you in a precarious position.

But I absolutely -- I -- whenever I set a trial -- cite my own minute order.

MR. JONES: Well, we -- I -- we exchanged emails a week or so ago --

THE COURT: And that's fine --

MR. JONES: -- two weeks ago.

THE COURT: -- if you've waived it. But I guess we'll play it by ear. If you don't want to stipulate, you don't have to, we'll deal with them each when they come up. That being said, I can see Mr. Jones, as he always has, his rules of evidence, we use --

MR. JONES: Actually, I forgot my own book, Judge.

THE COURT: Wow.

MR. JONES: So I borrowed yours.

THE COURT: So Mr. Balabon?

MR. BALABON: Thank you.

MR. JONES: He keeps two up here.

THE COURT: I do. We do speaking objections in here. If you want to reference me to the citations, but a lot of times that's how we play.

Anything else as far as housekeeping matters?

MR. JONES: No, Your Honor.

THE COURT: That would be -- that was going to be one of my questions, is Dr. Paglini going to be here?

MR. JONES: He is here.

THE COURT: Okay.

MR. JONES: And I'm -- since he's on the clock, I'm going to --

THE COURT: I absolutely --

MR. JONES: -- waive opening and call him first.

THE COURT: -- would love nothing better than to get him out of here.

Timing-wise, we will -- we're here all day. We can go as late as 6:00, prefer to be done by 5:00, and we will be breaking some time for an hour lunch, so --

MR. JONES: I don't believe my case in chief will go more than a couple of hours, Judge.

THE COURT: Okay.

MR. BALABON: I'll try to limit it as well. We'll get as much in as we can as -- the time that we have.

THE COURT: We're here all day, if we need to.

(PAUSE)

THE COURT: Sir, how are you doing?

THE CLERK: Please raise your right hand. You do solemnly swear that the testimony you're about to give in this action shall be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you. You may be seated.

JOHN PAGLINI

having been called as a witness on behalf of the Plaintiff and being first duly sworn, testified as follows:

THE COURT: We don't need background stuff. I think everybody in Family Court's --

MR. JONES: I actually --

THE COURT: -- very familiar --

MR. JONES: -- had already eliminated that from my outline.

THE COURT: -- with Dr. Paglini and his credentials.

DIRECT EXAMINATION

BY MR. JONES:

Q Good morning, Doctor. How are you?

A Good. How about yourself, sir?

Q Not too bad. Prior to you being here today, have either of the attorneys had any conversations with you

regarding your testimony today?

A No, just that I talked to you for half a second, indicating you were going to subpoena me, and that was it.

Q And you were in fact subpoenaed and you're here in response to that subpoena?

A Yes.

Q Now you were appointed by the Court to perform an evaluation in this matter?

A Correct.

Q And did you prepare a report containing your findings and recommendations?

A Yes, I did. Dated October 4th, 2013.

MR. JONES: Your Honor, do you have the original?

THE COURT: You're trying to locate it upstairs? I have my copy, I think you guys were submitting it?

THE CLERK: She's printing -- if you would like two copies of it?

THE COURT: I thought I saw both parties listing a copy. Do we have not an extra copy --

MR. JONES: I have mine.

THE COURT: -- of the exhibit.

MR. BALABON: I have mine.

MR. JONES: I generally would -- am not going to show an expert --

THE COURT: No, I understand that.

MR. JONES: -- anything but the original.

THE COURT: I have mine -- I have mine, and I obviously can't disclose mine, because I have my highlighted copy. We're trying to locate the original upstairs. We'll do a quick answer.

BY MR. JONES:

Q Do you have a copy of your report?

A Yes, I do.

Q Okay.

THE COURT: Well that's probably --

MR. JONES: I will move the original when it is found.

THE COURT: Okay.

MR. JONES: Or probably Dr. Paglini's copy, if he'll give it to us.

THE COURT: That reminds me, for housekeeping purposes, when I set the evidentiary hearing, I had indicated it will be coming in as Court's Exhibit 1 pursuant to EDCR 5.13. So if you want to make reference to it, it will be at Court's Exhibit 1.

(COURT'S EXHIBIT 1 ADMITTED)

MR. JONES: Right. And I was aware of that, Judge. I just -- I generally prefer to deal with the original when it

comes to a report.

THE COURT: Okay.

BY MR. JONES:

Q Now I'm going to walk through some of the points in your report if -- with you here, and I'm going to try to stay in the order that they're found in the report, for ease of reference.

Now there is discussion in the report regarding comments made by the Defendant, in the presence of the child, that were derogatory towards Dad; do you recall that?

A Some of them, yes.

Q And during the course of your investigation of these comments, the Defendant in fact did admit to having made at least some of the comments that are specifically referenced in your report, right?

A Correct. She made those -- she admitted those in her last session, in October.

Q Now there is a reference in your report on page 19, in the I guess the fifth paragraph down, to Mrs. Abid borrowing $8,000 from Mr. Abid in 2011; do you recall that discussion?

A I see that sentence, correct.

Q Did she ever make any statement to you that it was anything but a loan?

A I just recall it as a loan, but I'm not sure. It was a long time ago.

Q Did she notify you or tell you at all that she had filed a motion with this Court claiming that it was a gift?

A I don't recall that.

Q Now on page 21, you discuss, with her, or you list your discussions with her, regarding Mr. Marquez. And it reports that she visited him, which from the history I see, meant her first face-to-face contact with him in November of 2012. Was that -- is that accurate, as far as her reporting to you?

A It says here on November 2nd, 2012 Mr. Marquez visited Mrs. Abid. This was the first day he was allowed to leave the state. This began their relationship. It seems like that may have been her first contact.

Q And later on, at the very bottom of that page, it reflects that they were married approximately six months later, on May 28th?

A Correct.

Q In general, did you find -- even not considering Mr. Marquez's criminal history, did you find a marriage after first meeting somebody in November, to be sudden?

A I think you have to get to know someone. I mean you can think it's going to work, you probably need to give it

more time. So yes, it -- it was sudden, I -- I think especially considering his history.

Q Now during your investigation, you interviewed Mr. Marquez; is that right?

A Correct.

Q And there is a discussion of your collateral interview of him beginning on page 26. At the very bottom of page 26, you have a sentence that says, on occasions there appeared to be vagueness regarding his responses. Can you explain what you mean by that?

A Yes. When I would ask him about criminal activity and try to get more detail oriented, there were just kind of general, vague responses. Not all the time, but at times.

Q In your interview, actually in your collateral reference, on the next page you have very -- you have different categories, one of which is substance abuse history, on page 27. Did Mr. Marquez reveal to you the extent of his -- did he accurately reveal to you the extent of his use and/or abuse of cocaine?

A His rendition, which is on page 27, appears different from the probation officer's rendition. Mr. Marquez did note that he thought the PSI was inaccurate in some information, and I don't know if that pertained to that, or not, but what Mr. Marquez said and what the probation officer

said are two different things.

Q And did that concern you?

A Well it was roughly, you know, 10, 12 years ago, but, you know, I was -- it's concerning that, you know, I would like a person to be candid, regarding what the issues are. So yes, I had concerns about it. In terms of if it's an -- an issue that's relevant now, based on Probation Officer Baldwin, he's been drug tested and he's been clean, so that was positive.

Q Now on page 28 you have a section regarding criminal history. And the second to the last paragraph on the page you once again referenced that he was vague regarding what that meant. Did he actually -- well, did he actually tell you what he did to end up in prison for ten years?

A Well it was the gun charge and a drug charge. And -- and then I think he pled to the drug charge and the gun charge was dropped. And then in that statement here, this -- this is based on my follow up, of numerous questions, to get that information, the second paragraph to the bottom.

Q Now did he tell you, in the criminal history I see in your report, there's no reference to an arrest, a prior arrest for selling marijuana, that you then later reference in your discussions with the probation officer.

A That -- that might be my mistake. On page 28,

Criminal History, it says, reported he was arrested for possession of sales -- that should be sales of marijuana.

Q Okay.

A That's my mistake on that.

Q Okay. And that was something that the probation officer confirmed for you?

A Correct.

MR. JONES: Now do you prefer that I -- I'd prefer to use the already marked exhibit, one at a time, that the clerk has?

THE CLERK: Absolutely.

MR. JONES: Thanks.

THE CLERK: I'd prefer that.

MR. JONES: May I have Exhibit -- Proposed Exhibit 18? In fact, if you just want to put them out here, I'll be happy to take them as I go.

THE CLERK: That'd be great.

BY MR. JONES:

Q Now as part of your investigation, you were provided materials by the parties?

A Yes.

Q As well as probably the pleadings, by my office and Mr. Balabon's office. Do you recall Mr. Abid providing you a rather voluminous document reflecting the entirety of the

prosecution of Mr. Marquez? Let me show you what's been marked as Proposed 18. Tell me if you recall Mr. Abid providing that document to you.

A I recall some information on Mr. Marquez. I did not look at this information last night. Some of it looks more extensive than what I have. So I may not have -- have all this. I know some of it I -- I -- I -- notice it.

Q Okay. In the materials that you did review, did you feel like you had a firm grasp on Mr. Marquez's criminal history?

A Well, a firm grasp would have been receiving the PSI report, reading, in entirety, the criminal -- the arrest report, also looking at his prison records, in regards to his behavior in prison. That would have led me to a firmer grasp on -- on Mr. Marquez. I've done risk assessments for a long time, and so I kind of know what to look for in -- in some of these things, and I like to have more information than less information. I was fortunate enough to be able to talk to the pro -- the probation officer, because he was able to give me information on the PSI, but I would have liked to have gone much more in depth on that.

Q Now turning to -- I'll take 18 off your hands for right now. Turning to page 30 in your report.

A In my report?

Q Yes.

A Thank you.

Q This is where you have -- are speaking to the probation officer, Mr. Boden (ph). Did Mr. Boden believe, as you discuss in paragraph -- the fifth paragraph on the page, that Mr. Marquez was in the Mexican Mafia?

A It says the PSI does not state that, yet he would assume, if he was distributing drugs and guns, that there's a tie.

Q And while you expressed concerns regarding the criminal conduct in general, if there was a mafia -- Mexican Mafia tie, would that cause you even more concern?

A Well when you're -- that's a complicated question. Would you -- yes and no wouldn't suffice for that. Would you like me --

Q Then please explain.

A -- to expand on that? When you're doing a risk assessment, you have risk factors that are historical and dynamic, and you also have what we call a resiliency factor. So if he's in the Mexican Mafia, I think, or any type of mafia, I would have a concern, because you know, these individuals could be around the new family, unless he severed ties completely and he's pursuing a different life. So it, historically, is a risk factor and dynamically, those dynamics

potentially could change. And that part would need to be assessed.

Q Now in the second to last paragraph on page 30, you discuss Officer Boden's reference to Mr. Marquez's prior drug use. What was his drug of choice?

A Cocaine.

Q And it all -- he also, according to his probation officer, did methamphetamine?

A Yes.

Q But neither a regular use of cocaine or any use of methamphetamine was provided to you by Mr. Marquez in your interview of him, right?

A Correct. He -- think he just said he used cocaine twice in the late 90's.

Q All right. Now on page 31 you discuss your interview of Sean's current wife, Angie?

A Yes.

Q When you interviewed her, did you find her to be credible?

A Yes.

Q Did you find the anecdotes and stories that she told regarding certain things that Sasha says to be believable?

A Well, it -- it seemed to be consistent in regards to what I'm hearing from not only her but the -- the aunt, and

then some of the other statements. She seemed, you know, fairly straightforward with things.

Q And were the types of things that she reported hearing consistent with the types of things that Mrs. Abid admitted to saying to Sasha?

A Y -- very similar. Yes.

Q Now I'm going to skip ahead to page 43, the collateral number 16, Irina (ph), the Defendant's daughter from a prior relationship. Do you recall interviewing her?

A Yes.

Q Now historically, during the parties relationship and even after their divorce, did she report having a close relationship with Sean?

A If you can show me where that's at. I think at the beginning she did. Yeah, relationship with Mother and Sasha is also -- hang on. Oh, she said that her parents fought a lot, that Sean called her mom negative names and always wanted to kick them out. I informed her that I had heard that Sean stated they got along well, and she said not really; he was controlling. Never helping with homework, he's always intimidating me if I did not get good grades. Yeah.

Q Now did Irina report to you anything having to do with an April of 2012 incident where her mother, the Defendant, attacked her?

A If it's not in my report, it wouldn't have been brought up.

Q And if there had been a CPS investigation based upon an altercation --

MR. BALABON: Objection. I'm sorry, finish the question. I'm sorry, John.

BY MR. JONES:

Q Based upon an altercation between the Defendant and her daughter, you would have expected to -- somebody to have reported that to you on Mom's side, right?

A I am aware --

MR. BALABON: Objection to the form of the question.

THE COURT: It's a hypothetical. So I'll sustain it.

MR. BALABON: Thank you.

THE WITNESS: Can I respond to it? Okay. I -- if I recall I was aware of it, from Mr. Abid. And I don't think I have addressed it with Irina.

BY MR. JONES:

Q Did Mrs. Abid tell you anything about the altercation?

A I don't recall.

Q Now at page 49, there is a reference to a discussion with Sasha's great aunt, or a discussion with Lyudmyla

regarding an incident with the great aunt, dealing with a photo in which Angie was in the family photo; do you see that?

A Yes.

Q At the very bottom of --

A Uh-huh.

Q -- page 49?

A Yes.

Q What, to your recollection, occurred in that incident?

A I think the great aunt put together a photo for Sasha, of all the family members and that would include Lyuda as well as Angie, who was just in the picture a few months. And Lyuda became irate when she saw that and informed that if she ran into her apparently she wouldn't know what she would do to -- to her, that's what Lyuda said. But the aunt said that she would assault her. And I think she wrote an affidavit supporting that, if I'm not mistaken.

Q And the Defendant actually admitted to that incident, right?

A She admitted that the incident -- I don't think she admitted that she was going to assault her, but she wouldn't know what she would do.

Q Now there was an incident reflected in the papers, and reported by both parties, regarding the selection of a

preschool --

A Yes.

Q -- for Sasha. And that at one point the parties had made an agreement, which then there was a change of heart on the part of the Defendant; do you remember discussing that with the Defendant?

A Yes.

Q In your recommendations you state that it's probably not in Sasha's best interest to go to two preschools; is that fair to say?

A It's -- the more continuity the better. Could a child handle -- handle two preschools? Probably. But it's -- it's the parents that need to handle it more effectively than the child. The child can cope, if everyone's on board.

Q Did the Defendant explain to you why she changed her mind after reaching an agreement with Dad?

A She perceived Sean as being very controlling and constantly harassing her, and things were not good enough, there was a financial issue. I think at one point there was an agreement and then there was no longer an agreement. She presi -- presented a few different scenarios.

Q Now at page 50, you list risk factors pertaining to Mom, the first one being possible failure to protect. Please explain.

A Well that goes into the risk assess -- not risk assessment, but the risk research on the following pages regarding Mr. Marquez. This is a serious issue when you bring a person with a -- a history of felonies, two felonies. There is a potential destabilizer, not just for the child, but the whole family, in regards to whether the person's improved or not. So that's why it's a possible failure to protect. You're bringing in someone who could be potentially a significant risk factor.

Q Now in -- on page 51, you reflect that Mom believes that Ricky's just fine because he has not raped or killed anyone. Do you find that type of position to be naive?

A Extremely, and I'll tell you why. I've probably worked on 40 to 50 death penalty cases, I've interviewed hundreds of murderers and probably thousands of sex offenders, probably about 2,000 sex offender assessments and risk assessments. And, you know, most people, when they enter a relationship they're probably going to put their best foot forward. And, you know, I've had stories where, you know, the mom's really connected to the guy that she's met for a few months, and then their child is dead. And I've had stories where the mom connects with an ex-con, both of these are ex-cons and, you know, she comes home from work and there's a dead prostitute in her kitchen and the guy is right over her.

So I have a lot of different stories in terms of recidivism rates.

And so I know people fall in love, and I think that's wonderful, but -- you know, and -- and this relationship could be great, potentially, you know, but there are risk factors. And so, you know, when I hear someone says, hey, he's nice to me and the kids, you know, he hasn't raped anyone, he hasn't killed anyone, so therefore I'm turning a blind eye to this information, that is a cause of concern for me, because, you know, yeah, it's really great that he treats you well.

But at the same time, if you look at his history, he was on probation for three years, from '97 to 2000 and he successfully completed probation, and then he re-offended after probation was over. So he was successful on supervised reform, but not successful later on. And so to me, you look at risk and resiliency and this is a risk factor. And so the courts need to weigh what that means.

Q And there's also recidivism issues as it pertains to drug use as well, right?

A Well, you know, I guess my point is, is that if -- if he consumed methamphetamine, although illegal, that would be the -- the -- I wouldn't say the least of my concerns, considering the other dynamics, selling arms -- potentially

selling arms and selling drugs, as -- you know, that is of -- and then the people around it would be much more concerned than -- than if he consumed meth, if he didn't have the child, or -- or cocaine. That becomes an issue, it would be an issue for the courts, but that's probably not as high on my list of other concerns.

Q Now turning to page 54, the second to the last paragraph, you kind of touch on what we just discussed and conclude that, nevertheless, it is a significant risk factor and Mr. Sean Abid's concerns are valid. Throughout this -- these proceedings, Sean has been portrayed as someone who's controlling and -- and interfering in her life. Do you believe, for a second, that his filing a motion regarding Mr. Marquez's presence in his son's life was in any -- anything but acting in his child's best interest?

A I think -- I agree with that. I think what you have to look at is context. And for a period of time this couple, they were married, they broke up, they -- Lyuda struggled with the break up, she wanted to reconcile, she felt emotionally abandoned, her and her daughter. He was involved in the child's life, there was -- he eventually disengaged for multiple reasons, in regards to her anger and responses, and -- and all these other different dynamics and then the child support.

And then, sometimes when they were kind of co-parenting, all of a sudden you have this issue that emerges. And I think it's a significant issues. I can understand that any parent would have legitimate concern and -- and -- and look for some type of help. I think he felt threatened, he didn't know which way was up, I don't think he -- you know, not that she has to consult and that he's -- he's getting married, but it is going to be a potential risk factor. And it's probably something that maybe that should have been handled a lot differently early on, between them.

Q Do you think Sean would have been wrong to have not brought this to the Court's attention, rather than just sort of let it go?

A I think any reasonable person would have pause on this dynamic. And I -- I'm also of the belief that if a person has, you know, kind of resolved their issues and moved forward, we have to give credence to that, too. But from his perspective, from any, I think normal parent's perspective, you would struggle with what's going on, especially if there's a very poor co-parenting working relationship.

So you know, you have -- you have a son, and a son's going to be around this step-parent. And what we want is we want the step parent to be high functioning and be someone as a resiliency factor and a protective factor, versus a

potential risk factor.

Q Now you didn't do psychological testing on Mr. Marquez --

A No.

Q -- is that right? On the issue of recidivism, do you -- does it concern you at all that he -- given the employment history that he gave, that he really doesn't have a marketable skill on a going forward, bread-winning basis?

A Well that is of concern. I think he worked at a surf shop for a period of time. And then he obviously -- it's appeared that he was involved in illegal activities in Europe, because of these dynamics. And so, you know, what is his marketable skill from this point forward? I'm not sure. That's something -- he has a high school education, that's something obviously he has to work on.

I think Lyuda told me, in the last session, that she was going to get him involved with, I think, the unions and connect him where he can work and get a pension and -- and they both can move forward. She perceives him as a very hard worker. So -- but nevertheless, I think you have to have the skill set.

Q And that would -- not having a skill set or being unsuccessful in obtaining legitimate employment might be a reason that recidivism would result in somebody being back in

the criminal system, right?

A My -- my main concern of recidivism, if you look at the Bureau of Justice Statistics Evaluation, what they're saying is, is that the rate is fairly pronounced in the first three years, and roughly 67.5 percent. If somebody's employed, that helps out. If somebody has stability, such as a good relationship, that helps out, too.

What we find out is the first year, the recidivism rate is even higher and then between year one to two, two to three, it decreases. But it continues, you know, obviously after three years, because you have a survival curve. And that people with transporting guns, I think it's 70.2 percent in three years, and transporting drugs I think it was roughly 64 1/2 percent for three years. Now he has to mitigate that by his age, 45, and that becomes, at times it could be -- this is another dynamic that you would put in for the risk assessment. So what I'm giving the courts is base rates to kind of think about and to, you know, to -- to contemplate about this case.

Q Now on the preschool issue, if, hypothetically, when Sean delivers Sasha to Mom's preschool, Mom also shows up and changes Sasha's clothes every day because she doesn't approve of the clothes that Sean brought him to school on. Would that be something that would be contrary to Sasha's best interest?

A Well I think we have to understand what the dynamics are. I remember in my last session with her, she was complaining that Sasha was going to school with clothes that were way too big for him, and -- and that was a concern for her. And that was in early October, so that was about two months ago. So if it's not her day, and there's an issue, I -- you know, this is one of the reasons why you directed them to a parental coordinator, because, you know, to try to resolve these dynamics.

I don't want this kid -- you know, if you're changing this child's clothes, you know, at school, what message is that sending? I think he's been sent some negative messages of his father, you know, in terms of what -- what Lyuda admitted to. You know, she would speak negatively to her daughter, in Sasha's presence. And that was, you know, a period ago, you know, like about a year ago. And if -- if negative images are being sent to the child, like, you know, Dad's putting you in the wrong clothes, or Dad's doing this wrong, that -- that stuff has to stop. And you know, that's very, very -- you know, it's -- it's overwhelming to a child. It's -- it's emotional stress that a child doesn't need.

Q Now moving to page 57 where we have the beginning of your recommendations. Actually, I guess 58 is probably a better place to look. You recommend that if the Court finds

your assessment of the risk of Mr. Marquez to be relevant and credible, that custody could be changed so that Sasha would be with Sean primarily during the school week and with Mom three weekends a month.

A Yeah, let me qualify that. On page 58, my first line in number 3, it says, evaluator cannot provide a risk level of Mr. Ricky Marquez towards Mr. Sean Abid, Angie and Sasha, because I didn't do a risk assessment. Okay? I'm providing risk information for the courts. And -- and I even say there, even if you do a risk assessment, you know, you still are dealing with the same dynamic. Like if this guy is assessed as moderate, or moderate/high, how do you proceed? All right? And if he's assessed as low, well then I think that's going to be pretty easy for the courts. But anything higher than that, that might be something that the courts have to entertain.

So my job wasn't to do a risk assessment, because I was -- I was asked to do a child custody evaluation and relocation risk assessment. So if the courts need that, that would have to be done by an independent party from me at this point. But if the courts perceive this as a significant factor, then -- then, yes. I think, you know, primary should be with the father.

And -- but you have to also look at it this way, you

know, if a person's at risk, you know, is -- are you reducing that risk if you're going from, you know, three and a half to two? You know, I mean it depends on the person. So you know, that's the dynamic that -- you know, and you put them on supervised visits and that's -- that's good, but then you have to make sure the person doing the supervised visits gets it. And if the person doesn't get it, then what does that mean?

And I've had a lot of cases where, you know, people don't get it. And -- and then perhaps, you know, there's -- there potentially could be a harm to a child.

Q Well you generally operate under the assumption, in this case, that if Mom is actually around when Ricky is around the child, that there is some measure of safety for the child, as it pertains to the risk, right?

A I'm -- I'm expecting Mom to employ good judgment. And -- and the -- the safety of the child is the utmost responsibility over any boyfriend, husband, anyone else. And so that's -- that's my hypothesis going into this.

Q So if one of -- and I believe this might be why you made your recommendation, given the fact that Sean's work schedule is the same as a school day --

A Right.

Q -- because he works at a school, and Mom has to work later, and would need supplemental care, by placing the school

days so that the child is always with a parent, you're making sure that there isn't a possibility that Mr. Marquez could be improperly supervised, right?

A And plus, he's a very good parent. He's demonstrated involvement, he loves his son, he has very good collaterals of his involvement. And he gets off early so he could be there. It's kind of a win-win, so to speak. And she's off of work and she gets more time with her child.

Q On the weekend?

A He kind of -- he kind of loses out in a way, because he loses out on weekends, which I think is really unfortunate. But when you're trying to weigh this, I mean, if you come up with a better system, great. I mean I guess you can. I mean it depends if Mr. Marquez is here or not. If you're assuming he's here, then I guess that's a decent system. If he's not here, then it could change a little.

Q Now at the last court hearing the judge made an order that Sasha was not to be unsupervised with Mr. Marquez, based upon your recommendations. If, in fact, since that time, Mom has allowed Sasha to be with Mr. Marquez unsupervised, and contrary to the court order, would that be something else that you would have significant concern about?

A I think the judge would have significant concern with that. You know, I mean I -- you know, that -- if the

judge ordered that, then that's -- that becomes a rel -- I mean once again, the parent needs to get -- and that's the most important thing. And my concern was, at the time, what I was hearing from Lyuda, who's a very nice lady, but she -- you know, I think she was downplaying that dynamic. And, you know, once again, people can move forward. I understand. And I -- and I hope that's the scenario.

Q And you would obviously hope that her first priority would be to protect the child, the second to -- or a later priority to be to protect her husband, right?

A Correct.

Q Now if the Court, as you said, if the Court decides that Mr. Marquez possesses a risk towards the family, and you put into effect a three weekends a month to Mom's schedule, do you believe that that, as we discussed, as far as getting the quality time, do you think that adequately allows Mom to preserve her relationship with Sasha?

A Of course. It's not ideal, but she's -- she's made a -- she's made a decision. And so you know, hey, if -- if she gets more time, that's great, just as long as everything's fine.

Q And the time share you recommend, because of the parties' work schedules, ensures that Sasha can be cared for by a parent rather than any third party, right?

A That's the preference. Yes.

Q Now the last recommendation you make, on page 59, which by the way, this was, you know, 20 pages shorter than the last one, so obviously someone's talked to you about brevity.

A Yeah. I'm still making spelling errors, though. So I'm working on that.

Q Everybody does that.

THE COURT: Join the club.

THE WITNESS: Yeah.

BY MR. JONES:

Q Your fifth recommendation is that if Mom continues to make negative comments, that she should probably be required to participate in therapy. What type of therapy?

A Well my recommendations in a situation like this is that, you know, this creates -- any time you're saying it, giving negative information to your child, it's totally inappropriate. And it's -- what it does, is it sets that parent up as being a better parent than the other person. Diminishes, in the eyes of the child how they view that parent, and that's totally inappropriate.

And so what I would recommend is that if therapy was appropriate, that the therapist, who would have to be approved on the Family Court list, because we want people who know what

they're doing, all right? And then consult with me and what the issues are. If they need to read the report, that's fine, but they could easily consult with me and save the, you know, probably 90 minutes it's going to take to read this thing. And I can summarize it in a quick, five, ten minutes. And then work on the issues. And hopefully through, like -- or using a parental coordinator, work on the issues of what appropriate co-parenting is, working on unresolved issues where you're not making these comments, because they are hurtful.

And I didn't think it rose to a level of parental alienation, because that's a whole different situation, but it's extremely of concern. And it has to be cut off now, because it can increase in the future, and you have to negotiate it now. So individual psychotherapy with a therapist who's schooled in proper parenting, co-parenting, you know, custody situations and addressing these dynamics, helping her resolve unresolved issues towards Sean and moving forward quickly. Making sure she recognizes that it could be emotionally damaging to their child.

Q And you didn't make a recommendation that Sean potentially would need therapy for anything, right?

A I'm hoping that if they're working with their parental coordinator, that in time they can get beyond their

issues and co-parent effectively. So I'm not saying that Sean is, you know, hasn't done anything wrong in this situation, because I think at times he's made comments to her that have been hurtful. But, you know, I'm hoping that the first level of attack, and that is a PC, will be beneficial, to be able to move forward.

Sean exhibited a lot of insight to a lot of different dynamics and a lot of emotional sensitivity. And if you look at his psych testing, he has a lot of emotional sensitivity, although he could be just a little controlling, but that's okay.

Lyuda, on the other hand, her emotional warm scale was really low. And sometimes listening to her talk, she's very abrasive and acerbic on how she internalizes her world, and how -- the negative comments that she makes. And I think that's something that she probably needs to work on.

And that was one of Sean's major complaints in the marriage. You know, she would say a lot of hurtful things. And I think that part needs to be resolved for her, especially in this post-divorce co-parenting relationship.

Q And in their entirety, obviously with the Court making the decision regarding the risk issue, do you believe the recommendations you've made are in Sasha's best interest?

A Yes.

MR. JONES: I pass the witness, Judge.

THE COURT: Historically, if I don't ask questions while they're on my mind, and I let the other side go, they seem to dissipate. So let me ask my few questions while I have them.

VOIR DIRE EXAMINATION

BY THE COURT:

Q Dr. Paglini, my general -- when I read the report, even though Mr. -- her new husband is concerning, I read the bigger issue is more the co-parenting than the concern for the new husband; is that correct? Or are they -- equally concerning?

A I think -- equally concerning.

Q Okay. All right. I'm glad I asked that. If, in fact, we, at some time in the future, since you cannot be the one to do it, do have a what you call, in paragraph three of page 58, an extensive risk assessment regarding Mr. Marquez, since you cannot be the one to do it, would there be three preferred providers that you would submit?

A Yes. I thought of this.

Q Okay.

A I would probably use Shera Bradley, PhD because she was my post-doc intern, along with Dr. Lenkeit. And she did some criminal work and so she was used to doing these kind of

dynamics. And she also works -- you know, does a lot of work with Juvenile Court in regards to prostitution, so she knows kind of criminal dynamics. And so she would have a handle on what to look for, and that's where -- you know, so that would be the person. Dr. Lenkeit's great, but I don't think he has the criminal experience as Dr. Bradley would have. And then outside of that I think -- well that's the person I would start with. I don't think you'd have a problem using her.

Q Okay. That's fair. You also recommended, if in fact the Court did not change custody, that I should consider a 4/3/3 format. I'm guessing from what I know with the child psychology literature out there, this child is still too young to go week on, week off. Would that be accurate?

A You know, yes it is. I like to do that later in childhood, because I think they internalize better and -- especially, I think, if there is potential negative comments going, that one week on, one week off is long. The 3/4/4/3 is recommended because we're reducing some of the transition days, and that's what I'm trying to see happen here. So reduce some of the conflict.

THE COURT: Okay. All right. I may have some after Mr. Balabon, but for now, that was the three I have. Mr. Balabon.

//

CROSS EXAMINATION

BY MR. BALABON:

Q How are you doing, sir?

A Good afternoon.

Q Just briefly, Dr. Paglini, with regard to Ricky, based on all of your collateral interviews with people that had knowledge of Ricky's association with Lyuda and the children, were the -- did you ever receive any kind of reports that there as any kind of violence or that anything has happened with regard to drug use or anything like that?

A No violence and no drug usage. But at the same time, you have to remember that these people had very -- and I'm not saying there is, okay? But they had very limited exposure to Ricky and Sasha, because it's like, you know, maybe some of her friends, and they would see her -- see them -- see Ricky and Sasha once or twice. So based on the information we have, there has been no known violence towards the child, and no known drug usage.

Q And is it also true that there's really no history of violent crime involved in Ricky's history? It's not violent crime, it's conspiracy to do drugs and a conspiracy to make an arrangement to sell a firearm. That -- those were the charges; were they not?

A I think it was conspiracy to move drugs --

Q Right.

A -- and conspiracy to move weapons, that was -- that was my understanding. So -- so -- but there is not -- based on what I heard from Officer -- Proba -- Probation Officer Bolden (sic) he did not say there's a violent history and he also was very clear indicating that there's been no history that he's aware of. He doesn't think Ricky's a -- a risk to the child.

Q That's what Dr. -- or that's what Officer Boden indicated to you?

A Yes. It's in the report.

Q Now it's indicated in the report you were referred, by Counsel, to a paragraph on page 30 about Ricky's so-called connection with the Mexican Mafia. And unfortunately he didn't read the next sentence. He indicated that although the PSI does not state that he was in the Mexican off (sic) he would assume he was distributing guns and that there is a tie. When asked if there is a tie between Marquez and his brother, the probation officer reported the PSI does not indicate any type of connection. Is that a accurate representation of your conversation with Dr. -- or, I mean, with Officer Boden?

A That is accurate.

Q So there is no connection indicated?

A Well according -- he's saying he thinks there is.

He's saying the PSI doesn't indicate that there is. He's saying -- he's -- he's hypothesizing there is, because of some of the dynamics, but he's very clearly indicating the PSI does not indicate any type of connection.

Q And I believe, instead of saying that there is a connection, maybe -- it may be more accurate to say that there may have been a connection prior to the crimes, correct? Because does he not further report to you that in his surprise home visits that he's found absolutely no evidence of any kind of a connection or any kind of communication between Ricky and his brother that's in prison.

A That's post-prison.

Q Correct.

A However, Mr. Marquez noted, in my interview of him, that it seemed like he was doing things for his brother. Okay? I mean if I -- if you don't mind, I could read it. I can --

Q Sure.

A Okay. I have to find it first, though.

Q Okay.

A So just give me -- just be patient with me for a second. Okay. This is on page 28, paragraph one, two, three -- oh, it's actually one, two -- the third paragraph in criminal history section. When asked what drug they allege he

brought in to the United States; reported ecstacy. He then commented about how his brother wanted him to bring drugs from Europe to Mexico, but not the United States, but that never happened. Okay?

And then -- and then he, further down, I think we were talking about then the guns. Okay? The machine gun. So he -- he then was sent to Europe to negotiate and talk to people. He stated his job was normally introduce people to people, such as talk to Customs and introduce them to certain people. You know, you can just hypothesize what that's about. I mean -- so he makes the connection for me, in terms of saying this is what his brother want (sic). But he's vague on it. So, you know, follow up questions didn't get me anywhere. So that's -- that's -- that -- those -- that was in my notes.

Q But that would go back 10 years, 11 years?

A Correct.

Q Now Dr. (sic) Boden on page thir -- I mean, Officer Boden, on page 30 also indicated what he currently felt based on his observations of Ricky on the supervised probation. He -- did he report that the prison time has done him good? That would be paragraph one, two, three, four, five, six?

A Yes, sir.

Q Also indicates there that he perceives that Mr. Marquez wants to distance himself from his brother; is married

and wants to move forward?

A That is correct, sir.

Q And then during surprise home visits there were never any letters between Mr. Marquez and his brother?

A Correct.

Q And Officer Boden also indicated to you, with regard to drug use, that although there may have been a history of drug use, that predated his incarceration, he's always tested negative for drugs --

A That is correct, too, sir.

Q -- since he's been released, I'm sorry.

A Yes.

Q And that he's tested approximately two times a month?

A Correct.

Q And you've also previously indicated that he doesn't have any concerns relative to the Abid child?

A Yes.

Q And he also testified to you, or provided reporting to you that the ten years have had a positive effect on him and he appears to be doing well?

A Correct.

Q Currently that he has no contact with his brother and he has complied with his federal probation?

A That's all true.

Q Now you made a statement which was kind of alarming, that you've -- involved in cases where, you know, previous convicted felons had raped or killed people after their release. Do you think that that is an appropriate analogy to make in this case, where Mr. Marquez doesn't have any kind of history of instrumental violence?

A Well my analogy is simply this. Is that when you get involved in a relationship, especially a relationship with an ex-felon, all right, and especially something that is not, you know, I'll use the word vetted, okay? You know, that's a strong word, but the point is, is that -- and that time sometimes does that. That there is risk factors attached to this. And -- and if you look at the research, you know, it's not this just that if like a person who commits a -- a drug offense is only going to commit a drug offense later on. Some people who don't have history of violence may then engage in a violent act and his risk factors are higher for re-offense.

And there are some -- there are some records here, in terms of I think -- that I had to look at, in terms of this special report from Bureau of Justice Stats on violence. But the point is, the risk factor is much more significant, and that's what the courts have to recognize.

Yes, there is no history of violence. It could be

that Mr., you know, Marquez, could go his whole life without another violent -- without a violent act. You know, we just know on paper there's no violence. And I'm not saying that there is violence in his past, but being an ex-felon with these dynamics, there is a history of re-offense rate that is considerable that the courts need to recognize.

Q But the offense rate would it be lesser, I think you indicated, based on his current age?

A His current age probably brings it down. If we're looking at base rates, you know, the re-offense rate for three years is 67.5 percent based on 292,000 people, prisoners released into the community. Okay? However, think of his life. What he did is he successfully completed probation for three years. All right? So he got through that and then re-offended several years after that.

So he has -- we know he has the ability to comply with supervision. He's done it once before. But -- but the re-offense rate, I mean what we're looking at, it could be another -- it could be a -- some type of crime. Maybe the child's exposed to other people that the child shouldn't be exposed to. And these are just the dynamics, the risk factor I think the judge has to weigh.

And I'm not here to say that the guy is going to re-offend, but I'm -- I'm here to say that these are the --

some of the base rates the courts need to consider.

Q So the Court just needs to take this into consideration. Now you had indicated that if there was a violence risk assessment performed on Ricky and that assessment -- how do they rate the potential? How does -- I'm sorry, how does that --

A Okay. Here's how I would do it.

Q -- if it's low --

A And there's still -- Your Honor, it's really important to understand there's still an element of subj -- clinical judgment in this. So if I use the -- the HCR-20, which is a risk assessment instrument, or VRAG, Violence Risk Assessment Guide, I'm going to want to interview him, probably do psych testing, probably do about, you know, five to ten collaterals. I'm going to want to really look at his criminal history.

And what the person should report is he already has what we call negative static risk factors, which would be he has two offenses on record. So he can't change that. Okay? But can the person move forward from that point on? Yes. We know what the risk of re-offense is. All right? You know, so his chances of success are probably below -- below 30 percent. All right? But it doesn't mean he can't do it.

But, you know, in -- in -- in time, though, even

with all this knowledge, a judge is then going to have to make a decision of which way they want to go on it.

Q So do you think a Violence Risk Assessment would be helpful?

A Well I think it would help the courts make a better decision and -- and that's why I kind of presented everything the way I did, because, you know, I can't -- I can't say, with -- with certainty. I'm just bringing up information for the courts to consider.

Q Now you brought up some issues with regard to Lyuda. You also made some specific positive findings with regard to Lyuda. Let me find that page.

A Try 49, 50 maybe.

Q That would be page 50, correct, sir?

A Yes, sir.

Q You found that she has a stable work history?

A Correct.

Q No psychologi -- you performed psychological testing on her, standard psychological testing?

A Yes.

Q And what were the results of those tests?

A She was for the most part open and honest and everything was within normal limits. It doesn't mean, you know, you may not have anger problems or something, but yes,

for the most part, everything was stable. No psychosis, no bi-polar disorder, nothing like that.

Q No substance abuse issues?

A Correct.

Q No criminal history?

A Correct.

Q A beautiful home?

A Yes.

Q You determined that she was bonded with her son?

A Right.

Q How did you make that determination?

A Through brief observation, but mostly collateral interviews.

Q Okay. And the collaterals indicated to you, in summary, what?

A That she's an involved mother, she's a good mother. And that was also talking to her daughter, indicating that they were close, even though they've had conflicts before.

Q You feel also -- you also made findings that she has a good understanding of her son?

A Yes.

Q And you indicate that despite her occasional negative comments, you indicate -- okay, let's talk about the negative comments. Despite the occasional negative comments.

Now with regard to the negative comments, do you find that there's a systematic attempt on her part to disparage Sean or to alienate Sean from Sasha? Is this a systematic plan on her part?

A I don't know if it's a systematic plan, as -- as -- as opposed to being impulsive and not being mindful. I mean look -- let's -- let's look at it this way. I had a talk with her in October about this. Right? So if this continues, all right, and you've gone through all this mess, financially, the courts, and you're continuing -- if you, hypothetically, if it continues, then it's going to be a little deeper, as far as I'm concerned, and she probably would need to be in therapy, if it continues. If a person gets it, and can move forward, that's another thing.

Because even if, hypothetically, he's doing some wrong things, you're still in control of your behavior. And it's not appropriate to say negative comments to your child. There's no way you can slice the bread any differently. Okay? You're -- you don't tell the child that their father's bad or you don't say negative things on your child -- the child in front of the -- the other pa -- or, you know, other people.

Q Can you, based on your observations and what you know now, do you think she gets it now?

A Well I thought she got it in October, okay, when I

sat down with her. That's why I probably watered that down a bit. So I'm hoping she got it. But the point is, is that if you're having a child kind of starting to reject their father in the spring of 2013, as some people were saying these things are happening, and then some of the other things, then I have some concerns. And so I've outlined my concerns for the judge. And it -- you know, if -- I would expect perfect behavior from this point on.

Q On both parties' part?

A Well I would -- except there's no reason to speak negatively to your child about the other parent. There's no reason. Even though, if -- if -- if you want to speak negatively about the other parent, make sure the child isn't -- not even a different room, just a different house, because there's a history there, we don't want to put any undue stress on the child.

Q I'm just -- I'm a little bit curious. It seems that based on the review of your report, that most of the reportings of negative comments you indicated in the report were one or two years old.

A Well you know what, I was probably a little off on that. The -- the -- September and October it was one year old. You're right. But the child, being -- having some difficulties in the spring of '13, I don't think I gave that

too much weight, in terms of rejecting the father. And I'd have to look at my notes to support that.

(COUNSEL AND CLIENT CONFER BRIEFLY)

BY MR. BALABON:

Q That's just -- regarding -- she wants me to ask a question about the Super Bowl party. Are you familiar with an issue with regard to the Super Bowl party, with what occurred? Do you remember?

A You know, I remember we discussed it, I don't -- I can't -- I don't think it had hit my report.

(COUNSEL AND CLIENT CONFER BRIEFLY)

BY MR. BALABON:

Q Now with regard to the threat level, you're aware that Sean has repeatedly, and continuously required police to be present at exchanges.

A Yes.

Q Is that correct?

A Yes.

Q How -- what did you find, after your thorough investigation, as to whether or not she represents an actual threat to Sean or Angie or anybody involved in this litigation?

A I can -- I can see why things developed, but I don't think it's really healthy for the child right now, and that's

maybe perhaps why the exchanges need to be at school versus anything else, to reduce this. Because the child shouldn't be around these dynamics of police coming and then perhaps internalizing who's a negative parent from these dynamics. And so my conclusion was, is that, you know, I'm hoping that she got it, that there's some negative comments that were made, I have concerns about it. I don't see her as being an active threat. I think -- I do think she gets emotional and she needs to kind of think through things a bit. But I don't see her as an actual threat.

Q So you don't agree with the continued police presence at exchanges?

A I don't -- I don't think that's necessary. Okay?

Q And did you relay that to Sean, that you didn't think that it was necessary?

A I think it was relayed through the report. I don't think I did it in person.

Q Would you have concerns with the fact that Sean has ignored those recommendations and has continued to insist of -- upon police present at -- presence at exchanges?

A It would -- it would depend on the context, but I -- initially I would have concerns and if -- once again, just like we discussed earlier, you know, if Lyuda was doing certain things, that's something for the judge to weigh.

Q And the concerns are relative to the impression that it gives to the child that somehow if he -- if Dad requires police to be at exchanges, that Mom is a bad person? Is that --

A Or -- or --

Q -- the inference?

A -- vice versa. What's -- what's -- it could be both ways. What's being sent -- said to the child and what is the child internalizing through these -- through this. And that's where I'm hoping the parental coordination will work, or some type of intervention with a mental health professional that can help both of these people resolve issues more appropriately and move forward.

Q Okay. So with regard to --

(COUNSEL AND CLIENT CONFER BRIEFLY)

BY MR. BALABON:

Q With regard to co-parenting, you had made -- you draw -- you had made a conclusion in your report that Lyuda appears to genuinely want to co-parent with Sean; is that correct?

A That's what I said in my report, correct.

Q What is that based on?

A Well that would be based on my observations and discussions with her where she's saying things like, look I

want to talk to her (sic), I did lose it at these earlier phases, I want to be able to move forward, I want to be able to be at the same activities. And people who are engaged in parental alienation normally don't say those kind of things, but it doesn't mean they don't struggle with issues.

Q Did Lyuda indicate to you problems with Sean, in terms of trying to communicate with her son, call him, when the son is -- when Sasha is with Dad?

A Yes.

Q And does she complain about that quite frequently or was that a major issue for her?

A She -- it is a major issue for her.

Q Did you address Sean with that issue? Did you ask him about it?

A I think I did, and I don't recall his response.

Q Okay. Now you had also indicated in the -- well you didn't make the same finding with regard to Sean with regard to his desire to continue -- or to co-parent. You didn't make that same finding with regard to him. Do you feel that Sean really wants to co-parent with Lyuda, or does he just want total control?

A I don't see Sean as wanting total control. I see -- I see Sean as being exhausted with the process and if negative comments are being -- I mean, both of these people have hurt

each other. All right? Both of these people said bad things to each other. And I think Lyuda felt emotionally abandoned when the marriage ended and, you know, she -- thank God, she has an education and she's an intelligent woman, she was able to move forward in life. And she wasn't as destabilized as she could have, but she felt really abandoned by that, and I think there is still some unresolved issues.

And then the game playing, I mean I think Sean wanted to stay involved in her daughter's life, genuinely, and be supportive. And eventually the -- the issues between the parents became so hostile that he cut off contact with her. He said, I'm not -- I'm not going to deal with this anymore, because it's always turns negative. And I'm -- I'm -- I'm going to deal with it in a different way.

And so -- and then finally we're here and then I'm hoping that the PC -- and it may not work, but I'm hoping the PC can help these litigants move forward.

Q So I've just -- before I just get you to summarize, you indicated, on your last page of your report, on page 59, if Mr. Abid does not co-parent adequately, the Court needs to address this issue. I believe you also indicated as a possible risk factor with Mr. Abid, issues of co-parenting. What specific finding -- or what is the basis of that recommendation that the courts need to address the issue of

his failure to co-parent and possibly reduce his time?

A That actually should be said for both parents, as I -- as I look at that a little more now. But what I was referring to is that I think there was negative comments that went both ways and I -- I just had concern -- concerns about him. But I -- I see him as -- I mean I could kind of understand the progression of his withdrawal to a certain degree and -- and that's the part -- I mean, you know, if I'm in a position like that and -- and the person is emotionally reactive and saying these negative things, you're going to withdraw. You're going to kind of restrict contact as much as you can.

Q Well does that go both ways, Doctor?

A It probably does. I think it builds up on each other, so that's where the co-parenting, I'm trying to give some responsible -- responsibility to both parties. And -- but she's kind of like more observable, I mean in terms of some of the things that she said. So if he's more subtle, I mean that's quite possible. But the reality is, is I could kind of understand the progression of the relationship. And I'm hoping that if we get a PC in there, that perhaps the couple could move forward and not put their child in these -- the situation.

Q If you were made aware that Sean is sending text

messages to Lyuda indicating that Ricky is scum of the earth, pond scum, the lowest person on the planet, how could you marry such a piece of garbage like him, is that conducive to good co-parenting, or to facilitate co-parenting?

A If I'm not mistaken I think that was quite some time ago, but nevertheless, it's inappropriate. Okay. It's inappropriate.

Q Actually --

A Even if it was -- if -- I thought it was more like at around maybe June time frame or July time frame, but nevertheless, it's inappropriate.

Q So --

A He could express his concerns in a healthy manner. That just is going to further push her away.

Q So those comments were made in February, but if you knew -- well, we have the exhibits.

A Yeah.

Q Based on -- this happened around Thanksgiving of this year.

A Okay.

MS. ABID: Last week.

BY MR. BALABON:

Q Do you feel that that's going to help make their relationship better and make them more effective co-parents?

A Inappropriate.

Q If you -- do you feel that she may have been justified in her reactions based on things that Sean has said to her, regarding Ricky? That he's a piece of garbage, human piece of garbage, et cetera, et cetera.

A Justified in what actions?

Q In terms of reacting to that. I mean if he's baiting her, does he not bear some responsibility?

A Yes. I think that if you're inappropriate like that, you're sharing the blame of poor co-parenting, and which I'm emphasized in the report.

Q And just briefly, I just wanted you to address the issue of -- although I think -- with regard to Ricky and his relationship with her daughter, Irina, you interviewed Irina. What findings did you make based on that interview?

A I'd have to review her notes, but I think there were no issues of concern. I thought she got along well with him.

Q Didn't she indicate a real positive relationship? She smiled, she was happy, she indicated that -- well, let me -- I apologize.

A Here. I think it starts on page 43, sir. He is awesome. She smiled. He helps me and buys me clothes. Described him as really nice. Treats her mother awesome, there are no fights. Third paragraph at the top.

Q I got it. If -- that she also indicated that Ricky and Sasha frequently play, she has no concerns, she denied that there was any violence or neglect. She reported that Sasha is well cared for by her mother as well as Ricky.

A Correct.

Q Okay. Now just in conclusion, absent the risk thing with regard to Ricky, is it your recommendation that the parties maintain joint legal and joint physical custody?

A I think that was my conclusions in my report. That my big --

Q Do you feel that --

A -- issue was with Mr. Marquez in regards to his risk factors. And then if, as I noted, maybe not as clear as it should have been, that if the parties aren't able to co-parent, that becomes an issue for the -- for the judge then, in regards to what's in the best interest of the child.

Q So we could -- you could deal with the co-parenting issues, maintain joint legal, joint physical, appoint the parenting coordinator, Family Wizard, et cetera, and see how it goes?

A Yes.

Q And that would be in the best interest of the child; in your opinion?

A That's based on the judge's assessment of the

information I've given him and everything else he hears.

MR. BALABON: Okay. I pass, Your Honor.

REDIRECT EXAMINATION

BY MR. JONES

Q Irina's 13 years old, right?

A Yes.

Q So all of those statements that were attributed to her in your report are from a 13 year old, right?

A Yes.

Q He's not a risk, he's nice, that type of thing?

A Right.

Q Okay. Now as far as the connection between Mr. Marquez and his brother, if in fact they were just on vacation with his brother's daughter, would that be a concern for you, that there is an ongoing connection?

MR. BALABON: Objection. It assumes facts in -- not in evidence.

MR. JONES: It's a hypothetical.

MS. ABID: There is no daughter. She has --

THE COURT: Overruled.

MR. BALABON: Don't talk.

THE COURT: Ms. Abid, you have a very capable attorney and I can tell you your head shaking and all your actions are only distracting to me. Okay?

It's overruled. Go ahead, Mr. Jones.

BY MR. JONES:

Q Would that be something that would establish a connection to you?

MR. BALABON: A vacation? Again, for clarification with what brother? He has two brothers.

THE COURT: Is it not posed as a hypothetical?

MR. JONES: It's a hypothetical.

THE COURT: Overruled. It's a hypothetical.

THE WITNESS: I don't know if it'd be a concern to me, because if -- I don't know how old the girl is and maybe she's a wonderful person and -- and they've had a good bond and so I don't know if it's a risk or not.

BY MR. JONES:

Q Now turning to page 40 of your report, this is reference to the collateral of Kathryn Marquez who I believe is his brother's wife, his other brother's wife. Not the one who is the mafia guy, but he's also in prison, or he's also been convicted of crimes. Midway through page 40 you asked the question, of Ms. Marquez, meaning Kathryn Marquez, about the connection with the brother. Do you see that?

A Of the Mexican Mafia?

Q Yes.

A Yes.

Q Her statement to you was that, I never saw it. The brother was not around. If they had a connection I don't know how it developed, I was never around the family. Do you see that?

A Yes.

Q Did she ever come out to you and say that there was no connection between Ricky Marquez and his brother?

A She just said she never saw it.

Q Now on the issue of recidivism and risk factors, if his first conviction was for selling marijuana and several years later his second conviction was for selling ecstacy and guns, that would, in my opinion, and I want to ask you yours, that would be an increase of the type of crime that he was involved in, right?

A Yes.

Q So in addition to re-offending, he re-offended at a higher level, right?

A Yes.

Q And that would factor into one of the things that you're concerned about, as it pertains to the standard risk factor percentages for re-offense?

A Right.

Q Now on the issue of this -- the alienating behaviors, we'll call -- or negative comments, it's possible

that Mom doesn't even know she's doing these things, right?

A It's possible that people may not have insight into their behavior.

Q So she may think it's perfectly normal and has no impact whatsoever on Sasha to, every Friday, when Sean drops the child off at her preschool, for her to go there and change his clothes in front of the other students, because she believes Sean's clothes aren't adequate enough. She might not even know that that's negative or a bad thing for Sasha, right?

A I don't know why you would have to change their clothes. Is something wrong with the clothes? I mean --

Q Okay.

A -- I mean it's -- why -- why would you have to change a parent -- what -- what -- I don't know what message would it send to the child if you're changing the child out of Dad's clothes to Mom's clothes at school. What's -- what's the purpose of that and what are you saying when you're doing it?

Q And if you spoke to her in October about the negative comments stopping, and say October 26th, you know, the end of the month when Sean is calling to speak to Sasha, she places Sean on speaker phone and engages in a verbal attack, that would obviously be contrary to what you spoke to

her about, right?

A I would think so, if that's true, yes.

Q And further to the issue of changing clothes on Fridays at school, because of the time share as it sits, Monday, Tuesday to Mom, Wednesday, Thursday to Dad, with the exchanges taking place at school, there would be absolutely no reason, other than, you know, if something was forgotten or an emergency, for Mom to be present at the school on Friday morning, right?

A It seems on the surface, yeah, that would be true. Especially if she's working.

Q In your 59 pages I did not see, and maybe you can point out, any collateral or any evidence that Sean has ever said negative things to Sasha about his mother. Did I miss something?

A I don't think you did.

Q And finally, on page 24, since we talked briefly about that on your redirect, you discussed the MMPI testing of Mom.

A Yes.

Q In the last paragraph, it says, the paranoia scale exhibited significant elevation with a T score of 70, the depression subscale had a moderate elevation with a T score of 66.

A Yes.

Q What does that all mean?

A All right. Well the depression scale could be situationally based. I didn't see her as a depressed person, but it was elevated. And she did lose, I think, about 30 pounds during the -- the assessment process of -- through distress, which is, you know, a lot of people are obviously overwhelmed. The paranoia scale indicates a T score of 70, that she is suspicious and the person she's suspicious of is Sean. And what you have to balance here is, is one or two things with that number.

One is is that when we have child custody litigants, we get higher paranoid scales, because everybody is at odds. So sometimes it's hard to tease out whether that 70 is a trait or situational. Okay? And what I mean by that is, is that if it's situational I would expect if I assess her maybe a year from now, if things are going decent that -- that paranoia scale should be 50 or 55, within normal limits. An average score is 50.

And -- but if it remains constantly high, you know, that might be more of a trait. And at the moment I looked at that as being situational.

Q And did Sean have any similar such elevations?

A Let me find out, page 13. Moderately elevated but

within normal limits. No -- yeah.

Q He was within normal limits --

A Yes.

Q -- and she was not?

A She was -- yeah, she has a T score of 70, two standard deviations from the mean, 98th percentile.

MR. JONES: No further questions, Judge.

RECROSS EXAMINATION

BY MR. BALABON:

Q Do the differentiation in the psychological testing results affect your opinion as to whether or not the parties should continue to enjoy joint legal and joint physical custody, assuming there's no Ricky issue?

A Psychological testing is one aspect of many. And, you know, no, I wouldn't say it would interfere with her ability to -- to maintain joint physical custody, if those other things were addressed.

Q Now with regard to the clothes issue, and her appearing at the school. Certainly you don't have a problem with her appearing at the school after she -- after Sean's custodial period, just to meet and greet him and say hello and send him off to school? Is that a problem?

A If -- if things are healthy, I have no problem at all. You know, if a parent goes there in -- in a healthy way,

interacts with their child, that's fine. But hopefully nothing is emerging, any conflict isn't emerging. You know, so I mean that -- I think that's the part that the judge has to probably consider. You know, is -- is this an aspect of a meet and greet, hey, I love you, have a beautiful day, or is something evolving that becomes problematic from it.

Q Okay. And just -- I mean if -- is it wrong for a parent, if a parent sends a child to school and the shoes are literally twice the size of the child's feet, in that situation, would it be wrong for the other parent to change his shoes? Literally, if they're twice the size of the child's feet, would it be wrong, at that point? Is that --

A Twice the size?

Q Yes. Twice the size.

A Do you have a photo?

THE COURT: It's a hypothetical, too --

THE WITNESS: Oh --

THE COURT: -- correct?

THE WITNESS: -- hypothetical. Okay. All right.

THE COURT: I'm guessing.

MR. BALABON: I do have a photo, Your Honor, of the shoe, that -- which was based upon an email correspondence where she showed -- she -- Lyuda took a photo of the shoe and put the child's foot next to it and it's literally twice --

almost -- well I'd say one-third greater than --

MR. JONES: Have I seen this photo?

MR. BALABON: -- the size -- no.

THE COURT: I don't know if you've seen it or not. I -- let's keep it as a hypothetical, if you haven't disclosed it to him.

MR. BALABON: Okay. Okay.

BY MR. BALABON:

Q I mean literally, if it's his -- if his foot is this big and the shoe's this big, would -- is it unreasonable for Mom to change that shoe?

A I guess it wouldn't be unreasonable for Mom to change the shoe.

MR. BALABON: All right. I have no more questions.

FURTHER REDIRECT EXAMINATION

BY MR. JONES:

Q And if the shoe was a normal size, would there be a reason for Mom to change it?

A Probably not.

Q And if the shoe were even an abnormal size, would there be a reason for Mom to change the shirt and the pants?

A Probably not.

MR. JONES: That's all I have, Judge.

THE COURT: I was waiting for if the shoe fits, you

must acquit. But I --

MR. JONES: If it does not fit.

THE COURT: I have just a couple of questions.

THE WITNESS: Yes, sir.

VOIR DIRE EXAMINATION

BY THE COURT:

Q Obviously these people do not get along, in your limited investigation in them, is there any way you could generally apportion fault regarding their co-parenting, or do you think it's equal?

A You know, I think on the surface it seems that, you know, she's running a little hotter than he is. So to what percentage, I don't know what to attribute that. But you know, it doesn't seem like he's saying negative comments to the child and she is. And that was in the past, whether that's a year ago or if something is current, I don't know. So I think they're both not without fault, but on the surface I think that she -- she has to work on the co-parenting.

Q More -- a little more of the Defendant? Okay. Given the facts of this particular case, similar to my prior question, do you -- would you have a specific recommendation for a parenting coordinator?

A I don't know If Dr. Lenkeit's still doing it. He's really good. I would go with a PhD versus an MFT or MSW

because -- and somebody with like ten years' skill versus somebody with one years' skill, which is I want somebody who can work around the block on this.

Q And since you've done those, you call them BRAG (sic) assessments; is that correct?

A VRAG is one or the HCR-20. I would probably go -- I haven't used the VRAG for a while. The HCR-20 is 20 clinical judgment variables, but I would leave that up to the assessor, because they should know what they're doing in regards to an assessment. And if, hypothetically, if Dr. Bradley does it and for some reason she doesn't know, I think what she should do is if -- I'm not saying what the Court should do, but a suggestion would be that maybe she'd want to consult with me and then just kind of get an idea of what I was looking at and what she should be looking at.

Q Okay. And estimated time frame. How long do those assessments take?

A It depends on her -- the -- when she can get the information, because you see the -- the problem areas, Your Honor, is, you know, we had that stack and then, you know, I don't know if you're going to be able to get a presentence investigation report nor the records of when he was at prison. So assuming -- you know, here's what you have to look at. Even if you have all that information, you're going to be

assessing this guy and giving a risk level and it's -- part of it is, you know, he's been to prison ten years, so his resiliency factors right now are he's -- he hasn't tested positive on drugs and he has abided by the rules and regulations on Department of Criminal Probation, or the federal probation.

However, he did that before, then he re-offended. Right? So there's -- there's a clinical judgment that's going to come into your risk assessment. And if -- you know, you're just going to get more information to make a healthier decision. And that's where it comes down to of why you would perhaps consider ordering a risk assessment.

But you're not going to get a definitive, like, you know, like you're not going to get a number or something like that. But I gave you base rates, in terms of what we have on, you know, the Bureau of Justice Statistics to conceptualize the case. And everyone's different, and I'll give you an illustration. If I'm going too long, I apologize.

But if I'm doing a sex offender risk assessment, and we used to have an instrument called the Static 99, which is an actual instrument. The person scores low, they have a six to nine percent chance of re-offending. So when I do a hundred of those assessments and -- and I -- and I give a person the low rating, I'm going to be wrong six to nine

percent of the time, even though I'm using my judgment in all other areas if we're just basing it on that instrument. And so the same thing goes with a violence risk assessment or a risk assessment.

You know, we have a -- there could be a false positive rate on this. Or, you know, we could be missing something. We could think the guy's low and he's high. But we're reducing our risk. You know, we're trying to have a better judgment when we get there; that makes sense.

Q If I follow your recommendation that Mr. Marquez should not be left alone with the child for the next three years, is there a chance there could be a risk assessment so high on Mr. Marquez that he shouldn't be around the child at all?

A You know, it's -- I mean from -- conversely -- this is how I look at this case, conversely, right, if hypothetically, and I wrote this in my report, if you pay your debt to society, you know, and you -- he doesn't have, what -- that we know, child abuse cases, he doesn't have violence towards a child, you know, those are all positive indicators for him. And at what level does someone who has served his prison time, you know, do you still get dinked? You know, these are all dynamics that have to be weighed. And I try to look at and I try to put in my report to help you with the

decision making.

You know, because I don't think, you know, you're going to get him where he should never have unsupervised visits, because he's -- he's not a pedophile. We don't have any information he's sexually abused a child. And sometimes you even have people who sexually abuse children, after they've paid their debt to society and have gone through therapy and reunification, sometimes they can be reunified. But it's not -- that's not what we're dealing with.

So if we conceptualize that issue, you know, like at what point do you -- you take off, you know, the supervision? That's something -- but we already know, and this makes your case -- your -- your -- the situation more complicated for you, we already know that he -- he completed probation before, that he violated years later. So, you know, that's the part that -- that I'm stuck with because, you know, there's a -- he's -- he's already violated probation, and that's a risk factor.

When -- when I'm looking at somebody, in terms of my risk, the fact that he committed two offenses, okay, and then he -- he violated, you know, I'm -- I'm sorry, he didn't violate, he re-offended, that's a significant factor. So I'm sorry if that's too much information for -- okay.

THE COURT: Thank you for being here today.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right.

THE WITNESS: Thank you everyone.

MR. BALABON: Thank you.

MR. JONES: Good to see you.

THE WITNESS: Be well.

MR. JONES: Take care. Would the Court prefer to break now before starting my client's testimony?

THE COURT: If you'd like. I mean, listen, in -- as I do in many trials, sometimes I put my foot in my mouth, sometimes I speak, sometimes it's held against me, some -- I don't mean things. (Indiscernible).

Let me be very candid. I mean I come -- when I come to the bench I have to take my real life experiences with me. And let me -- and I'll kind of give you an example regarding guns. When -- and in practice I had a case where I was actually in the gallery, it wasn't even my case, I had a case where one of the unnamed judges made a decorative musket on the wall be taken down whenever a child came over to the house, that's how anti-gun that particular judge was.

I'm a gun guy. I don't -- I'm not concerned about guns. As long as there's a safe in the house, I'm not concerned about guns. That being said, I have eight years with parole and probation. Just because someone's a criminal

doesn't make me start shaking, I spent a lot of time with them. So I'm being very candid in saying if you want to stay these proceedings, do exactly as Dr. Paglini recommended, have Shera Bradley do the criminal risk assessment, that might weigh in this case. But if we're going to spend the next bit of the time trying to make me scared of Mr. Marquez, I don't know that that's going to make the day. I'll be very candid with you.

MR. JONES: Well, Judge, I completely understand. I mean the issues, in my opinion, are almost as much alienation or alienating behaviors issue as well. But I guess my question --

THE COURT: He absolutely said --

MR. JONES: -- to you --

THE COURT: -- there was no alienation in here. That was right from Dr. Paglini's mouth.

MR. JONES: Well, there's alienating behaviors. There's a difference.

THE COURT: I can go back in my notes where he said this is not a parental alienation case. Absolutely need a parenting coordinator. In fact, I'm shocked the last time we were here I didn't go ahead and do that, and I can assure you after at least this hearing I will and it'll probably be Dr. Lenkeit, unless you've got another Ph.D.

MR. JONES: I would probably suggest someone other than him --

THE COURT: Okay.

MR. JONES: -- just given my past issues as far as him being a parenting coordinator and not being able to get actual written decisions so that people could either challenge them or not challenge them before Your Honor.

THE COURT: I can let you know I'm taking Ms. Bradley out of the equation, because whether your client wants to do it now, and I can turn to this way, I'm going to also likely keep it as is, where it's supervised for three years. And if in fact she wants that lifted in three years, she will be paying for that risk assessment, the criminal risk assessment with Dr. Bradley, so.

MR. JONES: Well, and I guess my question, so I can discuss with my client, Judge, is, is it likely that no matter what we go on, as far as the rest of the proceedings that you might -- you may order that anyway? Meaning I believe that --

THE COURT: Absolutely.

MR. JONES: -- I believe that there are a lot of reasons why you would be inclined to change custody, that have nothing to do with Dr. Paglini's efforts. Okay? But, by the same token, if you're going to do that anyway, particularly prior to, you know, maybe making a determination on the change

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in custody, it might make more sense for you to order it and then we, you know, start up once that's done.

Because the issues are not going to change. The things that Mom has done, in our opinion, isn't going to change. She's not going to get a blank slate on a going forward basis. So if you were going to do that anyway, it might make more sense to do it, because then if it comes back that he's a tremendous risk, and --

THE COURT: Absolutely.

MR. JONES: -- if this -- it certainly makes your job easier going forward if that's an inclination. I mean I'll certainly discuss it with my client, and see if that's what he would prefer to do is to --

THE COURT: I just -- I don't want to spend the rest of the day -- I realize he has two felonies --

MR. JONES: It's --

THE COURT: -- I realize it's concerning. You can allege Mexican Mafia till you're blue in the face. At the end of the day, again, until I have a professional likely in this case recommending that he is a risk to this child, I don't know that you're going to break that with me. I'll be candid with you.

MR. JONES: Well, and I understand that, Judge. And I think it might make more sense, and I'll certainly discuss

it with my client, to have you have everything all at once, rather than put on the rest of the case, do that and then come back.

THE COURT: Let's digress a little. I mean, you pose a hypothetical and if you have any evidence whatsoever that she did allow him access, between the last time we were here and now, I'll put it in my minutes, I'll change custody like that, because I can. But if you don't have it --

MR. JONES: I --

THE COURT: -- if it was only a hypothetical --

MR. JONES: No, no, I don't ask a hypothetical of an expert, Judge, unless I actually have the testimony to --

THE COURT: Can you --

MR. JONES: -- prove that it occurred.

THE COURT: -- I don't even know why we have to put on a trial. I can modify custody. I was so concerned -- that's an existing order of this Court that he not be left alone with that child, and if you can prove to me, to my satisfaction, that the child was, let's not waste -- let's just modify it now. That was my order.

You understand that? That will be my order for the next three years. Absolutely.

MR. BALABON: Pending the result of the risk assessment?

THE COURT: Unless the risk assessment supersedes -- listen, everybody has a different role in this case. Dr. Paglini made the recommendation it should be for three years. The -- I doubt Dr. Bradley would supersede that recommendation, maybe, possibly, I don't know. I would doubt it. But it's up to you.

MR. BALABON: So you're advocating maintaining the current custodial designation, with supervised restrictions for Ricky for three years?

THE COURT: That -- is that not exactly what's in his report?

MR. JONES: Yes.

MR. BALABON: Well, no.

THE COURT: Right.

MR. BALABON: Well what's in his report is if you're going to require -- if you're going to find him to be a risk then Mom gets alternating weekends.

THE COURT: I'm concern -- he's --

MR. JONES: Actually, it's three weekends a month.

THE COURT: -- his testimony enough leaves a concern. The issue to me is whether Mr. Marquez is such a concern he shouldn't be around the child, period. And that's going to be for the Plaintiff to have that assessment done and convince the Court with that.

Dr. Paglini did not change his testimony that -- I didn't hear anything from his mouth today that said he would back off that three year recommendation. That's his recommendation.

MR. JONES: Well let me talk to him at the break.

THE COURT: That's fine. Let's go ahead and we'll break for lunch. Back at 1:15? All right. And the marshal will be able to give you the rules about what you can leave, what you can't leave. And you guys can leave stuff in the ancillary room, but he does lock the courtroom, so don't leave anything in the courtroom that you don't want to have access to.

(COURT RECESSED AT 11:51:12 P.M. TO 15:24:33 P.M.)

THE CLERK: On the record.

The court: All right. Back on the record in Case D-424830, the Abid case.

After quite a lengthy break I guess there's some indication we reached an agreement; is that correct?

MR. JONES: Yes, Your Honor. The parties, like all smart people, preferred to try to work things out regarding their own child, rather than a virtual stranger in a black robe do it for them, so --

THE COURT: That's probably a good thing.

MR. JONES: I'm going to go in no particular order

into what my understanding of the terms are, and Mr. Balabon can confirm or instruct me as to what I've left out, or what I got wrong.

The time share, for the most part, is going to remain a Monday, Tuesday to Mom, Wednesday, Thursday; Dad, alternating weekend time share. Save and except for the change will now be that Dad will be able to pick up Sasha after school on the Monday, Tuesday and every other Friday and have him until 5:30 those days, when Mom is able to get off work.

As far as who will do the transporting for the 5:30 exchange on those days, the parties are going to work with each other about which is more convenient. Either my client will drop off at her house, or she'll pick up after work, but they're actually going to communicate in a manner that is more positive and reasonable on a going forward basis.

The parties are going to equally share the cost of Sasha's school, it'll currently be the school that Dad had selected, I believe it's called American Heritage School. And he will begin going only to one school, on a going forward basis. In the future, Sasha will go to school in Sean's zone, when they decide to put him in public school, which will likely be --

MR. ABID: Next year.

MR. JONES: -- next year. The -- Mom is going to reimburse Dad one-half of the cost of the Paglini evaluation and testimony time, which I think we've estimated to be in the neighborhood of 12 to $14,000.

The -- there will be general language that the parties will be reasonable and flexible regarding exchange times, with an example I'm actually going to put right into the order. Like, you know, if Mom has a flight and the only flight she can get is 7:00 a.m., when it would be Dad's custodial time the night before, she'll either pick up the night before or at 5:00 a.m. or something -- even if the exchange time was some time later. That type of example for reasonableness and flexible, because I like to at least give some inkling as to where we're going at.

I know it would never stand muster on an order to show cause or a contempt issue --

THE COURT: Right.

MR. JONES: -- but it at least puts the parties intent down on paper for the parties to live by.

On holidays, there will be a default time -- the holidays that are already defined in the parties' order will remain the same, but the default return time will be 8:00 a.m. the next day. So the holiday starts after school on such and such a day, and the return time, assuming it's the other

party's custodial time, will be 8:00 a.m. Now the parties are free to, once again, be reasonable and flexible to adjust that time share or the exchange time, but that will be the default if an agreement will not -- cannot be reached.

In the summer, the time share is going to change such that Dad, in 2000 --

MR. ABID: Fourteen.

MR. JONES: -- what -- '14 will have six out of the ten weeks in the summer and Mom will have four out of the ten weeks in the summer. And in odd years, 2015 and odd years thereafter, Mom will have the six weeks and Dad will have the four weeks.

We are going to identify a parenting coordinator that the parties can choose to use, if there is any difficulty in the future.

THE COURT: I can tell you I already pre-selected that.

MR. JONES: You did?

THE COURT: I did.

MR. JONES: I'm not sure --

THE COURT: Unless you guys have --

MR. JONES: -- we're going to agree with you.

THE COURT: -- agreed to -- well, given what Dr. Paglini's recommendation was that it be of a doctorate

level, let me suggest -- if they -- let's put it this way. If they come back or file any motions for modification on having any issues in the next 12 months, I could assure you this Court will be assigning whatever (indiscernible).

MR. JONES: Well what -- I think what we've agreed to do is say, this person is going to be the PC and that if there is any problem either party can make demand that the process begin.

Now here's my issue. I know Dr. Paglini talked about a PhD and I'm not going to accuse him of only recommending PhDs when really lawyers are more effective parenting coordinators. But the PhDs that you would consider recommending are Dr. Holland and Dr. Lenkeit. I know you likely would not recommend Dr. Holland --

THE COURT: I do not use Dr. Holland.

MR. JONES: -- from past experience.

THE COURT: I probably --

MR. JONES: And I will -- cannot and will not --

THE COURT: Would not --

MR. JONES: -- use Dr. Lenkeit.

THE COURT: Well it wouldn't be Dr. Holland. Again, if you guys can agree, then --

MR. JONES: I suggested, and that's the one thing I didn't actually get Michael's confirmation. The reason I

almost always go Margaret Pickard across the board is she's the only person who I consistently see, when there's a dispute that she needs to make the call on, writing up a decision and submitting it to the Court so it triggers the ten-day opportunity to seek judicial review. If you don't have any bad experiences with her --

MR. BALABON: No.

MR. JONES: -- I was --

THE COURT: I have no -- that's fine.

MR. JONES: -- I would like to include her name as the one that they will use which hopefully they will never need to invoke that provision of the order.

THE COURT: I have no problem with that.

MR. JONES: Okay. And I know --

THE COURT: If for some reason Ms. Pickard believes -- and actually the only one even on the list who are qualified under Dr. Paglini's parameters would be Michelle Gravley, who's a Psy.D like Dr. Paglini.

MR. JONES: I have zero experience with her.

THE COURT: I have zero as well.

MR. JONES: So --

THE COURT: But that's actually the only one.

MR. JONES: -- I'd rather stick to a known --

THE COURT: That's fine.

MR. JONES: -- commodity and hopefully they will never need to invoke the parenting coordinator provision, but it will be there if there is one.

THE COURT: Let me clarify, though. Either party, if they're having problems, either party, ex parte, whether they're represented by you, anybody simply needs to contact my chambers, I will issue my PC order --

MR. JONES: Your standard PC orders.

THE COURT: -- and I will put Ms. Pickard's name in there. But I'm not going to -- until we need it --

MR. JONES: And that's fine.

THE COURT: -- I won't do it.

MR. JONES: And I'll even include that language in the order saying that that would be the method for actually getting the referral order, rather than while the parties are getting along and trying to work together, if we name a PC and they're actually there and ready to go, it might make it more inclined to use a PC when they should be -- at least somewhat inconvenienced by doing so, by --

THE COURT: Right.

MR. JONES: -- contacting the Court.

THE COURT: Okay.

MR. JONES: All other provisions of the prior order will remain in effect that are not modified by this agreement.

And Mr. Balabon is required to wash my car four times a year.

THE COURT: Wow. You driving that Nova?

(COUNSEL AND CLIENT CONFER BRIEFLY)

MR. BALABON: Three times more than it gets washed now.

MR. JONES: That's right. Did I miss anything?

MR. BALABON: She just wants to clarify --

MS. ABID: Ricky?

MR. BALABON: -- there's no restrictions --

MR. JONES: There is no restriction -- well, I mean I said the prior order, so you're right. I could have been referring to the more -- most recent order.

It's the prior order regarding custody and support is going to be modified by this. The temporary order requiring a lack -- you know, requiring supervision for Mr. Marquez is going to be lifted.

THE COURT: Okay. Fair enough.

MR. JONES: And everybody's going to play nice and get along and never have to pay a lawyer ever again.

THE COURT: I hope so, or Ms. Pickard will give me some recommendations. So is that a correct statement as set forth? Clarifications? Anything incorrect?

MR. BALABON: Are you good with that? Did you hear everything?

MS. ABID: I just want to have it --

MR. BALABON: Oh, no police involved in custody exchanges.

MR. JONES: Oh, yeah. There's --

MS. ABID: Yeah, mostly for police never involved.

MR. JONES: Well I mean here's the thing. If one party --

THE COURT: I can't say never, but --

MR. JONES: -- violates the order.

MS. ABID: Well unless there is --

MR. JONES: Right.

THE COURT: -- as a regular --

MS. ABID: -- some (indiscernible).

MR. JONES: There will not be police involvement for a standard exchange, there will be police involvement only if somebody's in violation of the order.

THE COURT: Okay.

MR. JONES: The clear, unambiguous language of the order.

THE COURT: Like I tell all my pro se litigants, practice if you need to, every cell phone nowadays has video capability, two clicks you can get video running if there's any incident that does break out. But I also don't want the holding it in your face while things are going on to cause

problems.

Any other -- anything from your side or --

MR. BALABON: I have nothing else.

THE COURT: -- or is that a correct statement then?

MR. BALABON: Can I canvas my client?

THE COURT: Listen -- you can, sure.

MR. JONES: I was going to canvas her as well.

THE COURT: That's fine.

MR. JONES: I was going to canvas mine, if he was -- I -- my only concern is -- Sean, do you believe -- or did you -- did we swear everybody originally? Yes? No.

THE COURT: No. We didn't. And I have --

MR. JONES: Do you need them sworn? You don't need them sworn, do you?

THE COURT: When people are in open court on the record making statements, sometimes I don't think it's necessary to actually swear them in, but that's just me.

MR. JONES: Do you believe the terms and provisions of the settlement that we've just placed on the record are in the best interest of your son?

MR. ABID: I do.

MR. JONES: And it's your desire to work in a more positive manner with Mom on a going forward basis?

MR. ABID: Yes.

MR. JONES: Mom, you believe that the terms and provisions that we placed on the record are in the best interest of Sasha?

MS. ABID: I do.

MR. JONES: And we're all going to get along nice from now on?

MS. ABID: Yes.

MR. JONES: And you'll control that nasty temper of yours?

THE COURT: Hey, now, now, now, now.

MR. BALABON: Objection.

MS. ABID: Objection.

MR. JONES: I had to make one --

MR. BALABON: Objection.

MR. JONES: -- at least one nasty -- no, that actually -- you know, my joking in such a serious forum is more to alleviate the stress of what's gone on today, as anything else. But we -- I think the parties have made some real progress here today, and hopefully they will never see your smiling face again.

THE COURT: Mr. Balabon, do you have any questions of either of the parties?

MR. BALABON: No more questions at this time.

THE COURT: All right. Are you going to give me a

final order then?

MR. JONES: Yeah, I will prepare an order. We're going to say it's enforceable under 7.50 effective today. And it'll be a final order that will close these proceedings, at least -- hopefully forever.

THE COURT: Okay. All right. Congratulations on working it out. Best of luck to both of you.

MR. ABID: Thank you.

MR. BALABON: Thank you.

MS. ABID: Thank you.

THE COURT: All right. Have a good day.

(PROCEEDINGS CONCLUDED AT 15:35:28)

* * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribe the digital proceedings in the above-entitled case to the best of my ability.

/s/ Susan E. LaPooh
Susan E. LaPooh
Transcriptionist

TRANS

EIGHTH JUDICIAL DISTRICT COURT

FAMILY DIVISION

CLARK COUNTY, NEVADA

In the Matter of the Joint Petition for Divorce of:	
SEAN R. ABID and LYUDMYLA A. ABID,	Case No. D-10-424830-Z
Petitioners.	Dept. F

BEFORE THE HONORABLE LINDA MARQUIS
DISTRICT COURT JUDGE

TRANSCRIPT RE: ALL PENDING MOTIONS

WEDNESDAY, MARCH 18, 2015

APPEARANCES:

THE PETITIONER:	SEAN R. ABID
FOR THE PETITIONER:	JOHN JONES, ESQ. 10777 West Twain Ave., Ste. 300 Las Vegas, Nevada 89135 (702) 869-8801
THE CO-PETITIONER:	LYUDMYLA A. ABID
FOR THE CO-PETITIONER:	MICHAEL BALABON, ESQ. 6260 S. Rainbow Blvd., Ste. 100 Las Vegas, Nevada 89118 (702) 450-3196

LAS VEGAS, NEVADA WEDNESDAY, MAY 18, 2015

P R O C E E D I N G S

(PROCEEDINGS BEGAN AT 10:53:50)

THE MARSHAL: On record in the matter of Abid.

THE COURT: Good morning, good morning.

MR. BALABON: Good morning.

THE COURT: This is the matter of Sean Abid vs. Lydumyla (sic) Abid -- and I apologize, I mispronounced that -- D-10-424830-Z. Counsel, please correct me.

MR. BALABON: Lyudmyla.

THE COURT: Say it again.

MR. BALABON: Lyudmyla.

THE COURT: Oh, my goodness. Beautiful, and I apologize. Counsel, your appearances for the record.

MR. JONES: John Jones, bar number 6699, appearing on behalf of the Plaintiff, who's also present.

MR. BALABON: Michael Balabon appearing -- 4436 -- appearing on behalf of the Defendant, who is present.

THE COURT: Good morning, counsel.

MR. BALABON: Good morning.

THE COURT: Good morning. I read all of your pleadings, submissions of authorities, declarations. So, counsel, it's your motion, go ahead.

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID, Appellant, v. SEAN ABID, Respondent.	Supreme Court No. 69995 District Court Case No. D-10-424830-Z

Appeal from the Eighth Judicial District Court

APPELLANT'S APPENDIX

VOLUME 7

RADFORD J. SMITH, ESQ.
Nevada Bar No. 2791
RADFORD J. SMITH, CHARTERED
2470 Saint Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorneys for Appellant

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Electronically Filed
12/29/2015 11:35:46 AM

CLERK OF THE COURT

MOT
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

NOTICE: PURSUANT TO EDCR 5.25(b) 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.

MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

DATE OF HEARING: February 10, 2016
TIME OF HEARING: 9:30 AM

COMES NOW, Defendant, LYUDMYLA A. ABID ("Lyuda"), by and through her attorneys of record, Radford J. Smith, Esq. and Garima Varshney, Esq., of the Radford J. Smith, Chartered, and hereby files her Motion, and requests that the court find and order as follows:

1. Excluding the recording of court hallway conversation on November 18, 2015 between Lyuda and her husband, RICKY MARQUEZ ("Ricky") that Plaintiff, SEAN R. ABID ("Sean") surreptitiously

obtained without Lyuda or Ricky's knowledge or consent;

2. Sanctions against Sean and for an award of attorney's fees and costs for having to bring this Motion pursuant to EDCR 7.60; and

3. For such other and further relief as to the Court may seem proper.

These motions are made and based upon the points and authorities attached hereto, all pleadings and papers on file in this action, and any oral argument or evidence adduced at the time of the hearing of this matter.

DATED this 29th day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
GARIMA VARSHNEY, ESQ.
Nevada Bar No. 011878
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
(702) 990-6448
Attorneys for Defendant

NOTICE OF MOTION

TO: SEAN R. ABID, Plaintiff, and

TO: JOHN ABID, ESQ., his attorney:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motions on for hearing before the above-entitled Court on the 10th day of February 2016 9:30 AM, ~~2015,~~ at the hour of _____ or as soon thereafter as counsel may be heard.

DATED this 29th day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

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

I.

SEAN SHOULD BE PRECLUDED FROM INTRODUCING ANY RECORDING THAT HE OBTAINED WITHOUT LYUDA AND RICKY'S KNOWLEDGE OR CONSENT

On December 21, 2015 Sean's counsel, Mr. Jones sent Lyuda's counsel, Mr. Smith an email in the above referenced matter that reads:

> It turns out, the hallway conversation in which your client was being instructed by her husband to perjure herself was actually captured on an Iphone voice memo. Initially my client did not think the conversation was audible, but at a high enough volume on quality audio equipment it can be heard. I will be producing the audio recording, and a more accurate transcript than the recorded recollection previously provided, today.

See Email from Mr. Jones to Mr. Smith attached hereto as Exhibit "A."

The "hallway conversation" Mr. Jones refer to has been identified by him as a conversation between Lyuda and her husband, Ricky Marquez while they were seated in the Courthouse waiting for the hearing in the above-entitled case on November 18, 2015. At that hearing, Mr. Jones represented to

the Court and Mr. Smith that Mr. Abid and his wife were not visible to Lyuda and her husband, but instead were seated nearby behind one of the barrier walls in the courthouse separating the seating. Mr. Abid and his wife listened in on the conversation between Lyudmyla and Mr. Marquez without Lyudmyla or Mr. Marquez's knowledge or consent.

Mr. Jones' is troubling in a number of ways. First, the communications between husband and wife are privileged under NRS 49.295(1)(b). Second, and most important, the primary issue in this case has been Sean's surreptitiously placing a recording device in Lyuda's home without her knowledge or consent, or the knowledge or consent of any individuals that reside in the home. Sean has defended his surreptitious recording by asserting a defense under the doctrine of "implied consent" based upon decisions from other jurisdictions. That doctrine has not been adopted by the Nevada Supreme Court or the Nevada legislature, and Sean's attempt to admit an altered copy of the illegally retained recording is currently being reviewed and adjudicated by the Court. In other words, Sean's actions have not been found by the Court to be justified by the defense he has raised.

It bears repeating (this was fully briefed to the Court on numerous instances in this case) that it is illegal in the State of Nevada to surreptitiously record any private 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 and his wife have admitted that they have surreptitiously recorded a conversation between Lyuda and her husband. The plain definition of a private conversation is one that the parties intend not to be heard by another other than the parties to the conversation. Notably many lawyers and clients

privately discuss matters in the same hallway in which Sean listened in on and recorded the conversation between Lyuda and her husband. Just as one cannot attempt to record the private conversations between counsel and their clients in that hallway, Sean and his wife violated NRS 200.650 when they surreptitiously recorded the conversation between Lyuda and her husband.

Sean cannot justify his behavior in any way. There is no "implied consent" outside of the context of conversations with small children. Moreover, Mr. Jones' act of "enhancing" and now producing the recording is also, in my view, a violation of NRS 200.650 by Mr. Jones. Lyuda's counsel have not and will not be listening to the illegal recording. Even the attempt to listen, record or monitor a private conversation is a violation of law.

For the reasons set forth herein, Lyuda seeks to exclude the recording from the hearing, and requests the Court for a declaration that the exclusion is based upon Sean's blatant violation of NRS 200.650. Lyuda further seeks sanctions against Sean for his blatant submission of illegally obtained evidence to the Court.

II.

TIMELINESS OF MOTION IN LIMINE

EDCR 2.47, applicable to family division matters through EDCR 5.40 reads:

> Unless otherwise provided for in an order of the court, all motions in limine to exclude or admit evidence must be in writing and filed not less than 45 days prior to the date set for trial and must be heard not less than 14 days prior to trial.
>
> (a) The court may refuse to sign orders shortening time and to consider any oral motion in limine and any motion in limine which is not timely filed or noticed.
>
> (b) Motions in limine may not be filed unless an unsworn declaration under penalty of perjury or affidavit of moving counsel is attached to the motion setting forth that after a conference or a good-faith effort to confer, counsel have been unable to resolve the matter satisfactorily. A "conference" requires a personal or telephone conference between or among counsel. Moving counsel must set forth in the declaration/affidavit what attempts to resolve the matter were made, what was resolved, what was not resolved and the reasons therefore. If a personal or telephone conference was not possible, the declaration/affidavit shall set forth the reasons.

The trial in this case has already begun. The Court asked the parties to provide Briefs in this case and continued the Trial to January 11. During that interim period, Mr. Jones produced a recording that clearly illegally obtained in violation of NRS 200.650. Pursuant to EDCR 2.47, Mr. Smith sent a letter to Mr. Jones objecting to the recording but Mr. Jones has not responded. *See* Letter from Mr. Smith to Mr Jones attached hereto as Exhibit "B."

III.

LYUDA'S REQUEST FOR SANCTIONS AND FEES

Under EDCR 7.60, district court may award attorney's fees and sanctions against a party that "unnecessarily multiplies" the proceedings in a case. Sean's attempts to admit an illegal recording has caused Lyuda to incur unnecessary fees and costs. Lyuda seeks an order entering a judgment against Sean and in favor of Lyuda, in a sum equal to all attorney's fees and costs incurred in the prosecution of this motion. If the court is inclined to grant Lyuda's request, she will submit a Memorandum of fees and costs detailing the same.

IV.

CONCLUSION

Based upon the foregoing the court should enter its order as follows:

1. Excluding the recording of court hallway conversation on November 18, 2015 between Lyuda and her husband, RICKY MARQUEZ ("Ricky") that Plaintiff, SEAN R. ABID ("Sean") surreptitiously obtained without Lyuda or Ricky's knowledge or consent;

2. Sanctions against Sean and for an award of attorney's fees and costs for having to bring this Motion pursuant to EDCR 7.60; and

. . .

. . .

3. For such other and further relief as to the Court may seem proper.

DATED this 29th day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

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

AFFIDAVIT OF GARIMA VARSHNEY, ESQ.

COUNTY OF CLARK)
) ss:
STATE OF NEVADA)

Garima Varshney, Esq., having been duly sworn, deposes and says:

1. I am an attorney for the Defendant, LYUDMYLA ABID, in the above-entitled matter.

2. I make this Affidavit based upon facts within my own knowledge, save and except as to matters alleged upon information and belief and, as to those matters, I believe them to be true.

3. I have reviewed the foregoing Motion and can testify that the facts contained therein are true and correct and to the best of my knowledge. I hereby affirm and restate them as if set forth fully herein.

FURTHER AFFIANT SAYETH NAUGHT.

Garima Varshney
GARIMA VARSHNEY, ESQ.

Subscribed and sworn before me
this 21 day of December, 2015.

NOTARY PUBLIC in and for
said County and State

NOTARY PUBLIC
JOLENE M. HOEFT
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. NOV. 23, 2017
No: 05-100754-1

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

MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

on this 29 day of December, 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, Chartered

EXHIBIT “A”

Filters Used:
1 Tagged Record

Email Report

Form Format

Date Printed: **12/29/2015**
Time Printed: **11:19AM**
Printed By: **GVARSHNEY**

Date **12/21/2015** Time **10:24AM** **12:00AM** Duration **0.00** (hours) Code **Case Related**
Subject **Abid** Staff **Radford J Smith**
Client **John D. Jones** MatterRef **Abid v. Abid** MatterNo **D-10-424830-Z**
From **John Jones <jjones@blacklobellolaw.com>**
To **Radford Smith; Garima Varshney**
CC To **seanabid@gmail.com**
BCC To

Reminders	(days before)	Follow	Done	Notify	Hide	Trigger	Private	Status

Custom1 Custom3
Custom2 Custom4

It turns out, the hallway conversation in which your client was being instructed by her husband to perjure herself was actually captured on an Iphone voice memo. Initially my client did not think the conversation was audible, but at a high enough volume on quality audio equipment it can be heard. I will be producing the audio recording, and a more accurate transcript than the recorded recollection previously provided, today.

John D. Jones, Esq.

Partner.

Nevada Board Certified Family Law Specialist

<http://www.blacklobellolaw.com/index.aspx> <http://www.facebook.com/BlackLoBello>

10777 West Twain Avenue, Third Floor

Las Vegas, Nevada 89135

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Fax: 702.869.2669

Mobile: 702.523.6966

Visit our improved website at:

www.blacklobellolaw.com <http://blacklobellolawblog.com/>

EXHIBIT “B”

RADFORD J. SMITH, CHARTERED
A Professional Corporation
2470 ST. ROSE PARKWAY – STE. 206
HENDERSON, NEVADA 89074

TELEPHONE: (702) 990-6448
FACSIMILE: (702) 990-6456
RSMITH@RADFORDSMITH.COM

RADFORD J. SMITH, ESQ.
GARIMA VARSHNEY, ESQ.
MATTHEW P. FEELEY, ESQ.
JOLENE HOEFT, PARALEGAL
KENNETH F. SMITH, PARALEGAL
KIMBERLY A. MEDINA, PARALEGAL

VIA EMAIL
John Jones, Esq.
Black & Lobello

December 23, 2015

Re: Abid (Pyankovska) adv. Abid
Case No.

Dear John:

On December 21, 2015 you sent me an email in the above referenced matter that reads:

> It turns out, the hallway conversation in which your client was being instructed by her husband to perjure herself was actually captured on an Iphone voice memo. Initially my client did not think the conversation was audible, but at a high enough volume on quality audio equipment it can be heard. I will be producing the audio recording, and a more accurate transcript than the recorded recollection previously provided, today.

The "hallway conversation" you refer to has been identified by you as a conversation between my client, Lyudmyla Abid Pyankovska and her husband Ricky Marquez while they were seated in the Courthouse waiting for the hearing in the above-entitled case on November 18, 2015. You represented to the Court and me on that date that Mr. Abid and his wife were not visible to my client and her husband, but instead were seated nearby behind one of the barrier walls in the courthouse separating the seating. Mr. Abid and his wife listened in on the conversation between Lyudmyla and Mr. Marquez without Lyudmyla or Mr. Marquez's knowledge or consent.

Your email is troubling in a number of ways. First, the communications between husband and wife are privileged under NRS 49.295(1)(b). Second, and most important, the primary issue in this case has been your client's surreptitiously placing a recording device in my client's home without her knowledge or consent, or the knowledge or consent of any individuals that reside in the home. Your client has defended his surreptitious recording by asserting a defense under the doctrine of "implied consent" based upon decisions from other jurisdictions. That doctrine has not been adopted by the Nevada Supreme Court or the Nevada legislature, and your client's attempt to admit an altered copy of the illegally retained recording is currently being reviewed and adjudicated by Judge Marquis in this case. In other words, your client's actions have not been found by Judge Marquis to be justified by the defense you have raised.

It bears repeating (this was fully briefed to the Court on numerous instances in this case) that it is illegal in the State of Nevada to surreptitiously record any private 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.

Your client and his wife have admitted that they have surreptitiously recorded a conversation between my client and her husband. The plain definition of a private conversation is one that the parties intend not to be heard by another other than the parties to the conversation. I would note that many lawyers and clients privately discuss matters in the same hallway in which your client listened in on and recorded the conversation between my client and her husband. Just as one cannot attempt to record the private conversations between counsel and their clients in that hallway, your client and his wife violated NRS 200.650 when they surreptitiously recorded the conversation between my client and her husband.

I cannot conceive of any way in which your client and his wife can justify their behavior. There is no "implied consent" outside of the context of conversations with small children. Moreover, your act of "enhancing" and now filing the recording is also, in my view, a violation of NRS 200.650 by you. I have not and will not be listening to the illegal recording. Again, even the attempt to listen, record or monitor a private conversation is a violation of law.

I will be moving to exclude the recording from the hearing, and asking for a declaration from the Court that the exclusion is based upon your client's blatant violation of NRS 200.650. I will be further requesting sanctions for the blatant submission of illegally obtained evidence to the Court.

Sincerely,

RADFORD J. SMITH, CHARTERED

Radford J. Smith, Esq.
Board Certified Nevada Family Law Specialist

cc: client

0001

DISTRICT COURT
CLARK COUNTY, NEVADA

SEAN ABID,

Plaintiff,

v.

LYUDMYLA A. ABID,

Defendant.

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

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

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

MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

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

NOTICE:

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

Mark correct answer with an "X"

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

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

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

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

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

Dated this 29 of December, 2015

Jolene Hoeft
Printed Name of Preparer

Signature of Preparer

EXPT
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
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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

EX PARTE MOTION FOR ORDER SHORTENING TIME

COMES NOW Defendant, LYUDMYLA A. ABID ("Lyuda"), by and through her attorneys Radford J. Smith, Esq. and Garima Varshney, Esq. of the firm of Radford J. Smith, Chartered, and moves this court for an Order Shortening Time of Defendant's Motion In Limine To Exclude Recording Plaintiff Surreptitiously Obtained Outside Courtroom On November 18, 2015, Sanctions And Attorney's Fees currently scheduled for February 10, 2016 at 9:30 a.m.

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This Motion is made and based upon the Points and Authorities and Affidavits attached hereto, and upon all pleadings and papers herein.

Dated this 29 day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

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

I.

POINTS AND AUTHORITIES

EDCR 2.26 states as follows:

> Ex parte motions to shorten time may not be granted except upon an unsworn declaration under penalty of perjury or affidavit of counsel describing the circumstances claimed to constitute good cause and justify shortening of time. If a motion to shorten time is granted, it must be served upon all parties promptly. An order which shortens the notice of a hearing to less than 10 days may not be served by mail. In no event may the notice of the hearing of a motion be shortened to less than 1 full judicial day.

Attached hereto is the Affidavit of Garima Varshney, Esq setting forth the reasons for Defendant's request to hear Defendant's Motion on an Order Shortening Time. Based on that Affidavit, Defendant respectfully requests that the hearing of Defendant's Motion be shortened **prior to the Trial currently scheduled for January 11, 2016 or on January 11, 2016 prior to commencing the continued Trial.**

Dated this 29th day of December, 2015.

RADFORD J. SMITH, CHARTERED

Garima Varshney

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

AFFIDAVIT OF GARIMA VARSHNEY, ESQ.

COUNTY OF CLARK)
) ss:
STATE OF NEVADA)

Garima Varshney, Esq., having been duly sworn, deposes and says:

1. We are the attorneys for the LYUDMYLA A. ABID ("Lyuda"), in the above-entitled matter.

2. I make this Affidavit based upon facts within my own knowledge and based upon information and documents provided by my client, save and except as to matters alleged upon information and belief and, as to those matters, I believe them to be true. On December 29, 2015, we filed a Motion in Liminie to Exclude Recording Plaintiff Surreptitiously Obtained Outside the Courtroom on November 18, 2015, Sanctions and Attorney's Fees ("Motion") currently scheduled for February 10, 2016 at 9:30 a.m.

3. The continued Trial in this case is presently scheduled for January 11, 2016 at 9:00 a.m. In her Motion, Lyuda seeks exclusion of a recording that Sean surreptitiously obtained outside the Courtroom on November 18, 2015. Sean is expected to use that recording at the continued Trial on January 11.

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4. Lyuda's Motion is currently scheduled for February 10, 2016 at 9:30 a.m. which is ***after*** the continued Trial. For these reasons, we request that the hearing on Lyuda's Motion be shortened to a time ***prior to*** January 11, 2016 or ***on*** January 11, 2016 prior to commencing the continued Trial.

FURTHER AFFIANT SAYETH NAUGHT.

GARIMA VARSHNEY, ESQ.

Subscribed and sworn before me
this 29 day of December, 2015.

NOTARY PUBLIC in and for
said County and State

NOTARY PUBLIC
JOLENE M. HOEFT
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. NOV. 23, 2017
No: 05-100754-1

ERR
RADFORD J. SMITH, ESQ.
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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 ERRATA TO MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

COMES NOW Defendant, LYUDMYLA A. ABID, by and through her attorneys Radford J. Smith, Esq. and Garima Varshney, Esq. of the firm of Radford J. Smith, Chartered, and submits the following Errata to her Motion in Limine to Exclude Recording Plaintiff Surreptitiously Obtained Outside the Courtroom on November 18, 2015, Sanctions and Attorney's Fees ("Motion") filed on October 15, 2015, in this matter.

The following clarification –

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Page 4, Line 6: It should read, "Mr. Jones' **email** is in troubling in a number of ways…"

Dated this 4th day of January, 2016

RADFORD J. SMITH, CHARTERED

Garima Varshney

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 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

DEFENDANT'S ERRATA TO
MOTION IN LIMINE TO EXCLUDE RECORDING PLAINTIFF SURREPTIOUSLY OBTAINED OUTSIDE COURTROOM ON NOVEMBER 18, 2015, SANCTIONS AND ATTORNEY'S FEES

on this 4th day of January, 2016 to all interested parties as follows:

☒ 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
Attorney for Plaintiff

An employee of Radford J. Smith, Chartered

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

*****

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

Findings of Fact, Conclusions of Law and Decision

This matter was set for an Evidentiary Hearing, pursuant to Plaintiff's Motion to Change Custody.

At the Evidentiary Hearing, the Plaintiff (hereinafter Dad) sought to introduce portions of recorded conversations between Defendant (hereinafter Mom) and the Minor Child. Plaintiff obtained the recording by placing a recording device in the backpack of the minor child just before the minor child travelled to the Defendant's home.

. . . .

LINDA MARQUIS
DISTRICT JUDGE

FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

Findings of Fact

This matter is a post divorce custody action.

The Parties have one minor child, A.A., born in February 2009.

The Parties last custody order was a stipulated order resulting from December 9, 2013, Evidentiary Hearing, and later filed on September 9, 2014.

At the time of the stipulation, Dad was aware that Mom's current husband had a significant criminal background.

In Fall 2014, Dad met with FBI Agents regarding Mom's current husband.

Dad was less than honest, at the Evidentiary Hearing, in his assertion that he does not remember anything discussed during his meeting with FBI Agents.

Dad was concerned about Mom badmouthing Dad to the minor child. Dad believed the Minor Child was frustrated, angry, and defiant due to Mom's continued badmouthing of Dad.

In January 2015, Dad placed a recording device into a plastic box which contained the Minor Child's sight word flash cards. The plastic sight word box was placed into the Minor Child's backpack.

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Dad intended to record the communication between Minor Child and Mom while the child was at Mom's residence or in Mom's vehicle. Dad hoped to capture Mom badmouthing Dad to the Minor Child.

Mom, Mom's current husband, and Mom's minor daughter from another relationship live together at Mom's residence.

Mom, Mom's current husband, and Mom's minor daughter from another relationship did not consent to recording.

Mom, Mom's current husband, and Mom's minor daughter from another relationship did not know that the recording device was placed inside the Child's backpack.

The recording device recorded 15 straight hours of audio. The device was equipped with a flash drive that allowed the audio to be uploaded to Dad's computer.

Dad cannot identify the software he utilized to upload the audio files to his home computer.

Dad destroyed portions of audio recording.

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DISTRICT JUDGE

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LAS VEGAS, NV 89101

Dad destroyed both the recording device and the computer on which audio the recordings were temporarily stored.

Nature of the Recording

The State of Nevada uniquely distinguishes between recording telephone communications and recording private conversations. NRS 200.620 prohibits the recording of telephone conversations without the consent of ***both*** parties to the conversation, unless authorized or ratified by the court. *See also Mclellan v. State*, 124 Nev 263 (2008). Alternatively, NRS 200.650 prohibits the recording of conversations without the consent of ***one*** of the parties engaged in the conversation. *See also State v. Bonds*, 92 Nev. 307 (1976); *Summers v. State,* 102 Nev. 195 (1986).

Here, Dad placed a recording device inside a plastic container, which housed the Minor Child's sight words. The plastic container was kept inside the Minor Child's backpack. Dad testified he placed the recording device in the Minor Child's backpack with the intention of recording conversations between Mom and Minor Child while the Minor Child was at Mom's residence or while the Minor Child was in Mom's vehicle. The Minor Child was unaware that Dad had placed the recording device in the Minor Child's backpack. Mom was unaware that Dad

had placed the recording device in the Minor Child's backpack and, further, Mom did not consent to the recording.

The conversations that were recorded were not communications via telephone, but were communications governed by NRS 200.650. Accordingly, at a minimum either the Minor Child or Mom must have consented to the recording of those conversations.

Vicarious Consent Doctrine

Dad argues that the vicarious consent doctrine should apply in the instant case. The vicarious consent doctrine allows a parent to vicariously consent to recording a communication on behalf of a minor child, if the parent has a good faith belief that it was necessary and in the best interest of the child.

The Nevada Supreme Court and/or Appellate Court have yet to consider this issue. However, many other jurisdictions have considered the admissibility of a recording made by a custodial parent of *telephone communication* between a minor child with a non-custodial parent, while the minor child was in the custodial parent's home under the "home extension exception" and "vicarious consent." *See Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998).

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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. *See id.* at 607 (*citing 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; 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).

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.

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Some States have also adopted the vicarious consent doctrine. *See Wagner v. Wagner*, 64 F.Supp.2d 895, 896 (D.Minn.1999) ("adopt[ing] 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"); *Campbell v. Price*, 2 F.Supp.2d 1186, 1191 (E.D.Ark.1998) (finding "defendant's good faith concern for his minor child's best interests, may, without liability under [the federal interception of communications act], empower the parent to intercept the child's conversations with her non-custodial parent"); *Thompson v. Dulaney*, 838 F.Supp. 1535, 1544 (D.Utah 1993) (stating "as 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"); *Lawrence v. Lawrence*, 360 S.W.3d 416 (2010)(holding parent may vicariously consent to record minor child's telephone conversations).

Not all state courts have adopted the vicarious consent doctrine. The Washington Supreme Court declined to adopt the vicarious consent doctrine

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where a mother listened to a telephone conversation between her daughter and the daughter's boyfriend in which a criminal act was discussed. *See State v. Christensen*, 153 Wash.2d 186, 102 P.3d 789, 796 (2004). Washington's statute requires all parties to the conversation to consent to the recording. Wash. Rev.Code § 9.73.030. Further, the Washington Supreme Court found its statute extends considerably greater protections to its citizens than do comparable federal statutes and rulings and its "statute, unlike similar statutes in thirty-eight other states, tips the balance in favor of individual privacy." Id. at 795–96.

Nevada, like Washington, extends greater protections to its citizens regarding telephone communications, than do comparable federal statutes and the majority of states, requiring ***both*** parties to consent to recording.

All of the cases discussed above that adopt vicarious consent doctrine involve recording of ***telephone conversations*** by a parent on behalf of a minor child ***in that parent's custody***. In other words, the parent recorded the child's telephone conversations while the child was in that parent's home. Here, the recording device was placed by Dad into Mom's home, without the knowledge and/or consent of Mom.

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The West Virginia Supreme Court of Appeals declined to adopt the vicarious consent doctrine under its statute, which only requires one party to consent, when it held a father did not have the authority to consent on behalf of his children to the interception of conversations between his children and their mother. *W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L.*, 192 W.Va. 663, 453 S.E.2d 646, 648 (1994). In *David L.*, the father, who claimed to have given vicarious consent, had the recording device placed in the mother's home, rather than in his own home. *Id.*

In *David L.*, father asserted that he became concerned the minor children were being abused by mother while in mother's custody. Paternal grandmother had access to the mother's home because she babysat the children and placed a voice activated recording device in the children's bedroom in order to record conversations between the minor children and mother. Father obtained the recordings through paternal grandmother. Mother had no knowledge that the recording device had been placed in her home.

This Court previously indicated that it would consider the doctrine of vicarious consent and require Dad to establish first, as a threshold requirement, a good faith basis to record the Minor Child's conversations.

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The Court finds that the doctrine of vicarious consent does not extend to the facts presented in this case. As in *David L.*, the facts presented in the instant matter are distinguished from all the cases in which the doctrine of vicarious consent was extended. Vicarious consent may be appropriate in those cases in which there is one party consent required and the recording takes place within the custodial parent's home.

Here, Dad surreptitiously caused a recording device to be placed inside of Mom's home and recorded the conversations between Minor Child and Mom.

Even if the doctrine of vicarious consent did apply to the facts in the instant case, the Court finds that Dad did not meet the threshold good faith basis sufficient to record the communications between Minor Child and Mom.

The Court DENIES the Plaintiff's request to admit portions of the audio recording into evidence.

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However, pursuant to NRS 50.285(2) and *Barrett v. Baird*, 908 P.2d 689 (1995), the Court will allow Dr. Holland to testify regarding her expert opinion in this matter which may be based, in part, upon the audio recordings.

DATED this 5th day of January, 2016.

DISTRICT COURT JUDGE
LINDA MARQUIS

LINDA MARQUIS
DISTRICT JUDGE

FAMILY DIVISION, DEPT. B
LAS VEGAS, NV 89101

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * *

SEAN R. ABID, Plaintiff, vs. LYUDMYLA A. ABID Defendant.	Case No.:	D-10-424830-Z
	Dept. No.:	B

Findings of Fact, Conclusions or Law, and Decision

This matter having come on for evidentiary proceedings on the 11th and 25th day January of 2016, upon Plaintiff, Sean A. Abid's (Dad) request to change custody; Dad being present and represented by John D. Jones ; Defendant Lyudmyla A. Abid (Mom) being present and represented by Radford J. Smith.

The Court having heard the evidence presented, and after taking the matter under advisement, finds and orders as follows:

Findings of Fact

This matter is a post-divorce custody action.

The Parties have one minor child, A.A., born in February 2009.

The Parties last custody order was a stipulated order, filed on September 9, 2014. The Parties stipulated to joint legal custody and joint physical custody.

Dr. Stephanie Holland, licensed psychologist, testified as an expert witness

Non-Trial Dispositions:
☐ Other
☐ Dismissed - Want of Prosecution
☐ Involuntary (Statutory) Dismissal
☐ Default Judgment
☐ Transferred
Settled/Withdrawn:
☐ Without Judicial Conf/Hrg
☒ With Judicial Conf/Hrg
☐ By ADR
Trial Dispositions:
☐ Judgment Reached by Trial
☐ Decided after Trial Start
☐ Decided after Hrg Begun

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and conducted a child interview of the minor child.

Dr. Holland has conducted 75-100 child interviews in conjunction with the Eighth Judicial District Court, Family Division, since 1999.

Dr. Holland relied upon: four separate interviews with the child; an interview of Mom; an interview with Dad; the child's medical records; email and text messages between the parties; pleadings relative to the instant litigation; and audio recordings made by Dad.

Dr. Holland interviewed the child on four occasions. Mom and Dad were both allowed to bring the child an equal number of times to Dr. Holland's office. Mom brought the child to Dr. Holland's office two times; and Dad brought the child to Dr. Holland's office two times.

The child's behavior and statements were consistent throughout the four interviews.

During the interviews, the child described his father as "sneaky" and "mean." Further, the child indicated that Mom told the child that the child's Dad was "sneaky" and "mean." However, those descriptions were in direct contrast to the child's description of the child's actual experiences with his Dad.

The child's own statements during the four interviews clearly established that Mom was directly and overtly attempting to influence the child's belief system regarding Dad.

The child exhibited significant signs of distress and confusion. Further, the child is internalizing a belief system that is not his own. The child is confused by statements Mom makes to the child about the child's father.

During Mom's interview with Dr. Holland, Mom admitted she told the child not to tell Dad what happens in Mom's home.

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Dr. Holland testified that children should be able to speak freely to their parents about the other parent. This type of speech restriction causes confusion and distress in children. It also creates a loyalty bind for children, especially younger children.

The Parties' homes are structured differently. Dad's home is more rigid and Mom's home is unstructured. Mom indicated that child was allowed to play Call of Duty, a video game rated for mature players only, thirty (30) minutes per day. Dad does not allow the child to play Call of Duty.

The child exhibited a preoccupation with the video game Call of Duty throughout the interviews. The child's level of preoccupation with Call of Duty was not consistent with Mom's statement that the child is only allowed to play Call of Duty thirty (30) minutes per day.

Call of Duty, with or without any additional controls, is inappropriate for a five or six year old.

Based on the child's own statements during the interview, the child exhibited a decreased desire to spend time with Dad.

As a direct result of Mom's direct and overt actions, the child is experiencing: confusion; distress; a divided loyalty between his parents; and a decreased desire to spend time with Dad.

Conclusions of Law

A modification from a joint physical custody arrangement is appropriate if it is in the child's best interest. *See Truax, v. Truax*, 110 Nev. 437, (1994). In considering the best interest of the child the District Court shall consider and set forth specific findings concerning several factors, found in the yet to be codified AB 263, section 8., as follows:

a. The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his 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.

Here, the child is of insufficient age and capacity to form an intelligent preference as to his custody.

Father requests to be designated primary custodian. Mother requests the parties continue as joint physical custodians and that visitation be modified from the last Order, increasing her visitation time with the child.

The parties were previously able to cooperate and allow the child frequent association with the other parent. Mom allowed the child additional time with Dad in the past, especially for sporting events. However, the expert testimony from Dr. Holland indicates that Mom's behavior is impacting the child's continuing relationship with Dad. Specifically, Mom's behavior is creating confusion, distress, and divided loyalty in the child. Mom concedes she is limiting the child's ability to freely speak about events and circumstances at each home.

The level of conflict between the parties is high. The parties are unable to cooperate to meet the needs of the child. Both parties have a difficult time listening and appropriately communicating.

The mental and physical health of both parents is good.

While there was no evidence that the child has special needs, Dr. Holland testified that the child is experiencing confusion and distress because of Mom's actions. Mom has limited insight into the damage she is causing and is unable to recognize and meet the emotional needs of her child.

Each party clearly loves the child and enjoys a special relationship with the child.

The child has a half-sibling who resides full time with Mom and two half-siblings who reside full time with Dad. The child will be able to continue to maintain a relationship with all siblings pursuant to the visitation schedule outlined herein.

There is no history of parental abuse or neglect.

There is no history of domestic violence.

Based upon the foregoing best interest analysis, this Court determines that it is in the child's best interest that Dad be awarded primary physical custody of the minor child.

Child support is calculated utilizing the formulas found in NRS 125B.070 and deviation factors found in NRS 125B.080.

Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that it is in the best interest of the minor child that the parties maintain joint legal custody and that Dad be granted primary physical custody, subject to Mom's specific visitation, commencing on Monday, March 28, 2016, the day school resumes after Spring Break.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that until Monday, March 28, 2016, the parties shall maintain joint physical custody and the specific visitation schedule outlined in the previous stipulation and order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that commencing March 28, 2016, Mom's visitation time with the child shall be defined as follows: every other weekend, Mom shall pick up the child from school on Friday afternoon and return the child to school on Monday morning. On the alternating week, Mom shall pick up the child from school on Thursday afternoon and return the child to school on Friday morning.

If school is not in session, for any reason, the receiving party shall pick up the child. For example, Mom shall pick up from Dad, or directly from a designated child care provider, at the same time school releases. Dad shall pick up from Mom, or directly from a child care provider, at the same time school releases.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall continue to utilize their existing holiday schedule. However, during summer break, each parent shall have a two week vacation with the child. Each party shall notify the other parent in writing on or before May 1st of each year of the dates of the two week summer break. If the summer vacation dates conflict, Mom's request shall take precedence in all even years and Dad's request shall take precedence in all odd years.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that 18% of Mom's gross monthly income is $914.04. The presumptive maximum is $749.00 therefore it is in the best interest of the child that Mom's child support obligation be set at $ 749.00 per month beginning April 2016. Such support shall continue until further order of the Court, upon a three year review, or upon substantial change of circumstances. Otherwise, the support shall continue until

the child turns 18, unless the child is still attending high school, then the support shall continue until the child turns 19.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the current support order shall be in effect until April 2016.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Parties shall utilize Our Family Wizard as their exclusive method of communication, absent emergency or exigent circumstances, until further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following provisions are required to be included in this custody and support order:

That the party ordered to pay child support to the other, is HEREBY PUT 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. 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.

That both parties, and each of them, shall be bound by the provision of NRS 125C.200, as amended by AB No. 263, Section 16:

1. If primary physical custody has been established pursuant to an order, judgment or decree of a court and the custodial parent intends to relocate his or her residence to a place outside of this State or to a place within this State that is at such a distance that would

substantially impair the ability of the other parent to maintain a meaningful relationship with the child, and the custodial parent desires to take the child with him or her, the custodial parent shall, before relocating:

(a) Attempt to obtain the written consent of the noncustodial parent to relocate with the child; and

(b) If the noncustodial parent refuses to give that consent, petition the court for permission to relocate with the child.

2. The court may award reasonable attorney's fees and costs to the custodial parent if the court finds that the noncustodial parent refused to consent to the custodial parent's relocation with the child:

(a) Without having reasonable grounds for such refusal; or

(b) For the purpose of harassing the custodial parent.

3. A parent who relocates with a child pursuant to this section without the written consent of the noncustodial parent or the permission of the court is subject to the provisions of NRS 200.359.

That 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 ETENTION OF A CHILD IN VIOLATION OF THIS ORDER IS PUNISHALBLE AS A CATEGORY D FELONY AS PROVIDED ION 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 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.

That, 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 parent poses an imminent risk of wrongfully removing or concealing the child outside the country of habitual residence. The bond must be in an amount determined by the Court and may be used only to pay for the cost of locating the child and returning 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.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mom's request to modify the current timeshare to allow her to pick up the child after school on her custodial days is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mom's request for sanctions for Dad's failure to provide Mom with child's passport to allow child and Mom to travel to the Ukraine in summer 2015 is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that both parties shall bear their own attorneys' fees and costs.

DATED this 1st day of March, 2016.

DISTRICT COURT JUDGE
LINDA MARQUIS MC

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID, Appellant, v. SEAN ABID, Respondent.	Supreme Court No. 69995 District Court Case No. D-10-424830-Z

Appeal from the Eighth Judicial District Court

APPELLANT'S APPENDIX

VOLUME 6

RADFORD J. SMITH, ESQ.
Nevada Bar No. 2791
RADFORD J. SMITH, CHARTERED
2470 Saint Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorneys for Appellant

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CLERK OF THE COURT

ORDR
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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,

...

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(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

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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 STIPULATION AND ORDER TO CONTINUE TRIAL

PLEASE TAKE NOTICE that a Stipulation and Order to Continue Trial was entered in the above entitled matter on the 1st day of October, 2015, a copy of which is attached hereto.

DATED this 6th day of October, 2015.

Respectfully submitted:

BLACK & LOBELLO

John D. Jones, Esq.
Nevada Bar No. 006699
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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of October, 2015 I served a true and correct copy of the **NOTICE OF ENTRY OF STIPULATION AND ORDER TO CONTINUE TRIAL**, 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:

Radford J. Smith, Esq.
RADFORD SMITH CHTD.
2470 St. Rose Pkwy. Suite 206
Henderson, NV 89074
Email: ksmith@radfordsmith.com; jhoeft@radfordsmith.com
Attorney for Defendant
Lyudmyla Abid

Cheryl Berardi
an Employee of BLACK & LOBELLO

BLACK & LOBELLO
10777 West Twain Avenue, Suite 300
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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

STIPULATION AND ORDER TO CONTINUE TRIAL

IT IS HEREBY STIPULATED by and between Plaintiff, SEAN R. ABID ("Sean"), by and through his attorney of record, John D. Jones and the law firm of Black & LoBello, and Defendant, LYUDMYLA A. ABID ("Lyudmyla"), by and through her attorneys of record, Radford J. Smith, Esq., that the Trial currently scheduled for October 5, 2015 at 9:00 a.m. and October 12, 2015 at 9:00 a.m., shall be continued for approximately 30-45 days to the Court's next available dates. The parties anticipate that the trial will take one and one-half (1 ½) days.

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The parties further stipulate that the discovery deadline shall be 20 days before the Trial date and rebuttal expert report shall be produced 30 days before the Trial date.

DATED this 24 day of September, 2015

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 28th day of September, 2015.

RADFORD SMITH CHTD.

RADFORD J. SMITH, ESQ.
Nevada State Bar No. 2791
2470 St. Rose Pkwy. Suite 206
Henderson, NV 89074
702-990-6448
Attorneys for Defendant,
LYUDMYLA A. ABID

ORDER

IT IS HEREBY ORDERED that based on the foregoing STIPULATION, the Trial, currently scheduled for October 5, 2015 at 9:00 a.m. and October 12, 2015 at 9:00 a.m. is hereby continued approximately 30-45 days and reset to the 17th day of November, 2015 at the hour of 1:30 p.m. and the 18th day of November, 2015 at the hour of 1:30 p.m. and the 19th day of November at 1:30pm.

IT IS FURTHER ORDERED that the discovery deadline shall be 20 days before the Trial date and rebuttal expert report shall be produced 30 days before the Trial date.

IT IS SO ORDERED this 1st day of October, 2015.

DISTRICT COURT JUDGE

Respectfully Submitted,
BLACK & LOBELLO

JOHN D. JONES, ESQ.
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10777 West Twain Ave., Suite 300
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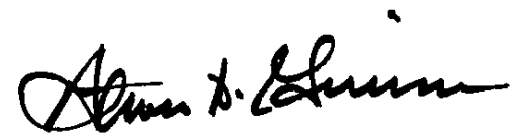

CLERK OF THE COURT

TMEM
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rsmith@radfordsmith.com
Attorneys for Defendant

IN THE FAMILY DIVISION
OF THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

SEAN ABID,

Plaintiff,

v.

LYUDMYLA ABID,

Defendant.

CASE NO.: D-10-424830-Z

DEPT NO.: B

DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF HER OBJECTION TO PLAINTIFF'S REQUEST TO ADMIT PORTIONS OF AUDIO RECORDINGS HE ILLEGALLY OBTAINED, MODIFIED AND WILFULLY DESTROYED TO AVOID CRIMINAL PROSECUTION AND PREVENT DEFENDANT FROM REVIEWING

DATE OF HEARING: N/A
TIME OF HEARING: N/A

COMES NOW Defendant, LYUDMYLA ABID ("Lyuda"), by and through her attorney, RADFORD J. SMITH, ESQ., of the law firm of RADFORD J. SMITH, CHARTERED, and pursuant to EDCR 7.27, and request of the Court, submits the Supplemental Brief and Objection identified above.

. . .

. . .

Defendant's objections are based upon the facts gleaned at the Court's hearings of November 17, 18 and 19, 2015, the following points and authorities, and all pleadings, transcripts and papers filed in this matter.

Dated this 4th day of December, 2015.

RADFORD J. SMITH, CHARTERED

RADFORD J. SMITH, ESQ.
Nevada Bar No. 002791
2470 St. Rose Parkway, Suite 206
Henderson, Nevada 89074
Attorneys for Defendant

I.

INTRODUCTION

This case involves Plaintiff Sean Abid's third attempt to modify custody of the parties' now six-year-old son, Sasha. Sean's current motion, and the expert report upon which he relies, are primarily based upon an audio recording he surreptitiously obtained by placing a recording device into Sasha's school backpack that Sean knew would continuously record conversations in Lyuda's home and vehicle. Sean has not produced the entirety of the two recordings he now acknowledges he secretly recorded, because he has destroyed those recordings, the computer that housed them, and the device used to record them. Instead, he has submitted what he claims are selected portions of the recordings that he edited with software that he cannot identify, and that he erased from his computer. Lyuda objects to the admission of the recordings, and objects to the admission of any expert report that utilized the tapes as all or part of its basis.

Further, Sean has requested that he and his wife, Angie Abid, be permitted to testify as to a conversation they allegedly secretly overheard between Lyuda and her husband Ricky Marquez at the

courthouse on the second day of the evidentiary hearing, November 19, 2015. Lyuda objects, and addresses below the privilege preventing the submission of such evidence.

II.

STATEMENT OF FACTS RELEVANT TO DEFENDANT'S OBJECTION TO THE ADMISSION OF TAPED CONVERSATIONS

1. Sean's Admission that he Surreptitiously Recorded Conversations in Lyuda's Home.

On two occasions, January 20, 2015 and January 26, 2015, Sean placed a recording device in the backpack of the parties' son Sasha for the purpose of recording conversations in Lyuda's home. Video Transcript (VT) 11/17/15 at 16:25:00. Sean testified that he understood that Lyuda, her husband Ricky Marquez, and her daughter Irena (from a previous marriage), all resided in the home. VT 11/17/15 at 16:26:38. He further understood that the recording would, for a period of 15 hours, record all conversations of any individual within recording distance of the device in the backpack. VT 11/17/15 at 16:26:04.

Sean acknowledged that he could not control where the backpack would be placed in Lyuda's home. He further acknowledged that the device would record any conversation near the backpack regardless who was involved in that conversation.[1] VT 11/17/15 at 16:25:52.

Sean testified that the device worked as planned on the first occasion, recording for approximately 15 hours in Lyuda's home (and car when she transported Sasha to school). VT 11/17/15 at 15:26:47. He claims, however, that on the second occasion, the device malfunctioned due to a battery issue and only recorded for a few hours. VT 11/17/15 at 16:34:10. When Sasha was back in Sean's custody, Sean retrieved the recording device from Sasha's backpack. VT at 11/17/15 16:27:10.

B. Sean's Admission that He Listened to, Modified, and Destroyed the Original Recordings and Any Complete Copy of Those Recordings

---

[1] Sean predictably claimed that the recording device would only record conversations held close to the backpack. VT 11/17/15 at 16:26:04. That convenient statement cannot be corroborated by any evidence in the record since Sean destroyed both the recording device and the original recording.

Sean testified that he copied the original recording from the device electronically into a computer in his home. VT 11/17/15 16:27:08. He then placed the copied recording into a software program that he downloaded from the Internet that allowed him to modify the recording by parsing it into sections. VT 11/17/15 at 16:28:07. When questioned about the software, Sean could not identify which software he used or how he purchased it, nor was he able to produce a copy of the software because he claims he erased it. VT 11/17/15 at 16:28:20. Sean did not deny, however, that the design of the software he selected was to alter the recording by separating it into any number of sections the operator chose. VT 11/17/15 16:29:00.

Sean did not retain the complete, original recording in any form. He deleted portions of the recording, he did not retain in any form a copy of the other portions of the recordings that he did not submit to the Court, and he did not retain or produce the device that he claims he used for the recording. VT 11/17/15 at 16:29:00-16:35:59. Sean testified that he did not keep the original recording because he trashed the hard drive that contained the information associated with the original recording along with the software. VT 11/17/15 at 16:35:10. Sean testified that he discarded the computer to which he transferred the original recordings. *Id.,* and Transcript of the Deposition of Sean Abid (hereinafter "Abid depo.") page 177. Sean revealed in his deposition that he discarded the computer (thereby forever preventing Lyuda or the Court from examining the full recordings) because he feared Lyuda's attempts to have Sean prosecuted for his illegal recording:

> Q: [By Mr. Smith]: What did you do with the hard drive?
>
> A: [By Sean]: It went in the trash.
>
> Q: Ok. So the hard drive with the data that you removed from the .wav files that you received by recording information in Lyuda's home went in the trash, correct?
>
> A: Yes.

> Q: When was that?
>
> A: I don't recall exactly. It was shortly thereafter.
>
> Q: So you got rid of that computer shortly thereafter?
>
> A: Yeah, because I knew that she was more concerned about trying to prosecute me than correct these abysmal things she was saying to my son.

Sean claims that the two sections he parsed and preserved were what he estimated would contain only conversations between Lyuda and Sasha, the only two sections he parsed from the original recording, and testified that he listened to only those two sections. VT at 11/17/15 15:27.58. He claims he only heard conversations between Lyuda and Sasha. VT at 11/17/15 15:28:13.

Moreover, Sean also testified that he in January 2015, he was aware that Nevada law required that he could not record a conversation involving others without one of the participant's consent. *See Sean Abid's Deposition*, pages 147-148. Remarkably, Sean Claims that he was aware of the "one-party" consent doctrine when he overheard two FBI agents discussing the doctrine while Sean was waiting for a meeting with other FBI Agents. Abid depo., pages 150-154. Sean later testified, that although he did not remember, generally, what his meeting with the FBI agents was about, the overheard one-party consent doctrine conversation, for some reason, "stuck" with him. VT 11/17/15 at 15:36:24.

II.

SEAN'S RECORDINGS WERE ILLEGALLY OBTAINED NEVADA LAW, AND THUS THE COURT SHOULD DEEM THEM INADMISSIBLE

Illegally intercepted communications are not admissible. NRS 48.077 reads in relevant part:

> The contents of any communication lawfully intercepted under the laws of the United States or of another jurisdiction before, on or after July 1, 1981, if the interception took place within that jurisdiction, and any evidence derived from such a communication, are admissible in any action or proceeding in a court or before an administrative body of this State, including, without limitation, the Nevada Gaming Commission and the State Gaming Control Board. Matter otherwise privileged under this title does not lose its privileged character by reason of any interception.

Implied in that statute is that communications that are not lawfully intercepted are not admissible. *See, e.g. Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998). It is illegal in the State of Nevada to surreptitiously record any 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.

Here, Sean admits that he surreptitiously attempted to record, and recorded, through the use of an electronic device, private conversations engaged in by the persons in Lyuda's home. Sean further admits that he did not have express consent to do so from any of the members of Lyuda's household. Sean's acts violated NRS 200.650.

Sean argues that he could grant himself "vicarious consent" to tape any conversation in which Sasha was a participant. Sean relies on the analysis in *Pollack v. Pollack,* 154 F.3d 601 (6th Cir. 1998). Sean repeatedly misstates the holding in *Pollack*, the predecessor cases upon which it relies, and the cases that relied upon it. *Pollack* stands for the proposition that a recording by a parent of a ***telephone conversation*** in that parent's home between a child and the other parent is not a violation of federal wiretapping law (Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510-2520) because the recording parent may grant "vicarious consent" for the child where the recording parent has demonstrated a "good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child." *Pollack*, 154 F.3d at 610. ***All*** of the cases upon which the *Pollack* court relied, and all of the cases that have relied upon *Pollack,* address the recording of telephone conversations between a child and the other parent in the home of the parent performing the recording. *See, e.g., Thompson v.*

Delaney, 838 F.Supp 1535, (D. Utah 1993)(parent recording phone calls of children and other parent in recording parent's home); *Silas v. Silas,* 680 So.2d 368, 371 (Ala. App. 1996)(taped phone conversations by father in father's home); *Cacciarelli v. Boniface,* 737 A.2d 1170, 1171 (N.J. Super 1999)(phone conversations taped by father in father's home); *Smith v. Smith,* 923 So.2d 732, 735-736 (1st Cir. 2005)(specifically noting, as an element of the vicarious consent waiver, that the phone conversations were recorded by father in father's home); *Griffin v. Griffin,* 92 A.3d 1144 (Me. 2014)(conversations taped by father in father's home).

None of these cases cited above, nor any other granting a vicarious consent exception, address facts like those in the present case. First, Nevada has not, and cannot, adopt the "vicarious consent" exception to its wiretapping laws underlying the federal and state statutes in issue in the above referenced cases. Unlike Title III, Nevada law requires that all parties to a telephone conversation provide consent. *See,* NRS 200.620; *Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1181, 969 P.2d 938, 941 (1998). The vicarious consent provided by one parent under the doctrine cited in *Pollack* and its progeny would not grant a parent in Nevada the ability to record telephone conversations requiring two party consent.

Further, no case has adopted the "vicarious consent" doctrine exception to statutes prohibiting the recording of private conversations where a device was placed randomly in the other party's home. The only case addressing the vicarious consent doctrine in the context of a parent placing a recording device in another parent's home is *West Virginia Department of Health & Human Resources ex rel. Wright v. David L.,* 453 S.E.2d 646 (W. Va. 1994) in which the court rejected the application of the vicarious consent doctrine.

In *David L.*, the father of children ages 3 and 5 caused his mother, the paternal grandmother, to place a voice activated recording device in the children's bedroom at their mother's house while the grandmother was babysitting there. She did so, and the device recorded conversations between

the mother and the children. 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. *David L.,* 453 S.E.2d 646, 648.

Upon appeal, the West Virginia Supreme Court recognized the vicarious consent doctrine, had been adopted in different jurisdictions, citing *Thompson v. Delaney,* 838 F.Supp 1535 (D. Utah 1993) stating:

> 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 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.

Davidl L., 453 S.E.2d at 654. [Emphasis supplied]. 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.

Id. at 654 n.11 (emphasis added). Accordingly, while the court in *David L.* declined to permit vicarious consent in that particular case.

The distinction drawn in the *David L.* is vitally important in the context of modern divorce cases. The vicarious consent exception as defined in *Pollack* and other wiretapping cases permit the recordation of phone calls between certain individuals into the recording parties' home where the child is residing at the time of the conversation. The recording party is aware who is calling, and the phone conversation is

limited to the targeted individual and the child. The recording of a particular call or series of calls has little chance of invading the privacy of other individuals who did not provide consent to the taping of their conversations, and are not a target of any good faith belief by the parent that they are causing harm to the child.

The protection of private individuals from random invasions through the placement of recording devices is the essence of NRS 200.650. Here, Sean sent a tape recorder into the home that was occupied by Lyuda, her husband Ricky and her daughter Irena. Sean did not testify that he had any reasonable good faith belief that either Ricky or Irena were causing harm to Sasha. Nevertheless, logic informs us that Sean's actions led to the recording of any conversations between Lyuda and Ricky, conversations between Irena and Ricky or Lyuda, and conversations between any individual that came to Lyuda's residence and a member of the household during the time Sean's recording device was in the home. Indeed, complete strangers were subject to Sean's recording because he could not control who the device recorded. The granting of Sean's proposed extension of the vicarious consent doctrine to the surreptitious and random placement of recording devices in the homes of others would means that every individual who lives in a home with a parent and a child that is subject to a custody matter has ***no*** expectation of privacy. That individual would have their most private and intimate declarations, conversations, and expressions subject to recording at the whim of a parent who suspects he or she is being "badmouthed" by the other parent.

Moreover, because even the ***attempt*** to record private conversations of individuals is crime under NRS 200.650, Sean's random placement of a recording device in a backpack he admits could have been placed in any location in the house, and could have recorded any conversation, was a violation of law even if he could grant vicarious consent to one of the members of the household. His explanation, without the provision of one iota of corroborating proof, that he guessed fortunately when dividing the original recordings and only listed to portions of the recordings in which Lyuda was speaking to Sasha defies

belief. Moreover, his modification of the original recordings, his destruction or discarding of the original recordings, the recording device, the software he used to "parse" the recordings, and his discard of those portions of the recording that he parsed out of the original, all suggest purposeful concealment of the evidence Lyuda and the Court would need to test his convenient claims. If that was not sufficient, his claim that he destroyed the computer because Lyuda was "concerned about trying to prosecute" him, is an admission that he destroyed the original recordings to shield his culpability under NRS 200.650. The recordings Sean surreptitiously made at Lyuda's home are illegal, inadmissible, and not subject to any exception recognized by any court.

III.

SEAN HAS NOT DEMONSTRATED A GOOD FAITH REASON FOR RECORDING PRIVATE CONVERSATIONS IN VIOLATION OF NRS 200.650

Even if the Court here expanded the vicarious consent doctrine beyond the recording of phone calls in a parent's home to the random placement of recording devices in the other parent's home, Sean must demonstrate that he acted in good faith. 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. *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, 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. In order to have a good faith belief that Lydua was harming Sasha, Sean must show something more than alleging uncorroborated claims that Sasha told him various negative things. No one has testified to any statements made by Sasha to corroborate Sean's claims. The testimony of Sasha's teachers was that in their experience of him five days per week he showed no signs of being alienated from either parents. He was and is a happy, cooperative, talkative and energetic child who did, and continues to do well in school. He is kind to others and has shown no behaviors that would suggest any type of favoritism toward either parent. Both teachers testified that Sasha did not speak poorly of either parent.

Moreover, Sean, who regularly texted and communicated with Lyuda, could not and did not provide a single email that corroborated any concern that he had about Lyuda speaking to Sasha in December 2014 or January 2015. What was occurring at that time was Lyuda's filing of a motion regarding her assertion (supported by Sean's actions for two months) that her agreement to allow Sean to have Sasha on her days in the afternoon was based upon her work schedule, and Lyuda's request that Sean release Sasha's passport. Sean was continuously baiting Lyuda by accusations of poor parenting (failure to do homework, keeping Sasha up at night, allowing Sasha to play videogames all day, etc.), refusing to provide Sasha's passport, refusing to allow her to exercise the agreed time of pick up the parties had

followed for months (Sean's allegation that he ended the contact because of a conversation he had with Sasha's teacher was denied by the teacher in her testimony), and refusing to return clothes.

Worst of all, the evidence produced at hearing equally supports Lyuda's assertion that Sean's motivation for placing a tape recording device in Lyuda's home was directed at finding evidence of criminal behavior by Lyuda's husband, Ricky Marquez. 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. Indeed, his testimony at hearing and in his deposition tied his communication with the FBI to his knowledge of Nevada law regarding the recordation of private conversations, and the vicarious consent doctrine:

> Q [By Mr. Smith] What was the basis of the conversation withthe FBI in August of 2014?
>
> A [By Sean Abid] 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 do with 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 FBI agent.
>
> A Uh-huh.
>
> Q Yes?
>
> A Yes.
>
> Q And this was on a telephone call in your home or 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 of the word, so...

Q You were listening to whom?

A The agents that were talking.

Q Okay. The agents that were talking were talking to you on your cell phone in August of 2014?

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

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 about him.

Q Asking what you knew about RickyMarquez?

A Yeah.

Q And what did they tell you about Ricky Marquez?

A They didn't tell me anything.

Q How did they identify themselves?

A As FBI agents. I mean...

Q They said we're so-and-so from the Federal Bureau ofInvestigation?

A Yeah, yeah.

Q And did they tell you why they were calling you?

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 were investigating 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 duringthat conversation to have a meeting with them?

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 law enforcement 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 I assume 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 knew about 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 present they 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'dlike 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 recorder in a backpack and have Mr. Marquez's conversations overheard?

A Absolutely not.

Q But that's where you got the idea.

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 tell them?

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 asingle word -- you can't remember one word from that conversation that occurred in -- I think you said September or October of 2014.

A No.

Q Did you have any further contact with theFederal Bureau of Investigation or any investigators, employees or 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 that meeting? At that meeting what did the FBI tell you about Mr. Marquez?

A I don't remember. They don't tell you anything. They ask.

Q How long was themeeting?

A An hour, 45 minutes. A long time ago. Maybe it was a half an 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 white male.

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 herhair?

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

Q You don'tremember?

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 thatspoke to you in September and you met with in -- or excuse me-- in August and you met with in either September orOctober that contacted youagain?

A Yeah. One of the agents was in theroom.

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

A This is true.

Q And was that the female or the maleagent?

A Female.

Q And you don't know hername.

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, andso...

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

A Not several. I told you once.

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

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

Q And what was the purpose of the follow-upphone call?

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

Q What did you discuss withthem?

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.[2]

Sean's testimony about the FBI was only believable in two ways – he had multiple contacts with the FBI in the months leading to his placing a recording device in Lyuda and Ricky's home, and he became aware of the vicarious consent doctrine through members of the FBI. His change in testimony at trial trying to limit his contact to the FBI to two occasions after he testified in his deposition to multiple contacts, his doubtful story as to how the FBI advised him of the vicarious consent doctrine, his destruction of all evidence of the complete recordings, his inability to remember any detail of his conversation with FBI agents except that they worked in the Eastern European Crime Division, and his obsession with Ricky Marquez demonstrate that his recording was either at the behest of the FBI or designed to gather evidence for the FBI.

Sean has not demonstrated by a preponderance of the evidence that he had a good faith reason to randomly place a recording device in Lydua's home. His attempt to record others (which attempt should be implied by his testimony that he understood the recording device would record anyone standing near the backpack) was and is a crime.

IV.

THE COURT SHOULD FIND THAT THE RECORDING AND TRANSCRIPT SEAN HAS PROFFERED ARE INADMISSIBLE BECAUSE THEY HAVE BEEN ALTERED, ARE NOT THE COMPLETE RECORDING, AND BECAUSE SEAN HAS IN BAD FAITH DESTROYED THE ORIGINAL RECORDING AND COPIES OF THE COMPLETE RECORDING

As addressed above, Sean has destroyed or discarded the original recording, discarded or destroyed the portions of the recording he parsed out of it, failed to produce or identify the software he used to parse

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[2] References and quotes of Sean's deposition evidencing his hatred and obsession with Mr. Marquez are set forth in detail in Defendant's Pre-Trial Memorandum, and are incorporated herein. *See,* Defendant's Pretrial Memorandum, pages 9-37.

the recording, and has destroyed or discarded both the recording device and the computer and hard drive that held a copy of the original recordings. Sean's apparent contention that the segregation and destruction of a large portion of the recording is not a modification of the recording defies reason. Sean modified, altered, and destroyed the original recordings. All that are left are selected digital recordings that he altered with software he cannot identify or produce.

A. Factors Commonly Used to Determine the Admissibility of Recordings Include Finding the Tape Inadmissible if the Tape has Been Altered

Nevada has yet to adopt a clear standard for the admission of a sound recording into evidence. Other jurisdictions have rules of evidence or have developed criteria to ensure that only reliable and complete recordings are admitted into evidence. Some jurisdictions have held those proffering recordings to a higher standard of evidence. For example, in *People v Ely,* 503 N.E.2d 532 (NY App.1986), the court identified the New York rule that the predicate for admission of tape recordings in evidence was clear and convincing evidence that the tapes were genuine and had not been altered. *Id.* at 522. In that case, an expert witness examined the tapes and found gaps in the recordings that suggested alteration. The court held the tapes inadmissible even though the recorded individual had acknowledged his voice on the recording. *Id.* at 525. In addressing what a party could do to support his claim of authenticity, the court provided a laundry list of common methods used:

> The necessary foundation may be provided in a number of different ways. Testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered or of a witness to the conversation or to its recording, such as the machine operator, to the same effect are two well-recognized ways. Testimony of a participant in the conversation together with proof by an expert witness that after analysis of the tapes for splices or alterations there was, in his or her opinion, no indication of either is a third available method.
>
> A fourth, chain of custody, though not a requirement as to tape recordings is also an available method. It requires, in addition to evidence concerning the making of the tapes and identification of the speakers, that within reasonable limits those who have handled the tape from its making to its production in court "'identify it and testify to its custody and unchanged condition'"

People v. Ely, 503 N.E.2d at 527-528 [Citations omitted]. Here, Sean cannot meet any of the basic criteria identified in *Ely* even if the Court here only applied a preponderance standard. Sean cannot testify that the recording is complete or accurate reproduction of conversation, or that it has not be altered. No participant in the conversation will testify to the tapes completeness or accuracy, and is precluded from doing so by Sean's destruction of the underlying recordings. Further, because of the destruction of portions of the recording, and destruction of the original recording, the destruction of the recording device, and the destruction of the software Sean used to parse the tape, Lyuda cannot have an expert examine the original recordings, or a complete recording. Finally, no one can testify to the "unchanged" condition of the recording.

Generally recognized criteria in the federal circuits include the determination that the recording was not altered. *See, e.g. United States v. King,* 587 F.2d 956 (9th Cir. 1978)(Proper foundation for the admission of a sound recording includes "that changes, additions or deletions have not been made to the recording"), *quoting United States v. McKeever,* 169 F. Supp 426 (S.D.N.Y 1958). Here, Sean cannot meet the basic criteria recognized by nearly every court addressing the admissibility of tape recordings because he admittedly altered the recording, then trashed or destroyed the hard drive with the original recordings.

VI.

CONCLUSION

Under Sean's view of the law, any parent that alleges, with any basis whatsoever, that a parent has "bad mouthed" him or her to the other parent, has the right to place a random recording device into the home of the other parent. Such a rule would allow a level of spying and an erosion of privacy that the legislators that enacted NRS 200.650 could not have possibly anticipated. The Court, however, need never get to the issue of vicarious consent simply by finding that Sean, by his own admission, cannot produce

the original or unmodified copy of the surreptitious recordings he admits to having taken in January, 2015 in Lyuda's home. Even if the Court were to apply the doctrine, Sean has failed to show an "objective, good faith" reason for the recording.

Therefore, based on the foregoing, Lyuda requests that the Court enter its order denying Sean's request to submit into evidence the recordings addressed above.

Dated this 4th day of December, 2015.

RADFORD J. SMITH, CHARTERED

By: _____
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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 SUPPLEMENTAL BRIEF IN OPPOSITION OF PLAINTIFF'S REQUEST TO THE ADMISSION OF ILLEGALLY OBTAINED EVIDENCE AND PRIVILEGED MARITAL COMMUNICATIONS" on this 4th day of December 2015, to all interested parties by way of the Eighth Judicial District Court's electronic filing system.

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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.

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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

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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?

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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?

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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?

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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.

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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?

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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?

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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:

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Q: Now, just so it's clear for the court, did you place the recording device in Sasha's backpack at the behest of the Federal Bureau of Investigation?

A: Absolutely not. I was only interested in providing this court with the information necessary to make a decision in Sasha's best interest, because I believe wholeheartedly that the things that I heard are the very things that Sasha was also repeating to me.

Q: Did you provide any portion of the tapes to the FBI?

A: No

Q: Did you place the recorder in Sasha's backpack to record anything having to do with Ricky Marquez?

A: No

Q: Now, you were asked questions yesterday that kind of went back and forth across the line of December 2013. I wanted the court to understand exactly how many times you contacted any of the authorities associated with Ricky Marquez's probation or parole after the stipulation of December 2013. And when I say you contacted, I mean you actually initiated the contact.

A: I just had the one conversation with Elizabeth Olson and the meeting with the FBI and one follow-up phone call.

13:50:05

Q: Did you request the meeting with the FBI or did they?

A: They did. I did not request that meeting.

Q: So as far as you actually initiating contact with any member of the authorities, after the stipulation, it would be limited to the call to Ms. Olson and the follow-up call to the FBI after the meeting?

A: They called me, I didn't call them, in fact, so...

Q: Ok, so I want it to be crystal clear. As far as you making any contact with any type of authority associated with Ricky Marquez and his prosecution and parole or probation, it was one call, after the stipulation up until the time that we filed this action?

A: Correct

Q: When you were asked about your deposition testimony involving 200 friends, or some phrase along those lines, discussions about Mr. Marquez and his past, was that something that frequently happened after the stipulation?

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A: Not as frequently as before. When I first found out, I was shocked, I talked to a lot of people, and I just didn't know what to think or...I just process it with a lot of friends, a lot of family. That's waned over time, but the uh, initially it was such a shock. I mean, the biggest shock being that that person's a part of my child's life, and trying to deal with that on some level, which also, which you'll probably get into later, is why I started going to therapy in July of 2013.

Sean contacted Ricky's probation officer once. Sean was called by the FBI once. While Sean's uncontroverted testimony that placing the device had nothing to do with Ricky Marquez was sufficient to eliminate the Ricky Marquez Red Herring, a review of the entirety of the intentionally misleading cross examination of Sean when compared to the facts, should lay this issue to rest for the Court.

Even though Sean's testimony regarding the effects of Lyuda's alienation of Sasha from his father, more than met the burden of good faith, the text messages that Lyuda, herself, moved into evidence proved that during the relevant timeframe, from October until January when the device was placed, there was a good faith reason to place the recording device. While Lyuda tried to point to good co-parenting prior to October, the fact that things were once more cordial and escalated significantly over the fall/winter of 2014 establishes Sean's reasoning as being in good faith. Sean reasoned, based upon Sasha's statements and demeanor the source of which, according to Sasha, was Lyuda, that if Lyuda was willing to write texts, as she did, which she knew could become evidence, what she must be telling Sasha in private was even worse. Over that span of time, the texts contained in Exhibits H and I reveal the following.

1. Lyuda accusing Sean of not feeding Sasha after school simply based upon his request to take him to dinner on her time.

2. Lyuda accusing Sean of not providing Sasha proper clothes.

3. Lyuda accusing Sean of not bathing Sasha.

4. Lyuda accusing Sean of Stealing Sasha's belt.

5. Attempts by Sean to co-parent regarding bed time and similar issues met with threats of her attorney.

6. Lyuda, amazingly, accusing Sean of parent alienation because he was working on Sasha's sight words with him and following the Court order regarding time share.

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7. Lyuda threatening Sean and the school superintendent's jobs for corruption simply because Sean was following the Court ordered time share.

8. Sean's attempts at co-parenting regarding extra-curricular activities that Sasha loves are met with claims of harassment and threats of attorney involvement.

With regard to the text messages, Sean testified as fillows:

Q: On October 17th, what was this text about?

A: It was about that conference that I'd had with Ms. Abacherle, his Kindergarten teacher. And uh, when I met with her, she gave me some information that showed me where he placed relative to other students. She exchanged information with me about his progress in all areas, and the information that she gave me, very clearly, very succinctly that I recall, was that he was behind other students in his class, other Kindergarten students at Twitchell Elementary School. And to me, as someone who is very concerned about that area of my child's life, I wanted to correct it and I felt like...we had actually had a phone conversation on this day where I was reaching out to her for help.

Judge: To the defendant?

A: Ya, to the defendant, to reach out to her for help, as to how we could correct this because I felt like I was doing everything I could and if we were doing it together we could certainly get him caught up. I felt really concerned that he was below and I just...it's my duty. I'd never forgive myself if he was behind the pack and I didn't do something. So that was my first attempt at helping.

Q: Looking at the rest of that page, is there a response from Lyuda on the 17th of October?

A: No

Q: Was there a response from Lyuda between October 17th and 20th?

A: No

Q: Ok, now, on October 20th, there is a series of text messages from you to Lyuda. Can you tell me what those and the photos in them are?

A: Well, I didn't get any response, as you just described as you went through those emails, so I thought I'd try a different approach. And so I thought I'd just give her some specific activities, flashcards, worksheets that she could try with him. So that's what I did in the top two texts, and you can see that she replied that she got it. Then the text at 10:04 a.m. on October 20th, I'm telling her that if we are committed to practicing with him each day, I think we'll get him up to a level that he needs to be at. That's where my

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head was at. That's all I cared about. And then on the bottom, when Ms. Abacherli was talking about that kids should know their alphabet when it's October, almost November. He didn't know his alphabet. So this was a crisis situation to me.

14:01:22

Q: Text message October 28 at 2:59 p.m. Do you see that one?

A: Yes

Q: This was another text message regarding what?

A: He was just falling asleep and whining. It had become a pattern. If you notice the date, it was a day that he had been returning from her house. And so I'm just asking her...keeping him up late is hurting his ability to learn. Because it was. If we didn't stop this path we were on, he didn't know his alphabet in almost November, so I'm pleading with her. You're his mother, you can do what you want, but it's having an affect on him. I was trying to say it diplomatically without getting her upset.

Q: Now, looking at her response, she states that he got sick and my question is did you give him a jacket in the morning? Have you ever not sent your son to school properly clothed?

A: I always send him to school properly clothed.

Q: I mean, you work in the school district, right? You understand those concepts?

A: He has lots of jackets. I'm not that forgetful.

Q: And then the next line she talks to you about the fact that, she's alleging that you don't even bathe him at your house?

A: Ya

Q: Do you give your son baths during your custodial time?

A: Ya ya. Just to elaborate a little bit, not only do I do the same thing, he comes home and he eats his snack, we do the homework, we do sightwords, whatever the school stuff is. When we're done, we go in the backyard and play sports. After that, we spend some family time, eat dinner, and he takes a bath at 7 o'clock, and usually with his little brother. So, I mean, I take a shower every day, so I don't understand the concept that I wouldn't bathe my child. And I don't even understand how that's constructive. It's definitely not in the spirit of co-parenting. This kind of text that I'm getting here, it's just an accusation. Anyway, I'm sorry, I'm rambling.

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14:04:36

Q: What is the issue that you are trying to resolve with her?

A: When he would talk to us about his life, he would tell us that he watches a lot of videos, that that's how he spends his time. And so we would just ask him, in a general way you know, how was your night? And he'd tell us what he did. He'd be candid at that time and say I was watching videos, I was up late, or whatever.

Q: Now, you tell her that Sasha tells you that she tells him not to tell you that he watches videos. Do you see that?

A: Ya

Q: What is her response at 3:44 p.m.?

A: That was the first day, I was out in the backyard playing baseball with him, and he had said that. I just wanted to ask her about that in a way that wouldn't make her upset. But the bottom line is if you are asking him to keep secrets from me, I wouldn't be Ok with that.

Q: Ya, ok but what is her response?

A: I will see my attorney. God as my witness, I tried to give you a chance. I will pick Sasha up in 5 minutes. That is the initial text, from that point, that started the litigation.

Q: In your response then, to her saying she'll pick up Sasha in 5 minutes, what is that photograph that you sent her?

A: That's a picture of him knocked out at 4:07.

Q: Ok, and then the following text from you to her?

A: He just woke up, but we didn't have time to finish. There was, we were doing 120 words every day and that took time. Plus, there wasn't homework every day, but just the sight words alone and reading two of those little Reading A-Z books took a good hour. And I want to teach him that we get the job done every day. We finish the work, and so I need until 5:30 to do it.

14:08:10

Q: Starting with Monday, November 17, 3:34 p.m., there's a text from Lyuda asking to let Sasha outside. Do you see that?

A: Yes

Q: What was your response?

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A: We're not done yet. And that had a certain significance because, if you're doing sight words with your kid every day, you can tell if someone else is doing it without asking, because they learn the words so slowly at this age, so I had concern that if I don't finish this, I'm so committed, and I know these sight words will give him the basis for reading, that whether it's sight words or doing homework, we're going to finish it. And it's also teaching him about structure and discipline and so...it wasn't done, and I felt like I wasn't doing it to be difficult, I was doing it for my son.

14:11:18

Q: There's a text message at 15:42 from Lyuda saying bring him to me. What is your response?

A: My friend Anthony was in town from Orlando and Sasha was playing with his sons so I asked her if we could take Sasha out to dinner with us.

Q: And what was her response?

A: She assumed because I was asking to take him with us to dinner that I hadn't fed him. That I had starved him until 5:30, when in fact we do the same thing every day. He ate when he got home from school. But she's assuming and very imperial saying you must have not fed him, that's disgusting.

Q: The following day, she texts you to let Sasha out at 4:21 p.m. What is your response?

A: You can pick him up at 5:30. Because...just based on these types of responses that I'm receiving, they are not logical, they are not kind, they are not in the spirit of co-parenting...I can't even reason with somebody like that. So why would I...we can't negotiate if you are going to accuse me of not feeding my kid. Or I'm stealing clothes as it says. The best thing for Sasha, let's not have any disputes out in the driveway. Let's just do what the order says.

Q: November 21st 15:26

A: This is a common theme, it happens all the time. It happens to this day. I get a text where are his clothes? I'm stealing his clothes. First of all, why would I steal his clothes? They don't fit me. I don't understand. He wears a uniform. So it wouldn't even be any different. And it's part of the badmouthing, the message that I'm stealing, I'm a thief, because you know she's saying this to him. Daddy steals stuff. Daddy doesn't buy you clothes, and the things Daddy does buy you are cheap.

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14:16:58

Q: At 7:53, there is a text from you about Little League sign-ups. What is her response?

A: That, um, you can do it on your days. I'm going to sign him up for Jiu Jitsu on my days, and the court will adjust visitation to restore my mother's rights. She was informed before that we were practicing and Sasha had been telling her that we'd been practicing.

14:17:56

A: Baseball is something that's associated with me. Baseball is dad. I played college sports, and so anything that's a team sport is devalued because that's me, that's what this text message is. That's dad. Anything I love, that's not encouraged. No matter how civil...when I look at what I wrote there, where is the vitriol in what I've written in any of this stuff? They are pleadings.

14:35:58

Q: After you get a response to you do baseball on your days, what was your response to Lyuda?

A: I was pleading with her. We just had so much time in preparing for baseball and she knew it. She knew this was something we do every day. Teaching baseball to a five year old is somewhat challenging. And so I just knew, if she's not going to bring him, you can't go to practice one day and not the next and miss games. That defeats the purpose of being on a team and being committed. As a coach, I would want people to be there every day, on time, never miss anything, so I was really frustrated. And I'm just basically pleading with her, please let's put it aside. Let him play baseball.

Q: And then what does she tell you that she's already done?

A: Her response was that she's already paid her lawyer. I can't even ask her simple things without her accusing me of harassing her. How am I harassing her? We don't speak outside of text messages, so how am I harassing her? She can't separate what is me and what is for Sasha. This is all for Sasha. I'm not out there doing it for me. I'm not doing sight words for me. I'm doing it for Sasha. But she can't separate that.

14:39:16

Q: At 7:57, you text Lyuda about the Call of Duty issue. What did you provide her in that text message?

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A: I provided a website that discussed a review of the game and which ages it was appropriate for. It included a discussion about pros/cons of kids of various ages playing this game. The consensus was that this is not a game designed for a five year old. He was 5 at the time. And of course, the tenor of the time was, she had just filed a motion, so I'm telling her, you're asking for more time, but then you give him this game that's for teenagers. He's five years old. I felt I was very fair and diplomatic considering I find out that he's been playing it for hours. He was excited about it. First time I found out about it at the bus stop, he's telling me that he's playing this game, and I told him that I don't think that's a good idea. I went home and investigated the game, discussed it with my wife, and told Sasha that we aren't playing this game at our house, and I am going to reach out to your mom to talk to her about this. I couldn't believe, I just don't understand putting your child in front of that game.

Q: Now, she responds the way she responds, then you explain to her what you know. What did you specifically tell her?

A: I said you bought this for him at Christmastime. I'm just asking you to do some research before you plop your kid in front of it, unsupervised.

Q: And what's the final part that you say?

A: And the secrets. To me, this is a big part of the alienation and the badmouthing. You keep secrets from me, that means I'm not important enough to have information shared with me. This continues to this day. He's afraid to talk to me about anything.

Q: And then when you address the issue of asking her not to tell him to keep secrets from you, who do you get a response from there?

A: Um, Ricky interjects himself into the conversation and tells me, see you in court. Now, I don't know what spirit of co-parenting this is in, but I come with a very reasonable request as a parent. You are coming with an M-17, whatever, game with this child. I'm asking you, hey take a look at this website, you basically tell me to .... no...and then you put your husband on who says see you in court. I don't know if that's a threat or how that's constructive, but I'm supposed to be afraid now? I took it as a threat. I felt like this is so disheartening. I can't even ask her about anything, whether it's baseball, whether it's can we have dinner with a friend, I'm met with you're stealing clothes, you don't feed him, you're keeping secrets, I just...at this point I'm so frustrated. On top of that, I'm hearing the things from my son as well at this point, non-stop.

Q: And that interruption of your attempt to have a dialogue with Lyuda was a few days before you placed the recording device, is that right?

A: Correct

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Amazingly, even though Lyuda has repeatedly claimed that Sean won't let her participate in homework, the texts reveal just the opposite. The texts reveal a parent asking the other parent to help their son and providing additional work for her to work on with Sasha. Obviously the texts prove that Lyuda has no credibility.

Probably the most conclusive evidence, other than Sean's testimony, was one of the final text exchanges prior to the placement of the recording device (Exhibit I, Bates 251). Sean, having become more and more concerned about Sasha's exposure to adult content in the form of Call of Duty and other video games attempted to co-parent with Lyuda. Sean texted Lyuda a link to an article on the damage such games can cause when played at too young of an age. Lyuda, even though she knew that Sasha was playing the game in her home, responded by accusing Sean of exposing Sasha to the game. When Sean responded that her allegation was not true he received the following response **from Lyuda's Husband**:

> **Hey Shawn this is Ricky Lyuda's husband could you please stop writing my wife enough now just leave her alone will see you in court**
>
> **Would appreciate it!!**

Sean, taking the high road, and even trying to co-parent with a person he allegedly hates and is obsessed with, responded as follows:

> **I simply want to make sure Lyuda understands the damage this game can inflict on young minds. That's what co-parenting is about. This isn't about Lyuda....this is about what is best for Sasha. End of story. Good night.**

Ricky, not Lyuda, responded as follows:

> **Like I said would appreciate if you would stop writing my wife...no need for good nights...just stop writing unless emergency regarding Sasha**

Now, the alleged victim of Sean's harassment, is cutting off co-parenting communication between Sean and Lyuda over an issue that this Court has already found to be compelling. A few days later, based upon the totality of the foregoing evidence, Sean, in good faith, and solely to protect his son, placed a recording device in Sasha's backpack.

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II. LEGAL ANALYSIS

A. The Recordings In Question Are Absolutely Legal.

Rather than recognize the horrific nature of her manipulations and alienations, Lyuda will argue that the recordings should not be considered by the Court. Whereas the Court has already determined that the recordings would certainly be considered by Dr. Holland, 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

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Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), and Silas v. Silas, 680 So.2d 368 (Ala.Civ.App.1996).

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

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

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

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

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

Pollack is just one of many authorities recognizing the vicarious consent doctrine. (See **Exhibit "1"**) It was based upon this well-established authority that the Court found that provided Sean could meet the burden of good faith basis that was objectively reasonable for believing that it is necessary to consent on behalf of Sasha, the tapes would be admitted into evidence. As Sean testified, it was "his duty to protect him." Sean recognized the mandate that a parent has to act in the best interests of their child and acted reasonably. His explanation of when he hoped to capture evidence of Lyuda's abuse, establishes conclusively that he acted reasonably to protect his son. The contents of the tape are truly the best evidence that his actions

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were both in good faith and reasonable.

B. <u>Nothing Precludes a Court Appointed Expert from Considering the Recordings, Even if they were Illegal.</u>

Even though, based upon the overwhelming evidence presented at trial thus far, the tape should necessarily be directly received into evidence, 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. **<u>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</u>**.
>
> (emphasis added)

It was based upon this statute that the Court already decided the issue of Dr. Holland receiving the tapes. While Dr. Holland has not yet testified regarding the types of things upon which experts in her field routinely rely, this Court brings its own experiences to each case. It has likely reviewed expert reports which have been accepted into evidence which contain references to the following:

1. Hearsay statements of witnesses.
2. Hearsay documents.
3. Private investigator reports which contain questionably obtained material.
4. Questionably legal GPS data from surreptitiously placed GPS trackers.
5. Legally or illegally obtained telephone recordings.
6. Selectively chosen voice mail messages (discussed further hereinafter)
7. Secretly made recordings of interactions between the parties or their children.
8. Unauthenticated documents and photos.

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9. Information that predated the last custody order which would be barred from admission by Nevada law.

10. Evidence obtained as a result of breaking into a spouse or ex spouse's home.

The list of potentially excludable evidence routinely relied upon by experts, particularly in child custody cases, is vast and certainly greater than the foregoing. More importantly, there is no case authority that would exclude a court-appointed expert from testifying solely because she considered inadmissible evidence. In fact, the Nevada Supreme Court has conclusively held that even if the testimony of the expert is on the ultimate issue (such as negligence, or in this case, best interests) the expert can rely on evidence that is absolutely inadmissible. In Barrett v. Baird 908 P2d 689 (1995), the Nevada Supreme Court held as follows:

> *Barrett* first claims that the screening panel statute denies her right to a jury trial because jurors will overvalue the weight of the panel's decision without knowing that the panel's decision relies on evidence that would be inadmissible at trial. This claim lacks merit. In *Jain v. McFarland,* 109 Nev. 465, 472, 851 P.2d 450, 455 (1993), this court held that the screening panel process "is not a full trial on the merits and should not be represented as such." Indeed, NRS 41A.069, which sets out jury instructions that a jury are to be given when panel findings are introduced at trial, clearly indicates that the panel's recommendation is, in effect, "an expert opinion which is to be evaluated by the jury in the same manner as it would evaluate any other expert opinion." *Comiskey v. Arlen,* 55 A.D.2d 304, 390 N.Y.S.2d 122, 126 (1976), *aff'd* 43 N.Y.2d 696, 401 N.Y.S.2d 200, 372 N.E.2d 34 (1977). In Nevada, as in most jurisdictions, experts may rely on evidence that is otherwise inadmissible at a trial even when testifying before a jury as to an ultimate issue such as negligence.[6] NRS 41A.100, 50.285, 50.295. A jury is free to accept or reject that expert's opinion. Therefore, the fact that the screening panel's decision is introduced to the jury does not infringe on the jury's fact-finding duty even though the panel decision is based on otherwise inadmissible evidence.

Barrett v. Baird, 111 Nev. 1496, 1502-03, 908 P.2d 689, 694-95 (1995) overruled on other issues by Lioce v. Cohen, 122 Nev. 1377, 149 P.3d 916 (2006) overruled by Lioce v. Cohen, 124 Nev. 1, 174 P.3d 970 (2008)

In Barrett, even though Statutes exist to control the dissemination of data from a medical-legal screening panel in a medical malpractice case because panels rely on evidence which is not admissible in a trial, an expert could base its opinion on the panel's conclusions. Clearly, there is no bar to Dr. Holland considering the recordings.

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C. Lyuda's Spoliation Red Herring

Initially, Lyuda argued that because the original tape was not available, the tape should be excluded. NRS 52.245, however allows for the admissibility of a duplicate. Lyuda has made no claim that the recordings produced were not authentic and there is no evidence to support a contention that allowing a duplicate, which is routine in family Court in nearly every trial, would be unfair. As such, this is yet another attempt to basically "make stuff up" in order to distract the Court from the best interests of Sasha.

Lyuda has now argued that because Sean discarded portions of the tape, that somehow that impacts the admissibility of the tapes which were retained. THERE IS NO NEVADA AUTHORITY TO SUPPORT SUCH A CONTENTION. While the legal authority that contradicts this position will be discussed hereinafter, a simple analogy, which appeals to common sense rather than rhetoric and vitriol might assist the Court in disregarding Lyuda's attempt to mislead the Court. Lyuda's position would mean that if one parent left 100 voicemails on the phone of the other parent evidencing perfect co-parenting and 2 voicemails that evidenced alienation, and the 100 voicemails were deleted and the 2 voicemails preserved, that somehow the 2 voicemails would be inadmissible. Obviously this is not the case and there is no authority for such a position.

Moreover, the cases cited by Lyuda in her Pre-Trial Memo do not support the exclusion of Sean's properly obtained evidence. In fact, there is not a single Nevada case that stands for the proposition that even if evidence was intentionally or negligently destroyed that such an act could ever result in other evidence being excluded. The only result of spoliation is either a presumption that the destroyed evidence was negative for the spoliator or an inference that it was. No cases result in the exclusion of other evidence.

The primary case cited by Lyuda is Bass-Davis v. Bass, 122 Nev. 442 (2006). The Court in Bass held as follows:

> When evidence is willfully suppressed, NRS 47.250(3) creates a rebuttable presumption that the evidence would be adverse if produced. Other courts have determined that willful or intentional spoliation of evidence requires the intent to harm another party through the destruction

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> and not simply the intent to destroy evidence. We agree. 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. 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. If not rebutted, the fact-finder then presumes that the evidence was adverse to the destroying party.
>
> Unlike a rebuttable presumption, an inference has been defined as "[a] logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts." Although an inference may give rise to a rebuttable presumption in appropriate cases, an inference simply allows the trier of fact to determine, based on other evidence, that a fact exists. An inference is permissible, not required, and it does not shift the burden of proof.
>
> As the rebuttable presumption in NRS 47.250(3) applies only when evidence is willfully suppressed, it should not be applied when evidence is negligently lost or destroyed, without the intent to harm another party. Instead, an inference should be permitted. As recognized by the Maryland Court of Special Appeals, "[a]n intentional or willful destruction of the evidence could support a presumption unfavorable to the [destroyer]; however, the mere inability to produce the [evidence] would support an adverse inference rather than a presumption."

Bass-Davis v. Davis, 122 Nev. 442, 448-49, 134 P.3d 103, 106-07 (2006)

This case discusses the only two possible remedies for spoliation, a presumption, or an inference. No other remedy, such as the exclusion of other relevant evidence, could ever be available to Lyuda, even if Sean intentionally discarded the other portions of the recording. Moreover, Sean's uncontroverted testimony established that he did not act in bad faith in discarding the irrelevant recordings and he certainly did not do so with the intent to harm Lyuda. Even if the Court found spoliation, and even if it concluded that and inference or even a presumption existed that the discarded recordings favored Lyuda's case, the recordings preserved would remain unaffected by such a ruling. Moreover, the extreme and disturbing nature of the preserved recordings would outweigh any such presumption or inference to such an exponential degree that it would not matter.

Finally, even though Lyuda, with every breath asks the Court to ignore Sasha's best interests, the Nevada Supreme Court has made it clear that the best interests of a child are far more important than mere discovery abuses. Although Sean has committed no such abuses, in Blanco v. Blanco the Nevada Supreme Court held as follows:

> With regard to child custody and child support, we determine that a case-concluding discovery sanction is simply not permissible. These child custody matters must be decided on their merits. It is well established that when deciding child custody, the sole consideration of the court is the child's best interest. NRS 125.480; *Sims v. Sims,* 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993).

Blanco v. Blanco, 129 Nev. Adv. Op. 77, 311 P.3d 1170, 1174 (2013)

The Court went on to hold as follows:

> In other contexts, we have held that a court may not use a change of custody as a sword to punish parental misconduct, such as refusal to obey lawful court orders, because the child's best interest is paramount in such custody decisions. *See Sims,* 109 Nev. at 1149, 865 P.2d at 330; *see also Dagher v. Dagher,* 103 Nev. 26, 28, 731 P.2d 1329, 1330 (1987). Moreover, child custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children. *See Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *see also Price v. Dunn,* 106 Nev. 100, 105, 787 P.2d 785, 788 (1990) (stating that the policy in favor of deciding cases on their merits is heightened in domestic relations matters), *disagreed with on other grounds by NC–DSH, Inc. v. Garner,* 125 Nev. 647, 651 n. 3, 218 P.3d 853, 857 n. 3 (2009). Other courts have similarly held that before rendering a default judgment on child custody and support issues as a discovery sanction, the lower court must conduct an evidentiary hearing or consider other evidence in the record as to the child's best interest. *See Fenton v. Webb,* 705 N.W.2d 323, 327 (Iowa Ct.App.2005); *Wright v. Wright,* 941 P.2d 646, 652 (Utah Ct.App.1997).

Blanco v. Blanco, 129 Nev. Adv. Op. 77, 311 P.3d 1170, 1175 (2013)

Basically, even if this Court were to fall for Lyuda's spoliation Red Herring regarding the discarded recordings, it could never ignore the best interests of Sasha. It could never ignore the preserved recordings. Even the worst possible discovery sanction could not allow Lyuda prevent the truth from coming out. Truth which will necessarily result in the Court concluding that a change in custody is in Sasha's best interests.

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III. CONCLUSION

With every breath she has taken since the villainy preserved on the recordings was exposed, Lyuda has done nothing but obfuscate and attempt to prevent the Court from considering the truth and what lies in Sasha's best interests. She has tried to distract this Court by saying things like this can't possibly be permissible while ignoring statutes and case law which not only support, but require the admission of the tapes. Based upon the foregoing analysis, even if this was a close legal call for the Court, which it is not, the best interests of Sasha would necessarily be the tie-breaker. The truth coming out about the types of things that Lyuda says to Sasha, truth that Lyuda spontaneously admitted to at the very first hearing (although she tried to blame it on Sean as always) is necessarily in Sasha's best interests. Interestingly, most of the authority supporting the vicarious consent doctrine, uses as its rationale the existence of a parent acting in his child's best interests. As the Court considers this issue, it must necessarily conclude that only one parent has acted in Sasha's best interests. Sean placed the recording device for a very short period of time after an escalation in Sasha's statements to him and demeanor and after a temporally corresponding escalation in Lyuda's own behavior as evidenced in the text messages. While any one example could satisfy the good faith requirement of the vicarious consent doctrine, the totality of all of the evidence put Sean in a position that if he did not act, he would be in a position of failing to protect his son and ignoring the mandate to act in his best interests discussed in the Pollack case analyzed above.

Based upon the foregoing authorities and overwhelming evidence adduced at trial, the Court should make the following findings of fact, conclusions of law, and orders:

1. Sean had a good faith basis to conclude that he needed to consent to the recordings on behalf of his son, based upon his testimony regarding the statements made by Sasha and based upon the text messages from Lyuda and her husband from October of 2014 to January of 2015.
2. Sean's conclusion that he must consent on behalf of Sasha was objectively reasonable based upon his testimony regarding the statements made by Sasha and based upon the text messages from Lyuda and her husband from October of 2014

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to January of 2015.

3. That Sean did not place the recording device for any other purpose other than Sasha's best interests.

4. That consistent with the Court's prior ruling, based upon the multiple authorities submitted by Sean, the vicarious consent doctrine applies to the recordings and as such, they are admissible and shall be received into evidence.

5. That even if the Court excluded the recordings, they would have been properly reviewed and considered by Dr. Holland as the Court appointed expert pursuant to NRS 50.285 and the holding in Barrett v Baird.

6. That Dr. Holland shall be allowed to testify about the entirety of her report and her report will be admitted and received into evidence in its entirety.

7. That there is no evidence that Sean intentionally spoliated evidence.

8. That even if the Court concluded that evidence was spoliated, there is no legal authority that would allow the Court to disregard evidence that was in fact preserved.

9. That even if the Court concluded that evidence was spoliated, any inference that the lost evidence would have favored Lyuda would be outweighed by the relevance of the recordings on the issue of best interests.

10. That even if the Court found that evidence was intentionally spoliated, Blanco v. Blanco requires the Court to determine custody on the merits with the sole consideration being the best interests of the child.

11. That the fact that the recordings offered are duplicates is of no consequence pursuant to NRS 52.245 due to the fact that no question has been raised as to the authenticity, in fact, Lyuda admitted to her voice being on the recordings at the initial hearing in this matter. Moreover nothing about admitting a duplicate recording would be unfair.

///

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12. Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED THAT the recordings are admitted for any purpose and can be played in open Court and discussed by and form a basis for the opinions of the Court appointed expert, Dr. Stephanie Holland

RESPECTFULLY SUBMITTED this 4 day of December, 2015.

BLACK & LOBELLO

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2015, a true and correct copy of **PLAINTIFF'S BRIEF REGARDING RECORDINGS,** 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 depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid, addressed as follows:

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

Darryl Berdahl
an Employee of BLACK & LOBELLO

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Exhibit 1

Exhibit 1

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CLERK OF THE COURT

MISC
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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

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

DATED this 16 day of March, 2015.

BLACK & LOBELLO

John D. Jones, Esq.
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Attorneys for Plaintiff,
SEAN R. ABID

CERTIFICATE OF MAILING

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

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

an Employee of BLACK & LOBELLO

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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

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

BRIMMER, District Judge.*

The above-entitled matter having come before the Court upon Defendants' Motions for Summary Judgment, and the Court having reviewed the materials on file herein, having heard argument from the parties, and being fully advised in the premises, FINDS and ORDERS as follows:

Factual Background

In 1989, defendant Denise Dulaney and her husband James Thompson obtained a divorce in Utah state court. During subsequent custody proceedings, Denise Dulaney attempted to introduce transcripts of several phone conversations she had **recorded** with a wiretap between Thompson and the couple's then three and five year old children, who lived with Dulaney. In 1988, when these conversations were **recorded**, divorce proceedings between Dulaney and Thompson had commenced and Dulaney and the children were living with Dulaney's parents, Phil and Elsie Dulaney, in Oregon.

Prior to trial, Thompson filed a motion in limine to exclude the transcripts of the wiretapped conversations from the custody proceeding. The motion was not granted,[1] and the transcripts were introduced. At the custody hearing, the court determined that both Thompson and Dulaney were fit to be named guardian of the children, but nonetheless awarded Denise Dulaney custody.

In 1990, Thompson initiated the present suit against the seven above-named defendants,[2] alleging violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510– *1538 2520 (1968 & West Supp.1993) ("Title III"),[3] conspiracies to violate Title III, and numerous state law claims, both statutory and common law. He sought several million dollars in compensatory and punitive damages.

Procedural Background

After discovery commenced, the parties filed cross-motions for summary judgment, and this Court heard oral argument on those motions on May 3, 1991. In an order dated May 29, 1991, this Court, relying on *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir.1977), concluded that this case was outside the purview of Title III since it was a "purely domestic conflict," *id.* at 679, and judgment was entered for all the defendants on Thompson's claims. Given the Court's disposition on the sole federal cause of action, there was no longer a basis for the exercise of subject matter jurisdiction over the pendent state law claims, and they were dismissed accordingly.

Thompson appealed the Court's ruling on summary judgment to the Tenth Circuit, which, on July 23, 1992, issued an order affirming in part and reversing in part this Court's order granting summary judgment. *See Thompson v. Dulaney,* 970 F.2d 744 (10th Cir.1992). The appeals court remanded the case to this Court for further proceedings.

This Court has subject matter jurisdiction over the federal cause of action pursuant to 28 U.S.C. § 1331 (1988) and 18 U.S.C. §§ 2510–2520 (1968 & West Supp.1993), over the state-law claims by way of supplemental jurisdiction under 28 U.S.C. § 1367(a) (West Supp.1993), venue is proper in this Court under 28 U.S.C. § 1391 (West Supp.1993), and no objections have been raised to this Court's assertion of personal jurisdiction over the defendants.

Standard of Review

A. *The Requirements of Rule 56(c)*

Pursuant to Rule 56(c), a trial court hearing a motion for summary judgment is simply required to determine if there are any "genuine issues of material fact," and whether the moving party is entitled to "judgment as a matter of law." FED.R.CIV.P. 56(c). In deciding a summary judgment motion, the Court must therefore make two separate inquiries. First, are the facts in dispute "material" facts, and if so, does the dispute over these material fact create any "genuine" issues for trial.

In determining materiality, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also Carey v. United States Postal Service,* 812 F.2d 621, 623 (10th Cir.1987). Factual disputes over collateral matters will therefore not preclude the entry of summary judgment. *See Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510 (citation omitted).

[1] If the Court concludes that the fact in dispute is a "material" fact, then the Court must determine whether the issue is a "genuine" issue of fact that must be resolved by a jury. This requires a court to assess whether the evidence presented is such "that a reasonable jury could return a verdict for the nonmoving party." *Id.* This inquiry focuses on the sufficiency of the evidence as well as its weight. In the absence of "any significant probative evidence tending to support the complaint," *First Nat'l Bank of Arizona v. Cities Serv. Co.,* 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968), summary judgment is warranted. The Supreme Court has noted that assessing whether an issue is genuine under Rule 56(c) is similar to standard used for deciding a motion for a judgment as a matter of law, formerly known as a directed verdict, under Rule 50(a). *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (citation omitted). The primary difference between a Rule 56(c) motion and a Rule 50(a) motion is procedural; the former is based on documentary evidence while the latter is ***1539** based on evidence admitted at trial. *Bill Johnson's Restaurant, Inc. v. NLRB,* 461 U.S. 731, 745, 103 S.Ct. 2161, 2171, 76 L.Ed.2d 277 (1983). Thus, it is apparent that the ultimate determination is whether reasonable minds could differ as to the import of the evidence; if they cannot, then there is no "genuine" issue of fact and summary judgment is proper.

This approach to ruling on a motion for a directed verdict, adopted in the summary judgment context, represents a repudiation of what had been known as the "scintilla of evidence" standard. Under that standard, the production of any evidence, without regard to its probative value, which created an issue of fact, required a trial judge to deny a motion for a directed verdict and let the jury decide. *See Anderson,* 477 U.S. at 251, 106 S.Ct. at 2511 (adopting several old Supreme Court precedents on the standard for a directed verdict in the summary judgment context) (citations omitted).

[2] The trial court's role is limited to determining the existence *vel non* of a genuine issue of material fact, and nothing more. The Court does not assess the credibility or the probative weight of the evidence that established the existence of the genuine issue of material fact. The determination that a true factual dispute exists means, *ipso facto,* that summary judgment may not be entered "as a matter of law," and the case must therefore be submitted to a jury.

B. *The Burdens of Proof*

[3] The initial burden of production under Rule 56(c) is on the moving party. That party must make a sufficient "showing" to the trial court that there is an absence of evidence to support the non-moving party's case. *Celotex,* 477 U.S. at 322–24, 106 S.Ct. at 2552–53. The movant satisfies its burden by producing evidence that is admissible as to content, not form, identifying those portions of the **record**, including the pleadings and any material obtained during discovery, that demonstrate the absence of any genuine issues of material fact. *Id.* at 323–24, 106 S.Ct. at 2552–53.

If the movant meets its burden of production, then the burden of production shifts to the nonmoving party. That

party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510 (emphasis added). The nonmoving party is now put to their proof; they must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986) (citations omitted). They must make a "sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof." *Celotex,* 477 U.S. at 322, 106 S.Ct. at 25; *Carey,* 812 F.2d at 623. They must demonstrate to the Court's satisfaction that the "evidence presents a sufficient disagreement to require submission to a jury." *Id.* at 623. In making this determination, the trial court must "examine the factual **record** and [draw all] reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Dorrance v. McCarthy,* 957 F.2d 761, 762 (10th Cir.1992) (quoting *Abercrombie v. City of Catoosa,* 896 F.2d 1228, 1230 (10th Cir.1990)).

The Court will now apply these legal standards to the facts of the case before it.

Discussion

A. *The Tenth Circuit's Order on Remand*

1. *Rulings on Summary Judgment*

In its order on remand, the Tenth Circuit affirmed in part and reversed in part the grant of summary judgment. The appellate court specifically took the time to discuss and interpret Title III and to delineate what was necessary to establish a *prima facie* cause of action under that statute in an effort to provide this Court, and other courts, with guidance under this little-used statute. *See Thompson,* 970 F.2d at 749–50.

The opinion of the Court of Appeals can be broken down into three separate rulings: one on the conspiracy claims, one on the unlawful wiretapping claims, and one on the use or disclosure claims.

***1540** The grant of summary judgment on Thompson's claims that Phil and Elsie Dulaney conspired to violate Title III, and that Denise Dulaney's expert witnesses and her attorneys also conspired to violate Title III, was affirmed on appeal. *See id.* at 749. The appellate court did, however, state that there were factual issues as to whether Denise Dulaney and Russ Sardo engaged in a conspiracy to violate Title III and remanded for a determination of that issue. *Id.* at 749–50.

The Court of Appeals reversed and remanded Thompson's unlawful wiretapping claims against Phil, Elsie and Denise Dulaney. *Id.*

Finally, the appellate court reversed and remanded Thompson's use or disclosure claims against all seven defendants. *Id.*

2. *The Tenth Circuit's Interpretation of Title III*

As noted above, the Court of Appeals took the time to render an interpretation of Title III in an effort to provide this Court with controlling legal standards to apply in this case. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 2511(1)(a)–(d), provides in relevant part:

> (1) Except as otherwise specifically provided in this chapter any person who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication....;
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> .....
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).[4]

[4] In this Court's May 1991 order granting the defendants' motions for summary judgment, this Court was faced with an issue of first impression in the Tenth Circuit regarding the applicability of Title III to cases of interspousal wiretapping.[5] Although three other circuits had ruled that Title III did apply to interspousal wiretapping, *see Kempf v. Kempf,* 868 F.2d 970, 973 (8th Cir.1989); *Pritchard v. Pritchard,* 732 F.2d 372, 274 (4th Cir.1984); *United States v. Jones,* 542 F.2d 661, 673 (6th Cir.1976), two circuits had ruled that interspousal wiretapping was beyond the reach of Title III. *See Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir.1977); *Simpson v. Simpson,* 490 F.2d 803, 810 (5th Cir.), *cert. denied,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974) (adopting the reasoning of *Anonymous*). This Court adopted the "minority" view of the Second and Fifth Circuits that Title III was inapplicable to interspousal wiretapping, which provided the basis for granting summary judgment to the defendants.

***1541** While Thompson's appeal was pending in this matter, the Tenth Circuit issued two opinions within a period of five weeks that essentially dictated the result in Thompson's appeal.

Newcomb was decided in late August, 1991. That case involved a minor child who sued his custodial parents under Title III for intercepting his telephone conversations. While the Tenth Circuit noted that there was a split in the circuits over the question of whether Title III extended to so-called interspousal wiretapping, *see id.* at 1535 n. 3, the court avoided that question, concluding that interspousal wiretapping was "qualitatively different from a custodial parent tapping a minor child's conversation within the family home." *Id.* at 1535–36.

Five weeks later, the Tenth Circuit was squarely confronted with the issue left open in *Newcomb.* In *Heggy v. Heggy,* 944 F.2d 1537 (10th Cir.), *cert. denied,* 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992), which was decided in early October, 1991, the Tenth Circuit adopted the "majority" view taken by the Fourth, Sixth and Eighth Circuits, concluding that Title III did provide a remedy for interspousal wiretapping within the marital home. *Id.* at 1539. In its opinion in *Heggy,* the Tenth Circuit specifically rejected and criticized the conclusion reached in *Simpson* and *Anonymous,* which were the cases that this Court relied on in granting the defendants' motions for summary judgment.

Heggy, which was decided after this Court's May 1991 ruling, justified reversal of this Court's order granting summary judgment for the defendants. In *Thompson v. Dulaney,* 970 F.2d 744 (10th Cir.1992), the Court of Appeals relied on *Heggy* in reversing in part this Court's order granting summary judgment. The Court explained that in *Heggy,* it elected to follow the majority view because the words "any person" in the statute were a "clear and unambiguous" dictate that compelled the result that "[t]here exists no interspousal exception to Title III liability." *Thompson,* 970 F.2d at 748.

While the language of the statute compelled this result, the court also pointed out that the statute established certain limits on the actionability of interspousal wiretapping in a particular case. First, the statute requires proof of actual intent on the part of the intercepting spouse, thereby excluding what the court called "inadvertent interceptions." *Id.* Second, the court noted that 18 U.S.C. § 2511(2) enumerated specific exceptions that would often relieve the actor of liability, the most notable of which was the "consent" exception, *see* 18 U.S.C. § 2511(2)(d). Finally, the court pointed out that liability under Title III premised on the wrongful use or disclosure of information obtained from a wiretap requires an even "greater degree of knowledge on the part of the defendant." *Thompson,* 970 F.2d at 749. In addition to proving that the use or disclosure was done intentionally, a defendant "must be shown to have been aware of the factual circumstances that would violate the statute." *Id.*

Thus, to establish use or disclosure liability, it is insufficient to prove only that the defendant knew that the information was the product of a wiretap. The reason for this is that not all wiretaps are illegal *per se.* As discussed above, § 2511(2) specifically lists exceptions to the general prohibition against wiretaps. It is apparent that the intent of Congress was only to deter the use or disclosure of information *illegally obtained* in violation of Title III, and not all wiretap evidence. It would not further the purposes underlying the prohibition against the use or disclosure of such information to punish people who use or disclose information known to have been obtained from a wiretap if, in fact, that wiretap was consented to or otherwise lawfully obtained.

[5] Therefore, in order for a plaintiff to prevail on a use or disclosure claim, the plaintiff must prove: (1) that the defendant "knew or should have known" that the information was the product of an illegal wiretap, and (2) that the defendant had knowledge of the facts and circumstances surrounding the interception so that he "knew or should have known" that the interception was prohibited under Title III. *See id.*

This will often require the plaintiff to prove that the

defendant had notice that *1542 neither party consented to the wiretap, since consent would negate the requirement that the party had knowledge that the wiretap was an illegal one. Mere knowledge that the information allegedly used or disclosed came from a wiretap is insufficient unless additional circumstantial proof is introduced that would enable an inference to be drawn that the defendant knew or should have known that the wiretap was an illegal one under Title III.

With these principles in mind, the Court will now turn to the merits of the contentions.

B. *Application to this Case*

1. *The Unlawful Wiretapping Claims*

a. *Denise Dulaney*

After expounding on what is required to state a claim under the various aspects of Title III, the appellate court concluded that this case should be remanded for a determination of whether any factual issues existed regarding the conduct of Denise, Phil and Elsie Dulaney with respect to Title III. As discussed above, establishing a violation of 18 U.S.C. § 2511(1)(a) for intercepting an electronic communication requires proof of actual intent on the part of the intercepting spouse, Denise Dulaney.

i. *Intent*

[6] Denise Dulaney's argument is that she did not act with the requisite state of mind in this case. In support of her contention, she first argues that she recorded these conversations because she was concerned that Thompson may have been trying to undermine the childrens' relationship with her. In essence, she argues that she taped the conversations because she was acting in the best interests of her children. She also argues that she did so in reliance on the advice of her attorneys that her actions were legal, and after consulting with Thompson.

Thompson alleges that Denise Dulaney admitted that the recordings were "innocuous," but that she still continued to tape the conversations. As a result, he contends that she intended to tape the recordings. This Court agrees.

The critical issue on this point is the definition of intent. Denise Dulaney argues that her acts were not performed with a bad purpose, or with a specific disregard of the law, and that they were not without justifiable excuse. This Court is not persuaded.

In *United States v. Townsend,* 987 F.2d 927 (2d Cir.1993), the Second Circuit set forth a suggested jury instruction on the intent element of Title III. The Court stated that the defendant must be shown to have acted "deliberately and purposefully; that is, defendant's act must have been the product of defendant's conscious objective *rather than the product of a mistake or an accident.*" *Id.* at 930 (emphasis added).

The Court is aware that *Townsend* was a criminal prosecution. Nonetheless, this Court is convinced that this definition of intent is consistent with the view taken by the Tenth Circuit in *Thompson.* In *Thompson,* the court stated that the wording of the statute "requires that interceptions be intentional before liability attaches, thereby excluding liability for *inadvertent* interceptions." *Thompson,* 970 F.2d at 748 (emphasis added). Thus, the focus of the Tenth Circuit, like the Second Circuit, is on the issue of the deliberateness of the act, or, stated another way, whether the actor intended to intercept the communication or whether it happened inadvertently. Thus, Dulaney's *motive,* whether she acted with a bad purpose or in disregard of the law, is not the issue. *See* S.REP. No. 99–541, 99th Cong., 2d Sess. 23 (Oct. 17, 1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3577–79 ("The term 'intentional' is not meant to connote the existence of a motive."). As a result, this Court concludes that the proper focus is on the volitional nature of the *act* of intercepting the communication. Since Denise Dulaney does not contest the fact that she did voluntarily tape record these conversations, the Court concludes that she had the requisite intent as a matter of law.

[7] Denise Dulaney's second argument is that she relied, in good faith, on the advice of her attorneys in taping the conversations. This contention has been flatly rejected by the Tenth Circuit. In *Heggy,* the Tenth Circuit specifically rejected the defense of *1543 "good faith reliance on a mistake of law" for two reasons. First, § 2520(d) expressly provides for a good faith defense in a limited number of circumstances, such as reliance on a warrant or subpoena; good faith reliance on mistake of law is not listed, and thereby deemed not to be a defense. Second, the Court stated that "[t]he law's reluctance to allow testimony concerning subjective belief after the fact reflects an obvious concern with the reliability of such testimony." *Heggy,* 944 F.2d at 1542. Thus, this evidence

cannot be considered probative in determining whether to grant summary judgment.

ii. *The Defense of Consent*

Even though Thompson may have stated a claim against Denise Dulaney under Title III with respect to intentional wiretapping, the statute expressly provides several defenses to these claims. One specific defense is § 2511(2)(d), which provides a safe harbor from Title III liability

> where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

In this case, Denise Dulaney alleges that she gave **vicarious consent**, on behalf of her minor children, to tape the conversations.

It is clear from the case law that Congress intended the consent exception to be interpreted broadly. *See Griggs–Ryan v. Smith,* 904 F.2d 112, 116 (1st Cir.1990) (citing *United States v. Amen,* 831 F.2d 373, 378 (2d Cir.1987)). Some courts interpreting the consent exception have drawn a distinction between whether a party had the legal capacity to consent and whether they actually consented.[6] *See United States v. King,* 536 F.Supp. 253 (C.D.Cal.1982).

In *King,* the party who allegedly consented to the wiretapping was an adult with legal capacity to consent. The district court concluded that, for purposes of the consent exception to Title III, the "only issue under the statute is a factual one: did the individual 'voluntarily' consent?" *Id.* at 268 (citations omitted); *see also Luna v. State of Oklahoma,* 815 P.2d 1197, 1199–1200 (Okla.Crim.App.1991) (finding that a seventeen-year old, who lacked legal capacity to consent, nonetheless "freely and voluntarily consented" to wearing a wiretap). While this Court is inclined to agree with the analysis of consent in *King* and *Luna,* which focus on actual consent, those cases would not be controlling here since this case involves minor children who lack *both* the capacity to consent and the ability to give actual consent.

[8] The children in this case were ages three and five. They clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent, either express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent. Thus, this case presents a unique legal question of first impression on the authority of a guardian to **vicariously consent** to the taping of phone conversations on behalf of minor children who are both incapable of consenting and who cannot consent in fact. Denise Dulaney asserts that in this situation, "the parent as legal guardian must have the ability to give actual consent for the child." Thompson vehemently contests this proposition.[7]

*1544 Denise Dulaney's argument is four-fold. First, she argues that the Utah Supreme Court has declared that the rights associated with being a parent are fundamental and basic rights and therefore, she should be afforded wide latitude in making decisions for her children. *See In re J.P.,* 648 P.2d 1364, 1372–74 (Utah 1982) (citing various state and federal constitutional provisions). Second, she bolsters this argument by noting that Utah statutory law gives parents the right to consent to legal action on behalf of a minor child in other situations, such as for marriage, medical treatment and contraception. Third, she argues that as the legal guardian of the children, Utah law allows her to make decisions on behalf of her children. Thus, the argument goes, the parental right to consent on behalf of minor children who lack legal capacity to consent and who cannot give actual consent, is a necessary parental right. In addition, she argues that the decision in *Newcomb* lends support to her argument. While this is a close and difficult question, this Court is persuaded that, on the specific facts of this case, **vicarious consent** is permissible under both *Newcomb* and applicable Utah law.

Utah law clearly vests the legal custodian of a minor child with certain rights to act on behalf of that minor child. While UTAH CODE ANN. § 78–3a–2(13) (1958) enumerates certain rights that the guardian has vis-a-vis the minor child, the statute does not, by its own terms, purport to be all-inclusive. In addition, § 78–3a–2(14)(b) states that a guardian is responsible for, *inter alia,* protecting the minor child. Denise Dulaney argues that if she is unable to **vicariously consent** for her minor children, then she is deprived of her ability to protect them. This Court believes that this case presents the paradigm example of why **vicarious consent** is necessary.

[9] Denise Dulaney argued that she **recorded** the conversations with Thompson because he allegedly was interfering with her relationship with the children to whom she was awarded custody. In this case, or perhaps a

more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, **vicarious consent** is necessary to enable the guardian to protect the children from further harassment in the future. Thus, as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, **vicarious consent** will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.[8]

*1545 [10] The consent exception, however, contains an express limitation stating that if the communication is intercepted "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State," 18 U.S.C. § 2511(2)(d) (West Supp.1993),[9] then the defense of consent is inapplicable for public policy reasons which are readily apparent. Here, Thompson alleges that the interceptions amounted to criminal and civil violations of Utah law, and as a result, the consent exception is inapplicable.

Utah recognizes the crime of "communication abuse." UTAH CODE ANN. § 76–9–403(1)(a) (1953). A person is guilty of this crime, which is a misdemeanor, if he "[i]ntercepts, without the consent of the sender or receiver, a message by telephone ..." This statute would appear to fall within the scope of the limitation on consent. The Court has concluded, however, that whether Thompson can rely on this limitation on the consent exception requires a factual resolution of what Denise Dulaney's "purpose" was in intercepting the communication. As noted above, she asserts it was to protect the children; Thompson submitted contrary evidence on this issue alleging that Denise Dulaney continued taping the conversations several months after she concluded that the conversations were in fact "innocuous." Thus, the viability of the consent defense is contingent on a resolution of her purpose in intercepting these communications.

In sum, this Court concludes that Denise Dulaney did in fact intentionally **record** the phone conversations between Thompson and their children. She asserts the defense of consent, and while this Court concluded that she could **vicariously consent** for the children as a matter of law, there are factual issues as to whether she did in fact give such consent, and if so, whether it was "prior" consent, as required by the statute. Finally, Thompson has argued that the limitation in § 2511(2)(d) removes the defense of consent from this case. The Court concluded that while Utah law does criminalize[10] Denise Dulaney's conduct, there is a fact question as to what her "purpose" was in intercepting the conversations.

b. *The Unlawful Wiretapping Claims Against Phil and Elsie Dulaney*

[11] Thompson allegations with respect to his unlawful wiretapping claim against Denise Dulaney's parents, Phil and Elsie Dulaney, are wholly conclusory. He simply alleges that they "agreed" to gather wiretapped evidence against him, and that they intercepted his conversations and procured Denise Dulaney to intercept them.

As to Thompson's first contention regarding their "agreement," the court of appeals affirmed this Court's initial grant of summary judgment with respect to Thompson's conspiracy claim. *Thompson,* 970 F.2d at 749. The appeals court noted that Phil and Elsie Dulaney's "ownership of their home and telephone and their conduct in hiring lawyers and experts for Denise Dulaney's custody suit" did not state a claim for conspiracy, and thus affirmed summary judgment on that claim.

As to plaintiff's claim of unlawful wiretapping, it is well-established that in opposing a motion for summary judgment, a party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510 (emphasis added). The nonmoving party must produce proof in support of its assertion that there are genuine issues of material fact for trial. Thompson has failed to make this showing with respect to his unlawful wiretapping claims against Phil and Elsie Dulaney.

*1546 The only possible allegation to support these claims is Thompson's claim that on February 11, 1989, Denise Dulaney admitted to him that her parents were involved in taping the conversations. Thompson has, however, failed to provide any affirmative evidence other than his own conclusory statements in support of this contention. Moreover, at his deposition, he admitted that all he knew about Mr. and Mrs. Dulaney was that the tapings occurred in their house with their equipment, and that they hired experts and attorneys for Denise Dulaney. He admits that this is the full extent of his knowledge regarding the involvement of Phil and Elsie Dulaney. As a result, this Court concludes that he has failed to meet his burden of demonstrating that there are any factual issues for trial, and summary judgment will therefore be entered for Mr. and Mrs. Dulaney on Thompson's unlawful wiretapping claim.

2. *The Conspiracy Claim*

[12] The Tenth Circuit concluded that there was a question of fact as to whether Denise Dulaney and one of her expert witnesses, Dr. Russ Sardo, engaged in a conspiracy to violate Title III. Thompson alleges that Dr. Sardo specifically requested that Denise Dulaney gather wiretapped evidence for his use at the custody hearing. He also alleges that Dr. Sardo admitted that Denise taped and transcribed the conversations for him, and that he reviewed them and discussed them with other defendants.

Dr. Sardo vigorously contests these allegations. He denies that he conspired with Denise Dulaney to tape the conversations at issue; he denies any participation in any form relative to the taping of these conversations; he further denies that the tapes, which he admits he reviewed, were created in violation of the law; and finally, he denies that he disclosed the contents to anyone other than when he testified in court.

The Court concludes that there are conflicting factual allegations here as to Dr. Sardo's involvement in, and knowledge of, the tape **recordings** at issue here. As a result, summary judgment on the conspiracy claim must be denied.

3. *The Use or Disclosure Claims*

a. *In General*

[13] As discussed above at length, in order to set forth a *prima facie* claim for use and disclosure liability under Title III, a defendant must know that the information used or disclosed was the result of an illegal wiretap. Proof of knowledge that the information came from a wiretap is, without more, insufficient to make out a *prima facie* claim. The Tenth Circuit clearly stated that unless circumstantial evidence is introduced which would allow an inference that the defendant knew or should have known that the wiretap was illegal under Title III, which will often require the plaintiff to prove that no consent was ever given, then summary judgment is appropriate. The Court will now apply these principles to the particular circumstances of each defendant.

b. *Application to this Case*

i. *Denise Dulaney*

[14] Denise Dulaney has not contested the issue of whether the information obtained came from a wiretap. She has also not challenged Thompson's claim that she did in fact disclose this information to her attorneys, Moody and Kobelin, as well as her expert witnesses, Drs. Sardo and Brounstein. She has, however, asserted that consent is a valid defense. Thus, there is a factual issue of whether she, acting on behalf of the minor children, *knew* that the wiretap itself was illegal. Therefore, summary judgment is unwarranted on this claim.

ii. *Phil and Elsie Dulaney*

[15] In Thompson's opposition to summary judgment, he makes the conclusory statement that Phil and Elsie Dulaney "disclosed to other Defendants and others the contents of the intercepted communications." Thompson's affidavit opposing summary judgment does not, however, contain any factual allegations as to Phil and Elsie Dulaney and his claim of unlawful disclosure. It bears repeating that a party "may *not* rest upon the mere allegations or denials of his pleadings" to avoid summary judgment. *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510 ***1547** (emphasis added). The nonmoving party must produce proof in support of its assertion that there are genuine issues of material fact for trial. While Thompson is not resting on his pleadings *per se,* a conclusory assertion in his affidavit that Phil and Elsie Dulaney disclosed this information, does not provide this Court with any additional guidance as to what, if any, material disputes of fact exist. In their motion for summary judgment, the Dulaneys argue precisely this point: that Thompson has failed to identify the factual basis for these claims.[1] 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 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.

Exhibit 3

Exhibit 3

154 F.3d 601
United States Court of Appeals,
Sixth Circuit.

Samuel B. POLLOCK Jr. and Laura Pollock,
Plaintiffs–Appellants,
v.
Sandra T. POLLOCK, Oliver H. Barber, and Luann C. Glidewell, Defendants–Appellees.

No. 97–5803. | Argued April 24, 1998. | Decided Sept. 1, 1998. | Rehearing and Suggestion for Rehearing En Banc Denied Oct. 16, 1998.

Father of minor daughter and his wife sued mother and her attorneys, alleging violations of federal wiretapping statute and seeking damages and injunctive relief. The United States District Court for the Western District of Kentucky, Charles R. Simpson, III, Chief Judge, 975 F.Supp. 974, entered summary judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, McCalla, District Judge, addressing an issue of first impression, held that: (1) as long as guardian has good faith belief that **recording** is in child's best interests, guardian may **vicariously consent** on behalf of the child to the **recording** of child's telephone conversations, but (2) genuine issue of material fact as to whether mother was motivated by concern for child's best interests when she **vicariously consented** to tape **recording** of child's telephone conversations precluded summary judgment.

Affirmed in part and reversed in part.

West Headnotes (6)

[1] **Child Custody**
Right to Control Child in General

As long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may **vicariously consent** on behalf of the child to the **recording**; such **vicarious consent** will be exempt from liability under federal wiretapping statute, pursuant to the consent exception. 18 U.S.C.A. § 2511(2)(d).

38 Cases that cite this headnote

[2] **Federal Civil Procedure**
Wiretapping and Electronic Surveillance, Cases Involving

Evidence raised genuine issue of material fact as to whether mother was genuinely motivated by concern for her minor child's best interests when she **vicariously consented** to tape **recording** of child's telephone conversations with child's father and father's wife precluded summary judgment in father's action against mother under federal wiretapping statute; taping began soon after mother discovered that father had hired attorney to represent daughter in ongoing domestic dispute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

34 Cases that cite this headnote

[3] **Federal Civil Procedure**
Form and Requisites

An unsworn affidavit cannot be used to support or oppose a motion for summary judgment. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

21 Cases that cite this headnote

[4] **Federal Civil Procedure**
Form and Requisites

Unsworn affidavits which contained declarations that they were made under penalty of perjury and were signed and dated could be considered when ruling on summary judgment motion. 28 U.S.C.A. § 1746.

36 Cases that cite this headnote

[5] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Evidence raised genuine issues of material fact as to whether mother knew that **recording** of child's telephone conversations with child's father and father's wife was potentially illegal precluded summary judgement in father's action under federal wiretapping statute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

12 Cases that cite this headnote

[6] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Whether mother's attorneys knew, or should have known, that tape **recorded** conversations of mother's minor child came from an unlawful wiretap when they disclosed contents of the conversations during course of their representation of mother precluded summary judgement in action under federal wiretapping statute. 18 U.S.C.A. § 2511(2)(d); Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

9 Cases that cite this headnote

Attorneys and Law Firms

***602** Samuel Manly (argued and briefed), Louisville, KY, for Plaintiffs–Appellants.

Allen K. Gailor (argued and briefed), Louisville, KY, for Defendants–Appellees.

Before: BATCHELDER and COLE, Circuit Judges; McCALLA, District Judge.*

OPINION

McCALLA, District Judge.

Plaintiffs Samuel and Laura Pollock appeal the judgment of the district court granting Defendants' motion for summary judgment pursuant to Fed.R.Civ.P. 56.[1] Plaintiffs brought an action against Defendants, alleging that Defendants violated the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2521 ("Title III"), when Defendant Sandra Pollock tape-**recorded** conversations between her ex-husband, Plaintiff Samuel Pollock, and their minor daughter Courtney, and between Plaintiff Samuel Pollock's current wife, Plaintiff Laura Pollock, and Courtney. On appeal, we must determine: (1) whether the statutory consent exception contained in 18 U.S.C. § 2511(2)(d) of the federal wiretapping statute permits a parent to "**vicariously consent**" to **recording** a telephone conversation on behalf of a minor child in that parent's custody, without the ***603** actual consent of the child; and (2) if "**vicarious consent**" does qualify for the consent exception, ****3** whether questions of material fact precluding summary judgment exist as to whether Defendant Sandra Pollock's **recording** of her minor daughter's phone conversations with the child's father and step-mother was motivated by concern for the child's best interest. The district court concluded that "**vicarious consent**" to **recording** a telephone conversation, by a parent on behalf of a minor child in that parent's custody, qualifies for the statutory consent exception, and found that no questions of material fact existed as to Defendant Sandra Pollock's motivation in **recording** the conversations. Accordingly, the district court granted summary judgment for Defendants. For the reasons set forth below, we **AFFIRM IN PART** and **REVERSE IN PART** the judgment of the district court.

I.

Samuel Pollock ("Samuel") and his current wife, Laura Pollock ("Laura"), are Plaintiffs–Appellants in this matter. Samuel's former wife, Sandra Pollock ("Sandra"), and her attorneys, Oliver Barber ("Barber") and Luann Glidewell ("Glidewell"), are Defendants–Appellees. Samuel and Sandra were married in 1977, and had three children: Courtney Pollock, born April 24, 1981; Robert Pollock, born May 24, 1984; and Ian Pollock, born July 8, 1987. Samuel and Sandra separated in 1992, after Sandra discovered that Samuel had been having an extramarital affair. Joint Appendix ("J.A.") at 127. Their divorce

became final in 1993, and the final divorce decree granted Sandra custody of all three children.

After the divorce, Samuel married Laura. In 1995, during the pendency of an appeal from the Jefferson County Circuit Court's property and support decrees, Sandra taped certain telephone conversations between Courtney and Samuel, and between Courtney and Laura. It is undisputed that Courtney, Samuel, and Laura did not consent to the **recording** of these conversations. Rather, Sandra argues that she "**vicariously consented**" to the **recording** on behalf of Courtney, a minor child in her custody, because she was concerned that Samuel was emotionally abusing Courtney.

**4 **5 A.

Careful consideration of the complete **record** in this matter is essential to the determination of the issues before us. As we conduct our analysis, it is important to be cognizant of the fact that the tape **recordings** by Sandra Pollock that form the basis of this lawsuit occurred in the context of a bitter and protracted child custody dispute. Accordingly, we begin with a summary of the events leading up to, and relating to, the tape-**recording** of the conversations by Sandra Pollock.

In May of 1994, Sandra learned that a telephone conversation between herself and her daughter Courtney had been tape-**recorded**.[2] Sandra contends that Courtney told her that Samuel and Laura had tape-**recorded** the telephone call, but that Courtney would not give any further details. J.A. at 102. Laura and Courtney contend that Courtney told Sandra that *Courtney* had **recorded** a conversation with her mother from her father's home, with Samuel and Laura's knowledge and consent. J.A. at 157, 160. Laura concedes that on April 10, 1994, "Courtney tape-**recorded** a telephone conversation with Sandra with my knowledge and consent and with the knowledge and consent of my husband, Sam."[3] J.A. at 157.

Sandra contends that Samuel was very upset about losing custody of the children, especially Courtney.[4] J.A. at 101. According *604 to Sandra's affidavit, during the divorce proceedings, and even after Jefferson County Circuit Court Judge Geoffrey P. Morris confirmed Sandra's custody of the **6 children in April of 1994,[5] she "believed that Courtney was being subject to emotional and psychological pressure by Samuel and Samuel's wife, Laura, whereby Samuel was trying to get Courtney to do whatever she could to convince [Sandra] to let Courtney primarily live with Samuel." J.A. at 102. During this process, Sandra contends that she "noticed a gradual change in Courtney which included what [Sandra] felt was a[sic] excessive or compulsive desire to be with her father and corresponding deteriorating relationship with [Sandra]." *Id.* According to Sandra, she "could not determine merely from talking with or observing Courtney how far this desire of Courtney extended but [Sandra] believed, at the minimum, the psychological and emotional pressure which she believed was being put upon Courtney by Samuel was detrimental to Courtney and perhaps rose to the state of abuse or emotional harm or injury." *Id.*

According to Sandra, it was this concern for Courtney, who was fourteen years old at the time, that caused her to place a tape **recorder** on her extension telephone in her bedroom to monitor the telephone activity at her house. J.A. at 102–03. Sandra maintains that her only motivation in doing this was "concern for her child's well being." *Id.* The monitoring began in May of 1995, and lasted only a few weeks. During the course of the monitoring, Sandra heard a conversation between Courtney and Laura "which greatly alarmed and frightened" her and "gave [her] immediate concern for the safety and well being of 3 other individuals and confirmed to [her] the abuse and emotional injury and harm she suspected Courtney was being subjected to." J.A. at 103. The **7 substance of that conversation, according to Laura,[6] was the following:

> In late May of 1995, Courtney called me up one night when Sam was not at home, and was upset and complaining of Judge Morris's decision to require her to live with Sandra. Courtney began, as is not unusual for a teenager to do, to let off steam, even to the point of remarking—*in obvious jest and with no semblance of seriousness*—that she would like to kill "the two of them," referring to Oliver Barber and Luann Glidewell [Sandra's attorneys]. In equal jest, I joined in her sentiments, adding Judge Morris to the "hit list."
> J.A. at 157 (emphasis in original). According to Laura, neither she, nor Courtney, took this conversation seriously, "as is obvious to anyone who would listen to the tape **recording**."[7] *Id.*

Because Sandra was disturbed by this conversation, she reported it to her attorney, Oliver Barber. J.A. at 103. After learning of the conversation's contents, Sandra alleges that Barber felt compelled by Ky.Rev.Stat. Ann. § 620.030,[8] to report the conversation to the Crimes Against Children Unit ("CACU"), a joint task force operated by the Louisville Division of Police and Jefferson County Police Department. **8 *Id.* Barber had Sandra's permission to report the conversation. *Id.* Sandra ceased monitoring after she reported this conversation to Barber.

Id. Subsequent to this, Courtney discovered the rest of the *605 tapes in her mother's bathroom cabinet and gave them to Samuel and Laura.

The CACU then disclosed the contents of the tape containing the above conversation to Judge Morris, who had presided over Samuel and Sandra's divorce and subsequent custody disputes. A transcript of the conversation was made a part of the official **record** in the case, and Judge Morris recused himself.

According to Samuel and Laura, Sandra was not motivated by concern for Courtney when she **recorded** the phone conversations. Instead, they contend that Sandra was angry that Courtney had taped a conversation between herself and Sandra with Samuel and Laura's consent, and "wanted to return the favor by taping Courtney's conversations with Sam and [Laura]." J.A. at 155–56. Laura further contends that immediately before the **recording** began, Sandra discovered Courtney's diary, in which Courtney had **recorded** that she was being represented by counsel (hired by her father Samuel), Rebecca Ward, incident to the then on-going dispute as to Courtney's custody. J.A. at 156. Before discovering the diary, Sandra was unaware that Courtney had her own attorney. *Id.* Rather than being motivated by concern for Courtney's welfare, Laura contends that "Sandra's predominant motive in eavesdropping on the children's calls was to overhear Courtney's confidential, attorney-client conversations with her lawyer." *Id.*

In addition, Courtney's declaration states: "I believe my mother started **recording** calls when she discovered my diary entries which said that I was being represented by my own attorney, Becky Ward. At about the same time, someone had reported my mother to the authorities for possible abuse and neglect of me and my brothers." J.A. at 159–60. As to the state of her relationship with her mother, or any deterioration thereof, Courtney states: "I simply do not get along well with my mother, and do get along well with my father and **9 stepmother. I was not happy at all living with my mother, and so told Judge Morris when he interviewed me....The decision which Judge Morris made, against my wishes, to require me to live with my mother led to the further deterioration of my relationship with her." J.A. at 159. Finally, Courtney alleges that "[her] relationship with [her] mother was not helped by [Sandra] dating a man only a few years older than [Courtney] was, who had been convicted of a crime." *Id.*[9]

Samuel and Laura filed their amended complaint on January 16, 1996. Counts 1–5 of the amended complaint allege that Sandra violated 18 U.S.C. § 2511(1)(a) by intentionally intercepting telephonic communications between two parties without either party's consent. Counts 6–11 allege that Sandra, Barber, and Glidewell violated 18 U.S.C. § 2511(1)(b)-(d) by intentionally using and disclosing the contents of these communications to third parties. Samuel and Laura also allege a violation of their right to privacy under Kentucky common law. In response to the complaint, Defendants filed a motion to dismiss, which the district court construed as a motion for summary judgment. On May 22, 1997, the district court granted summary judgment for Defendants, finding that Sandra had **vicariously consented** to the **recording** of the phone calls, and thus qualified for the consent exception found in 18 U.S.C. § 2511(2)(d). Because the court found that Sandra's interceptions of the phone conversations were not unlawful, the district court granted summary judgment as to the claims against Sandra, Barber, and Glidewell for distribution and use of the tapes. Finally, as all of the federal claims were dismissed before trial, the court dismissed the pendent state claims as well. Plaintiffs Samuel and Laura then filed this appeal.

**10 **11 II.

We review a district court's grant of summary judgment *de novo. City Management Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 250 (6th Cir.1994). Accordingly, we must consider all facts and inferences drawn therefrom in the light most favorable to the nonmoving *606 party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir.1987).

III.

Plaintiffs allege that Sandra and her attorneys violated Title III when: (1) Sandra taped conversations between Courtney and Plaintiffs; (2) Sandra disclosed these conversations to her attorneys; and (3) Sandra and her attorneys disclosed these conversations to the CACU. As set forth above, there appears to be no dispute that Sandra intentionally intercepted the phone calls or that Defendants intentionally disclosed the contents thereof.[10] Instead, this case raises two principal questions. First, whether a parent, motivated by concern for the welfare of his or her child, can "**vicariously consent**" to tape-**recording** the calls of a minor child, when the child

has not consented to the **recording**. If we answer this question in **12 the negative, judgment must be entered for Plaintiffs, and our inquiry ends there. If, however, **vicarious consent** does qualify for the consent exception to the wiretap statute, we must then address the second question: whether questions of fact precluding summary judgment exist as to Sandra's motivation in **recording** the telephone calls at issue in this case.

A.

Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability.[11] The question of whether a parent can "**vicariously consent**" to the **recording** of her minor child's phone calls, however, is a question of first impression in all of the federal circuits.[12] **13 Indeed, while other circuits have addressed cases raising similar issues, these have all been decided on different grounds, as will be discussed below. The only federal courts to directly address the concept of **vicarious consent** thus far have been a district court in Utah, *607 *Thompson v. Dulaney,* 838 F.Supp. 1535 (D.Utah 1993), a district court in Arkansas, *Campbell v. Price,* 2 F.Supp.2d 1186 (E.D.Ark.1998), and the district court in this case, *Pollock v. Pollock,* 975 F.Supp. 974 (W.D.Ky.1997).

B.

As a threshold matter, we note that Seventh, Tenth, and Second Circuits have decided cases with facts similar to those of this case on different grounds, holding that parental wiretapping without the consent of the minor child does not violate Title III because the **recording** was done from an extension phone within the home. *Scheib v. Grant,* 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle,* 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin,* 843 F.2d 110 (2d Cir.1988); *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir.1977). The "extension telephone" exemption, also known as the "ordinary course of business exemption," is set forth in 18 U.S.C. § 2510(5)(a)(i), which expressly exempts from the coverage of Title III "any telephone or telegraph instrument, equipment or facility or any component thereof ... being used by the subscriber or user in the ordinary course of its business...."

From this language, the Seventh, Tenth, and Second Circuits have held that the § 2510(5)(a)(i) exemption was intended to cover tape **recorders** attached to extension phones in the home. In *Scheib,* the Seventh Circuit stated:

> **14 The language of § 2510(5)(a)(i) juxtaposes the terms "subscriber" and "user" with the phrase "in the ordinary course of business." Although the latter phrase might be used to distinguish commercial from personal life, in the context presented here, it must be read in conjunction with the terms "subscriber" and "user." These terms certainly do not have exclusively market-oriented connotations. Reading this extension phone exemption as a whole, then, it is no lexical stretch to read this language as applying to a "subscriber's" conduct—or "business"—in raising his or her children.

Scheib, 22 F.3d at 154.

In 1995, however, this Court expressly rejected the line of cases holding that the extension exemption extended to the home in *United States v. Murdock,* 63 F.3d 1391 (6th Cir.1995).[13] Instead, this Court held that the statute did not permit the sort of extension phone **recordings** at issue in this case. *Murdock,* 63 F.3d at 1396 ("[W]e conclude that the **recording** mechanism (a tape **recorder** connected to extension phones in Mrs. Murdock's home) does not qualify for the telephone extension (or business extension) exemption."). The Court further noted that "spying on one's spouse does not constitute use of an extension phone in the ordinary course of business." *Id.* at 1400.[14]

Accordingly, this Court's rejection of the "extension exemption" in these types of cases dictates that the cases **15 discussed above, though cited by both parties, are not persuasive as to the issue of **vicarious consent**.

C.

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

The district court in *Thompson* was the first court to address the authority of a parent to **vicariously consent** to the taping of phone conversations on behalf of minor children. In *Thompson,* a mother, who had custody of her

three and five-year-old children, *608 **recorded** conversations between the children and their father (her ex-husband) from a telephone in her home. 838 F.Supp. at 1537. The court held:

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

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

An obvious distinction between this case and *Thompson,* however, is the age of the children for whom the parents **vicariously consented**. In *Thompson,* the children were three and five years old, and the court noted that a factor in its decision was that the children were minors who "lack[ed] **16 both the capacity to [legally] consent and the ability to give actual consent." *Id.* at 1543. The district court in the instant case, in which Courtney was fourteen years old at the time of the **recording**, addressed this point in a footnote, stating:

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

Pollock v. Pollock, 975 F.Supp. 974, 978 n. 2 (W.D.Ky.1997).

The only other federal case to address the doctrine of **vicarious consent** is also the most recent case to analyze this issue. In *Campbell v. Price,* 2 F.Supp.2d 1186 (E.D.Ark.1998), a father, who had custody of his twelve-year-old daughter, tape-**recorded** conversations between the child and her mother because the father observed that his daughter "would cry and become upset after talking with her mother on the phone," and he was concerned that the mother was emotionally abusing the child. 2 F.Supp.2d at 1187. The child's mother then brought an action against the child's father, alleging that he violated 18 U.S.C. § 2511 by intentionally intercepting and **recording** conversations between herself and her minor daughter. *Id.* at 1188. The court, noting that "[it] uncovered no cases rejecting the **vicarious consent** argument," and "find[ing] persuasive the cases allowing **vicarious consent**," adopted the concept of **vicarious consent** and granted summary judgment for the father. *Id.* at 1189. In support of its decision, the court cited *Thompson* and the district court's opinion in the instant case, and noted that these cases "clearly stand for the proposition that a defendant's good faith concern for his minor child's best interests, may, without liability under Title III, empower the parent to intercept the child's conversations with the non-custodial parent." *Id.* at 1191.

In addition, two state courts have recently addressed the issue of **vicarious consent** by a parent on behalf of a minor **17 child under the applicable state's version of the federal wiretap act, *Silas v. Silas,* 680 So.2d 368 (Ala.Civ.App.1996) and *State v. Diaz,* 308 N.J.Super. 504, 706 A.2d 264 (1998), and two state courts have addressed the issue under both the state and federal statutes, *Williams v. Williams,* 229 Mich.App. 318, 581 N.W.2d 777 (1998) and *West Virginia Dep't of Health & Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994).

In *Silas,*[15] the court held that a father had authority to consent on behalf of his seven-year-old son to taping phone conversations with the child's mother, pursuant to Alabama's version of the federal wiretap statute.[16] The court did, however, make the test *609 for valid **vicarious consent** more stringent than the one set forth in *Thompson,* in that it specifically required the parent to have a "good faith basis that it is objectively reasonable to believe that the minor child is being *abused, threatened, or intimidated by the other parent,*" *Silas,* 680 So.2d at 371 (emphasis added), as opposed to the *Thompson* court's requirement of "a good faith basis that is objectively reasonable for believing that it is necessary ... [and] in the best interests of the [child]." 838 F.Supp. at 1544. The district court in the instant case adopted the test as set forth in *Thompson. Pollock,* 975 F.Supp. at 978.

In *State v. Diaz,* 308 N.J.Super. 504, 706 A.2d 264 (1998), the court held that parents could **vicariously consent** on behalf of their five-month-old infant to **recording** a nanny abusing the child on videotape, under

New Jersey's version of the **18 federal wiretap act. The Court in *Diaz* noted that the New Jersey statute was modeled after the federal statute, and cited *Thompson* and the district court's opinion in this case in support of its holding that the state statute incorporates the theory of **vicarious consent**. *Diaz,* at 514–15, 706 A.2d 264.

Finally, two state courts have addressed this issue under both the federal and state wiretap statutes. The Court of Appeals of Michigan is the only court that has evaluated the concept of **vicarious consent** and declined to adopt it. In *Williams v. Williams*, 229 Mich.App. 318, 581 N.W.2d 777 (1998), a divorced father tape-**recorded** conversations between his five-year-old son and the child's mother. The *Williams* court reversed the lower court's grant of summary judgment for the father, holding that the "language [of Title III] gives us no indication that Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf and tape **record** telephone conversations between the child and a third party." 581 N.W.2d 777, 780. The court noted, however, that in declining to adopt the doctrine of **vicarious consent**, it was departing from the path chosen by all of the other courts that have addressed this issue. *Williams,* 581 N.W.2d 777, 781 ("[W]e nonetheless recognize that several courts in other jurisdictions have analyzed this precise issue....In general, these courts have been willing to extend the consent exception in the federal wiretapping act to include **vicarious consent** by a parent on behalf of his or her minor child to intercepting and using communications with a third party where such action is in the child's best interests.").

In the final case to address this issue, *West Virginia Dep't of Health & Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), the court discussed the concept of **vicarious consent** under both Title III and the West Virginia statute. The facts of *David L.* are distinguishable from the facts in the instant case. In *David L.,* the court held that a father violated Title III when he **recorded** conversations between his children and their mother (his ex-wife) via a tape **recorder** secretly **19 installed *in the mother's home.*[17] 453 S.E.2d at 648. The father, David L., argued that, under the state's version of the wiretap statute, he had authority to **vicariously consent** to the taping on behalf of his children. *Id.* at 653. The court rejected this argument and held that "under the specific facts of the case before us, ... a parent has no right on behalf of his or her children to give consent under W. Va.Code § 62–1D–3(c)(2) or 18 U.S.C. § 2511(2)(d), to have the children's conversations with the other parent **recorded** while the children are in the other parent's house." *Id.* at 654. In so holding, however, the court discussed *Thompson* and stated:

> *We do not disagree with the reasoning in Thompson;* however, we determine the facts of the present case are different from the facts of in *Thompson* in two significant respects. First, [in *Thompson*], the children were physically residing with [their mother] at the time the conversations were **recorded**. Second, the conversations were **recorded** from a telephone in the house where [the mother] and her children resided. On the other hand, in the present case, first, [the mother], not [the father], was awarded temporary custody of the *610 children during the divorce proceedings. Second, the **recordings** occurred in [the mother's] house, not [the father's] house, and he had absolutely no dominion or control over [the mother's] house where he procured his mother's assistance to hide the tape **recorder**.
> *Id.* (emphasis added). The court further noted:
>
> > We draw a distinction between the present situation and a situation in which a guardian, *who lives with the children and who has a duty to protect the welfare of the children,* gives consent on behalf of the children to intercept telephone conversations *within the house where the guardian and the children reside.*
>
> **20 **21 *Id.* at 654 n. 11 (emphasis added). Accordingly, while the court in *David L.* declined to permit **vicarious consent** in that particular case, it appears from the above language that the court did not oppose the concept of **vicarious consent** to a parental wiretap in all cases.

D.

[11] After this review of the relevant case law, we conclude that although the child in this case is older than the children in the cases discussed above in which the doctrine of **vicarious consent** has been adopted, we agree with the district court's adoption of the doctrine, provided that a clear emphasis is put on the need for the "consenting" parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. Accordingly, we adopt the standard set forth by the district court in *Thompson* and hold that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to

consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may **vicariously consent** on behalf of the child to the **recording**. *See Thompson,* 838 F.Supp. at 1544. Such **vicarious consent** will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d).

We stress that while this doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: "I was doing it in his/her best interest," there are situations, such as verbal, emotional, or sexual abuse by the other parent, that make such a doctrine necessary to protect the child from harm. It is clear that this is especially true in the case of children who are very young. It would be problematic, however, for the Court to attempt to limit the application of the doctrine to children of a certain age, as not all children develop emotionally and intellectually on the same timetable, and we decline to do so.

Moreover, support for adopting the doctrine is found in the decisions of the Seventh, Tenth, and Second Circuits which ****22** have permitted parental taping of minor children's conversations in situations similar to this one on the "extension exemption" ground. *Scheib v. Grant,* 22 F.3d 149 (7th Cir.1994); *Newcomb v. Ingle,* 944 F.2d 1534 (10th Cir.1991); *Janecka v. Franklin,* 843 F.2d 110 (2d Cir.1988); *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir.1977). Thus, while these cases address the question from a different perspective than the instant case, the end result—that these kinds of wiretaps should be permitted in certain instances—supports adoption of the doctrine. *See Scheib,* 22 F.3d at 154 ("We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for **recording** their minor child's phone conversations out of concern for that child's well-being.").[18] Accordingly, the district court's adoption of the concept of **vicarious consent** is **AFFIRMED**.

IV.

[2] We turn next to the question of whether questions of material fact exist as to Sandra's motivation and purpose in taping the telephone conversations at issue that would preclude summary judgment for the Defendants. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to ***611** any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," *id.* at 323, 106 S.Ct. 2548, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. *Emmons v. McLaughlin,* 874 F.2d 351, 353 (6th Cir.1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden–Alimak, Inc.,* 799 F.2d 1128, 1133 (6th Cir.1986).

****23** When confronted with a properly supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52, 106 S.Ct. 2505.

A.

The district court found that no question of material fact existed as to whether Sandra was motivated by genuine concern for her child's best interest, and granted summary judgment for Defendants. We disagree. Upon a *de novo* review of the **record**, it appears that questions of fact precluding summary judgment exist as to whether Sandra had a good faith basis that was objectively reasonable for believing it was necessary to consent on behalf of her minor child to the taping of these conversations.

As set forth above, both Laura and Courtney submitted declarations asserting that Sandra was motivated by something other than concern for her child's welfare. The allegations that Sandra was taping the phone conversations to gain access to Courtney's attorney-client communication with her lawyer, combined with the fact that the taping began soon after Sandra found the diary in which Courtney stated that her father had hired a lawyer to represent her, without Sandra's knowledge or consent, create a question of material fact as to Sandra's motives. J.A. at 155–56. Moreover, Courtney's allegations in her declaration that the deterioration in her relationship with her mother was caused by the fact that she did not get

along with her mother, and by her mother's relationship with a convicted felon "only a few years older than [Courtney]," rather than by anything done by her father, **24 further contribute to our determination that questions of material fact exist. J.A. 159–60.[19]

[3] [4] The district court did not directly address any of the statements contained in Laura's and Courtney's declarations.[20] In *612 granting summary judgment for Defendants, the district court stated:

> We find no ... countervailing evidence offered by the plaintiffs that would eviscerate Sandra's **vicarious consent** defense here and preclude summary judgment. Sandra's affidavit clearly supports her claim that she acted to protect the welfare of her children in taping the conversations at issue.... [P]laintiffs have offered no evidence tending to suggest that the **vicarious consent** defense is inappropriate here or that Sandra's "child **25 welfare" contention is pretextual. The plaintiffs cannot simply point to the tension and bitterness among the parties and expect the court to leap to the conclusion that Sandra's motives in taping were improper.[21]

Pollock v. Pollock, 975 F.Supp. 974, 979 (W.D.Ky.1997). In support of the decision to grant summary judgment, the district court cited *Silas* and *Scheib,* in which summary judgment was granted in favor of the taping parent. The facts in these two cases, however, were quite different than those in the instant case. In *Silas,* the father asserted that he began taping conversations between his seven-year-old son and the child's mother after "observing several instances when the minor child became extremely upset and began to cry during the telephone conversations." *Silas v. Silas,* 680 So.2d 368, 371 (Ala.Civ.App.1996). In *Scheib,*[22] the father who taped his eleven year old child's phone conversations stated that "on more than one occasion, [the child] became upset after speaking with his mother." *Scheib v. Grant,* 22 F.3d 149, 150 (7th Cir.1994).[23] In contrast, here Sandra states only that she "noticed a gradual change in Courtney which included what [Sandra] felt was a[sic] excessive or compulsive desire to be **26 with her father and corresponding deteriorating relationship with [Sandra]." J.A. at 102.

In *Thompson,* the district court, after approving of the doctrine of **vicarious consent,** declined to grant summary judgment because there was conflicting evidence as to what the mother's "purpose" was in intercepting the conversations. *Thompson v. Dulaney,* 838 F.Supp. 1535, 1545 (D.Utah 1993). Given the conflicting evidence offered by the parties, we find that there is a dispute as to material facts, making this case inappropriate for summary judgment. Thus, as in *Thompson,* while the doctrine of **vicarious consent** is properly adopted, there are questions of material fact as to Sandra's motivation in taping the conversations, and this issue should be submitted to a jury.

B.

If the jury determines that Sandra did properly consent on behalf of her minor child because she had a good faith, objectively reasonable belief that such consent was necessary and in the best interest of the child, judgment must be entered for Defendants as to the use and disclosure claims against Sandra, Barber, and Glidewell because the taping of the conversations would not, therefore, have been illegal. In order to state a claim for use or disclosure in violation of Title III, the communication at issue must be the product of an illegal wiretap. 18 U.S.C. § 2511(1)(c)-(d). If, however, the jury determines that Sandra was motivated by something other than concern for her child, it will have to evaluate the use and disclosure *613 claims and determine whether Sandra and her lawyers "knew or should have known" that the communication was the product of an illegal wiretap. *Id.*

[5] There are also questions of fact as to whether Sandra and her attorneys knew that the wiretap itself was potentially illegal. Sandra claims that she did not know the wiretap was **27 potentially illegal,[24] and that as soon as she learned it was, she stopped taping. J.A. at 102–04. Plaintiffs contend that they have a tape (one of Sandra's tapes provided to them by Courtney) on which Sandra has a discussion with another adult woman in which "Sandra goes to great lengths to explain to the other woman that her conversation with Sandra is being tape **recorded**. Sandra says herself that she is so advising the other woman because Sandra believes it is illegal to tape **record** telephone conversations without the knowledge of the other person whose call is being **recorded**." J.A. at 154–55.

[6] As to Sandra's attorneys, Barber and Glidewell, it appears undisputed that these Defendants did use or disclose the contents of these conversations during the course of their representation of Sandra. Whether they knew, or should have known, that the material came from an unlawful wiretap, however, is a question of fact for the jury.[25] *See Thompson,* 838 F.Supp. at 1548 (declining to grant summary judgment as to father's use and disclosure claims against mother's attorneys and stating: "Whether [the attorneys] knew the material came from an unlawful wiretap, ... is a question of fact which this Court may not

decide.").

Accordingly, the district court's grant of summary judgment is **REVERSED**, and this case is **REMANDED** for a trial on the disputed issues in this case in accordance with this opinion.

CONCLUSION

In summary, we **AFFIRM** the district court's adoption of the doctrine of **vicarious consent** as set forth above, **28 **REVERSE** the district court's grant of summary judgment, and **REMAND** this matter for trial.

Parallel Citations

1998 Fed.App. 0271P

Footnotes

* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

1 Defendants' motion was styled as a motion to dismiss Plaintiffs' amended complaint pursuant to Fed.R.Civ.P. 12(b)(6). Because both parties' briefs included, and relied upon, extraneous material, the district court construed Defendants' motion as a motion for summary judgment. *See* Fed.R.Civ.P. 12(b).

2 It is unclear whether Courtney told Sandra that one conversation, or multiple conversations, had been **recorded**.

3 Although this incident may or may not be a contributing factor to Sandra's later taping of Courtney's conversations with Samuel and Laura, it is not the taping incident at issue in this case.

4 The **record** contains copies of two settlement letters from Samuel's attorney in which he offers to drop this lawsuit in exchange for joint custody of Courtney, with Courtney residing with him. J.A. at 146–51.

5 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law note that Judge Morris interviewed Courtney and she expressed that she preferred to stay with her father, rather than her mother. J.A. at 113. Even so, Judge Morris found that Sandra should retain custody of Courtney. On May 13, 1995, Judge Morris issued Amended Findings of Fact and Conclusions of Law, again confirming his prior grant of custody of Courtney to Sandra, over Courtney's and Samuel's objections. J.A. at 128.

6 A transcript of the actual conversation is not included in the **record**, and Sandra does not discuss the contents of the conversation in her affidavit. Accordingly, the only sources regarding this conversation are the declarations submitted by Laura and Courtney, which describe the conversation as set forth above.

7 The Court was not provided with a copy of the tape.

8 Ky.Rev.Stat. Ann. § 620.030 provides:
> (1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky state police....

9 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law make reference to a Mr. Kevin Downs as follows: "The relationship [Sandra] has established with a convicted felon (Mr. Kevin Downs) and her visits to see Mr. Downs while in jail has required this Court to order [Sandra] not to allow the children to have any contact with Mr. Downs." J.A. at 113.

10 Title 18 U.S.C. § 2511(1) provides that a claim under Title III can be made against any person who:
> (a) intentionally intercepts ... the contents of any wire, oral, or electronic communication; ...
> (c) intentionally discloses ... to any person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
> (d) intentionally uses ... the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection....

11 Title 18 U.S.C. § 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception....

12 We note that although it can be argued, from a policy perspective, that the federal courts should stay out of these kinds of domestic disputes, that option has been foreclosed by the decisions of this Court and numerous other federal courts. In one of the earliest cases to address the issue of domestic wiretaps in a case involving interspousal wiretapping, *Simpson v. Simpson,* 490 F.2d 803, 805 (5th Cir.1974), *cert. denied,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974), the Fifth Circuit stated, "The naked language of Title III, by virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a result, one extending into areas normally left to states, those of the marital home and domestic conflicts." While the Fifth Circuit has not overruled that decision, it has been severely criticized by a number of other circuits, beginning with this Court in *United States v. Jones,* 542 F.2d 661, 673 (6th Cir.1976) (holding that "the plain language of § 2511 and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps"). *See also Heggy v. Heggy,* 944 F.2d 1537, 1539 (10th Cir.1991) (holding that "Title III does apply to interspousal wiretapping within the home"), *cert. denied,* 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992); *Kempf v. Kempf,* 868 F.2d 970, 973 (8th Cir.1989) (holding that "the conduct of a spouse in wiretapping the telephone communications of the other spouse within the marital home falls within [Title III's] purview"); *Pritchard v. Pritchard,* 732 F.2d 372, 374 (4th Cir.1984) (stating that there is "no legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping").

13 In *Murdock,* the defendant had been convicted after the district court admitted into evidence incriminating tape-**recordings** made by his estranged wife.

14 In *State v. Shaw,* 103 N.C.App. 268, 404 S.E.2d 887 (1991), the North Carolina Court of Appeals held that a mother who **recorded** her son's telephone conversation regarding an upcoming drug deal, from a telephone extension in her home using a microcassette **recorder**, violated Title III. ("There was no evidence before the trial court that the mother used a microcassette **recorder** 'in the ordinary course of business.' ") *Shaw,* 404 S.E.2d at 889.

15 The district court in this case also relied upon *Silas* in support of its decision.

16 The *Silas* court also addressed the question of parental wiretaps under Title III and held, in accordance with the circuits discussed *supra,* that the father's actions were exempt under the "extension exemption." 680 So.2d at 370. As set forth above, that exemption is not available as a basis for the decision in this case. *United States v. Murdock,* 63 F.3d 1391 (6th Cir.1995).

17 The children's paternal grandmother installed the tape **recorder** in the children's bedroom, pursuant to her son's request, when she was in the mother's home babysitting the children.

18 The child in *Scheib* was eleven years old. 22 F.3d at 150.

19 In addition, Courtney alleges that at about the same time that Sandra began taping the phone conversations, "someone had reported [Sandra] to the authorities for possible abuse and neglect of me and my brothers." J.A. at 160. Reading all inferences of fact in favor of Plaintiffs, as we must do on Defendants' motion for summary judgment, we note that such an allegation against her could provide further motive for Sandra to embark on a mission to "gather dirt" on Samuel in the context of their battle for custody of the children.

20 Defendants acknowledge that the district court did not directly address Laura and Courtney's allegations. In doing so, however, Defendants make much of the fact that the declarations were "unsworn affidavits." An unsworn affidavit cannot be used to support or oppose a motion for summary judgment. *See Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 968–69 (6th Cir.1991) ("the unsworn statements of the two employees ... must be disregarded because a court may not consider unsworn statements when ruling on a motion for summary judgment"). However, a statutory exception to this rule exists which permits an unsworn declaration to substitute for a conventional affidavit if the statement contained in the declaration is made under penalty of perjury, certified as true and correct, dated, and signed. 28 U.S.C. § 1746; *see also Williams v. Browman,* 981 F.2d 901, 904 (6th Cir.1992). Both Laura's and Courtney's declarations contain the statement: "I declare, under penalty of perjury, that the foregoing is true and correct," and both declarations are signed and dated. J.A. at 157, 160. Accordingly, we must consider these declarations when deciding this appeal.

21 Similarly, we cannot simply look to Sandra's poor relationship with her daughter and "leap to the conclusion" that Samuel was the cause of the deterioration of that relationship.

22 As discussed above, in *Scheib,* the Seventh Circuit permitted parental wiretapping on the "extension exemption" ground.

23 We note that summary judgment was also granted for the defendants in *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998), which was decided subsequent to the district court's opinion in this case. As in *Silas* and *Scheib*, the taping parent in *Campbell*, the child's father, offered evidence to substantiate his claim that the **recording** of the child's phone conversations was motivated by legitimate concern that the child's relationship with her mother was potentially abusive. *Id.* at 150–51. The child's father submitted an affidavit stating that "his daughter would cry and become upset after talking with her mother on the telephone, that she would 'mope around' and 'go into her room and just sit there' and that she was 'not willing to talk about what was wrong with her.' " *Id.*

24 However, Sandra does concede, as she must, that Courtney was unaware of, and did not consent to, the taping.

25 The **record** does not contain any affidavits from Barber and Glidewell as to what they knew, or did not know, about the **recording**.

End of Document

Exhibit 4

Exhibit 4

360 S.W.3d 416
Court of Appeals of Tennessee,
Eastern Section, at Knoxville.

Chris LAWRENCE
v.
Leigh Ann LAWRENCE.

No. E2010–00395–COA–R3–CV. | Nov. 8, 2010 Session. | Nov. 29, 2010. | Permission to Appeal Denied bySupreme Court April 13, 2011.

Synopsis
Background: Father brought action against mother seeking damages for, among other things, wiretapping, arising out of mother secretly tape recording their two-and-one-half-year-old daughter's telephone conversation with father during course of divorce and custody dispute. The Circuit Court, Knox County, Dale C. Workman, J., entered partial summary judgment in favor of mother. Father appealed.

[Holding:] The Court of Appeals, Charles D. Susano, Jr., J., held that mother had the right to vicariously consent, within meaning of wiretapping statute, to interception of child's telephone conversation with father, precluding mother's liability.

Affirmed; case remanded.

West Headnotes (3)

[1] **Parent and Child**
⚖Compromise, settlement, waiver, and release
Telecommunications
⚖Persons concerned; consent

Mother had the right to vicariously consent, within meaning of wiretapping statute, to intercepting, recording, and disclosing two-and-one-half-year-old child's telephone conversation with father during the course of a divorce and custody dispute, precluding mother's liability. West's T.C.A. § 39–13–601(b)(5).

2 Cases that cite this headnote

[2] **Parent and Child**
⚖Care, Custody, and Control of Child; Child Raising

Child-rearing autonomy encompasses unrestricted control of a two-and-one-half–year–old child's access to the telephone, including to whom the child speaks and when the child speaks and under what conditions the child speaks.

Cases that cite this headnote

[3] **Infants**
⚖Validity

Society's concern for minors may be constitutionally reflected in statutes to account for: (1) minors' peculiar vulnerabilities and their need for concern, sympathy, and paternal attention; (2) minors' inability to make sound judgments about their own conduct; and (3) the courts' deference to the guiding role of parents.

Cases that cite this headnote

Attorneys and Law Firms

*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.

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Exhibit 7

Exhibit 7

64 F.Supp.2d 895
United States District Court,
D. Minnesota.

Lesa Marie WAGNER and Sandra M. Wagner,
Plaintiffs,
v.
Robert Allen WAGNER, Defendant.

No. 98–1704 (DWF/AJB). | Sept. 16, 1999.

Former wife and daughter brought action against former husband, alleging violations of federal and Minnesota wiretapping statutes. Plaintiffs moved for summary judgment. The District Court, Frank, J., held that: (1) guardian may vicariously consent to interception of telephone communication on behalf of his children as long as guardian has good faith, objectively reasonable belief that interception of conversation is necessary for best interest of children in his custody, and (2) genuine issue of material fact precluded summary judgment.

Motion denied.

West Headnotes (2)

[1] **Telecommunications**
⇐Persons Concerned; Consent

Guardian may vicariously consent to interception of telephone communication on behalf of his children, for purposes of determining guardian's liability under federal and Minnesota wiretapping statutes, as long as guardian has good faith, objectively reasonable belief that interception of conversation is necessary for best interest of children in his custody. 18 U.S.C.A. § 2510 et seq.; M.S.A. § 626A.01 et seq.

9 Cases that cite this headnote

[2] **Federal Civil Procedure**
⇐Wiretapping and Electronic Surveillance, Cases Involving

Genuine issue of material fact as to whether father had good faith, objectively reasonable belief that interception and recording of telephone conversations between children and their mother and elder sister was necessary for children's best interests, precluding summary judgment in action brought by mother and sister against father under federal and Minnesota wiretapping statutes. 18 U.S.C.A. § 2510 et seq.; M.S.A. § 626A.01 et seq.

6 Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

FRANK, District Judge.

Introduction

This action arises under the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510–2521, and its Minnesota counterpart, Minn.Stat. § 626A.01, *et seq.* Two lawsuits were commenced and have been consolidated into the present proceeding. Plaintiff Lesa Wagner sued her former husband, Defendant Robert Wagner, for civil damages, alleging that Robert Wagner taped telephone conversations between Lesa Wagner and their two minor children. Plaintiff Sandra Wagner, the emancipated daughter of Robert and Lesa Wagner, also sued her father, alleging that Robert Wagner also taped telephone conversations between Sandra Wagner and the two minor

children.

The matter is currently before the Court on the Plaintiffs' Motion for Summary Judgment. The Plaintiffs assert that, as Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between the Plaintiffs and the two minor children, there is no issue of material fact and the Plaintiffs are entitled to judgment as a matter of law. Defendant Robert Wagner asserts that he vicariously consented to the interception and recording of the telephone conversations on behalf of the two minor children in his custody. *896

[1] [2] The Court, addressing an issue that has not yet been resolved by the Eighth Circuit, adopts the vicarious consent doctrine, finding that as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children in his or her custody, the guardian may vicariously consent to the interception on behalf of the children. As there is a factual issue as to whether Defendant Robert Wagner had a good faith, objectively reasonable belief that the interception and recording of the Plaintiffs' telephone conversations with the children was necessary for the children's best interests, the Plaintiffs' Motion for Summary Judgment is denied.

Background

The facts are not in dispute. Robert and Lesa Wagner were married from 1977 until 1998 and have four minor children: J.W. (now 17), C.W. (now 13), and twins A.W. and T.W. (now 11). Their oldest child, Plaintiff Sandra Wagner, had been emancipated prior to the dissolution proceeding.

The dissolution proceeding came on for trial before the Honorable Mary L. Davidson in Hennepin County District Court. In its Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, entered on January 15, 1998, the court made the following findings regarding the determination of custody:

> 1. *Wishes of parents.* .... Respondent [Lesa Wagner] has not shown that she is willing to cooperate with Petitioner [Robert Wagner] in setting schedules for the children. Petitioner's [Robert Wagner's] proposal would allow the children to continue to have both parents substantially participate in their lives.
>
> 2. *Preference of children.* The children in this matter are old enough to express their preference for one parent or the other as their custodial parent. However, the children in this matter have been pressured, manipulated and influenced by both parents in regard to their preference for a custodial parent....
>
> ....
>
> 4. *Intimacy between parent and child.* .... Based on both custody evaluations the children seem to be more intimately attached to the Respondent [Lesa Wagner]. As one evaluator explained, this may be because she is less of a disciplinarian, and there is less structure in her home.... Respondent [Lesa Wagner] is unwilling or unable to see that the children are in need of counseling at this time.
>
> 5. *Interactions and interrelationship of children and parents, siblings and any other person.* .... Petitioner [Robert Wagner] has made it clear that he wants Respondent [Lesa Wagner] to be involved in the lives of the children and will encourage a relationship....
>
> ....
>
> 8. *Mental and physical health of all individuals involved.* The custody evaluator from Hennepin County found that, "[b]eneath the surface of the well-behaved and polite children is a family in crisis", and that, "[t]here is a great deal of emotional strain in the relationships between the parents and the children" ....
>
> ....
>
> 12. *Disposition of each parent to encourage and permit frequent and continuing contact by the other parent with children.* Testimony was heard regarding several incidents where Respondent [Lesa Wagner] undermined Petitioner's [Robert Wagner's] visitation with the children. She often enticed one or more of the children to stay back with her when they were to have visitation with their father. She has suggested moving out of state permanently, and took the children to Iowa for a period of time *897 without notifying Petitioner [Robert Wagner] of her intentions.
>
> Petitioner [Robert Wagner] suggests that the parties should have close to equal time with the children. There is no evidence that Petitioner [Robert Wagner] has undermined Respondent's [Lesa Wagner's] relationship with the children. Rather, Petitioner [Robert Wagner] has made efforts to ensure that the children will have continued interaction, support and guidance of both parties.

(Def.'s Ex. A, Amended Judgment and Decree, dated January 15, 1998, pp. 3–7.)

The dissolution matter was eventually appealed to the Minnesota Court of Appeals. *Wagner v. Wagner,* 1999 WL 431139 (Minn.Ct.App. June 29, 1999). The Court of Appeals set forth the remaining procedural history of the case as follows:

> [T]he district court initially awarded the parties joint physical custody of all four children. But after hearing the parties' post-trial motions, the district court altered the award to give respondent [Robert Wagner] legal custody of all four children and custody of the twins [A.W. and T.W.], then 9, while appellant [Lesa Wagner] had legal custody of J.W., then 15, and C.W., then 12 Appellant [Lesa Wagner] now seeks sole legal and physical custody of all four children.
>
> The district court acknowledged that split custody is not favored but found it to be in the best interests of these children because (1) appellant [Lesa Wagner] had turned J.W. and C.W. against respondent [Robert Wagner], (2) J.W. and C.W. refused to live with respondent [Robert Wagner], (3) the children assign primarily negative feelings toward one another....

Wagner v. Wagner, 1999 WL 431139 at *1.

The Minnesota Court of Appeals affirmed the district court's rulings. *Wagner v. Wagner,* 1999 WL 431139 at *1.

Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between Plaintiff Lesa Wagner and the twins, and between Plaintiff Sandra Wagner and the twins. It is undisputed that Defendant Robert Wagner used the information obtained in the dissolution proceeding.

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously interfered with his visitation with the two older children in her custody, thereby damaging his ability to maintain a relationship with the children. Defendant Robert Wagner additionally asserts that Plaintiff Lesa Wagner has consistently failed to comply with the court's orders regarding her visitation with the twins:

> Lesa has moved herself and the two older children to Alabama.... Lesa "concealed" the children by keeping her moving actions secretive and not informing me of her whereabouts once she had moved. She never communicated to me in any way that she was leaving to go to Alabama. She never provided her address to me once she did move, and left it to me to find her. Her phone is not listed with the local telephone company there either.
>
> Lesa "took" all the children, including the twins, to Alabama without permission. I specifically gave permission for Lesa to leave with the children, providing she would make suitable provisions for me to have visitation with [J.W. and C.W.] Lesa made no such provision, therefore no permission was granted.
>
> Lesa was allowed an extended visitation with the twins until August 16th at 7:00 p.m. at which time she was to return the children to me at my apartment in Minnesota....
>
> On the 16th at 6:30 p.m. Lesa called to say the kids would not be back at 7:00 p.m. ...
>
> On Monday, Lesa called at 9:30 a.m. to say she couldn't get the children on the flight. She also threatened to go to the local sheriff to have him talk to the children and hear her story because she didn't think she should have to send the children back. She did not call on Tuesday *898 or Wednesday, and there was no answer when I called her.
>
> Given Lesa's dishonesty about the availability of flights and her lack of communication and cooperation regarding keeping her commitments to return the children on the 16th, I decided to drive to Alabama to pick up the children. I have since discovered that, during the time she was to be returning the kids to Minnesota, Lesa took [the twins] to see the elementary school they would go to in Prattville, AL.

(Def.'s Ex. C., Affidavit of Robert Wagner, dated August 26, 1998, ¶ 14 (emphases omitted).)

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously attempted to manipulate the twins' emotions and alienate the children from their father. Robert Wagner alleges that Lesa Wagner "continually is 'coaching' the twins to tell others that they want to live with her." (Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 33.)

Defendant Robert Wagner further asserts that Lesa Wagner participates in conversations between the twins and their sister, Plaintiff Sandra Wagner, and also uses those opportunities to manipulate the twins. Robert Wagner asserts that in a telephone conversation between Plaintiff Sandra Wagner and the twins, Plaintiff Lesa Wagner could be heard in the background coaching Sandra Wagner:

> Then both boys were coached to call 911 if I ever left them alone, even for a few minutes. When the boys asked what would happen? They were told the police would pick them up and they could come live at the house. They were also told to tell the neighbor mother that they want to go live at the house. Furthermore, they were told to tell everybody they meet they want to go live at the (Lesa's) house. At the end of the conversation they were told to "keep this very secret and be sure not to tell dad" ....

(Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 34.)

Discussion

A. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Enterprise Bank v. Magna Bank,* 92 F.3d 743, 747 (8th Cir.1996). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enterprise Bank,* 92 F.3d at 747. However, as the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.' " Fed.R.Civ.P. 1, *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enterprise Bank,* 92 F.3d at 747. The nonmoving party must then demonstrate the existence of specific facts in the record which create a genuine issue for trial. *Krenik v. County of Le Sueur,* 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986); *Krenik,* 47 F.3d at 957.

B. Violation of Wiretapping Statutes

The relevant provisions of the federal wiretapping statute provide as follows:

> 1. Except as otherwise specifically provided in this chapter any person who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to ***899** intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
>
> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; ...
>
> ....
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of the subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; ...
>
> ....
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C.A. § 2511 (1999).

Recovery of civil damages for violation of the federal wiretapping statute is authorized as follows:

> Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C.A. § 2520(a) (1999).

Minnesota's wiretapping statutes are nearly identical to the federal wiretapping statutes. *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 406 (Minn.Ct.App.1995). Minn.Stat. § 626A.02 similarly provides that any person who intentionally intercepts and discloses any oral communication is subject to civil suit.

C. Vicarious Consent Doctrine

Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability. *Pollock v. Pollock*, 154 F.3d 601, 606 (6th Cir.1998), 18 U.S.C. § 2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C.A. § 2511(2)(d) (1999).

Minn.Stat. § 626A.02, subd. 2(d) contains the same consent exemption.

The Court is now confronted with an issue upon which the Eighth Circuit has not spoken, specifically, whether the exemption permits a custodial parent to "vicariously consent" to the recording of the minor child's telephone conversations.[1]

*900 Although the issue has not been explicitly addressed by the Eighth Circuit, federal courts in other circuits have examined the issue of the vicarious consent doctrine. *See, e.g., Pollock v. Pollock*, 154 F.3d 601 (6th Cir.1998); *Thompson v. Dulaney*, 838 F.Supp. 1535 (D.Utah 1993).

Most recently, the Sixth Circuit analyzed the vicarious exception doctrine in *Pollock*. *Pollock*, 154 F.3d at 607–10. The *Pollock* case, in which a non-custodial parent sued the custodial parent for recording telephone conversations between the non-custodial parent and their 14 year-old child, involved facts substantially similar to those in the present matter. As the Sixth Circuit noted, the basis of the case "occurred in the context of a bitter and protracted child custody dispute," and the custodial parent maintained that the non-custodial father was subjecting the child to emotional abuse and manipulation by pressuring the child regarding custodial matters. *Pollock*, 154 F.3d at 603–04.

After an in-depth analysis of the issue, including a thorough examination of the relevant case law from other jurisdictions, the Sixth Circuit adopted the vicarious consent doctrine and held as follows:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

Pollock, 154 F.3d at 610.

The court held that the issue of material fact as to the defendant's motivation in taping the telephone conversations precluded summary judgment. *Pollock*, 154 F.3d at 612.

In addition, another district court in the Eighth Circuit addressed the vicarious consent doctrine in *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998). In analyzing the issue, the court recognized that the "Eighth Circuit has not addressed whether parents may vicariously consent to the recording of their minor children's conversations" and noted that the court had "uncovered no cases rejecting a vicarious consent argument, and, furthermore, finds persuasive the cases allowing vicarious consent." *Campbell*, 2 F.Supp.2d at 1189. The court thus adopted the vicarious consent doctrine, holding that the custodial parent's "intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child." *Campbell*, 2 F.Supp.2d at 1191. In reaching its decision, the court noted that it "merely applied what it concludes to be the majority law on the subject...." *Campbell*, 2 F.Supp.2d at 1192.

Indeed, the only case in which the court explicitly declined to adopt the vicarious consent doctrine in

connection with Title III was that of *Williams v. Williams* ("*Williams I*"), 229 Mich.App. 318, 581 N.W.2d 777 (1998).[2] In rejecting the doctrine, *901 the Michigan court recognized that it was deviating from the majority. *Williams,* 581 N.W.2d at 780–81. The Sixth Circuit, in *Pollock,* observed of the *Williams* court that, "in declining to adopt the doctrine of vicarious consent, it was departing from the path chosen by all of the other courts that have addressed the issue." *Pollock,* 154 F.3d at 609.

In fact, the Michigan Supreme Court later remanded the *Williams* case back to the Michigan Court of Appeals for reconsideration in light of *Pollock. Williams v. Williams* ("*Williams II*"), 593 N.W.2d 559 (Mich.1999). On remand, the Michigan Court of Appeals reversed its earlier ruling regarding the vicarious liability exception to Title III liability. The court recognized that, "because the Sixth Circuit Court of Appeals has now spoken on the issue and no conflict among the federal courts exists, we are bound to follow the *Pollock* holding on the federal question in the case."[3] *Williams v. Williams* ("*Williams III*"), 603 N.W.2d 114, 1999 WL 692342 (Mich.App. Sept.3, 1999). Accordingly, the only case which had explicitly rejected the vicarious consent exception was subsequently reversed, and its decision was brought into conformity with all other federal decisions that have addressed the issue.

Finally, therefore, as the Court has uncovered no cases explicitly rejecting the vicarious consent doctrine, as there appears to be no conflict among the federal courts, and as the Court finds persuasive the cases adopting the vicarious consent doctrine, the Court determines that the vicarious consent doctrine should apply in the present matter.

Conclusion

This Court adopts the vicarious consent doctrine, which holds that, as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children, the guardian may vicariously consent to the interception on behalf of the children. As there is an issue of fact in the present matter regarding Defendant Robert Wagner's motivations in intercepting and recording telephone conversations between the Plaintiffs and the two minor children in his custody, the Plaintiff's Motion for Summary Judgment must be denied.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Plaintiffs' Motion for Summary Judgment (Doc. Nos.9, 16) is **DENIED.**

Footnotes

1 The Eighth Circuit has previously decided two cases involving facts similar to the present matter. In *Platt v. Platt,* 951 F.2d 159 (8th Cir.1989), a husband sued his estranged wife under Title III for recording his telephone calls with their minor daughter, allegedly to gain advantage in the parties' dissolution proceedings. Similarly, in *Rice v. Rice,* 951 F.2d 942 (8th Cir.1991), the plaintiff sued his former wife under Title III for recording telephone calls between the plaintiff and the parties' children. However, at the time both cases were decided, the federal courts were grappling with the issue of whether Title III applied to interspousal communications, and whether the statute necessarily required that the federal courts become involved in purely domestic conflicts. Consequently, the cases were decided on that basis, and the Eighth Circuit did not reach the issue of the vicarious consent doctrine in *Platt* or *Rice.*

Indeed, the defendant mother in *Platt* had asserted that, as the legal guardian of the minor children she "stood in the place of the minor child and consented to the recording." *Platt,* 951 F.2d at 160. Nevertheless, as explained by the Eighth Circuit, the district court had framed the issue as the extent to which Title III applied to interspousal wiretaps and, in dismissing the case, had declined to address the parties' arguments concerning the application of Title III's consent exemption. *Platt,* 951 F.2d at 160. On appeal, the Eighth Circuit held that, in light of the then-recently decided case of *Kempf v. Kempf,* 868 F.2d 970 (8th Cir.1989) (holding that Title III applies to domestic situations of interspousal wiretapping), the district court had relied on a nonexistent interspousal immunity. *Platt,* 951 F.2d at 160. The Eighth Circuit thus reversed the district court's dismissal and remanded *Platt* for further proceedings, including consideration of the consent issue. *Platt,* 951 F.2d at 161.

2 The case of *West Virginia Dept. of Health and Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), in which the Supreme Court of Appeals of West Virginia discussed and declined to apply the vicarious consent doctrine, is distinguishable from the facts of this case and the aforementioned cases which applied the doctrine. In the West Virginia case, a non-custodial father enlisted his mother to place a tape recorder in the home of his former wife, who had custody of their children, for the purpose of recording conversations between the mother and the children. *David L.,* 453 S.E.2d at 648. The non-custodial father argued that he had parental authority to give the children's consent. *David L.,* 453 S.E.2d at 653. The court acknowledged the holding of *Thompson v. Dulaney, supra,* which had adopted the vicarious consent doctrine, but held that "under the specific facts of the case

before us, we hold a parent has no right on behalf of his or her children to give consent...." *David L.*, 453 S.E.2d at 654. The court explicitly stated, "We do not disagree with the reasoning in *Thompson;* however, we determine the facts of the present case are different from the facts in *Thompson* in two significant respects." *David L.*, 453 S.E.2d at 654. The court noted in distinction that, first, the parent who procured the interception was not the custodial parent; and second, the recordings did not occur in the home of the parent who procured the interception, but rather the tape recorder had been surreptitiously placed in the other parent's home. *David L.*, 453 S.E.2d at 654. The court thus did not explicitly reject the vicarious consent doctrine, but rather declined to apply the doctrine to the circumstances of that case.

3 The Michigan court reaffirmed its ruling regarding the Michigan eavesdropping statute, however, noting that "this Court is not compelled to follow federal precedent or guidelines in interpreting the Michigan eavesdropping statute." *Williams III,* 603 N.W.2d at ——, 1999 WL 692342.

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the Court and Mr. Smith that Mr. Abid and his wife were not visible to Lyuda and her husband, but instead were seated nearby behind one of the barrier walls in the courthouse separating the seating. Mr. Abid and his wife listened in on the conversation between Lyudmyla and Mr. Marquez without Lyudmyla or Mr. Marquez's knowledge or consent.

Mr. Jones' is troubling in a number of ways. First, the communications between husband and wife are privileged under NRS 49.295(1)(b). Second, and most important, the primary issue in this case has been Sean's surreptitiously placing a recording device in Lyuda's home without her knowledge or consent, or the knowledge or consent of any individuals that reside in the home. Sean has defended his surreptitious recording by asserting a defense under the doctrine of "implied consent" based upon decisions from other jurisdictions. That doctrine has not been adopted by the Nevada Supreme Court or the Nevada legislature, and Sean's attempt to admit an altered copy of the illegally retained recording is currently being reviewed and adjudicated by the Court. In other words, Sean's actions have not been found by the Court to be justified by the defense he has raised.

It bears repeating (this was fully briefed to the Court on numerous instances in this case) that it is illegal in the State of Nevada to surreptitiously record any private 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 and his wife have admitted that they have surreptitiously recorded a conversation between Lyuda and her husband. The plain definition of a private conversation is one that the parties intend not to be heard by another other than the parties to the conversation. Notably many lawyers and clients

IN THE SUPREME COURT OF THE STATE OF NEVADA

LYUDMYLA ABID, Appellant, v. SEAN ABID, Respondent.	Supreme Court No. 69995 District Court Case No. D-10-416307-D

Appeal from the Eighth Judicial District Court

APPELLANT'S APPENDIX

VOLUME 5

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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.

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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

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> 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

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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

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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 Berdell
an Employee of BLACK & LOBELLO

Exhibit 1

Exhibit 1

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03/16/2015 09:00:56 AM

CLERK OF THE COURT

MISC
BLACK & LOBELLO
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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

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

DATED this 16 day of March, 2015.

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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:

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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.

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.

[2] We turn next to the question of whether questions of material fact exist as to Sandra's motivation and purpose in taping the telephone conversations at issue that would preclude summary judgment for the Defendants. Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to ***611** any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," *id.* at 323, 106 S.Ct. 2548, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. *Emmons v. McLaughlin,* 874 F.2d 351, 353 (6th Cir.1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden–Alimak, Inc.,* 799 F.2d 1128, 1133 (6th Cir.1986).

****23** When confronted with a properly supported motion for summary judgment, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In essence, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52, 106 S.Ct. 2505.

A.

The district court found that no question of material fact existed as to whether Sandra was motivated by genuine concern for her child's best interest, and granted summary judgment for Defendants. We disagree. Upon a *de novo* review of the **record**, it appears that questions of fact precluding summary judgment exist as to whether Sandra had a good faith basis that was objectively reasonable for believing it was necessary to consent on behalf of her minor child to the taping of these conversations.

As set forth above, both Laura and Courtney submitted declarations asserting that Sandra was motivated by something other than concern for her child's welfare. The allegations that Sandra was taping the phone conversations to gain access to Courtney's attorney-client communication with her lawyer, combined with the fact that the taping began soon after Sandra found the diary in which Courtney stated that her father had hired a lawyer to represent her, without Sandra's knowledge or consent, create a question of material fact as to Sandra's motives. J.A. at 155–56. Moreover, Courtney's allegations in her declaration that the deterioration in her relationship with her mother was caused by the fact that she did not get

along with her mother, and by her mother's relationship with a convicted felon "only a few years older than [Courtney]," rather than by anything done by her father, **24 further contribute to our determination that questions of material fact exist. J.A. 159–60.[19]

[3] [4] The district court did not directly address any of the statements contained in Laura's and Courtney's declarations.[20] In *612 granting summary judgment for Defendants, the district court stated:

> We find no ... countervailing evidence offered by the plaintiffs that would eviscerate Sandra's **vicarious consent** defense here and preclude summary judgment. Sandra's affidavit clearly supports her claim that she acted to protect the welfare of her children in taping the conversations at issue.... [P]laintiffs have offered no evidence tending to suggest that the **vicarious consent** defense is inappropriate here or that Sandra's "child **25 welfare" contention is pretextual. The plaintiffs cannot simply point to the tension and bitterness among the parties and expect the court to leap to the conclusion that Sandra's motives in taping were improper.[21]

Pollock v. Pollock, 975 F.Supp. 974, 979 (W.D.Ky.1997). In support of the decision to grant summary judgment, the district court cited *Silas* and *Scheib,* in which summary judgment was granted in favor of the taping parent. The facts in these two cases, however, were quite different than those in the instant case. In *Silas,* the father asserted that he began taping conversations between his seven-year-old son and the child's mother after "observing several instances when the minor child became extremely upset and began to cry during the telephone conversations." *Silas v. Silas,* 680 So.2d 368, 371 (Ala.Civ.App.1996). In *Scheib,*[22] the father who taped his eleven year old child's phone conversations stated that "on more than one occasion, [the child] became upset after speaking with his mother." *Scheib v. Grant,* 22 F.3d 149, 150 (7th Cir.1994).[23] In contrast, here Sandra states only that she "noticed a gradual change in Courtney which included what [Sandra] felt was a[sic] excessive or compulsive desire to be **26 with her father and corresponding deteriorating relationship with [Sandra]." J.A. at 102.

In *Thompson,* the district court, after approving of the doctrine of **vicarious consent,** declined to grant summary judgment because there was conflicting evidence as to what the mother's "purpose" was in intercepting the conversations. *Thompson v. Dulaney,* 838 F.Supp. 1535, 1545 (D.Utah 1993). Given the conflicting evidence offered by the parties, we find that there is a dispute as to material facts, making this case inappropriate for summary judgment. Thus, as in *Thompson,* while the doctrine of **vicarious consent** is properly adopted, there are questions of material fact as to Sandra's motivation in taping the conversations, and this issue should be submitted to a jury.

B.

If the jury determines that Sandra did properly consent on behalf of her minor child because she had a good faith, objectively reasonable belief that such consent was necessary and in the best interest of the child, judgment must be entered for Defendants as to the use and disclosure claims against Sandra, Barber, and Glidewell because the taping of the conversations would not, therefore, have been illegal. In order to state a claim for use or disclosure in violation of Title III, the communication at issue must be the product of an illegal wiretap. 18 U.S.C. § 2511(1)(c)-(d). If, however, the jury determines that Sandra was motivated by something other than concern for her child, it will have to evaluate the use and disclosure *613 claims and determine whether Sandra and her lawyers "knew or should have known" that the communication was the product of an illegal wiretap. *Id.*

[5] There are also questions of fact as to whether Sandra and her attorneys knew that the wiretap itself was potentially illegal. Sandra claims that she did not know the wiretap was **27 potentially illegal,[24] and that as soon as she learned it was, she stopped taping. J.A. at 102–04. Plaintiffs contend that they have a tape (one of Sandra's tapes provided to them by Courtney) on which Sandra has a discussion with another adult woman in which "Sandra goes to great lengths to explain to the other woman that her conversation with Sandra is being tape **recorded**. Sandra says herself that she is so advising the other woman because Sandra believes it is illegal to tape **record** telephone conversations without the knowledge of the other person whose call is being **recorded**." J.A. at 154–55.

[6] As to Sandra's attorneys, Barber and Glidewell, it appears undisputed that these Defendants did use or disclose the contents of these conversations during the course of their representation of Sandra. Whether they knew, or should have known, that the material came from an unlawful wiretap, however, is a question of fact for the jury.[25] *See Thompson,* 838 F.Supp. at 1548 (declining to grant summary judgment as to father's use and disclosure claims against mother's attorneys and stating: "Whether [the attorneys] knew the material came from an unlawful wiretap, ... is a question of fact which this Court may not

decide.").

Accordingly, the district court's grant of summary judgment is **REVERSED**, and this case is **REMANDED** for a trial on the disputed issues in this case in accordance with this opinion.

CONCLUSION

In summary, we **AFFIRM** the district court's adoption of the doctrine of **vicarious consent** as set forth above, **28 REVERSE** the district court's grant of summary judgment, and **REMAND** this matter for trial.

Parallel Citations

1998 Fed.App. 0271P

Footnotes

* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

1 Defendants' motion was styled as a motion to dismiss Plaintiffs' amended complaint pursuant to Fed.R.Civ.P. 12(b)(6). Because both parties' briefs included, and relied upon, extraneous material, the district court construed Defendants' motion as a motion for summary judgment. *See* Fed.R.Civ.P. 12(b).

2 It is unclear whether Courtney told Sandra that one conversation, or multiple conversations, had been **recorded**.

3 Although this incident may or may not be a contributing factor to Sandra's later taping of Courtney's conversations with Samuel and Laura, it is not the taping incident at issue in this case.

4 The **record** contains copies of two settlement letters from Samuel's attorney in which he offers to drop this lawsuit in exchange for joint custody of Courtney, with Courtney residing with him. J.A. at 146–51.

5 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law note that Judge Morris interviewed Courtney and she expressed that she preferred to stay with her father, rather than her mother. J.A. at 113. Even so, Judge Morris found that Sandra should retain custody of Courtney. On May 13, 1995, Judge Morris issued Amended Findings of Fact and Conclusions of Law, again confirming his prior grant of custody of Courtney to Sandra, over Courtney's and Samuel's objections. J.A. at 128.

6 A transcript of the actual conversation is not included in the **record**, and Sandra does not discuss the contents of the conversation in her affidavit. Accordingly, the only sources regarding this conversation are the declarations submitted by Laura and Courtney, which describe the conversation as set forth above.

7 The Court was not provided with a copy of the tape.

8 Ky.Rev.Stat. Ann. § 620.030 provides:

> (1) Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky state police....

9 Judge Morris' April 19, 1994 Findings of Fact and Conclusions of Law make reference to a Mr. Kevin Downs as follows: "The relationship [Sandra] has established with a convicted felon (Mr. Kevin Downs) and her visits to see Mr. Downs while in jail has required this Court to order [Sandra] not to allow the children to have any contact with Mr. Downs." J.A. at 113.

10 Title 18 U.S.C. § 2511(1) provides that a claim under Title III can be made against any person who:

> (a) intentionally intercepts ... the contents of any wire, oral, or electronic communication; ...
> (c) intentionally discloses ... to any person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
> (d) intentionally uses ... the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection....

11 Title 18 U.S.C. § 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception....

12 We note that although it can be argued, from a policy perspective, that the federal courts should stay out of these kinds of domestic disputes, that option has been foreclosed by the decisions of this Court and numerous other federal courts. In one of the earliest cases to address the issue of domestic wiretaps in a case involving interspousal wiretapping, *Simpson v. Simpson,* 490 F.2d 803, 805 (5th Cir.1974), *cert. denied,* 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974), the Fifth Circuit stated, "The naked language of Title III, by virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a result, one extending into areas normally left to states, those of the marital home and domestic conflicts." While the Fifth Circuit has not overruled that decision, it has been severely criticized by a number of other circuits, beginning with this Court in *United States v. Jones,* 542 F.2d 661, 673 (6th Cir.1976) (holding that "the plain language of § 2511 and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps"). *See also Heggy v. Heggy,* 944 F.2d 1537, 1539 (10th Cir.1991) (holding that "Title III does apply to interspousal wiretapping within the home"), *cert. denied,* 503 U.S. 951, 112 S.Ct. 1514, 117 L.Ed.2d 651 (1992); *Kempf v. Kempf,* 868 F.2d 970, 973 (8th Cir.1989) (holding that "the conduct of a spouse in wiretapping the telephone communications of the other spouse within the marital home falls within [Title III's] purview"); *Pritchard v. Pritchard,* 732 F.2d 372, 374 (4th Cir.1984) (stating that there is "no legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping").

13 In *Murdock,* the defendant had been convicted after the district court admitted into evidence incriminating tape-**recordings** made by his estranged wife.

14 In *State v. Shaw,* 103 N.C.App. 268, 404 S.E.2d 887 (1991), the North Carolina Court of Appeals held that a mother who **recorded** her son's telephone conversation regarding an upcoming drug deal, from a telephone extension in her home using a microcassette **recorder**, violated Title III. ("There was no evidence before the trial court that the mother used a microcassette **recorder** 'in the ordinary course of business.' ") *Shaw,* 404 S.E.2d at 889.

15 The district court in this case also relied upon *Silas* in support of its decision.

16 The *Silas* court also addressed the question of parental wiretaps under Title III and held, in accordance with the circuits discussed *supra,* that the father's actions were exempt under the "extension exemption." 680 So.2d at 370. As set forth above, that exemption is not available as a basis for the decision in this case. *United States v. Murdock,* 63 F.3d 1391 (6th Cir.1995).

17 The children's paternal grandmother installed the tape **recorder** in the children's bedroom, pursuant to her son's request, when she was in the mother's home babysitting the children.

18 The child in *Scheib* was eleven years old. 22 F.3d at 150.

19 In addition, Courtney alleges that at about the same time that Sandra began taping the phone conversations, "someone had reported [Sandra] to the authorities for possible abuse and neglect of me and my brothers." J.A. at 160. Reading all inferences of fact in favor of Plaintiffs, as we must do on Defendants' motion for summary judgment, we note that such an allegation against her could provide further motive for Sandra to embark on a mission to "gather dirt" on Samuel in the context of their battle for custody of the children.

20 Defendants acknowledge that the district court did not directly address Laura and Courtney's allegations. In doing so, however, Defendants make much of the fact that the declarations were "unsworn affidavits." An unsworn affidavit cannot be used to support or oppose a motion for summary judgment. *See Dole v. Elliott Travel & Tours, Inc.,* 942 F.2d 962, 968–69 (6th Cir.1991) ("the unsworn statements of the two employees ... must be disregarded because a court may not consider unsworn statements when ruling on a motion for summary judgment"). However, a statutory exception to this rule exists which permits an unsworn declaration to substitute for a conventional affidavit if the statement contained in the declaration is made under penalty of perjury, certified as true and correct, dated, and signed. 28 U.S.C. § 1746; *see also Williams v. Browman,* 981 F.2d 901, 904 (6th Cir.1992). Both Laura's and Courtney's declarations contain the statement: "I declare, under penalty of perjury, that the foregoing is true and correct," and both declarations are signed and dated. J.A. at 157, 160. Accordingly, we must consider these declarations when deciding this appeal.

21 Similarly, we cannot simply look to Sandra's poor relationship with her daughter and "leap to the conclusion" that Samuel was the cause of the deterioration of that relationship.

22 As discussed above, in *Scheib,* the Seventh Circuit permitted parental wiretapping on the "extension exemption" ground.

23 We note that summary judgment was also granted for the defendants in *Campbell v. Price,* 2 F.Supp.2d 1186 (E.D.Ark.1998), which was decided subsequent to the district court's opinion in this case. As in *Silas* and *Scheib,* the taping parent in *Campbell,* the child's father, offered evidence to substantiate his claim that the **recording** of the child's phone conversations was motivated by legitimate concern that the child's relationship with her mother was potentially abusive. *Id.* at 150–51. The child's father submitted an affidavit stating that "his daughter would cry and become upset after talking with her mother on the telephone, that she would 'mope around' and 'go into her room and just sit there' and that she was 'not willing to talk about what was wrong with her.' " *Id.*

24 However, Sandra does concede, as she must, that Courtney was unaware of, and did not consent to, the taping.

25 The **record** does not contain any affidavits from Barber and Glidewell as to what they knew, or did not know, about the **recording**.

End of Document

Exhibit 4

Exhibit 4

360 S.W.3d 416
Court of Appeals of Tennessee,
Eastern Section, at Knoxville.

Chris LAWRENCE
v.
Leigh Ann LAWRENCE.

No. E2010–00395–COA–R3–CV. | Nov. 8, 2010 Session. | Nov. 29, 2010. | Permission to Appeal Denied bySupreme Court April 13, 2011.

Synopsis
Background: Father brought action against mother seeking damages for, among other things, wiretapping, arising out of mother secretly tape recording their two-and-one-half-year-old daughter's telephone conversation with father during course of divorce and custody dispute. The Circuit Court, Knox County, Dale C. Workman, J., entered partial summary judgment in favor of mother. Father appealed.

[Holding:] The Court of Appeals, Charles D. Susano, Jr., J., held that mother had the right to vicariously consent, within meaning of wiretapping statute, to interception of child's telephone conversation with father, precluding mother's liability.

Affirmed; case remanded.

West Headnotes (3)

[1] **Parent and Child**
⇐Compromise, settlement, waiver, and release
Telecommunications
⇐Persons concerned; consent

Mother had the right to vicariously consent, within meaning of wiretapping statute, to intercepting, recording, and disclosing two-and-one-half-year-old child's telephone conversation with father during the course of a divorce and custody dispute, precluding mother's liability. West's T.C.A. § 39–13–601(b)(5).

2 Cases that cite this headnote

[2] **Parent and Child**
⇐Care, Custody, and Control of Child; Child Raising

Child-rearing autonomy encompasses unrestricted control of a two-and-one-half–year–old child's access to the telephone, including to whom the child speaks and when the child speaks and under what conditions the child speaks.

Cases that cite this headnote

[3] **Infants**
⇐Validity

Society's concern for minors may be constitutionally reflected in statutes to account for: (1) minors' peculiar vulnerabilities and their need for concern, sympathy, and paternal attention; (2) minors' inability to make sound judgments about their own conduct; and (3) the courts' deference to the guiding role of parents.

Cases that cite this headnote

Attorneys and Law Firms

*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

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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

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MEMORANDUM OPINION AND ORDER

FRANK, District Judge.

Introduction

This action arises under the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510–2521, and its Minnesota counterpart, Minn.Stat. § 626A.01, *et seq.* Two lawsuits were commenced and have been consolidated into the present proceeding. Plaintiff Lesa Wagner sued her former husband, Defendant Robert Wagner, for civil damages, alleging that Robert Wagner taped telephone conversations between Lesa Wagner and their two minor children. Plaintiff Sandra Wagner, the emancipated daughter of Robert and Lesa Wagner, also sued her father, alleging that Robert Wagner also taped telephone conversations between Sandra Wagner and the two minor

children.

The matter is currently before the Court on the Plaintiffs' Motion for Summary Judgment. The Plaintiffs assert that, as Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between the Plaintiffs and the two minor children, there is no issue of material fact and the Plaintiffs are entitled to judgment as a matter of law. Defendant Robert Wagner asserts that he vicariously consented to the interception and *896 recording of the telephone conversations on behalf of the two minor children in his custody.

[1] [2] The Court, addressing an issue that has not yet been resolved by the Eighth Circuit, adopts the vicarious consent doctrine, finding that as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children in his or her custody, the guardian may vicariously consent to the interception on behalf of the children. As there is a factual issue as to whether Defendant Robert Wagner had a good faith, objectively reasonable belief that the interception and recording of the Plaintiffs' telephone conversations with the children was necessary for the children's best interests, the Plaintiffs' Motion for Summary Judgment is denied.

Background

The facts are not in dispute. Robert and Lesa Wagner were married from 1977 until 1998 and have four minor children: J.W. (now 17), C.W. (now 13), and twins A.W. and T.W. (now 11). Their oldest child, Plaintiff Sandra Wagner, had been emancipated prior to the dissolution proceeding.

The dissolution proceeding came on for trial before the Honorable Mary L. Davidson in Hennepin County District Court. In its Amended Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, entered on January 15, 1998, the court made the following findings regarding the determination of custody:

> 1. *Wishes of parents.* .... Respondent [Lesa Wagner] has not shown that she is willing to cooperate with Petitioner [Robert Wagner] in setting schedules for the children. Petitioner's [Robert Wagner's] proposal would allow the children to continue to have both parents substantially participate in their lives.
>
> 2. *Preference of children.* The children in this matter are old enough to express their preference for one parent or the other as their custodial parent. However, the children in this matter have been pressured, manipulated and influenced by both parents in regard to their preference for a custodial parent....
>
> ....
>
> 4. *Intimacy between parent and child.* .... Based on both custody evaluations the children seem to be more intimately attached to the Respondent [Lesa Wagner]. As one evaluator explained, this may be because she is less of a disciplinarian, and there is less structure in her home.... Respondent [Lesa Wagner] is unwilling or unable to see that the children are in need of counseling at this time.
>
> 5. *Interactions and interrelationship of children and parents, siblings and any other person.* .... Petitioner [Robert Wagner] has made it clear that he wants Respondent [Lesa Wagner] to be involved in the lives of the children and will encourage a relationship....
>
> ....
>
> 8. *Mental and physical health of all individuals involved.* The custody evaluator from Hennepin County found that, "[b]eneath the surface of the well-behaved and polite children is a family in crisis", and that, "[t]here is a great deal of emotional strain in the relationships between the parents and the children" ....
>
> ....
>
> 12. *Disposition of each parent to encourage and permit frequent and continuing contact by the other parent with children.* Testimony was heard regarding several incidents where Respondent [Lesa Wagner] undermined Petitioner's [Robert Wagner's] visitation with the children. She often enticed one or more of the children to stay back with her when they were to have visitation with their father. She has suggested moving out of state permanently, and took the children to Iowa for a period of time *897 without notifying Petitioner [Robert Wagner] of her intentions.
>
> Petitioner [Robert Wagner] suggests that the parties should have close to equal time with the children. There is no evidence that Petitioner [Robert Wagner] has undermined Respondent's [Lesa Wagner's] relationship with the children. Rather, Petitioner [Robert Wagner] has made efforts to ensure that the children will have continued interaction, support and guidance of both parties.

(Def.'s Ex. A, Amended Judgment and Decree, dated January 15, 1998, pp. 3–7.)

The dissolution matter was eventually appealed to the Minnesota Court of Appeals. *Wagner v. Wagner,* 1999 WL 431139 (Minn.Ct.App. June 29, 1999). The Court of Appeals set forth the remaining procedural history of the case as follows:

> [T]he district court initially awarded the parties joint physical custody of all four children. But after hearing the parties' post-trial motions, the district court altered the award to give respondent [Robert Wagner] legal custody of all four children and custody of the twins [A.W. and T.W.], then 9, while appellant [Lesa Wagner] had legal custody of J.W., then 15, and C.W., then 12 Appellant [Lesa Wagner] now seeks sole legal and physical custody of all four children.
>
> The district court acknowledged that split custody is not favored but found it to be in the best interests of these children because (1) appellant [Lesa Wagner] had turned J.W. and C.W. against respondent [Robert Wagner], (2) J.W. and C.W. refused to live with respondent [Robert Wagner], (3) the children assign primarily negative feelings toward one another....

Wagner v. Wagner, 1999 WL 431139 at *1.

The Minnesota Court of Appeals affirmed the district court's rulings. *Wagner v. Wagner,* 1999 WL 431139 at *1.

Defendant Robert Wagner has admitted to having intercepted and recorded telephone conversations between Plaintiff Lesa Wagner and the twins, and between Plaintiff Sandra Wagner and the twins. It is undisputed that Defendant Robert Wagner used the information obtained in the dissolution proceeding.

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously interfered with his visitation with the two older children in her custody, thereby damaging his ability to maintain a relationship with the children. Defendant Robert Wagner additionally asserts that Plaintiff Lesa Wagner has consistently failed to comply with the court's orders regarding her visitation with the twins:

> Lesa has moved herself and the two older children to Alabama.... Lesa "concealed" the children by keeping her moving actions secretive and not informing me of her whereabouts once she had moved. She never communicated to me in any way that she was leaving to go to Alabama. She never provided her address to me once she did move, and left it to me to find her. Her phone is not listed with the local telephone company there either.
>
> Lesa "took" all the children, including the twins, to Alabama without permission. I specifically gave permission for Lesa to leave with the children, providing she would make suitable provisions for me to have visitation with [J.W. and C.W.] Lesa made no such provision, therefore no permission was granted.
>
> Lesa was allowed an extended visitation with the twins until August 16th at 7:00 p.m. at which time she was to return the children to me at my apartment in Minnesota....
>
> On the 16th at 6:30 p.m. Lesa called to say the kids would not be back at 7:00 p.m. ...
>
> On Monday, Lesa called at 9:30 a.m. to say she couldn't get the children on the flight. She also threatened to go to the local sheriff to have him talk to the children and hear her story because she didn't think she should have to send the children back. She did not call on Tuesday *898 or Wednesday, and there was no answer when I called her.
>
> Given Lesa's dishonesty about the availability of flights and her lack of communication and cooperation regarding keeping her commitments to return the children on the 16th, I decided to drive to Alabama to pick up the children. I have since discovered that, during the time she was to be returning the kids to Minnesota, Lesa took [the twins] to see the elementary school they would go to in Prattville, AL.

(Def.'s Ex. C., Affidavit of Robert Wagner, dated August 26, 1998, ¶ 14 (emphases omitted).)

Defendant Robert Wagner asserts that Plaintiff Lesa Wagner has continuously attempted to manipulate the twins' emotions and alienate the children from their father. Robert Wagner alleges that Lesa Wagner "continually is 'coaching' the twins to tell others that they want to live with her." (Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 33.)

Defendant Robert Wagner further asserts that Lesa Wagner participates in conversations between the twins and their sister, Plaintiff Sandra Wagner, and also uses those opportunities to manipulate the twins. Robert Wagner asserts that in a telephone conversation between Plaintiff Sandra Wagner and the twins, Plaintiff Lesa Wagner could be heard in the background coaching Sandra Wagner:

> Then both boys were coached to call 911 if I ever left them alone, even for a few minutes. When the boys asked what would happen? They were told the police would pick them up and they could come live at the house. They were also told to tell the neighbor mother that they want to go live at the house. Furthermore, they were told to tell everybody they meet they want to go live at the (Lesa's) house. At the end of the conversation they were told to "keep this very secret and be sure not to tell dad" ....

(Def.'s Ex. E., Affidavit of Robert Wagner, dated June 26, 1998, ¶ 34.)

Discussion

A. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Enterprise Bank v. Magna Bank,* 92 F.3d 743, 747 (8th Cir.1996). The court must view the evidence and the inferences which may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. *Enterprise Bank,* 92 F.3d at 747. However, as the Supreme Court has stated, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.' " Fed.R.Civ.P. 1, *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Enterprise Bank,* 92 F.3d at 747. The nonmoving party must then demonstrate the existence of specific facts in the record which create a genuine issue for trial. *Krenik v. County of Le Sueur,* 47 F.3d 953, 957 (8th Cir.1995). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986); *Krenik,* 47 F.3d at 957.

B. Violation of Wiretapping Statutes

The relevant provisions of the federal wiretapping statute provide as follows:

> 1. Except as otherwise specifically provided in this chapter any person who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to *899 intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
>
> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; ...
>
> ....
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of the subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; ...
>
> ....
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C.A. § 2511 (1999).

Recovery of civil damages for violation of the federal wiretapping statute is authorized as follows:

> Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C.A. § 2520(a) (1999).

Minnesota's wiretapping statutes are nearly identical to the federal wiretapping statutes. *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 406 (Minn.Ct.App.1995). Minn.Stat. § 626A.02 similarly provides that any person who intentionally intercepts and discloses any oral communication is subject to civil suit.

C. Vicarious Consent Doctrine

Conversations intercepted with the consent of either of the parties are explicitly exempted from Title III liability. *Pollock v. Pollock*, 154 F.3d 601, 606 (6th Cir.1998), 18 U.S.C. § 2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C.A. § 2511(2)(d) (1999).

Minn.Stat. § 626A.02, subd. 2(d) contains the same consent exemption.

The Court is now confronted with an issue upon which the Eighth Circuit has not spoken, specifically, whether the exemption permits a custodial parent to "vicariously consent" to the recording of the minor child's telephone conversations.[1]

*900 Although the issue has not been explicitly addressed by the Eighth Circuit, federal courts in other circuits have examined the issue of the vicarious consent doctrine. *See, e.g., Pollock v. Pollock*, 154 F.3d 601 (6th Cir.1998); *Thompson v. Dulaney*, 838 F.Supp. 1535 (D.Utah 1993).

Most recently, the Sixth Circuit analyzed the vicarious exception doctrine in *Pollock*. *Pollock*, 154 F.3d at 607–10. The *Pollock* case, in which a non-custodial parent sued the custodial parent for recording telephone conversations between the non-custodial parent and their 14 year-old child, involved facts substantially similar to those in the present matter. As the Sixth Circuit noted, the basis of the case "occurred in the context of a bitter and protracted child custody dispute," and the custodial parent maintained that the non-custodial father was subjecting the child to emotional abuse and manipulation by pressuring the child regarding custodial matters. *Pollock*, 154 F.3d at 603–04.

After an in-depth analysis of the issue, including a thorough examination of the relevant case law from other jurisdictions, the Sixth Circuit adopted the vicarious consent doctrine and held as follows:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

Pollock, 154 F.3d at 610.

The court held that the issue of material fact as to the defendant's motivation in taping the telephone conversations precluded summary judgment. *Pollock*, 154 F.3d at 612.

In addition, another district court in the Eighth Circuit addressed the vicarious consent doctrine in *Campbell v. Price*, 2 F.Supp.2d 1186 (E.D.Ark.1998). In analyzing the issue, the court recognized that the "Eighth Circuit has not addressed whether parents may vicariously consent to the recording of their minor children's conversations" and noted that the court had "uncovered no cases rejecting a vicarious consent argument, and, furthermore, finds persuasive the cases allowing vicarious consent." *Campbell*, 2 F.Supp.2d at 1189. The court thus adopted the vicarious consent doctrine, holding that the custodial parent's "intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child." *Campbell*, 2 F.Supp.2d at 1191. In reaching its decision, the court noted that it "merely applied what it concludes to be the majority law on the subject...." *Campbell*, 2 F.Supp.2d at 1192.

Indeed, the only case in which the court explicitly declined to adopt the vicarious consent doctrine in

connection with Title III was that of *Williams v. Williams* ("*Williams I*"), 229 Mich.App. 318, 581 N.W.2d 777 (1998).[2] In rejecting the doctrine, *901 the Michigan court recognized that it was deviating from the majority. *Williams,* 581 N.W.2d at 780–81. The Sixth Circuit, in *Pollock,* observed of the *Williams* court that, "in declining to adopt the doctrine of vicarious consent, it was departing from the path chosen by all of the other courts that have addressed the issue." *Pollock,* 154 F.3d at 609.

In fact, the Michigan Supreme Court later remanded the *Williams* case back to the Michigan Court of Appeals for reconsideration in light of *Pollock. Williams v. Williams* ("*Williams II*"), 593 N.W.2d 559 (Mich.1999). On remand, the Michigan Court of Appeals reversed its earlier ruling regarding the vicarious liability exception to Title III liability. The court recognized that, "because the Sixth Circuit Court of Appeals has now spoken on the issue and no conflict among the federal courts exists, we are bound to follow the *Pollock* holding on the federal question in the case."[3] *Williams v. Williams* ("*Williams III*"), 603 N.W.2d 114, 1999 WL 692342 (Mich.App. Sept.3, 1999). Accordingly, the only case which had explicitly rejected the vicarious consent exception was subsequently reversed, and its decision was brought into conformity with all other federal decisions that have addressed the issue.

Finally, therefore, as the Court has uncovered no cases explicitly rejecting the vicarious consent doctrine, as there appears to be no conflict among the federal courts, and as the Court finds persuasive the cases adopting the vicarious consent doctrine, the Court determines that the vicarious consent doctrine should apply in the present matter.

Conclusion

This Court adopts the vicarious consent doctrine, which holds that, as long as the guardian has a good faith, objectively reasonable belief that the interception of telephone conversations is necessary for the best interests of the children, the guardian may vicariously consent to the interception on behalf of the children. As there is an issue of fact in the present matter regarding Defendant Robert Wagner's motivations in intercepting and recording telephone conversations between the Plaintiffs and the two minor children in his custody, the Plaintiff's Motion for Summary Judgment must be denied.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Plaintiffs' Motion for Summary Judgment (Doc. Nos.9, 16) is **DENIED.**

Footnotes

1 The Eighth Circuit has previously decided two cases involving facts similar to the present matter. In *Platt v. Platt,* 951 F.2d 159 (8th Cir.1989), a husband sued his estranged wife under Title III for recording his telephone calls with their minor daughter, allegedly to gain advantage in the parties' dissolution proceedings. Similarly, in *Rice v. Rice,* 951 F.2d 942 (8th Cir.1991), the plaintiff sued his former wife under Title III for recording telephone calls between the plaintiff and the parties' children. However, at the time both cases were decided, the federal courts were grappling with the issue of whether Title III applied to interspousal communications, and whether the statute necessarily required that the federal courts become involved in purely domestic conflicts. Consequently, the cases were decided on that basis, and the Eighth Circuit did not reach the issue of the vicarious consent doctrine in *Platt* or *Rice.*

Indeed, the defendant mother in *Platt* had asserted that, as the legal guardian of the minor children she "stood in the place of the minor child and consented to the recording." *Platt,* 951 F.2d at 160. Nevertheless, as explained by the Eighth Circuit, the district court had framed the issue as the extent to which Title III applied to interspousal wiretaps and, in dismissing the case, had declined to address the parties' arguments concerning the application of Title III's consent exemption. *Platt,* 951 F.2d at 160. On appeal, the Eighth Circuit held that, in light of the then-recently decided case of *Kempf v. Kempf,* 868 F.2d 970 (8th Cir.1989) (holding that Title III applies to domestic situations of interspousal wiretapping), the district court had relied on a nonexistent interspousal immunity. *Platt,* 951 F.2d at 160. The Eighth Circuit thus reversed the district court's dismissal and remanded *Platt* for further proceedings, including consideration of the consent issue. *Platt,* 951 F.2d at 161.

2 The case of *West Virginia Dept. of Health and Human Resources v. David L.,* 192 W.Va. 663, 453 S.E.2d 646 (1994), in which the Supreme Court of Appeals of West Virginia discussed and declined to apply the vicarious consent doctrine, is distinguishable from the facts of this case and the aforementioned cases which applied the doctrine. In the West Virginia case, a non-custodial father enlisted his mother to place a tape recorder in the home of his former wife, who had custody of their children, for the purpose of recording conversations between the mother and the children. *David L.,* 453 S.E.2d at 648. The non-custodial father argued that he had parental authority to give the children's consent. *David L.,* 453 S.E.2d at 653. The court acknowledged the holding of *Thompson v. Dulaney, supra,* which had adopted the vicarious consent doctrine, but held that "under the specific facts of the case

before us, we hold a parent has no right on behalf of his or her children to give consent...." *David L.*, 453 S.E.2d at 654. The court explicitly stated, "We do not disagree with the reasoning in *Thompson;* however, we determine the facts of the present case are different from the facts in *Thompson* in two significant respects." *David L.*, 453 S.E.2d at 654. The court noted in distinction that, first, the parent who procured the interception was not the custodial parent; and second, the recordings did not occur in the home of the parent who procured the interception, but rather the tape recorder had been surreptitiously placed in the other parent's home. *David L.*, 453 S.E.2d at 654. The court thus did not explicitly reject the vicarious consent doctrine, but rather declined to apply the doctrine to the circumstances of that case.

3 The Michigan court reaffirmed its ruling regarding the Michigan eavesdropping statute, however, noting that "this Court is not compelled to follow federal precedent or guidelines in interpreting the Michigan eavesdropping statute." *Williams III,* 603 N.W.2d at ——, 1999 WL 692342.

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Exhibit 2

Exhibit 2

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CLERK OF THE COURT

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 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 Berdahl
an Employee of BLACK & LOBELLO

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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.

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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;

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

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

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

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

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

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

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

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

IT IS SO ORDERED this 11th day of March, 2014.

DISTRICT COURT JUDGE
MATHEW HARTER

DATED this ____ day of February, 2014

BLACK & LOBELLO

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(702) 869-8801
Attorney for Plaintiff,
SEAN R. ABID

DATED this _____ day of February, 2014

BALABON LAW OFFICE

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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

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 BAZARON

Rev. 6-11