I. The Defendants' Argument That Gail Nelson Had No Objectively Reasonable Expectation Of Privacy Against Being Secretly Videotaped At Her Workplace Is Premised On Disputed Facts.

The defendants repeat the error of the trial court of impermissibly interpreting the facts concerning the privacy of Ms. Nelson's workplace *in a manner most favorable to the party moving for summary judgment,* the defendants. However, even when summary judgment concerns the issue of qualified immunity, the court is required to assume the truth of the facts as alleged by the plaintiff and view all facts and reasonable inferences in a light most favorable to the plaintiff. Saucier v. Katz, 533 U.S. 194, 200 (2001). *See, e.g.*, Orin v. Barclay, 272 F.3d 1207, 1216 (9th Cir. 2001) (because a particular fact was unclear from the record, the court assumed the facts in a light favorable to the plaintiff in the first step of the qualified immunity inquiry).

In their brief, the defendants argue that there was no unreasonable invasion of Gail Nelson's privacy by the defendants through their secret videotaping of her because (a) "the videotaping took place in the work area of a public building and was [thus] not unreasonable" (*see* Appellants' Brief, p. 34), and (b)

the defendants did not gather or disseminate private information about Ms. Nelson (*see* Appellants' Brief, pp. 34-35). To support these arguments, the defendants cite paragraphs 24 and 26 from their own "Statement of Undisputed Facts" (*see* App. I, p. 125), *which contain factual statements that were specifically denied and disputed by plaintiff Gail Nelson* in her response to the defendants' motion for summary judgment (*see* App. II, p. 9, ¶¶ 5, 20, 24, 26, 27, 30, 31, 33, 41 and 42). Gail Nelson, with the knowledge of her supervisor, defendant Young, sometimes changed her clothes at her workplace both before and after regular business hours and applied sunburn medication to her chest during the work day (App. II, p. 9, ¶¶ 26, 40 and 41). She did so only when her workplace afforded her an objectively reasonable expectation of privacy in certain areas and at certain times, and she took affirmative steps to further insure her privacy in those areas (App. II, p. 9, ¶¶ 5, 20, 26, 27, 30, 31, 33, 41 and 42).

The first floor (where Ms. Nelson worked) of the building was not an open public place, unlike the area photographed in Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71 (1979). Her workspace had two 5-6 foot

tall partitions in it which created private areas in the office that could not be seen by the public (App. II, p. 9, ¶¶ 5, 20 and 26). Because the glare from the front plate glass window made it difficult to see into the office from the street during daylight hours, the public could not readily see anything that Ms. Nelson was doing while she was in the back areas of the office (App. II, p. 9, ¶¶ 5 and 26). The hidden video camera placed by the defendants in her work area secretly videotaped private areas behind partitions that could not normally be seen by the public or other employees (App. I, p. 125, ¶¶ 6 and 20; App. II, p. 9, ¶¶ 5, 6, 27, 30 and 33).

As the hidden camera ran twenty-four hours a day, it secretly videotaped Ms. Nelson when she was alone in the office, outside of regular business hours, with the door locked and no other employees or members of the public in her workspace (App. II, p. 9 ¶¶ 20, 26, 27, 30 and 33). Despite the fact that the defendants and the trial court focus almost solely on the characteristics of Ms. Nelson's workplace, it is beyond argument that "the Fourth Amendment protects people, not places," and that what a person "seeks to preserve as private, even in an area accessible to the

public, may be constitutionally protected. Katz v. United States, 389 U.S. 347, 351-352 (1967). The Fourth Amendment recognizes and protects expectations of privacy, "the individual's legitimate expectations that in certain places and at certain times he has 'the right to be let alone--the most comprehensive of rights and the right most valued by civilized men.'" Winston v. Lee, 470 U.S. 753, 758 (1985)(*quoting* Olmstead v. United States, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting)). Ms. Nelson never would have engaged in activities such as changing her clothes and applying sunburn medication to her chest had she not expected to be alone while doing so.[1]

The mere fact that Ms. Nelson's workplace was open to the public and other employees during times when she was not engaged in private activities did not render the defendants' actions in using a hidden video camera therein for secret twenty-four hours a day

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1 Moreover, defendant Young, who was an active and key participant in the secret videotaping, knew that Ms. Nelson had some expectation of privacy during certain times while she was in her workplace. He was well aware that Ms. Nelson often worked alone, that she regularly locked the building's door to exclude the public both during her required lunch break and outside of regular business hours and that she engaged in private activities in the workplace (App. II, p. 9, ¶¶ 31, 41 and 42).

taping reasonable. *See* O'Connor v. Ortega, 480 U.S. 709, 730 (1987) (Scalia, J., concurring in judgment); Mancusi v. DeForte, 392 U.S. 364, 368-369 (1968); United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978); United States v. Taketa, 923 F.2d 665 (9th Cir. 1991); State of Hawaii v. Bonnell, 75 Haw. 124, 856 P.2d 1265 (1993); State of Indiana v. Thomas, 642 N.E.2d 240 (Ind. App. 1995); and United States v. Nerber, 222 F.3d 597 (9th Cir. 2000). The defendants' attempt to justify their actions based upon the completely different facts in Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71 (1979) is misleading at best.

Moreover, there is plainly a triable issue as to whether "any of the defendants saw any private activity engaged in by Nelson." Appellants' Brief at p. 35. Once again, the defendants attempt to turn the summary judgment standard on its head by ignoring the facts in the record that are favorable to the plaintiff. Given that (a) the defendants have admitted that the secret videotaping of Ms. Nelson's workplace ran twenty-four hours a day, seven days a week, during June - August, 1995, (b) Ms. Nelson has testified that she regularly changed her clothes and

applied sunburn medication during that period of time, (c) her supervisor, defendant Young, knew that she sometimes changed her clothes at her workplace both before and after regular business hours, (d) at least five persons at the college had possession of those videotapes at various times, and (e) the defendants destroyed all but two of the secretly recorded videotapes by re-using them, it is a reasonable inference (and indeed, highly probable) that Ms. Nelson's private activities of changing her clothes and applying sunburn medication to her bare chest were both recorded and observed by one or more of the individual defendants (*see* App. II, p. 9, ¶¶ 21, 24, 26, 34, 35, 36, 40 and 41; App. I, p. 125, ¶¶ 21 and 22). Other than a bare denial, the defendants have not provided any evidence to the contrary. The defendants further argument that videotapes showing Ms. Nelson changing into or out of her clothes or applying sunburn medication to her bare chest does not amount to the gathering of "facts of a private nature" about her (*see* Appellants' Brief at pp. 34-35), does not merit a reply.

Furthermore, the defendants' reliance on Dasey v. Anderson, 304 F.3d 148 (1st Cir. 2002) to claim that no

facts of a private nature about Ms. Nelson were disseminated or otherwise published is completely misplaced. In the first place, the Dasey court found that the videotape of the plaintiff smoking marijuana in the company of others was "hardly [a] 'private'" activity (id. at 154), and it certainly is not comparable to the solitary private activities engaged in by Ms. Nelson which were caught on videotape. Secondly, it was established in Bratt v. International Business Machs. Corp., 392 Mass. 508, 519 (1984), that disclosure of private facts about an employee among other employees in the same corporation can constitute sufficient publication for liability under the Massachusetts Privacy Act, G. L. c. 214, § 1B, which is plainly what occurred in Ms. Nelson's case. In addition to the videotapes being seen by the three college police officers (defendants Pray, Fuller and O'Connell, *see* App. I, p. 125, ¶ 24; App. II, p. 9, ¶¶ 21 and 24), defendant Young had direct control of the videotaping and of changing the tapes for a period of time, and defendant Cahill (the vice-president of the college) reported to defendant Harrington (the president of the college) as to what was on the videotapes, which he therefor had to have viewed (*see*

App. I, p. 125, ¶ 22; App. II, p. 9, ¶¶ 21 and 24). It is a reasonable inference that, in addition to the admitted viewing of some of the videotapes by Fuller, O'Connell and Pray, defendants Young and Cahill also viewed one or more of the secretly made videotapes of Ms. Nelson.

In ruling on the defendants' motion for summary judgment, the lower court was required to assume that all of the facts for which the plaintiff has produced some admissible evidence were true and to make all logically permissible inferences in favor of Ms. Nelson, as the non-moving party. Willitts v. Roman Catholic Archbishop of Boston,411 Mass. 202, 203 (1991); Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982). At worst, the lower court was required to recognize that there were material facts in dispute as to whether or not Ms. Nelson had an objectively reasonable expectation of privacy in her workplace, and whether or not the individual defendants acted reasonably in continuing to videotape Ms. Nelson over a period of several months after they knew that they were videotaping her private activities as detailed above. These disputed facts precluded the lower court from granting summary judgment to the individual

defendants on the plaintiff's claim for invasion of privacy.

II. Common Law Immunity Is Not Available To The Individual Defendants Because They Acted In Bad Faith In Continuing The Prolonged Secret Videotaping Of The Plaintiff's Private Activities At Her Workplace.

The individual defendants are not entitled to common law immunity under Gildea v. Ellershaw, 363 Mass. 800, 820 (1973) because they acted in bad faith in continuing the prolonged secret videotaping of Gail Nelson's private activities at her workplace for several months. *See* Breault v. Chairman of the Bd. of Fire Comm'rs. of Springfield, 401 Mass. 26, 34 (1987)(even if a defendant engages in a discretionary act, immunity is unwarranted if, based upon the plaintiff's allegations and evidence, the defendant could be found to have acted in bad faith or with malice).[2] The defendants have admitted that, after having the hidden camera secretly videotaping twenty-four hours a day for thirty days in June-July, 1995, to try and catch unauthorized after-hours entries into Ms. Nelson's workplace, they had not seen any such unauthorized activity (*see* App. I, p. 125, ¶¶ 20 and

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2 The plaintiff does not concede that the individual defendants are entitled to common law immunity on the theory that their acts were discretionary and relies on her argument in her initial brief (at pp. 38-49) concerning that issue.

21).[3] The defendants have also admitted that, although the college police "officers thought that the investigation was not going anywhere," they decided, at the specific urging of defendant Young, to continue the secret videotaping of Ms. Nelson's workplace for at least another month (*see* App. I, p. 125, ¶¶ 20 and 21). Based upon the facts cited on pages 5 - 6, *supra*, it is highly probable that this decision to continue the secret videotaping of Ms. Nelson's workplace was made after the private activities of Ms. Nelson had already been recorded and observed by one or more of the individual defendants.

This decision to continue this intentional invasion of Ms. Nelson's right to privacy is evidence of bad faith on the part of at least defendants Pray, O'Connell, Fuller (the college police officers) and Young (Ms. Nelson's direct supervisor). *See* Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 416-17 (1937)("bad faith" includes a "dishonest purpose or moral obliquity," a "conscious doing of wrong," or a "breach of a known duty through some motive of

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3 Indeed, the secret videotaping in Ms. Nelson's workplace, which may have lasted for a period of more than four months, never revealed any unauthorized or illegal activity of any kind by Ms. Nelson (*see* App. II, p. 9, ¶¶ 22 and 47).

interest or ill will."). On summary judgment, the facts must be viewed in the light most favorable to Ms. Nelson "to determine whether bad faith can reasonably be inferred from any of the evidence." International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 847 (1983), and contrary inferences drawn by the trial judge are not entitled to any weight on appeal. Simon v. Weymouth Agric. & Indus. Soc'y, 389 Mass. 146, 148 (1983).

The individual defendants, after reviewing a month of secretly made videotapes, knew that no illegal or unauthorized activity was taking place in Ms. Nelson's workplace, and that Ms. Nelson engaged in some private and personal conduct at appropriate times and with appropriate steps taken to safeguard her privacy that was being captured on the videotapes. Despite this knowledge, the defendants made the decision to continue the secret videotaping for at least another month. A jury could make a reasonable inference that this decision was a "conscious doing of wrong" or a "breach of a known duty," which amounts to bad faith, thus eliminating the shield of common law immunity from defendants Pray, Fuller, O'Connell and Young for their intentional acts which violated Ms.

Nelson's right to privacy under G. L. c. 214, § 1B.

III. The Doctrine Of Common Law Immunity For Governmental Employees, As Delineated In Gildea v. Ellershaw, 363 Mass. 800 (1973), Is Fundamentally Incompatible With The Massachusetts Tort Claims Act, G. L. C. 258.

If the common law immunity created by Gildea v. Ellershaw, 363 Mass. 800, 820 (1973),[4] eleven years before the passage of the MTCA, is permitted to stand, under the facts of this case, the citizens of Massachusetts will be faced with the unjustifiable situation of government agencies being able to *intentionally* violate their right to privacy with complete impunity, while being held liable only for unintentional/negligent violations of citizens' privacy rights. A governmental employer would be immunized for the intentional acts of its employees by G. L. c. 258, § 10(c), but not their negligent acts, while its employees who engaged in intentional and

4 The common law immunity doctrine announced in Gildea was stated as follows: "[I]f a public officer, other than a judicial officer, is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that decision, and the decision and acts are within the scope of his duty, authority and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby. This rule is presently limited to public officers acting in good faith, without malice and without corruption." 363 Mass. at 820.

substantial invasions of citizens' privacy would be immunized in almost all instances by the broad pre-MTCA common law definition of immunity contained in Gildea. The broad definition of such a judicially created immunity is incompatible with both the spirit and letter of the MTCA and serves only to substantially undermine the remedial purpose of both the MTCA and the Massachusetts Privacy Act, G. L. c. 214, § 1B. *See* Irwin v. Town of Ware, 392 Mass. 745, 769 (1984)("The Legislature's overriding purpose in enacting the Massachusetts Tort Claims Act was to eradicate the 'logically indefensible' doctrine of sovereign immunity.").

The enactment of the Massachusetts Torts Claim Act ("MTCA")in 1984 was meant to serve as a general abrogation of the patchwork of common law immunities for governmental employers and employees. *See* Rogers v. Metropolitan Dist. Com'n, 18 Mass. App. Ct. 337, 338-339 (1984)(the primary purpose of the MTCA was to abolish "sovereign immunity and the crazy quilt of exceptions to sovereign immunity [citations omitted] which courts have stitched together."). The MTCA was enacted

to institute "a rational scheme of

> governmental liability that is consistent with accepted tort principles and the reasonable expectations of the citizenry with respect to its government." Whitney v. Worcester, 373 Mass. 208, 215 (1977). The statutory scheme purports to broaden the range of tort claims beyond the numerous judicial and statutory exceptions earlier created to pierce the armor of immunity. *See* Morash & Sons v. Commonwealth, 363 Mass. 612, 619-623 (1973).

Gallant v. City of Worcester, 383 Mass. 707, 711 (1981). In order to accomplish these purposes, the MTCA included a general construction clause repealing all law that was inconsistent with the new statute:

> The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof but shall not be construed to supersede or repeal section eighteen of chapter eighty-one and sections fifteen to twenty-five, inclusive, of chapter eighty-four of the General Laws. *Any other provision of law inconsistent with any other provisions of this chapter shall not apply*.

Section 18 of St. 1978, c. 512 (emphasis added). This clause served as an express general repealer of all inconsistent law (*see* Rogers, 18 Mass. App. Ct. at 338), and should be interpreted, consistent with the recognized purposes of the MTCA, to have abrogated the common law doctrine of immunity for governmental employees stated in Gildea v. Ellershaw, 363 Mass. 800, 820 (1973).

In Breault v. Chairman of the Bd. of Fire Comm'rs. of Springfield, 401 Mass. 26, 35-38 (1987), the court noted that the "common law slate" for the immunity of public employees had been "wiped clean" by the passage of the MTCA, and its specific provisions for the liability of public employees for intentional torts, the indemnification of employees by the Commonwealth for such acts, and a new, narrower exemption from liability for public employers for discretionary acts under G. L. c. 258, § 10(b):

> The Tort Claims Act abrogated the common law rule of sovereign immunity which had theretofore immunized public entities from suit in tort claims arising from the acts or omissions of public employees. *See* G. L. c. 258, § 2. *See also* Morash & Sons v. Commonwealth, 363 Mass. 612 (1973). The Tort Claims Act also absolved public employees from liability for their negligent acts performed within the scope of official duties. G. L. c. 258, § 2. Significantly, however, the Tort Claims Act withheld immunity from public employees (and retained immunity for public entities) where the acts complained of were "intentional," as opposed to negligent, G. L. c. 258, § 10(c)....

Id. at 35.

Given this comprehensive legislative scheme of the MTCA, which specifically addresses the liabilities and immunities available to both public employers and public employees, it serves no rational purpose to

continue to provide one additional judicially developed immunity for public employees (created eleven years before the passage of the MTCA), particularly when that common law immunity directly conflicts with the legislative purpose of the MTCA "to broaden the range of tort claims" allowable against the government. *See* Gallant v. City of Worcester, 383 Mass. at 711.

The MTCA now specifically addresses the issues for which the Gildea court had no legislative guidance back in 1973. With regard to the facts of Ms. Nelson's case, the MTCA makes public employees individually liable when they engage in intentional torts such as invasion of privacy (G. L. c. 258, § 10[c]), but allows their public employer to indemnify them in such circumstances. *See* Breault, 401 Mass. at 35 ("the tort claims act authorized public employers to 'indemnify public employees...in an amount not to exceed one million dollars' where harm is alleged 'by reason of an intentional tort, or by reason of any act or omission which constitutes a violation of the civil rights of any person under any federal or state law.' G. L. c. 258, § 9."). It is both unnecessary and unwise to overlay an outdated common law immunity on

top of this legislative design, as it can only lead to confusion and perverse legal results such as the one sought by the individual defendants in this case. It is neither logical nor just that, as defendants would have this court hold, government agencies and their employees could be completely immune from liability for intentionally violating citizens' right to privacy, while being held liable for negligently doing so.

IV. The Individual Defendants Conduct In Conducting Their Secret Videotaping Of Ms. Nelson Was Intentional Conduct, As Defined By Statute, For Which They Have No Immunity Pursuant To G. L. C. 258.

The plaintiff has asserted claims against the individual defendants for their violations of her right to privacy, an intentional tort specifically listed as such in G. L. c. 258, § 10(c), a section of the MTCA. As argued in the plaintiff's initial brief at pp. 38-39, public employees, such as defendants Young, Pray, Fuller, and O'Connell, are personally liable when they commit such an intentional tort and are not entitled to immunity for their intentional actions. *See* Spring v. Geriatric Authy. of Holyoke, 394 Mass. 274, 286 and n. 9 (1965); Breault v. Chairman of the Bd. of Fire Comm'rs. of Springfield,

401 Mass. 26, 35 (1987); Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 596 (2001).

The individual defendants attempt to escape this liability by trying to re-characterize their intentional invasion of Ms. Nelson's privacy rights as "reckless or wilful" conduct, for which they claim they are immune. The defendants inappropriately seek to rely on the rulings in Forbush v. Lynn, 35 Mass. App. Ct. 696 (1994) and Jackson v. Milton, 41 Mass. App. Ct. 908 (1996), where the court found that "reckless or wilful" conduct was not the same as "intentional" conduct under the MTCA, and therefore a public employer could be held liable, but individual public employees were immune under the provisions of the MTCA, G. L. c. 258, § 2.

In the instant case, however, the defendants seek to shield *both the public employer and the individual employees* from liability to Ms. Nelson for their violations of the Massachusetts Privacy Act, G. L. c. 214, § 1B, by disingenuously using different characterizations of their conduct for different defendants. When referring to the public employer defendants (the Commonwealth, Salem State College and the individual defendants in their official

capacities), the defendants refer to their actions in violation of G. L. c. 214, § 1B, as constituting "intentional acts," for which the public employer defendants cannot be held liable, pursuant to G. L. c. 258, § 10(c)(which immunizes a public employer from liability for the intentional torts of its employees, including specifically invasion of privacy). *See* Appellants' Brief at p. 3, n. 3 and p. 40, n. 15. At the same time, the defendants argue that, with regard to the liability of the individual public employee defendants (Young, Pray, Fuller and O'Connell) their actions in violation of G. L. c. 214, § 1B, should be viewed as "reckless" (and not "intentional") conduct, *which does not fall within the definition of G. L. c. 258, § 10(c).* *See* Appellants' Brief at pp. 40-43. Therefore, the defendants argue, the individual employees are immune from the plaintiff's claim under G. L. c. 214, § 1B, pursuant to G. L. c. 258, § 2 (*see* Appellants' Brief at p. 40), which section of the MTCA would make the public employer liable for the employees' "reckless" conduct, except that the defendants have already argued that the employer is not liable under G. L. c. 258, § 10(c), because the conduct complained of was "intentional."

Under the defendants' argument, the public employers cannot be held liable to Ms. Nelson under the Massachusetts Privacy Act because of their immunity for intentional torts under G. L. c. 258, § 10(c) and the public employees cannot be held liable because of their immunity for "reckless or wilful" conduct under G. L. c. 258, § 2 (*see* Forbush v. Lynn, 35 Mass. App. Ct. 696 [1994]). Such a cynical and disingenuous argument should not be countenanced by this Court.

WHEREFORE, for all of the reasons stated in this reply brief and in the plaintiff's initial brief previously submitted, Ms. Nelson respectfully requests this Court to vacate the trial court's judgment in favor of the defendants and to remand this case for trial in the Superior Court.

Respectfully submitted,
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Certificate of Service

I, Jeffrey M. Feuer, under the pains and penalties of perjury hereby certify that a true copy of the Brief of Appellant Gail Nelson was served upon David R. Kerrigan, Esq., Assistant Attorney General, Government Bureau/Trial Division, Office of the Attorney General, One Ashburton Place, Boston, MA 02108-1598, who represents all the defendants, by first class mail, postage prepaid, on May 10, 2005

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