

PHILIP H. LOWENTHAL

A LAW CORPORATION
OF COUNSEL:
LOWENTHAL & LOWENTHAL

ATTORNEY AT LAW
33 N. MARKET STREET, SUITE 101
WAILUKU, MAUI, HAWAII 96793

MESSAGES: (808) 242-5000
CELL (808)280-6800
PHL@MAUI.NET

June 14, 2019

Moana M. Lutey
Maui County Corporation Counsel
200 S. High Street
Kalana O Maui Bldg 3rd Fl.
Wailuku, Hi 96793

Re: Tommy Russo v. County of Maui, Gary Yabuta, Rusty Lawson, et al.
1:14-cv-00515-JMS-RAT
Tendered pursuant to Rule 408 FRE

Dear Ms. Lutey:

Haleakala Highway is the principal arterial link between Up-Country and the other populous areas of the Island of Maui. Every weekday morning there is a steady stream of vehicles transporting adults and children to work, school, or appointments of every sort. On a Tuesday morning, November 20, 2012, instead of the normal flow, traffic was backed up and at a crawl for almost six miles above the Hana Highway intersection. Maui police had chosen that early morning to station officers on both shoulders and the medial strip with instructions to stop cars suspected of overly dark window tinting, tires extending beyond fenders, or any other technical vehicle violation. This activity threw the wrench in the morning commute. Finally arriving at the scene of the obstruction, Plaintiff Tommy Russo thought the remarkable police behavior that was inconveniencing hundreds of people might be newsworthy. He parked on the shoulder and began to film the police operation.

RECEIVED AT GET MEETING ON 10/15/19
Councilmember Rawlins-Fernandez

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The encounter that ensued between Mr. Russo and police officers was recorded on video and concisely described by the Hawaii Supreme Court:

The video depicts Russo exiting his vehicle and walking towards the cars parked in front of him. The camera pans along Haleakala Highway as Russo narrates that the road is “backed up” with traffic. The camera then focuses on the vehicles parked ahead on the side of the highway, and two uniformed police officers wearing orange and yellow vests are seen walking near one of the vehicles. Russo continues to walk towards these uniformed officers, and one of the officers—subsequently identified as Officer Fairchild—can be heard asking Russo to turn his hazard lights on. Russo replies, “Sure I can do that.” Officer Fairchild then walks back towards the parked vehicles, and Russo appears to begin walking back towards his vehicle.

In the second clip, the recording begins with the camera pointed towards Russo’s parked car. The vehicle’s hazard lights are on. Russo appears to begin walking towards the vehicles parked ahead, where Officer Fairchild and the second uniformed police officer—identified as Officer Lawson—are standing.

In the third and final clip, which appears to be an immediate continuation from the second clip, Russo continues to walk towards the vehicles parked ahead. Russo comes into proximity with the closest vehicle, which appears to be an unmarked police car. Officer Fairchild, who is standing next to this first unmarked vehicle, sees Russo approaching and appears to wave his hand. As Russo comes closer to the officer, the officer again appears to wave his hand to indicate the shoulder of the highway and states to Russo that the police are pulling people over “in this area here.” Russo then questions Officer

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Fairchild as to why the police are pulling people over, to which the officer responds, "Traffic violations." Russo asks Officer Fairchild whether he thinks it is "justifiable to back traffic all the way up to Hali'imaile," and they engage in a brief dialogue regarding the extent of the surrounding traffic. The officer again waves his hand along the highway shoulder and states to Russo, "We're pulling peop—cars over in this area right here okay, so please step off to the side I don't want you to get run over." Russo responds, "Okay."

At this point, Russo appears to begin walking away from Officer Fairchild and towards the second unmarked police vehicle, which is parked immediately behind the car subject to the traffic stop; Officer Lawson can be seen ****142 *186** standing at the driver-side window of the vehicle subject to the stop. As Russo approaches the area parallel to the front passenger-side of the stopped vehicle, Officer Lawson leaves his position at the driverside window and walks around the front of the vehicle towards Russo. The following exchange occurs:

Officer: Excuse me, sir—

Russo: Yes sir?

Officer: Can you stand back there? Can you stand back there? Don't come over here. There's a traffic stop being conducted. Can you stand—can you stand back there?

As the officer asks Russo to "stand back there," he points backwards in the general direction of Officer Fairchild's and Russo's parked vehicles.

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In response to Officer Lawson's request, Russo answers, "Uh—no, I'm [inaudible]." Russo is interrupted by the officer, who states, "You're obstructing a government operation." Russo responds that he is "not obstructing at all" and appears to walk backwards, away from the officer. Again pointing in the general direction of Russo's vehicle, Officer Lawson states, "Don't intervene ... this is a traffic stop ... you need to stand back there."

Russo can then be heard asking, "Where can I stand?" Russo walks a few steps to the right—away from the highway, and towards what appears to be an adjacent field—and asks, "Can I stand here ... this is private property, right?" The officer appears to indicate that Russo cannot stand there, gesturing again in the general direction of Russo's vehicle and stating, "You stand back there, you're on private property." Russo then takes several steps back towards the highway, closer to the officer, and asks, "Can I stand on public property?" At this point, Russo can be heard telling Officer Lawson, "Don't—are you touching me—you're touching me." Officer Lawson then places his right hand on his belt and states, "I'll arrest you for obstructing." Russo repeats that he is "not obstructing anything" and relays that "[he has] got video."

Russo begins walking backwards again, away from the officer and towards Russo's car. Officer Lawson continues to walk towards Russo, repeatedly stating that "there's a traffic stop back here" and asking him to "stand back there." Officer Fairchild then joins Officer Lawson, and both continue to walk towards Russo as he backs away. As he walks backwards, away from the officers, Russo states, "this is more than a traffic stop ... this

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is a circus,” and he repeats that he is not obstructing anything. Officer Lawson responds that he “told [Russo] five times” and states that he will “place [Russo] under arrest” for “obstructing government operations.” Russo then identifies himself by name and relates that he is a member of the media. As he continues to walk backwards and as Officer Lawson continues approaching him, Russo can be heard stating twice, “Don’t touch me, officer.” Officer Lawson then states, “Sir ... sir, you need to comply,” to which Russo responds, “I am complying officer, I am ... I am.”

The camera tilts down towards the ground as a scuffle ensues, at which point the video recording suggests that Russo is placed under arrest. An officer is heard telling Russo, “Stop resisting, stop resisting,” and that the officer was “sorry about this.” Russo replies, “I’m not resisting ... I was walking backwards, just as the video shows, officer.” Russo can then be heard stating, “No, no ... you’re not allowed to take my phone.” At this point, the video footage concludes.

Filming police from a public vantage point is an activity protected by the 1st Amendment of the United States Constitution. This protection is a cornerstone of liberty firmly embedded in the supreme law of our democracy. Government behavior infringing on it must be reasonable, focused and conscribed. Upholding the Constitution is the sworn duty of every government officer. Police officers must be particularly mindful of this duty given their authority and their discretion to exercise it. As much as they may disdain being filmed in the performance of their activities, police officers must put their personal feelings aside and scrupulously protect the videographer in the exercise of his or her constitutional

rights. This takes training, discipline, and some understanding of the primacy of the values that must be protected.

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This case represents a complete failure to uphold the supreme law of the land rationalized in the name of an overreaction to imaginary interference. Constitutional rights are conceptual. They exist only so far as people are willing or able to insist that they be the immutable principles defining the delicate relationship between the government, with its raw physical power, and the individual. When the police ignore constitutional rights out of meanness, ignorance, or negligence those persons in the community who have undertaken the civic responsibility to uphold the Constitution must send a clear, unambiguous, and public message of disapproval. Unlike State authorities¹, the Maui County Department of the Police under the direction of Chief Yabuta and the Department of the Prosecuting Attorney under the direction of Mr. Kim sent the wrong message. The responsibility now rests with the Maui County Council.

In Tommy Russo's case it has been affirmed with finality by the Hawaii Supreme Court that the observation and recording of police activities performed in public is conduct protected by the First Amendment. Further, the Court held as a matter of law that his arrest and detention was without "probable cause", another constitutional violation.

It is too late for a prompt dismissal and apology. For almost 7 years Maui County has used its government resources to pursue the criminal charges against Mr. Russo and to deny his concurrent civil rights claim.

The legal issues in this case are neither arcane nor novel. The principles of the First Amendment and the importance of the freedom of the press are the subject of every elementary school civics class. Furthermore, we all know that ignorance of the law is no excuse.

¹ The Hawaii Legislature passed and the Governor signed into law Act 164 Session Laws 2016, amending §711-1111(d) HRS; State v. Russo, 141 Hawaii 181, 407 P.3d 137 (2017) published opinion.

Now, as Daniel stood before the lions, Mr. Russo, alone, presents himself having stood up for nearly 7 years holding the bold idea of constitutionally required police

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restraint to shield him and the community from police power corrosion. Having finally been vindicated by the Legislature and the Hawaii Supreme Court, he is exhausted by this litigation with our parochial County. Nevertheless, if necessary, on behalf of himself, reporters everywhere, and his fellow members of the community, Mr. Russo will continue his federal civil rights claim with the goal to awaken within the Maui County government the critical importance of imparting to its police force actual respect for the rule of law, including constitutional law.

Mr. Russo is willing to settle his civil claim with the County for \$500,000. This is an amount not merely to reward him for the pain and stress associated with his steadfastness but also to demonstrate the County's acknowledgment of the seriousness of the issues and its commitment to address them.

Thank you for sharing this settlement offer with your client the County Council.

Very truly yours,

Philip H. Lowenthal