

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2007-P-1255

PETER K. FREI,
Plaintiff/Appellant

VS.

PLANNING BOARD OF HOLLAND et al.,
Defendants/Appellees

ON APPEAL FROM A DECISION OF THE
OF THE HAMPDEN SUPERIOR COURT

DEFENDANTS'/APPELLEES' SUR-REPLY

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I. INTRODUCTION

The defendants/appellees (hereinafter, "defendants") submit this sur-reply pursuant to this Court's order of December 14, 2007, allowing defendant's Motion for Leave to File Sur-Reply. See Mass. R. App. P. 16(c). Defendants hereby oppose plaintiff/appellant's (hereinafter, "plaintiff") request for reasonable attorney's fees and double costs.

II. ARGUMENT

A. ATTORNEY'S FEES AND DOUBLE COSTS ARE NOT AVAILABLE TO AN APPELLANT PURSUANT TO M.G.L. c. 211A, § 15 OR MASSACHUSETTS RULE OF APPELLATE PROCEDURE 25.

Neither M.G.L. c. 211A, § 15 nor Massachusetts Rule of Appellate Procedure 25 contemplate an award of damages to an appellant. See M.G.L. c. 211A, § 15; Mass. R. App. P. 25. Plaintiff misapprehends the meaning of the word "exceptions" in M.G.L. c. 211A, § 15, which clearly refers to a bill of exceptions under prior practice rather than an appellee's brief. See M.G.L. c. 211A, § 15; See also, Mass. R. Civ. P. 46; Mass. R. App. P. 1(c). Plaintiff cannot recover attorney's fees and double costs pursuant to M.G.L. c. 211A, § 15 or Massachusetts Rule of Appellate

Procedure 25 in that neither of these provisions authorizes an award to an appellant.

B. DEFENDANTS HAVE NEITHER OBSTRUCTED NOR DEGRADED THE ADMINISTRATION OF JUSTICE IN DEFENDING A FAVORABLE RESULT BELOW.

Plaintiff relies on this Court's "inherent power to punish those who obstruct or degrade the administration of justice." *Avery v. Steele*, 414 Mass. 450, 457 (1993) (internal quotation marks and citation omitted) (appeal frivolous where appellant misrepresented holding of trial court and appellant's position); See Appellant's Reply Brief ("Reply") at p. 4. Defendants responded to plaintiff's main brief as would any other appellee seeking to defend a favorable judgment below. In large part, defendants' brief expands upon and defends the logic utilized by the Superior Court in this matter. The fact that plaintiff's counsel is not persuaded by the reasoning employed by the Superior Court and the defendants herein does not render the defense of this appeal frivolous. See *Allen v. Batchelder*, 17 Mass. App. Ct. 453, 458 (1984).

A grant of reasonable attorney's fees and double costs is always an extraordinary remedy. See *Symmons v. O'Keefe*, 419 Mass. 288, 303 (1994). Defendants

have found no authority wherein this sanction has been visited upon an appellee and submit that such remedy is wholly unwarranted here.

C. PLAINTIFF IMPROPERLY AND WITHOUT SUPPORT ASCRIBES A RETALIATORY MOTIVE TO DEFENDANTS' DEFENSE OF THIS MATTER AND APPARENTLY ASCRIBES IMPROPER CONDUCT TO THE SUPERIOR COURT.

Plaintiff accuses the defendants of engaging in retaliatory conduct and accuses the Superior Court of "abetting" such conduct. Reply at pp. 3-4. There is no evidence in the record to support these serious allegations. It is inconceivable that a municipality's defense of a mandamus action where the relief sought would be inimical to the health, safety and welfare of the municipality's residents and employees could be seen as frivolous, much less retaliatory. Before this Court, defendants merely exercised their legal right to respond to plaintiff's appeal. In so doing defendants acted in good faith and utilized arguments which rest on a well-established body of Massachusetts precedent as well as strong public policy considerations. See *Town of Marion v. Massachusetts Housing Fin. Agency*, 68 Mass. App. Ct. 208, 212(2007).

D. PLAINTIFF IMPROPERLY RAISES THE ISSUE OF SETTLEMENT NEGOTIATIONS BETWEEN THE PARTIES AND IMPLICITLY MISREPRESENTS THEM.

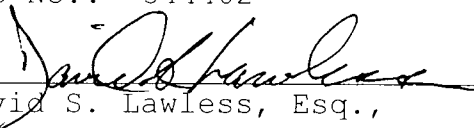
Plaintiff's Reply alleges that defendants should have settled the instant matter following this court's decision in *Kupperstein*. Reply at p. 6. The issue of settlement negotiations is not properly before the Court and there is no record upon which it can rule with regard to such negotiations. Defendants note, however, that plaintiff's reliance on an argument to the effect that defendants should have settled the case is unwarranted and misleading.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, defendants respectfully request that plaintiff's request for request for reasonable attorney's fees and double costs be denied.

THE DEFENDANTS/APPELLEES
PLANNING BOARD OF HOLLAND et al.

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CERTIFICATE OF COMPLIANCE PURSUANT
TO MASS. R. APP. P. 16(k)

The defendants/appellants certify that this brief complies with all the rules of this Court that pertain to the filing of briefs, in compliance with Mass. R. App. P. 16(k).



Nancy Frankel Pelletier, Esq.

CERTIFICATE OF SERVICE

I, Nancy Frankel Pelletier, Esq., hereby certify that on this 3RD day of January, 2008, served a copy of the above upon the parties in the action by mailing, postage prepaid, to counsel, Wendy Sibbison, Esq., 26 Beech Street, Greenfield, MA 01301-2308.

Subscribed under the penalties of perjury.



Nancy Frankel Pelletier, Esq.

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PART III. COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

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TITLE I. COURTS AND JUDICIAL OFFICERS

CHAPTER 211A. APPEALS COURT

Chapter 211A: Section 15. Frivolous appeals or exceptions; costs and interest

Section 15. If, upon the hearing of an appeal or exceptions in any proceeding, it appears that the appeal or exceptions are frivolous, immaterial or intended for delay, the appeals court may, either upon motion of a party or on its own motion, award against the appellant or excepting party double costs from the time when the appeal was taken or the exceptions were allowed, and also interest from the same time at the rate of twelve per cent a year on any amount which has been found due for debt and damages, or which he has been ordered to pay, or for which judgment has been recovered against him, or may award any part of such additional costs and interest.

ADDENDA A

§ RULE 1

Massachusetts Court Rules

RULES OF APPELLATE PROCEDURE

Cite as Mass.R.A.P.

RULE 1 SCOPE OF RULES: DEFINITIONS

RULE 1. SCOPE OF RULES: DEFINITIONS

Effective July 1, 1974

Including Amendments Received Through January 15, 2007

(a) Scope of Rules. These rules govern procedure in appeals to an appellate court.

(b) Rules Not to Affect Jurisdiction. These rules shall not be construed to extend or limit the jurisdiction, as established by law, of the Supreme Judicial Court or the Appeals Court. All proceedings related to any appeal from: (a) a decision of a single Justice of the Supreme Judicial Court, and (b) a decision of any tribunal, appeal from which must by law be brought in the Supreme Judicial Court, shall be had only before the full Supreme Judicial Court or a single justice thereof (unless transferred to the Appeals Court by order of the Supreme Judicial Court). But these rules shall govern such proceedings, except as provided in Supreme Judicial Court Rule 2.21.

(c) Definitions. As used in these rules:

"appeal" means an appeal to an appellate court and supersedes any procedure other than reservation and report by which matters have heretofore been brought before an appellate court for review.

"Appellate Court" means the full Supreme Judicial Court, the full Appeals Court, or a statutory quorum of either, as the case may be, whichever court is exercising statutory jurisdiction over the case at bar.

"child welfare case" means any case that is before a court of competent jurisdiction pursuant to G.L. c. 119, §§ 21-39J; G.L. c. 201, §§ 1, 2, 6, 14; or G.L. c. 210, §§ 1-11.

"clerk" means "clerk," "register," "recorder," and their respective assistants or deputies; "clerk of the appellate division" means the clerk of the trial court from which the action was reported to the appellate division.

"first class mail" means use of first class postage prepaid, whether certified, registered, uncertified, or unregistered. Registration or certification shall not be required unless specifically stated to be necessary.

"lower court" means the single justice, court, appellate division, board, commission, or other body whose decision is the subject of an appeal; for the purpose of Rule 9, the term includes any member of the lower court.

"rescript" means the order, direction, or mandate of the appellate court disposing of the appeal.

"single justice" means a single justice of whichever appellate court is exercising statutory

jurisdiction over the case at bar.

(d) Construction. Words or phrases importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter.

Amended May 15, 1979, effective September 1, 1979; May 29, 1986, effective July 1, 1986; amended effective July 28, 1987; November 15, 1995; amended July 28, 1999, effective September 1, 1999.

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ADDENDA B

§ RULE 46

Massachusetts Court Rules

RULES OF CIVIL PROCEDURE

TITLE VI. TRIALS

RULE 46 EXCEPTIONS UNNECESSARY

RULE 46. EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

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ADDENDA C

§ RULE 25

Massachusetts Court Rules

RULES OF APPELLATE PROCEDURE

Cite as Mass.R.A.P.

RULE 25 DAMAGES FOR DELAY

RULE 25. DAMAGES FOR DELAY

(Applicable to civil cases)

If the appellate court shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee, and such interest on the amount of the judgment as may be allowed by law.

Amended December 22, 1978, effective January 15, 1979; May 15, 1979, effective July 1, 1979.

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ADDENDUM D