

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS.

DISTRICT COURT DEPARTMENT
PALMER DIVISION
CIVIL ACTION NO. 1143CV293

Brian Johnson,)
Plaintiff)
)
v.)
)
Peter Frei,)
Defendant)

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION TO DISMISS**

INTRODUCTION:

Brian Johnson, thereafter plaintiff, is the elected Highway Surveyor of the Town of Holland.

Peter Frei, thereafter defendant, is a resident of the Town of Holland and the owner and operator of an interactive website, “The Holland Blog,” at <http://www.01521.com>.

The Holland Blog, thereafter “the blog,” went online on February 14, 2009, and since that time informs interested parties about what is happening in Town. Readers are able to leave comments and can do so anonymously.

Since the blog’s inception, the defendant, on numerous occasions, exposed plaintiff’s official and private improprieties. Plaintiff’s response has

been a series of harassments, attempts at intimidation, threats, and now this frivolous lawsuit.

Recently the situation escalated, culminating in assault and battery committed by the plaintiff and his associates on February 19, 2011 outside of defendant's house.

Plaintiff, accompanied by at least four of his Highway Department employees, his father-in-law, and friends, decided to go ice-fishing and surround defendant's house on said day, Saturday February 19, 2011, under the pretense of going ice-fishing.

In the late afternoon hours of that day, after copious and obvious drinking and carousing, plaintiff and his associates assaulted and battered defendant as defendant went about his ordinary business after two men trespassed onto defendant's property. Defendant had informed them that he would not tolerate Johnson and his associates trespassing onto defendant's property.

Instead of taking responsibility for his actions, plaintiff denied any wrong doing and claimed that it was actually defendant who harassed him and his associates. Plaintiff did not stop there; he falsely accused the defendant of having made a death threat towards him.¹

¹ Plaintiff had made an attempt before to falsely accuse defendant of a crime. Plaintiff conspired with his neighbor, Alexander Haney, and falsely claimed towards officers of the Holland Police and the State Police, that defendant trespassed onto his property, in an attempt to have defendant arrested. This incident occurred on September 30, 2009, on 61 Stafford Road. The defendant had pulled over to take pictures he needed to illustrate a report on the blog about Brian Johnson's J & G Construction INC., a construction company the plaintiff is running on the side together with some of his employees of the Highway Department, relatives, and friends.

The defendant learned about plaintiff's denial and false accusations when he obtained copies of the official police reports about the incident of February 19, 2011. The report which includes plaintiff's statement, the report Ref: 11-31-OF, is written by Corporal Jeffrey K. Forcier of the Holland Police Department.

In fear for his life and safety, defendant filed a request with this Court for a "Criminal Harassment Prevention Order."

Defendant had recorded the encounter with plaintiff and his associates on February 19, 2011, and its contents were chilling and frightening.

Plaintiff's move to suppress defendant's recording was unsuccessful and this Court allowed the recording to go into evidence.

Defendant played the audio during the second continuance of the hearing on June 10, 2011. Defendant being allowed to play the audio recording of the encounter on the ice that day between plaintiff and defendant exposed the plaintiff, Brian Johnson, as a liar. The audio also allowed defendant to defend himself from plaintiff's false accusations.

In an attempt to further harass, intimidate, and coerce defendant, plaintiff served this civil action just three days later, June 13, claiming unspecified actual and punitive damages pursuant G.L. c. 272, s. 99.

LEGAL ARGUMENT:

Plaintiff's interpretation of G.L. c. 272, s. 99 is misconceived, and here is why:

The Mass. Wiretap Statute, section 99, is one of the most restrictive in the entire Union and unambiguously declares recording of **"any ... oral communication"** as a violation; section 99 C 1, provides in part:

Except as otherwise specifically provided in this section any person who— willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall be fined not more than ten thousand dollars, or imprisoned in the state prison for not more than five years, or imprisoned in a jail or house of correction for not more than two and one half years, or both so fined and given one such imprisonment.

Since the defendant played the recording inside a court room of this Court, there is no denying that the defendant made the audio recording and plaintiff's case seems to be a slam-dunk, Right?

WRONG!

For a plaintiff to be successful with a CIVIL action, a defendant's violation of section 99 C, the section which declares the interception of "any ... oral communication²" to be a violation, is not enough.

For plaintiff to have a valid claim, it is necessary that the defendant's audio-recording violated plaintiff's "personal or property interest or privacy." Section 99 Q, Civil Remedy, provides:

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person—

1. actual damages but not less than liquidated damages computed at the rate of \$100 per day for each day of violation or \$1000, whichever is higher;

² "Oral communication," is defined as "speech," see G.L. c.272, s. 99 B 2.

2. punitive damages; and
3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

The broad spectrum of protection against interception given by the legislature's use of the term, "any ... oral communication," ONLY APPLIES to the elements of section 99 which pertain TO CRIMINAL MATTERS, see G.L. c. 272, s. 99 C.

The elements of section 99 which provide a CIVIL REMEDY are limited in their reach and only apply to "aggrieved persons ... whose personal or property interests or privacy were violated by means of an interception."

The prospect to success of plaintiff's complaint is incident to a violation of plaintiff's personal or property interests or privacy; the mere fact that the defendant recorded plaintiff's speech, or "any ... oral communication," does not satisfy the requirement of s. 99 Q to state a claim.

The plaintiff's complaint rests on the false notion that defendant's recording of plaintiff's speech per se gives rise to a civil action.

If the term "any ... oral communication" in connection with recording would be controlling in civil actions and no violation of "personal or property interests or privacy" would be necessary in the process, plaintiff's civil action would still have to overcome defendant's constitutional rights³.

³ Article XII of the Bill of Rights to the Massachusetts Constitution provides in part:

"And every subject shall have a right to produce all proofs, that may be favorable to him;"

Brian Jonson made a statement to the Police contradicting defendant's testimony and falsely accusing the defendant of having made a death treat

Plaintiff's complaint fails to recognize that not every violation of the wiretap statute will give rise to a civil action; it does not suffice to claim that defendant, "surreptitiously⁴] recorded Johnson and others," and, "[a]s a result of Frei's [defendant's] violation of G.L. c. 272, §99, Johnson has suffered damages." See par. 3 - 7, plaintiff's complaint.

Plaintiff's complaint fails to allege that his personal or property interests or privacy were violated, because they were not violated.

A civil remedy pursuant section 99 Q is only available to, "any aggrieved person ... whose personal or property interest or privacy were violated by means of an interception ..."

But even if plaintiff would allege that his "personal or property interests or privacy" were violated, his complaint would still fail to state a claim upon which relief can be granted.

Plaintiff's speech was NOT in privacy, and he certainly does not have a personal or property interest in assaulting and battering defendant or falsely accuse defendant of a crime.

Case law by the SJC and Appeals Court are consistent with this view.

The Supreme Judicial Court pointed out the difference between protected speech in a criminal action versus protected speech in a civil action in *Commonwealth v. Michael J. Hide* (infra).

Hide claimed that the police had no expectancy of privacy in their speech while he recorded audio during a traffic stop. With his claim, Hide tried to avoid a CRIMINAL conviction.

towards him. Defendant's audio recording proves defendant's testimony to be true, and exposes the plaintiff to be a liar.

⁴ Defendant assumes that Brian Johnson's lawyer meant "surreptitiously.

The SJC pointed out that consideration of such privacy issues would only be warranted in a CIVIL suit for damages under G.L. c. 272, s. 99 Q:

While we recognize that G. L. c. 272, s. 99, was designed to prohibit the use of electronic surveillance devices by private individuals because of the serious threat they pose to the "privacy of all citizens," the plain language of the statute, which is the best indication of the Legislature's ultimate intent, contains nothing that would protect, on the basis of privacy rights, the recording that occurred here [Note 6].

[Note 6, par.2 and 3] Because our own statute broadly prohibits the interception of *speech* (except that which is transmitted over public air waves), see G.L. c. 272, § 99 B 2, whether the police officers possessed privacy interests in their words spoken in the course of performing their public duties, or whether the encounter constituted a routine traffic stop or a custodial interrogation, as argued by the defendant, are issues that we need not address. Consideration of such issues would only be warranted in a civil suit for damages under G.L. c. 272, § 99 Q, which allows actual and punitive damages, as well as attorneys fees, for:

"any aggrieved person whose oral or wire communications were intercepted, disclosed, or used except as permitted or authorized by this section *or whose personal or property interests or privacy were violated* by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications *or who so violates his personal, property or privacy interest ...*" (emphasis added).

Commonwealth v. Michael J. Hide 434 Mass. 594, 600 (2001).

The definition of "aggrieved person" according to s. 99 B 6 further confirms the fact that civil actions are limited to situations whereby an individual's personal or property interest or privacy was invaded in the course of an interception, s. 99 B 6 provides:

The term “aggrieved person” means any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception, or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception.

Plaintiff had no expectancy of privacy out on the ice on February 19, 2011. The lake is a public place; there were at least seven individuals present besides Brian Johnson. The little oral communication that took place was absolutely not private conversation and the audio has proven this fact.

The audio recording is evidence that the commission of a crime by the plaintiff and his associates against the defendant took place.

Furthermore, the audio proves defendant’s innocence and exposes the plaintiff, Brian Johnson, to be a liar, and that he uttered false statements to two police officers (see footnote 3, page 5) in an attempt to criminalize the defendant.

If plaintiff’s complaint would be allowed, the perpetrator would become the victim and be rewarded for his criminal conduct.

Defendant recorded audio for self-protection as he knew from prior incidents that plaintiff would attack and / or attempt to criminalize him; a potentially very hazardous situation knowing that his associates, a disciplined and organized group consisting of subordinate employees, relatives, and friends, would back up his lies, as they have done before, (see footnote 1, page 2).

Hence, the plaintiff failed to state a claim upon which relief can be granted.

Procedural deficiency of plaintiff’s complaint:

Plaintiff has also failed to specify the required amount of the damages sought on the form prescribed therefore by the Administrative Justice of the District Court Department.

The term “shall” unambiguously and unequivocally mandates the plaintiff to state the amount of damages on said form, see Mass. District / Municipal Court Supplemental Rules of Civil Procedure, Rule 102A, which provides:

In all civil actions governed by the District/Municipal Courts Rules of Civil Procedure, a party seeking relief in the form of money damages in a complaint, crossclaim, or counterclaim shall state the amount of said money damages claimed on the form prescribed therefor by the Administrative Justice of the District Court Department or the Administrative Justice of the Boston Municipal Court Department, as the case may be. No clerk-magistrate shall accept for filing any complaint, crossclaim, or counterclaim unless it is accompanied by such form. A copy of the form, including the statement as to damages, shall be served on all other parties together with the complaint, crossclaim, or counterclaim.

Plaintiff’s failure to state the amount of his alleged damages by itself mandates dismissal of this civil action.

RELIEF SOUGHT:

For the forgoing reasons, the defendant respectfully moves this Honorable Court to dismiss plaintiff's complaint in its entirety.

Respectfully submitted

Peter Frei
101 Maybrook Road
Holland, MA 01521
Phone: (413) 245 4660

July 1st, 2011

Peter Frei

CERTIFICATE OF SERVICE:

I hereby certify that a true copy of the above document was served upon the following by hand delivery:

Sapirstein & Sapirstein, P.C.
Tani E. Sapirstein,
1350 Main Street, 12th Floor
Springfield, MA 01103

July 1st, 2011

Peter Frei