

COMMONWEALTH OF MASSACHUSETTS  
DISTRICT COURT DEPARTMENT  
WESTERN DIVISION

Hampden, ss.

Docket No. 201143CV293

BRIAN JOHNSON,  
Plaintiff

v.

PETER FREI,  
Defendant

HEARING HELD ON SEPTEMBER 11, 2013 AT  
SPRINGFIELD DISTRICT COURT

Tani Sapirstein, Esq.,  
Representing the Plaintiff

Henry Rigali, Esq.,  
Representing the Defendant

(Transcript Prepared from Tape)

Roxanne C. Costigan

1 THE CLERK: Brian Johnson v. Peter Frei.

2 MS. SAPIRSTEIN: Good afternoon, Your  
3 Honor.

4 MR. RIGALI: Can we bring some chairs up  
5 here, Judge?

6 THE COURT: Sure. Yes, of course. Is  
7 it going to be that long, you need to sit  
8 down?

9 MR. RIGALI: No, I'm hoping it won't.

10 THE COURT: I'm joking. Let me ask this  
11 question, though, before we start. Are you  
12 arguing today the JNOV motions plus the  
13 attorney's fees? I wasn't sure what was on  
14 today. It's just the JNOV?

15 MS. SAPIRSTEIN: Yeah, because I thought  
16 we had decided earlier that the attorney's  
17 fees are to be more appropriate after the  
18 JNOV was decided.

19 THE COURT: Right, I agree with you, but  
20 they handed me the whole packet so I wasn't  
21 sure, I didn't look through the mark up so I  
22 wasn't sure if you decided to argue them all  
23 at the same time given that you're here.

1 MS. SAPIRSTEIN: No, Your Honor. I'm  
2 not actually prepared to argue the  
3 attorney's fees motion today.

4 THE COURT: Alright. So it would be  
5 just the JNOV. Alright. So then Attorney  
6 Sapirstein, I'll hear from you, your motion.

7 MS. SAPIRSTEIN: Thank you, Your Honor.  
8 We're just looking to, we've moving for  
9 judgment notwithstanding the verdict just on  
10 the Civil Rights Act count.

11 THE COURT: Mm-hmm.

12 MS. SAPIRSTEIN: And as Your Honor  
13 knows, the standard for JNOV is taking into  
14 account all of the evidence in its aspect  
15 most favorable to Mr. Frei in this case and  
16 determine whether without weighing the  
17 credibility of the witnesses or otherwise  
18 considering the weight of the evidence,  
19 whether the jury could return a verdict  
20 reasonably for the plaintiff based on the  
21 evidence as it came in at trial. Now, the  
22 Civil Rights Act in Massachusetts prohibits  
23 interference with a constitutional, either

1 state or federal, constitutional right, but  
2 it has to be by threats, intimidation and  
3 coercion. And there is actually a lot of  
4 case law as to what each of those phrases  
5 means, threats, intimidation and coercion.  
6 I did file a memorandum of law.

7 THE COURT: I read it. Thank you.

8 MS. SAPIRSTEIN: So a threat as the  
9 Supreme Judicial Court says is the  
10 intentional exertion of pressure to make  
11 another fearful or apprehensive of injury or  
12 harm. And intimidation involves putting on  
13 in fear for the purpose of compelling or  
14 deterring conduct. And coercion is the  
15 application to another of force to constrain  
16 him to do against his will something he  
17 would otherwise not have done. And I'm  
18 quoting from the Mancusa case, which is a  
19 Supreme Judicial Court case. The Supreme  
20 Judicial Court has actually considered the  
21 issue of what is a threat, what is coercion  
22 and what's intimidation, quite frankly, more  
23 than a lot of other things that they've

1 considered, and the kinds of things that  
2 constitute threats, intimidation or coercion  
3 is the active domination of another's will.  
4 I'm now quoting from *Currier v. The National*  
5 *Board of Medical Examiners*, which is a 2012  
6 case, SJC case. Where one party deprives  
7 another of rights under a contract, for  
8 example, or makes it impossible due to  
9 sexual harassment to continue employment and  
10 the standard, or economic coercion can also  
11 fall within intimidation, threat and  
12 coercion, but for economic coercion it  
13 really has to be the deprivation somehow of  
14 an economic benefit and there was no  
15 evidence of that at all in this case. And  
16 the standard is an objective standard, it's  
17 not a subjective standard. So you have to  
18 look at it as whether a reasonable person  
19 would find the conduct to be threatening,  
20 intimidating or coercive. And we would  
21 submit that there's actually no evidence of  
22 Mr. Johnson engaging in any threatening or  
23 coercive or intimidating conduct, no

1 evidence that came in at this trial. Quite  
2 frankly, I ordered the transcript back in  
3 April and haven't gotten it yet but I do  
4 remember what evidence came in and the  
5 Supreme Judicial Court is very clear that  
6 this statute is not to be construed as a  
7 vast constitutional tort. The threat really  
8 has to fall within one of the definitions  
9 that the Supreme Judicial Court has already  
10 articulated. And again, examples would be  
11 deprivation of rights due under a contract  
12 would be the Redgrave case, or actually a  
13 case cited by Mr. Rigali, which was the Hull  
14 case. And in the Hull case that set of  
15 facts is completely different than the set  
16 of facts that was presented to this jury.  
17 In the Hull case there was a dispute between  
18 a housing authority and a board of selectmen  
19 about elderly housing and essentially, in a  
20 nutshell, the board of selectmen fired or  
21 forced the resignation of all of the members  
22 of the housing authority that voted in a way  
23 that they didn't want. That's clearly

1 coercive, I think we can all agree that  
2 that's coercive and the Supreme Judicial  
3 Court found that that's coercive. So there  
4 has to be some act in order for there to be  
5 enough evidence to find that Mr. Johnson  
6 violated the Civil Rights Act. There has to  
7 be some act by Mr. Johnson which objectively  
8 viewed would cause a person not to exercise  
9 a constitutional right or which would  
10 deprive that person of the right and that's  
11 the Doe case.

12 THE COURT: Let me just interrupt you,  
13 okay, for a minute, because I did read  
14 everything, I didn't read all the cases yet  
15 but I read your memos. What about, and I'm  
16 going to specifically focus on the  
17 activities at the lake that day. So what  
18 about if he is, I mean, could the jury have  
19 found that he was acting in concert with  
20 others to intimidate Mr. Frei?

21 MS. SAPIRSTEIN: Well, in order for him  
22 to be liable under the Massachusetts Civil  
23 Rights Act for the action of others, and I

1 think I did address this in the brief I  
2 submitted...

3 THE COURT: You did.

4 MS. SAPIRSTEIN: There has to be  
5 evidence that Mr. Johnson either approved  
6 or, well basically approved the conduct that  
7 was going on.

8 THE COURT: Was there not enough?

9 MS. SAPIRSTEIN: There wasn't evidence  
10 that he approved the conduct that was going  
11 on. In fact, what the evidence showed was  
12 that Mr. Johnson never came onto Mr. Frei's  
13 property.

14 THE COURT: Right.

15 MS. SAPIRSTEIN: There were two  
16 trespassers on Mr. Frei's property at one  
17 time during the day and Mr. Frei actually  
18 testified that he asked them to leave and  
19 they nicely said I'm sorry and they left.  
20 In fact, there was no confrontation between  
21 anybody until Mr. Frei came out on the ice  
22 at 3:00 and then started tape recording what  
23 was going on. But there was no testimony,



1 the only witnesses that testified were Mr.  
2 Johnson, Mr. Frei, Dana, whose last name I  
3 forget at the moment, and the police  
4 officer. And no one testified that Mr.,  
5 that they heard Mr. Johnson approve or  
6 encourage or suggest that anybody do  
7 anything. Essentially they were fishing on  
8 public property in a fishing derby and  
9 nobody had any interaction with Mr. Frei at  
10 all until he came on the ice at 3:00 or so  
11 after they had been there most of the day  
12 and started engaging them. So in order for  
13 Mr. Johnson to be found liable for the  
14 conduct of others there has to be something  
15 more affirmative than his just being there.  
16 There was a whole group of people who were  
17 there. And there wasn't any evidence that  
18 he did anything or said anything to anybody  
19 regarding their conduct. So if you're just  
20 focusing on the fishing derby...

21 THE COURT: Well, I don't mean I'm just  
22 focusing on that but that seems to be the  
23 main incident I guess that kind of stuck out

1 as perhaps being intimidating, trying to  
2 intimidate him.

3 MS. SAPIRSTEIN: It has to be more than  
4 intimidating though. The standard has to be  
5 the intimidation, I don't want to bore you  
6 by reading it again, but it has to be, let  
7 me see if I can find that particular quote,  
8 essentially the coercion has to be the  
9 application to another of such force, either  
10 physical or moral, as to constrain him to do  
11 against his will something he would not  
12 otherwise have done.

13 THE COURT: And is that the same  
14 definition as intimidation?

15 MS. SAPIRSTEIN: As intimidation,  
16 intimidation involves putting one in fear  
17 for the purpose of compelling or deterring  
18 conduct.

19 THE COURT: Right.

20 MS. SAPIRSTEIN: I don't think, I know  
21 that Mr. Frei testified that he was in fear.  
22 I think quite frankly the tape of him didn't  
23 sound particularly fearful nor did he ever

1 testify that Mr. Johnson touched him,  
2 threatened to touch him or did anything to  
3 him. In order for Mr. Johnson to be liable  
4 for the conduct of others there has to be  
5 evidence that he authorized or approved and  
6 there is no evidence that he authorized or  
7 approved. So if the jury found Mr. Johnson  
8 liable on that basis there's no evidence  
9 that he did either of those things. Other  
10 than his physical presence, there's no  
11 evidence he did much of anything on the day  
12 of the fishing derby and fish. He never  
13 entered his property, he never engaged him,  
14 he didn't do anything. He was fishing at  
15 the fishing derby.

16 THE COURT: Was there some, I can't  
17 remember this myself, but was there some  
18 evidence that he, once Mr. Frei came out on  
19 the ice that there was some back and forth  
20 between them? I thought there was some  
21 statement on the tape by, was purported to  
22 be by Mr. Johnson.

23 MS. SAPIRSTEIN: There was a statement

1 on the tape that Mr. Johnson I think  
2 identified himself as saying something like,  
3 I actually don't remember exactly what the  
4 one statement was so I don't want to  
5 misquote. I guess I didn't get the  
6 transcript because I didn't tell them what  
7 courtroom that trial was in. However, we  
8 did tell them today so at some point maybe  
9 I'll get the transcript. Hopefully I won't  
10 need it, but there was testimony that there  
11 was one statement. I think Mr. Johnson  
12 actually testified himself that he said one  
13 thing. But that again doesn't rise to the  
14 level of intimidation, coercion or threats.  
15 If somebody comes out to you, confronts you  
16 and you say something back, that's not what  
17 the Courts have found would satisfy that  
18 standard. And the only case that actually  
19 comes even remotely close is that Huffer  
20 case, and in the Huffer case there were  
21 repeated complaints to local authorities,  
22 which actually the Court found wasn't a  
23 problem. But the problem was that the

1 defendant in that case trespassed and  
2 harassed, trespassed on the plaintiff's  
3 property and harassed workmen and other  
4 people. There were neighbors who testified  
5 he came running at the plaintiff with a  
6 rake, so if you took it all together, the  
7 Court found that that was sufficient. But  
8 in this case we don't have anything like  
9 that. We don't even have Mr. Johnson on his  
10 property, and one would query and I think I  
11 raised this in the case in Palmer District  
12 Court, the case that started all this, one  
13 would query that if Mr. Frei was really in  
14 fear why he would come out on the ice and  
15 engage this group of people. That just is  
16 incredible that somebody, if you're really  
17 in fear, and I think I asked him at this  
18 trial as well, you just call the police and  
19 say there's a group of people who are  
20 disturbing the peace, can you do something  
21 about it, but that's not what Mr. Frei did.  
22 He went out and taped them and, you know,  
23 started the engagement, that was clear on

1 the tape. So even though there was some  
2 unpleasantness, Mr. Johnson actually did  
3 nothing and nobody saw Mr. Johnson trip or  
4 touch Mr. Frei. The evidence that we  
5 presented was that Mr. Frei slipped on the  
6 ice and that nobody actually kicked him or  
7 did anything. He couldn't identify anybody  
8 who did anything to him physically. So  
9 yeah, was it unpleasant, it was probably  
10 unpleasant but again, unpleasantness doesn't  
11 rise to the level of a violation of the  
12 Massachusetts Civil Rights Act and if, quite  
13 frankly, if this violates the Massachusetts  
14 Civil Rights Act then almost any neighborly  
15 discord would violate the Massachusetts  
16 Civil Rights Act and the Supreme Judicial  
17 Court was really clear that's neither the  
18 intent nor within the language of the  
19 statute. The statute came about basically  
20 in 1983 based on race relations and people  
21 calling each other racist names. Nothing  
22 like that happened and I know that Mr.  
23 Rigali argued that because the jury found

1           that there was, that Mr. Johnson  
2           intentionally wanted to inflict emotional  
3           distress on Mr. Frei that that's enough, but  
4           that's actually not what the case law says  
5           either. It's got to be threats,  
6           intimidation, coercion. Intentional  
7           infliction of emotional distress is a  
8           completely separate cause of action and Mr.  
9           Frei didn't prevail on that cause of action.  
10          And not every cause of action for  
11          intentional infliction of emotional distress  
12          would sound a cause of action for the  
13          Massachusetts Civil Rights Act. In looking  
14          at Mr. Rigali's opposition, there are no  
15          cases cited other than the ones that were  
16          cited in my brief and even quite frankly the  
17          facts as presented by Mr. Rigali don't rise  
18          to the level of violation of the  
19          Massachusetts Civil Rights Act, including  
20          the Swanset case, the Redgrave case and as I  
21          addressed, the Miller v. Town of Hull case.  
22          Those are very different facts than what we  
23          have in this case. And actually in the

1 Redgrave case that was the contract case,  
2 the Boston Symphony canceled a contract,  
3 that clearly doesn't apply. So unless Your  
4 Honor has any questions, there was no  
5 evidence at all but if you take all of the  
6 evidence that came in at trial, and it was a  
7 long trial, and you look at it in a light  
8 most favorable to Mr. Frei, he still can't  
9 sustain that burden of intimidation, threats  
10 and coercion as that's been defined by the  
11 Supreme Judicial Court. Thank you.

12 THE COURT: Thank you. Attorney Rigali?

13 MR. RIGALI: Your Honor, thank you. As  
14 the Court knows, judgments NOV are to be  
15 granted very sparingly and only if the Court  
16 feels that there was no evidence whatsoever  
17 to support the verdict and really that the  
18 jury failed to exercise honest and  
19 reasonable judgment. Another way of saying  
20 it is that only if reasonable people could  
21 have reached but one conclusion, which was  
22 the Parawalla case from Mass. Appeals Court,  
23 2005 case we cited on our brief, only if



1 that should the NOV occur. I don't want to  
2 go through all the facts, they're in the  
3 brief, we laid them out pretty well, but a  
4 lot of the points that sister counsel makes  
5 really involve weight or credibility  
6 arguments. You know, he didn't sound  
7 frightened to me. Why would he go out on  
8 the ice if he was afraid and so forth. I  
9 mean, I don't want to get into, you know,  
10 rebutting the facts. She left out obviously  
11 critical facts which we addressed in our  
12 brief. But those are credibility issues.  
13 And the issue isn't whether the Judge or  
14 counsel on either side thinks personally  
15 about what the weight of that evidence is.  
16 It is simply if the evidence was there and  
17 clearly it was. Now, this was a discerning  
18 jury, much to my frustration at times. In  
19 the wire tap case we have them on the  
20 special verdict slip saying this was a,  
21 essentially a secret recording without the  
22 consent that was disclosed. They found,  
23 however, no violations of personal or

1 property interest and no violations of  
2 privacy. You know, I mean, we've argued  
3 pretrial these very issues for quite some  
4 months, and I don't know how much research  
5 I've done on that, that's a fairly astute  
6 point in my opinion anyway as an attorney  
7 for them to pick up. The jury apparently  
8 didn't find sufficient evidence to warrant  
9 the assault or the assault and battery and  
10 that's fine. Defamation was clear. But on  
11 the emotional distress claims, these are  
12 significant not because what the ultimate  
13 result was but because the special verdict  
14 slips show the following. Checking off the  
15 boxes now. Did Johnson intend to inflict  
16 emotional distress, yes. Would a reasonable  
17 person have suffered emotional distress,  
18 yes. Was his conduct extreme, yes.  
19 Outrageous, yes. Beyond the bounds of  
20 decency, yes. Was it intolerable in a  
21 civilized society, yes. So, these are  
22 findings that, this is a discerning jury,  
23 okay, and to somehow suggest that, and I

1 don't criticize counsel for raising the  
2 point obviously, but to somehow suggest that  
3 the jury blew it, that they missed it, I  
4 think just is contrary to the facts. The  
5 key point that of course is left out by  
6 counsel is the fact that a big part of the  
7 case involved establishing Mr. Frei's  
8 freedom of expression basis for his claim,  
9 for his civil rights claim. He was a  
10 blogger, he had been a blogger, he had been  
11 critical of Mr. Johnson, Mr. Johnson's other  
12 family members, critical of the Town, et  
13 cetera, and Mr. Johnson had responded to  
14 that through a series of increasingly  
15 worrisome, I'll use that term, acts. He  
16 found that, there were phone calls, irate  
17 phone calls, there were vulgar physical  
18 confrontations that occurred in the clerk's  
19 office if you may recall, and there were  
20 several other things that led up to this.  
21 And then when you get to the day in  
22 question, you have a significant, now again,  
23 the jury was free to agree with counsel and

1 say no, they were just fishing, they were  
2 just fishing, they were free to do that, but  
3 they were also free to find that this man  
4 had a civil right, there was evidence of  
5 that. That he was expressing those rights  
6 and had been directly confronted to knock it  
7 off, that's a fact, that was in the  
8 testimony. You know, I'm not sure what else  
9 that you need. I respect threats,  
10 intimidation and coercion and those  
11 definitions. I thought that the Hoffler v.  
12 Zotos case, which was a Supreme Judicial  
13 Court case in 2006, which we cited in our  
14 brief, addressed that well. The Civil  
15 Rights Statute requires the coercion or the  
16 attempt to do so or the threat or the  
17 attempt to do so. So it's not a fate a  
18 comple. I think that the Court can draw and  
19 I think more importantly the jury could draw  
20 a reasonable inference that Johnson was part  
21 of a group. The evidence was that there  
22 were other, that he was the highway  
23 supervisor, that other members, other

1 employees of that department were present,  
2 that they drank, none of this is evil within  
3 itself by any means, but they drank beer all  
4 day long and urinated all over his property.  
5 They had a sign pointing at his house with a  
6 vulgarity on it. So, and then of course you  
7 have the confrontation, the jury was free to  
8 believe Mr. Frei's account of being knocked  
9 to the ground, of Mr. Johnson coming to him  
10 as if he were to kick him and so on and so  
11 forth. There was evidence of that. Now  
12 whether they felt that evidence was  
13 sufficient for assault or assault and  
14 battery, particularly in light of our  
15 convoluted joint venture instructions that  
16 we're all obligated by, that was a jury  
17 call. But if you look at those verdicts,  
18 particularly the special slips, I think the  
19 jury made the right call. I'll close by  
20 this, Judge, again, it is not for the Court,  
21 the standard is not for the Court to second  
22 guess the jury. The Judge's view of the  
23 weight of the evidence or the credibility of

1 witnesses does not trump the jury verdict.  
2 This is an objective finding, is there some  
3 evidence and that's it. So with that, Your  
4 Honor, I think the motion should be denied.

5 THE COURT: Thank you. Thank you both  
6 very much. Did you want to say something  
7 else? You look like you do.

8 MS. SAPIRSTEIN: Just a couple minutes,  
9 Your Honor, I'm sorry.

10 THE COURT: That's okay.

11 MS. SAPIRSTEIN: Mr. Rigali asked the  
12 rhetorical question of what else do you need  
13 and what else you need is you need something  
14 beyond an intentional infliction of  
15 emotional distress case because if you  
16 didn't then this would just be an  
17 intentional infliction of emotional distress  
18 case. The statute doesn't read intentional  
19 conduct intended to inflict emotional  
20 distress beyond all decency. That's not  
21 what this case, that's not what the civil  
22 rights case is about. What the jury had to  
23 have in order, and it's also not a

1 credibility issue because assuming,  
2 credibility doesn't play into a JNOV motion.

3 THE COURT: Oh, I would have to believe  
4 all of the evidence...

5 MS. SAPIRSTEIN: You have to believe Mr.  
6 Frei's...

7 THE COURT: Yeah.

8 MS. SAPIRSTEIN: Right. So if you  
9 believe Mr. Frei's version of the facts,  
10 then Mr. Johnson didn't do anything that day  
11 that rises to the level, quite frankly,  
12 during any day that rises to the level of a  
13 threat as defined by the Supreme Judicial  
14 Court under this statute, coercion or  
15 intimidation. And although Mr. Frei's  
16 credibility is key, the standard is an  
17 objective person, not Mr. Frei's frame of  
18 mind, but an objective, reasonable person.  
19 So the question Your Honor has to ask  
20 yourself is whether this jury heard any  
21 evidence at all that would make an objective  
22 person fear some conduct by Mr. Johnson, not  
23 by Mr. Johnson's friends, not by Mr.

1 Johnson's father-in-law, not by, unless  
2 there's proof that he authorized or approved  
3 that and there was absolutely no evidence of  
4 that. So in order for them to find on this  
5 count in favor of Mr. Frei and against Mr.  
6 Johnson there had to be evidence, and again,  
7 credibility is not the issue, there had to  
8 be evidence that Mr. Johnson engaged in  
9 threatening, intimidating or coercive  
10 conduct as has been defined more times by  
11 the Supreme Judicial Court than most  
12 statutes, that would put an objective person  
13 in fear of being deprived of their  
14 constitutional rights.

15 THE COURT: Does the statute say, I  
16 haven't read it probably since then, but  
17 does it say attempt to, either threat or  
18 attempt to?

19 MR. RIGALI: Yes.

20 THE COURT: Because as Attorney Rigali  
21 pointed out, I believe Mr. Frei did testify  
22 that he thought Mr. Johnson came at him or  
23 was coming at him with, about to kick him.



1 So if the statute says, obviously I'm going  
2 to read all this in the cases, but if the  
3 statute says attempt to, would that not be  
4 something the jury could have found as an  
5 attempt?

6 MS. SAPIRSTEIN: Well what it says is,  
7 what the statute says, I'm not reading from  
8 the statute itself, I'm reading from a case.

9 THE COURT: Okay.

10 MS. SAPIRSTEIN: That any person whose  
11 exercise or enjoyment of rights secured by  
12 the Constitution or laws of the United  
13 States or the rights secured by the  
14 Constitution or the laws of the Commonwealth  
15 has been interfered with or attempted to be  
16 interfered with by any person, the plaintiff  
17 must prove the defendant used, used threats,  
18 intimidation or coercion to interfere with  
19 or attempt to interfere with rights secured  
20 by the Constitution. But the conduct itself  
21 has to fall within the definitions of  
22 threat, intimidation and coercion.

23 THE COURT: Okay.

1 MS. SAPIRSTEIN: I guess the objective  
2 has to be to either interfere with or  
3 attempt to interfere with the constitutional  
4 rights.

5 THE COURT: Okay.

6 MS. SAPIRSTEIN: But I don't think...

7 THE COURT: So it's not attempt to  
8 threaten or attempt to coerce?

9 MS. SAPIRSTEIN: Exactly. It's attempt  
10 to interfere with by those three methods.  
11 And then again, if you want to boot strap  
12 and go to the third parties, there has to be  
13 something which showed that Mr. Johnson  
14 approved or authorized. I don't think  
15 anybody, I don't think there was any  
16 testimony to that effect at all. So as I  
17 said, credibility is not an issue and we do  
18 know that JNOV is not used often but it used  
19 when in fact the jury does get it wrong and  
20 when they make a ruling that there's no  
21 evidence, to rule in favor of somebody that  
22 there's no evidence to support. The  
23 inferences that they can draw from the

1 evidence in order to uphold this verdict  
2 have to be based on probabilities rather  
3 than possibilities and cannot be the result  
4 of mere speculation and conjecture, and  
5 that's out of the Macavoy Travel Bureau case  
6 which I think we both cited. So that's what  
7 we have and I, and the Huffer case I think  
8 goes way farther than anything Mr. Johnson  
9 did.

10 THE COURT: Okay. I'll obviously read  
11 all of the cases that you cited. Do you  
12 want to say anything else, Attorney Rigali?

13 MR. RIGALI: Just two things, Your  
14 Honor.

15 THE COURT: Alright.

16 MR. RIGALI: The key point of this, I  
17 think, is what the jury heard on the tape  
18 and what this man told the police, how he  
19 out and out lied. I mean, everybody heard  
20 that, and so could they infer as a result of  
21 that, that he was aware of what was going  
22 on. I mean, it's not an unreasonable  
23 inference. And again, counsel keeps on

1 harping well there was no evidence of this,  
2 I haven't had too many trials in which there  
3 was direct evidence of state of mind type  
4 issues, I mean, you know, it's  
5 circumstantial, you do it by inference. So  
6 my suggestion to the Court is that, again,  
7 the jury could reasonably infer not only the  
8 attempt to, the interference or the attempt  
9 to interference or based on this culmination  
10 of conduct over a period of time, the  
11 remoteness of the location, et cetera, et  
12 cetera, the escalating nature of this, what  
13 they said and did to this man's girlfriend,  
14 which is unspeakably vulgar after she, you  
15 know, went out on the ice and they did call  
16 the police and so forth, and the specificity  
17 of the verdict slips I think were very clear  
18 showing that the jury paid attention to the  
19 law which was instructed as exactly as  
20 counsel has argued today. The only other  
21 point I have is I guess where we go from  
22 here. There, you know, obviously I don't  
23 want to second guess this, the Court's

1 decision...

2 THE COURT: Well, assuming that it's  
3 denied, I'll just make that assumption for  
4 now for purposes of scheduling, obviously if  
5 it's allowed then whatever we schedule in  
6 the future won't be necessary or at least  
7 part of it won't be, but you both have  
8 claims for attorney's fees.

9 MR. RIGALI: Right, so there's going to  
10 be, if you allow the motion and Mr. Frei's  
11 civil rights case goes out then we still  
12 have a hearing on the motion for fees for  
13 the wire tap case.

14 THE COURT: Right, so let's mark that up  
15 and do you want to pick a date for that?

16 MR. RIGALI: Well, I wonder how much  
17 time, I know you're out straight, so.

18 THE COURT: Well, let's give thirty days  
19 I would say.

20 MR. RIGALI: That's fine.

21 THE COURT: I'll try to do it before  
22 then but these things are kind of involved,  
23 you know.

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MR. RIGALI: Right, I'm not trying to...

THE COURT: No, that's fine, and I may have it done in a week. It depends on where I'm sitting and how much down time I can have and I tend to look at them at night.

MR. RIGALI: Well, whatever the Court schedules is fine.

THE COURT: No more than thirty days, that's fine. So if you want to pick a hearing date on the motions for attorney's fees thirty days out.

MS. SAPIRSTEIN: Do you know when Your Honor's going to be here?

THE COURT: I don't in October, but I can have myself scheduled here purposely. I'll just let them know ahead of time I need to be here on a certain day. So whatever's convenient.

MR. RIGALI: Monday the 14th, Judge, is Columbus Day. The rest of my week looks good. I don't know how that is for counsel.

MS. SAPIRSTEIN: I'm actually taking some vacation time that week, I haven't done

1 that, but I'll be around the week of the  
2 21st.

3 MR. RIGALI: I'm good that week other  
4 than Wednesday morning.

5 THE COURT: Do you do civil motions I  
6 guess, any afternoon?

7 THE CLERK: Yeah.

8 THE COURT: Is the afternoon better?

9 MR. RIGALI: Two o'clock is great, yeah.

10 THE CLERK: Any day but Thursday then.

11 THE COURT: Okay. October...

12 MR. RIGALI: The 22nd, which would be a  
13 Tuesday, Your Honor?

14 THE COURT: Fine, oh, wait a minute, no,  
15 that is not fine. That afternoon I do have  
16 a medical appointment, I just remembered, so  
17 that's the one day I'm not available.

18 Twenty-first or twenty-fifth?

19 MR. RIGALI: Twenty-fifth is fine.

20 THE COURT: Friday the 25th?

21 MS. SAPIRSTEIN: That's fine.

22 THE COURT: Alright. So that will be  
23 for the motion for attorney's fees.

1           MR. RIGALI: Now, Your Honor, let me  
2 just jot that in here please. You recall  
3 that one of the issues that has come up in  
4 the motions we filed so far was Mr. Frei's  
5 objection to Mr. Johnson's request for  
6 attorney's fees based on the fact that he  
7 doesn't have any attorney's fees, that the  
8 Town of Holland is paying them and we've  
9 raised, you know, serious, what we think are  
10 serious issues, ethical and otherwise about  
11 that. Unless there is to be a stipulation  
12 to that effect, that counsel agrees that  
13 that's the facts, then we'd want to be able  
14 to conduct some discovery to make sure that  
15 that fact is established in the record here.

16           THE COURT: Well, somebody subpoenaed  
17 some records here...

18           MS. SAPIRSTEIN: Right, and I think that  
19 was already done, wasn't it, Mr. Rigali?

20           THE COURT: Have you seen those?

21           MR. RIGALI: If they came, yes, I have  
22 seen those.

23           THE COURT: They came here in April and



1 they, well, I think they're all here,  
2 they've got amounts and names written next  
3 to them so I don't know if that's, I don't  
4 know what that is but you can either  
5 stipulate to it or not, but there's records  
6 here.

7 MR. RIGALI: Okay, alright. I'll talk  
8 with counsel then about whether or not we  
9 need, I assume that the subpoena is self  
10 authenticating that I won't need to bring in  
11 a record keeper to authenticate that they're  
12 bona fide records that came in under a  
13 subpoena.

14 THE COURT: On a motion for attorney's  
15 fees, I mean, I wouldn't think so. You can  
16 argue that but they are signed by, I looked  
17 at them earlier today, yeah, they're signed  
18 by Kristen Laplante, the Clerk, indicating  
19 that on oath they're the records that are  
20 maintained by the office.

21 MR. RIGALI: The only other issue I  
22 wanted to raise was whether or not, I've had  
23 no objection to this, I mean, the Town

1 Counsel for Holland and Attorney Sapirstein  
2 are aware that these records are before the  
3 Court. They don't affect me personally but  
4 I'm not adverse to them being impounded.  
5 They do include information which is  
6 generally considered to be confidential  
7 between counsel and client. I have no  
8 problem so long as the Court sees them that  
9 the public not, but that's up to counsel.

10 MS. SAPIRSTEIN: I have to look at them.  
11 I actually wasn't given the opportunity to  
12 look at them, nor have I seen the subpoena.  
13 I probably won't do it today, I'll come by  
14 the clerk's office sometime.

15 THE COURT: Okay, they're here. I  
16 didn't know they were here either. Like I  
17 said, they came in way back in April. I  
18 didn't know they were here until today, when  
19 I was reading over everything I saw them so  
20 obviously look at them.

21 MR. RIGALI: I'm assuming that counsel  
22 can make arrangements to see those records,  
23 they're a matter of record before the Court.

1 THE COURT: Do you want to file, I mean,  
2 if anyone wants to file a motion to impound  
3 them that's fine.

4 MS. SAPIRSTEIN: I have to also check  
5 with Town Counsel but I haven't seen them  
6 yet.

7 THE COURT: Okay, alright, well, they're  
8 here.

9 MR. RIGALI: Thank you, Your Honor.

10 THE COURT: Alright. So October 25th at  
11 2:00. So we're not going to probably send  
12 out any notices, just remember. Somebody  
13 will contact you though if there's a problem  
14 with that and the case is going to be  
15 handled out of this clerk's office, it's not  
16 going back to Palmer, okay.

17 MR. RIGALI: Thank you, Your Honor.

18 MS. SAPIRSTEIN: Thank you, Your Honor.

19 THE COURT: You're welcome.

20 (HEARING CONCLUDED)  
21

I, Roxanne C. Costigan, Registered Professional Reporter, do hereby certify that the foregoing testimony prepared from designated portions of cassettes furnished by the parties herein is true and accurate to the best of my knowledge and belief.

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Date

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Roxanne C. Costigan