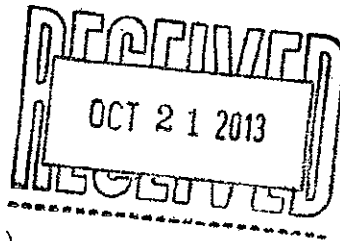


COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS



DISTRICT COURT DEPT.
OF THE TRIAL COURT
PALMER DIVISION
DOCKET NO. 1143 CV 293

BRIAN JOHNSON,
Plaintiff,

vs.

PETER FREI,
Defendant.

ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT

Following a jury trial, a judgment issued against the plaintiff (Johnson) on the defendant's (Frei's) counterclaim (Count VII) for violation of the Massachusetts Civil Rights Law, G.L. c. 12, § 11 I. In answers to special questions the jury found that Johnson interfered with or attempted to interfere with Frei's constitutional rights by threats, intimidation or coercion. The plaintiff has now filed a motion pursuant to Mass. R. Civ. Pro. 50(b) for judgment notwithstanding the verdict on that claim.

APPLICABLE STANDARD OF REVIEW

In considering a motion for judgment notwithstanding the verdict the following language from *Cahaly v. Benistar Prop. Exch.*, 451 Mass. 343, 350 (2008) is instructive:

Because the jury are a pillar of our justice system, nullifying a jury verdict is a matter for the utmost judicial circumspection. The touchstone is reasonableness. We ask whether, construing the evidence most favorably to the plaintiff, and "without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could have returned a verdict for the plaintiff. . . . To be reasonable, the inference [or conclusion] 'must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture.'" (citations omitted). "[We] consider whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn' in favor of the

nonmoving party.” (citations omitted).

MASSACHUSETTS CIVIL RIGHTS ACT

“To establish a claim under the Massachusetts Civil Rights Act (Act), G.L. c. 12, § 11I, [an individual] must prove that (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) has been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by “threats, intimidation or coercion.” *Bally v. Northeastern University*, 403 Mass. 713, 717 (1989). “In the context of the act, a “threat” consists of “the intentional exertion of pressure to make another fearful or apprehensive of injury or harm.” (citation omitted). “Intimidation” involves “putting in fear for the purpose of compelling or deterring conduct.” (citation omitted). “Coercion” is “the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.” (citations omitted).” *Haufler v. Zotos*, 446 Mass. 489, 505 (2006). In determining whether the conduct complained of constitutes threats, intimidation or coercion, a reasonable person standard is applied. See *Planned Parenthood League of Mass., Inc. v. Blake*, 417 Mass. 467, 474-475 (1994).

Taken in the light most favorable to the plaintiff, the evidence regarding the civil rights claim was as follows: Frei operates an interactive blog in the town of Holland. At times, Frei has been highly critical of Johnson, an elected highway surveyor and of Johnson’s father, an elected member of the town board of selectmen. Frei would elicit, or receive unsolicited from citizens, information on certain of Johnson’s activities. Frei would then investigate the information and under certain circumstances would post the results of his investigation on his blog. Oftentimes in his blog Frei would report that Johnson was doing something illegal or shady, e.g., using a town grader to plow his father’s driveway. The jury heard evidence that as the blog reports continued, Johnson, who was obviously upset about Frei’s investigations and postings, called him names, insulted him and called his house on a couple of occasions making insulting remarks. The hostility between the two parties culminated in an incident on February 19, 2011 in front of Frei’s lakeshore home. On that date, Johnson and some friends were ice fishing in a fishing derby run by the town. They set up their camp in front of Frei’s home. They had a large sign

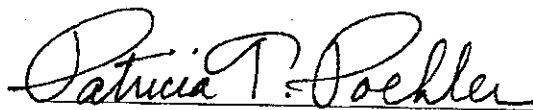
reading "Eat me" facing Frei's home and were drinking beer. When Frei came down to the lake to tell them not to trespass on his property, words were exchanged between the two and Frei testified that Johnson took a swing towards Frei's head with his foot. Johnson did not hit him but ultimately either someone in Johnson's group pushed Frei or he slipped on the ice. The police were called. No one was arrested.

Without reaching the issue of whether the jury could have found threats or coercion, they could have found intimidation. In criticizing Johnson's activities as an elected official, Frei was exercising his First Amendment right to free speech. There was evidence from which the jury could have found that Johnson intimidated or attempted to intimidate Frei by putting Frei in fear for the purpose of deterring him from reporting on Johnson's activities, and further that a reasonable person would have been so intimidated.

ORDER

It is hereby ORDERED that the plaintiff's motion for judgment notwithstanding the verdict is DENIED.

So ordered.



Patricia T. Poehler

Associate Justice of the District Court

Dated: October 16, 2013