

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS.

DISTRICT COURT DEPARTMENT
PALMER DIVISION
CIVIL ACTION NO. 1143CV293

Brian Johnson,)	MEMORANDUM OF LAW
Plaintiff)	IN SUPPORT OF
v.)	DEFENDANT'S
Peter Frei,)	MOTION FOR LEAVE
Defendant)	TO REOPEN DISCOVERY

INTRODUCTION:

Frei, the defendant in this action, was maintaining an interactive blog at the time, the Holland Blog at www.01521.com, to expose rampant corruption in town government; Johnson, the plaintiff, was and still is the elected Highway Surveyor in town.

Just days before the incident of February 19, 2011, Frei exposed Johnson for knowingly hiring his neighbor and friend to operate heavy equipment despite the fact that the individual had not the required license to operate heavy equipment. An ensuing investigation by the Holland Police confirmed the fact that his neighbor, Alexander Haney, failed to have the needed license issued by the Department of Public Safety. Parents of children attending Holland Elementary School were alarmed that Haney operated a

21,585 lb Front-Loader to clear snow, of all the places, around the Elementary School.

At the time, January and February 2011, more than 400 individuals read the Holland Blog on a daily basis, see exhibit 2.

Johnson, under public scrutiny, harassed and intimidated Frei by ice-fishing, of all the places, in front of Frei's house.

The Appeals Court noted in its rescript, "In the confrontations that precipitated Frei's surreptitious recording, Johnson and several of his friends set up ice fishing holes a mere few feet away from Frei's house on Lake Hamilton. The group displayed a sign pointed at Frei's home that read 'EAT ME.' The men were loud and boisterous. One individual even urinated on Frei's property. This behavior persisted until the confrontation that culminated with Frei's recording Johnson."

Thereafter, Frei was forced to use his recording to prove that Johnson was lying to the police. In his attempt to criminalize Frei, Johnson stated towards the police that Frei came out on the ice and threatened to kill him and that he would be in fear for his life because of it.

Johnson successfully accused another outspoken resident of Holland of the same crime before, docket # 0743CR00143, Palmer District Court.

The jury found that the sum of Johnson's actions violated Frei's civil rights.

From the outset, Frei was puzzled why Johnson would go through the expense of litigating such a frivolous suit; Frei was not afraid of the fee-reversal provision the civil remedy of the wiretap statute provides, as Frei's recording in public did not violate Johnson's privacy. The Jury made the explicit finding that none of Johnson's personal, property, or privacy interests were violated. The jury however was instructed that Frei's recording was a "violation" of the wiretap statute, more specific, a "violation" of G.L. c.272, s.99Q, the civil remedy. When a Super Lawyer like Tani Sapirstein who is representing Johnson in this matter as special appointed town counsel interprets the law (a surreptitious recording made in public is a violation of the civil remedy) a pro se's interpretation (a civil remedy does not create substantive law and can therefore not be violated, Johnson needs to claims violation of his privacy) is being discarded, even when supported with caselaw to the point. Frei does understand that this Court has no longer jurisdiction over this issue at this time, and that Johnson's lawyer succeeded misleading every single judge so far, a total of eight.

Frei, from the outset, was not only puzzled why Johnson would file his frivolous lawsuit, Frei was also certain that Johnson's action were a continuous effort

to intimidate and to put Frei in his place; and, if possible, to ruin Frei financially.

As a matter of fact, the perpetrator, Johnson, has not paid a dime so far, and the victim, Frei, has spent \$63.500 in attorneys fees, and also spent countless hours writing briefs to the Appellate Division, Appeals Court, and Supreme Judicial Court.

DISCOVERY WAS NOT POSSIBLE BEFORE TRIAL AS EVIDENCE SUBJECT TO THIS MOTION ONLY BECAME KNOWN AFTER TRIAL:

Only after trial one of the members of the Board of Selectmen at the time, Michael Kennedy, confided in Frei that he was mislead by others and reluctantly went along secretly paying for Johnson's private suit against Frei with taxpayer's money.

An even more disturbing revelation came to light 21 months later, after a lengthy investigation by the State Ethics Commission. A former resident of the town familiar with the incident of February 19, 2011, had filed an ethics complaint based on Michael Kennedy's admission.

On November 30, 2015, 21 months after trial, the State Ethics Commission concluded its investigation. The State Ethics Commission made the finding in its Public Education Letter ("PEL"), that Johnson violated the conflict of interest law, G.L. c. 268A, by accepting funds totaling \$23,023.

But more important to Frei's case, the State Ethics Commission revealed in its findings the true purpose of Johnson's complaint against Frei; according to the State Ethics Commission, Johnson sued Frei to **"deter him" and "discourage him"** from political activism and **deny him his constitutional rights to petition the government**, see PEL issued by the State Ethics Commission page 2 and 4.

The State Ethics Commission further states, "[i]t is a violation of the conflict of interest law, and a misuse of one's public position, to use public resources to fund a private lawsuit to deter future lawsuits and to solicit or receive such funding because of one's position," page 2 PEL; and, furthermore, "Town resources may not be used to fund private lawsuits in an effort to interfere with the exercise of citizens rights." Page 4 PEL.

The PEL issued by the State Ethics Commission mirrors Johnson's unpremeditated honest testimony and sworn statements to the Commission, unwittingly demonstrating his sense of privilege and entitlement.

It is all Frei needs to make his case and prove his abuse of process counter-claim.

THE APPEALS COURT'S REMAND OF FREI'S COUNTERCLAIM FOR ABUSE OF PROCESS NOT ONLY JUSTIFIES REOPENING DISCOVERY, IT CALLS FOR SUCH ACTION BY THIS COURT.

It is imperative to Frei's case to reopen discovery so he has an opportunity to obtain the record established

after trial by the State Ethics Commission in this matter, and/or to depose Johnson.

It would be an unnecessary and undo burden on Frei to depose Johnson and press out of him what is already known and in the public domain. Instead, Frei would rather rely on the State Ethics Commission's record for his summary judgment motion which Frei intends to file – with leave of this Court – hence, avoid another costly trial. Frei also needs to be able to use said record to impeach Johnson during trial if need be.

There is no sensible rationale which would preclude reliance on sworn statements and testimony faithfully recorded in the course of said investigation conducted by the State Ethics Commission. All of the hallmarks of reliability attend upon the record of this independent state agency which follows the strict procedures prescribed by G.L. c.30A, s.12, in creating such record.

Pursuant to Mass. R. Civ. P. Rule 26 and G.L. c.30A, s.11(6), such record of an adjudicatory proceeding can be requested by parties.

As a legal principle, Johnson can not deny his statements and testimony he made under oath to the State Ethics Commission in this matter and now take another position out of convenience; the Supreme Court opined:

It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds

in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position,

Davis v. Wakelee, 156 U.S. 680, at 689 (1895).

As to the question whether the PEL published by the State Ethics Commission is part of the record, the answer is YES!

On appeal at the Appeals Court of the Commonwealth, Frei filed his Motion for leave to file his supplemental appendix (paper #12); Johnson opposed Frei's Motion, but Frei's Motion was granted (entry 5/16/2018).

Thereafter, Johnson made another attempt to exclude the PEL and filed his Motion to strike the PEL (paper #21). Frei opposed Johnson's Motion and Johnson's Motion was denied by the Appeals Court of the Commonwealth (entry 5/16/2018).

There is no question that the PEL, and with it, the record as established by the State Ethics Commission, are part of the record and/or available through discovery.

Not to allow reopening discovery would be prejudicial and a denial of justice to Frei.

This case has been a colossal waste of judicial resources on every level; Johnson initiated this frivolous action in this Court (docket count at 75 at this time in this Court), was the one who filed the appeal in the Appellate Division of the District Court (docket count not known), was the one who filed an appeal in the Appeals Court of the Commonwealth (docket count 32), was the one

who filed first for rehearing, and filed first for FAR to the Supreme Court. And all this despite the fact that he never had a case.

The rules allow reopening discovery, judges have great discretion in discovery matters.

Frei has no other way to prepare for trial as to conduct discovery on the evidence mentioned in the PEL. To deny reopening discovery would create an undue hardship to Frei. Frei has no other means to get Johnson's unpremeditated honest testimony, the testimony he gave to the State Ethics Commission, as to get the record of said Commission.

"The conduct and scope of discovery is within the sound discretion of the judge." *Solemine vs. B. Grauel & Co.*, 399 Mass. 790 at 799 (1987).

The record established by the State Ethics Commission is within the scope of discovery:

Mass. R. Civ. P. Rule 26(b)(1) provides:

In General . Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any

discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

WHEREFORE, Frei respectfully prays your honor, to grant his Motion.

Respectfully written and submitted by the Defendant,

Peter Frei
101 Maybrook Road
Holland, MA 01521
phone (413) 245 4660
January 25th, 2019,

Peter Frei

CERTIFICATE OF SERVICE: I hereby certify that a true copy of the above document was served upon the following by First Class Mail, postage prepaid:
Tani E. Sapirstein,
Sapirstein & Sapirstein, P.C.
1331 Main Street, 2nd Floor
Springfield, MA 01103

January 25th, 2019,

Peter Frei