COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

District Court Department
Springfield Division
Civil Action No.: 1143CV293

BRIAN JOHNSON	)
	)
PLAINTIFF/DEFENDANT-IN-COUNTERCLAIM	)
v.	)
	)
PETER FREI	)
	)
DEFENDANT/PLAINTIFF-IN-COUNTERCLAIM	)

PLAINTIFF/COUNTERCLAIM DEFENDANT'S PROPOSED JURY INSTRUCTIONS

General Instructions

It is your duty to find the facts based solely on the evidence and to render a true and just verdict based on the facts and the law. I will now tell you what the law is, and it is your duty to follow the law as I give it to you, regardless of whether you personally agree with the law or not. You must follow all of my instructions; you may not follow some and ignore others.

It is your duty to find the facts in this case. In determining the facts, you must rely solely on the evidence admitted in this case. What is that evidence? It falls into three categories:

first, it is the sworn testimony of the witnesses, whether given during direct or cross examination;

second, it is the exhibits that were admitted into evidence during the trial;

third, it is any stipulations or agreements that the parties have entered into.

Let me also tell you what is not evidence.

The opening statements and closing arguments of counsel or Mr. Frei are not evidence, nor are any other arguments you heard them make during the course of the trial.

Questions asked of the witnesses are not evidence. Anything you may have seen or heard outside the courtroom is not evidence. If you did not hear it in the courtroom during the trial, it is not evidence and may not be considered. Objections to questions are not evidence. Let me speak for a moment about objections. It is an attorney's job to object to a question when they believe that the question is improper under the rules of evidence. You should not hold it against any attorney or any party that he or she has objected to any question. Nor should you be influenced in any way by my ruling on any objection.

Now that we have examined what evidence is, let me move to how you should evaluate that evidence.

You must determine what weight, what importance, to give to the different evidence before you. The law does not give oral testimony any greater or lesser weight that documentary evidence. You may find that the credible testimony of a particular witness is very important in reaching a factual finding, or you may find that a document admitted into evidence is more important. The weight of the evidence need not depend on the sheer volume of evidence, or the number of witnesses or exhibits. You might find that a few witnesses testifying to a particular fact are more believable than a larger number of witnesses testifying to the opposite, or you may not. It is up to you, using your intelligence, life experience, and common sense, to evaluate the evidence.

Just as I have told you what is not evidence, I shall also tell you how you shall not evaluate the evidence. You shall not be swayed by prejudice, bias, sympathy, or anger. Nor shall you be influenced by any personal likes or dislikes you have come to feel toward any party or their attorney. In this courtroom, every party is equal, and is entitled to a fair and impartial verdict in accordance with the evidence and the law. Do not consider anything I have done – in ruling on motions or objections, speaking with counsel or Mr. Frei, or instructing you on the law – as reflecting any opinion as to how you should decide this case. If you believe I have an opinion about the facts of this case, you must disregard it. Guesswork, conjecture, and assumptions must play no role in your decision; your decision must rest squarely on the evidence.

There are two types of evidence which you may use to determine the facts of a case: direct evidence and circumstantial evidence. Direct evidence is given when a witness testifies directly about the fact that is to be proved, based on what the witness claims to have seen or heard or felt with his or her own senses. Circumstantial evidence is given when a witness offers evidence of other facts that invite a reasonable inference about the fact that is to be proved. Drawing an inference is something you do every day; you make little steps in reasoning, in which you take some known information, apply your intelligence, life experience, and common sense to it, and then draw a conclusion. You may draw an inference even if it is not necessary or inescapable from the circumstantial evidence, so long as it is reasonably drawn from that evidence.

The law allows both direct and circumstantial evidence, and does not prefer one over the other – both types of evidence, if credible, can form the basis for your verdict. With regard to circumstantial evidence, however, you must keep in mind that the inferences you draw must be reasonable and warranted by the evidence.

As the judges of the facts, you are the sole judges of the credibility of witnesses. If there are differences in the testimony of different witnesses, you must resolve those differences, and find where the truth lies. You may believe everything a witness says,

or part of it, or none of it. In evaluating the credibility of a witness and deciding how much importance to give it, you may consider the following issues:

Is the witness trying to tell the truth or is the witness lying, bending the truth, or exaggerating the truth? Often it may not be what a witness says, but how he or she says it that might give you a clue whether to accept his or her version of events as believable. You may consider a witness' appearance and demeanor on the witness stand, frankness or lack of frankness in testifying, whether the testimony is reasonable or unreasonable, probable or improbable. You may also consider any motive the witness may have to testify in a certain way, whether the witness displays any bias, or whether the witness has any interest or stake in the outcome of the case. You may take into account how good an opportunity the witness had to observe the fact about which the witness has testified, the likelihood that the witness accurately understood what he or she saw, and the quality of the witness' memory.

Did the witness prior to the trial make any statement or act in a way that was inconsistent with the testimony the witness gave on the witness stand? If so, you may consider whether the inconsistency was significant or not in the context of this case, and whether it reflects an intentional falsehood, an innocent difference of memory, or a correction or a past misstatement. You are not required to believe or disbelieve a witness because his or her testimony has or has not been impeached or contradicted. It is for you and you alone to decide the believability of each witness and to give the testimony of each witness such weight, if any, that you believe the testimony deserves.

Exhibits

You will have all the exhibits that are in evidence with you in the jury room. You shall consider exhibit evidence in the same way as witness testimony; you must determine whether you believe what is contained or reflected in the exhibit and, if so, what weight it deserves.

Burden of Proof and Preponderance of Evidence

The plaintiff bears the burden of proving all the elements of the claims against the defendant by a preponderance of the evidence.

You have probably heard about the standard of proof beyond a reasonable doubt. This standard applies only in criminal cases, not in civil cases like this one. The standard here is a fair preponderance of the evidence. To establish a fair preponderance of the evidence means simply to prove that something is more likely so than not so, more likely true than not true. The plaintiff must persuade you that it is more probable than not that each essential element of the plaintiff's claim is true. If you find that it is more likely or equally likely that an essential element of the plaintiff's claim is not true, the plaintiff has failed to sustain the burden of proof.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. A preponderance of the evidence is not necessarily determined by the number of witnesses who have testified for the plaintiff or for the defendant. It is a question of the weight of the evidence – its quality, not necessarily its quantity. It is for you alone to decide what, if any, weight to give the testimony of each witness and to each exhibit in reaching your verdict in this case.

Abuse of Process

Peter Frei has made a claim for abuse of process. To recover, Mr. Frei must prove to you by a preponderance of the evidence that Brian Johnson:

1. used legal process;

2. for an ulterior or illegitimate purpose;

3. resulting in damage to Mr. Frei.[1]

"Process" refers to papers issued by a court to bring a party or property within the jurisdiction of the court.[2]

Mr. Frei must show that the process was used to accomplish some ulterior purpose for which the process was not designed or intended, or that was not a

---

[1] *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713 (2011); *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 636 (2010); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775-76 (1986); *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387 (1975); *American Mgmt. Servs., Inc. v. George S. May Int'l Co.*, 933 F. Supp. 64 (D. Mass. 1996); *Milford Power Ltd. P'ship By Milford Power Assocs., Inc. v. New England Power Co.*, 918 F. Supp. 471 (D. Mass. 1996); *General Elec. Co. v. Lyon*, 894 F. Supp. 544 (D. Mass. 1995); *see also Kobayashi v. Orion Ventures, Inc.*, 42 Mass. App. Ct. 492, 504 (1997); *Gutierrez v. Mass. Bay Transp. Auth.*, 437 Mass. 396, 407 (2002); *Ladd v. Polidoro*, 424 Mass. 196, 198-99 (1997); *North Shore Pharmacy Servs., Inc. v. Breslin Assocs. Consulting LLC*, 491 F. Supp. 2d 111, 130 (D. Mass. 2007); *Davidson v. Cao*, 211 F. Supp. 2d 264, 287 (D. Mass. 2002); *Hartford v. Hartford*, 60 Mass. App. Ct. 446, 454 (2004).

[2] *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 390 (1975); *Silvia v. Building Inspector of W. Bridgewater*, 35 Mass. App. Ct. 451 (1993); *Ferraro v. First Safety Fund Nat'l Bank*, 11 Mass. App. Ct. 928 (1981) (rescript); *Chemawa Country Golf, Inc. v. Wnuk*, 9 Mass. App. Ct. 506 (1980).

legitimate purpose for the particular process employed.[3] If the stated objective of the process was the actual objective, then there is no abuse of process.[4]

It is not enough for Mr. Frei to show that Mr. Johnson used the process to vex, annoy, or harass Mr. Frei. Such a motive does not alone suffice to show ulterior purpose. Rather, the ulterior purpose must be to gain some collateral advantage.[5] Abuse of process is a form of coercion to obtain a collateral advantage not properly involved in the proceeding itself, such as the surrender of property or the payment of money.[6]

The fact that a party will have to spend time and money to defend a legal action does not prove an ulterior purpose for filing the legal action.[7]

Mere commencement of litigation to enforce a claim that the person commencing the litigation knows or reasonably should have known to be groundless does not constitute legal abuse of process without proof of any ulterior purpose.[8] Proof of groundlessness of an action is not an essential element of a claim for abuse of process; however, that the person commencing the litigation knew or had reason to know that his

---

[3] *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713 (2011); *Ladd v. Polidoro*, 424 Mass. 196, 198 (1997); *FDIC v. Greenberg*, 851 F. Supp. 15 (D. Mass. 1994); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 396 Mass. 760, 775 (1986); *Beecy v. Pucciarelli*, 387 Mass. 589 (1982); *Quaranto v. Silverman*, 345 Mass. 423 (1963); *Altenhaus v. Louison*, 342 Mass. 773 (1961); *Elliott v. Warwick Stores, Inc.*, 329 Mass. 406 (1952); *Noyes v. Shanahan*, 325 Mass. 601 (1950); *Gabriel v. Borowy*, 324 Mass. 231 (1949); *Carroll v. Gillespie*, 14 Mass. App. Ct. 12 (1982).

[4] *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 391 (1975); *Silvia v. Building Inspector of W. Bridgewater*, 35 Mass. App. Ct. 451, 454-55 (1993).

[5] *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713-14 (2011).

[6] *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 406 (2000).

[7] *Broadway Mgmt. Servs., Ltd. v. Cullinet Software, Inc.*, 652 F. Supp. 1501, 1503-04 (D. Mass. 1987).

[8] *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 713 (2011); *Beecy v. Pucciarelli*, 387 Mass. 589 (1982); *Bednarz v. Bednarz*, 27 Mass. App. Ct. 668, 673 (1989).

claim was groundless is relevant as tending to show that the process was used for an ulterior purpose.[9]

Mr. Frei must show that damage occurred as the natural and probable consequence of the process initiated by Mr. Johnson. If there were no damages, then Mr. Frei does not have a claim, even if the process was for an ulterior motive.[10] In assessing Mr. Frei's damages, if any, you may consider the following:

a. Mr. Frei's fair and reasonable attorney's fees and costs in defending the wrongful claim;[11]

b. Any other pecuniary loss suffered by Mr. Frei which he would not have incurred but for the wrongful claim;

c. Any emotional harm suffered by Mr. Frei;[12] and

d. Any harm to Mr. Frei's reputation.[13]

---

[9] *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 637 (2010); *Fishman v. Brooks*, 396 Mass. 643, 652 (1986).

[10] *Ledgehill Homes, Inc. v. Chaitman*, 348 Mass. 777 (1964); *Quaranto v. Silverman*, 345 Mass. 423, 427 (1963); *Swartz v. Brockton Sav. Bank*, 318 Mass. 66, 69 (1945); *Madan v. Royal Indem. Co.*, 26 Mass. App. Ct. 756, 764 (1989).

[11] *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 645-46 (2010) (but plaintiff may not recover attorney fees and costs for prosecuting his or her own abuse of process claim).

[12] *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. at 647-49 (victim of abuse of process need not make a showing of medical or psychiatric treatment, and physical manifestation of emotional distress is not required).

[13] *Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. at 649-50.

Respectfully submitted,

The Plaintiff,
Brian Johnson,
By his attorney,

Tani E. Sapirstein, Esq.
BBO No. 236850
Sapirstein & Sapirstein, P.C.
1331 Main St., 2nd Floor
Springfield, MA 01103
Tel. (413) 827-7500
Fax (413) 827-7797
tani@sandslaw.com

Dated: September 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served upon the following via first class mail, postage prepaid, to:

Mr. Peter Frei
101 Maybrook Road
Holland, MA 01521

Dated: September 17, 2019

Tani E. Sapirstein

K:\WP61backup10.26.14\CASEFILE\Holland.Johnson v. Frei. New Trial Nov. 2018 File No. 821\New Trial Folder 11.8.18\Proposed Jury Instructions\9.12.19 P's Proposed Jury Instructions.docx

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

District Court Department
Springfield Division
Civil Action No.: 1143CV293

BRIAN JOHNSON	)
	)
PLAINTIFF/DEFENDANT-IN-COUNTERCLAIM	)
v.	)
	)
PETER FREI	)
	)
DEFENDANT/PLAINTIFF-IN-COUNTERCLAIM	)

WITNESS LIST – BRIAN JOHNSON

1. Brian Johnson
   c/o Tani E. Sapirstein, Esq.
   1331 Main St., 2nd Floor
   Springfield, MA 01103

2. Peter Frei
   101 Maybrook Road
   Holland, MA 01521

Respectfully submitted,

The Plaintiff/Defendant-in-Counterclaim,
Brian Johnson,
By his attorney,

Tani E. Sapirstein, Esq.
BBO No. 236850
Sapirstein & Sapirstein, P.C.
1331 Main St., 2nd Floor
Springfield, MA 01103
Tel. (413) 827-7500
Fax (413) 827-7797
tani@sandslaw.com

Dated: September 17, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served upon the following via first class mail, postage prepaid, to:

Mr. Peter Frei
101 Maybrook Road
Holland, MA 01521

Dated: September 17, 2019

Tani E. Sapirstein

K:\WP61backup10.26.14\CASEFILE\Holland.Johnson v. Frei. New Trial Nov. 2018 File No. 821\New Trial Folder 11.8.18\Witness List\9.13.19 Witness List Brian Johnson.docx