

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

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

BRIAN JOHNSON)
)
 PLAINTIFF)
)
 v.)
)
 PETER FREI)
)
 DEFENDANT)

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S
REQUEST FOR SANCTIONS AGAINST PLAINTIFF'S ATTORNEY**

Now comes Brian Johnson, the Plaintiff in the above-captioned matter ("Johnson"), and hereby opposes the Request for Sanctions Against Plaintiff's Attorney, Tani Sapirstein, filed by the Defendant, Peter Frei ("Frei") and respectfully requests that Frei's Request for Sanctions ("Request") be denied and that sanctions for opposing the Request be assessed against Frei. The basis for this opposition is as follows:

- Johnson filed a complaint on June 9, 2011 against Frei alleging violation of Massachusetts General Laws, c. 272, §99;
- Frei has admitted that he recorded Johnson and others on February 19, 2011;
- Frei did not request Johnson's permission or advise Johnson that he was recording this conversation prior to recording it;
- this conduct violates G.L. c. 272, § 99Q;

- Frei filed a Motion to Dismiss, in which he mischaracterized both G.L. c. 272, §99 and *Commonwealth v. Hyde*, 434 Mass. 594 (2001);
- Johnson filed an Opposition to Defendant's Motion to Dismiss which correctly characterized both G.L. c. 272, §99 and *Commonwealth v. Hyde*, 434 Mass. 594 (2001); and
- Frei filed a Request for Sanctions Against Plaintiff's Attorney, Tani Sapirstein, in which he again misinterprets the law and falsely accuses Johnson's counsel of misrepresenting the law and lying to the court.

First, Frei mischaracterizes the definition of aggrieved person as used in M.G.L. c. 272, §99. The relevant statutory section provides as follows:

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.

G.L. c. 272, §99(B)(6). Again, as in his Motion to Dismiss, Frei interprets this definition to mean that a party bringing a claim under G.L. c. 272, §99Q must claim that the audio recording violated the plaintiff's personal or property interest or privacy. The statutory language, however, clearly does not require this. The statute provides two options under which someone can be deemed an aggrieved person under M.G.L. c. 272, §99Q: 1) any individual who was a party to an intercepted wire or oral communication or who was named in the warrant authorizing the interception or 2) any individual who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception. The comma which divides the two options clearly indicates that they are separate alternatives. This definition provides an

opportunity for redress to two groups of plaintiffs: those who were directly affected by an interception or warrant authorizing an interception, and also those who were not directly affected but have had their personal or property interest or privacy invaded as the result of an interception. The definition of aggrieved person does not require that a plaintiff have a personal or property interest or privacy invaded if said plaintiff was a party to an intercepted wire or oral communication or was named in a warrant authorizing an interception.

Frei is also mistaken in his interpretation of *Commonwealth v. Hyde*, 434 Mass. 594 (2001). In *Hyde*, the Supreme Judicial Court addressed the definition of "oral communication" as used in M.G.L. c. 272, §99. In that case, the defendant argued that because the police officers who had pulled him over were performing official police duties, they had no expectation of privacy in their words, and such words should not be considered an "oral communication". *Id.* at 596. M.G.L. c. 272 §99(B)(2) states, "[t]he term 'oral communication' means speech, except such speech as is transmitted over the public air waves by radio or other similar device." The Supreme Judicial Court agreed with the Commonwealth's assertion that "the plain language of the statute unambiguously expresses the Legislature's intent to prohibit the secret recording of the speech of anyone, except in specifically delineated circumstances." *Hyde*, 434 Mass. at 597. "We conclude that the Legislature intended G.L. c. 272, §99, strictly to prohibit all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge." *Id.* "We reject the defendant's argument that the statute is not applicable because the police officers were performing their public duties, and, therefore, had no reasonable expectation of privacy in their words." *Id.* at 600. The Supreme Judicial Court clearly found that whether a party had an expectation of privacy in words was not relevant to whether a party was an "aggrieved person" as defined in the relevant statute.

The Supreme Judicial Court's interpretation of the term "oral communication" applies to both civil and criminal cases. The statutory definition of oral communication, cited above, applies to both the civil and criminal portions of M.G.L. c. 272, §99 as shown by the introduction to this part B, "B. Definitions. As used in this section..." M.G.L. c. 272, §99 includes both civil and criminal remedies. M.G.L. c. 272, §99 Q, which provides a civil remedy, states that "Any aggrieved person whose oral or wire communications were intercepted...." As the Supreme Judicial Court in *Hyde* has found that the definition of oral communication as used in M.G.L. c. 272, §99 was not intended to require that a reasonable expectation of privacy be present in such oral communication, such a requirement would not apply to the civil remedy provided by §99Q. Frei argues that because the Supreme Judicial Court stated in a note that consideration of whether someone claiming protection under M.G.L. c. 272, §99 had a privacy interest in their spoken words **COULD** be considered under M.G.L. c. 272, §99Q, that someone making a claim under M.G.L. c. 272, §99Q **MUST** argue that a privacy interest has been violated. Frei again misinterprets the law. The relevant statutory section provides as follows:

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 ...

G.L. c. 272, §99Q (emphasis added). As discussed in Johnson's Opposition to Frei's Motion to Dismiss, a cause of action will lie if the facts support any or all of the following alternatives: 1) oral or wire communications were intercepted, disclosed or used or 2) a person's personal or property interests or privacy were violated. Accordingly, if a plaintiff alleges his personal or property interests or

privacy were violated by an interception, it would be logical that a court would consider whether the plaintiff actually had a personal, property or privacy interest in the intercepted words. However, if a plaintiff simply alleged oral or wire communications were intercepted, disclosed or used, there would be no need for a court to consider whether a personal, property or privacy interest was present. Thus, depending upon what grounds a plaintiff brings a claim under M.G.L. c. 272, §99Q, a court certainly may have the opportunity to examine whether a personal, property or privacy interest is present, but has no need to do so if a party alleges only that oral or wire communications were intercepted, disclosed, or used, as is the situation in the instant case.

For the reasons stated above, Johnson and his counsel have been nothing but forthcoming with this Court. The proper statutory and case citations have been provided for all materials referenced by Johnson, and all statements made in his pleadings have been accurate reflections of the law. Frei has twisted and manipulated both the law and Johnson's words to fabricate his Request which contains little, if any, factual and legal basis. Frei's Request, which accuses Johnson's counsel of knowingly submitting false statements, lying to the court, and trying to "dupe this Court in a deliberate attempt to deny the defendant his right to equal protection under the law granted to every citizen under the US Constitution," is nothing more than a flagrant attempt at harassing, defaming and wasting the time of Johnson, his counsel, and the Court.

While Frei has chosen to represent himself, he is still required to comply with the law and rules of court. Because he has chosen to repeatedly misinterpret unambiguous law, hurl defamatory and false statements against Johnson's counsel, and cause the expense of this litigation to unnecessarily increase, Johnson requests that this Court impose sanctions against Frei. "The right to self-representation is not a 'license not to comply with relevant rules of procedural and substantive law.' *Faretta v. California*, 422 U.S. 806, 834-835 n. 46, 95 S.Ct. 2525, 2540-2541 n. 46 (1975). A pro se litigant is bound by the

same rules of procedure as litigants with counsel. *Martinez-McBean v. Government of V.I.*, 562 F.2d 908, 912-913 (3d Cir.1977); *In re Brewster*, 115 N.H. 636, 638 351, A.2d 889 (1975)(per curiam); *Commerce Bank of Kansas City v. Conrad*, 560 S.W.2d 388, 390 (Mo.App.1977).” *Int’l Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 847 (1983). “The fact that [a party] is pro se does not excuse him from compliance with relevant rules of substantive and procedural law.” *Pandey v. Roulston*, 419 Mass. 1010, 1011 (1995), citing *McGowan v. Director of the Div. of Employment Sec.*, 388 Mass. 1003, 1004, 445 N.E.2d 1066 (1983). Where a pro se party’s “appendix and brief contain[ed] myriad unsupported and irresponsible accusations and allegations” and the party filed a frivolous appeal, awarding costs to the opposing party was appropriate. *Id.* While some leniency may be appropriate with a pro se litigant, “the rules of procedure bind a pro se litigant as they bind other litigants.” *Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985). Massachusetts District Court Supplemental Rule of Procedure 103 states that, “[i]n allowing an amendment, removing a default or dismissal, granting a postponement, or making any other interlocutory order, costs may be awarded and terms imposed in the discretion of the court, in addition to any otherwise provided for by court rule.”

In *Gardino v. Magdiziak*, 2005 WL 2496401, No. 05-2170-A (Mass. Super. October 4, 2005), a pro se plaintiff filed motions to appoint a receiver, for order of mediation and for accounting. The court found that these motions were “frivolous and, by all appearances, filed for the purpose of harassment and not in furtherance of claims for relief in good faith.” *Id.* The court found that the pro se plaintiff should be judged “by the same standards as would be an attorney in similar circumstances” and that sanctions against the pro se plaintiff were appropriate. *Id.*, citing *International Fidelity Insurance Company v. Wilson*, 387 Mass. 841, 847 (1983).

Because Frei’s Request is baseless, defamatory and seeks to unnecessarily delay the progress of this case Frei, Johnson requests that

sanctions enter against Frei. Johnson is concerned that Frei will continue to file frivolous motions to both burden Johnson and the Court and delay the progress of this case. Because Frei's motion has no basis in fact or law and is simply a tool of harassment, Johnson requests that this court sanction Frei to both renounce Frei's filing of an unsupported motion and to prevent a continuance of such filings which would further add to the time and expense of what is otherwise a straightforward case.

As Johnson and his counsel have made no misrepresentations to this Court, Frei's Request for Sanctions should be denied. Johnson also requests that sanctions be imposed against Frei for the filing of his frivolous and defamatory Request for Sanctions.

WHEREFORE, for the foregoing reasons, Brian Johnson requests that the Request for Sanctions be denied and that sanctions be assessed against Frei.

Respectfully submitted,

The Plaintiff,
Brian Johnson,
By his attorney,



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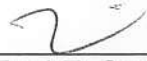
Dated: July 22, 2011

CERTIFICATE OF SERVICE

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

Peter Frei
101 Maybrook Road
Holland, MA 01521

Dated: July 22, 2011



Tani E. Sapirstein

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