COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

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

BRIAN JOHNSON, )
Plaintiff, )
)
vs. )
)
PETER FREI, )
Defendant. )

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS

## INTRODUCTION

The plaintiff filed suit alleging that the defendant secretly recorded him in violation of G.L. c. 272, § 99. The defendant has filed a motion to dismiss arguing that the statute is unconstitutional as applied to him. He further argues that the plaintiff's claim violates G.L. c. 231, § 59H. For the reasons set forth below, the motion to dismiss is denied.

## FINDINGS OF FACT

For purposes of deciding this motion I find the following facts:

The plaintiff and defendant both live in Holland, Massachusetts. The plaintiff is an elected highway surveyor. The defendant runs an interactive blog which, among other things, monitors and reports on conduct of elected town officials, including the plaintiff. On February 19, 2011, the plaintiff and others were taking part in a fishing derby on Hamilton Reservoir in Holland. The defendant's home is a waterfront property on the reservoir. The defendant alleges that the plaintiff and others set up their fishing equipment in front of his home and spent the day drinking and generally annoying the defendant. At one point the defendant went out to the ice to tell the plaintiff not to trespass on his property. When he did so, he concealed his cell phone in

his pocket. He maintains that he had a small microphone pinned to the outside of his jacket. He then proceeded to record the conversation that he had with the plaintiff. He then used this recording to try to obtain a harassment prevention order against the plaintiff, which was denied. The plaintiff then brought this lawsuit claiming a violation of G.L. c. 272, § 99.

## DISCUSSION

G.L. c. 272, § 99 is statute providing for criminal penalties and civil remedies for the interception of wire or oral communications. Section Q of the statute provides for the civil remedies and it is that section under which the plaintiff has sued. Section Q reads 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 -
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> 1. actual damages but not less than liquidated damages computed at the rate of $100 per day for each day of violation or $1000, which ever is higher;
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> 2. punitive damages; and
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> 3. a reasonable attorney's fee and other litigation disbursements reasonably incurred. Good faith reliance on a warrant issued under this section shall constitute a complete defense to an action brought under this paragraph.

"Aggrieved person" is defined in pertinent part under section B(6) as "any individual who was a party to an intercepted wire or oral communication. . ." Under section B(4) "interception" is defined in pertinent part as "to secretly hear, secretly record, . . . the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication . . ."

*Constitutionality of G.L. c. 272, § 99.*

It is the defendant's position that G.L. c. 272, § 99 is "unconstitutionally vague, over

broad and as enforced against [him] violates state and federal guarantees of free speech and expression." Acknowledging that the statute has been construed in several criminal cases, the defendant maintains that the "'civil' privacy interest sought to be protected is not clear." Defendant's memorandum in support of his motion to dismiss, page 5.

*Vagueness.* Although section Q creates a civil remedy for violation of § 99, the definition of what is prohibited, i.e. interception of wire or oral communications, is applicable to both criminal and civil liability. See § 99, section B(4). *Commonwealth v. Hyde*, 434 Mass. 594 (2001) has settled the question of whether the statute is vague, holding that, "[T]he statute is carefully worded and unambiguous, and lists no exception for a private individual who secretly records the oral communications of public officials." *Id.* at 598. The defendant argues that *Hyde* is a criminal case and therefore has no applicability to a civil action. I disagree. Whether the *remedy* is civil or criminal, the *Hyde* case determined that what is prohibited by the statute is clear and unambiguous. *Id.* (emphasis added).

*First Amendment argument.* The defendant next contends that § 99 is unconstitutional as applied to him because he "is a citizen-journalist gathering non-private information about the conduct and behavior of a public official" and that "[h]e is entitled to due {sic} so by the First Amendment and Article 16 and the legislature cannot regulate against such a fundamental right." Defendant's memorandum in support of his motion to dismiss, page 12. In support of this position the defendant cites *ACLU v. Alvarez*, 679 F. 3d 583 (7th Cir. 2012). *Alvarez* involved an Illinois statute which made it a felony to audio record "all or any part of any conversation" without the consent of all parties to the conversation. *Id.* at 586. The statute applied to all oral communication whether or not the communication was intended to be private. *Id.* In *Alvarez*, the ACLU had a "plan to openly make audiovisual recordings of police officers performing their duties in public places and speaking at a volume audible to bystanders." *Id.* Fearing prosecution under the eavesdropping statute, the ACLU sought declaratory and injunctive relief barring the State's County Attorney from enforcing the statute. The issue presented to the Seventh Circuit was "whether the First Amendment prevents Illinois prosecutors from enforcing the eavesdropping statute against people who openly record police officers performing their official duties in public." *Id.* In allowing a preliminary injunction, the Seventh Circuit found that the

ACLU had a "strong likelihood of success on the merits of its First Amendment claim" *Id.* at 608.

The defendant here argues that § 99 is comparable to the Illinois statute and should similarly be found unconstitutional. However, there is a major difference between the two statutes. The Illinois statute prohibits audio recording without the consent of all parties thereby criminalizing "the nonconsensual recording of most any oral communication, including recordings of public officials doing the public's business in public and regardless of whether the recording is open or surreptitious." *Id.* at 586. Conversely, § 99 prohibits the "secret" audio recording of oral communications. In fact, the court in *Alvarez* highlighted the distinction, commenting that, "[U]nlike the federal wiretapping statute and the eavesdropping laws of most other states, the gravamen of the Illinois eavesdropping offense is not the secret interception or surreptitious recording of a private communication. Instead, the statute sweeps much more broadly, banning *all* audio recording of *any* oral communication absent consent of the parties regardless of whether the communication is or was intended to be private." (emphasis in original). *Id.* at 595. Later in its opinion the court again emphasized this distinction noting that "this case has nothing to do with private conversations or surreptitious interceptions. . . . the ACLU plans to record *openly*, thus giving the police and others notice that they are being recorded." (emphasis in original) *Id.* at 606.

A more fact specific distinction also exists between *Alvarez* and the instant case. As stated above, *Alvarez* dealt with the ACLU's desire to audiovisually record police officers in public places performing their official duties. *Id.* at 586. Although the plaintiff here is an elected official, there is no contention that he was performing an official duty at the time the recording took place. The presented facts suggest the opposite, that he was fishing with friends at the Hamilton Reservoir.

The defendant next cites to the case of *Jean v. Massachusetts State Police et al.*, 492 F. 3d 24 (1st Cir. 2007) for the proposition that the "[F]irst Amendment protects blogger-journalist's posting of what was assumed to be the illegal (secret) recording of an arrest by the state police." Defendant's memorandum in support of his motion to dismiss p. 14. In *Jean*, the plaintiff brought suit seeking a preliminary injunction against the police prohibiting them from enforcing

§ 99 against her. Jean was a blogger who maintained a website critical of the local District Attorney's Office. A citizen contacted her and gave her an audiovisual recording of what he maintained was an illegal search of his home by the Massachusetts State Police. Jean posted the recording on her website with an editorial comment criticizing the District Attorney. The Massachusetts State Police then wrote Jean a letter threatening prosecution if she did not remove the recording from her website. Jean filed suit seeking a preliminary injunction on the basis that the First Amendment right to free speech prohibited enforcement of § 99 against her.[1] The court ultimately held that Jean's posting was entitled to First Amendment protection and therefore affirmed the district court's grant of a preliminary injunction enjoining the enforcement of § 99 against her. In reaching this decision, the First Circuit relied heavily on the holding of the United States Supreme Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). Both the *Jean* and *Bartnicki* cases involved dissemination of illegally recorded audio by third persons who neither recorded the illegal audio nor participated in making the recording and who in fact had obtained the recordings legally. Further, the courts in both *Jean* and *Bartnicki*, determined that the "subject matter of the [recorded] conversation was a matter of public concern." *Jean v. Mass. State Police*, supra at 28 quoting *Bartnicki v. Vopper*, supra at 525. In *Jean*, the recording was of the Massachusetts State Police conducting a warrantless search of a citizen's home and in *Bartnicki*, the recording was of telephone call between the union's chief negotiator and the president of a local union regarding ongoing collective bargaining negotiations between the school board and local high school teachers. *Id.* at 27.

Contrary to the *Bartnicki* and *Jean* cases, the defendant in the instant case was not a recipient of the recording but in fact made the recording. In addition, while the plaintiff herein may be an elected official, the recording made of the exchange between the plaintiff and

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[1]In addition to the parts of § 99 quoted above, the statute also prohibits, "willfully disclos[ing] or attempt[ing] to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception". G.L. c. 272, § 99 C (3) (a).

defendant did not involve subject matter of a public concern.[2] The defendant here decided to audio record the plaintiff while the plaintiff was fishing on the reservoir.

The preamble of § 99 is enlightening as to the intent of the Legislature in enacting the statute. "[T]he general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited." The fact that the defendant maintains a website monitoring public officials does not give him a First Amendment right to secretly record those officials any time, especially where the subject matter of the recording is not a matter of public concern.

*Violation of the Anti-Slapp Statute, G.L. c. 231, § 59H.*

The defendant next maintains that the complaint should be dismissed because "it violates the provision of the Commonwealth's Anti-Slapp statute G.L. c. 231, § 59H." Defendant's memorandum in support of his motion to dismiss p. 14. G.L. c. 231, §59H protects an individual's right of petition "'by creating a procedural mechanism, in the form of a special motion to dismiss, for the expedient resolution' of suits designed to deter or retaliate against individuals who seek to exercise their right of petition.'" *Marabello v. Boston Bark Corporation*, 463 Mass. 394, 397 (2012) quoting *Wenger v. Aceto*, 451 Mass. 1, 4 (2008).
"[A] parties exercise of its right of petition" is defined in § 59H to mean

> any written or oral statement made before or submitted to a legislative, executive, or judicial body or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a

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[2]The defendant maintains that he was recording the plaintiff because "[H]e felt the public had a right to know, should know and needed to know the kind of fellow they had elected and entrusted to discharge their public trust." Defendant's memorandum in support of his motion to dismiss p. 2. Carried to its logical conclusion, this reasoning would result in making every conversation the plaintiff had a matter of public concern simply by virtue of the fact that he is an elected official.

> legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

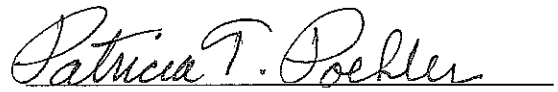
Referring to this definition, the court in *Marabello v. Boston Bark Corporation*, supra at 399 stated, "[I]n short, a party cannot exercise its right of petition without making a "statement" designed 'to influence, inform, or at the very least, reach governmental bodies — either directly or indirectly.'(citations omitted). And a claim cannot be "based on" a party's exercise of its right to petition unless the claim is based on such a "statement". *Id.*

The plaintiff's claim here is not based on any "statement" of the defendant. It is based on the plaintiff's allegation that the defendant secretly recorded him in violation of G.L. c. 272, § 99. Because the plaintiff's claim is not based on any "statement made by [the defendant] in the exercise of its right of petition", I find that G.L. c. 231, § 59H is not implicated. See *Marabello v. Boston Bark Corporation*, supra at 400. The defendant's motion to dismiss is denied on this ground.

ORDER

It is hereby ORDERED that the defendant's motion to dismiss is DENIED.

So ordered.



Patricia T. Poehler
Presiding Justice, Palmer District Court

Dated: October 15, 2012