

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT**

HAMPDEN, SS

PALMER DISTRICT COURT
DOCKET NO: 1143 CV 0293

BRIAN JOHNSON
Plaintiff

vs.

PETER FREI
Defendant

**DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE AND REFERENCE
TO PREVIOUS HARASSMENT
PROCEEDING**

Pursuant to the provisions of Rule 7(b)¹ of the Massachusetts Rules of Civil Procedure, the Defendant hereby moves in limine² for an order of the court excluding any reference to, evidence of or the result of a harassment proceeding initiated by the Defendant against the Plaintiff in the matter of *Peter Frei vs. Brian Johnson*, Palmer District Court, Docket # 1143 RO 79.

In support hereof, Defendant alleges the harassment proceeding is not relevant

¹ In pertinent part, Rule 7(b), Mass. R. civ. Pro., provides an application to the court for an order shall be made by motion unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds therefore and shall set for the relief or order sought.

² A motion in limine seeks a ruling on the admissibility of certain evidence prior to its presentation in court. It is designed to prevent mentioning before the jury, by counsel or witnesses, of certain prejudicial matter, such as privileged material, subsequent warning or repair, hearsay and offers to settle. Such motions are designed for protection in a jury trial.

"The purpose of a motion in limine is to prevent irrelevant, inadmissible or prejudicial matters from being admitted into evidence...and in granting such a motion, a judge has discretion similar to that which he has when deciding whether to admit or exclude evidence..." (citations omitted)... Such motions are typically directed at specific items of evidence or testimony." (citations omitted)... Commonwealth v. Hood, 399 Mass. 581, 452 N.E.2d 188, 196-197 (1983).

to the present matter and evidence thereof is likely to confuse the trier of fact. Further, the prejudice engendered by disclosure of the parties, nature, purpose and/or result of the harassment case would far outweigh any possible probative value.

In the harassment case, Frei sought a harassment prevention restraining order pursuant to the provisions of G.L. c. 258E against Johnson. In order to prevail, Frei had to prove Johnson committed three (3) wilful and malicious acts toward Frei intended to cause fear, intimidation, abuse to Frei or damage to Frei's property and that Frei was in fact put in fear, intimidated, abused, etc. Following a lengthy hearing, the Court allowed Johnson's Rule 41(b)(2) motion for involuntary dismissal. The case was dismissed.³

That court's decision is not relevant to Frei's present counter-claims of assault, assault and battery, defamation, MA Civil Rights violations, negligent and intentional infliction of emotional distress, etc. None of Frei's counter-claims require proof of multiple acts, wilful or malicious conduct or that Frei was, in fact, intimidated or made fearful.⁴ For the same reason, Frei's present claims

³ Frei does not seek to limit either party to the use of the transcript of that proceeding for witness impeachment, such as to show a prior inconsistent statement. In doing so, however, Frei asks that neither the identities of the parties, nature of that proceeding or its result be disclosed by either counsel or any witness.

⁴ The MA Civil Rights Act permits an individual to file an action for money damages against one who has interfered with or attempted to interfere with a plaintiff's exercise or enjoyment of rights secured by the constitution or laws of the United States or of rights secured by the constitution or laws of the Commonwealth by means of threats, intimidation or coercion or attempts to do so. G.L. c. 12 §§ 11H and 11I. Section 11I was intended to provide a remedy coextensive with 42 U.S.C. § 1983. *Sena v. Commonwealth, et als*, 417 Mass. 250,262 ((1993) and may therefore provide relief where an individual is punished for assertion of a constitutional right. *Id.* @ 261. Proof of harassment in a G.L. c. 258E proceeding, requires proof the victim was, in fact, put in fear, intimidated, abused, etc. Section 11I conduct is measured by an "objective" - not subjective - standard. See, Model Superior Court Jury Instruction and cases cited.

are not barred or limited by the principles of issue preclusion. *Heacock v. Heacock*, 402 Mass. 21 (1988), *Jarosz v. Palmer*, 436 Mass. 526, 530 - 534 (2002).⁵

WHEREFORE, the Defendant moves that all reference to said harassment proceeding be excluded from the present trial and that should the transcript thereof be used for witness impeachment, the attorney and witnesses be instructed to refrain from providing the identity of the parties to that proceeding; its nature or purpose; the result or any other details thereof.

Respectfully Submitted,
The Defendant
By his attorney,

February 26, 2013

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⁵ The doctrine of collateral estoppel provides that a factual issue which has been actually and necessarily litigated and finally determined in a prior action may not be relitigated in a subsequent proceeding. See *Brown v. Felsen*, 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 2213 n. 10, 60 L.Ed.2d 767 (1979). There are four requirements before collateral estoppel will preclude relitigation of a factual issue in a subsequent proceeding: (1) the precise issue sought to be precluded was raised in a prior proceeding; (2) the issue was actually litigated; (3) the determination of the issue must have been essential to the final judgment in the prior proceeding; and (4) the party against whom estoppel is sought must have been fully represented in the prior action. *Kwiat v. Doucette*, 81 B.R. 184, 187 (D.Mass.1987); *Sack v. Friedlander (In re Friedlander)*, 170 B.R. 472, 476 (Bankr.D.Mass.1994).

Certificate of Service

I certify a copy of the foregoing document was served upon the Plaintiff by delivery in hand to his attorney, namely, upon Tani E. Saperstein, c/o Saperstein & Saperstein, P.C., 1350 Main Street, 12th Floor, Springfield, MA 01103, this ____ day of February, 2013.

Henry L. Rigali, Esq.