

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT
WESTERN DIVISION

Hampden, ss.

Docket No. 201143CV293

BRIAN JOHNSON,
Plaintiff

v.

PETER FREI,
Defendant

HEARING HELD ON FEBRUARY 26, 2013 AT
SPRINGFIELD DISTRICT COURT

Tani Sapirstein, Esq.,
Representing the Plaintiff

Henry Rigali, Esq.,
Representing the Defendant

(Transcript Prepared from Tape)

Roxanne C. Costigan

1 THE CLERK: Brian Johnson v. Peter Frei,
2 Palmer District Court Civil Action number
3 1143CV293.

4 THE COURT: Good morning.

5 MR. RIGALI: Good morning, how are you.

6 MS. SAPIRSTEIN: Good morning.

7 THE COURT: Fine, thank you. I have all
8 of your motions, Attorney Rigali, so I
9 suppose the first one we should address is
10 the motion to recuse.

11 MR. RIGALI: Thank you, Your Honor. I
12 guess the only question that I have is the
13 one that rises on all these recusal motions
14 and that is of course you've heard so much
15 about the prior instances in the cards as to
16 whether or not you feel that you can be
17 impartial. If you feel so then we're
18 satisfied. The only way I can raise the
19 issue is by motion so that's unfortunate,
20 it's a distasteful thing for me personally
21 after all these years in the business, but
22 that's the only mechanism I have. So I'm
23 not going to get into, you know, there's no

1 aspersions here of ethics or, you know, any
2 of that stuff. It's just that in the prior
3 decisions both on the harassment case, the
4 motion to dismiss, you've seen a lot of
5 testimony, you've made decisions which
6 include credibility assessments. So the
7 issues are different here, but if you're
8 comfortable with it then that's fine and
9 that's all the purpose of the motion was.

10 THE COURT: Okay. Anything you want to
11 add?

12 FEMALE: No, Your Honor.

13 THE COURT: You know, I read over my, I
14 actually printed out my decision on the
15 harassment order and I read it over and I
16 read over the case that you cited and, you
17 know, I don't have any bias one way or the
18 other. I mean, I made credibility calls
19 because that's what I had to do on that
20 motion, but as far as any bias or any
21 feelings like I've, you know, in favor of
22 one side more than the other I really don't
23 have any feeling about that.

1 MR. RIGALI: I'm totally satisfied with
2 that, Judge.

3 THE COURT: Alright.

4 MR. RIGALI: So I'm not going to push
5 the motion further. You can take no action
6 on it or I'll withdraw it, whatever the
7 proper verbiage is. If at some point, you
8 know, you sense that you're uncomfortable
9 because as an example credibility decisions
10 were made in a different forum then
11 obviously I'd want the Court to bring that
12 to our attention and we'll address it but
13 I'm satisfied.

14 THE COURT: Well, I would, I would bring
15 that to your attention. I don't foresee
16 that happening. I pretty much know what the
17 case is about, I know who the parties are.

18 MR. RIGALI: Exactly. And we have a
19 jury that hopefully we make some factual
20 decisions here.

21 THE COURT: Right, they will. Okay, so
22 the next thing I have is the, you have each
23 listed witnesses and that's fine.

1 MR. RIGALI: I haven't heard back from
2 counsel. I did this from the pretrial
3 conference report so I initially started off
4 listing all the witnesses. By phone counsel
5 and I have been conferring and my
6 understanding is she has two witnesses, I
7 have two or three, whatever ones are listed
8 on that final list. But I don't know if
9 Attorney Sapirstein has actually seen that,
10 agrees with it, I got the stuff to her
11 yesterday.

12 MS. SAPIRSTEIN: I have three witnesses.
13 I think there are three on there. Brian
14 Johnson, Peter Frei and Kristen Johnson.

15 THE COURT: Okay, well Peter Frei is
16 listed under the defendant's list but as
17 long as he's listed, okay.

18 MR. RIGALI: My only concern and I don't
19 know, I wouldn't know this gentleman if I
20 saw him, I had subpoenaed Officer Forcier
21 from the Holland Police Department.

22 THE COURT: Okay.

23 MR. RIGALI: Thank you very much. So

1 we're ready.

2 THE COURT: So then I have for your
3 witnesses Peter Frei, Dana Manning, Officer
4 Jeff Forcier, Officer Leonard Bean and
5 Michael Stankowitz.

6 MR. RIGALI: Right, and I think as a
7 practical matter I'm not going to call
8 Officer Bean. Is Officer Bean here? If you
9 could just hang in for a moment when we're
10 done. Maybe I'll talk with you in the
11 corridor. But I think as a practical matter
12 I'm not going to call Officer Bean.

13 THE COURT: But do you want me to list
14 him anyways to the jury just in case? I
15 mean, if you do change your mind he'll at
16 least have been...

17 MR. RIGALI: Yes, the precaution, right.
18 And there's a stipulation that counsel and I
19 have been talking about about the tape
20 that's going to be played, about the
21 authenticity, the integrity. Counsel says
22 she has no problem with the tape, she's not
23 concerned about the authenticity, the

1 integrity, there's not going to be any
2 direct or indirect reference to well it's
3 not complete or somebody tampered with it or
4 any of that. If that's the case then (a),
5 I'd like to have a stipulation to that
6 effect and (b), I don't need Mr. Stankowitz.

7 THE COURT: Okay.

8 MR. RIGALI: Because he's just a tape, a
9 forensic tape expert.

10 THE COURT: Okay. Well, when are you
11 going to decide that? Do you have the tape
12 with you to like play for her or something
13 this morning?

14 MR. RIGALI: She has a copy of it and
15 we've discussed this. I don't think that's
16 an issue.

17 THE COURT: Okay.

18 MR. RIGALI: I would like a stipulation
19 to this effect so that there's no questions,
20 so that during openings or closings we can
21 say to the jury freely and openly, there's
22 no question about this. If it's a question
23 in your mind it is not a question in

1 evidence. This is the tape.

2 THE COURT: Okay. Is that?

3 MS. SAPIRSTEIN: I haven't actually
4 heard it recently. I tried to play the CD.
5 I have it on my system, it didn't work. And
6 we tried to meet and my computer's are down.

7 THE COURT: Do you have something to
8 play it on here?

9 MR. RIGALI: I think we could probably
10 arrange that. Not here in the courtroom but
11 perhaps counsel and I before we get started.

12 THE COURT: Right, so you can listen to
13 it and then, okay.

14 MS. SAPIRSTEIN: I don't anticipate any
15 problems, Your Honor. I have an expert
16 report that says it wasn't, I mean, quite
17 frankly it didn't even cross my mind until
18 Attorney Rigali raised the issue.

19 THE COURT: Well, before we actually get
20 started, if you've had a chance to listen
21 then we can, you can address that
22 stipulation. Alright, but do you want me to
23 read, I'm just concerned that I want to make

1 sure I read all of the witness' names that
2 you might call.

3 MR. RIGALI: It's fine by me, Judge.
4 The danger of course is, you know, the jury
5 sits here and hears a half a dozen witnesses
6 and then a few don't. So long as there's an
7 instruction that they're to draw no
8 inference later if they recall.

9 THE COURT: Okay, why don't we do this,
10 okay, that's fine. I can do that. Or if
11 you do reach a stipulation before we start,
12 I'll just eliminate Mr. Stankowitz' name.

13 MR. RIGALI: Thank you.

14 THE COURT: Proposed statement of the
15 case to be read to the jury. Now, you've
16 signed this, Attorney Rigali.

17 MS. SAPIRSTEIN: And I don't have an
18 issue with it, it's fine.

19 THE COURT: Alright, could I just have
20 you sign it then.

21 MS. SAPIRSTEIN: And actually I have two
22 motions and proposed jury instructions,
23 which I did send, I didn't know who was

1 going to be sitting on this trial so I
2 didn't file them yesterday, and also the
3 clerk's office was closed for part of the
4 afternoon.

5 THE COURT: Oh no, that's fine. I
6 probably won't address those until later on
7 in the case anyways because you think this
8 is going two days?

9 MR. RIGALI: I think it will be two.
10 There's some logistical things that will
11 take a little time.

12 THE COURT: Alright. So you want me to
13 read this entire, the plaintiff's position,
14 the defendant's position?

15 MR. RIGALI: I would propose that.
16 Again, the advantage of having you here is
17 you're somewhat familiar with this, so if
18 you think that that in any way does not
19 reflect what the issues are before the jury,
20 that's fine by me, but that's the best I
21 could do.

22 THE COURT: No, I think it's thorough.
23 Okay, that's fine. Defendant's motion to

1 submit jury voir dire questions. Do you
2 have that, Attorney Sapirstein?

3 MS. SAPIRSTEIN: I do, Your Honor.

4 THE COURT: Alright. Any objection to
5 any particular ones?

6 MS. SAPIRSTEIN: I don't have any
7 objection. I think most of these are pretty
8 standard, except for maybe seven and eight.

9 MR. RIGALI: I don't want to exclude
10 anybody like myself who's an electric
11 dinosaur from jury duty but it would I think
12 be helpful for counsel to know that the
13 jury's at least familiar with what the
14 internet is, what the blog is and so forth
15 so I don't have to explain it to them. I
16 mean, once we know, you know.

17 THE COURT: Alright. So the model
18 instructions have just very, very general
19 are you related to any of the parties, and
20 so on, so these would be in addition to
21 those?

22 MR. RIGALI: Right.

23 THE COURT: So no objection to these?

1 MS. SAPIRSTEIN: No objection.

2 THE COURT: Alright. Okay. Defendant's
3 motion in limine to exclude evidence in
4 reference to previous harassment proceeding.
5 Okay, so Attorney Rigali, why don't you?

6 MR. RIGALI: Well, as stated in the
7 motion, Your Honor, and again just I suppose
8 for the record if nothing else, as the Court
9 is aware there has been some history both
10 between these individuals, the primary
11 parties here, Mr. Johnson and Mr. Frei for
12 the last several years, and some litigation
13 also. A piece of that litigation involved a
14 request for a restraining order/harassment
15 protection order by Mr. Frei against Mr.
16 Johnson, which was litigated in the Palmer
17 District Court and some of the evidence, the
18 issues were quite different today than at
19 that time, but some of the evidence
20 overlaps, and I don't want the jury, I don't
21 think it's fair to any of these parties. I
22 think there's a danger of some significant
23 prejudice that certainly outweighs any

1 probative value of having the jury informed,
2 either directly or indirectly, that one
3 party or the other was successful or
4 unsuccessful in some prior litigation which
5 has nothing to do with the issues that are
6 here. Now, of particular concern is that in
7 a harassment proceeding, as I understand it,
8 one of the elements is that, and I think I'm
9 quite sure of this, is that the complainant
10 or the movant in a harassment proceeding has
11 to prove a series of acts, number one, that
12 were intended to be malicious, willful,
13 harassing, intimidating, et cetera, and in
14 fact that they were, that the individual
15 felt both subjectively and somewhat
16 objectively intimidated. That's not
17 required as an element of proof in a civil
18 rights violation or in, you know, these
19 other causes of action here. And so as an
20 example an assault, an assault is either an
21 attempted battery or it is, putting a person
22 in fear. And there is an issue in a jury's
23 mind if we were just going forward on a

1 criminal case, let's say an assault, as to
2 what was the state of mind, what was
3 subjectively and objectively reasonable
4 based on all of the circumstances. I don't
5 think that the Court in the harassment case
6 made the decision that Mr. Frei wasn't
7 assaulted on February 19th, which was one
8 incident, or that he was or wasn't fearful.
9 My reading of the harassment order was that
10 those elements required, you know, three
11 instances, multiple instances anyway, of
12 fearful circumstances and so forth and you
13 basically found, I'm not satisfied that in
14 my reading, I'm not satisfied that that
15 evidence is there to the standard of proof
16 required, it looks to me like more this is a
17 back and forth between two guys that are,
18 you know, squaring off and sort of taunting
19 each other. I don't think it's appropriate
20 that the jury know that. I think that it
21 would be very, very prejudicial if the jury
22 knew that a judge in particular already, you
23 know, sort of tipped her hand or his hand as

1 to how these things go. So both on the
2 issue of, and the civil rights is the same.
3 Massachusetts civil rights prosecution case
4 does not require proof that the individual
5 was intimidated. The statute's very clear,
6 whoever violates the civil right, if you
7 will, and does so through coercion,
8 intimidation, you know, duress or whatever
9 the appropriate words are or attempting to
10 do so, or attempts to do so. There's no
11 element that the individual has to feel
12 intimidated. The conduct that's proscribed
13 by the Constitution and by the statutes is
14 people attempting to do this, so I mean, to
15 take maybe a hyperbole hypopolic example,
16 somebody puts a burning cross on someone's
17 lawn in a racially charged case, it doesn't
18 matter that the victim, the target, is
19 intimidated. The violation is the
20 violation. So I think on an issue
21 preclusion sense as well as from, just the
22 simple prejudice, it's just inappropriate
23 that the result of that or any ruling that

1 was made in any prior litigation, including
2 litigation which Mr. Frei was successful, be
3 admitted into evidence.

4 THE COURT: Thank you. Attorney
5 Sapirstein?

6 MS. SAPIRSTEIN: Thank you, Your Honor.
7 I have actually two issues with the motion
8 in limine. The first issue is we can
9 clearly use the transcript of the prior
10 hearings, which we both have, to impeach the
11 credibility of any witness.

12 MR. RIGALI: Agreed.

13 MS. SAPIRSTEIN: And we don't have to
14 announce that it was a harassment hearing
15 but my more significant legal issue is that
16 there is in fact issue preclusion. My
17 reading of your decision is a little bit
18 different than Mr. Rigali's. I
19 unfortunately don't have a written
20 opposition because I got it pretty late
21 yesterday afternoon, but right in your
22 decision you make the finding that Peter
23 Frei was not afraid of, intimidated by or

1 abused by Brian Johnson. That is issue
2 preclusion. The same exact, and you also
3 quite frankly based it not only on the
4 February 19, 2011 incident, which is what's
5 going to be tried here today, but also on
6 all the prior incidents. So it actually
7 does meet the issue preclusion test, which
8 is that everything was actually litigated,
9 it was actually litigated, everybody had an
10 opportunity to put in their evidence and
11 there was in fact a determination by Your
12 Honor that Mr. Frei wasn't intimidated. So
13 as far as the counts that...

14 THE COURT: So what counts would that...

15 MS. SAPIRSTEIN: That would be assault,
16 that would be civil rights. I disagree with
17 Mr. Rigali's reading I think and we'd only
18 be proceeding I believe under 11I because
19 11H is for the Attorney General, but one of
20 the elements that he has to prove is that
21 the interference or attempted interference
22 was by threats, intimidation or coercion.
23 If he's not intimidated, I mean, I've got to

1 guess he could try and prove that it was by
2 threats or coercion, but my understanding of
3 what the evidence that Mr. Rigali is going
4 to put on is that it was intimidation. So
5 if that's already been decided, and it has,
6 and quite frankly it was a fairly extensive
7 hearing. Everybody had an opportunity to
8 put all their evidence in. There's no
9 reason why my client should have to defend
10 against that all over again. And the quote
11 we took right out of Your Honor's decision,
12 which is that you don't believe, and I think
13 it's in the discussion, the legal discussion
14 section, that Peter Frei is afraid of,
15 intimidated by or abused, and then it goes
16 on to explain the rationale. So this should
17 quite frankly be subjected to issue
18 preclusion.

19 THE COURT: Are you saying as to those
20 two counts, assault and the civil rights
21 violation?

22 MS. SAPIRSTEIN: Assault, civil rights,
23 battery, well, assault and civil rights,

1 maybe intentional infliction of emotional
2 distress. I have proposed jury instructions
3 and I can compare the specific elements and
4 I think probably the easiest and the less
5 prejudicial way to handle it would be when
6 you instruct the jury you say that it's
7 already been found that he wasn't
8 intimidated or something fairly neutral so
9 they can do the rest of their job.

10 THE COURT: Okay. I'm going to have to
11 take a look at the law on issue preclusion
12 and the elements of all of these before I
13 can rule on that.

14 MS. SAPIRSTEIN: I do have some cites,
15 if you want, Your Honor.

16 THE COURT: You do? Okay.

17 MS. SAPIRSTEIN: Actually, I think I
18 have some cases that were printed. One is,
19 and this was just delivered to me, one is
20 Heacock v. Heacock.

21 MR. RIGALI: It's cited on page three of
22 your brief, Your Honor.

23 MS. SAPIRSTEIN: That's your brief,

1
1 okay. I'm going to need a moment to give
2 you the cites but I can get those to you
3 before the trial starts.

4 THE COURT: Alright. Okay, why don't
5 you do that.

6 MR. RIGALI: Your Honor, if I may,
7 again, even a quick look at the model jury
8 instructions for a civil rights violation
9 makes very, very clear that intimidation,
10 that there be either some sense of
11 subjective or objective intimidation by the
12 target of coercive conduct if you will is
13 not an element, period. And there's no,
14 it's black and white, there's no question
15 about it.

16 THE COURT: Alright.

17 MR. RIGALI: And if you read, now again,
18 I'm not the best researcher in the world,
19 but I researched this fairly thoroughly.
20 The Heacock and the Jaroz cases and the
21 others put down in our footnote I think
22 you'll find quite helpful.

23 THE COURT: Alright. I'll take a look

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at those and if you want to write down those
cites for me I'll look at that as well.

MS. SAPIRSTEIN: Yes, Your Honor.

THE COURT: Defendant's motion in limine
to confirm District Court jurisdiction.

MR. RIGALI: Again, Your Honor, this is
a, sort of a pendent jurisdiction case and
the rule is if you're not sure, file the
motion, so I don't want to belabor this
point but I just want to make sure that none
of us are caught off short by the fact that
at least if brought originally, you know, a
privacy statute case or a civil rights case
and a few others, you know, the Superior
Court has "exclusive jurisdiction" of those.
The Revenancar case and several others that
have followed have basically said unless,
you know, they tag along, piggyback onto
some other case which is validly there, so I
just wanted to make sure and again, there's
no other means of raising it. If that's not
an issue then we need not spend much time on
it.

1 THE COURT: Okay. Do you have any
2 argument on that? I'll take a look at the
3 case.

4 MS. SAPIRSTEIN: I don't. 11H we would
5 argue doesn't apply. That's one of my
6 motions to dismiss.

7 THE COURT: Okay.

8 MS. SAPIRSTEIN: That's the Attorney
9 General and only the Attorney General that
10 can bring the case.

11 THE COURT: Is that what the complaint
12 says or the answer rather?

13 MS. SAPIRSTEIN: It cites both H and I.

14 THE COURT: Okay. Is there an agreement
15 on that, that it is I? I don't have the
16 complaint right in front of me.

17 MR. RIGALI: I don't know how the Court
18 wants to address these, if you want to go
19 through my motions first and then she's got
20 a couple.

21 THE COURT: Okay, alright.

22 MR. RIGALI: I am prepared to address
23 that.

1 MS. SAPIRSTEIN: But I think under
2 pendent jurisdiction if a case started here
3 and there are compulsory counterclaims then,
4 unless there's something specifically in the
5 Civil Rights Act that says it has to go to
6 Superior Court, it would seem like it would
7 be pendent jurisdiction.

8 THE COURT: Alright, okay. Defendant's
9 motion to sequester witnesses. Any
10 objection to that?

11 MS. SAPIRSTEIN: Yes, Your Honor, I do.
12 First of all, he's only moving to sequester
13 the plaintiff's witnesses and I only have
14 three, Mr. Johnson, his wife and Peter Frei.
15 Both Mr. Johnson and Peter Frei have to be
16 here because they're parties, so I would
17 like his wife to be here, so I would object
18 to that.

19 THE COURT: Okay.

20 MR. RIGALI: Again, I object. I object.
21 I'm not sure what the wife's testimony is
22 going to be but these are credibility, you
23 know, some very serious credibility issues.

1 THE COURT: But you're talking about all
2 witnesses, aren't you?

3 MR. RIGALI: Correct, I'm assuming it
4 was going to be reciprocal. You know, I
5 mean, I've done these for years, as an
6 advocate, but if it's reciprocal I have no
7 problem.

8 THE COURT: Yeah, alright, that's
9 allowed as to all witnesses except the
10 parties obviously can remain. Alright, and
11 then on your proposed jury instructions,
12 yeah, I don't think I need to take that up
13 right now.

14 MR. RIGALI: Right.

15 THE COURT: But I'll take, yeah. Thank
16 you.

17 MR. RIGALI: Your Honor, both of us have
18 submitted some proposals. I'm supplementing
19 what I previously filed.

20 THE COURT: Is this your supplement
21 right here?

22 MR. RIGALI: It says assault at the top.

23 THE COURT: Yes.

1 MR. RIGALI: Yes. Normally and again,
2 we all do this a little differently, I don't
3 try to replicate the Court's boilerplate
4 instructions on various causes of action.
5 If there's a knotty issue that I think my
6 client, you know, can be well served by
7 having specific language I do that. So
8 initially I didn't file the assault, the
9 assault and battery, because they're
10 boilerplate instructions. The other
11 suggestion I would make though is because
12 this is a complaint, counter complaint case,
13 you know, the typical language of well the
14 plaintiff has to do this, the defendant, you
15 know, you've got six people here that, I
16 would prefer and I'd recommend as a courtesy
17 that it be Mr. Frei has to prove this, Mr.
18 Johnson has to prove this, so in my language
19 it sort of transcends it, but those are
20 some, these are more for your assistance.
21 You don't need my help obviously in these
22 particular causes of action.

23 THE COURT: Okay.

1 MR. RIGALI: There is a, on the third
2 page of that, there is a joint liability,
3 excuse me, a liability as a joint venturer
4 instruction which the Court may want to
5 spend some time in crafting. But the theory
6 will be at the close of the evidence,
7 assuming we get to that point in front of
8 the jury, that plaintiff alleges that these
9 men were acting in concert at the time that
10 he was, as you know there's an allegation he
11 was kicked and knocked to the ground and
12 that Mr. Johnson then quickly approached him
13 as if to kick him while he was down, and the
14 plaintiff's contention is they're acting as
15 a group at that point. They were aggressive
16 to him throughout, they were hostile to him
17 throughout both before and after the
18 accident, or the incident, to he and his
19 girlfriend. And so when we get to that
20 issue, that's why I propose, if that's
21 appropriate.

22 THE COURT: Okay, alright.

23 MS. SAPIRSTEIN: I don't know, I have to

1 take a look at the counterclaims. I just
2 got that from Mr. Rigali today. I'm not
3 sure that was actually in his counterclaims,
4 the joint liability, so I'd have to take a
5 look at that.

6 THE COURT: Well, there's talk about Mr.
7 West in the counterclaims so I'm not going
8 to address those right now, okay. We'll get
9 started and see how the evidence comes in.
10 Now, let me just, because there was a couple
11 of, before I get to your motions, Attorney
12 Sapirstein, I thought I saw in here a couple
13 of different answers. Was the answer
14 amended at some point?

15 MR. RIGALI: My client, yes, I think so.
16 I didn't get into this until quite late, but
17 I think he filed a pro se answer.

18 THE COURT: He did.

19 MR. RIGALI: And then I moved to file a
20 substitute answer, so I suppose we should go
21 on the latter as far as issues that are
22 raised by pleadings and so forth. His are
23 probably actually better than mine.

1 THE COURT: I just want to make sure I
2 have the right one. Let's see, okay, I have
3 one that was filed on August 29, 2011 that
4 is only signed by Mr. Frei, that's
5 defendant's answer to plaintiff's complaint
6 and claim for jury trial.

7 MR. RIGALI: I have a copy of the one
8 that's time stamped, Your Honor, filed on
9 August 30th by myself, if you'd like that.

10 THE COURT: Okay, let me take a look at
11 that one because this one was filed on the
12 29th. Is yours filed August 30, yeah, 2011.
13 Okay, defendant's substituted answer,
14 affirmative defenses, counterclaims and jury
15 demand, okay. So that's the one we're
16 working off of.

17 MR. RIGALI: Correct.

18 THE COURT: Alright.

19 MR. RIGALI: For better or for worse.

20 THE COURT: So, okay. So Attorney
21 Sapirstein, you can respond to the motion
22 for instructions to the jury later. I'm not
23 going to rule on it right now.

1 MS. SAPIRSTEIN: Okay, but there isn't
2 actually anything in the substituted answer
3 that talks about a joint venture.

4 THE COURT: Okay.

5 MS. SAPIRSTEIN: So I would suggest that
6 that's not actually a part of this case.

7 THE COURT: Okay, alright, I'll take a
8 look at that.

9 MR. RIGALI: When you get to that, Your
10 Honor, you know, bear in mind that pleadings
11 are sufficient if they just give a general
12 description and the assault and battery
13 description, my memory is, in the
14 counterclaim talks about that others were
15 involved in this.

16 THE COURT: Let's see, yeah. Brian
17 Johnson in joint concert with others.

18 MR. RIGALI: Right, as long as that
19 issue is raised, it puts them on notice, I
20 think it's fair, it's not a surprise.

21 THE COURT: Okay, well we'll address the
22 jury instruction after the evidence comes
23 in, okay. Alright, so Attorney Sapirstein,

1 you have motions.

2 MS. SAPIRSTEIN: Two motions to dismiss.

3 THE COURT: Okay, motion to dismiss
4 defendant's counterclaim under General Law
5 Chapter 12, Section 11H.

6 MS. SAPIRSTEIN: Right, and it's
7 basically just a legal argument because 11H
8 by its terms can only be pursued by the
9 Attorney General, and the quote on page
10 three, specific language, I is a private
11 cause of action, not H. So Mr. Frei can't
12 pursue a cause of action under 11H.

13 THE COURT: Okay. What do you say about
14 that?

15 MR. RIGALI: Actually I'm a little bit
16 surprised by this one, Judge. When civil
17 rights actions are brought privately they're
18 brought under both sections, and the reason
19 is that General Laws Chapter 12, 11I
20 provides as follows, any person whose
21 exercise in enjoyment of certain rights, et
22 cetera, et cetera, as described in 11H,
23 right in the statute, may institute or

1 prosecute in his own name on his own behalf
2 a civil action for injunctive relief,
3 equitable relief, monetary damages, dah,
4 dah, dah, dah, dah, dah, dah. So when you
5 bring the action, you bring it under both
6 sections, you're not seeking to be an
7 Attorney General here. I mean, I don't
8 understand why there's a dismissal. The
9 pleadings state a civil rights cause of
10 action very clearly, it's crafted after the
11 Superior Court jury instructions. So
12 that's all I have to do is plead the
13 elements, they're on notice. I don't quite
14 understand it. The Redgrave case, I don't
15 know if you remember that, that's way back
16 when, the Boston Pops and so forth, Phillips
17 v. Youth Development Center, Planned
18 Parenthood, they all recognize a private
19 right of action under these two sections and
20 that's just how you plead them.

21 MS. SAPIRSTEIN: I would just submit by
22 the terms of the statute H specifically says
23 the Attorney General may bring a civil

1 action and it shall be brought in the name
2 of the Commonwealth. It's pretty clear
3 language, that's H. What Mr. Rigali was
4 referring to in I refers back to the rights
5 that have been interfered with or attempted
6 to be interfered with as described in 11H.
7 But by the very terms of H, Mr. Frei can't
8 bring it. It's got to be brought in the
9 name of the Commonwealth by the Attorney
10 General.

11 THE COURT: This isn't going to make any
12 difference in the evidence, is it?

13 MR. RIGALI: No.

14 THE COURT: So I'll read the statute and
15 it seems kind of technical.

16 MR. RIGALI: And, Your Honor, not to
17 belabor the point but if you look at the
18 language, the specific language of I think
19 it's count seven, the counterclaim, it says
20 violation of Massachusetts Civil Rights Act
21 and it has 11H and 11I.

22 THE COURT: Mm-hmm.

23 MR. RIGALI: So, I mean, I don't know, I

1 don't really understand the motion to be
2 honest with you.

3 THE COURT: Well, it seems sort of
4 technical. Obviously I see your point under
5 I only the Attorney General can bring it.
6 Under H, it's private. I mean, the other
7 way around. It seems very technical so I'll
8 deal with that at the end if necessary.
9 Plaintiff's motion to dismiss defendant's
10 counterclaim for obstruction of justice.

11 MS. SAPIRSTEIN: And in the substituted
12 answer it's count six, it's combined, abuse
13 of process and obstruction of justice.

14 THE COURT: Okay.

15 MS. SAPIRSTEIN: Obstruction of justice
16 is a crime. We're unable to find nor is
17 there anything in the answer which supports
18 a civil remedy for obstruction of justice.
19 So again, as a matter of law obstruction of
20 justice would not be able to be brought by
21 Mr. Frei against Mr. Johnson. Abuse of
22 process can, but not obstruction of justice.

23 THE COURT: Alright.

1 MR. RIGALI: All we're looking for is an
2 abuse of process instruction, Judge.

3 THE COURT: Okay. Then this is allowed.
4 Any other motions, Attorney Sapirstein?

5 MS. SAPIRSTEIN: No, Your Honor.

6 THE COURT: Okay. Okay, why don't we do
7 this. I'm going to have to obviously take a
8 recess to take a look at a couple of these
9 issue preclusion counts and perhaps you can
10 either listen to the tape or whatever you
11 have to talk about to resolve that
12 stipulation.

13 MR. RIGALI: If I may, on just a couple
14 of housekeeping matters, Your Honor.

15 THE COURT: Yes.

16 MR. RIGALI: What I anticipate happening
17 at some point in the case, probably
18 relatively early on, I don't think this is
19 going to go more than a day, a day and a
20 half trial, is I want to bring in and show
21 the jury or have Mr. Frei on the witness
22 stand show the jury his blog, his computer
23 newspaper, if you will, so that they know

1 what's going on and where this sort of
2 relentless criticism coming from Mr. Frei
3 was going and its impact, so we have to
4 physically set up a TV, which I have in the
5 building.

6 THE COURT: Okay.

7 MR. RIGALI: And also we're going to
8 play some tapes so we've got to get some
9 audio equipment in here, it's not anything
10 entirely sophisticated. So if it's okay
11 with the Court, I'll involve myself or have
12 the parties be working on that also. I just
13 didn't want to come in and take over the
14 courtroom and be in the background, you
15 know, acting like I own the place.

16 THE COURT: No, that's fine, that's
17 fine. I have a few civil motions and so
18 obviously you can just start doing that,
19 okay.

20 MR. RIGALI: Okay, thanks very much.

21 THE COURT: And then once I take a look
22 at these I'll come back out, we'll readdress
23 those couple of issues and then we'll get

1 started.

2 MR. RIGALI: Thanks.

3 MS. SAPIRSTEIN: Thank you, Your Honor.

4 THE CLERK: Court is back in session. You
5 may be seated. We're back on the record,
6 Brian Johnson v. Peter Frei, case number
7 1143CV293.

8 THE COURT: Alright. That must be
9 yours, that's not the Trial Court's.

10 MR. RIGALI: We've been working while
11 you were gone.

12 THE COURT: Yes, thank you. Okay, let
13 me start with the motion in limine to
14 confirm District Court jurisdiction. I did
15 read the Ravnecar case and that is allowed.
16 And I looked at your cases also, Attorney
17 Sapirstein, on the motion to exclude
18 evidence in reference to previous harassment
19 proceedings. Let me just talk about this a
20 little. You mentioned three counts where
21 you thought that the issue preclusion
22 applied, the first being assault. First, in
23 my decision on the harassment order I didn't

1 make a determination of whether or not there
2 was an assault.

3 MS. SAPIRSTEIN: No, but one of the
4 elements of assault is the apprehension.

5 THE COURT: Where do you see that
6 because I'm looking at the instructions on
7 assault and what I see is that in either
8 form of assault it is not required that
9 there be subjective fear.

10 MS. SAPIRSTEIN: Well...

11 THE COURT: I see that the first branch
12 of assault, again, this is from the model
13 instructions in the cases that follow them.
14 The first branch of assault does not require
15 that the victim was aware of or feared the
16 attempted battery. The second branch of
17 assault requires that the victim was aware
18 of the defendant's objectively menacing
19 conduct. However, subjective fear is not an
20 element of either branch. Do you have
21 something that disagrees with that?

22 MS. SAPIRSTEIN: In my proposed
23 instructions we have as an element that he

1 had to apprehend immediate physical contact
2 and we have some footnote cites.

3 THE COURT: Apprehend immediate physical
4 contact.

5 MS. SAPIRSTEIN: So the intent that's
6 required, my understanding is...

7 THE COURT: He must have perceived it in
8 the second branch, the threatened battery,
9 he must have perceived the threatened
10 battery.

11 MS. SAPIRSTEIN: Right. And the intent
12 that's required is to either cause harmful
13 or offensive contact or make him
14 apprehensive of immediate physical contact.
15 So it would only be the apprehension, which
16 obviously is an important element, that has
17 already been decided at least...

18 THE COURT: Where do you think that I
19 decided that? Do you have a copy of my...

20 MS. SAPIRSTEIN: I do. I have a copy.

21 THE COURT: You have a copy of my
22 decision, alright. Where in there do you
23 think I decided that? I didn't think I did.

1 MS. SAPIRSTEIN: On page four, under
2 discussion.

3 THE COURT: Do you have a copy, Attorney
4 Rigali?

5 MR. RIGALI: I believe I do, Judge, just
6 give me a few seconds here. Page four?

7 MS. SAPIRSTEIN: Under discussion. I do
8 not believe that the plaintiff is afraid of,
9 intimidated by or abused by the defendant.
10 He says he is but his actions say otherwise,
11 and then it goes on.

12 THE COURT: Right, okay. So that was in
13 general but let me take a look at your
14 request for instructions. Anything you want
15 to say on this point?

16 MR. RIGALI: I mean, I think I can see
17 where counsel makes the argument, but I just
18 think with all respect that it's off point.
19 An assault does not require, I mean, as an
20 old DA I can tell you that if somebody comes
21 up behind somebody else with a baseball bat,
22 swings and misses with the intent to hit
23 him, the so-called victim doesn't even know

1 about it if it's witnessed and can be
2 established.

3 THE COURT: Right.

4 MR. RIGALI: So...

5 THE COURT: That's not going to be the
6 evidence here though, is it?

7 MR. RIGALI: No.

8 THE COURT: On the assault?

9 MR. RIGALI: No. The evidence will...

10 THE COURT: The assault is going to be a
11 threatened battery, isn't it?

12 MR. RIGALI: It is. But again, let's
13 assume that, and the Court, I think you just
14 picked up on the key difference here, if in
15 a criminal case, and again, that's where the
16 bulk of my experience is, but I think it's
17 the same elements here.

18 THE COURT: It is the same elements.

19 MR. RIGALI: You know, if somebody comes
20 up and points a weapon at someone and, you
21 know, that individual is not frightened it
22 does not negate, it doesn't undermine the
23 assault.

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THE COURT: Yeah, I agree.

MR. RIGALI: So, I mean, I think it's off point.

THE COURT: I have to agree. Yeah, I have to agree. I mean, I'm looking at the cases, Commonwealth v. Chambers, 57 Mass. Appellate Court, I don't see the beginning, they're citing at 48 through 52, and it indicates that the Court concluded that subjective fear is not an element of either branch of the assault. Alright, so I'm going to deny the motion, well I should say allow the motion on that as to that count. So then the other count is the civil rights action.

MR. RIGALI: You confused me on that a little bit.

THE COURT: I know, I'm sorry. I'm going to allow the motion as to that count to exclude evidence. I'll deal with it all in one big, I think I'm going to allow the motion to exclude the evidence of the harassment.

1 MR. RIGALI: So you're on my motion to
2 exclude, I got you, okay.

3 THE COURT: To exclude evidence in
4 reference to previous harassment proceedings
5 and when I asked Attorney Sapirstein which
6 claims does that pertain to, you indicated
7 assault, civil rights and intentional
8 infliction of emotional distress. So as to
9 the civil rights action...

10 MS. SAPIRSTEIN: The intimidation is an
11 element. He had to be, the interference or
12 attempted interference was by threats,
13 intimidation or coercion.

14 THE COURT: Right. But does that mean
15 that the defendant had to actually be
16 intimidated?

17 MS. SAPIRSTEIN: I believe so under the
18 Civil Rights Act, yes.

19 THE COURT: Alright, why do you say
20 that? Because I see the elements that the
21 exercise or enjoyment of rights secured by
22 the Constitution have been interfered with
23 or attempted to be interfered with and that

1 the interference or attempted interference
2 was by threats, intimidation or coercion.

3 MS. SAPIRSTEIN: Right, the crux of the
4 civil rights violation would be forcing
5 submission by conduct calculated to
6 frighten, harass or humiliate.

7 THE COURT: Calculated to, but, I mean,
8 does it actually have to? Because I think
9 that was the issue in the harassment order
10 that I found that he actually, I mean, I
11 don't, let me look at my decision again. I
12 don't know that I addressed, okay, the
13 plaintiff must show that the defendant
14 committed three willful acts, the acts were
15 aimed at the plaintiff, acts were intended
16 to cause fear, intimidation or abuse or
17 damage and plaintiff was in fact put in
18 fear. I really didn't address any of the
19 first three issues in the decision other
20 than probably by implication that there were
21 three acts but I guess I didn't have to
22 address the first three elements because I
23 found that he was not intimidated, was not

1 afraid of.

2 MS. SAPIRSTEIN: Well, you said he's not
3 afraid of, intimidated by or abused.

4 THE COURT: Right.

5 MS. SAPIRSTEIN: So if that's already
6 been found then I guess I don't see the
7 difference between that element and proving
8 that he's been interfered with or attempted
9 to be interfered with through threats,
10 intimidation or coercion, that's what he has
11 to prove in this count.

12 THE COURT: He does.

13 MS. SAPIRSTEIN: It sounds like it's
14 already been found that he wasn't
15 intimidated or abused or afraid of.

16 THE COURT: Well, let me ask, I don't
17 know that he has to prove that he actually
18 was intimidated but rather that the actions
19 were designed to intimidate. I mean, that's
20 the way I read it.

21 MR. RIGALI: That's right, I couldn't
22 agree with you more and that's my reading of
23 the cases and it's the plain reading of the

1 elements that are put out, as they're laid
2 out in the jury instructions by the model
3 code. Again, it's maybe hyperbole but in a
4 different context, in a different
5 Constitutional right context, if someone
6 puts a racially vulgar, you know, symbol, a
7 swastika, a burning cross, you know, on
8 someone's lawn because they're trying to
9 intimidate them, the case is made by the
10 conduct and so forth. The fact that the
11 homeowner or the target says I wasn't
12 intimidated at all but this conduct was
13 offensive. It's like the assault, I didn't
14 even know the bat was coming, or that they
15 threw the beer bottle at me in the bar but I
16 saw it break and I turned around and the
17 police had grabbed the guy, I wasn't afraid
18 at all, but the crime is made. So I don't
19 think that, and particularly in a harassment
20 proceeding which has, in my view, different
21 elements. There are different elements in
22 that proceeding than there are from either
23 the civil rights, the assault, the assault

1 and battery, I mean, really any of the
2 plaintiff's counterclaims.

3 MS. SAPIRSTEIN: Can I just address
4 that? Actually he does have to feel
5 coerced. Both the Planned Parenthood case
6 as well as the Redgrave case, what he has to
7 show is creation of fear to compel conduct,
8 that's exactly what he has to show, at least
9 that was, there was a Mass. Appellate Court
10 case as well as an SJC case. So if he can't
11 show that he was, that fear was created to
12 compel conduct, that's actually the crux of
13 the civil rights claim. We're not talking
14 about, quite frankly I think a burning cross
15 on your lawn would create fear and of course
16 you would compel conduct, but that's what he
17 has to show. It may be different than
18 assault but he has to show that the conduct
19 made him fearful and coerced a certain
20 response. That is what he has to show.

21 MR. RIGALI: I think if that same quote
22 is read again I don't think...

23 THE COURT: I need to read it. Can I

1 just take a look at it?

2 MS. SAPIRSTEIN: Well, I just have it in
3 my footnote in my jury instructions. I can
4 find the case probably, but in the Planned
5 Parenthood case, the case that I was just
6 quoting is Delaney v. Chief of Police of
7 Wareham, it's 27 Mass. Appeals Court 398.
8 It says acts or language by which another is
9 placed in fear of injury or damage. I think
10 you have to be placed in fear in order to
11 be, I think that's an element of a civil
12 rights violation, at least under I. And if
13 I could just be heard...

14 THE COURT: Alright, I'm going to look
15 that case up, 27 Mass. Appellate Court 98?

16 MS. SAPIRSTEIN: I just lost it, 398.

17 THE COURT: 398, sorry.

18 MS. SAPIRSTEIN: And I think it's on
19 409, but just to address Mr. Rigali's other
20 point about apples and oranges. The Dugan
21 case, which I'm sure we all remember well,
22 which is a Supreme Judicial Court case, in
23 that case the SJC said it was issue

1 preclusion that findings in an unemployment
2 were issue preclusion in a completely
3 different case, so you can actually
4 transport...

5 THE COURT: Yes, but they have to be
6 identical issues.

7 MS. SAPIRSTEIN: Right, and at least the
8 apprehension element, it's our position, is
9 identical.

10 THE COURT: Alright.

11 MR. RIGALI: I've got nothing more to
12 comment.

13 THE COURT: The intimidation, the
14 intimidation, alright, even if that was
15 true, what about threats and coercion? That
16 wouldn't be precluded, would it?

17 MR. RIGALI: Well, I think the key
18 thing, not to interrupt, is it is whoever
19 does this or attempts to do so.

20 THE COURT: I know, attempts to do it.

21 MS. SAPIRSTEIN: I understand that.

22 THE COURT: What if they just attempt to
23 do it?

1 MS. SAPIRSTEIN: But the element still
2 has to, he still has to show that the
3 attempt or the actual interference created a
4 fear that coerced him to do something and I
5 think, maybe I'm reading it too broadly,
6 obviously I don't want to put words in Your
7 Honor's mouth, but it says, you said the
8 plaintiff is not afraid of, intimidated by
9 or abused.

10 THE COURT: Oh, I did. I did.

11 MS. SAPIRSTEIN: So that to me seems
12 broad enough, afraid is fear and intimidated
13 by, that's the same word, I think that's
14 already been found. We have the same
15 parties, we have basically the same sets of
16 facts and we'll be hearing about it all over
17 again. There's already been a finding that
18 didn't make him frightened and that in fact
19 has to happen. He has to be feel coerced by
20 the fear or the threats.

21 THE COURT: Okay. Can you give me the
22 cite on the Redgrave case right there? I
23 know it's on your jury instructions, but if

1 you have it.

2 MS. SAPIRSTEIN: The Redgrave case is
3 399 Mass. 93.

4 THE COURT: Okay.

5 MS. SAPIRSTEIN: And the Planned
6 Parenthood case is 417 Mass. 467.

7 THE COURT: Okay. Now, what about the
8 intentional infliction of emotional
9 distress?

10 MS. SAPIRSTEIN: Let me just get to
11 that.

12 MR. RIGALI: Your Honor, while counsel
13 is looking at that, the only other issue
14 that I point out is that in our brief,
15 citations in our motion, another element is
16 noted by some of the courts and that is that
17 the parties not only have the same parties,
18 the same issues and so on and so forth, but
19 in the prior proceeding that they be
20 represented by counsel, that's in the
21 footnote. So Mr. Frei was not represented
22 by counsel in that harassment proceeding, he
23 was pro se, and if you look at the footnote

1 in our motion I think it's, I don't have it
2 in front of me, but...

3 THE COURT: I have it.

4 MR. RIGALI: So it's just another
5 factor, I don't know if it's dispositive but
6 I think it's a factor.

7 THE COURT: Okay. Alright. And on
8 the...

9 MS. SAPIRSTEIN: The intentional
10 infliction? This has to have caused extreme
11 emotional distress. It's not quite, it
12 doesn't fit quite as well as the civil
13 rights element but I think there was an
14 implicit finding that there wasn't any
15 emotional distress, especially when you
16 quote the tape, these are not the actions of
17 a person who's afraid or intimidated. This
18 is at the end of your opinion, Your Honor,
19 instead of, basically you held that he
20 failed to show that he was put in fear,
21 intimidated, abused or suffered damage to
22 his property, that was the ruling. So as I
23 said, it's not quite as close as the civil

1 rights, but if there's no injury, there's no
2 damage. He wasn't put in fear, intimidated,
3 abused. It would seem like the element of
4 the extreme emotional distress would be
5 satisfied. If I can just speak to the
6 counsel issue. The case was fully
7 litigated, although Mr. Frei was pro se, but
8 the elements are actually met because it's
9 the same parties' overlapping issues. It
10 was actually litigated and determined and
11 that determination was essential to the
12 decision in the prior action. Because Mr.
13 Frei chose to appear pro se doesn't take it
14 out of issue preclusion. As you know, pro
15 se parties are held to the same standard as
16 those who were represented by counsel. So
17 you can't have it both ways.

18 THE COURT: Okay, thank you. Attorney
19 Rigali, on the intentional infliction of
20 emotional distress?

21 MR. RIGALI: I'd tell you the same
22 arguments, Your Honor. The issue here is
23 quite different from what was going on in

1 the harassment proceeding. Again, the
2 harassment proceeding and the legislative
3 history behind General Laws Chapter 258 was
4 to provide a remedy for sort of these
5 ongoing series of events that we see in
6 domestic and non-domestic situations. So
7 there's a very different, you know, level of
8 proof there. The thrust of the plaintiff's
9 argument in his counterclaims is that he is
10 a journalist, he's a blogger, he's a pain in
11 the butt of the targets of his writings and
12 his pictures and so forth that's included in
13 his blog. He has a right to do that. He
14 did it for a good purpose. I mean, I'm not
15 trying to get too far ahead, but he did it
16 for a valid purpose, he felt right or wrong
17 that the governance, that some of the
18 governance of the Town of Holland were
19 bullies and they were self-dealing and they
20 were corrupt and other people in that town
21 happen to share that. But again, we don't
22 go into the truth of it, this is his right
23 to express his opinions in the same way that

1 John Stewart and Jay Leno and Rush Limbaugh
2 and everybody else has the same right to
3 come up with their own theories on how
4 things go. His theory here is that in a
5 culminating series of confrontations on a
6 particular day, several men, all of whom or
7 at least the bulk of whom work for the
8 Highway Department, they're close friends of
9 Mr. Johnson, who up at his house, you've
10 heard the evidence and so forth, for the
11 sole purpose of intimidating him and
12 harassing him and, you know, getting him to
13 think twice about all this, you know, his
14 actions in publicizing all these things.
15 And this is a, I think, a singular, I think
16 it's a jury question. It should be a jury
17 question as to whether or not they found on
18 those particular facts whether or not his,
19 what he will describe as his reaction and
20 how upset that he was by this. It didn't
21 stop his conduct, you know, you can be
22 afraid and still go on and confront, you
23 know, situations. So I think that the jury

1 should be allowed to decide that.

2 THE COURT: Yeah, I have to agree with
3 that. I think it is a little bit different
4 as far as severe emotional distress than
5 what I had decided in the, you know, I
6 didn't find that he was afraid in the
7 harassment hearing, but whether he was
8 emotionally distressed, I don't know, I
9 didn't deal with that. So the only issue I
10 really have left is the civil rights one and
11 so I will take one more look at that with
12 these cases that you've given me and I think
13 that's it. Is there anything else?

14 MS. SAPIRSTEIN: Can you just note my
15 objection for the record on that?

16 THE COURT: Yes.

17 MS. SAPIRSTEIN: Thank you.

18 MR. RIGALI: Again, I don't think it's a
19 strong argument, I don't mean that to put
20 your order away but I don't think that
21 logically from a legal point of view if
22 we're in a law school class, if it's a
23 strong argument that, you know, the prior

1 decisions because of the different elements
2 are some sort of issue preclusion or erase
3 judicate or whatever. But in particular
4 the glaring point is that the civil rights
5 statute clearly says whoever does A, B or C
6 or attempts to do so, and to me, now I'm not
7 beyond missing key points here, but to me
8 it's pretty clear, whoever attempts to do
9 so.

10 THE COURT: I would agree but I do want
11 to just read the cases that you've
12 referenced because I didn't read those
13 earlier. So, okay, let me just ask a few
14 other things. Have you stipulated as to the
15 tape?

16 MR. RIGALI: Yes.

17 MS. SAPIRSTEIN: Yes, Your Honor.

18 THE COURT: Okay, so then I do not have
19 to announce Mr. Stankowitz?

20 MR. RIGALI: Correct. And was that
21 stipulation signed, by the way?

22 THE COURT: I didn't see anything. What
23 are you stipulating, to the authenticity of

1 the tape?

2 MR. RIGALI: Right. So at some point
3 that should be read. I'll find it, Your
4 Honor, it was a stipulation for both of us
5 to sign.

6 THE COURT: Alright. And are there any
7 other exhibits that are stipulated to or are
8 we going to have issues with?

9 MR. RIGALI: I don't think so, Your
10 Honor. Just so the Court knows, I have some
11 electronic evidence that's going to be
12 introduced of the blog and sort of a quick
13 waltz through that, this is what it is,
14 school lunch program, fire department,
15 fishing derbies, as well as later on some
16 materials that shows how aggressive, you
17 know, Mr. Frei was in going after, again,
18 pursuing what he felt was his right as a
19 journalist or whatever, and I don't have
20 those marked out as of yet. Now, I do have
21 some hard copies of different photographs,
22 you know, for the jury. They are smaller
23 versions of something like this, which is a

1 map of the lake.

2 THE COURT: Okay.

3 MR. RIGALI: so I have an eight by ten
4 which I've given to counsel. I do want to
5 introduce these but I also have the
6 duplicates in a smaller, more manageable
7 size. There's a couple of other audio
8 things that we're all set up for
9 electronically, I don't think that's a
10 problem. I did prepare a, in the past I
11 found to be very helpful and I always use a
12 different color only so I can find the darn
13 thing, a sheet that just says exhibits for
14 yourself, for counsel and myself, so that we
15 can write these things down, I've got the
16 stickers here. We didn't have a chance just
17 because of scheduling to actually physically
18 sit in a room and label them, so I don't
19 think there will be a problem.

20 THE COURT: Alright, so let me ask, are
21 there going to be objections to the blog, I
22 mean, I don't mean particular, you know, if
23 there's something particular, fine, but in

1
1 general?

2 MS. SAPIRSTEIN: The blog, I don't know
3 only because I don't know what he's going to
4 introduce so a lot depends on the contents.

5 THE COURT: Alright. The contents I
6 understand but just in general, that form
7 of?

8 MS. SAPIRSTEIN: Well the fact that a
9 blog exists obviously I wouldn't be but a
10 lot depends on what he, what Mr. Rigali
11 intends to introduce.

12 MR. RIGALI: Just a thought to share
13 with the Court, hearsay as we all know is
14 extraneous material admitted for its truth
15 content. When I'm introducing an article, a
16 news article or whatever that says, you
17 know, so and so ran over a duck in front of
18 some school children, I'm being
19 hypothetical, I'm not introducing that in
20 this context for the truth content of that
21 at all. I'm introducing it merely for the
22 fact that it was said to show that there
23 would be a reaction on the part of the

1 plaintiff and a reason and a motive for him
2 to be angry and upset and to seek to, you
3 know, so again...

4 THE COURT: Alright, well we'll take
5 that as it comes up.

6 MR. RIGALI: As a generic rule, but I
7 just wanted to let everybody know that's
8 where I'm coming from.

9 THE COURT: Okay. If you do object,
10 would you just say that you object and if I
11 ask what is your objection, can you just
12 give me a one word, hearsay, relevance,
13 whatever, and then if I need something more
14 I'll see you over at the side, okay? Do you
15 want the jurors, is that the stipulation, do
16 you want the jurors to take notes?

17 MR. RIGALI: I have no problem with them
18 taking notes.

19 MS. SAPIRSTEIN: I have no problem with
20 that.

21 THE COURT: Alright. Yeah, we'll get
22 that. Okay, so we'll seat seven jurors and
23 there will be two preemptory challenges

1 apiece. I think the jurors right now are
2 being used in another courtroom, a criminal
3 courtroom, so we may have a little bit of a
4 wait before they actually come down. Is
5 there anything else?

6 MS. SAPIRSTEIN: No, Your Honor.

7 THE COURT: When do you want me to read
8 this stipulation, or do you just want it at
9 the end with the instructions?

10 MR. RIGALI: Yeah, as part of the
11 instructions.

12 THE COURT: Or I can read it when you're
13 offering it.

14 MR. RIGALI: Either way is fine.

15 MS. SAPIRSTEIN: Since we stipulated
16 that it's authentic and no one's saying that
17 it's not or been tampered with.

18 THE COURT: I don't have to read it at
19 all.

20 MS. SAPIRSTEIN: Well, that's my
21 thinking.

22 MR. RIGALI: Here's the thing, here's
23 the thing, this is what I call the CSI

1 effect, okay. You've got seven people
2 there, whatever, they all know more than we
3 do, which in my case is probably true, but
4 you know, they've got these ideas and well
5 why didn't they do this or why didn't they
6 do that, you know, and maybe somebody
7 tampered with the tape, you know, we've seen
8 the president do that. So I just want it to
9 be a non-issue.

10 THE COURT: Fine. I don't have a
11 problem with reading it. When do you prefer
12 I read it, at the end or when it's being
13 offered?

14 MR. RIGALI: Either one, but I think in
15 the instructions it's a pretty good idea.

16 THE COURT: Okay.

17 MR. RIGALI: But either way is fine.

18 THE COURT: Alright. I'll do it in the
19 instructions, okay. Alright. If there's
20 nothing else I'm going to take another
21 recess, just take a look at this last issue
22 on the civil rights and do we know where the
23 jurors are at this point? Are they in

1 courtroom ten? Okay, we may be bringing
2 them down sooner rather than later. It
3 looks like the matter in courtroom ten might
4 end up being a plea, so okay. Yeah, maybe
5 fifteen minutes. Sorry to keep putting you
6 off.

7 MR. RIGALI: We'll be here, Judge, no
8 problem.

9 THE CLERK: We're back on the record.
10 Brian Johnson v. Peter Frei, 1143CV293.

11 THE COURT: Okay. I did take a look at
12 the cases, this is in regard to the civil
13 rights claim. So the standard, and I'm
14 reading from the Planned Parenthood League
15 of Mass., the standard is whether a
16 reasonable, in this case woman, would have
17 felt threatened, intimidated or coerced by
18 the defendant's conduct. And then they go
19 on to say that on the other hand any
20 evidence that women who were unable to
21 obtain abortions as scheduled did not feel
22 threatened, intimidated or coerced by the
23 defendant's conduct would be relevant to the

1 issue of reaction of a reasonable woman in
2 the circumstances. How actual participants
3 responded to events could be a guide to how
4 a reasonable person would react in the same
5 circumstances. So I think the standard is a
6 reasonable person. So I don't think that my
7 finding that he, Mr. Frei, was not, I mean
8 certainly you can cross examine him, but if,
9 I don't think that precludes the claim. So
10 anyways, that's my ruling.

11 MR. RIGALI: Thank you, Your Honor.

12 THE COURT: I will note your objection.

13 MS. SAPIRSTEIN: Your Honor, would you
14 have an objection if my client sits with me?

15 THE COURT: Oh no objection, fine. All
16 of them.

17 MR. RIGALI: If we could have the
18 witnesses remain in the courtroom during
19 jury selection so they can identify
20 themselves.

21 THE COURT: Absolutely. And as to
22 anyone who is going to testify, Ms. Manning,
23 Officer Forcier, Mrs. Johnson, there was a

1 sequestration order put into effect earlier
2 this morning, so what that means, just in
3 case you don't know or the lawyers haven't
4 explained it to you, you're going to have to
5 step outside of the courtroom until it's
6 your turn to testify and you're also ordered
7 not to discuss your testimony with any other
8 witnesses, okay. So I guess ultimately,
9 Attorney Rigali, your motion in limine to
10 exclude evidence in reference to previous
11 harassment proceeding is allowed.

12 MR. RIGALI: Thank you.

13 MS. SAPIRSTEIN: But we can use the
14 transcript from...

15 THE COURT: Oh yes, and he has that
16 right in the motion.

17 MS. SAPIRSTEIN: Yes, I know, I just
18 wanted to make sure.

19 THE COURT: He agrees to that, sure.

20 MR. RIGALI: But, and again, I trust
21 Attorney Sapirstein, but you know, I'm going
22 to hold her to your order.

23 THE COURT: Just a prior proceeding,

1 refer to it as a prior proceeding.

2 MR. RIGALI: Prior proceeding is fine.

3 THE COURT: I'm going to definitely tell
4 them the case probably will continue until
5 tomorrow. Attorney Rigali, just one further
6 question. Did you want me to announce
7 Office Leonard Bean?

8 MR. RIGALI: No.

9 THE COURT: No, okay.

10 MR. RIGALI: Does court still break at
11 one?

12 THE COURT: Yes. I just said we'll
13 probably get through the jury selections and
14 the openings and then be breaking for lunch.

15 MR. RIGALI: That may work out well. I
16 think I've got a motion after the opening,
17 so it will give you something to read over
18 lunch.

19 THE COURT: Well, thank you.

20 COURT OFFICER: All rise for jury pool
21 please. Folks, please make sure you have
22 your white cards available and make sure
23 your call phones are turned off please.

1 Thank you. You may be seated.

2 THE CLERK: This is the matter of Brian
3 Johnson v. Peter Frei, docket number
4 1143CV293. Will all the jurors please stand
5 and raise your right hands. Do you
6 severally and solemnly swear or affirm that
7 you will make true answers to such questions
8 as put to you by the Court so help you God?
9 Thank you. You may be seated.

10 THE COURT: Alright. Good, well I guess
11 it's just about afternoon, good afternoon,
12 ladies and gentlemen. My name is Patricia
13 Polar. I'm an Associate Justice of the
14 District Court and I'm going to be presiding
15 over this jury trial that we're starting
16 today. So the first thing that we need to
17 do is empanel a jury and just to let you
18 know who the other individuals in the
19 courtroom are, there's an assistant clerk,
20 William McNamara, court officers are Chris
21 Gramatikis, Tim Barrett. So this is the
22 trial of a civil case, which means that this
23 is a dispute between private parties. The

1 plaintiff is the person or the party who is
2 bringing the claim and the plaintiff in this
3 case is Brian Johnson and he is from
4 Holland, Massachusetts and he is being
5 represented by Attorney Tani Sapirstein and
6 she has offices in Springfield,
7 Massachusetts. So Attorney Sapirstein, if
8 you could just introduce you and your client
9 please.

10 MS. SAPIRSTEIN: Thank you. Good
11 afternoon, ladies and gentlemen. I'm Tani
12 Sapirstein. My office is on Main Street in
13 Springfield and with me is Brian Johnson.

14 THE COURT: Thank you. Okay, the person
15 or the party being sued, ladies and
16 gentlemen, is called the defendant in court
17 terminology. The defendant in this case is
18 Peter Frei and he is from Holland,
19 Massachusetts and he is being represented by
20 Attorney Henry Rigali with offices in
21 Springfield, Massachusetts. So Attorney
22 Rigali, if you could briefly introduce
23 yourself.

1 MR. RIGALI: Thank you. I'm Henry
2 Rigali and my office is in Springfield. I
3 represent Mr. Frei and this is Mr. Frei.

4 THE COURT: Thank you. This is a case
5 involving a claim by Brian Johnson against
6 Peter Frei for surreptitiously recording
7 statements made by Mr. Johnson on February
8 19, 2011 in violation of Mass. General Laws
9 Chapter 272, Section 99Q and that as a
10 result Mr. Johnson is entitled to an award
11 of money damages. Peter Frei admits to
12 recording Mr. Johnson's comments on February
13 19, 2011 but denies that he violated the law
14 when he did so. He denies Mr. Johnson is
15 entitled to an award of money damages. By
16 way of counterclaims, Mr. Frei claims that
17 Mr. Johnson used threats, intimidation or
18 coercion to interfere with or attempt to
19 interfere with the exercise or enjoyment of
20 rights secured by the Constitution or the
21 laws of either the United States or the
22 Commonwealth. Mr. Frei further claims Mr.
23 Johnson committed defamation, assault,

1 assault and battery, abused judicial process
2 and caused him emotional distress as a
3 result of which he is entitled to monetary
4 damages. Mr. Johnson denies Mr. Frei's
5 counterclaims. Mr. Johnson denies that he
6 committed any of the acts Mr. Frei has
7 accused him of, namely, the violation of his
8 civil rights, defamation, assault, assault
9 and battery, the infliction of emotional
10 distress and abuse of process. Now, my
11 description of the case, the brief
12 description, is not evidence about the case
13 but I wanted all of you to at least have a
14 general idea of what the case involves. In
15 addition to the plaintiff and the defendant,
16 there are a number of other potential
17 witnesses in this case. If the potential
18 witness is here as I read their identifying
19 information, could you please stand up, you
20 don't have to say anything, you shouldn't
21 say anything, but just stand up so that the
22 prospective jurors can see you. So other
23 witnesses that may testify, Kristen Johnson

1 of Holland, Massachusetts. Thank you. Dana
2 Manning from Sturbridge, Massachusetts.

3 Thank you. Officer Jeff Forcier of the
4 Holland, Massachusetts Police Department.

5 Thank you. Alright, to all of the potential
6 jurors, I'm going to ask you a series of
7 questions. The reason that I ask these
8 questions is so that we can accomplish the
9 most important thing in a trial that we can
10 possibly accomplish and that is to have a
11 fair, open-minded and impartial jury. There
12 are no right or wrong answers to these
13 questions so don't be hesitant or shy about
14 raising your hand. If you have any concern
15 about the questions that I'm about to ask
16 you, please err on the side of caution and
17 raise your hand. If your answer to any of
18 these questions is yes or in the
19 affirmative, do not say anything, just raise
20 your hand and then at the end of all of the
21 questions anyone who raised their hand, I
22 will meet with them privately at the
23 sidebar. So the first question is, is there

1 anyone here who is related to the plaintiff,
2 Brian Johnson. I see no hands. Is there
3 anyone here who is related to the defendant,
4 Peter Frei. Is there anyone here who knows
5 the plaintiff or the defendant or any of the
6 potential witnesses or either of the lawyers
7 in this case. I see one hand. Is there
8 anyone here who has an interest or a stake
9 of any kind in this case or this kind of
10 case. I see no hands. To the extent that
11 you have heard anything about this case, and
12 I know you've just heard my brief summary,
13 but to the extent that you have heard
14 anything else about the case, have you
15 formed or expressed any opinions, feelings
16 or impressions about this case. I see no
17 hands. Is there anyone here who is aware of
18 any bias or prejudice or opinions that you
19 have regarding either the plaintiff or the
20 defendant. I see no hands. Is anyone here
21 now or have you ever been a resident of the
22 Town of Holland, Massachusetts. No hands.
23 Is there anyone here who now owns or has

1
1 ever owned property in the Town of Holland,
2 Massachusetts. Again I see no hands. Is
3 there anyone here who themselves or a member
4 of their immediate family is a past or
5 present resident of the Town of Holland. I
6 see two, I think two hands, okay. Is there
7 anyone here who themselves or a member of
8 their family has ever been a party to a
9 civil lawsuit. I see no hands. Is there
10 anyone...

11 COURT OFFICER: There's one hand, Your
12 Honor.

13 THE COURT: Was there a hand, I'm sorry,
14 I didn't see that, okay. Is there anyone
15 here who is now or has ever held a public
16 office or served on a city or town
17 committee, council, department, commission
18 or anything like that. No hands. Is there
19 anyone here who has a member of their
20 immediate family who has ever held public
21 office or served on a city or town
22 committee, council, department or some
23 similar position. Two hands, okay. Thank

1 you. Could you raise your hand if you have
2 never used a computer. I see one hand. Two
3 hands. Okay, I need new glasses here,
4 sorry. Anyone here who is not familiar with
5 the internet at all. Two hands, okay. Is
6 there anyone here who is not familiar with
7 the term website or blog. No hands. Is
8 there anyone here who has heard of or is in
9 any way familiar with an internet website
10 known as the Holland Blog, the web address
11 of which is www.01521.com, that being the
12 zip code of Holland, Mass., is anyone
13 familiar in any way with that website. I
14 see no hands. Okay. Is there anyone here
15 who has heard of or is any way familiar with
16 the facts or controversies of this case or
17 any publicity about the parties or the
18 witnesses. I see no hands. Is there anyone
19 here who has any strong feelings for or
20 against those who openly criticize public
21 officials in the media. I see no hands.
22 This case probably, well it will go over
23 until tomorrow, okay. Is there anyone for

1 whom that poses an extraordinary burden.

2 Okay, I see one hand, two hands. Alright.

3 And does anyone know of any reason, physical

4 or otherwise, or anything that I might not

5 have asked about, anything that makes you

6 feel that you would not be able to be fair

7 and impartial in this case and be able to

8 render a true and a just verdict based

9 solely on the evidence and the law. I see

10 one hand. Okay. So anyone who raised their

11 hand to any of the questions could you just

12 line up behind the court officer there and

13 I'm going to see you at the sidebar.

14 THE CLERK: Okay, we'll start the

15 empanelment process now. I'm going to call

16 the prospective juror's names and numbers.

17 If I call your name and number, please

18 answer audibly so that we can hear you

19 because we record everything here and then

20 report to the proper seat in the jury box as

21 directed by the court officer. Juror number

22 three, Hector Garcia. Please answer.

23 MR. GARCIA: Here.

1 THE CLERK: Juror number five, Michael
2 Pedro.

3 MR. PEDRO: Here.

4 THE CLERK: Juror number eight, Karen
5 Williams.

6 MS. WILLIAMS: Here.

7 THE CLERK: Juror number nine, Thadius
8 Markowitz.

9 MR. MARKOWITZ: Here.

10 THE CLERK: Juror number sixteen,
11 Richard Ryan.

12 MR. RYAN: Here.

13 THE CLERK: Juror number twenty-three,
14 James Muzzy.

15 MR. MUZZY: Yes.

16 THE CLERK: Juror number thirty, Susan
17 Sroka.

18 MS. SROKA: Here.

19 THE COURT: Whenever the attorneys are
20 ready if you'd just approach the sidebar
21 please.

22 THE CLERK: Juror number three, Hector
23 Garcia, you may step down from the jury

1 panel.

2 THE COURT: Thank you, Mr. Garcia.

3 THE CLERK: Juror number thirty-two,
4 Daniel Brown.

5 MR. BROWN: Here.

6 THE CLERK: Juror number twenty-three,
7 James Muzzy, you may step down from the jury
8 panel.

9 THE COURT: Thank you, sir.

10 THE CLERK: Juror number thirty-four,
11 Rosa Chavez.

12 MS. CHAVEZ: Here.

13 THE CLERK: Michael Pedro, you may step
14 down from the jury panel. Juror number
15 thirty-five, Obie Banks.

16 MR. PEDABANKS: Here.

17 THE CLERK: Juror number thirty-five,
18 Mr. Banks, could you come over to the
19 sidebar. Juror number thirty-five, Mr.
20 Bank, you may step down from the jury panel.

21 THE COURT: Thank you, Mr. Banks.

22 THE CLERK: Juror number thirty-six,
23 Shantel King.

1 MS. KING: Here.

2 THE COURT: Okay, ladies and gentlemen,
3 we have a jury. So the remainder of the
4 jury pool, you'll be going back upstairs.
5 No, released for the day? Okay, you're all
6 released for the day then. Thank you very
7 much.

8 THE CLERK: Would the jurors please
9 stand and raise your right hands. Do you
10 severally solemnly swear that you shall well
11 and truly try the issues between the
12 plaintiff and the defendant in accordance
13 with the evidence and laws so help you God.
14 Thank you, you may be seated.

15 THE COURT: Okay, ladies and gentlemen,
16 I'm about to make just some preliminary
17 brief introductory remarks to you about the
18 trial of this case and to acquaint you with
19 some of the general legal principles that
20 will control your deliberations. These
21 remarks that I'm about to make are not a
22 substitute for the more detailed
23 instructions on the law that I'll be giving

1 you at the end of the case. As I told you
2 before, this is a trial of a civil case
3 involving a dispute between private parties.
4 In this case the plaintiff, the party
5 bringing the claim, must prove the case by
6 the civil standard of proof which is a
7 preponderance of the evidence. Basically
8 what that means is the plaintiff must prove
9 that his case or his claims are more
10 probably true than not. The plaintiff does
11 not have to prove the case by the criminal
12 standard of proof, which you may be familiar
13 with from television or just from general
14 knowledge, which is proof beyond a
15 reasonable doubt. That is not the standard
16 that applies in this case. The civil
17 standard of proof is not as strict as the
18 criminal standard. In this case the
19 plaintiff must prove the case is more
20 probably true than not true, and I'll
21 explain to you at the end of the trial in
22 more detail about the civil standard of
23 proof and I will also explain to you at the

1 end of the trial the elements of each
2 party's claim and what the law requires that
3 party to prove by a preponderance of the
4 evidence. The trial is going to proceed in
5 the following order. We start the trial
6 with opening statements. That's a chance
7 for the lawyers to describe to you what they
8 expect the evidence is going to be. The
9 plaintiff's lawyer is going to go first and
10 then the defense attorney may either make an
11 opening statement right away or he may chose
12 to delay making the opening statement or he
13 may not make an opening statement at all
14 because the plaintiff has the burden of
15 proof in this case. The opening statements
16 of the lawyers are not evidence. In fact,
17 nothing that is said or asked by the
18 lawyers, no matter how artfully it's
19 phrased, at any time during the trial is
20 evidence. Only the answers that are given
21 by the witnesses under oath in response to
22 questions and any documents and items that
23 are marked as exhibits which you will have

1 with you in the deliberation room and any
2 stipulations of the parties, that is the
3 evidence in the case. Lawyers are given the
4 opportunity to make opening statements to
5 basically give you a roadmap or a preview of
6 what they expect the evidence is going to be
7 so that at the outset you have a sense of
8 what the case involves from the parties'
9 point of view. After the opening statements
10 come the presentation of witnesses and
11 evidence. That is when witnesses are asked
12 questions and give testimony under oath, as
13 well as documents and items marked as
14 exhibits are entered into evidence. After
15 the presentation of the evidence, the
16 closing arguments are presented. The
17 closing arguments is a chance once again for
18 the lawyers to summarize their views of the
19 case and to suggest to you what conclusions
20 they would like you to draw from all of the
21 believable evidence. Again I remind you
22 that the closing arguments of the attorneys,
23 like their opening statements, are not

1 evidence. And the very last stage of the
2 trial I will instruct you on the law that
3 applies to this case. Let me just speak
4 briefly about your role as the jurors and
5 mine as the judge. My responsibility is to
6 see that the case is tried in a way that is
7 fair, orderly and efficient. It is also my
8 responsibility to rule on any questions of
9 evidence or law that come up during the
10 course of the trial and to instruct you at
11 the end of the trial about the law that
12 applies to this case. It is your duty as
13 the jurors to accept the law as I state it
14 to you. Your function as the jury is to
15 determine the facts. You are the sole and
16 the exclusive judges of the facts. You
17 alone will determine what evidence to
18 believe, how important any evidence is and
19 what conclusions to draw from all of the
20 believable evidence. Ultimately you must
21 decide whether or not the plaintiff or the
22 party making the claim has proven its case
23 or his case by a preponderance of the

1 evidence. During the trial the lawyers may
2 object to questions or answers that they
3 believe are not admissible under our rules
4 of evidence. That is their responsibility
5 and you should not look either positively or
6 negatively upon either lawyer or the side
7 they are representing for making such
8 objections or requesting sidebar
9 conferences. If I agree with an objection
10 the word I will use is sustained, in which
11 case I will not allow the witness to answer
12 the question and you are not to guess or
13 speculate as to what the answer might have
14 been. Sometimes I don't say the word
15 sustain fast enough and the answer gets out.
16 If that happens I will tell you that the
17 answer is stricken and I will say strike the
18 answer. That means that you are to put that
19 answer out of your mind and not rely on that
20 answer in deciding the facts of this case.
21 If I disagree with an objection the word
22 that I will use is overruled and I will
23 allow the witness to answer. You should

1 give that answer by that witness the same
2 degree of belief or importance that you
3 would give to any other answer by that
4 witness. If you need to take a break at any
5 time during this trial, if you can't hear,
6 you can't see, you need a glass of water,
7 anything like that, just please raise your
8 hand and I'll have the court officer come
9 over and address your concern. I would ask
10 you to keep in mind that when we start this
11 trial we have an agreement sort of between
12 all of us that you are a fair and open-
13 minded and impartial jury. Both sides have
14 agreed that you can be what you are, the
15 judges of the facts of this case. That is
16 basically why we go through the empanelment
17 process which you just participated in. A
18 trial by its nature does not occur all at
19 once, it necessarily occurs one answer at a
20 time, one piece of paper at a time. If you
21 start to form a view about the case before
22 all of the evidence is in, before the
23 closing arguments are made and the

1 instructions on the law are given to you,
2 you might actually start to take a position
3 from which you need to be dissuaded later on
4 as the case develops more fully and you will
5 no longer be fair, open-minded and
6 impartial. So I would ask you, keep an open
7 mind. Do not make up your mind about what
8 the verdict ought to be until after you have
9 gone to the deliberation room at the end of
10 the trial and you've had a chance to
11 deliberate this case and to discuss it with
12 all of your fellow jurors present. Keep an
13 open mind until then. Similarly, you are
14 not allowed to pre-deliberate the case. And
15 what I mean by that is you cannot discuss it
16 with anyone. You should not even discuss it
17 amongst one another until the trial is
18 complete and the deliberation process has
19 begun. You'll have to keep your thoughts to
20 yourself regarding the case until I instruct
21 you to begin deliberating. Obviously you
22 can talk about anything else, but you just
23 can't talk about this case until the

1 deliberations start. I know that you will
2 try this case according to the oath that you
3 have just taken as jurors in which you
4 promised that you would well and truly try
5 the issues between the parties according to
6 the evidence and the law. If you follow
7 that oath and you try the issues in this
8 case without any fear or prejudice, bias or
9 sympathy I am confident that you will arrive
10 at a true and a just verdict. And let me
11 just make one final comment about the note
12 taking. Obviously you've been distributed a
13 pad and a pen or a pencil and sometimes
14 jurors do find it helpful to jot down names
15 of witnesses, dates, times, things like
16 that, and if you feel that it would be
17 helpful to you in your jury service to write
18 things down, please feel free to do that.
19 You are not required to take notes and so if
20 you prefer not to take notes, just put the
21 pad aside and don't take any notes. If you
22 do take notes, I would ask you to be sort of
23 sparing in your note taking, just in this

1 sense. A lot of what happens during the
2 trial is not just what is said but it is how
3 it is said and how people appear on the
4 witness stand and if you're too focused on
5 your notebook and writing everything down,
6 you may miss a lot of the important clues
7 that you will need to rely on at the end of
8 the trial when you have to determine issues
9 of believability or credibility. So if you
10 do choose to take notes, please be sparing
11 in your note taking. And I will tell you
12 also that the notes are for your own
13 personal use as jurors, they will not become
14 a part of the record in this case, they will
15 not be reviewed by anybody and at the end of
16 the trial the court officer will collect all
17 of the notepads, tear out all of the pages
18 with writing and then those pages will be
19 destroyed. Okay? Can I see the attorneys
20 at the bench for one minute before we
21 continue? Okay, ladies and gentlemen, the
22 next step in the trial is for the attorneys
23 to make their opening statements. It's ten

1 of one and we do break for lunch at one
2 o'clock for an hour from one to two so
3 rather than have them start their openings
4 and then either one doesn't finish or one
5 finishes and the other doesn't finish, I'd
6 like to make it more continuous so I'm going
7 to take a break now until two o'clock, okay.
8 Let me just caution you about this because
9 everybody that uses this building uses the
10 same elevators so when you go out, of course
11 you haven't heard any evidence in the case
12 yet but if you do see parties that you
13 recognize from the courtroom, just try and
14 stay away from them. We just don't want you
15 to by accident overhear something that
16 somebody is saying that has some kind of an
17 impact on your or whatever. Everything that
18 you need to hear about the case has to be
19 heard in the courtroom, okay. So you're
20 free for lunch until two o'clock. Alright,
21 so, Attorney Sapirstein, we'll start with
22 your opening at two, okay.

23 MS. SAPIRSTEIN: Yes, Your Honor. Your

1 Honor, actually could you share one thing
2 when they come back. Can you just explain
3 why we won't say hello or acknowledge them
4 if we happen to see them today and tomorrow,
5 because there have been times where it just
6 gets uncomfortable so I just generally
7 ignore them.

8 MR. RIGALI: I have no problem with
9 that, Judge. Your Honor, just a logistical
10 matter. Officer Forcier is here from the
11 Holland Police Department and has some
12 issues tomorrow. He is my witness. I'd
13 like to call him this afternoon out of order
14 and probably out of case order also. I
15 don't know if that causes a problem for
16 Attorney Sapirstein. I don't think it does,
17 but that's up to her.

18 MS. SAPIRSTEIN: I want to accommodate
19 Officer Forcier, I know his baby is sick and
20 he has childcare issues. We go to until
21 4:30 though, right?

22 THE COURT: 4:30.

23 MS. SAPIRSTEIN: I don't have a problem

1 with that. But if you could explain it's
2 his case.

3 THE COURT: Yes, I will explain to the
4 jury that one of the witnesses because of
5 scheduling conflicts tomorrow is going to be
6 taken out of order, that's fine and I'll
7 explain who it is. But you're not going to
8 call him like first, are you?

9 MR. RIGALI: No.

10 MS. SAPIRSTEIN: Oh, you're not going to
11 call him first?

12 MR. RIGALI: Well, if we're going to be
13 here until 4:30, I figured I'd...

14 THE COURT: Okay, well what may happen
15 is if Mr. Johnson takes the witness stand at
16 say 2:20, I mean if he's on there for two
17 hours, I don't know how long he's going to
18 be, but I don't even know who you're going
19 to call first, but let's say the first
20 person you call is on there for two hours
21 then he's got to come back tomorrow.

22 MS. SAPIRSTEIN: So do you want to call
23 him first?

1 MR. RIGALI: So we can't interrupt
2 someone's testimony is what you're telling
3 me?

4 THE COURT: I'd rather not do that.
5 What is his problem tomorrow? Is it an all
6 day problem?

7 MR. RIGALI: He can speak for himself
8 but he has some childcare issues.

9 MR. FORCIER: Yes, Your Honor. I have
10 two little ones at home and I was able to
11 make arrangements for childcare today but I
12 haven't been able to make them for tomorrow.

13 THE COURT: You want to over the lunch
14 hour see if you can make arrangements and
15 then we can release you today? I mean, you
16 don't really know that you can't, you just
17 didn't try, right?

18 MR. FORCIER: I haven't tried. I can
19 try.

20 THE COURT: Well, I'll leave it to you.
21 If you can agree that's fine, otherwise
22 maybe you could make a phone call or two
23 during the lunch hour and if you can come

1 back tomorrow, then you can leave now.

2 MS. SAPIRSTEIN: I don't have a problem
3 with Mr. Rigali putting Officer Forcier on
4 first.

5 THE COURT: Okay.

6 MS. SAPIRSTEIN: I would not like to
7 interrupt.

8 THE COURT: Right. I don't like to
9 interrupt a witness either.

10 MS. SAPIRSTEIN: I mean, I have my
11 witness.

12 MR. RIGALI: I'm okay with it.

13 THE COURT: Either put him on first or
14 if he makes other arrangements.

15 MR. RIGALI: I'd like to see and out of
16 the deepest respect, I'd like to see if he
17 could make other arrangements but if he
18 can't we'll accommodate him.

19 THE COURT: Okay. Anything else before
20 we break?

21 MS. SAPIRSTEIN: No thank you, Your
22 Honor.

23 THE COURT: Okay.

1 THE CLERK: Okay, we're back on the
2 record in the matter of Johnson v. Frei,
3 1143CV293.

4 THE COURT: Okay. We're missing
5 somebody.

6 THE CLERK: Attorney Rigali.

7 MR. FREI: Your Honor, he said he had to
8 go to his office, he said he would be back
9 in one minute.

10 THE COURT: Okay.

11 MR. RIGALI: I'm so sorry. I was halfway
12 here and I got a call that a burglar alarm
13 went off in my office so I had to go check
14 it out. It was just a tenant. I apologize.

15 THE COURT: No problem. Alright, so
16 Officer Forcier is going to...

17 MR. RIGALI: First witness.

18 THE COURT: Okay, so I'll just let the
19 jury know that typically the plaintiff would
20 go first with their case, but in this case
21 the defendant's going first with his.

22 MS. SAPIRSTEIN: Well, one witness.

23 THE COURT: One witness.

1 MS. SAPIRSTEIN: Unless you want to,
2 that's an interesting concept. You don't
3 want to do your first, do you, your
4 counterclaims?

5 THE COURT: Yes, just the first witness
6 because of scheduling. Okay. The witnesses
7 are sequestered.

8 MS. SAPIRSTEIN: Actually, we're not
9 going to be calling Mrs. Johnson.

10 THE COURT: Oh, you're not going to call
11 her at all?

12 MS. SAPIRSTEIN: Not at all.

13 THE COURT: Oh, then she's not
14 sequestered. But Ms. Manning is
15 sequestered. Yeah, you're still going to do
16 your opening though first, right? I mean,
17 we're still going in the same order with the
18 openings and then he'll call his witness.

19 MS. SAPIRSTEIN: Yes.

20 MR. RIGALI: Do you remember Rhonda
21 Zankawitz?

22 THE COURT: Yes I do.

23 MR. RIGALI: Well Ronnie is my tenant.

1 THE COURT: Oh. Is he the one that set
2 off the alarm?

3 MR. RIGALI: Yeah. He's just back from
4 Africa and he's got to get into the routine
5 again.

6 THE COURT: What did he do there,
7 climbing?

8 MR. RIGALI: No, he has a house there.
9 We were there like ten years ago doing some
10 humanitarian aid stuff and he goes back once
11 or twice a year. But anyway, there's a
12 little re-acclimation process that he and I
13 discussed. So I apologize for the delay.
14 Can we approach the sidebar before the jury
15 comes in.

16 THE COURT: Sure.

17 THE CLERK: Court is back in session.
18 You may be seated.

19 THE COURT: Okay. Good afternoon,
20 everybody. We're about to start and we will
21 start with Attorney Sapirstein, your
22 opening.

23 MS. SAPIRSTEIN: Thank you, Your Honor.

1 Good afternoon, ladies and gentlemen. My
2 name is Tani Sapirstein and I represent
3 Brian Johnson, who's the plaintiff in this
4 case. Now Mr. Johnson and Mr. Frei live in
5 a small town in Massachusetts, the Town of
6 Holland, about two thousand people and on
7 February 19, 2011 there was a fishing derby
8 in the Town of Holland. And as a
9 participant in that fishing derby, Brian
10 Johnson was fishing on Hamilton River or
11 Hamilton Lake, which is a public lake in the
12 Town of Holland, and he was fishing on the
13 south side of that lake, and Mr. Frei lives
14 on the south side of Hamilton Lake. Now,
15 there will probably be testimony from Mr.
16 Frei that fishermen were loud that day, it
17 was a Saturday morning in February and they
18 were ice fishing and they probably were
19 loud. But there will be no evidence in this
20 case that Brian Johnson ever went on Peter
21 Frei's property. There will be no evidence
22 in this case that Brian Johnson ever touched
23 or threatened to touch Peter Frei. Now you

1 heard in the description of the case that
2 Her Honor read you that Peter Frei admits to
3 recording Brian Johnson's comments on
4 February 19, 2011. And what he did in fact
5 was he concealed an Iphone or some cell
6 phone in his pocket with a microphone and he
7 went up on the ice and he recorded the
8 conversation between himself and about six
9 other individuals. He never asked anybody
10 for permission to make that recording, and
11 that's undisputed, and he never asked
12 anybody's consent to record them, and that's
13 also undisputed. Now Brian Johnson is a
14 highway surveyor, which is an elected
15 position in the Town of Holland but on that
16 day all Brian Johnson was doing with his
17 friends was ice fishing in a derby. Then
18 Peter Frei told Brian Johnson and the others
19 that he recorded them after the fact and
20 Peter Frei posted the recording verbatim on
21 his blog, the Holland Blog. And he also
22 gave a copy of the recording to a newspaper
23 reporter, actually a TV reporter, for CBS3.

1 And Brian Johnson filed this lawsuit because
2 he was recorded without his permission,
3 secretly, it invaded his privacy and it was
4 disclosed to other people, both through the
5 Holland Blog and to the news reporter.
6 After Brian Johnson filed the cause of
7 action for violating the wiretapping statute
8 in Massachusetts, Peter Frei filed
9 counterclaims against Brian Johnson. He
10 accused Brian Johnson of assault, of
11 battery, of violating his civil rights, of
12 intentional and negligent infliction of
13 emotional distress and abuse of process.
14 Peter Frei didn't assert any of these claims
15 against Brian Johnson until after Brian
16 Johnson filed his lawsuit for violation of
17 the wiretapping statute. Now we would all
18 both Mr. Rigali and I and the parties would
19 ask you to listen carefully to all of the
20 evidence in this case. And while you listen
21 to the evidence I'd like you particularly to
22 focus on whether or not there was a
23 recording of Mr. Johnson that was disclosed

1 to a third party without his permission or
2 consent. And I would also like you to focus
3 on whether there is any evidence at all that
4 Brian Johnson did anything to Peter Frei
5 other than fish in a public place in a
6 fishing derby, which by the way, his group
7 won. So we would ask you to pay careful
8 attention. We thank you for your time and
9 we appreciate your effort in this. Thank
10 you.

11 THE COURT: Thank you. Attorney Rigali,
12 do you wish to make an opening now?

13 MR. RIGALI: Thank you. So just really
14 a bunch of good old boys fishing, that's all
15 the case is about and Mr. Frei is a crazy
16 man goes out and records and so forth. So
17 let me just give you this thought to think
18 about. This is the account of the facts
19 just given to you by Mr. Johnson's attorney.
20 The rest of the blackboard is what happened.
21 So keep an open mind. I guess the inference
22 from that opening is that the evidence
23 involves Mr. Frei, this gentleman sitting

1 over here, my client, goes out on the ice,
2 has some sort of a beef with these
3 fishermen, you know, makes up some story,
4 records them theoretically illegally and
5 they call the police on Frei and he calls
6 the police on them, just sort of one of
7 these back and forth type things. Except
8 for the fact that, like Paul Harvey says,
9 there's the rest of the story. Now, Brian
10 Johnson is a public official in the Town of
11 Holland and he was fishing on this lake with
12 many members of the highway department,
13 certainly there's several people work in
14 that department that he either works in or
15 is in charge of. So on a lake that's three
16 miles long that has several other miles of
17 shoreline and all sorts of opportunities to
18 fish elsewhere, eight men show up at seven
19 o'clock in the morning or eight o'clock,
20 whatever it is, and with power loggers
21 surround, and by power logger I'm talking
22 about a big thing like a chainsaw that's got
23 a big drill on it and you drill through the

1 ice, you'll see some videos of this, all
2 around Mr. Frei's house, which is on a
3 peninsula, a very pretty house, it's a
4 little cottage, a lake type cottage, it
5 sticks out on a peninsula, so water is on
6 three sides. So Mr. Johnson and his buddies
7 surround the house and early in the morning
8 start drilling into the lake. And it's true
9 that although Mr. Frei's land is there, for
10 the most part the men stayed off of Mr.
11 Frei's property but not always, and that's
12 an important fact for later. So there's all
13 this noise which wakes Mr. Frei and his
14 girlfriend Ms. Manning, who is a nurse
15 anesthetist, a well educated, articulate
16 woman, Mr. Frei has the equivalent of an
17 electrical engineering Ph.D. in electrical
18 engineering, he's an intelligent, well
19 educated man, and they wonder what is going
20 on here. Of course they look out and they
21 see the players and they immediately know.
22 Now, why would that be, why would that be.
23 Is it a bunch of good old boys just fishing

1 or are there more facts that are going to
2 come out in this trial. I'll tell you a
3 little bit more about it, the background
4 information. It turns out that Mr. Frei is
5 a from Switzerland, he speaks with an
6 accent, he's a skinny guy, he has a ponytail
7 and he's a pain in the butt. If you are a
8 public official in the Town of Holland,
9 Massachusetts Peter Frei is a pain in the
10 butt. If you are a resident that lives
11 there you sort of like him because Peter
12 Frei has a website, if you will, a blog,
13 it's sort of like a newspaper for those of
14 you that might not be unfamiliar with this,
15 I think you were asked that as a juror, do
16 you know anything about the internet and
17 things like that. The reason was Mr. Frei
18 has created a blog, an interactive blog, so
19 you can go onto his, we'll call it a
20 website, and there are things about the Town
21 of Holland. You can get the school lunches,
22 you can find out where to go hiking, you can
23 learn about this, that and the other thing

1 but you can also read commentary and
2 criticism, strong, riveting criticism
3 against public officials that both Mr. Frei
4 writes and Mr. Frei puts on the website by
5 other authors, so other people write in,
6 they want to air some gripe and it goes on
7 the website. This has been going on for
8 several years. It is relentless, it is
9 relentless. There were many incidents
10 leading up to February 19th, incidents
11 involving yelling and screaming, threats,
12 shouting, you'll hear about these incidents.
13 The inference is that Mr. Johnson was about
14 fed up with this sort of thing and it's
15 payback time now. So there's a fishing
16 derby and on this huge lake, you'll see maps
17 and so forth, they happen to pick this one
18 out of the way little cove where the only
19 guy that lives is Mr. Frei, and they
20 surround his house and they start drilling
21 and all day long drinking, driving out their
22 ATV's and their quad's, drinking, drinking,
23 urinating all over the property, coming up

1 on his property, so on and so forth, looking
2 in his windows. Around three o'clock in the
3 afternoon, Mr. Frei didn't react to this, he
4 and his girlfriend stayed inside and said
5 well we'll let these frat boys do what they
6 want to do. Around 2:30, 3:00, now some of
7 the men start walking on the ice up the hill
8 to where Peter and Dana's cars are parked.
9 Now, they were concerned about that. They
10 were concerned about property damage. You've
11 got eight drinking men out there that have
12 been drinking since early in the morning,
13 it's now several hours later, it's getting
14 ruckus, so Peter decides to go out and tell
15 the people you can't, get off the land, stay
16 away from the cars, you can't trespass and
17 so forth. And so he does so. Fearful and
18 concerned that there's going to be an
19 incident when he, skinny guy from
20 Switzerland that might weight a hundred and
21 thirty pounds, is going to go out onto the
22 ice with eight drunken guys, all of, not all
23 of them, but several of them who are co-

1 workers at the highway department, you know,
2 you'll get a chance to see Mr. Johnson, he's
3 six, three, he's got to look at 230, 240
4 anyway, but setting that aside, a bunch of
5 big guys, a bunch of big guys out there. So
6 Mr. Frei and his girlfriend, concerned that
7 there's going to be an incident, do two
8 things, they take a precaution. He puts his
9 cell phone in his pocket and puts a
10 microphone on the outside of his pocket in
11 plain view, in plain view, no intent to be
12 secret, in plain view. He doesn't have to
13 announce that he's going to record, but he
14 puts his cell phone in his pocket and he has
15 a wire sticking out with a microphone on it
16 in plain view. The wire is white, the
17 microphone is white, the coat is black. It
18 was as obvious as the nose on your face. So
19 he goes out, he goes up to where the cars
20 are parked, dumps his trash, he picks up his
21 mail and so forth and he comes back down on
22 this icy trail, now this is the winter a
23 couple of year ago in '11, where the snow is

1 outrageously deep, do you remember this.
2 You know, it's every couple of days we're
3 out there really digging ourselves out.
4 Well his house is about six or seven hundred
5 feet down from the main drag, so he has to
6 sort of walk a path down the peninsula to
7 his little lakeside cottage and because the
8 shortest distance in the winter is to walk
9 across part of the cove on the ice, he does
10 that. So there's a very distinct foot path
11 which cuts across the cove to his house and
12 low and behold Mr. Johnson happens to park
13 his crew in the middle of the path. So on
14 the way back Mr. Frei comes down and says to
15 these guys, microphone outside the jacket,
16 hey, and you'll hear the tape, words to the
17 effect of, you know, this is just a summary,
18 hey you can't private trespass or whatever,
19 at which point, at some point anyway, within
20 minutes, seconds, you'll hear Brian Johnson,
21 the highway surveyor or supervisor or
22 whatever he is from the Town of Holland, say
23 hey get the F out of here, yelling,

1 aggressive, loud language. You'll hear the
2 tape. Within a few seconds Peter's, you
3 know, obviously he doesn't want anything to
4 do with these crazies, wants to tell them to
5 stay off his land, not to trespass and turns
6 to go and is kicked from behind, behind the
7 knees, down he goes onto the ice. He's
8 okay, there's a bruise on his hand, he hurt
9 his hip a little bit, picks himself up and
10 says to the crew thank you so much for that
11 because you're being videotaped. Peter
12 thought that Dana was in the house videoing
13 this entire incident and she intended to,
14 she'll tell you she had a camera, she
15 screwed it up, no film came out. But
16 nonetheless you'll hear Peter say that on
17 the tape and that's about it. You know,
18 there's some, you'll hear the microphone
19 rubbing on fabric, you'll hear a lot of, you
20 know, get the F out of here and what and
21 this is somebody in the house and we have a
22 transcript that's typed up, you can both
23 hear it and sort of read along when that

1 part of the case comes up. So he goes in
2 and he calls the police. He tells the
3 police what happened and so forth and the
4 police do a report and sometime later,
5 sometime later, Peter finds out from the
6 police report that Brian Johnson told the
7 police out on the ice Peter came out yelling
8 and threatening at them and threatened to
9 kill Brian Johnson. He told that to the
10 police, it's in the police report. Officer
11 Forcier is going to be your first witness,
12 we're going to call him out of order only
13 because Officer Forcier has some other
14 responsibilities, he would normally testify
15 later in the trial but he's due to be the
16 first witness. Now he'll tell you what was
17 said and so forth. Now later on the trial
18 you're going to hear the tape, and I want
19 you to remember these words and Officer
20 Forcier's words as to what Brian Johnson
21 said to Officer Forcier, what he didn't say
22 and what Peter Frei said and didn't say, a
23 very, very critical part. So I'll close

1 with this, it's wonderful that you're on
2 jury duty and I don't care what you say, I
3 know you hate being here, I know this is a
4 pain, we all do, you have better things to
5 do, you begrudgingly do your civic duty, I
6 know, and you have to put up with a guy like
7 me who's just going to talk but it's very
8 important to these people. These facts are
9 big, this is a big day for these people. If
10 you were involved in this incident you would
11 want fair and attentive jurors to be openly
12 and look at all the evidence. I just want
13 you to use your common sense here. The
14 bigger issue here is really not so much
15 about two men who antagonize each other, the
16 bigger issue is Peter Frei is a journalist.
17 He's sort of an investigative reporter in a
18 sense for his newspaper. This is an
19 electronic newspaper which is on the web and
20 you'll see it, we've got pictures of it for
21 you and we'll walk you through it. And his
22 criticism for the public officials,
23 including Mr. Johnson personally is pretty

1 intense, that is what this is about. Mr.
2 Johnson's fed up with this, he's fed up with
3 this. He tracks down Peter Frei in public
4 places, calls him a scumbag and white trash
5 loud enough so people can hear. It's been
6 going on for a long, long, long time until
7 this incident and that's what the rest of
8 the story is all about here. Mr. Frei has a
9 civil right, like Jay Leno and Rush Limbaugh
10 and other people who talk about public
11 things, it is the right of expression, it is
12 a Constitutional right. It doesn't have to,
13 you don't have to like him, as I said, if
14 you're a public official in the Town of
15 Holland, Mr. Frei is a pain in the butt,
16 okay. If you're a Barrack Obama, Rush
17 Limbaugh is a pain in the butt, okay. But
18 that right that you have and I have, which
19 is unique to this country, it goes, I mean,
20 from Thomas Jefferson and all the way back,
21 that unique right is what is threatened
22 here, that's the rest of the story. The
23 allegation of an assault, you'll either find

1 it or you won't. The allegation of
2 defamation, of making a false statement to a
3 police officer, accusing him of a crime,
4 you'll either find it or you won't. Assault
5 and battery, being kicked in concert, I
6 mean, he never says that Mr. Johnson kicked
7 him, but somebody else that was there with
8 whom Johnson was present and shared the
9 items with him and so forth, that's the
10 allegation. So but the civil rights claim,
11 the civil right is that these men and in
12 particular Mr. Johnson came to that house
13 that morning on that day to further
14 intimidate Mr. Frei for his, for the
15 exercise of, if you will, of his rights to
16 express things on his website. That's what
17 it was about. Something's fishy here about
18 the plaintiff's story. By the way, both of
19 these guys are plaintiffs there, you know.
20 Mr. Johnson is suing Mr. Frei for supposedly
21 illegally recording. It's not illegal if
22 it's not a secret, Mr. Frei will tell you
23 later I had no intentions of making it

1 secret. I didn't really care. I thought
2 that the video would give us whatever we
3 want. But he'll tell you today what his
4 thoughts were about the wiretap, but
5 something's fishy, something's fishy if the
6 story is just a bunch of good old boys who
7 start drinking beer at eight o'clock in the
8 morning or seven o'clock, whatever it is,
9 and drink all day and the antics that you're
10 going to have described here is just
11 something fishy about that story and that's
12 all it was.

13 THE COURT: Okay, thank you. Attorney
14 Rigali alluded to this, but normally the
15 plaintiff's case would go on first, the
16 plaintiff being Mr. Johnson, but because a
17 witness has some scheduling difficulties for
18 tomorrow he's going to be called out of order,
19 okay. So actually the defendant and
20 plaintiff in counterclaim, Mr. Frei, is
21 going to call the first witness.

22 MR. RIGALI: Officer Forcier please.

23 (WITNESS SWORN)

1 MR. FORCIER: Good afternoon, Your
2 Honor.

3 THE COURT: Good afternoon.

4 MR. FORCIER: Good afternoon, counsel.
5 Good afternoon, ladies and gentlemen of the
6 jury.

7 DIRECT EXAMINATION BY MR. RIGALI:

8 Q. Officer, if you tell us your name,
9 spelling your last name for the benefit of our
10 record?

11 A. The last name is Forcier, F-O-R-C-I-E-R.

12 Q. And your first name and your occupation,
13 sir?

14 A. My first name is Jeffrey and my
15 occupation is a police lieutenant now for the
16 Holland Police Department.

17 Q. How long have you been a police officer?

18 A. Since 1998.

19 Q. And you're now a lieutenant. At the
20 time of this incident in February, you had a
21 different rank?

22 A. I was a corporal.

23 Q. Okay, but now a lieutenant. I direct

1your attention to February 19, 2011, sometime in
2the afternoon, were you working on that day?

3 A. Yes I was.

4 Q. And what shift were you on?

5 A. I believe I was working the day shift
6into the evening shift.

7 Q. What were your responsibilities as a
8police officer that day?

9 A. I was assigned to a plain clothes
10investigation actually.

11 Q. Anything to do with this case, these
12men, these individuals at that time?

13 A. No, I was actually following up on a
14prior case. I was in plain clothes.

15 Q. Okay. Now, at some point did you
16respond to a dispatch to report to the vicinity
17of Mr. Frei's home?

18 A. Yes I did. I responded to a call for an
19assault that took place out on the lake.

20 Q. And the information that you had on hand
21at least on the way there was what?

22 A. According to my dispatch Mr. Frei, who's
23present here in the courtroom, according to my

1 dispatch he was assaulted by a gentleman named
2 Tom Laplante.

3 Q. So you arrived, what happened after
4 that?

5 A. Upon my arrival, I wasn't the primary
6 officer, like I said, I was assigned to a plain
7 clothes investigation. The primary officer had
8 initially responded and I was a secondary officer
9 to show up and I observed a group of individuals
10 out on the ice in close proximity to where the
11 report was reported and I went out onto the ice
12 and made contact with the six or seven
13 individuals that were there. I identified them.
14 They positively identified themselves to me and
15 then I had conversation regarding if there was an
16 alleged, regarding the alleged assault that had
17 took place.

18 Q. Alright, let me if I may show you a
19 picture. Do you recall the layout of the land
20 and the location of the house and where they were
21 on the pond roughly?

22 A. Roughly. I am vaguely familiar with the
23 location, the layout. It's been a couple of

1years but I kind of got an idea of how it's set
2up.

3 Q. Okay. I'm just going to show you this
4blow up of a map and I'll show it to the jury
5also. I'm sorry, Judge, I'm going to surround
6you in a moment. Do you recognize this, not that
7you've seen this before, but do you recognize
8what this shows?

9 A. Yes that's Lake Hamilton.

10 Q. Okay. So this is the lake that Mr. Frei
11lives on, it's the lake that's in your town, that
12you police, correct?

13 A. Yes it is.

14 Q. Alright. And if I were to direct your
15attention, we see up here there's some marks,
16Holland, that would be the village of Holland?

17 A. If you say so. I'm not sure.

18 Q. You know where the lake is in relation
19to the town?

20 A. Yes.

21 Q. And the town is sort of at the north
22side of the lake?

23 A. If that's to the north, the big side is

1the north side, yes.

2 Q. Alright, you're familiar with the shape,
3the causeway, you know what's on the north and
4the south and so forth?

5 A. Right.

6 Q. I mean, you haven't been inside the
7police station all those years, right? You do
8get out and drive around?

9 A. Well, I do, but it's forever circling.

10 Q. Okay. So you've got the town up here
11and do you know how long the lake is?

12 A. No. I mean, mile wise?

13 Q. Mile wise.

14 A. No I don't.

15 Q. Okay. Directing your attention to down
16to this area here, do you recognize that as the
17basic area where Mr. Frei's property was by this
18little peninsula?

19 A. I would assume that's the area, yeah.
20Because there's a side that Connecticut is on, I
21would assume that if this is the Connecticut side
22then that over there would in fact be the
23peninsula in question.

1 Q. So right down here, I'm just going to
2 put my finger on the map here in the courtroom
3 and I'm going to circle a jud of land that comes
4 out into the lake north of the, assuming this is
5 north, north of the Connecticut line. Is that an
6 approximate location of Mr. Frei's property?

7 A. I would say that's an approximate
8 location.

9 Q. And so when you responded that day, you
10 had to work your way from the road which was some
11 distance, I'm not trying to testify for you but
12 just to speed things up, some distance from the
13 road to actually walk down to the property,
14 correct?

15 A. Correct.

16 Q. Okay.

17 MR. RIGALI: Any objection to this?

18 MS. SAPIRSTEIN: No, I don't have any
19 objection.

20 MR. RIGALI: I'd like to mark this as an
21 exhibit.

22 THE COURT: Defendant's exhibit one.

23 Q. Okay. Now Officer, we've got exhibit

1 one which was shown to the jury and I'm pointing
2 down to that little peninsula that you described
3 before, I'm going to show you this, which is a
4 blow up of that peninsula, okay. Members of the
5 jury, can you see this. So this spot on the map,
6 hold on one second, so this area right here, this
7 little peninsula is this blown up, okay, are you
8 with me on that, see the shape of it, so forth,
9 officer, do you see the shape of it?

10 A. Yes.

11 Q. Alright. So do you recognize this as a
12 blow up, if you will, a closer up shot, of Mr.
13 Frei's property which includes his house, an
14 outbuilding and the cove which was then frozen
15 where the incident occurred?

16 A. If you say so, sir, I mean, I wouldn't
17 know, you know, it all looks the same, a lot of
18 properties, but what you're showing in relation
19 to what you showed me there I would say it looks
20 similar, yes.

21 MS. SAPIRSTEIN: Objection, Your Honor.

22 THE COURT: There's been an objection.

23 MS. SAPIRSTEIN: I don't think there's

1 been a foundation.

2 MR. RIGALI: I didn't offer it.

3 THE COURT: Yeah, okay. But the
4 objection is overruled, go ahead.

5 MR. RIGALI: Thank you, Judge.

6 Q. You had to park your car by the road?

7 A. I did.

8 Q. And then it's your guess but as accurate
9as you can tell the jury, how far of a walk
10either in minutes or distances to get down to the
11lake where men were?

12 A. From where I parked I believe was, I
13don't even remember the name of the road, but I
14know the approximate location.

15 Q. Maybrook Road maybe?

16 A. It was off of Maybrook Road. There's a
17side road which is parallel to Mr. Frei's
18property, it's a dirt road and then I believe I
19walked down the hill from there, a hundred feet
20maybe. I'm not good with distances, so a hundred,
21two hundred feet.

22 Q. Okay, it's some distance, right, from
23the road down to the lake?

1 A. Yeah, it's, you know, it's a patch of
2 wooded area that separates the lake from the
3 broad.

4 Q. Okay, alright. And then when you got
5 down there, again, assuming this is Mr. Frei's
6 house, you know, his cottage where you went out
7 and spoke with him eventually, and this was a
8 portion of the cove where the incident occurred.

9 A. Right.

10 Q. Was this area frozen at the time?

11 A. Yes.

12 Q. Okay.

13 MR. RIGALI: I would offer this into
14 evidence.

15 MS. SAPIRSTEIN: Objection, Your Honor.

16 THE COURT: That's sustained.

17 MR. RIGALI: If we could just mark for
18 identification.

19 THE COURT: Yes, A for identification.

20 Q. Alright. On getting down to the ice you
21 said that you identified the men that were there.
22 Did you know those men, had you met them before?

23 A. A couple of them I knew by face.

1 Q. And you know Mr. Johnson, right?

2 A. Yes.

3 Q. And how is it that you know Mr. Johnson?

4 A. He's the highway supervisor who runs the
5 highway department in the Town of Holland.

6 Q. Okay. And so as the highway supervisor
7 he's essentially in charge of the roads, clearing
8 the roads and maintaining them and so forth in
9 the Town of Holland?

10 A. That is correct.

11 Q. And you've worked with him and have for
12 some time on road details, he and his crew?

13 A. That is correct.

14 Q. Okay. Were there other members of the
15 highway department in that group that you spoke
16 with on that day?

17 A. I believe there was one, one or two, I'm
18 not sure. But I believe there was one.

19 Q. Would it be fair to say at least one?

20 A. At least one.

21 Q. Okay. You can look at your report if
22 you don't recall, but did you write down the
23 names of the men that were there when you

1arrived?

2 A. Yes I did.

3 Q. And would you tell us those individuals,
4the names of those individuals?

5 A. Brian Johnson, Kyle Walkowski, Johnny
6Folger, Tim Fortuna, Dave Caulley, Tom Laplante
7and Al West.

8 Q. So that's seven, right?

9 A. Yes, sir.

10 Q. Now, do you know whether or not another
11individual left before your arrival?

12 A. That I don't.

13 Q. Did anybody tell you that somebody left?

14 MS. SAPIRSTEIN: Objection.

15 THE COURT: Well, he can answer yes or
16 no.

17 Q. Did anybody tell you that somebody left?

18 A. I don't recall.

19 Q. Did you also notice any ATV's, you know
20all-terrain vehicles or quads on the ice?

21 A. I believe there was.

22 Q. And did you, how many of them were
23there, would you say?

1 A. If I were to guess I would say, I don't
2 know, I can't accurately answer that because I
3 didn't document it.

4 Q. Well, more than one?

5 A. I don't know. I don't know. I can say
6 that there was at least one.

7 Q. Okay.

8 A. But I don't know if there was six or
9 five or three. I can't give you a firm number
10 because I didn't document that.

11 Q. Okay, and you have no memory of it
12 today?

13 A. It was two years ago, you know, it's
14 very vague.

15 Q. Now, do you recall there being any signs
16 or words painted on the plow of any of those
17 ATV's? Are they called ATV's or quads, by the
18 way? You know what I'm talking about though,
19 right?

20 A. Yeah, they're called quads, I've heard
21 them called ATV's, I've heard them called four-
22 wheelers, I've heard them called, you know.

23 Q. Alright, well on whatever those vehicles

1 are called, did you notice anything written on
2 the blade of one of them?

3 A. I did not.

4 Q. Okay. So you didn't see whether one of
5 them had in painted, in large painted letters the
6 phrase eat me across it?

7 A. No, I'm pretty sure if I were to observe
8 something like that I would have documented it.

9 Q. Alright. And you are trained to
10 document, are you not, that's part of being a
11 police officer?

12 A. I try to be thorough.

13 Q. Okay. So if you had seen that, that
14 would have been included in your report, correct?

15 A. I would think, yes.

16 Q. Alright. Now, when you spoke with the
17 men, I'm assuming you asked them, you were there
18 to investigate some sort of assault, so what did
19 you ask the men?

20 A. Basically I asked them if there was an
21 altercation that just took place out on the ice
22 and if any of them were involved.

23 Q. And did you talk with them, did you

1separate them individually or did you just talk
2with them as a group?

3 A. I believe I, I believe I didn't, I
4didn't poll them all one by one. I believe I did
5take a few of them to talk to them to get the
6initial gist but I didn't interview each party
7separately, hundreds of feet away from each
8other, no.

9 Q. So is it fair to say when you said to
10them words to the effect, you know, has there
11been an altercation with Mr. Frei, that was heard
12by at least one or two or three or probably all
13of the men?

14 A. I guess that's safe to say.

15 MS. SAPIRSTEIN: Objection.

16 THE COURT: Sustained.

17 Q. Well, when you asked that question, did
18you ask that in a voice, in an audible voice?

19 A. No. And again, it's been two years, I
20mean, I didn't document exactly how I interviewed
21the people out on the ice, but generally I
22wouldn't make a blanket statement and just say
23hey was there an altercation here. I'm pretty

1 sure I would have pulled them, you know, people a
2 few feet apart and said hey, you know, is there
3 anything going on here, what did you see, were
4 you involved in anything and then further my
5 investigation from that point.

6 Q. Okay, now at some point did you talk
7 with Brian Johnson?

8 A. I did.

9 Q. And he was in fact one of the men that
10 was out on the ice?

11 A. He was.

12 Q. Alright. And what did Mr. Johnson say
13 with regards to Mr. Frei?

14 A. He said that, and my memory if I exhaust
15 myself I can refer back to my report to get the
16 exact statement.

17 Q. Go ahead.

18 A. But he said, he told me that Frei had
19 come out on the ice and was yelling at a group of
20 them saying that they were trespassing on his
21 property and that he felt threatened by Frei
22 because he had made a threat to him.

23 Q. What did he say?

1 A. According to my report he said stay off
2 my property or I'll fucking kill you.

3 Q. Okay.

4 A. And Johnson was concerned for his safety
5 and...

6 Q. Because of the threat?

7 A. Because of the threat. And then he went
8 on to tell me that, and I asked him if he had
9 seen the altercation or, and he said no but he
10 did see Peter Frei fall down on the ice and I
11 told him I would document the incident
12 accordingly and that if he wanted to pursue the
13 matter for the threat being made, you know, he
14 could petition the court for the threat to commit
15 a crime that Mr. Frei had made.

16 Q. Isn't the threat to commit a crime a
17 crime?

18 A. If you have the ways and the means.

19 Q. Right. So what did you do after that,
20 let me just go back a little bit here. Mr.
21 Johnson told you, number one, that Frei came out
22 onto the ice yelling, according to your report?

23 A. According to my report, yes.

1 Q. Yelling, yelling that they were
2 trespassing, number two, correct?

3 A. Yes.

4 Q. He said, he Johnson, said that he felt
5 threatened by Frei, correct?

6 A. Correct.

7 Q. And he said that Frei said to him stay
8 off my property or I'll fucking kill you, his
9 words, correct?

10 A. That's what I documented, yes.

11 Q. And Mr. Johnson went on to say that he
12 was concerned for he, his personal safety, Mr.
13 Johnson's safety because of supposedly this
14 threat that Mr. Frei had given to him?

15 A. That's correct.

16 Q. What did you do after that, Officer?

17 A. It was shortly after that another party
18 who I guess will testify after, who's not in the
19 courtroom now, came out onto the ice to tell us
20 that Mr. Frei had a deep cut on his hand and he
21 needed medical attention. While I was speaking
22 with the individuals on the ice, my partner, who
23 had initially responded, was already in the

1house, had already been in the house speaking
2with Mr. Frei. He came out onto the ice for a
3brief period at the end of my interaction with
4the gentlemen that were on the ice and the party,
5the female party that was in the house came out
6and told us both that...

7 MS. SAPIRSTEIN: Objection.

8 THE COURT: Sustained.

9 Q. Well, the bottom line was at some point
10did you go into Frei's house and talk with him?

11 A. Yes I did.

12 Q. Okay, so tell the jury in general terms
13what happened when you went inside?

14 A. So basically when I went in the house
15with Mr. Frei had a cut on his hand, he appeared
16to be limping and he said that he was assaulted
17out on the ice, that he believes the person named
18Tommy Laplante that had knocked him down on the
19ice and he hurt his hip. As a result I asked him
20if he needed medical attention, you know, for the
21laceration on this hand. He said no, he's more
22concerned about his hip but that he would have
23his girlfriend drive him to the hospital. Mr.

1Frei said that he had recorded the altercation
2that took place on the ice and he offered to play
3the recording for me. I cautioned him not to
4play that due to the wiretapping laws. He said
5it was okay, he would go ahead and play it for me
6and he played the recording. And then after that
7I basically gave him the same opportunity that I
8gave to Mr. Johnson was that it appeared to a
9simple assault, it didn't happen in our presence,
10if he wanted to pursue the matter in court, we
11had already identified everybody out on the ice,
12that he could pursue the matter for the assault
13in court.

14 Q. Alright. So is it fair to say that
15nothing that is alleged by either Mr. Frei or Mr.
16Johnson, regardless of what happened, ever
17occurred in front of yourself or another police
18officer, I'm talking about on February 19th?

19 A. Yes, as far as the alleged assault or
20the alleged report of the assault, that is
21correct.

22 Q. Right, and the threat, the alleged
23threat, none of that occurred in front of a

1 police officer?

2 A. That is correct.

3 Q. And so as a result you advised them,
4 they would have to pursue their own remedies if
5 they wanted to, correct?

6 A. Correct.

7 Q. Okay.

8 MR. RIGALI: If I may just have one
9 moment, Your Honor.

10 THE COURT: Sure.

11 MR. RIGALI: No further questions.
12 Thank you, Your Honor.

13 THE COURT: Alright, thank you.
14 Attorney Sapirstein?

15 CROSS EXAMINATION BY MS. SAPIRSTEIN:

16 Q. Good afternoon.

17 A. Good afternoon, counselor.

18 Q. Did Peter Frei ever tell you that Brian
19 Johnson touched him on February 19, 2011?

20 A. No, ma'am.

21 Q. Did Peter Frei ever tell you that Brian
22 Johnson knocked him down?

23 A. No, ma'am.

1 Q. Was the area in which the men were
2 fishing public property or private property?

3 A. It's public property.

4 Q. And do you know whether there was a
5 fishing derby going on that day?

6 A. Yes there was, a very large fishing
7 derby.

8 Q. A very what?

9 A. A very large fishing derby.

10 Q. And who sponsored that?

11 A. That I don't know, ma'am.

12 Q. Do you know what time it started?

13 A. I'm assuming it starts early in the
14 morning. I don't know the exact, you know, hour
15 but it generally starts at sunrise, right around
16 that time.

17 Q. At sunrise?

18 A. That's usually, yeah, the fishermen,
19 especially during derby times, they're out there,
20 you know, at the crack of dawn.

21 Q. We're talking about ice fishing, right?

22 A. Yes, ma'am, February, ice fishing.

23 Q. Do you know whether other people live on

1that south side of the lake?

2 A. Well there's several residents, ma'am,
3that, you know, I had to walk down the road up
4top, there's several houses on the road up top.
5I know that, I'm not sure if it's the plaintiff,
6the defendant...

7 MR. RIGALI: Mr. Frei.

8 A. Mr. Frei, he does have a house out on a
9peninsula area that's kind of secluded, you know,
10well I guess by woods on all three sides or water
11on all three sides.

12 Q. Do you know whether other people who
13were fishing in that group that day, if any of
14those people lived on the south side of the lake?

15 A. I believe Mr. Rikowski lives with his
16parents that have property on the south side of
17the lake.

18 Q. Was the ice slippery?

19 A. Well, it goes to say, yes, I mean, ice
20is slippery.

21 Q. Now, Mr. Frei on the day that you
22responded identified Tommy Laplante as the person
23who knocked him down?

1 A. Yes, that was the call that was brought
2 into dispatch and then through a later
3 conversation he said he believed that the
4 individual was Tommy Laplante but he couldn't be
5 certain.

6 Q. Do you know whether or not Brian Johnson
7 or anyone who was there that day felt threatened
8 by Mr. Frei?

9 MR. RIGALI: Objection.

10 THE COURT: Why don't I see you at the
11 side for a minute.

12 Q. You testified on direct that Brian
13 Johnson told you he felt threatened?

14 A. That's what I documented, ma'am, yes.

15 Q. Do you have any independent knowledge of
16 whether or not Brian Johnson felt threatened?

17 A. No, ma'am. I just know what was said, I
18 documented what was said.

19 Q. And on that day you told Peter Frei, I'm
20 sorry, and on that day you told Peter Frei that
21 there might be an issue with him tape recording
22 the individuals on the ice?

23 A. Yes, ma'am, I did.

1 Q. Can you tell us what you told Peter
2 Frei?

3 A. I cautioned him that he...

4 MR. RIGALI: Again, I object. I think
5 this is getting into legal conclusions which
6 I think the Court should tell the jury about
7 later on. I think this is prejudicial.

8 THE COURT: Well, I'm going to overrule
9 that. He can tell them what he told him.

10 A. I cautioned him, again, I cautioned him
11 that it may not be in his best interest to play
12 the recording due to the wiretapping laws and he
13 insisted that it wasn't an issue and proceeded to
14 play the recording.

15 Q. Did you ever see Brian Johnson on Peter
16 Frei's property that day?

17 A. I'm sorry?

18 Q. Did you ever see Brian Johnson on Peter
19 Frei's property?

20 A. No, ma'am, he was on the ice.

21 Q. And also, do you remember whether it was
22 a windy day, do you remember what the weather
23 was like other than the fact that it was

1 February?

2 A. I know it was extremely cold. I know it
3 was extremely cold because I couldn't wait to get
4 off the ice.

5 MS. SAPIRSTEIN: Thank you, I don't have
6 anything further.

7 THE COURT: Alright. Anything further,
8 Attorney Rigali?

9 MR. RIGALI: Just a couple questions.

10 THE COURT: Alright.

11 REDIRECT EXAMINATION BY MR. RIGALI:

12 Q. Officer, when you were in Mr. Frei's
13 home and he was telling you his version and Ms.
14 Manning was there also, right, his girlfriend?

15 A. I believe so.

16 Q. Right, and they were telling you what
17 had happened. Did they tell you that they wanted
18 to go out on the ice, one or both of them, to see
19 if they could identify who it was that actually
20 kicked Mr. Frei?

21 A. Yes they did.

22 MS. SAPIRSTEIN: Objection. I object to
23 him testifying as to what Ms. Manning might

1 have said. I have no objection to him
2 testifying to what Mr. Frei might have said.

3 THE COURT: Alright. Want to just
4 clarify that?

5 MR. RIGALI: I will clarify.

6 Q. Did Mr. Frei indicate to you that he
7 wanted to go out on the ice?

8 A. Yes he did.

9 Q. And what was this purpose, the stated
10 purpose?

11 A. So that he could be certain who the
12 person was that knocked him down was.

13 Q. So he never accused Mr. Johnson of doing
14 it, right, in your report or at any other time?

15 A. To the best of my knowledge, no.

16 Q. Right, he never did. But he said
17 somebody did and he wanted to go out on the ice,
18 correct?

19 A. That is correct.

20 Q. And what was your response?

21 A. My response at that time was it wasn't
22 necessary because we had already identified
23 everybody. And I was in plain clothes, I wasn't

1equipped. If in fact what we were being told
2that there was some type of altercation, it's
3just, we have a very small department, small
4resources, there was no need for us to go out
5there and further escalate a potential situation
6if in fact there was a situation at all when we
7had already identified everybody, that it could
8proceed as a follow up from there. It was just
9an officer safety issue.

10 Q. Okay. And when you were out there, did
11you observe cans of beer and empty beer
12containers and so forth?

13 A. Again, I didn't, you know, I didn't
14document anything like that in my report. I can't
15one hundred percent say that there was or there
16wasn't.

17 MR. RIGALI: Okay, nothing further.

18 Thank you very much.

19 THE COURT: Thank you. Anything
20 further?

21 MS. SAPIRSTEIN: No, thank you, Your
22 Honor.

23 THE COURT: Alright, thank you, Officer,

1 you can step down. Is he free to go then?

2 MR. RIGALI: Yes.

3 MS. SAPIRSTEIN: He's free to go.

4 MR. FORCIER: Thank you, Your Honor.

5 Thank you, ladies and gentlemen.

6 THE COURT: Okay, Attorney Sapirstein?

7 MS. SAPIRSTEIN: Thank you, Your Honor.

8 So now we're going to switch back to the
9 plaintiff's case and I'd like to call Brian
10 Johnson please.

11 (WITNESS SWORN)

12 DIRECT EXAMINATION BY MS. SAPIRSTEIN:

13 Q. Good morning, good afternoon, sorry, Mr.
14 Johnson. Can you state your full name for the
15 record please?

16 A. Brian Johnson.

17 Q. And what's your address?

18 A. I live at 61 Stafford Road in Holland,
19 Mass.

20 Q. How long have you lived in Holland?

21 A. So far thirty-five years.

22 Q. What's your occupation?

23 A. I'm the highway surveyor.

1 Q. A highway surveyor?

2 A. Yes. That's the correct title for my
3 job.

4 Q. And is that for the Town of Holland?

5 A. Yes it is.

6 Q. And is that an elected position?

7 A. Yes it is.

8 Q. And what are your duties as highway
9 surveyor?

10 A. Taking care of the roads in the
11 wintertime and summertime and all the
12 preventative maintenance, free all the catch
13 basins and drainage work we have in town.

14 Q. Now, are you familiar with Peter Frei?

15 A. Yes.

16 Q. And how are you familiar with him?

17 A. I just know Mr. Frei's a resident of
18 the Town of Holland. That he's had a lot of
19 problems in the past with a lot of town
20 officials.

21 Q. Now, if I could just focus your
22 attention on February 19, 2011. What if anything
23 did you do that day?

1 A. What did I do that day?

2 Q. What did you do that day?

3 A. I entered an ice fishing derby held by
4the Holland Rod and Gun Club.

5 Q. And is that an annual event?

6 A. Yes it is.

7 Q. And where did you fish in the derby?

8 A. We decided to fish on the south side of
9the lake because Michael Ritkowski, who I work
10with, he works part time in the highway
11department, he's retired, he fishes a lot. He
12was over there catching a lot of fish and he said
13let's fish on the south side of the lake, so
14that's where we went

15 MR. RIGALI: Objection.

16 THE COURT: Sustained as to what he
17 said. So disregard what the other gentleman
18 said.

19 Q. And is the fishing derby, is it a
20competition?

21 A. Yes.

22 Q. And what's the goal of the competition?

23 A. The goal is catch the biggest fish.

1 Q. Were you on public property?

2 A. Yes we were.

3 Q. Were you on public property the entire
4time you were fishing?

5 A. Yes.

6 Q. Did you personally ever enter Peter
7Frei's property?

8 A. No I didn't.

9 Q. Now, what was the weather like that day
10besides being cold and icy?

11 A. It was actually extremely cold and
12windy.

13 Q. And what part of the lake were you
14fishing on other than the south side, can you
15pinpoint it a little bit more than that?

16 A. Well we did nestle in, like get into the
17cove to get out of the wind that day.

18 Q. Okay. And that exhibit, exhibit one,
19which is facing you that's been admitted, can you
20show us, you can come around...

21 MS. SAPIRSTEIN: Your Honor, may he
22 come around to show us on the exhibit where
23 the cove is?

1 THE COURT: Sure.

2 MR. RIGALI: If I could suggest if Mr.
3 Johnson would put the exhibit up against the
4 blackboard there.

5 THE COURT: They have a tripod, so
6 we'll get the tripod. Probably right about
7 where the board is, that way everybody can
8 see it.

9 A. I would say that we got into this cove
10 right here, like I said, due to the wind.

11 Q. And was there less wind in the cove?

12 A. Yes there was.

13 Q. Had you ever fished there before?

14 A. Yes I have.

15 Q. About how many times?

16 A. I mean, I grew up in Holland, so I don't
17 know how many times, but numerous times.

18 Q. And did you ever have any encounters
19 with Peter Frei when you fished there on the
20 other times before February 19, 2011?

21 A. No.

22 Q. Did you catch fish that day?

23 A. Yes we did.

1 Q. Did you win the derby?

2 A. Yes we did.

3 Q. Now, did there come a time when Peter
4 Frei came onto the ice?

5 A. Yes.

6 Q. And did he approach you, not just you
7 but the group?

8 A. Yes he did.

9 Q. And at the time that he was approaching
10 you, were you aware at that time that he was
11 recording you?

12 A. No.

13 Q. Did he ask you if he could record you?

14 A. No.

15 Q. Did he tell you that he could record
16 you?

17 A. No he didn't.

18 Q. I'm sorry, did he tell you he was
19 recording you?

20 A. No.

21 Q. Did you ever consent to being recorded?

22 A. No.

23 Q. How did you become aware that he was

1recording you?

2 A. We became aware of it when he actually,
3he played it on the Holland blog but I also
4became aware of it when a reporter came to my
5office a few days later and she wanted to have a
6statement and I refused and she actually played
7it for me and she told me that she got it from
8Peter Frei.

9 Q. And who was that reporter if you
10remember?

11 A. Her name was Natalie Tolemo I think.

12 Q. And is she with a local TV station or
13newspaper?

14 A. TV station.

15 Q. Now you said that it was on the Holland
16blog?

17 A. Correct.

18 Q. Was the whole recording on the Holland
19blog?

20 A. Yes.

21 Q. Now, did you see any microphone on Peter
22Frei's jacket that day?

23 A. No.

1 Q. Was he wearing like a ski jacket?

2 A. Yes.

3 Q. It was cold, right?

4 A. Yes.

5 Q. At some point did the police arrive?

6 A. Yes.

7 Q. And did you personally make any
8 statements to the police?

9 A. When Officer Forcier came out to the ice
10 I told him that Peter Frei did come at us in a
11 threatening manner. And I talked to Jeffrey
12 about Mr. Frei three or four years ago...

13 MR. RIGALI: Object.

14 THE COURT: Okay. Well, I don't know
15 that he's...

16 MR. RIGALI: The question is what was
17 the conversation about out on the ice.

18 We're not into three or four years ago.

19 THE COURT: Yeah, alright. Just ask him
20 another question, okay, as opposed to going
21 back three or four years ago at this point
22 anyways.

23 MS. SAPIRSTEIN: Can we be seen at

1 sidebar?

2 THE COURT: Or just separate it out
3 then.

4 Q. What statement did you make that day to
5 Officer Forcier?

6 A. I told Officer Forcier that I do feel
7 threatened by Peter Frei because he was involved
8 in a case where a man threatened to kill my kids
9 and Mr. Frei went to support him in court.

10 Q. And that's what you told Officer
11 Forcier?

12 A. I told Officer Forcier that, yes.

13 Q. And did you in fact...

14 MR. RIGALI: Your Honor, if I may.

15 THE COURT: Alright, let me see you at
16 the side.

17 Q. Sorry, Mr. Johnson, can you tell us what
18 you told Officer Forcier that day as to why you
19 felt threatened by Peter Frei?

20 A. I told Officer Forcier that day that I
21 felt threatened by Mr. Frei due to the prior
22 incidents I've had with Mr. Frei. I talked to
23 him about when I was threatened, my kids were

1 threatened by James Lamountain. We had to bring
2 him to court and have a restraining order put on
3 him and Mr. Frei went to court that day to
4 support James Lamountain.

5 Q. Did you in fact feel threatened by Mr.
6 Frei that day?

7 A. Yes I did.

8 Q. Now, did you ever touch Mr. Frei?

9 A. No.

10 Q. Did you trip Mr. Frei?

11 A. No I did not.

12 Q. Did you knock him down?

13 A. No.

14 Q. Did you kick him?

15 A. No.

16 Q. Did you see Mr. Frei fall?

17 A. Yes.

18 Q. Can you describe what you personally
19 saw?

20 A. He was actually screaming with another
21 gentleman and he just, his feet went out from
22 under him, he fell on the ice onto his back.

23 Q. Did you see anyone else touch Mr. Frei?

1 A. No.

2 Q. Did you see anyone else kick Mr. Frei?

3 A. No.

4 Q. Did you see anyone else trip Mr. Frei?

5 A. No.

6 Q. Now, did you personally suffer any
7 damages from the recording?

8 A. I think the hardest problem we have with
9 the recording is he used it, he uses it a lot of
10 information on his blog with mistruths, half
11 truths and mistruths to attack a lot of people in
12 town. So as far as damages, I mean, this has
13 been an ongoing thing for years.

14 MR. RIGALI: I object and move to
15 strike, Your Honor. It's not responsive to
16 the question.

17 THE COURT: Okay, that's sustained.

18 Q. Did you lose any income as a result of
19 the recording?

20 A. No.

21 Q. Did you suffer any kind of emotional
22 distress as a result of the recording?

23 A. Yes.

1 Q. And can you describe the emotional
2 distress you suffered?

3 A. Well, like I say, the emotional distress
4 would be seeing people in town, everybody wanting
5 to talk about it, you know, all the questions
6 being asked, all the rumors due to what he, like
7 I say, information he puts on his blog.

8 Q. And this was specifically the recording
9 that was put on the blog?

10 A. Yes.

11 Q. So people in town came up to you and
12 talked to you about the recording on the blog?

13 A. Correct.

14 Q. For how long a period did that go on?

15 A. Months.

16 Q. Now, when you were fishing that day were
17 you doing anything in your official capacity as
18 highway surveyor?

19 A. No.

20 Q. It was a Saturday, right?

21 A. Correct.

22 Q. And you were participating as a private
23 citizen in the fishing derby?

1 A. Yes.

2 MS. SAPIRSTEIN: I don't have anything
3 further. Thank you.

4 THE COURT: Alright, thank you.
5 Attorney Rigali?

6 CROSS EXAMINATION BY MR. RIGALI:

7 Q. So this blog or this tape that you heard
8 on the blog, Mr. Johnson, you heard that tape I
9 assume?

10 A. Yes.

11 Q. Okay. You listened to it at least
12 several, one or two or three times?

13 A. Yes.

14 Q. Okay. And on that tape, I think you
15 just said that Mr. Frei was screaming at somebody
16 when he slipped and fell?

17 A. No.

18 Q. Was that your words? I'm sorry, I
19 didn't mean, that's what I thought I heard you
20 say. What was he, was he yelling at somebody at
21 that time?

22 A. There was someone yelling at him. There
23 was someone yelling at him to get away from us,

1we were telling him to get away from us.

2 Q. Okay. So that tape, that tape is going
3to have everything on it that you said, right?
4So it's going to record you telling him to get
5away from you or words to that effect, correct?

6 MS. SAPIRSTEIN: Objection.

7 THE COURT: No, that's overruled.

8 Q. Right?

9 A. It's actually another person in the
10party that was telling him to get away.

11 Q. Okay. So but you are telling this jury
12that, that's something a little different than
13what you told Officer Forcier as far as the
14statements that you made?

15 MS. SAPIRSTEIN: Objection.

16 THE COURT: No, that's overruled.

17 Although you might want to be a little more
18 specific.

19 MR. RIGALI: You told, yeah, I started
20 out general, thank you, Your Honor.

21 Q. I mean, you told Officer Forcier, you
22heard Officer Forcier testify just a few minutes
23ago, right?

1 A. Correct.

2 Q. Correct? And you know Forcier, he's a
3 cop in town?

4 A. Correct.

5 Q. Okay. So he testified that you told him
6 on that day that Mr. Frei came on the ice
7 yelling. Did Mr. Frei come on the ice yelling at
8 you or anybody else?

9 A. I didn't tell him that.

10 Q. I'm sorry?

11 A. I did not tell him that. I told him
12 that he came at us in a threatening manner.

13 Q. Okay.

14 A. That's what I told Mr. Forcier.

15 Q. And he accused you, I'm just repeating
16 what Officer, my memory, it's up to the jury what
17 they remember obviously, but I'm just repeating
18 to you what I remember Officer Forcier saying, he
19 said that you came onto the ice, that you told
20 him that Frei came onto the ice yelling, accused
21 you of trespassing and that you felt threatened
22 by Frei and that Frei said stay off my property
23 or I'll fucking kill you. So that's what Officer

1Forcier just told this jury that you said to him.

2Did you say that?

3 A. I said the third thing, that he came out
4in a threatening manner. I did not say he came
5out yelling at us. What Mr. Forcier wrote and
6what I said to Mr. Forcier are two different
7things.

8 Q. Okay. So the tape would resolve the
9issue, right?

10 MS. SAPIRSTEIN: Objection.

11 A. How would it show that he came out in a
12threatening manner.

13 THE COURT: Sustained. Sustained.

14 Q. So when you listened to the tape, and by
15the way did you subsequently learn where the
16recording device was when Mr. Frei recorded you?

17 A. I had no clue where it was.

18 Q. Did you subsequently learn at any time
19that he had an Iphone or a telephone or a phone
20in his pocket and that that's where the recording
21device was?

22 A. I believe that's what he said, he had it
23in his pocket, yes.

1 Q. Okay. And in your memory of that tape,
2 do you remember hearing Mr. Frei's voice? The
3 tape you heard on the blog...

4 A. Yes.

5 Q. Do you remember Mr. Frei's voice?

6 A. Yes.

7 Q. Okay. And on the blog, do you remember
8 him saying stay off my property or I'll fucking
9 kill you, is that on the tape?

10 A. No.

11 Q. Who else was with you on the ice that
12 day?

13 A. There was five or six people. Do you
14 want me to name them?

15 Q. Please.

16 A. Kyle Ritkowski, John Folger, Mike Mike
17 Wikowski, Tom Laplante, Al West, I believe there
18 was a few other guys too though, Mike Joy.

19 Q. Okay. If I said to you that according
20 to the police report there were eight of you with
21 the following names, and I won't give the first
22 names, but Folger, Mike and Kyle Wikowski, Tom
23 Laplante, obviously yourself, Mr. Fortuna and a

1gentleman named Caulley, right, those eight? Is
2that fair to say that the eight of you were out
3there?

4 A. Yes.

5 Q. So there's eight of you out there. And
6what time did you get out there on the lake that
7day?

8 A. I'd say 6:30.

9 Q. Okay. And when you got out there, what
10did you do?

11 A. We started drilling our holes.

12 Q. Okay. It's just about daybreak?

13 A. Mm-hmm.

14 Q. So it's still sort of dark, you can see
15what you're doing but it's still sort of dark?

16 A. Yeah, I'd agree with that.

17 Q. And you know where Mr. Frei lives?

18 A. Yes.

19 Q. And on that day you knew where he lived?

20 A. Mm-hmm.

21 Q. And you knew that you were essentially
22in the immediate vicinity, on the lake but
23nonetheless in the immediate vicinity of his

1house?

2 A. Yes.

3 Q. And you made a day of it, correct?

4 A. Yes.

5 Q. So you're there from 6:30 in the morning
6roughly until when?

7 A. I believe the derby ended at 3:00.

8 Q. Alright. How long after this incident
9when the police responded did you guys stay or
10was that getting to be towards the end?

11 A. I believe that was towards the end. I
12don't really recall how much longer we stayed,
13but.

14 Q. So let's say from 6:30 in the morning
15until 3:00 in the afternoon, at least the eight
16of you were out there fishing, drinking beer,
17barbecuing, driving your quads, correct?

18 A. Yes.

19 Q. Okay. And did you drive your quads in
20the direction or around the vicinity of Mr.
21Frei's home?

22 A. I mean, we were out in front of his
23house.

1 Q. How far away were you?

2 A. I'd say two hundred feet, three hundred
3 feet.

4 Q. Two, three hundred feet? What was the
5 closest fishing hole tip up to Mr. Frei's
6 property?

7 A. I couldn't tell you.

8 Q. Well how about something in this room,
9 was it within the distance from where you are now
10 to say the door right here?

11 A. It could have been.

12 Q. It could have been?

13 A. Bu like I said, I don't know.

14 Q. And isn't it in fact true, sir, that at
15 about 6:30 in the morning several of you, how
16 many of these power augers were there, by the
17 way?

18 A. We all own one individually.

19 Q. Okay, so five or six of them anyway, or
20 was there eight of them?

21 A. No, there wasn't eight of them. A lot
22 of us share them.

23 Q. Okay, so say a half a dozen of them or

1so?

2 A. No, I wouldn't say that, there probably
3was that many, but three or four.

4 Q. And those, you guys started digging
5holes around, on the ice, public property, but in
6the vicinity of Mr. Frei's property, correct?

7 A. On the ice, yes.

8 Q. And you don't remember how close those,
9the closest of what those was?

10 A. No.

11 Q. And you can't tell the jury here how
12close they were, how close you guys were,
13correct?

14 A. Correct.

15 Q. Okay. Now, let me show you this little
16blow up which was earlier marked for
17identification. Do you recognize, this is a
18summer shot obviously, but do you recognize
19what's shown there?

20 A. Yes.

21 Q. Okay. Tell the jury in your own words
22what that shows?

23 A. Peter Frei's house.

1 Q. And does it show the cove where you guys
2 were fishing?

3 A. Yes.

4 Q. And it shows the lake, right, this is
5 sort of the wider part of the lake, the open part
6 and the cove part is down here?

7 A. Yes.

8 Q. And based on your familiarity with the
9 basic layout of the land and the trees, the
10 shoreline, the house, is that a fair
11 representation of sort of where things, how
12 things are situated as they were on February 19,
13 2011?

14 A. Yes.

15 Q. Other than some ice and wind and snow?
16 Okay. And would you agree with me that this is a
17 peninsula entirely owned by Mr. Frei?

18 A. Yes.

19 Q. And that this is Mr. Frei's home?

20 A. Yes.

21 Q. And isn't it in fact true that actually
22 a couple of Mr. Frei's piers that support his
23 house, the corner over there, are actually in the

1water? Is that true?

2 A. I believe they are, yes.

3 Q. You know where they are, you saw them,
4you've lived there all your life, right?

5 A. Yes.

6 Q. They're actually sticking out into the
7water, correct?

8 A. Yes.

9 Q. Okay. And so, and I'm referring in the
10diagram here, can you see it over here, Mr.
11Johnson?

12 A. Mm-hmm.

13 Q. So holding up the exhibit, what's marked
14as an exhibit for now marked for identification
15for the Judge's benefit, this is the peninsula
16that is owned by Mr. Frei and this is the
17mainland back here where the road is where people
18would park or other people who live back here,
19correct?

20 A. Yes.

21 Q. Alright. And this is a cove which was
22frozen over in February, we've got other pictures
23of that but just to give the layout, and this is

1Mr. Frei's home?

2A. Correct.

3Q. And this is the home that he was in on
4the 19th when you guys were out in this cove
5fishing, drinking, driving your ATV's and so
6forth, correct?

7A. Yes.

8Q. Alright. Now on that day do you remember
9whether there was a path, a very visible footpath
10that went across the frozen surface of the cove
11from the land down here towards Mr. Frei's home?

12A. No.

13Q. You don't remember that?

14A. No.

15Q. Alright.

16MR. RIGALI: I'd offer this at this
17point as exhibit two, Your Honor.

18THE COURT: Alright.

19MS. SAPIRSTEIN: No objection, Your
20Honor.

21THE COURT: Thank you.

22Q. Now, on the back side of exhibit two
23there's another picture which purports to show

1 some men in winter clothes, some beer, some
2 machines here which I'll call a quad, do you
3 recognize this, what's shown here?

4 A. Yes.

5 Q. What does that show?

6 A. It shows a group of guys ice fishing.

7 Q. Alright. And is basically that a
8 picture of you guys on the 19th?

9 A. Yes.

10 Q. Okay. Is that a fair and accurate
11 presentation of, you know, how you guys looked,
12 how you're dressed, what's shown here out on the
13 ice?

14 A. Yes.

15 MR. RIGALI: This is a flip side
16 exhibit, Your Honor, I'd offer that as
17 exhibit three.

18 MS. SAPIRSTEIN: Can I see that?

19 THE COURT: Any objection?

20 MS. SAPIRSTEIN: No objection, Your
21 Honor.

22 THE COURT: Thank you.

23 Q. And I'll do this over here. Who's this

1guy?

2 A. That's me.

3 Q. Alright. How tall are you?

4 A. I'd say 6'3".

5 Q. And how much do you weigh?

6 A. Two seventy-five.

7 Q. Okay. And on February 19th, how much
8did you weigh, of 2011, roughly the same?

9 A. Two seventy-five, yeah.

10 Q. Two seventy-five. Six foot three, two
11hundred and seventy-five pounds, right?

12 A. Yes.

13 Q. Okay. Is it fair to say without going
14into naming everyone, these are the other fellows
15that you've described that were out with you, the
16six, seven or eight other guys?

17 A. Yes.

18 Q. Okay. How many of those guys work on
19the highway department?

20 A. Two full-time.

21 Q. Two full-time, and are there some, what
22were their names?

23 A. Kyle Ritkowski and Tom Laplante.

1 Q. And your father-in-law was there,
2 correct?

3 A. Yes.

4 Q. And his name is what?

5 A. Al West.

6 Q. Okay. Were there some other guys that
7 work part-time on the fire department, excuse me,
8 the highway department that were there?

9 A. Yes.

10 Q. How many?

11 A. Two or three?

12 Q. You tell me, two or three?

13 A. Mike Ritkowski and John Folger. I think
14 that was it.

15 Q. Alright. So we've got two full-time
16 guys, two part-time guys and yourself, five
17 members of the highway department are fishing in
18 this cove on February 19th, correct, and a
19 father-in-law, correct?

20 A. Yes.

21 Q. Alright. And how many people are on the
22 highway department in the Town of Holland, let me
23 rephrase that, on February 19, 2011, how many

1either part or full-time employees were there for
2the highway department?

3 A. Three full-time members.

4 Q. And two part-timers?

5 A. Yes.

6 Q. So pretty much the entire department is
7out there for a day of fishing, barbecuing, beer
8drinking and so forth, right?

9 A. Yes.

10 Q. Okay. Now, from the time that this
11incident occurred with Mr. Frei out on the ice to
12the time that the police got there, did somebody
13leave?

14 A. You know what, to be honest with you, I
15don't recall.

16 Q. Who's Mike Ritkowski?

17 A. Mike Ritkowski is the guy who lives on
18the south side of the lake who wanted to fish
19there that day.

20 Q. Okay. And let me show you this other
21photograph here, this is mounted, and ask if you
22recognize this?

23 A. Yes.

1 Q. What is that?

2 A. It's our four-wheelers.

3 Q. This is another picture on February
4 19th, okay, a different angle than the other one
5 perhaps, but same guys, different quads, people
6 hanging around drinking, whatever, correct?

7 A. Yes.

8 Q. And now, the person who took this
9 picture, we don't know who that was, but what,
10 based on this, what direction was this picture
11 taken from?

12 A. I mean, how could I tell you.

13 Q. It was taken from Mr. Frei's house's
14 direction, right?

15 A. I guess.

16 Q. This is the view of your group on the
17 ice from Mr. Frei's home, in the direction of his
18 home?

19 A. I think so.

20 MS. SAPIRSTEIN: Objection.

21 THE COURT: Okay. What's the objection?

22 MS. SAPIRSTEIN: I don't think he has

23 knowledge of that. There's no foundation.

1 He just said he didn't know.

2 THE COURT: Well, the objection is
3 overruled. If he doesn't, he can say that.

4 Q. Basically from the direction of Mr.
5 Frei's home, correct?

6 A. I guess so.

7 Q. Well, you know where you were, right?

8 A. Right.

9 Q. You've lived there all your life, you
10 fish on the lake according to you many times,
11 you're familiar with where Mr. Frei's house is,
12 so is that a picture taken basically from the
13 direction of Mr. Frei's home?

14 A. I would say yeah.

15 Q. Okay. And whose quad is the one that
16 has eat me painted on the blade?

17 A. Mike Ritkowski.

18 Q. Was Mike the guy that left after, right
19 before the police got there?

20 MS. SAPIRSTEIN: Objection.

21 THE COURT: Overruled. You can answer.
22 If you know.

23 A. I don't know. I don't know if he left or

1not.

2 Q. Well, let me ask you this, was the quad
3with the eat me sign facing Mr. Frei's house, was
4that there when the police officer got there,
5when either of the police officers got there?

6 A. I don't know.

7 Q. Was that quad facing Mr. Frei's house
8that way all day?

9 A. All day?

10 Q. Yes.

11 A. I'd say no.

12 Q. And where would it have been, other than
13facing Mr. Frei's house?

14 A. He would probably be riding it going to
15check his tills back and forth.

16 Q. So riding it around Mr. Frei's house?

17 A. That's where we fished.

18 Q. Right.

19 MR. RIGALI: I'd like to mark this as an
20 exhibit.

21 THE COURT: Is that exhibit four?

22 Q. Alright, now there had been, we all know
23that ice is slippery, right? You said the ice

1 was slippery. Officer Forcier said the ice is
2 slippery. But in this particular, on this
3 particular day, and shortly before that, there
4 had been a lot of snowfall on that ice, had there
5 not?

6 A. There was no snow on the ice, I can tell
7 you that much. It was glare ice.

8 Q. Was there, it was glare ice?

9 A. It was glare ice.

10 Q. Whereabouts was there glare ice in this
11 photograph?

12 A. Not in the cove but out where we were
13 fishing it was all glare ice.

14 Q. In the cove, in the cove, was there
15 glare ice?

16 A. In spots there was, yes, from what I
17 remember.

18 Q. Okay, where?

19 A. Like I said, we all had ice cleats on.

20 Q. Isn't this sort of a crunchy almost
21 softer surface of snow that has a residue of snow
22 on top of ice?

23 A. Last time I checked all ice was

1slippery, so.

2 Q. That's your testimony, all ice is
3slippery?

4 A. I would say it was slippery that day,
5yes, all ice is slippery.

6 Q. So this, we don't see any glare ice
7right here, where you guys are parked, where you
8guys are eating, where the trail was, but that's
9your testimony, it was glare ice?

10 A. It was glare ice.

11 Q. Glare ice right there?

12 A. Yes.

13 Q. Now, this is another photograph that's
14on the back of exhibit four, do you recognize
15this?

16 A. Do I recognize it? Yes.

17 Q. Who is that? Who is shown in this
18photograph?

19 A. Myself, Kyle Rikowski and the other guy
20I know his first name is Dave.

21 Q. Okay. And where is this spot, this
22picture taken? Where were you at the time that
23this picture was taken?

1 A. I would say we were in the cove.

2 Q. In the cove, okay. And what are you
3 doing?

4 A. Drinking.

5 Q. Drinking what?

6 A. Mike's Hard Lemonade.

7 Q. I'm sorry?

8 A. Mike's Hard Lemonade.

9 Q. Which is an alcoholic drink, correct?

10 A. Yes.

11 Q. And how many Mike's Hard Lemonades did
12 you have that day?

13 A. I don't recall.

14 Q. More than one?

15 A. Yeah, I would say more than one.

16 Q. More than several, correct? You're
17 there from 6:30 in the morning until 3:30 in the
18 evening. How many did you have?

19 A. Like I said, I don't really keep count
20 of how many drinks I had during the course of the
21 day.

22 Q. Alright. And let me ask you this, how
23 many did you bring?

1 A. A twelve pack.

2 Q. So you brought a twelve pack. And how
3 many were left by the end of the day?

4 A. I don't recall. I don't remember.

5 Q. None, isn't that fair to say? Come on,
6 you're just out fishing, right?

7 A. Yes.

8 Q. So in the course of six, seven, eight
9 hours you knocked down twelve Mike's Hard
10 Lemonades?

11 MS. SAPIRSTEIN: Objection.

12 THE COURT: Overruled.

13 Q. Yes?

14 A. Could've. Like I said, I don't know. I
15 don't keep track of how many drinks I had.

16 Q. That's why I asked you how many were
17 left.

18 A. Yeah. Like I said, I don't recall.

19 Q. And the other guys were drinking other
20 things, they were drinking beers, right?

21 A. Yes.

22 Q. Okay. And let me ask you this final
23 question, I'm sorry counsel, is this a fair

1 photograph and representation of what you
2 described earlier as to yourself, you know,
3 having a drink and some other fellows out on the
4 ice, in the cove on February 19th?

5 A. Yes.

6 MR. RIGALI: I'd like to mark this
7 please. Thank you.

8 Q. Mr. Johnson, this is a different
9 photograph, not a photograph, it's a map
10 representation of the lake which purports to show
11 the same cove and peninsula that is defendant's
12 exhibit two previously introduced, okay. So just
13 to orient you, this is just another angle of
14 that. Do you recognize this, sir, the basic
15 layout of the lake, the shoreline, once again,
16 the cove?

17 A. Yes.

18 Q. It looks like some cottages or buildings
19 in the vicinity, do you recognize that?

20 A. Yeah.

21 Q. And isn't it basically a fair depiction
22 of the layout of the land, the lake, the
23 lakeside, the cottages and so forth?

1 A. Yes.

2 Q. And there is what looks like a yellow,
3 almost like a push pin blown up and it says Frei
4 residence, would you agree that that is in fact
5 an accurate representation of where the Frei
6 residence is located on that map?

7 A. Yes.

8 Q. Okay. And further, would you agree with
9 me that you guys placed your fishing tip ups all
10 around the cove, all around the peninsula?

11 A. Not all around.

12 Q. Not all around, okay.

13 A. I'd say from there down.

14 Q. Okay. So from right about here down?

15 A. Correct.

16 Q. In this area here?

17 A. Yes.

18 Q. And set up camp, so to speak, with your
19 tables and chairs and quads into the cove,
20 correct?

21 A. Yes.

22 Q. Alright. Now, do you know as a member
23 of the highway department are familiar with

1 Maybrook Road as it goes by this general area?

2 A. Yes.

3 Q. Okay. And do you know where Mr. Frei's
4 driveway begins off of Maybrook?

5 A. Yes.

6 Q. And would you also agree with me that
7 this dot up here, it says beginning of driveway,
8 if that is in fact a fair representation of the
9 beginning of Mr. Frei's driveway as it meets the
10 hard road up above?

11 A. Yes.

12 Q. Okay. And do you have any idea of the
13 distance between his residence and the highway?

14 A. No.

15 Q. And you're telling me and the members of
16 the jury here that you saw no observable path
17 across the ice, and I'm sorry I'm shaking, you'll
18 get this way when you're old...

19 MS. SAPIRSTEIN: Excuse me, I hate to
20 interrupt, but I'd like to, can I position
21 myself so I can see?

22 THE COURT: Of course.

23 MR. RIGALI: I'm sorry.

1 Q. Okay, so you're telling the jury that
2 when you arrived you observed there was no path
3 through the snow, through the ice, through the
4 glare ice, whatever it might have been, coming
5 down through the snow from the beginning of the
6 driveway, at least where you could see from where
7 you were, Mr. Johnson, coming across the ice in
8 the direction of his property?

9 A. No.

10 MR. RIGALI: If we could mark this as
11 the next exhibit, Your Honor.

12 THE COURT: Okay, six.

13 Q. Now, throughout the day, were the other
14 guys drinking, by the way?

15 A. Yes.

16 Q. Yeah, I mean, no big sin, I'm not trying
17 to trick you or trap you here, but everyone's
18 drinking, drinking beers, drinking hard lemonade,
19 it's a fishing party, right?

20 A. Yes.

21 Q. Okay. And between, and there's eight of
22 you out there, correct, I mean, maybe not at
23 every second, people are coming and going, but

1there's a crowd out there, correct?

2 A. Yes.

3 Q. And you had a certain number of hard
4lemonades, were you drinking anything else, by
5the way?

6 A. I don't recall. I don't remember.

7 Q. Could have though, right?

8 A. Could have.

9 Q. Did you have to go to the bathroom out
10there? Did you have to urinate?

11 A. Yes.

12 Q. Okay. And the other eight guys did, or
13the seven guys did also, correct?

14 A. Yes.

15 Q. And where would you go when you had to
16urinate?

17 A. Usually when we're out on the ice we'd
18try to find a place to go in private on our four-
19wheelers.

20 Q. Okay. Along the shoreline basically,
21sort of out of, I'm not accusing you of anything,
22I'm just saying you go to the shore, right?

23 A. Yes. We try to, yeah.

1 Q. Okay. And including sometimes just
2 walking over to the edge of the property and
3 urinating on where the, on the shoreline, in the
4 brush or the vegetation right by the shoreline,
5 correct?

6 A. Yes.

7 MS. SAPIRSTEIN: Objection.

8 THE COURT: What's the objection?

9 MS. SAPIRSTEIN: The objection is is Mr.
10 Rigali asking Mr. Johnson or all the eight
11 people or it's just an unclear question.

12 THE COURT: Okay, maybe clarify.

13 Q. All eight. Is it, again, is it fair to
14 say that eight men drinking alcoholic beverages
15 from 6:30 in the morning until at least 3:00, the
16 police were there at 3:00 the latest, so at least
17 6:30 in the morning until 3:00, they're drinking,
18 is it fair to say that they would at some point
19 have to urinate and they would do so by going to
20 the side of the cove and urinating in the brush
21 on the banks, right?

22 A. Yes.

23 Q. On Mr. Frei's property? Yes? No? Are

1you going to tell the jury that didn't happen?

2 A. I know I didn't go on Mr. Frei's
3property.

4 Q. But you're with the guys that's got an
5ATV that's pointed directly at Mr. Frei's
6property with an eat me sign on it, did he go on
7Mr. Frei's property?

8 A. I didn't keep track of where Mike
9Ritkowski peed that day.

10 Q. Okay. Let me show you this picture,
11this is somewhat similar to previous exhibit
12number four, do you recall for the record if
13exhibit four shows, you know, half a dozen or so
14quads, some guys standing around, you've
15described that as in the cove by Mr. Frei's
16property, correct?

17 A. Yes.

18 Q. Okay. And by the way, it's not
19particularly clear, I'll move this in a moment,
20what is this right here? Is that a path right
21there?

22 A. I guess so.

23 Q. No, don't guess, is it a path or not?

1 Do you remember that as being a path, a footpath
2 in the snow?

3 A. No.

4 Q. Do you recognize this photograph?

5 A. Yes.

6 Q. Again, fairly similar to exhibit four, a
7 picture of a bunch of guys, quads, looks like the
8 same cove, you've got a quad that says eat me on
9 the front, and now we got a gentleman on the
10 banks, is that a fair representation of a
11 photograph of your crew, as you've described it,
12 on the 19th?

13 A. Yes.

14 Q. Okay.

15 MR. RIGALI: I'd move to mark this.

16 THE COURT: Alright, exhibit seven.

17 Q. Now, I want you to look at the shadows
18 underneath the quads here, like right in this
19 area here, or over here, and tell the jury where
20 that glare ice is?

21 A. It's all right here, all around him.
22 That could have been where we drilled holes. I
23 don't really know, to be honest with you.

1 Q. Okay. And by the way, do you know who
2 that is, this gentleman that's on the land?

3 A. Yes.

4 Q. Who is that?

5 A. Dave. I know his first name his Dave.

6 Q. Okay. A member of your, one of the
7 fellows that was with you that day?

8 A. Yes.

9 Q. And had Dave been with you drinking and
10 driving a quad and fishing and so forth
11 throughout the day?

12 A. He showed up later on in the day. He
13 doesn't have a quad, I know that.

14 Q. Okay. Oh, I'm sorry, but he was with
15 you and your buddies who have quads, correct?

16 A. Correct.

17 Q. Okay. So is it fair to say, I'm not
18 trying to put words in your mouth, but he was a
19 member of the group that you were with partying
20 on the ice that day?

21 A. Yes.

22 Q. Okay. And do you know whose property
23 that is right there where he is standing, where

1 Dave is standing?

2 A. No.

3 Q. He's not on the lake, am I right?

4 A. Right, I agree with that.

5 Q. Okay. Does it look like he's on the
6 footpath right there, going up into the woods a
7 little bit, we've got a little bit of a slope
8 going uphill?

9 A. Yeah, it does look like it.

10 Q. Yeah. So you're now saying that there
11 is a footpath that goes up the hill there?

12 A. I mean, like I said, if it's a footpath
13 or whatever it is, I don't know what it is, I
14 mean.

15 Q. But you're saying, you told the jury
16 earlier that you didn't see any footpath going up
17 the hill where you had been all day long
18 drinking, going to the shore, you and your
19 friends urinating in this area, you never saw
20 that footpath?

21 A. No. I never saw a footpath.

22 Q. And you never saw a footpath going
23 across the ice directly to Mr. Frei's house?

1 A. No.

2 Q. And you didn't intentionally set up your
3 camp in the midst of that footpath, correct?

4 A. Correct.

5 Q. Okay. I'm just going to show you this
6 photograph and ask you if you recognize that.
7 This was not taken on the 19th.

8 A. Definitely not.

9 Q. But is that a photograph of Mr. Frei's
10 house?

11 A. Yes.

12 Q. Okay. And that is from a different
13 angle, from somewhat up the hill. So up this
14 hill where, was it Dave you said, this guy here
15 Dave, yes?

16 A. Yeah.

17 Q. Okay. So if Dave continued on up or a
18 photographer continued on up the hill a little
19 bit, turned back towards the lake and towards the
20 cottage, Mr. Frei's home, that's essentially what
21 the home would look like, I'm not asking you
22 about ice or snow?

23 A. Yes, I would say yes, you're correct.

1 Q. And so that in front of it is in fact
2 the cove that you guys were fishing on on the
3 19th?

4 A. Yes.

5 Q. Okay.

6 MR. RIGALI: Can we mark this please?

7 MS. SAPIRSTEIN: Objection.

8 THE COURT: Okay. I'll see you at the
9 side.

10 MR. RIGALI: I just want to mark it,
11 that's all.

12 THE COURT: Oh, for identification?

13 MR. RIGALI: Yes.

14 THE COURT: Oh, I'm sorry. Okay, that's
15 fine.

16 MS. SAPIRSTEIN: Sorry, I misunderstood.

17 THE COURT: Alright, that will be
18 Exhibit B for identification.

19 Q. So the quad right here that says eat me
20 that Officer Forcier said he never saw, that
21 blade is facing that house just like that,
22 correct?

23 A. Yeah, you can say that, yes.

1 Q. Is it fair to say, Mr. Johnson, that
2 Peter Frei has been relentless in writing stories
3 about you, your dad when he was a selectman,
4 members of the highway department, other town
5 officials, and he puts those articles, as do
6 others, on his so-called blog?

7 A. Yes.

8 Q. And this has gone on for some time, has
9 it not?

10 A. Yes.

11 Q. There have been several incidents
12 between you and Mr. Frei in which tempers flared,
13 words were said?

14 A. No.

15 Q. No?

16 A. Two I would say.

17 Q. Two, okay. Did you ever tell him to
18 knock off his bullshit on the blog?

19 A. Through the blog?

20 Q. On the blog. The information that he put
21 on the blog, did you ever tell him to knock off
22 the bullshit that you're putting on the blog?

23 A. I called him once about something he put

1on the blog.

2 Q. What'd you tell him?

3 A. I told him once again he was misleading
4the truth.

5 Q. And you said it in those words?

6 A. Yeah.

7 Q. Mr. Frei, you are misleading the truth?

8 A. I said once again you're lying, you're
9not telling people the truth. We had a rented
10piece of equipment that he said was a town
11vehicle.

12 Q. No, no, I'm not asking you what was
13said, I'm just asking, I'm just telling the jury
14there's some history here, alright, we could go
15on here for weeks if we get into the details.
16There's a history, isn't there?

17 A. With Mr. Frei putting things on the
18blog, yes.

19 Q. About you in particular?

20 A. Yes.

21 Q. And as a matter of fact some of those
22things, do you know whether or not by the way
23some of those things were simply tips that were

1given to Mr. Frei that he simply reprinted on the
2blog, that he didn't know about them at all, he
3just put, some citizen gave it to him and he put
4it on the blog. Do you know whether or not that
5occurred?

6 A. I don't know how he does or how he
7operates.

8 Q. And do you recall an incident with the
9DEP, Department of Environmental Protection, on
10the lake and some machinery as a result of which
11your department, your town was fined by the DEP?

12 A. Yes.

13 Q. Okay. And do you know who, and what
14were they fined for, by the way?

15 A. We didn't have the proper paperwork
16through the DEP.

17 Q. Wasn't it, right, you didn't have the
18proper paperwork, you didn't have anything from
19the DEP, correct?

20 A. That's not true.

21 Q. For this particular job?

22 A. We were working with Pioneer Valley and
23we had permits for three sites. We had leftover

1 money and Pioneer Valley told us to go ahead and
2 do this with the money we had left over. And we
3 actually didn't get fined in the end.

4 Q. I understand. But you were cited by the
5 DEP for some violations?

6 A. Yes.

7 Q. And one of those, among others, was that
8 heavy equipment was practically in the lake?

9 A. There was a piece of the equipment in
10 the lake. But that was not what we're talking
11 about.

12 Q. Correct. And that was on the blog, was
13 it not?

14 A. Correct.

15 Q. And it was your department that were
16 operating the heavy equipment, either you or
17 members of your department?

18 A. Correct.

19 Q. So regardless of what happened with the
20 fine, there was some sort of sanction imposed by
21 the DEP against the town for work done by your
22 department in either a wetland, a protected zone,
23 by water, by a lake, whatever, right?

1 A. Yes.

2 Q. And that was on the blog? And many,
3 many, many other things were on the blog,
4 correct, things critical of you, things that you
5 thought were totally untrue, totally uncalled for
6 and totally untrue, correct?

7 A. Correct.

8 Q. Do you remember an incident where Mr.
9 Frei was in the Town Hall and you came up to him
10 and in an audible tone and called him a scumbag
11 and white trash?

12 A. I called him a white trash scumbag.

13 Q. Oh, I'm sorry, you tell the jury what
14 you called him?

15 A. That's what I called him. I told him he
16 was white trash and he was a scumbag.

17 Q. So I misstated it, I thought you said
18 scumbag and white trash, but you said white trash
19 and scumbag, is that correct?

20 A. Correct.

21 Q. People were around, it was in the
22 clerk's office, correct?

23 A. I don't recall.

1 Q. Do you recall another incident where Mr.
2 Frei was in the little ante room at the police
3 station making out a statement or writing
4 something and you came up to him and said some
5 other things. Do you recall that incident?

6 A. No.

7 Q. You don't recall that incident?

8 A. I don't.

9 Q. Do you recall sticking your cell phone
10 camera in his face about an inch away and
11 clicking it and calling him a loser and a scumbag
12 and white trash?

13 A. No.

14 Q. You don't recall any of that?

15 A. I don't recall that, no.

16 Q. What do you recall about that incident?

17 A. I do remember he was in the police
18 department and I remember leaving the police
19 department.

20 Q. And you didn't touch his car, by the
21 way, when you left the department, did you?

22 A. No.

23 Q. You saw his car parked outside?

1 A. Yes.

2 Q. Directing your attention to the 19th,
3 February 19, 2011, did you see anybody touch Mr.
4 Frei that caused him to fall?

5 A. No.

6 Q. So your testimony is that nobody kicked
7 him?

8 A. That's correct.

9 Q. That he just fell on the glare ice?

10 A. Yes.

11 Q. And when he was down, did you approach
12 him as if to kick him again?

13 A. No.

14 Q. Did you attempt to kick him?

15 A. No.

16 Q. Did you draw your foot back as if to
17 kick him?

18 A. No.

19 Q. And stop because he said you're being
20 recorded, you're being videotaped?

21 A. No.

22 Q. Do you remember him saying you're being
23 videotaped and sort of either laughing or

1 smiling?

2 A. Yeah. I remember that, he was all
3 excited, he thought he had it. I remember him
4 saying I have you now or something to that
5 statement.

6 Q. Words to that effect, right, because
7 you're being videotaped, right? He said to you,
8 you're being videotaped, I have you now or I got
9 you now, something to that effect, right?

10 A. Something to that effect. We're going
11 to hear the tape.

12 Q. And you weren't anywhere near him when
13 you said that?

14 A. We were all right there. He fell right
15 in the middle of the group of the guys.

16 Q. So he was just standing on the glare ice
17 and fell?

18 A. Yes.

19 Q. Okay. And how, I want you to position
20 me here in the courtroom how close or far away
21 you were to Mr. Frei the moment he fell. So were
22 you this far away.

23 A. I'd say like where you and Tani, Mrs.

1 Sapirstein are right now.

2 Q. So let's put you on the ice on February
3 19th and where's Mr. Frei, is he here, is he here
4 or is he back here where Ms. Sapirstein is?

5 A. No, he's over here.

6 Q. Over here?

7 A. Yeah.

8 Q. Just stop me when I get close enough.

9 A. I was probably about that close to him.

10 Q. Okay, so you're within this distance of
11 Mr. Frei, okay, and he, and everybody's around
12 him, right, correct? Head shakes aren't picked
13 up on tape so you have to say.

14 A. Correct.

15 Q. And so everybody's around him, okay, are
16 the other guys about your size, some of them?

17 A. Maybe a couple of them but the other
18 guys aren't.

19 Q. Okay. But everybody's got their big
20 coats on, it's freezing out there according to
21 you, you've got leggings and we've seen the
22 pictures, right?

23 A. Yes.

1 Q. So you've got a bunch of big appearing
2guys that have circled around him at this point
3pretty much?

4 A. Yes.

5 Q. He's in the middle of this entourage of
6guys, five or six guys, six, seven, eight guys,
7whatever it is, and he's in the middle.

8 A. He was actually arguing with one guy is
9what he was doing.

10 Q. He was arguing with one guy?

11 A. Yes.

12 Q. What was he saying in the argument?

13 A. That he was, that one guy was telling
14him to get away from us because when he
15approached us on the ice, the one guy was saying
16just get away from us.

17 Q. Okay. And was this when he threatened
18to kill you?

19 A. No.

20 Q. So when he fell on the ground what did
21you do?

22 A. Nothing.

23 Q. Did anybody go near him to try to help

1him up?

2 A. No.

3 Q. But one thing you didn't do, excuse me,
4one thing that nobody else did, because you were
5looking right at him, and you were looking at him
6when he fell, correct?

7 A. Yeah, he was right in front of me.

8 Q. Right in front of you a few feet away he
9fell, you're looking at him, so if somebody
10kicked him from behind, behind his knee, you
11know, like you go to when in you're in school and
12you kick a guy behind the knee, you tape him and
13his legs give out, that didn't happen?

14 A. No.

15 Q. And so when he hit the ground you didn't
16come up or closer to him as if you were going to
17kick him?

18 A. No.

19 Q. Who yelled out hey isn't there somebody
20else in the house?

21 A. I don't know.

22 Q. You remember that being yelled out?

23 A. Yes.

1 Q. Why would anybody care?

2 MS. SAPIRSTEIN: Objection.

3 THE COURT: That's sustained.

4 MR. RIGALI: I'll withdraw it. If I
5 could have just a moment, Your Honor.

6 THE COURT: Sure.

7 MR. RIGALI: I have no further
8 questions. Thank you, Mr. Johnson.

9 THE COURT: Thank you. Attorney
10 Sapirstein?

11 MS. SAPIRSTEIN: Just a couple, Your
12 Honor.

13 REDIRECT EXAMINATION BY MS. SAPIRSTEIN:

14 Q. Mr. Johnson, the incident that was on
15 the blog regarding the DEP, do you know what year
16 that was?

17 A. It must have been two years ago, two or
18 three years ago, two years ago.

19 Q. So was it at least a year before you
20 went fishing in the cove in the fishing derby in
21 February of 2011?

22 A. Was it before that you're saying, Tani?

23 Q. Was it at least a year before that?

1 A. I believe so, yes.

2 Q. And how about when you saw Mr. Frei in
3 the Town Hall, how long ago, what year was that
4 in?

5 A. I don't recall. It had to have been
6 four years ago maybe.

7 Q. Now, when you went to the lake to fish
8 in that cove, did you go there, you personally,
9 did you go there for the purpose of stopping Mr.
10 Frei from publishing items on the blog?

11 A. No.

12 Q. And following that day, February 19,
13 2011, did Mr. Frei in fact continue to publish
14 things about you and your family on the blog?

15 A. Yes.

16 Q. Did the fact that he was publishing
17 items on the blog that concerned you or your
18 father or other town officials in any way affect
19 your decision to fish in the cove that day?

20 A. No.

21 Q. Were you wearing cleats?

22 A. Yes.

23 Q. Was everybody in your group wearing

1cleats?

2 A. Yes we were.

3 Q. Why was that?

4 A. Because it was extremely slippery.

5 Q. Because it was ice?

6 A. Ice, yes.

7 MS. SAPIRSTEIN: I don't have anything
8 further. Thank you.

9 THE COURT: Thank you. Anything
10 further, Attorney Rigali?

11 MR. RIGALI: Just a couple.

12 RECROSS EXAMINATION BY MR. RIGALI:

13 Q. How were the cleats affixed to your
14feet?

15 A. You put them on the front of your boot
16and you pull them over and strap them on the
17back.

18 Q. Can you show me on any of the prior
19exhibits? I don't know if we've got any close
20ups of your feet, but can you show me on any of
21the prior exhibits cleats? Maybe none of these
22are appropriate.

23 A. I don't think you'll be able to see

1them.

2 MR. RIGALI: I have nothing further.

3 Thank you, Mr. Johnson.

4 THE COURT: Okay, thank you. Thank you,
5 sir, you can step down. Attorney
6 Sapirstein?

7 MS. SAPIRSTEIN: Your Honor, we go until
8 what, 4:30?

9 THE COURT: Yes.

10 MS. SAPIRSTEIN: Okay then, I'd like to
11 call Peter Frei please.

12 (WITNESS SWORN)

13 DIRECT EXAMINATION BY MS. SAPIRSTEIN:

14 Q. Good afternoon, Mr. Frei. Can you state
15 your name for the record please?

16 A. My name is Peter Frei. It's spelled F-
17 R-E-I.

18 MS. SAPIRSTEIN: Your Honor, I'm really
19 sorry to do this. Can we come to sidebar
20 for just a really quick moment?

21 THE COURT: Sure.

22 MS. SAPIRSTEIN: Thank you.

23 Q. And what's your address, Mr. Frei?

1 A. I live on 101 Maybrook Road in Holland,
2 Massachusetts.

3 Q. How long have you lived there?

4 A. I bought the property in 1986 and
5 immediately started living there.

6 Q. Okay, so you've lived there since 1986?

7 A. At that time I would spend summers there
8 and winters in Switzerland.

9 Q. Okay. And what's your occupation?

10 A. I studied electrical engineering in
11 Switzerland but I did that only for like six or
12 seven years and then I started buying and selling
13 like scientific instruments, mechanical antiques
14 and that sort of things.

15 Q. So is that how you earn your living?

16 A. Yes.

17 Q. Now, I'd like to turn your attention to
18 February 19, 2011. Did you record Brian Johnson
19 and other individuals that day?

20 A. I was wearing, yes.

21 Q. And why did you do that?

22 A. I did that to protect myself because
23 there were prior incidences whereby Mr. Johnson

1 tried to criminalize me.

2 Q. Well, you approached Mr. Johnson that
3 day, isn't that right?

4 A. Excuse me?

5 Q. You approached Mr. Johnson that day?

6 A. I was on my way back from getting my
7 mail and putting out the trash and I walked down
8 that path and I approached Mr. Johnson, yes.

9 Q. So Mr. Johnson nor anyone else who was
10 fishing that day approached you? No one came up
11 to you?

12 A. I would say they were stationary in the
13 area, yes, I actually walked to my house and
14 stopped by this group of people to tell them that
15 I would not tolerate them trespassing my
16 property.

17 Q. Okay, now what device did you record
18 them on?

19 A. I had an Iphone slipped into the pocket
20 and the microphone hanging out with the wires.
21 It was a white microphone and I was wearing a
22 black overall.

23 Q. Were you wearing a coat?

1 A. Excuse me?

2 Q. Were you wearing a coat?

3 A. It was like a ski overall. It was one
4piece.

5 Q. Okay. And where was the microphone, was
6it attached to your clothing in some way?

7 A. It was kind of hanging down outside this
8pocket in plain sight.

9 Q. Well, when you say it was in plain
10sight, do you know whether anyone in that group
11saw the microphone?

12 A. No I do not.

13 Q. Did you ask anyone, including Mr.
14Johnson, for permission to record them?

15 A. No I did not.

16 Q. Did you tell Mr. Johnson or anyone else
17in the group that you were recording them?

18 A. Once I fell I said you're all being
19videotaped. I did not tell him that I actually
20recorded them audio.

21 Q. Okay. Did there ever come a time where
22you recorded them or where you told Mr. Johnson
23or the others that you were recording them?

1 A. No.

2 Q. Did Mr. Johnson or the others in the
3 group ever give you permission to record them?

4 MR. RIGALI: Objection. Sidebar maybe?

5 THE COURT: Okay. Alright. That's
6 overruled.

7 Q. Did you ask Mr. Johnson or anyone in the
8 group for permission to record them?

9 A. No I did not.

10 Q. Did you post the recording on your blog?

11 A. Yes I did.

12 Q. The entire recording?

13 A. Yes I did.

14 Q. Do you know when you did that?

15 A. I did that once I saw the police report
16 and saw that Mr. Johnson actually accused me of
17 committing a crime and I felt like it's
18 appropriate to tell the community that he was not
19 telling the truth and that I didn't make such a
20 threat.

21 Q. Okay, my question actually wasn't that,
22 my question was when did you post it?

23 A. That was, I don't know, I would say the

119th of February, this incident happened, and I
2think it took like eight days until the police
3report came out. I would say, I don't know
4exactly the day but it was around maybe towards
5the end of February.

6 Q. And when you say you posted it, I just
7want to make sure that I actually understand
8this, did you have some way for people to
9actually listen to the tape recording by going on
10your blog?

11 A. Yes. You know, it's like an audio
12recording on the blog. You click on it and then
13it plays, yes.

14 Q. So the actual audio recording was on
15your blog?

16 A. Yes.

17 Q. Did you give the recording to somebody
18from CBS3?

19 A. Yes. I heard earlier that that was a
20CD, it was not a CD, I didn't give her a CD. She
21came to my house and I played this voice memo to
22her and then she said can I get a copy and I said
23sure, I can email it to you. She had an Iphone

1 too, so I emailed it to her and she had it on her
2 iPhone.

3 Q. And this was the actual recording that
4 you made on the 19th?

5 A. Yes.

6 Q. What was her name, do you remember?

7 A. That was Natalie Tolamayo.

8 Q. Tolamayo?

9 A. Yes.

10 Q. And how did she, did you ask her to come
11 to your house?

12 A. No.

13 Q. She just happened to come to your house
14 one day?

15 A. Yes.

16 Q. Okay. Did you tell Officer Forcier that
17 you had recorded what, that you had recorded the
18 people on the ice?

19 A. That's correct.

20 Q. And did you play it for him?

21 A. Yes.

22 Q. Did you ever see Brian Johnson on your
23 property on February 19th?

1 A. No.

2 Q. Did Brian Johnson ever touch you on
3 February 19th?

4 A. No.

5 Q. Did he beat you?

6 A. Excuse me?

7 Q. Did he beat you?

8 A. No.

9 Q. Did he trip you?

10 A. No.

11 Q. Did he kick you?

12 A. No.

13 MS. SAPIRSTEIN: If I could have one
14 moment please, Your Honor.

15 THE COURT: Sure.

16 Q. Are you aware that there is a fishing
17 derby sponsored by the Holland Rod and Gun Club
18 on an annual basis?

19 A. Do I know now or did I know then?

20 Q. Do you know now?

21 A. Yes.

22 Q. Okay. And was that the first time that
23 people had fished in that cove during the derby?

1 A. That I don't know.

2 Q. Do you know whether anyone fished on the
3 south side of the lake near your house in this
4 past derby in February of 2013?

5 MR. RIGALI: Objection. This past derby
6 is irrelevant.

7 THE COURT: Relevance, that's sustained
8 unless you want to be heard.

9 MS. SAPIRSTEIN: I do want to be heard,
10 Your Honor.

11 THE COURT: Okay.

12 Q. Mr. Frei, do you generally object to
13 people fishing in that area?

14 A. No.

15 Q. Have you objected to people other than
16 the individuals who were there in February of
17 2011, have you objected to other people fishing
18 in front of your house in a fishing derby?

19 A. No.

20 Q. Did you object to somebody fishing in
21 that area, the south side of the lake in this
22 past fishing derby?

23 A. As I said, I don't know when that

1happened.

2 Q. Did you, well, did you object, did you
3confront a fisherman this past fishing derby, not
4Mr. Johnson, someone else?

5 A. No.

6 Q. Do you remember calling the police on or
7about February 2, 2013?

8 A. Yes I do.

9 Q. And was that regarding somebody fishing
10in the general area of your house?

11 A. No that was not with regard to somebody
12fishing in the vicinity of my house. That was
13somebody assaulted me.

14 MS. SAPIRSTEIN: Your Honor, can we come
15 back to sidebar for a second please?

16 Q. Did you ever report to the Holland
17Police that Brian Johnson assaulted you in any
18way on the 19th of February, 2011?

19 A. As far as I recall, I told Jeff Forcier
20the events of that day and it included the fact
21that Mr. Johnson tried to take a swing, I mean,
22he took a swing with his right foot towards my
23head while I was laying on the ice and that's

1when I said you're all being videotapes and he
2froze. Other than that, I didn't accuse him of
3anything.

4 Q. I'm sorry, I'm having trouble hearing
5you, Mr. Frei. Can you keep your voice up a
6little bit?

7 A. Sure. The whole thing you want to hear
8again?

9 Q. Well, you said that you told Officer
10Forcier that Brian Johnson took a swing at you?

11 A. Yes.

12 Q. And was that on the same day that you
13called the police to your home?

14 A. That was on February 19th.

15 Q. February 19th?

16 A. Yes. I would think that it's also in my
17personal report, like a personal statement to
18that incident.

19 Q. Okay.

20 MS. SAPIRSTEIN: May I approach please?

21 THE COURT: Yes.

22 Q. Mr. Frei, can you identify that
23document? Mr. Frei, can you identify that?

1 A. Yes. First I got to look at it, excuse
2 me.

3 Q. Okay.

4 A. It's a narrative from Corporal Jeffrey
5 Forcier about the incident of February 19, 2011.

6 Q. Okay. And that was the same police
7 officer you spoke with?

8 A. Yes.

9 Q. Okay. And does it say anywhere in there
10 that Mr. Johnson assaulted you in any way?

11 MR. RIGALI: Again, I object, Your
12 Honor. These questions were not asked of
13 Mr. Forcier when he was on the stand. I
14 can't cross examine a statement.

15 THE COURT: Well, overruled. He can say
16 whether the statement says that.

17 A. May I read it?

18 THE COURT: No, just answer her
19 question, okay.

20 MS. SAPIRSTEIN: No, he asked if he
21 could read it.

22 THE COURT: Oh, can you read it? Out
23 loud you mean?

1 A. No, not out loud, but you know, I got to
2 read it before I can answer.

3 THE COURT: Oh, can you read it to
4 yourself? Of course, of course. I thought
5 you meant out loud.

6 A. I'm a slow reader so maybe it takes a
7 minute or so. I'm sorry. No, there's no mention
8 in the police report.

9 Q. So on the day of the incident you didn't
10 report to the Holland Police when they came out
11 to investigate the incident that Brian Johnson
12 did anything regarding either tripping you or
13 attempting to kick you?

14 A. I did report it but it's not in the
15 police report.

16 MS. SAPIRSTEIN: May I approach please?

17 THE COURT: Yes.

18 MS. SAPIRSTEIN: I don't have any
19 further questions on direct. Thank you.

20 THE COURT: Okay.

21 MR. RIGALI: Your Honor, there's just a
22 few minutes. If I could just introduce a
23 few exhibits so we get that out of the way.

1 I can do it in less than five minutes and be
2 done with it.

3 THE COURT: Go ahead.

4 MR. RIGALI: I'm reserving my rights
5 again.

6 THE COURT: Yes.

7 CROSS EXAMINATION BY MR. RIGALI:

8 Q. Mr. Frei, I'm showing you a photograph
9 that's been blown up and mounted on the
10 blackboard here, do you recognize this?

11 A. Yes I do.

12 Q. Could you tell the jury what this
13 represents please?

14 A. It's a picture taken out of the kitchen
15 window of my house of a group of men which were
16 fishing on February 19.

17 Q. Is this the Brian Johnson, one or more
18 of the Brian Johnson crowd that you described in
19 earlier testimony?

20 A. Yes, it is actually the moment when
21 Officer Bean and Officer Forcier interviewed the
22 men. Officer Bean, if I get a laser point I
23 could show it.

1 Q. I will just rely on your angle.

2 A. I don't want to hit his eyes. Over
3 there with the white papers, that's Officer Bean.
4 Then in between here the man which is kind of
5 shorter than the rest of the men, that's Officer
6 Forcier.

7 Q. Okay. So this is taken from your
8 kitchen window on the 19th shortly after the
9 incident, correct?

10 A. Yes.

11 Q. And is it a fair representation of the
12 scene as it appeared on that day from your
13 kitchen window?

14 A. Yes.

15 Q. Over here in the corner of the picture
16 going up in this direction there looks like
17 there's somewhat of a path to the vegetation,
18 could you tell us what that is?

19 A. That's where the shortest way between
20 where I park my car when there's a lot of snow
21 and I can't drive down my driveway and the house,
22 that's, I would walk down here and across the ice
23 to the house.

1 Q. Okay. And would you describe the
2 condition of the ice on that day, the 19th?

3 A. Over there, there was absolutely no
4 black ice or slippery, it was like walking on
5 snow, you know, it's totally flat.

6 Q. Could you ice skate on something like
7 this over here?

8 A. No, no, absolutely not.

9 MR. RIGALI: If we could just mark that,
10 Your Honor.

11 THE COURT: Alright, that's exhibit
12 eight.

13 THE CLERK: I think it's number ten,
14 actually eight, it's number eight.

15 A. Can I say something?

16 THE COURT: No, not until there's a
17 question.

18 Q. Again, we'll be back tomorrow. I'm
19 showing you this photograph, can you tell us what
20 this represents please?

21 A. That shows my left hand by the violent
22 kick in the back of my lower legs.

23 MS. SAPIRSTEIN: Objection, Your Honor.

1 THE COURT: Okay, hang on a minute.

2 There's an objection. Just describe what's
3 in the photo I think was the question.

4 Q. Yes, correct. Just describe what's in
5 the photo.

6 A. It's my left hand bleeding.

7 Q. And was this taken, to save some time,
8 shortly after when you fell?

9 A. Yes.

10 Q. Okay. So is this a fair representation
11 of your hand, where was the photograph taken, I'm
12 sorry?

13 A. That was inside the house.

14 Q. How long after the incident, roughly?

15 A. Between ten minutes and maybe twenty
16 minutes.

17 Q. Okay. So is this a fair representation
18 of the condition of your left hand you said?

19 A. Left hand.

20 Q. Left hand, shortly after the incident,
21 the fall down incident on the ice?

22 A. Yes.

23 MS. SAPIRSTEIN: I'd just like to know

1 who took it since it obviously wasn't, maybe
2 we could get in through whoever took it?

3 MR. RIGALI: It is a fair
4 representation.

5 THE COURT: Yeah, if that's the only
6 objection I'm going to allow it. Exhibit
7 number nine. Do you have any other
8 exhibits?

9 MR. RIGALI: I think that was it.

10 THE COURT: Okay. Mr. Frei, you can
11 step down, alright. Are you going to
12 resume questioning him tomorrow?

13 MR. RIGALI: Yes, Your Honor.

14 THE COURT: Okay, you can step down,
15 sir. Ladies and gentlemen, we're going to
16 break for the day because it's about twenty-
17 seven after four. I'm just checking on
18 tomorrow morning's schedule. Okay, so we'll
19 resume at 9:00 tomorrow morning. If you
20 could try and get here at about ten of nine
21 and then we can get going right around nine
22 or within a few minutes of 9:00. Again,
23 just don't talk about this case with

1 anybody, even your family members when you
2 go home and I'll just remind you as I did at
3 lunchtime, you know, everybody in the
4 building uses the same elevators. Don't get
5 offended if the lawyers don't say hello to
6 you or anything like that. They're supposed
7 to just go on their way as well as the
8 parties, okay. So with that, we'll see you
9 tomorrow morning. Okay.

10 (HEARING CONCLUDED)

I, Roxanne C. Costigan, Registered Professional Reporter, do hereby certify that the foregoing testimony prepared from designated portions of cassettes furnished by the parties herein is true and accurate to the best of my knowledge and belief.

Date

Roxanne C. Costigan