

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT
WESTERN DIVISION

Hampden, ss.

Docket No. 201143CV293

BRIAN JOHNSON,
Plaintiff

v.

PETER FREI,
Defendant

HEARING HELD ON FEBRUARY 27, 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: Back on the record on the
2 trial of Johnson v. Frei.

3 THE COURT: Okay. Okay, good morning,
4 everybody.

5 MS. SAPIRSTEIN: Good morning, Your
6 Honor.

7 THE COURT: Are we ready to resume?

8 MR. RIGALI: We are. Just by way of a
9 heads up, Judge.

10 THE COURT: Yes.

11 MR. RIGALI: We're still on the
12 plaintiff's case here.

13 THE COURT: Yes.

14 MR. RIGALI: So I'm basically done with
15 Mr. Frei. I'll call him in my own case,
16 after which I've got a motion for directed
17 verdict so I didn't know how you wanted to
18 handle any other stuff.

19 THE COURT: Well, when you say you're
20 basically done with him, is he going to take
21 the witness stand at all or are you done?

22 MR. RIGALI: I think I'd be done. I
23 should say, I shouldn't say I think, I'm

1 done. I'm going to call him so whatever I
2 got to get out of him, I'll get out of him
3 on direct.

4 THE COURT: Alright. And Attorney
5 Sapirstein, did you want to ask him any
6 redirect?

7 MS. SAPIRSTEIN: I don't think so. I
8 think I would ask him on cross in his case.

9 THE COURT: Okay.

10 MR. RIGALI: So that being the case, I
11 didn't know if you wanted to bring them all
12 down.

13 THE COURT: No, I don't if the plaintiff
14 is resting. Is the plaintiff resting?

15 MS. SAPIRSTEIN: The plaintiff is
16 resting, Your Honor.

17 THE COURT: Alright. Okay. Then not
18 yet. Do you have a, is it a written motion,
19 Attorney Rigali?

20 MR. RIGALI: I do. I have a written
21 motion and a short memo. I also have some
22 extra instructions and verdict slips which
23 we'll do at a later time I guess.

1 MS. SAPIRSTEIN: I did give the Judge my
2 verdict slips.

3 MR. RIGALI: Here we go. I've given
4 this to...

5 THE COURT: Alright, so I have the
6 defendant's motion for a directed verdict.

7 MR. RIGALI: Just so I don't forget on a
8 side, I've put together some proposed
9 verdict slips and a few more instructions so
10 I just wanted to get that off my bullet
11 list.

12 THE COURT: Alright. Thank you.
13 Alright, do you want to be heard on the
14 motion?

15 MR. RIGALI: I do very briefly, Your
16 Honor, and I put together the thrust of the
17 remarks that I want to make today in the
18 memo, so I'll just highlight them.
19 Essentially, as you know, Mr. Frei has
20 contended all along that the wire tap
21 statute involves essentially efforts to
22 prohibit invasions of privacy. There's got
23 to be some expectation of privacy, there's

1 got to be a recording that takes place, that
2 threatens some sort of privacy interest,
3 that's been his position. The only case law
4 which is contrary to that, and it is the
5 Hyde case, which is in a criminal context,
6 and so the question before this Court and
7 quite frankly why I think this is a case of
8 first impression is whether or not in the
9 civil context some sort of aspect of privacy
10 is required to establish that claim by the
11 preponderance. So using Commonwealth v.
12 Hyde, there are other cases but that's the
13 leading case as far as the interpreting of
14 the statute within the elements and so
15 forth, as far as analogizing Hyde if you
16 will to the civil context, it's actually a
17 pretty compelling argument. Hyde of course
18 is a case in which a motorist, I don't know
19 if he was sort of a hippie type or whatever,
20 but he gets pulled over by the police for an
21 alleged motor vehicle violation and he says
22 they hassle him a little bit and treat him
23 inappropriately and while this is going on

1 he has some sort of a recording device, you
2 know, in his car or on his person,
3 unbeknownst to the police. And the police
4 let him go but he, the motorist is upset and
5 he goes to the station and says to the
6 superiors of the stopping officers that he
7 was treated badly and he complains and he
8 gives the tape to say, you know, this is
9 what they did. And we the readers of the
10 case don't know what was said but whatever
11 was said, the internal investigation does
12 not result in any misconduct charges against
13 the police officers, all of which is
14 collateral to the point. But then the
15 police offices, nice guys that they are,
16 bring criminal charges against the motorist
17 for violating the criminal aspects of the
18 privacy statute. So that defendant makes
19 the argument in Hyde, which actually got
20 some traction with Chief Justice Marshall
21 and Judge Cordie, that this is ridiculous,
22 this is an absolutely ridiculous thing,
23 there's got to be some sort of a privacy

1 component and so forth. And of course the
2 majority says no, if there's any privacy
3 issues that's relegated to the civil side,
4 this is, you know, and that's really the
5 quote. So if you look at page three of the
6 brief, so, let me back up. So both the
7 majority and the minority in Hyde recognized
8 that the privacy interest that is referenced
9 in the statute only comes up in the civil
10 context, only comes up in the civil context,
11 and so here's the quote from the majority
12 opinion in Hyde which is on page three of
13 our brief. Because our, and I put the word
14 in criminal, because our criminal statute
15 broadly prohibits the interception of
16 speech, and then I in bold this phrase at
17 the bottom of page three I have this quote,
18 whether the police officers possessed
19 privacy interests in their words, dah, dah,
20 dah, dah, making a stop, you know, and so
21 forth, is something we not need address.
22 And then the key quote, consideration of
23 such issues would only be warranted in a

1 civil suit for damages under 99Q. Now, you
2 know, I don't know if the Court's had a
3 chance to go through the statute in detail,
4 but it's a lengthy statute, 99 percent of
5 the verbiage is about restrictions on
6 government eavesdropping and the need for
7 warrants and things like that. So the
8 majority says, yeah, the privacy interest if
9 it should come up at all is something that
10 is only to be considered in the civil
11 context. Now, then you go to the descending
12 opinions and they're a little bit more
13 emphatic. Now, the descenders in my opinion
14 sort of go off on a tangent. You know,
15 Chief Justice Marshall and Justice Cordie
16 say, you know, there's some sort of public
17 function that's at issue if you can't record
18 a police officer doing something, you know,
19 a public setting and so on and so forth. I
20 tend to agree with the descent, not that my
21 opinion matters or tend to agree with the
22 majority, I think that is a tangent, but the
23 technical point is this, the statute gives

1 under 99Q a private individual a right of
2 action only if they are "an aggrieved
3 person", and that of course is defined in
4 the statute. And the question is, you know,
5 whether or not on these facts or on any
6 facts, whether or not is there a privacy
7 interest that's partial to being an
8 aggrieved person. Now, the descent said we
9 think that the police officers had to be
10 aggrieved persons and therefore have a
11 privacy interest and the majority said no,
12 an aggrieved person is a term that has
13 nothing to do with the criminal case, that's
14 only in the civil case. That's as far as
15 they got. So it's sort of a, you know, I
16 think it's an open issue. I personally
17 think it's an issue of first impression.
18 Because if you look at the preamble and if
19 you look at everything else in the statute,
20 it's all about privacy, the threat of
21 telecommunications and modern listening
22 devices is a potential threat to the privacy
23 of all of us and all very legitimate points.

1 I mean, I can remember when I worked law
2 enforcement police officers would figure out
3 how to use parabolic mikes, microphones, you
4 know, that can pick up a conversation at a
5 distance. They also had devices where they
6 could pick up, you know, surreptitiously
7 cell phone conversations while outside
8 somebody's home in their police cruisers,
9 okay, due to, you know, surreptitious
10 electronic technology that was available, no
11 warrant, no nothing. So a good point for
12 the legislature, I think, to come up with
13 this. But again, if you look at the
14 statute, they're primary talking about
15 government intrusions and then there's this
16 little add on paragraph, and by the way, you
17 know, a private person has a remedy, a civil
18 remedy, if a, b and c. So the long and
19 short of it is, Your Honor, that if you read
20 the aggrieved person definition it says, in
21 pertinent part, whoever A, is a party to a
22 conversation, B, his name comes up on a
23 warrant, C, has some property interest,

1 personal property interest or otherwise, or
2 has a privacy interest.

3 THE COURT: But aren't those separated
4 by or?

5 MR. RIGALI: They're separated by or,
6 however, or privacy interest is also
7 separated by a comma. So I'm not exactly a
8 grammatical wizard, however, there's the
9 rule of the last antecedent I guess is the
10 technical phrase, that is, does that phrase
11 or privacy interest, separated from the
12 previous antecedents, does that modifier...

13 THE COURT: I don't see that comma in
14 the statute. Is it there? I mean, I'm
15 looking at the meaning of aggrieved person
16 in paragraph six under Section 99.

17 MR. RIGALI: My...

18 THE COURT: Unless it's been amended.
19 Let me just take a look.

20 MR. RIGALI: It's in the definition.

21 THE COURT: Yeah, I have that.

22 MR. RIGALI: After the word interception
23 there's a comma.

1 THE COURT: Oh, I thought you meant or
2 property interest. Okay.

3 MR. RIGALI: Yeah, I think I misspoke,
4 I'm sorry.

5 THE COURT: Okay.

6 MR. RIGALI: Or who would otherwise have
7 standing to complain that his personal
8 property or privacy was invaded. So the
9 question is does the phrase, that last
10 phrase, or modify the prior to. And so
11 then, I didn't know this before I started
12 look at this, but there's apparently a rule
13 of statutory construction, there's a rule of
14 grammar, and we've cited some of these
15 things in our brief called the rule of the
16 last antecedent, and you know, there's a
17 funny case where Judge Scalia, you know,
18 talks about it in a case and so forth in the
19 Supreme Court. But basically the rule is if
20 it's separated by a comma it modifies all
21 the previous antecedents.

22 THE COURT: I am with you, I'm just
23 looking because I know I addressed this in

1 my decision on the motion to dismiss, so I
2 was looking for that I'm not finding it.

3 MR. RIGALI: So because it was addressed
4 in the motion to dismiss, Your Honor, I'll
5 close it off with that.

6 THE COURT: Alright.

7 MR. RIGALI: However, it's important I
8 think for the jury instructions. I'm
9 arguing that because in the setting here
10 there was no privacy interest, you have
11 allowed a bunch of men arguably intoxicated,
12 you know, shouting at the person doing the
13 recording, arguably intimidating and
14 harassing him in a public way, there's no
15 expectation of privacy, it's not a privacy
16 setting in any way, shape, manner or form.
17 It's not a situation like in Pine v. Rust
18 where there's, you know, there's a group of
19 people but it's in someone's home. We have
20 a political candidate that's fundraising and
21 he's talking to what he thinks is the inner
22 circle and there's a plant, you know,
23 there's somebody who's snuck in and begins

1 recording. You know, again, those are sort
2 of public settings but there's a privacy or
3 confidentiality atmosphere around it.
4 There's nothing like that here. The last
5 argument would be whether or not because an
6 oral communication as defined in the statute
7 affects speech. The question is whether or
8 not the First Amendment standards of what
9 speech is comes into play here because most
10 speech is protected. Vulgar words said
11 calmly, obscenities worn on your T-shirt,
12 gestures to police officers with your
13 fingers, you know, that's all under the
14 First Amendment. However, fighting words
15 are not, they are not considered speech and
16 they therefore can be restricted. Now
17 again, it's a bit of an analogy but I would
18 argue that what occurred here were fighting
19 words. These were, you know, get the F out
20 of here and so on and so forth, these were
21 loud, insulting, degrading, humiliating
22 types of comments that were made to him in
23 the context of an assault and battery, where

1 he's physically harmed. So that would be my
2 final argument, Your Honor, that they have
3 not met their case by showing two things.
4 One, that this was speech prohibited or
5 protected by, sought to be protected by the
6 statute, that there was any degradation of a
7 privacy interest. And finally that whether
8 there was secrecy or not. We have testimony
9 that was brought out on direct that we've
10 got a microphone that's out in plain view in
11 the presence of people who are no more than
12 a few feet away from them. So we think that
13 the case should be dismissed.

14 THE COURT: Thank you.

15 MS. SAPIRSTEIN: Thank you, Your Honor.
16 I'm actually not going to belabor this point
17 because in your decision in your motion to
18 dismiss on page three you address the
19 argument that Hyde is a criminal case, the
20 defendant argued, and has no applicability
21 to a civil case and you said you disagree,
22 as do I. The definition of aggrieved person
23 to me is really clear, it is alternative, it

1 is a party to an intercepted wire or oral
2 communication or a party who is named in a
3 warrant or who would otherwise have standing
4 to complain that his personal or property
5 interest or privacy as invaded. That's
6 right out of the statute. It is not all of
7 those, it is any one of those. And the
8 civil remedy in Q is that any aggrieved
9 person, which I just defined, who's oral or
10 written communications, I'm sorry, wire
11 communications, are intercepted, disclosed
12 or used, except as permitted or authorized
13 and I think we all agree that there was no
14 permission, well there's no authorization by
15 this statute, that's more in the criminal
16 context. And then it goes on to what the
17 civil remedy is. And quite frankly, even
18 the Hyde case doesn't actually say
19 specifically what Mr. Rigali says it said.
20 That footnote in the Hyde case says that
21 because our own statute is a broad statute,
22 the only time the privacy interest would
23 come up in a civil remedy, would be in a

1 civil remedy, but that's because an
2 aggrieved person could say my privacy
3 interest was invaded, therefore that
4 analysis would have to be done. It doesn't
5 mean your privacy interest has to be
6 invaded. I mean, the statute is probably
7 one of the clearest written, it's not
8 ambiguous, it's not vague and even though
9 Mr. Rigali would like to side with the
10 minority in the dissenting opinion, the
11 majority is what the law is. There is
12 absolutely no question that there is enough
13 evidence in this case to get to a jury. Mr.
14 Frei admitted he recorded them and Mr.
15 Johnson testified that he had no idea he was
16 being recorded until after the fact when he
17 was told by Mr. Frei, when it was posted on
18 the blog and when the reporter played it
19 back to him. So we actually have two, Mr.
20 Johnson is an aggrieved person in two cases.
21 One is that oral communication was
22 intercepted and the other is that it was
23 disclosed to a third party. Or once posted

1 on the blog, quite frankly, multiple third
2 parties. There's clearly enough evidence to
3 get to a jury and I think the SJC has
4 already addressed this issue and spoken
5 relatively clearly so I would oppose the
6 motion.

7 THE COURT: Thank you. Okay, the motion
8 is denied.

9 MR. RIGALI: Thank you, Your Honor.

10 THE COURT: Are we ready to have the
11 jury come out now?

12 MR. RIGALI: We are.

13 THE COURT: Alright. I'll just indicate
14 to them that the plaintiff or you can stand
15 up and say that you're resting and then
16 we'll move forward.

17 MS. SAPIRSTEIN: Okay, thank you, Your
18 Honor.

19 COURT OFFICER: Please rise for jurors.

20 THE COURT: Good morning, everybody.
21 Thank you for your patience this morning.
22 Attorney Sapirstein, does the plaintiff have
23 any further witnesses?

1 MS. SAPIRSTEIN: No, Your Honor, the
2 plaintiff rests.

3 THE COURT: Okay, thank you. Attorney
4 Rigali.

5 MR. RIGALI: Thank you. I call Brian
6 Johnson to the stand please.

7 THE COURT: Okay, so you were sworn in
8 yesterday, Mr. Johnson.

9 DIRECT EXAMINATION BY MR. RIGALI:

10 Q. Just a couple of questions, Mr. Johnson.
11 What were the, you named several individuals that
12 were with you on the ice at the time of your
13 prior testimony on the 19th, yes?

14 A. Yes.

15 Q. I just want to direct your attention, so
16 I'm just going to write some names here. Was
17 one of them a gentleman named Folger?

18 A. Yes.

19 Q. And what's his first name?

20 A. John.

21 Q. Okay, John Folger. And do you remember
22 who the other ones were? Was there some
23 Ritkowski's that were there?

1 A. Yeah, Kyle and Mike.

2 Q. Alright, so Kyle Ritkowski and Mike.

3 Was there a Plant or a Laplante?

4 A. Tom Laplante.

5 Q. Mr. West?

6 A. Yeah, Al West.

7 Q. Mr. West is your father-in-law?

8 A. Correct.

9 Q. And a Mr. Fortuna?

10 A. Yes, Tim.

11 Q. And finally, Dave Caulley?

12 A. Dave Caulley, yes.

13 Q. Anybody else that you can recall being
14 there at the time that the incident occurred with
15 Mr. Frei, not before or after, but at the time
16 where he came out on the ice and you had your
17 confrontation?

18 A. I don't recall. I believe there was
19 other people there, but I don't recall who else
20 was there.

21 Q. So besides you, one, two, three, four,
22 five, six, seven individuals, right?

23 A. Yeah.

1 Q. So, which ones have any association with
2 the highway department, either part or full-time?

3 A. John Folger.

4 Q. Okay, I'm just going to put an H here.

5 A. Kyle Ritkowski.

6 Q. Okay.

7 A. Mike Ritkowski and Tom Laplante.

8 Q. And Mr. West is a relative, by marriage?

9 A. Yes.

10 Q. And Mr. Fortuna and Mr. Caulley, are
11 they in any way associated with the Town of
12 Holland?

13 A. No.

14 Q. Just friends?

15 A. Friends.

16 Q. And how long have you known all of these
17 guys?

18 A. John Folger, I grew up with. Tom
19 Laplante. The Witkowski's I've only known for,
20 they moved into town maybe eight years ago. Tim
21 Fortuna I grew up with and the last one, Dave,
22 I've only known him for about a year. Or I don't
23 really know him to be honest with you.

1 Q. Does he live locally, to your knowledge,
2 in or around the Town of Holland?

3 A. He lives out on the south side.

4 Q. To this day, he lives on the south side
5 of the lake?

6 A. Yes.

7 Q. So he's around, in other words, even
8 though he's not the closest friend of yours, he's
9 available, he's around?

10 A. Yeah.

11 Q. Okay. And all the other individuals,
12 I'm not trying to mischaracterize what you said,
13 but you've known the other ones for years
14 basically?

15 A. Yes.

16 Q. Okay. And are they all around or any of
17 them that are not around?

18 A. To this day?

19 Q. Yeah, to this day.

20 A. Yeah, they're still all around.

21 Q. They're all around, they all live in or
22 around Holland, right?

23 A. Correct.

1 Q. And you've seen them regularly or
2 recently, the last week, two weeks, three weeks?

3 A. Yes.

4 Q. Okay.

5 MR. RIGALI: I have no further
6 questions, Your Honor.

7 THE COURT: Thank you.

8 MS. SAPIRSTEIN: I don't have any
9 questions, Your Honor.

10 THE COURT: Alright, thank you. You may
11 step down, sir. Attorney Rigali?

12 MR. RIGALI: Thank you, Your Honor.
13 Your Honor, I call Dana Manning to the stand
14 please.

15 (WITNESS SWORN)

16 DIRECT EXAMINATION BY MR. RIGALI:

17 Q. Good morning. Would you tell us your
18 name please and spell your last name for the
19 benefit of the recording?

20 A. Dana Manning, M-A-N-N-I-N-G.

21 Q. And what town do you live in, Ms.
22 Manning?

23 A. I live in Holland.

1 Q. And do you know this gentleman here, Mr.
2 Frei?

3 A. I do.

4 Q. And do you have a relationship with him?

5 A. Yes, he's my boyfriend.

6 Q. Okay. What type of work do you do?

7 A. I'm a nurse anesthetist.

8 Q. And what sort of training, schooling and
9 so forth have you had for that?

10 A. My undergraduate nursing degree, which
11 was four years, and then three years of
12 anesthesia training.

13 Q. And so you are both a registered nurse
14 and someone with advanced training, is that
15 correct, in nursing in the field of specialty, if
16 you will?

17 A. That's correct.

18 Q. Okay. And do you currently work as a
19 nurse anesthetist?

20 A. Yes.

21 Q. How long have you known Mr. Frei?

22 A. Almost four years. I met him in April
23 of 2009.

1 Q. Directing your attention to February 19,
2 2011, did you have occasion to be in Mr. Frei's
3 home that prior evening and the early morning?

4 A. Yes I did.

5 Q. And do you basically recall the events
6 of that day?

7 A. Yes.

8 Q. Tell the, you got to just sort of answer
9 the questions, it's the rules of the game.

10 A. Sorry. Okay.

11 Q. So, tell us what you recall about the
12 events of that day, beginning with early in the
13 morning when you first woke up?

14 A. We were woken up to a lot of noise, it
15 sounded like jackhammers. The sun was just
16 coming up so I think it was between 6:00 and 7:00
17 a.m.

18 Q. Okay. And what did you guys do as a
19 result of that? Did the noise wake you up or
20 were you already up?

21 A. Oh absolutely, and it wasn't a noise
22 that I've heard before. I sort of said what was
23 that and Peter got up to look out the window to

1see what that was.

2 Q. At some point did you look out the
3window?

4 A. Yeah.

5 Q. Okay, what did you see?

6 A. There, on all sides of the house there
7were vehicles and people and jackhammers which I
8guess are ice augers that are gas powered and
9they were all fired up. I think there was about
10four of them going all at once.

11 Q. Alright. And where were they, describe
12for the jury and they've heard some of this
13before, but describe the setting of Mr. Frei's
14home, very briefly?

15 A. His house is on stilts in the water.
16It's got a very narrow six hundred foot driveway
17and it isn't paved and there's roots growing
18through it and it's actually, it's very remote
19from the road, but it is surrounded on three
20sides by water.

21 Q. Okay. So it's sort of out on a
22peninsula, on a little jet of land that sticks
23out?

1 A. Yes.

2 Q. So when you say that the ice augers were
3 making noise outside, where were they in relation
4 to the house?

5 A. They were to the right of the house,
6 they were out from the center of the house, they
7 were to the left of the house, they were spread
8 out making holes all around.

9 Q. And at that time how close were they to
10 the house?

11 A. I'm not really good with distance, I'm
12 sorry.

13 Q. Okay, well that's alright. Let's pick
14 something here in the courtroom. Say from where
15 you are to this doorway here, were any of them
16 that close?

17 A. Possibly some holes were that close, but
18 they I guess the goal of fishing is to have your
19 holes everywhere. I mean, they were spread out.

20 Q. Again, just, I'm not trying to interrupt
21 you but I want you to just answer the question.
22 So maybe some were but there were others that
23 were not, right, some were further away?

1 A. Correct.

2 Q. But they, if I understand your
3 testimony, they sort of encircled the house?

4 A. Correct.

5 Q. Alright, so what happened after that,
6 what did you do as a result of that?

7 A. Umm.

8 Q. Let me rephrase the question. So I
9 assume you guys just got up and started your day?

10 A. Mm-hmm.

11 Q. Alright. And did you keep an eye on
12 these men that were outside throughout the day
13 from time to time?

14 A. Yeah. It was hard not to because you'd
15 hear noise, you'd hear revving very close to the
16 house and you'd look out the window to see and
17 the quads were coming very close to the house and
18 going around the house basically.

19 Q. Sort of encircling the house?

20 A. Mm-hmm.

21 Q. And when you say they were coming close
22 to the house, again using something here in the
23 courtroom, if that's fair, could you tell us how

1close they came to the house?

2 A. I would say maybe as far as the doors.
3Often by the time you got up to look to see, I
4mean, the quad kept moving so you don't really
5know exactly how close it came.

6 Q. Right, but at least what you saw was at
7least at some point they're a distance of
8whatever this is, thirty, forty feet, fifty feet,
9something like that.

10 A. Yeah, fifty feet.

11 Q. Okay. And how about the sound, was the
12sound quite audible from inside the house?

13 A. You almost wondered if it was
14intentionally audible. They'd be revving them as
15they got close to the house.

16 MS. SAPIRSTEIN: Objection, move to
17 strike.

18 THE COURT: Sustained.

19 Q. Was the sound audible?

20 A. Yes.

21 Q. And you know the difference between just
22a running engine that's moving along at a
23constant speed and one that revs up?

1 A. Yes.

2 Q. Okay, and is it fair to say that when an
3 engine revs up, it's a lot louder?

4 A. Yes.

5 Q. And did you notice whether there was any
6 revving of engines outside the house?

7 A. I did notice revving.

8 Q. Okay. And how frequently did this
9 activity go on throughout the day that you've
10 just described of the quads, you know, coming
11 close to the house and revving engines?

12 A. Frequently. Not every five minutes but
13 more than once an hour.

14 Q. Okay. And so what did you observe, did
15 you observe anything about the, I'll just refer
16 to them as men that were driving the quads, what
17 they were doing, were they eating, were they,
18 what were they doing?

19 A. They were eating at times, there was, it
20 looked like a grill set up. There was drinking
21 alcoholic beverages.

22 Q. Okay. And they were fishing also?

23 A. And they were fishing.

1 Q. Now, when you say that you saw alcoholic
2 beverages and so forth, did you see any of them
3 driving while drinking alcoholic beverages?

4 A. Yes.

5 Q. And did you see Mr., at some point
6 whether you knew him or not early in the morning,
7 at some point did you learn that one of these
8 people was Mr. Johnson?

9 A. Yes.

10 MS. SAPIRSTEIN: Objection.

11 THE COURT: Overruled.

12 Q. And that would be this gentleman seated
13 here in the courtroom?

14 A. Yes.

15 Q. And did you observe whether Mr. Johnson
16 was drinking and driving on February 19th?

17 A. Yes he was.

18 Q. Now, had the men sort of set up a little
19 picnic area or weigh station area?

20 A. Yes.

21 Q. Where was that in relation to the house?

22 A. There's a little cove, it's hard to say
23 left and right, but there's a cove on one side of

1the house and they were set up in that cove right
2next to or a walking path that we use or created.

3 Q. Okay. Let me, I don't mean to be rude
4by me not looking at you, let me see if I can
5find a picture here that would help. Let's use
6this exhibit, which is exhibit number six and I
7just want you to look at it for a second and see
8if you can acquaint yourself with this.

9 A. Mm-hmm.

10 Q. Do you basically recognize what is shown
11there?

12 A. Yes.

13 Q. Okay, so I'm going to go over here.
14Now, is it fair to say as is indicated right on
15the exhibit, this is Mr. Frei's place here?

16 A. Yes.

17 Q. Okay. And is this the cove that you're
18talking about?

19 A. Yes.

20 Q. And up here, and you said there's like a
21six hundred foot driveway which goes from the
22road down to the house?

23 A. Mm-hmm.

1 Q. So do you know, can you give us just a
2 rough estimate having said that, of what the
3 distance is from the road to the house?

4 A. Going across the ice or?

5 Q. Either way.

6 A. It's shorter if you go across the ice
7 than to go down the driveway.

8 Q. How long is the driveway?

9 A. About six hundred feet.

10 Q. Okay. So maybe going across the ice is
11 five hundred and fifty feet or five hundred feet,
12 something like that?

13 A. I think a little shorter than that even.

14 Q. Okay, alright. Now, what do you recall,
15 so there was a path that went across the ice?

16 A. Mm-hmm.

17 Q. And have you used that path before?

18 A. Mm-hmm.

19 Q. Was that a particularly bad winter in
20 your memory as far as snowfall and the like?

21 A. It was the winter that never ended, yes.

22 Q. Okay. So I'm going to show you, I'd
23 like to show you the number but I can't read it,

1so I'm just going to show you this picture which
2was previously marked as an exhibit, it has a
3house, a beautiful home with a lot of snow on it
4and what looks like a path going through the
5snow, do you recognize that?

6 A. That's the path made by our feet to the
7house.

8 Q. Okay. And now this wasn't taken on that
9day, correct?

10 A. No.

11 Q. Do you know when this was taken?

12 A. I don't recall but it was after one of
13the snowstorms because it was just so pretty. We
14actually took the picture only because it was
15pretty.

16 Q. Basically it's safe to say this was just
17a short time before the incident that this
18photograph was taken?

19 A. Yes. It was that winter, yes.

20 Q. So it shows the path that you describe
21coming across the ice, is that correct?

22 A. Yes.

23 Q. And is it fair to say that essentially

1that path that I'm putting my pen on, exhibit
2six, that path goes this way?

3 A. Yes.

4 Q. Now, what was the condition of the path
5on February 19th, in a sense that was it visible,
6was there a clear, even though some snow had
7melted from that picture with the fluffy snow on
8it, was there or was there not a clear path going
9across the ice?

10 A. There was a clear path.

11 Q. Okay. And where did the men set up, the
12fishermen?

13 A. Around, in the cove near the path.

14 Q. Now, during the, what other observations
15did you make throughout the day about the men?
16What were they doing, you know, how did they act,
17were they looking in the house, were they
18fishing, what were they doing?

19 A. Often they would be standing around in a
20group. You'd see them drinking beer. There was
21a quad that faced the house during the day that
22said eat me on it. They would urinate on the
23land.

1 Q. On Peter's land?

2 A. On Peter's land. They stayed on the ice
3but everything else went on the land.

4 Q. Later on in the afternoon, in the mid to
5later afternoon, and by the way, did you guys
6take any pictures or videos or photographs of
7what was going on out there from the house?

8 A. Yes.

9 Q. Okay. And was one of those a video of
10the noise that you heard early in the morning of
11the augers working and so forth?

12 A. Yes.

13 Q. What happened later on in the afternoon?

14 A. We saw someone going up onto the land on
15Peter's property and it was essentially the path
16that we would walk on up to the cars.

17 Q. Did you have a concern about someone
18walking up the path towards your cars?

19 A. I did.

20 Q. And suffice it to say you're just
21concerned that they stay away from your cars or
22not be any problems up there. Okay. And is
23there any question that that path was on Peter's

1land?

2 A. The path over the ice?

3 Q. The path, I'm sorry, the path that the
4gentleman was walking up?

5 A. Oh, that was definitely Peter's land.

6 Q. Okay. So what happened after that, what
7did you do, what did Peter do?

8 A. Peter, well we sort of felt trapped in
9the house all day but needed to get the mail and
10get rid of the trash and he walked up the long
11way, the driveway and to get the mail, to get the
12trash and tell the trespasser that he was
13trespassing.

14 Q. Okay. And before, you had some concerns
15before he did that, you had some concerns that he
16would even go out in the vicinity of these men?

17 A. Yeah.

18 Q. And what did you say to him?

19 A. I...

20 Q. In summary, not word for word?

21 A. I was afraid that something would happen
22to him, just like I was afraid of the cars, I was
23afraid something would happen to him, and I said

1you need a way to be able to show what happened
2if something happens.

3 Q. Okay. So there's eight men out on the
4ice, it looked to you that they had all been
5drinking throughout the day, right?

6 A. Yes.

7 Q. And you knew that at least some of these
8men that there was some history, there was some
9history of bad feelings at least between Mr. Frei
10and Mr. Johnson and maybe some of the others,
11correct?

12 A. Yes.

13 Q. Okay. And was that why you were
14concerned?

15 A. Yes.

16 Q. So what did you do, what did you and
17Peter do?

18 A. I told him to just take your Iphone and
19use it to record anything that happens.

20 Q. Okay. And at the same time, did you
21have any plan to maybe take a video or other
22pictures from inside the house of Peter walking
23up the hill, just if there was anything to

1happen?

2 A. Yes.

3 Q. And I'm assuming you didn't know
4anything was going to happen at that point?

5 A. I didn't know anything.

6 Q. Alright. So what did you guys do with
7the Iphone?

8 A. Peter put on his snow pants, ski pants,
9and...

10 Q. Is it a one piece outfit?

11 A. It's a once piece outfit.

12 Q. Okay, so we'll call that an overall just
13for ease of discussion, but what color was it?

14 A. Black.

15 Q. Alright, and where was the Iphone put?

16 A. On the outside, on the pocket.

17 Q. Inside the pocket?

18 A. Not completely. It had all the headset
19and wires outside.

20 Q. And the wires included a microphone?

21 A. Yes.

22 Q. Alright. Was there a clip or anything
23on the Iphone that would have allowed the Iphone

1to be clipped on the outside of the pocket?

2 A. No.

3 Q. Alright. So and you set this up,
4there's a phone in the pocket, wires and a
5microphone outside, were they plainly visible?

6 A. Yeah.

7 Q. So what happened after that?

8 A. I was upstairs in the balcony window
9and watched from the balcony and I was, with the
10tape recorder, which...

11 Q. Was it a tape recorder or like a video
12camera?

13 A. A video camera.

14 Q. Okay. And were you intending to video,
15did you think that you were videoing Peter, the
16events that were occurring outside?

17 A. I did think I was videoing and I'm not
18very good with electronics and every time I hit
19the button to video it was on pause. And every
20time I took it off of pause it was videoing, so
21we had like ten seconds of video.

22 Q. Okay. So notwithstanding the best
23efforts, basically nothing came out?

1 A. Correct.

2 Q. Alright. But what did you see?

3 A. I saw Peter come down the path on his
4property and step on the ice and start walking
5across the path, the shortcut towards the house,
6and he stopped and he was kicked from behind and
7they had sort of gathered around him when he
8stopped.

9 Q. Let me back you up just a little bit and
10I'm sorry, so you see Peter coming down the path,
11gets onto the ice and begins to walk on the path
12towards the house?

13 A. Yes.

14 Q. Okay. What did the men do, if anything,
15as he began to walk towards the house?

16 A. They started to get closer to him, kind
17of like circling him but not completely around,
18just on the back and on one side of him, this
19side.

20 Q. Alright. I'm assuming you couldn't hear
21what was going on?

22 A. I could not hear.

23 Q. But what did you see, tell the jurors

1what you saw?

2 A. I saw Peter stop. I saw someone kick
3him from behind and he fell and I saw Brian
4Johnson pull his foot back to kick him in the
5head but he stopped and then Peter got up and
6walked, finished walking to the house.

7 Q. Alright. And then after he arrived in
8the house, without going into the conversation I
9assume someone, there was a 911 call was made at
10some point?

11 A. Yeah.

12 Q. What did you observe about Peter
13physically when he came into the house, what was
14his condition?

15 A. He was short of breath, you know, just
16was breathing heavily because of coming to the
17house so quickly. His hand was bleeding and he
18said we need to call 911.

19 Q. Okay. Let me show you another
20photograph, I'm showing you exhibit number nine
21and ask if you recognize this as a photograph of
22Peter's hand?

23 A. I took that picture of his hand.

1 Q. When did you take it?

2 A. Right...

3 Q. A short time after he came into the
4house?

5 A. A short time after when I noticed that
6it was cut and torn, the skin.

7 Q. And did you notice whether he had any
8other injuries, limping or other complaints or
9what have you?

10 A. He complained of a headache and that his
11hip hurt and his elbow hurt.

12 Q. Alright. So I'm assuming the police
13came at some point?

14 A. Yes.

15 Q. And after the call was made and you're
16waiting for the police, what did you do, if
17anything?

18 A. I, you wouldn't know how to get to
19Peter's house unless you've been there so I went
20along the driveway, not the ice path, up to where
21the cars were to wait for the police officer.

22 Q. Okay. And as you, did you notice
23anything about the men or see anything, hear

1 anything, the fishermen on the ice?

2 A. From about the same spot that the pretty
3 picture of the house was taken, because there's
4 an opening there, they were all gathered around
5 in a huddle and they yelled things to me from the
6 ice.

7 Q. Okay, what did they yell to you? You
8 can use the words here in the courtroom.

9 A. They said you better get a life girl.
10 They called me fat. They called me a cunt. they
11 told me you better watch out.

12 Q. So you waited up by the, eventually you
13 kept on going I assume?

14 A. Mm-hmm.

15 Q. Waited up by the road?

16 A. Mm-hmm.

17 Q. And finally a police officer arrived?

18 A. Yes.

19 Q. And did you escort the police officer
20 back towards Peter's house?

21 A. Yes.

22 Q. And what happened then, did you go on
23 the ice or stay on the path?

1 A. I stayed with the police officer to the
2house.

3 Q. Across the ice or on the footpath?

4 A. On the footpath. On the driveway.

5 Q. Okay.

6 A. And he, he...

7 Q. Well, did he come into the house at some
8point?

9 A. He did.

10 Q. Okay. And you had some conversation
11with him about what happened and so forth?

12 A. Mm-hmm.

13 Q. Okay. Now, did you notice anything
14different about the scene out on the ice, the
15people there that maybe weren't there anymore and
16so forth before and after that police officer
17arrived?

18 A. As we were walking down I tried to point
19out to him the eat me sign and it was gone. It
20wasn't there.

21 Q. Referring to exhibit seven, let me show
22you this photograph, do you recognize that
23photograph?

1 A. Yes.

2 Q. Where was that photograph taken from?

3 A. From the balcony.

4 Q. From the balcony of Peter's house?

5 A. Mm-hmm.

6 Q. And is that a fair representation of
7 where the guys were set up on the ice and so
8 forth?

9 A. Yes.

10 Q. Now, I'm showing you in that photograph
11 one of the quads across the blade or front of
12 which is the sign, is that the eat me sign that
13 you're referring to?

14 A. Yes.

15 Q. And that was not there when the police
16 arrived?

17 A. That was gone.

18 Q. Was it there when you were walking up
19 the road, walking up to the road, if you recall?

20 A. I didn't notice because it was facing
21 the house the whole day and as you're walking up
22 the path, it's the opposite end of it. I didn't
23 notice.

1 Q. Okay. Now, at some point was there a
2 discussion about who it was in fact that had
3 kicked Mr. Frei? About who it was, knowing his
4 name, identifying that person and so forth?

5 A. Peter was positive that he would be able
6 to tell who had kicked him if he were taken out
7 onto the ice and been able to identify the
8 person.

9 Q. Okay, to get close to him, close up?

10 A. Yeah.

11 Q. And by the way, what was the condition
12 of the ice, the surface of the cove where all
13 these events occurred?

14 A. It was snow covered.

15 Q. Okay. So using your own words, would you
16 describe the degree or the extent to which it was
17 actually slippery?

18 A. I didn't find it slippery. As you go
19 further out of the cove, it's not snow covered
20 anymore and you slip a little there but the cove
21 isn't slippery.

22 Q. Was it fair to say that the cove, the
23 surface of the cove was covered with crusty snow?

1 A. Yes. It was.

2 Q. So at some point going back to this
3 effort to try to identify the individual that
4 kicked Peter, did you either by yourself or with
5 a police officer go back out onto the ice?

6 A. The police officer didn't want to go
7 back out onto the ice because he didn't want to
8 escalate the situation, that's what he said to
9 Peter and I. Realizing that an opportunity would
10 be missed if somebody didn't figure out who was
11 there, I went out on the ice with my camera and
12 was running on the ice actually to get pictures
13 of everyone there.

14 Q. What happened then?

15 A. One person threatened to destroy my
16 camera and fucking shove it down my neck or
17 something to that effect. One person did this
18 gesture to me and said you got that.

19 Q. In the courtroom you're basically
20 holding up your middle finger so one of the guys
21 gave you the middle finger?

22 A. Yes. And I was able to get pictures of
23 Brian Johnson and his father-in-law Al West and

10others but they had pulled the ski masks down and
2put sunglasses on and I don't know who they are.

3 Q. And was there some more name calling at
4that point?

5 A. Some of the same things were said. Fat,
6to get a fucking life, I'd better watch out, the
7same things were said, yes.

8 Q. And did they call you, actually let's do
9this, at some point you gave a statement to the
10police, correct?

11 A. Yes.

12 Q. I'm showing you this, and you did some
13other affidavits about this, do you recognize
14this document?

15 A. Yes.

16 Q. Is it fair to say that's a statement
17that you gave about this incident on a prior
18occasion?

19 A. Yes.

20 Q. Just looking at what's marked as forty,
21just read that to yourself please. Does that
22refresh your memory a little bit about some of
23the things they were saying?

1 A. Yes.

2 Q. Tell the jury what you remember people
3 saying to you?

4 A. They told me to get the fuck out of here
5 and they told me to get a life.

6 Q. Okay. And they called you some other
7 names?

8 A. Yeah.

9 Q. Thank you.

10 MR. RIGALI: Nothing further.

11 THE COURT: Okay, thank you. Attorney
12 Sapirstein?

13 MS. SAPIRSTEIN: Thank you, Your Honor.

14 CROSS EXAMINATION BY MS. SAPIRSTEIN:

15 Q. Good morning, Ms. Manning.

16 A. Good morning.

17 Q. Did you ever see Brian Johnson touch
18 Peter Frei?

19 A. No.

20 Q. Now, you testified on direct that you
21 saw Brian Johnson lift his boot or lift his foot
22 as if to kick Peter Frei in the head but stopped?

23 A. Correct.

1 Q. How far away from, were you from them at
2 the time you saw that?

3 A. I was in balcony window upstairs.

4 Q. And is that farther than from where
5 you're sitting to the door?

6 A. It is, you're looking from above so I
7 would say the angle makes it further, yes.

8 Q. Did you know about how far, I know that
9 you're not good with distance, but do you know
10 about how far you were?

11 A. At least fifty feet. It could be more.

12 Q. And what was Brian Johnson wearing that
13 day?

14 A. He had warm clothing on that was dark
15 brown. It was a jacket and, or medium brown,
16 like camel colored brown.

17 Q. I'm sorry, I'm having trouble hearing
18 you.

19 A. He had a heavy jacket on that was a
20 camel colored brown, like a medium colored brown
21 and I believe black bottoms.

22 Q. Was he wearing a hood or a hat?

23 A. At times.

1 Q. Were most of the men dressed in a
2 similar fashion?

3 A. Similar, yes.

4 Q. It was cold, right?

5 A. It was cold.

6 Q. How could you tell it was Brian Johnson?

7 A. We sometimes watch select board meetings
8 and there was a select board meeting that I saw
9 where Brian had asked for money to be moved from
10 the Butterworth fund to the highway department
11 and so I've seen him on videos for the Town.

12 Q. You've seen him on videos in a ski
13 jacket with a hood and dark pants?

14 A. No.

15 Q. How could you tell the men apart if you
16 were about fifty feet away and they were all
17 dressed in ski jackets and hoods and long pants?

18 A. One gentleman had a bright red hat.
19 Another gentleman had a different pattern, it
20 wasn't a plain jacket, it was a cammo jacket.
21 Another person had a green jacket. They weren't
22 dressed identical but.

23 Q. Were any of the people dressed in a

1similar fashion?

2 A. Similar, heavy clothing, warm clothing.

3 Q. Similar colors?

4 A. I'm sorry?

5 Q. Similar colors?

6 A. Some.

7 Q. Now, if you saw Brian Johnson raise his
8foot as if to kick Peter Frei in the head, why
9didn't you tell the police officers that when
10they came to the house that day?

11 A. I believe I did.

12 Q. You believe you did?

13 A. I believe I did.

14 MS. SAPIRSTEIN: May I approach please?

15 THE COURT: Yes.

16 Q. Ms. Manning, those are two police
17reports, one from Officer Forcier and one from
18Officer Bean.

19 A. Mm-hmm.

20 Q. If you could just briefly review them
21and see if there's anything in either of those
22reports about Brian Johnson lifting his foot as
23if to kick Peter Frei in the head?

1

1 MR. RIGALI: Again, Your Honor, I raise
2 the same objection as yesterday.

3 THE COURT: I'll see you both to the
4 side. Okay. Ma'am, you can answer the
5 question if you're ready. Or you want to
6 ask it again maybe?

7 Q. I think I asked whether you told either
8 Officer Forcier or Officer Bean about the
9 allegation that Brian Johnson lifted his foot as
10 if to kick Peter Frei in the head?

11 A. I did tell them that.

12 Q. You did? And you have the police
13 reports of both officers in front of you?

14 A. Yes.

15 Q. Is it in either of those reports?

16 A. It's not in either of their reports.

17 MS. SAPIRSTEIN: May I approach please?

18 THE COURT: Yes.

19 Q. Now, Ms. Manning, if you're in the house
20 from 6:30 in the morning until 3:00 in the
21 afternoon and the noise is the way you described
22 and you had concerns, why didn't you call the
23 police?

1 A. You don't call the police unless you
2 need them.

3 Q. So you didn't feel you needed them?

4 A. I don't think they were going to tell
5 people at that hour of the day to stop making
6 noise.

7 Q. Why not?

8 A. Because generally it's not tolerated
9 before or after certain late and early hours.

10 Q. So it's not your position that the
11 fishermen were making noise when they weren't
12 supposed to be making noise in the Town of
13 Holland?

14 A. They can fish.

15 Q. And they can ice fish too, right?

16 A. Correct.

17 Q. If it was so bothersome, why didn't you
18 and Mr. Frei go out for the day?

19 MR. RIGALI: I object. I object.

20 THE COURT: Let me see you at the side.

21 Q. Ms. Manning, was there anything stopping
22 you from leaving the house that day?

23 A. Yeah. I mean, we were afraid to go out.

1We didn't want to leave the house unattended and
2the way the house is set up the bathroom is right
3in the corner right on the ice basically and
4you've got a window that you can look in from the
5ice here and a window that you can look in from
6the ice here and I was afraid to even take a
7shower because it's not finished yet, there's no
8shades and people could see in.

9 Q. On exhibit seven, you said that this,
10well this quad that said eat me was facing your
11house?

12 A. Mm-hmm.

13 Q. Is that a snowplow on that quad?

14 A. It looks like it is, yes.

15 Q. Did you ever see the movie Animal House?

16 A. No.

17 Q. Did you see Brian Johnson on Peter
18Frei's land at any time on that day?

19 A. No.

20 Q. Did you see anyone looking into the
21windows of the house that day?

22 A. Looking up at the house.

23 Q. That wasn't my question actually. My

1question was, did you see anyone looking into the
2windows of the house?

3 A. Yeah, from the ice they were looking at
4the house.

5 Q. Looking at the house.

6 A. And looking in the windows.

7 Q. Did you see anyone approach the house
8and look in the windows?

9 A. No. No.

10 Q. Now, the path over the ice, is that on
11Peter Frei's land?

12 A. No.

13 Q. So that's public property?

14 A. Yes.

15 Q. And I just want to make sure I
16understand where the phone was situated when the
17recording was going on. It was inside Mr. Frei's
18pocket?

19 A. The heavy part of the phone.

20 Q. The main part of the phone was in his
21pocket?

22 A. Yes.

23 Q. Okay. And how big was the microphone?

1

1 A. About more than an inch.

2 Q. An inch?

3 A. Yeah.

4 Q. It's an Iphone, right?

5 A. Yes.

6 Q. And it was a thin wire?

7 A. The headset is a thin wire but the
8 microphone is this bubble on the wire that is
9 about the size of a straw maybe, like not in
10 length, in thickness, and about a little more
11 than an inch long.

12 Q. A little more than an inch long?

13 A. Mm-hmm.

14 Q. And that was the only part of the phone
15 that was exposed?

16 A. The whole attachment was, the white
17 part, the headset was visible.

18 Q. Was he wearing the headset?

19 A. No, it was draped there. It wasn't in
20 his ears.

21 Q. Okay. And what color was the phone, the
22 phone itself, the phone?

23 A. The phone, I believe he's got a black

1phone. The headset is white.

2 Q. And he was wearing a black snow
3pantsuit?

4 A. Yes.

5 Q. Now, who did you see kick Mr. Frei from
6behind?

7 A. Brian Johnson's father-in-law, Al West.

8 Q. But you told the police it was Tommy
9Laplane, right?

10 A. No.

11 Q. You didn't tell the police it was Tommy
12Laplane?

13 A. No.

14 Q. Okay.

15 A. My statement to the police doesn't
16identify Tommy Laplane.

17 Q. Your statement to the police doesn't
18identify who kicked Mr. Frei from behind. Okay.
19Did you ever tell the police that it was Brian
20Johnson that kicked Mr. Frei from behind?

21 A. No, not to my recollection, no.

22 Q. Now, did you feel threatened that day?

23 A. I did.

1 Q. If you felt threatened, Ms. Manning, why
2 did you go on the ice?

3 A. You know, I never thought I'd be one of
4 those girls that opens the door and goes to the
5 basement and the monsters down there in the
6 horror movie, but I was just afraid that, I guess
7 more afraid that Peter would never have the
8 opportunity to identify who kicked him so I went
9 and got pictures of people. If they wouldn't
10 take Peter to the people, I brought the people to
11 Peter.

12 Q. So you went out on the ice and took
13 pictures of all of the men on the ice?

14 A. I did. I tried. They ran.

15 Q. How close did you get to them?

16 A. Some of them very close, three feet,
17 four feet.

18 Q. Now, who threatened you? You said on
19 direct that some of the people said some various
20 things to you like they would take your camera
21 and other comments that might not be appropriate.
22 Who said those to you?

23 A. The one who threatened to smash my

1 camera was Tim Fortuna.

2 Q. Who else made comments to you?

3 A. They all made comments but most of them,
4 they were communicating to each other, she's
5 taking pictures, she's taking pictures, run and
6 they pulled their ski masks down and put their
7 sunglasses on.

8 Q. You don't know who made comments to you?

9 A. Some of them I don't.

10 MS. SAPIRSTEIN: If I could just have a
11 moment please.

12 THE COURT: Okay.

13 MS. SAPIRSTEIN: Can I have one moment?
14 I don't have anything further, thank you,
15 Ms. Manning.

16 THE COURT: Alright. Anything further,
17 Attorney Rigali?

18 MR. RIGALI: Just a few, Your Honor.

19 REDIRECT EXAMINATION BY MR. RIGALI:

20 Q. The phone itself is black or a dark
21 color, is that correct?

22 A. The phone itself was black.

23 Q. Right, but the part that was hanging out

10 of the pocket was what color?

2 A. White.

3 Q. Okay. And the jacket itself was black?

4 A. Yes.

5 Q. Let me show you, before this incident,
6 before these men even got on the ice you knew who
7 Brian Johnson was, correct?

8 A. Other than seeing him at select board
9 meetings.

10 Q. Right, but you could recognize, I'm not
11 saying that you had met him, talked with him, but
12 you could recognize him, you knew who he was?

13 A. Yeah.

14 Q. Okay. So I'm going to show you exhibits
15 three and ask if you recognize Mr. Johnson as
16 being shown there?

17 A. I do.

18 Q. Which one is he?

19 MS. SAPIRSTEIN: Can I see that, is it
20 possible?

21 Q. And that's your description, a man sort
22 of in a dark green jacket, dark pants and so
23 forth, right?

1 A. I said dark pants and I said like a
2 camel grey colored jacket. I'm not sure that the
3 color on my printer is matching it exactly the
4 way my eyes saw it.

5 Q. But no question in your mind it was him,
6 right?

7 A. Yeah.

8 Q. Is there any question in your mind of
9 who drew back to make the kick?

10 A. No, no question.

11 Q. Does the police report that you were
12 asked to read, does that contain every single
13 statement, every little thing that you told the
14 police verbatim, is that in that statement?

15 A. No.

16 Q. Now, were you asked by the police in
17 effect, okay, we got this, write up a statement
18 and send it to us or if you want to give us a
19 voluntary statement we'll take that?

20 A. Yes.

21 Q. And did you do that?

22 A. Yes I did.

23 Q. And when did you do that, when did you

1at least begin working on it?

2 A. I wrote it within hours of it happening,
3the same day.

4 Q. Okay, and thereafter did you type it up?

5 A. I did type it up.

6 Q. Okay, and did you give it to the police?

7 A. Mm-hmm.

8 Q. And in that statement do you in fact
9tell the police that you saw Brian Johnson try to
10kick Peter?

11 A. Yes.

12 Q. Okay.

13 MR. RIGALI: Nothing further. Thank
14 you.

15 THE COURT: Alright. Anything else?

16 MS. SAPIRSTEIN: No thank you, Your
17 Honor.

18 THE COURT: Alright, thank you, ma'am.
19 You can step down.

20 MR. RIGALI: Your Honor, can we approach
21 for a second?

22 THE COURT: Sure. Okay, ladies and
23 gentlemen, before we get started on the next

1 witness, we're going to take a brief break,
2 okay. So the court officer will take you
3 out and we will resume within fifteen or
4 twenty minutes, okay.

5 COURT OFFICER: All rise please.

6 MR. RIGALI: I think we're going to
7 being showing, at some point fairly soon,
8 some material on the TV screen here, which
9 may require Mr. Frei to come over, maybe
10 seat himself in a corner, we don't have a
11 cord that's long enough.

12 THE COURT: Oh, you can't move that
13 over? Well, let's put it this way, I
14 wouldn't be able to see it from here, I
15 don't know if the jury's going to be able to
16 see it. Is there any way to move it to a
17 table closer?

18 MR. RIGALI: Well, I think we can.

19 THE COURT: Well, that's all right, if
20 you think they can see it, that's fine. I
21 just want to make sure they can see it.

22 MR. RIGALI: It's more for the effect of
23 just letting them know, well I'll tell you,

1 I don't know.

2 MS. SAPIRSTEIN: It's pretty big.

3 THE COURT: It is pretty big when the
4 printing comes up?

5 MR. RIGALI: Let me give you an example.
6 Why don't you just put it on there.

7 MS. SAPIRSTEIN: I think we should get
8 started.

9 MR. RIGALI: Let's take a quick example,
10 you can see, Judge. I mean, I think for my
11 purposes...

12 THE COURT: Okay. I can't read that
13 from here. Maybe they can, maybe it's just
14 me.

15 MR. RIGALI: I'm not going to ask them
16 to read it as much as, you know, I'll walk
17 him through it, you know, that's all it is.

18 THE COURT: Alright. Well, if anyone
19 can't see we'll, they'll let us know.

20 COURT OFFICER: All set, Your Honor?

21 THE COURT: Yes, thank you.

22 COURT OFFICER: All rise. Court is back
23 in session. You may be seated.

1

1 THE COURT: Okay, Attorney Rigali?

2 MR. RIGALI: Mr. Frei please.

3 THE COURT: You were already sworn
4 yesterday.

5 DIRECT EXAMINATION BY MR. FREI:

6 Q. Still good morning, Mr. Frei. In your
7 last testimony you were asked questions about
8 whether you reported the assault, that is the
9 attempted kick to the police. Did you report
10 that to the police?

11 A. Yes.

12 Q. Alright, and like Ms. Manning, did the
13 police ask whether you want to submit a voluntary
14 statement summarizing in detail what had
15 happened?

16 A. Yes.

17 Q. And in fact you did do that, correct?

18 A. Yes I did that.

19 Q. And does that statement in detail go
20 through the assault incident?

21 A. Yes.

22 Q. Okay. And all the other events, at
23 least as best as you could summarize, that

1 occurred on that day?

2 A. Yes.

3 Q. Okay. And did that statement get down
4 to the police station within, you know, a week or
5 so after the incident, whatever time it was?

6 A. I would say so, yes.

7 Q. Okay, alright. So Mr. Frei, tell the
8 members of the jury what a blog is?

9 A. A blog is basically a website which
10 gives people an opportunity to leave a comment so
11 you're at your home, you type in your comment and
12 then you click submit and it shows up on the
13 blog. You can actually protect your name if you
14 are brave and you want to use your real name or
15 if you use like a user name you can do that too
16 and then you with a password you can protect that
17 and if you come back you can post another comment
18 under the same name and you can do that
19 anonymous. Most people actually do leave
20 comments anonymous.

21 Q. Did you set up a website at some point,
22 well did you set up a website pertaining to the
23 Town of Holland?

1 A. Yes.

2 Q. And what's the name of that website?

3 A. I have this idea so people can remember
4it easy to use the zip code of Holland, so it's
5the zip code of Holland dot com, which is
601521.com.

7 THE COURT: Attorney Rigali, I'm sorry
8 to interrupt you, could I just see the
9 attorneys at the side for one minute?
10 Alright, I'm sorry, thank you.

11 Q. So for people that perhaps don't know
12about a website and what that is, particularly
13the one that you set up for the Town, or for the
14people in the Town to use, to access, would you
15tell the members of the jury what a website is?

16 A. The worldwide web, you have like
17millions and millions of websites and each
18website has its unique, they call it URL and is
19basically on top when you're on your computer,
20what's on top in that address. Usually it starts
21with http://www. and then the name. Http stands
22for hypertext protocol.

23 Q. Is it fair to say that in terms of

1 someone who's illiterate as I am about computers,
2 is it sort of like a newspaper page or like a
3 billboard or that type of a thing that if I
4 wanted to know about the Library of Congress I
5 could electronically from my computer access the
6 website for that institution, I could do that
7 right in my home, correct?

8 A. Yes.

9 Q. Alright. And so tell us approximately
10 when you set up the website that you set up for
11 Holland?

12 A. I had established the website maybe back
13 seven, eight years, I don't know exactly. But
14 interactive website which people call a blog, in
15 fact, refer to it as a blog, where people
16 actually can interact and leave their own
17 comments, that I started in 2009, February, 2009.

18 Q. Okay, so I'm detecting that there's a
19 difference between just a website where you can
20 get on the computer and look at a page.

21 A. Yes.

22 Q. And an interactive website which would
23 be a blog, where you can actually put things into

1the website?

2 A. Yes. A website is basically a static
3website, you go on it and there's just there what
4the company or a private person or whatever, a
5newspaper puts there. Interactive means you can
6actually create your own content by leaving a
7comment and then of course it constantly changes
8each time somebody leaves a comment, you add that
9comment to the content.

10 Q. Okay. And have you, we've got some
11electronics set up over here in the corner.
12Could you show us the website and blog site that
13you set up, and if you need to leave the witness
14stand, that's fine.

15 A. So this is how it would look like and
16then it's...

17 THE COURT: Excuse me, Mr. Frei, let me
18ask, can everyone on the jury see that?

19 Yes.

20 MR. FREI: Do you want us to move it
21closer? No, okay.

22 MR. RIGALI: For my purposes, Your
23Honor, and I'll tell the jury this also, I'm

1 not interested that the jury actually read
2 the content, I'm just trying to give you a
3 flavor for, you know, what the website looks
4 like and we'll get into the whys and the
5 wherefores later.

6 THE COURT: Alright.

7 Q. So this is a picture, would this be what
8 we call the home page?

9 A. Yes. That's where you get if you go
10 onto 01521.com and then it's organized on the
11 left here you can click on home and then it
12 brings you home or it has like categories, like
13 announcement, you can click on announcements.
14 These are board of selectmen meetings, and then
15 you want to read more you can click on anyone.

16 Q. So the website isn't just about
17 political criticism, right?

18 A. No it's not.

19 Q. So is there information there about the
20 schools?

21 A. Yes.

22 Q. Give us a quick example if you could.

23 A. It has links to all websites which are

1 of an interest to people who live in Holland, for
2 instance, Holland Elementary School, and then for
3 instance, you want to see what your kids eat, you
4 go to lunch menu.

5 Q. Okay. So how about anything with like
6 the senior citizens?

7 A. Just a moment. For instance, this is
8 the category local history, and it's also not
9 that I write everything, there are people in
10 Holland, if they want to have a piece on the blog
11 they can email it to me with pictures and I
12 actually post it on the blog for everybody to
13 read.

14 Q. So are some of the information about say
15 parks and recreation or hiking trails or the
16 library or this piece here on history, are those
17 things that either came from yourself or from
18 other people in the Town that through you posted
19 that information on the web?

20 A. Yes.

21 Q. Okay. Now, how much time is involved
22 would you say, have you spent, arranging this
23 internet website for the Town?

1 A. Hundreds of hours, literally hundreds of
2 hours, maybe thousands of hours.

3 Q. Do you get paid for that?

4 A. No I don't.

5 Q. Now, there's an interactive part of this
6 that you described to the members of the jury
7 where people can click on or access this and put
8 on comments, things, their comments about things
9 they like or dislike going on in the town,
10 correct?

11 A. Yes. Each piece has, that doesn't work,
12 each piece has basically a title and then what it
13 is all about and then if you want to leave a
14 comment, you click on comments and then it brings
15 all the comments, I can show that. This would be
16 the comments, that's first one, second one, third
17 one, fourth one, and there's, you might not see
18 that, but for instance here's one by SMH, caring
19 citizen by the farm.

20 Q. So these would be the names of the
21 people who are posting the comments on your
22 website, correct?

23 A. Yes. And then it also shows near this

1and you can actually now it time being here, if
2you would like to leave a comment, I can show
3that. You can just type anything in here and
4then it's in there. And you can create your own
5password, I can just make one up to show how it
6works and then you add the comment. I did
7something wrong, I'm sorry. I also can give it a
8title, I'm going to call it test, author and then
9I can add it.

10 Q. Well, I'll tell you what, I think that
11like all good things they never work during
12demonstrations, so we'll take your word for it
13that a person who, from their home, can access
14and put comments on the Holland Blog, correct?

15 A. Yes.

16 Q. I'd like to direct your attention more
17to your personal criticism and comments that you
18made about town government over the years, either
19selectmen or what have you, actually I think you
20could take the stand if you don't mind. So I
21want to start by asking you a few questions that
22perhaps you've been involved, along with other
23citizens, many other citizens, in leaving

1 comments on this blog about matters of public
2 interest that really don't have anything to do
3 with the Johnson's, either Brian Johnson or his
4 family or what have you, let's just sort of start
5 with that. Could you give the jury just a brief
6 example of some of the things that you have, and
7 I'll use the term blogged, about, that you had
8 written about and posted on the website?

9 A. For instance, there was a project where
10 they wanted to build like a complex for senior
11 citizens, like low-income housing and I think
12 that was a great idea but a lot of citizens of
13 Holland, they felt like they should put it in a
14 nicer place and squeeze it somewhere where they
15 just felt like it should go in there. In order
16 to build it the town could only have sixteen
17 variances and there was a problem with the
18 drinking water supply and there was a problem
19 with frontage and with not enough space for
20 parking lots and some concerned citizens, they
21 informed me of their concerns. So I followed it
22 up and I informed the people what a better way
23 would be to do it and what they actually want to

1propose and eventually those public hearing, I
2went to the public hearing, I recorded the
3hearing and I put the audio up in the blog for
4people to listen to in case they had to work that
5evening or were not able to go there. And it
6kind of created a community, people knew what was
7actually proposed and the majority didn't like it
8and to the surprise of the select board it was
9actually voted down at the annual town meeting
10and I think because of the blog people knew what
11was proposed exactly and that it was not a good
12idea, that there's a better way to do it. That
13senior citizens, that they deserve better than
14what was proposed.

15 Q. Now, can you give us another example,
16we'll just do this quickly, of something
17involving a truck stop?

18 A. Yes. We had part of the town zoned as a
19special conservancy like because it was a
20sanctity of resource area for groundwater and
21that's why wise people before us decided this
22should be zoned as a special conservancy.

23 Q. And now conservancy, is that

1conservation land, conservation essentially?

2 A. They call it, yeah, you could call it
3that.

4 Q. I didn't know if the pronunciation if
5the jury's going to recognize conservation land a
6little bit more than conservancy, so that's all,
7but anyway, go ahead. I'm sorry to interrupt.

8 A. One of the selectmen in town, he has a
9friend who bought all this land, which is
10basically not worth much because it's conservancy
11and his friend had this idea to build, of all the
12things, a truck stop in that area. And people,
13you know, most people don't get information and
14then they go to these town meetings, annual town
15meetings, and cast their vote and they believe
16what the select board tells them and then when
17it's done it's too late to do anything about it.
18So the vote is actually voting in favor to rezone
19this eighty acre or whatever it was of land to
20commercial and flying jay, it was proposed, they
21proposed to build a truck stop there and just
22because flying jay eventually filed for Chapter
2311 bankruptcy it never happened. But if it

1 wouldn't be for bad economy Holland now would
2 have a truck stop with all its negative impact.

3 Q. And was this, I think the point being,
4 was this something that you wrote about
5 extensively on the blog?

6 A. Yes I did.

7 Q. And were there quite a few comments from
8 other people, both for and against, people that
9 agreed with you and people that disagreed with
10 you, on the public forum, so to speak?

11 A. Yes. It even costs some citizens to
12 collect signatures and they wanted to reverse
13 that decision to make the land commercial.

14 Q. Okay. And was there just one other
15 example, did you post information and do some
16 investigatory work, and by the way, when
17 information comes up, do you investigate some of
18 these issues that come up yourself, do you take
19 the time to do research and track down
20 information?

21 A. Yes I do, hundreds of hours.

22 Q. And did you post any information about a
23 former police chief, who was actually then the

1 police chief?

2 A. Yes.

3 Q. But did you post information about the
4 police chief for the Town of Holland?

5 A. Yes, I did some research because I
6 didn't like him, what he did. He was basically a
7 puppet at the strings of the select board,
8 especially one particular one. And he arrested
9 one of my friends just because he had the guts to
10 challenge this particular selectman and I found
11 out that he was let go at the Southbridge Police
12 Department because one night on his way home
13 after a night of drinking he rolled over his car,
14 like just two hundred yards away from his house,
15 and basically the Southbridge Police Department
16 said either you disappear or we're going to press
17 charges and nobody really knew. I went to Dudley
18 District Court and researched, you know, if I
19 could find anything why he actually left in
20 Southbridge and I found that he was drunk and
21 rolled over his car and was arrested and I put
22 that on the blog too. Eventually Mr. Gleason,
23 because I put more pressure on him, he was

1investigated and for other events he was actually
2convicted and had a two year jail sentence.

3 Q. And this was a police chief that had
4been hired by the selectmen at the time?

5 A. Yes.

6 Q. Alright. And as a result of that did
7you take some flak from the selectmen?

8 A. Yes.

9 Q. Okay. So these are some examples then
10that aren't quite related to the Johnson family.
11Let's tell the members of the jury about some
12incidents involving, and again for our purposes
13here we don't need to go into too much detail,
14but tell the, you know to prove whether things
15were true or not or have you, but tell the
16members of the jury about some things involving
17the Johnson's and I'll start with something
18involving land.

19 A. It's difficult not to get too deep into
20it.

21 Q. Alright, well let me ask you this, did
22you write and research, did you research and
23write extensively about what you felt to be

1illegal land transactions conducted by the public
2officials, one or more public officials in the
3Town of Palmer?

4 A. Yes, not Palmer, the Town the Holland.

5 Q. I'm sorry, I live in Palmer, I'm sorry.
6In the Town of Holland, correct?

7 A. Yes.

8 Q. Okay. And was that information put on
9the web?

10 A. Yes.

11 Q. And did that investigation and publicity
12and the allegations that you made, did that
13involve Mr. Johnson's father?

14 A. Yes.

15 Q. And was part of the allegation that you
16published on your blog information pertaining to
17Mr. Johnson, that is to say Brian Johnson here in
18the courtroom, obtaining a piece of land through
19that what you described as a questionable
20transaction, illegally?

21 A. Yes.

22 Q. So whether it was true or not there was
23a lot of publicity about that on the blog, was

1there not?

2 A. Yes.

3 Q. And that involves both this gentleman
4here in the courtroom who has sued you and his
5father, who's not here, correct?

6 A. Yes.

7 Q. Now, was there another occasion in which
8you published extensive information about a
9member of the highway department who you alleged
10was not licensed to operate certain heavy
11equipment?

12 A. Yes.

13 Q. And that would be a trucking license?

14 A. Yes.

15 Q. And another incident involving
16unlicensed operation of heavy equipment, hoisting
17equipment, lifting equipment?

18 A. Yes.

19 Q. And other allegations of the use of
20public, we're going to come back to some of
21these, use of public equipment owned by the Town
22of Holland to remove snow from private property,
23namely the property of Mr. Johnson, Brian's

1father?

2 A. Yes. You know, I said that I
3investigated that all these street things, the
4last three things you mentioned that were
5actually information from people who knew the
6facts and they told me about it and I wrote about
7it on the blog so it's not like I went out
8there.

9 MS. SAPIRSTEIN: Move to strike the part
10 about people telling him, the hearsay part
11 of that. I move to strike that section.

12 THE COURT: Well, is any of this offered
13 for the truth of the matter?

14 MR. RIGALI: No, none whatsoever.

15 THE COURT: Alright, overruled.

16 MR. RIGALI: But some of the
17 information, I think he's just trying to be
18 clear that some of the information he
19 investigated, some comes from tips, citizen
20 tips, is that what you're trying to say?

21 A. Yes, that's correct.

22 Q. Okay. And so my last question was about
23the use of public equipment to say plow snow or

1 whatever from private property?

2 A. Another tip...

3 Q. I'm sorry, just the category. We'll go
4 back into that in a little bit.

5 A. Yes.

6 Q. Alright. And then was there other
7 publications that you put on the blog, whether it
8 came from you or not, that pertain to Department
9 of Environmental Protection violations?

10 A. Yes. I was emailed some pictures and I
11 was made aware of the fact that Brian Johnson was
12 violating the Wetlands Protection Act and I wrote
13 an email and I forwarded those pictures to Mr.
14 McCollum from the DEP.

15 Q. And the DEP is the Department of
16 Environmental Protection?

17 A. Yes.

18 Q. Okay. I'm going to show you this email
19 and ask if you recognize that?

20 A. This is my email to the DEP, to Mr.
21 Robert J. McCollum. I wrote this on June 23,
22 2010 at 10:30 a.m.

23 Q. And just in summary, is this essentially

1 where you report the violation, what you had
2 thought was a violation which had been told to
3 you by a citizen?

4 A. Yes.

5 Q. Of Mr. Johnson's violating the Wetlands
6 Protection Act?

7 A. Yes.

8 Q. And these documents which I have here,
9 are these in fact exact copies of the email that
10 you sent to the DEP, including the photographs?

11 A. Yes.

12 MR. RIGALI: I'd offer this, Your Honor.

13 MS. SAPIRSTEIN: No objection.

14 THE COURT: Alright. Exhibit number
15 ten.

16 Q. As a result of this, to your
17 knowledge...

18 MR. RIGALI: Very quickly, Your Honor,
19 if I may just explain this for the jury.

20 THE COURT: Sure.

21 MR. RIGALI: You'll get to see this
22 later on, members of the jury, but just to
23 give you a quick idea.

1 Q. As a result of this report to the DEP,
2 what happened?

3 A. The DEP, the Department of Environmental
4 Protection, issued what they call an abuse order
5 fining the highway department with twelve
6 thousand dollars.

7 Q. Now was there some mitigation of that
8 later on where they didn't actually have to pay
9 the money but there was some other sanction?

10 A. Yes. The way I understand it is Mr.
11 Johnson had to organize like a seminar for him
12 and his workers and surrounding towns somehow so
13 they would learn what they actually have for
14 obligations, not to violate the Wetland
15 Protection Act and I don't know if they actually
16 did that.

17 Q. But all of this was played out on the
18 web, correct?

19 A. Yes.

20 Q. And all of this information for those
21 who wanted to know could see it in the Town of
22 Holland or really any place else could see this
23 stuff on the web?

1 A. The whole world and there are actually
2citizens who spend winters in Florida and they're
3happy to stay in contact with Holland by reading
4what's going on in Holland on the blog.

5 Q. Okay. And now, so that was an incident
6involving, in a sense, Mr. Johnson, Brian Johnson
7here in the courtroom, him personally at least in
8his official capacity as the highway
9superintendent or surveyor?

10 A. Yes.

11 Q. Alright. Now, have there been some other
12instances involving that were personal between
13you and Mr. Johnson relative to his conduct,
14statements made, exchanges between the two of
15you, that also appeared on the web?

16 A. Yes.

17 Q. Now, do you recall an incident that
18occurred and there was some, I questioned Mr.
19Johnson about this, but some incident that
20occurred in the Town Clerk's Office?

21 A. Yes.

22 Q. Would you tell the jury your memory of
23what happened then?

1 A. I was driving to the Town Hall and
2there's like an intersection before the Town Hall
3and I saw Brian Johnson driving this way and he
4saw me driving this way. I parked in front of
5the Town Hall, I went upstairs to the Clerk's
6Office and within a minute or two, maybe three
7minutes, Brian Johnson came in too and since he's
8a town official I figured it's more important
9what he has to do, I said why don't you go
10forward and he didn't want to, so he just stood
11there and then I said to him, Brian, how is the
12road business.

13 Q. How's the road business?

14 A. Yeah. It was a stupid question maybe,
15and he said to me, I don't need to talk to you.
16I said, you're right, you don't need to talk to
17me. And then after a moment he started, you
18know, as far as I'm concerned, you're just white
19trash, you're a scumbag.

20 Q. Are there any other people around at
21this time?

22 A. The Town Clerk was the only person in
23the Town Clerk's Office beside Mr. Johnson and

1myself.

2 Q. Okay. And what happened after that?

3 A. Should I recollect the conversation?

4There was more said.

5 Q. Briefly, very briefly, sure.

6 MS. SAPIRSTEIN: Objection.

7 THE COURT: What's the objection?

8 MS. SAPIRSTEIN: He was asked, the
9 witness was asking the attorney what his
10 testimony should be.

11 THE COURT: Yeah, just answer the
12 questions. Don't ask questions back and
13 forth.

14 MR. RIGALI: I think he just wanted to
15 know to save time.

16 THE COURT: Okay.

17 Q. Yeah, if you just briefly summarize to
18the jury what happened after that, in this
19particular conversation?

20 A. There's another outspoken member in the
21Town and I also covered extensively the issues
22between the Town and that gentleman and he said
23you're nothing like...

1

1 MS. SAPIRSTEIN: Objection.

2 THE COURT: Okay.

3 MS. SAPIRSTEIN: Hearsay.

4 MR. RIGALI: Well again, this all goes
5 to the...

6 THE COURT: Is it going to the truth of
7 the matter?

8 MR. RIGALI: No, just the fact, do you
9 want to go to sidebar?

10 THE COURT: Yeah. Overruled.

11 Q. So there's another individual who's also
12 an outspoken critic or whatever in the Town,
13 correct?

14 A. Yes.

15 Q. And without naming that individual, did
16 Mr. Johnson make any more remarks now including
17 that third party?

18 A. The third party?

19 Q. I'm sorry, why don't you just tell the
20 jury what happened in your own words?

21 A. He basically said, you know, you're the
22 same scumbag like this individual and he repeated
23 it like three or four times, scumbag, white

1trash, and eventually I said to him, you know,
2Brian how dare you to call me that inside the
3Clerk's Office. And at one point I don't know
4exactly what that was but he says to me do you
5want to claim that everything you do down there,
6meaning on my peninsula, is legal, I said yes.

7 Q. Okay. So at some point that
8conversation ended, he left?

9 A. I got my copies and I left the Clerk's
10Office, yes.

11 Q. And when you, so was that sort of the
12end of that incident?

13 A. No.

14 Q. Okay, what happened after that?

15 A. I felt like unacceptable behavior by Mr.
16Johnson and I wrote a letter to the board of
17selectmen and I complained about it.

18 Q. These would be the people that hired
19him, right, or I'm sorry, he's an elected
20official, I'm sorry about that. Now, so you
21wrote a letter to the board of selectmen?

22 A. Yes.

23 Q. And did you describe the incident saying

1 basically this is what happened, this is what he
2 does, what's going on here?

3 A. Yes.

4 Q. And was that also, and did you
5 essentially describe to the selectmen what you
6 just told the jury here in essence?

7 A. Yes.

8 Q. Okay. Was that put on the blog?

9 A. Yes.

10 Q. Now, a little closer to February of
11 2011, I direct your attention to January 18,
12 2011, did you receive some information again,
13 posted on the blog eventually...

14 A. Yes.

15 Q. Relative to the operation of some heavy
16 equipment?

17 A. Yes.

18 Q. Tell the members of the jury what you
19 were informed of and what you did?

20 A. Somebody brought to my attention that an
21 individual who happens to be the neighbor of
22 Brian Johnson was doing snow removal with a
23 twenty-two thousand pound front loader and this

1 individual seemed to have very, very exact
2 knowledge and he told me that this man doesn't
3 have the proper training...

4 MS. SAPIRSTEIN: Objection.

5 THE COURT: Okay, that's sustained as to
6 what he told him.

7 Q. Alright, well nonetheless was what he
8 told you put on the blog?

9 A. Yes.

10 Q. Alright, so again, not for the truth
11 content of it though, what was told?

12 A. What was told that this individual would
13 run the roads of Holland with this twenty-two
14 thousand pound front loader without the required
15 license issued by the Department of Public Safety
16 and without the proper training and to me it was
17 hard to believe and I put it on the blog.

18 Q. Okay, you put that on the blog, and was
19 there an incident that occurred, this gentleman's
20 name was a fellow named Haney, correct?

21 A. Yes.

22 Q. Alright. So was there an incident that
23 occurred on January 28th involving Mr. Haney?

1 A. Yes.

2 Q. I'm sorry January 18th.

3 A. Yes.

4 MS. SAPIRSTEIN: Objection, relevance.

5 THE COURT: Sustained, unless you want
6 to be heard.

7 MR. RIGALI: No.

8 Q. Again, was the incident that occurred,
9 however, posted on the blog?

10 A. Yes.

11 Q. And did Mr. Johnson at some point
12 confront you regarding your coverage of that
13 incident, make statements to you?

14 A. Yes.

15 Q. Okay, so what, you posted on the blog in
16 essence that an employee of the highway
17 department was unlicensed and operating heavy
18 equipment, correct?

19 A. Yes.

20 Q. Alright. And what happened on the 18th,
21 were you taking pictures?

22 A. On the 18th I came out, I don't remember
23 exactly if it was the 18th, I would have to look

1it up.

2 Q. Okay, on the date in question you're
3taking pictures and there was an incident, right?

4 A. Yes.

5 Q. Okay.

6 A. The date in question I went to the Town
7Hall on other business and I see, that was
8shortly after we had all that snow, you remember,
9and I see this front loader and I went out there
10to take pictures of this front loader. I had no
11idea who was actually operating the front loader,
12I just wanted to have a picture of this front
13loader, and then Haney came out of the front
14loader...

15 MS. SAPIRSTEIN: Objection, Your Honor.

16 THE COURT: Alright, hang on one minute,
17 Mr. Frei. Can I see you at the side?

18 Q. Alright, so Mr. Frei, you took a picture
19of this heavy equipment operation going on. You
20said a gentleman got out, correct?

21 A. Yes.

22 Q. There was some incident that then
23occurred.

1 A. Yes.

2 Q. As a result of which, without going into
3 the details of the incident, as a result of which
4 what did you do shortly after the incident?

5 A. I went to the police station inside the
6 Town Hall and I wrote a report.

7 Q. For what purpose?

8 A. Because this individual hit me so my
9 iPhone flew into the snow bank.

10 Q. Okay. Was it a purpose to write a
11 police report about the incident?

12 A. Yes.

13 Q. And while you were in the police
14 station, what happened?

15 A. I was writing on one of these boards,
16 like...

17 Q. A clipboard?

18 A. A clipboard, yes. I was writing my
19 recollection of the incident and Mr. Johnson came
20 down the stairs, the police department is in the
21 basement at the Town Hall, so Mr. Johnson came
22 down and he went into the police, just he just
23 opened the door and went in there and I heard

1that they were talking in there and I'm writing
2my report and eventually he came out the door and
3he stood right here, right next to me, and
4staring at my clipboard, I turned it around and I
5looked up and he took his cell phone and he put
6it like in my face and took like click, click,
7click pictures and said, you know, you're a
8fucking loser.

9 Q. Who said that?

10 A. Mr. Johnson.

11 Q. Said that to you?

12 A. Yes. And then he went up the stairs and
13went outside.

14 Q. Where's the highway department office?

15 A. It's about I'd say two hundred feet
16away.

17 Q. So it's not in that building where the
18police department is?

19 A. No. Mr. Johnson has an office in that
20other building.

21 Q. Okay, and so an incident occurs with a
22highway department employee operating a piece of
23heavy equipment, right?

1 A. Would you repeat that?

2 Q. I'm sorry, you took a picture of a big
3 loader owned by the Town?

4 A. Yes.

5 Q. There was an incident that followed
6 between you and the driver?

7 A. Yes.

8 Q. You go to the police station to write up
9 about that incident?

10 A. Yes.

11 Q. How long after the incident with the
12 heavy equipment operator was it that you were in
13 the police station?

14 A. Minutes.

15 Q. Minutes, okay? And within two minutes
16 Mr. Johnson shows up?

17 A. Maybe within five minutes.

18 Q. Okay, so you were there writing for a
19 little bit first?

20 A. Yes.

21 Q. Okay. So within five minutes Mr.
22 Johnson shows up?

23 A. Maybe like ten minutes I was still

1writing.

2 Q. Okay. But he shows up out of nowhere?

3 A. Yes.

4 Q. And does what with his cell phone?

5 MS. SAPIRSTEIN: Objection. I think
6 he's already testified to this.

7 THE COURT: Asked and answered.

8 MR. RIGALI: Okay, I'll move on. I just
9 wanted to make sure the jury heard it,
10 that's all.

11 Q. So and then you had parked your car
12 outside?

13 A. Yes.

14 Q. And did your car have any damage to it
15 when you parked it and left it there? At the
16 time that you left it there to go into the
17 station?

18 A. I didn't notice it right then.

19 Q. At some time later on in the day did you
20 notice damage to your car?

21 A. Yes.

22 Q. Where was that?

23 A. The driver door was kicked in.

1 Q. Not able to prove who did it, correct?

2 A. Yes.

3 Q. Now, directing your attention to January
4 29, 2011, did you cover on the blog some
5 information you received about Town of Holland
6 equipment being used to remove snow from the
7 driveway of Mr. Johnson, Sr.?

8 A. Yes.

9 Q. What information did you receive and
10 what did you do with it?

11 A. I got a text message and to the text
12 message attached was a picture showing what I
13 thought at that time to be the front loader
14 basically plowing out and digging out Mr.
15 Johnson's father's driveway.

16 Q. And this is a piece of equipment owned
17 by the Town of Palmer, by the Town of Holland,
18 I'm sorry?

19 A. The front loader would be but I learned
20 later Mr. Johnson was so nice to call me and
21 inform me that it was not a fucking front loader,
22 that it is a fucking grader.

23 Q. Okay. So you posted on the web that the

1 machine and publically alleged the question,
2 brought to the attention of the public, that we
3 have possibly public equipment, public heavy
4 equipment being used on private property to take
5 care of a former selectman's driveway, correct?

6 A. Yes.

7 Q. And that was on the web for everybody to
8 see, correct?

9 A. Yes.

10 Q. Did you get contacted by Brian Johnson,
11 this man here in the courtroom, following your
12 posting of that information?

13 A. Yes.

14 Q. And when you posted the information, how
15 did you refer to the equipment itself, how did
16 you describe it?

17 A. A front loader.

18 Q. A front loader, okay. So how was it that
19 Mr. Johnson contacted you?

20 A. He called me.

21 Q. On the phone?

22 A. Yes.

23 Q. Alright. Called your personal phone?

1 A. Yes.

2 Q. Alright. What did he say, in substance?

3 A. He didn't tell me his name but of course
4I knew it was him, I recognized his voice, and I
5don't recall the exact words but it's always the
6same, fucking loser. Oh, he called me the
7dumbest person he ever met, the dumbest person he
8ever met and it's not a fucking front loader,
9it's a fucking grader. And oh, I think, I don't
10know if it was in the first phone call he called
11me twice or three times and at one point he
12called me really early in the morning and
13obviously they were pushing the snow further
14back, there was not new snow, but they wanted to
15push the snow further back, so he said by the way
16today we're going to use that fucking grader to
17push the snow further back and from now on every
18morning I'm going to fucking call you when we
19push snow back.

20 Q. Alright, so directing your attention,
21and this occurs just a couple of weeks before the
22incident on the ice, correct?

23 A. I would say less than two weeks.

1 Q. Okay. And it was one or more phone
2 calls that Mr. Johnson made to you on different
3 days?

4 A. Yes.

5 Q. Alright. So directing your attention to
6 the 19th of February, we've heard testimony and I
7 think you testified earlier about the men showing
8 up early in the morning and using ice augers or
9 power augers to drill through the ice?

10 A. Yes.

11 Q. Do you have, did you record that, did
12 you take a video of that?

13 A. Yes.

14 Q. Do you have that in the courtroom with
15 you today?

16 A. Yes.

17 MR. RIGALI: Can we play that to the
18 jury please?

19 THE COURT: Yes.

20 Q. What time of the day is this
21 approximately?

22 A. It was before dawn, a short while before
23 dawn. I didn't switch it off so it went to the

1end of the tape, so just a second.

2 Q. In courtrooms a hundred years ago the
3term experiencing technical difficulties probably
4never came up.

5 A. It's rewinding.

6 Q. Mr. Frei, do you recognize this
7individual who's, we've paused the tape for
8purposes of the record here, that appears on the
9screen?

10 A. Yes.

11 Q. Who is that?

12 A. That's Al West, Mr. Johnson's father-in-
13law.

14 Q. And was he the individual that kicked
15you?

16 A. Yes.

17 Q. Okay. And where is he, where is he
18looking at?

19 A. It appeared to me...

20 THE COURT: Can I just interrupt. He
21 might have to take, I just want to make sure
22 it's being recorded, that it's picking up,
23 so if you don't mind, yes.

1 MR. RIGALI: Thank you.

2 Q. Go ahead. So where's he looking at this
3 point?

4 A. It appeared to me that he was directly
5 looking at the lens of my phone.

6 Q. Roughly how far away from you was he at
7 that time, from the building or from you?

8 A. I would say maybe five feet more than
9 from here to the door.

10 Q. So to this door right here in the
11 courtroom?

12 A. Yes.

13 Q. So maybe five feet beyond that?

14 A. Yes.

15 Q. Okay.

16 A. Maybe ten feet. It's hard to say.

17 Q. Right, well we're not going by inches,
18 but just approximately.

19 A. Yes. And that would be from the window.

20 Q. So how about from the edge of the
21 shoreline or the property, would that be even a
22 few feet closer?

23 A. That would be about a few feet closer.

1 Q. Okay. Well, I'm just going to leave
2 that up there for now.

3 THE COURT: Okay.

4 Q. So the day begins with you and Dana
5 hearing these sounds as the jury has heard?

6 A. Yes.

7 Q. And throughout the day did you keep an
8 eye on these gentlemen from time to time?

9 A. Yes.

10 Q. Okay. And is it fair to say that at
11 different parts of the day these pictures which
12 have been marked as exhibits were taken?

13 A. Yes.

14 Q. I have one picture that the jury has
15 seen several times but has not actually been
16 marked as an exhibit and that is this one with
17 the snow covered ice and your house. Is that a
18 fair picture of the ice and snow that was on your
19 house a short time before the incident?

20 A. Yes.

21 Q. Okay. Does this track that's through
22 the snow show the path that is actually the path
23 that you use to go from your car up by the road

1down to your house during the winter?

2 A. Yes.

3 MS. SAPIRSTEIN: Objection.

4 THE COURT: Okay.

5 MS. SAPIRSTEIN: It's not the same day.

6 THE COURT: Oh, I think he already said
7 that, but if you want to ask him that just
8 to make it clear.

9 Q. Was this, as I said this was taken a
10 short time before February 19th, correct?

11 A. I actually, I could find out exactly
12 when this was taken. It was taken the day after
13 we had all that snow, we had once really a lot of
14 snow and I was going out there and I took this
15 picture.

16 MS. SAPIRSTEIN: I still object. Do you
17 want to hear us at sidebar?

18 THE COURT: Okay. The objection is
19 sustained.

20 Q. Alright, so throughout the day though
21 you were making observations of the men, keeping
22 tabs on the men, keeping your eye on them,
23 correct?

1 A. Yes.

2 Q. Alright, and what did you see them
3 doing, just in general, what were they doing?

4 A. They started drinking shortly after the
5 sun went up and they kept drinking all day long.
6 I actually worked and once in a while I would
7 take a picture and then go back to work and I
8 would hear, you know, the revving of the quads
9 and sometimes there was yelling and there were
10 obscenities yelled and I tried to ignore it as
11 good as I could but I took pictures because I was
12 sure going to report on the blog about the fact
13 that they now harass me at my house.

14 Q. And had that ever happened before,
15 harassment at the house?

16 A. No.

17 Q. Now, later on in the afternoon, and by
18 the way, did you see them drinking, eating,
19 urinating, that type of thing?

20 A. They set up a table with a grill like
21 two, three feet to the south of the path where I
22 would walk up to my car and they would cook, they
23 ate and they fished and they drank all day and

1they urinated and eventually they trespassed.

2 Q. Now, going back to our chalk diagram
3here, this again was not taken on February 19th,
4but the jury's seen this a number of times.
5There's a path through the snow. Is that
6essentially how the path looked some time before
7February 19th?

8 A. Yes.

9 Q. And on February 19th was the path that's
10shown in this picture, which I think is marked
11for identification only at this point, is that
12basically the same spot?

13 A. Yes.

14 Q. Okay. And give me one moment please, in
15this exhibit, exhibit number four, does the path
16shown, are you able to see the path or any
17portion of it here in this one?

18 A. Yes, it comes down and then here is like
19a steep step and then it goes here. And over
20here, that's where they would cook with the grill
21and they also had the stack of, I don't know, I'm
22not an expert, a twenty-four packs or whatever.

23 Q. And was this particular quad with the

1eat me sign, it looks like it's on the blade, was
2that facing your house for a good part of the
3day?

4 A. Yes.

5 Q. And does this photograph show, you said
6that the path was just to the jury's, I'm sorry,
7was just to the right of this quad with the sign
8on it?

9 A. Yes. It would go up the hill there and
10right here towards the house.

11 Q. And does the photograph pick up the
12condition of the crust on the ice as it was on
13that day?

14 A. Yes, you can clearly see the snow and
15the difference there is because it's a cove, it's
16protected, the sun doesn't get there.

17 Q. And was it slippery ice right there or
18not?

19 A. It was not slippery, but I have to say I
20was attacked a little bit further away, not right
21next to the quad, I would say that spot maybe
22here, so it was a little bit, it was in between
23what you see there and what was out on the lake

1but it was not slippery, so you know, you would
2fall just by walking.

3 Q. Okay. Now this next exhibit, which is
4exhibit seven, somewhat the same scene but this
5shows a gentleman or someone at least on the
6path?

7 A. Yes.

8 Q. Okay. And that's your property?

9 A. Yes.

10 Q. So at some point later in the afternoon
11you noticed people were trespassing, going up the
12path, or what have you, what do you do?

13 A. When I saw that people actually now were
14trespassing on my property and walking up towards
15my girlfriend's car, I had to do something. I
16couldn't just stay in the house any longer. So
17very quickly I put on my overall, there was a
18short conversation with my girlfriend Dana and I
19actually wanted to intercept, there were two guys
20who walked up there and tell them that they're
21going too far and it's not acceptable and they
22should go back. So I ran up the long way, not
23over the ice, I ran up through the woods to where

1the cars are parked and at the end of my driveway
2there's also my mailbox, it's where I have my
3trash bin, so I ran up there and I said guys,
4back, you're trespassing, back, and they said no
5problem and they actually backed off and went off
6my property. I then proceed and I put the trash
7out, it's like one of these BFI blue trash bins
8and has these plastic coils which make noise if
9you drag the lid over the ice, I put that out on
10the curb and then I took my mail and I walked
11down the woods.

12 Q. I'm showing you exhibit number seven
13once again.

14 A. So then I came down that path and this
15group of men, they were around here, and I
16slipped as I took the last step and somebody
17actually said to me watch the step, and then
18Brian Johnson...

19 Q. I'm sorry, I don't mean to interrupt,
20when you slipped, was this just getting onto the
21ice you slipped a little?

22 A. Yes.

23 Q. Okay. And did you fall down or just

1slip?

2 A. You can't really fall down because
3behind you you have the bank so...

4 Q. Okay. So you got onto the ice, what
5happened after that?

6 A. I walked, I followed the path and these
7men were here and Brian Johnson was there and he
8said something, I couldn't hear it at that time,
9and I said huh, and then things really
10deteriorated quickly, I said, you know, this is
11my property, something like respect it, don't
12trespass, and then Brian Johnson says get the
13fuck away from me and something like you're
14harassing us, get the fuck away from me, get out
15of here right now, and I looked towards the
16house, there was this man, at that time I didn't
17know his name, it turned out to be Al West, and
18he took off his heavy winter coat and I said to
19myself, it's not warm, why is he taking off his
20winter coat, I mean, this is going through my
21head really quick, and I realized he's getting
22ready for a fist fight, and I was not going to
23get into a fist fight, I mean, there were like

1six men, every single one twice my size. So I
2just wanted to get out of there and walk towards
3my house and as I walked by Al West to my left he
4kicked me from behind into my lower legs, I fell
5backwards and as I lay on the ice, I mean, this
6is all going on very quickly, Brian Johnson moved
7over and he looked like, can I show it?

8 Q. Yes, tell the jury what he did.

9 A. So I was laying here, there are my feet,
10here's my head, someone's over here, over here
11and he makes a swing like this, that's when I
12said, I started laughing and said you're all
13being videotaped and he froze immediately.
14Everybody froze immediately. I got up, and I
15couldn't believe that actually I have no proof on
16videotape of what they did to me and then I said
17that's just great, that's exactly what I need and
18I proceeded walking towards the house and I said
19to my girlfriend, did you videotape it and I
20think she said yes and I said woohoo.

21 MS. SAPIRSTEIN: Objection, Your Honor.

22 THE COURT: Okay.

23 MS. SAPIRSTEIN: Hearsay.

1 THE COURT: Sustained.

2 Q. So you get back into your house, did you
3at some point find out that in fact the video
4that you thought she was making at the time did
5not come out?

6 A. Yes.

7 Q. Okay. But you recorded that incident
8from the time roughly of when you left your
9house, went up to the mailbox, came back and then
10got back to your house, is that fair?

11 A. Yes.

12 Q. Now, tell the members of the jury how
13you did the recording, what you recorded it on
14and so forth?

15 A. I have an Iphone and I put the
16microphone which is part of the headset thing
17into the Iphone and there's like around the same
18place here, there's like a pocket and I slipped
19it in here, the Iphone, and I let the microphone
20hang out on its wires and it was like hanging
21down here.

22 Q. And why did you leave the, were you
23intending to secretly record what went on?

1 A. No, absolutely not. I was intending to
2 record the encounter because Mr. Johnson, he
3 tried to criminalize me before, just for my
4 protection.

5 Q. There had been prior instances in which
6 you felt Mr. Johnson had made false allegations
7 against you to the police?

8 A. Yes.

9 Q. Alright. And there were no witnesses to
10 those incidents, were there, other than the two
11 of you?

12 A. There was Alexander Haney.

13 Q. Okay, well in general though, as far as
14 allegations which had been previously made, had
15 some of those been made just between the two of
16 you and you couldn't prove them?

17 MS. SAPIRSTEIN: Objection, Your Honor.

18 This is direct. It's a little leading.

19 THE COURT: It is.

20 MR. RIGALI: I'll rephrase it.

21 THE COURT: That is sustained.

22 Q. So, going back to the 19th, you said it
23 wasn't your intention to secretly record this?

1 A. It was not my intention, no.

2 Q. And what, your coverall, your overall
3 was black, I think you told the jury this before?

4 A. Yes.

5 Q. And the microphone was white?

6 A. Yes.

7 Q. Now, no question but that when you got
8 out on the ice you didn't ask permission to
9 record, correct?

10 A. No.

11 Q. And you didn't notify them as you
12 approached them I'm recording this, correct?

13 A. No.

14 Q. Not as you approached them?

15 A. No.

16 Q. Now, do you have the Iphone or the tape
17 with you today?

18 A. Yes I do.

19 Q. Okay.

20 MR. RIGALI: Your Honor, I'd like to set
21 up playing that. We also have as an aide,
22 we have a transcript of that, it's a little
23 rough, you know, it's a microphone in a

1 pocket or just outside a pocket, so I have
2 ten copies of that, if I can go to the
3 sidebar and look at it. Counsel has a copy.
4 I don't think there's a problem with it, but
5 I could distribute that to the jury as the
6 tape is being played and it might make it a
7 little easier to understand.

8 THE COURT: Okay. Let me just see it
9 over here. You have a copy that I can look
10 at?

11 MR. FREI: Do you want me to get it
12 ready?

13 THE COURT: Hang on a minute, okay.
14 Okay that will be marked as Exhibit C for
15 identification.

16 MR. RIGALI: While that exhibit is being
17 marked, could you please the tape?

18 A. Should I set it up over there?

19 Q. As long as the jury can hear. While
20 that's rebooting, Mr. Frei, are you able to
21 identify who the speakers are, whose voices the
22 jury will hear on that tape?

23 A. Yes.

1 Q. Okay.

2 A. The first five minutes is just me
3 walking to the ice.

4 MS. SAPIRSTEIN: I'm sorry, are we going
5 to hear the whole tape?

6 THE COURT: Are we going to hear the
7 whole thing?

8 MR. RIGALI: If you'd like. There's a
9 little bit of just footsteps in the snow.

10 MS. SAPIRSTEIN: I would like to hear
11 the whole thing.

12 THE COURT: Yeah, the whole thing.

13 MR. RIGALI: Footsteps and that kind of
14 stuff.

15 A. Your Honor, can I take [INAUDIBLE].

16 THE COURT: Sure.

17 Q. That's the end of the tape?

18 A. That's the end.

19 Q. Is that a tape a fair and accurate
20 recording of the sounds and statements that were
21 made from the time you left your house, actually
22 it sounds like shortly before you left the house,
23 went up to the top of the road and came back to

1 your house?

2 A. Yes.

3 Q. Are you able...

4 MR. RIGALI: We'd offer that as an
5 exhibit, Your Honor.

6 MS. SAPIRSTEIN: No objection, Your
7 Honor.

8 THE COURT: Okay. That will be exhibit
9 eleven. Is it on something that can
10 actually be offered?

11 MR. RIGALI: That is actually on the
12 original phone.

13 THE COURT: Right, but is there...

14 MR. RIGALI: We have a CD copy of it,
15 which is an exact duplicate, so if the jury
16 wants to actually hear it again, so long as
17 there is a CD player that they can access or
18 computer, they could do that.

19 THE COURT: Okay, but do you have that
20 with you now, that CD?

21 MR. RIGALI: Yes.

22 THE COURT: Why don't you offer that so
23 I can have it marked.

1

1 MR. RIGALI: Sure.

2 THE COURT: Okay. Why don't you show it
3 to Attorney Sapirstein. Is there any
4 objection to it the way it is?

5 MS. SAPIRSTEIN: No, there's no
6 objection. Well, we're just going to erase
7 one thing, but it's no problem, we agree.

8 THE COURT: Alright.

9 MR. RIGALI: Thank you, Judge. It may
10 just erase off.

11 THE COURT: That will be exhibit eleven.
12 You can do that afterwards.

13 MR. RIGALI: Thank you.

14 Q. Now, are you able to tell the jury whose
15 voice is on the tape that says get the F out of
16 here?

17 A. That's Mr. Johnson's voice.

18 Q. And you're not, nor have you ever,
19 alleged that it was Mr. Johnson personally that
20 kicked you, correct, that knocked you down?

21 A. I never alleged that. No, I didn't.

22 Q. But your testimony is that you came
23 moments later, he approached you, as you

1described to the jury, right?

2 A. Yes.

3 Q. And when you were down on the ground and
4he approached you, what did you think was going
5to happen?

6 A. I was afraid. I mean, for a moment I
7was afraid that I'm really going to get killed or
8get really banged up bad. I mean, these guys
9were drinking all day. It took me, it actually
10took me by surprise, it took me by surprise. That
11was the first time I was actually attacked by
12friends of Mr. Johnson's, besides that incident
13with Haney.

14 MR. RIGALI: If I could have just a
15 moment, Your Honor.

16 THE COURT: Sure.

17 Q. Did Mr. Johnson ever directly make any
18statements to you on an earlier occasion about
19your activities in posting information on either
20your blog or another blog, a public blog?

21 A. Yes he did.

22 Q. Could you tell us just what, very
23briefly what the circumstances were as to where

1this incident occurred, what you were doing at
2the time?

3 A. It was in front of the senior citizens
4center, I was preparing to give a slideshow for
5the senior citizens and I was bringing equipment
6there. Among them a slide projector and in order
7to do that show I needed also a remote and I had
8left the remote so I need to go home and get the
9remote and I went outside and as I approached my
10car a man approached me, it was Mr. Johnson, I
11didn't know him at that time. It was the first
12time I actually had an encounter with Mr.
13Johnson. He approached me and he says, you know,
14can I talk to you a moment, and I said sure, or
15something along that line. And then he says to
16me, you know, why don't you cut out that
17bullshit, you know, on your blog, with my
18father's as a selectman deeding over property,
19and landlocked and that we illegally, you know,
20he went into details, I said that's all the
21truth, that's why I sign it with my name. I
22researched it, that's the truth. If you don't
23believe me, if you think, you know, it's

1 libelous, sue me, that's the truth. I would
2 never publish something in the newspaper and sign
3 it with my name. And he went on, and he went on,
4 and he went on and I wanted getting into my car
5 and he was standing right here. Here's my car
6 with the door and he's standing here and after
7 like five minutes, I felt like everything was
8 said and it was getting ugly so I wanted to
9 leave. And I actually had to physically push the
10 door open to get into my car and I drove home.

11 MR. RIGALI: Nothing further. Thank
12 you.

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

15 MS. SAPIRSTEIN: Thank you, Your Honor.

16 CROSS EXAMINATION BY MR. SAPIRSTEIN:

17 Q. When did that last incident that you
18 just described occur?

19 A. That was in May, 2007.

20 Q. I'm sorry, 2000 what?

21 A. 2007.

22 Q. Mr. Frei, I maybe asked you some of
23 these questions when I called you as a witness,

1but was Mr. Johnson ever on your property on
2February 19, 2011?

3MR. RIGALI: Objection. Asked,
4answered.

5THE COURT: Well, it was, but I'll let
6you briefly. Don't review everything you
7already asked him before.

8A. What was the question?

9Q. Was he ever on your property?

10A. No.

11Q. The people that you were talking to on
12the tape, when you said hey back off, this is my
13property, do you know who those people were?

14A. I don't know them, no.

15Q. Was it Mr. Johnson?

16A. No.

17Q. And was there any issue with them
18getting off your property?

19A. No.

20Q. You testified that someone kicked you
21from behind.

22A. Yes.

23Q. You first or originally identified that

1 person as Tommy Laplante, is that right?

2 A. Yes.

3 Q. And then you later identified that
4 person as Al West, is that right?

5 A. Yes.

6 Q. Did this person allegedly kick you on
7 the back of the leg?

8 A. Yes.

9 Q. Did you take a picture of any bruise
10 that you sustained?

11 A. No I did not.

12 Q. Why not?

13 A. It never occurred to me.

14 Q. Well, it occurred to you to take a
15 picture of your hand, right?

16 A. Yes.

17 Q. But it didn't occur to you to take a
18 picture of allegedly being kicked on the back of
19 your leg?

20 A. No I did not.

21 Q. Up until the time that you went out on
22 the ice, did you have any interaction with any of
23 the individuals that day?

1 A. No.

2 Q. And the tape that you played for the
3 jury, were you on your balcony when you taped
4 that?

5 A. The first part was taken out the balcony
6 door, that would be south, and then maybe you
7 noticed there was a little bit from inside the
8 house, that's when I moved over to the bedroom
9 window, which is on the east side of the house.

10 Q. And was the noise louder when the
11 balcony doors are open?

12 A. I would say so, yes.

13 Q. Did you call the police to tell them
14 that you were being disturbed that day by the
15 noise?

16 A. No.

17 Q. Now, on this exhibit, I think it was
18 six, is this the one where you indicated there
19 was a path that led up to your house?

20 A. Yes.

21 Q. But it's not on the picture, is it?

22 A. It's coming down here. Yeah, you can
23 see it.

1 Q. But you can't see it leading down to the
2 ice, can you?

3 A. Can I come closer?

4 Q. I'll bring it over.

5 A. Okay. You know, maybe because I know
6 where it is, you know, I show it's here. It's
7 kind of difficult to say because everything is
8 just white and white. We have one which shows
9 more detail, which is that one.

10 Q. I understand, but was actually the one
11 that was used on direct. Does the path show up
12 on this picture.

13 A. No, I don't see it.

14 THE COURT: What exhibit was that?

15 MS. SAPIRSTEIN: That was seven.

16 THE COURT: Alright.

17 Q. When did you write the letter to the
18 select board about Mr. Johnson, what year?

19 A. I don't recall.

20 Q. Was it in 2011?

21 A. I don't recall.

22 Q. Do you know for a fact that in January
23 of 2011 Mr. Johnson was using town equipment to

1 plow his father's driveway?

2 A. Is the question whether he was
3 personally operating it or whether the equipment
4 was owned by the town?

5 Q. That's a fair clarification. Do you
6 know for a fact whether or not town equipment was
7 being used to plow the elder Mr. Johnson's
8 driveway in January of 2011?

9 A. Do I know that as a fact, no.

10 Q. You don't, do you?

11 A. No.

12 Q. Was it snowing on February 19, 2011?

13 A. I would say not but I don't recall.

14 Q. Did you notice on the tape that you
15 played for the jury that there was snow?

16 A. Oh, on February 19th?

17 Q. Yes.

18 A. I think I remember seeing some snow,
19 yeah.

20 Q. Do you think that would account for some
21 of the snow on the ice?

22 A. I would say no.

23 Q. Did you see on the tape that you played

1for the jury that some of the fishermen were
2slipping on the ice as they walked?

3 A. Yes, I did see that. We actually didn't
4get to see that because I never played it through
5the end.

6 Q. Would you agree with me that the ice was
7slippery on February 19, 2011?

8 A. I would agree with you that the ice was
9slippery out on the ice, not in the cove.

10 Q. What false allegations other than the
11one that is the subject of your counterclaims did
12Brian Johnson make to the police about you?

13 A. He accused me of having threatened to
14kill him.

15 Q. Well that was on February 19th, right?

16 A. Yes.

17 Q. My question to you is, I thought that
18you testified on direct that there had been
19earlier occasions that Brian Johnson made false
20allegations against you?

21 A. Oh, okay.

22 Q. What were those?

23 A. That was an incident I was on Stafford

1 Road taking a picture of his house for a piece on
2 my blog and Mr. Haney, his neighbor who lives
3 closer to the road, came out and...

4 Q. If you could just, if you could direct
5 your answer to my question. When else did Brian
6 Johnson make allegations, false allegations, to
7 the police about you?

8 A. That was that day.

9 Q. Okay, and what did he say?

10 A. He claimed that I was trespassing onto
11 his property.

12 Q. And how close to his property were you?

13 A. I was on Stafford Road, pulled over on
14 Stafford Road. I was I would say maybe within
15 five feet of his property.

16 Q. Now that was you laughing on the tape,
17 right?

18 A. Yes.

19 Q. And it's your testimony that the person
20 who used the profanity was Mr. Johnson?

21 A. What kind of profanity?

22 Q. Well I'll quote, "get the fuck out of
23 here right now, you better get the fuck out of

1here".

2 A. Yes.

3 Q. Are you a thousand percent sure that was
4Mr. Johnson?

5 A. I saw him. I was there.

6 Q. So you're a thousand percent sure?

7 A. Yes.

8 Q. You're sure it wasn't Mr. West?

9 A. Yes.

10 Q. One of your claims is for defamation for
11the statement that Brian Johnson allegedly made
12to the police about him feeling threatened
13because you would kill him if he came on your
14property, is that true?

15 A. Yes.

16 Q. Did you post that statement on your
17blog?

18 A. Can you clarify what you mean by that
19thing?

20 Q. Did you post the statement that I just
21said that Brian Johnson allegedly made to the
22police, did you post that on the Holland blog?

23 A. Are you talking about the police report?

1 Q. I'm talking about that portion of the
2 police report, yes.

3 A. I actually published the whole police
4 report, yes.

5 Q. Including that statement, right?

6 A. Yes.

7 Q. If you were concerned about that
8 statement having been made by Mr. Johnson, why
9 would you post it on your blog and further
10 disseminate it to the public?

11 A. I don't understand that question.

12 Q. Why did you post it on your blog?

13 A. Because that's the police report, that's
14 what I do. I basically inform the public of
15 what's going on.

16 Q. Well, did you have a concern about the
17 impact that that statement might have on your
18 reputation?

19 A. No because at the same time I actually
20 also posted the audio so people could actually
21 listen to the audio and then form their own
22 opinion what really happened on that day of
23 February 19th.

1 Q. So if you didn't have any concern about
2 that statement being published, what's your
3 injury regarding Mr. Johnson making that
4 statement to the police?

5 A. What's my injury?

6 Q. Mm-hmm.

7 A. What's my injury?

8 Q. Mm-hmm.

9 A. You know, I have very strong
10 convictions, I'm very passionate about what's
11 right and wrong and if certain people in the Town
12 of Holland think a different set of rules apply
13 to them than to the rest of the...

14 Q. Mr. Frei, I'm actually...

15 MR. RIGALI: No, let him answer the
16 question please.

17 THE COURT: Well, I don't know that he
18 is. Why don't you rephrase it.

19 MS. SAPIRSTEIN: I'll rephrase it.

20 THE COURT: Or specify something.

21 Q. Prior to you posting the report on the
22 Holland blog, presumably the only people who knew
23 that statement was made was Mr. Johnson, you and

1the police department?

2 A. That's not true.

3 Q. That's not true? Who else knew?

4 A. No, that's not true. Right after that
5incident he told me that Brian Johnson
6disseminates information that I went out there on
7the ice and kicked those tip ups.

8 Q. I'm sorry, Mr. Frei, that actually
9wasn't my question. My question is really
10focused on the statement that you allege Brian
11Johnson made to the police concerning you, false
12criminal allegations, okay. Before you posted
13that on your Holland blog, do you have any
14knowledge of anyone being aware of that statement
15other than Mr. Johnson, the police and you?

16 A. Yes.

17 Q. Who?

18 A. For instance, there's a name...

19 Q. I'm sorry, what?

20 THE COURT: I'm sorry?

21 A. Your Honor, now I'm in a situation, I'm
22going to release these names, and I'm afraid that
23they will have the same fate as I have being

1harassed. Can I do that somehow, I don't know.

2 THE COURT: No.

3 A. No? There were members of the Holland
4Rod and Gun Club, there is a woman who...

5 Q. That knew that Brian Johnson, and all
6I'm asking you is about the statement he
7allegedly made to the police which was I felt
8threatened, Mr. Frei said, and I'm paraphrasing
9so I may not have it exactly right, if you come
10on my land I'll fucking kill you, and that's a
11quote, that statement, do you have any knowledge
12of anyone other than the police department, Mr.
13Johnson and yourself being aware of that
14statement before you published it?

15 A. No. No.

16 Q. And what injury did you sustain as a
17result of Mr. Johnson allegedly saying that to
18the police, if any?

19 A. I mean, it's the same question. I say
20it again, I have very strong convictions. I
21learned what's right and wrong and if someone
22accuses me of having committed a crime that's
23about the worst thing you can do to me.

1 Q. But my question is, what injury? Did
2 you suffer any economic injury?

3 A. You know, I think all a man has when he
4 gets up in the morning...

5 Q. Mr. Frei?

6 THE COURT: Could you just try and
7 answer the question right now.

8 A. Reputation, reputation.

9 Q. Okay, your reputation. So if Mr.
10 Johnson and the police department and you were
11 the only people who had knowledge of that alleged
12 threat, how did that impact your reputation?

13 MR. RIGALI: May I object? There were
14 six or eight other people on the ice when
15 that thing was made so it's not just the
16 three of them. There was quite a few people.
17 The question has a false premise to it.

18 THE COURT: Alright, well he can answer
19 it. That's overruled.

20 A. I would say everybody who reads the
21 police report. I have no idea who else read that
22 police report. Police reports are made so
23 there's an exact account of what actually

1 happened and they're public record and everybody,
2 every member of the public can actually go to the
3 police station and request a copy of that report
4 and read it.

5 Q. But you don't know if in fact that
6 happened, do you?

7 A. No I don't.

8 Q. Did it impact your business?

9 A. That's hard to tell.

10 Q. Okay. You sell antique instruments?

11 A. Yes.

12 Q. Is that the only business you have?

13 A. Yes.

14 Q. And did your business incur a loss as a
15 result of that alleged statement?

16 A. I don't know. I cannot quantify that.

17 Q. Did you suffer any physical injury as a
18 result?

19 A. Yes I did.

20 Q. And what was that?

21 A. I had cuts on my hand and I had a
22 problem with my left hip and I went to physical
23 therapy for weeks after that to get well.

1 Q. Well that was from the fall, right?

2 A. Yes.

3 Q. But from the statement made to the
4 police, any physical injury?

5 A. No.

6 THE COURT: We'll take a break here for
7 lunch, okay. So ladies and gentlemen, we
8 will break for lunch. Again let me caution
9 you not to discuss the matter either among
10 yourselves or anybody else over the lunch
11 break and we'll resume at two o'clock. You
12 know, I don't even know if this is going to
13 the jury today. I think not. I don't know
14 how much more you have and I don't know if
15 you have any rebuttal witnesses or whatever,
16 but just going through the request for jury
17 instructions, going through the special
18 verdict questions, I mean even if you have
19 another hour that brings us until three
20 o'clock. If it takes us forty-five minutes,
21 half an hour, well forty-five minutes even
22 to do all of the jury instructions and
23 everything, then we're at 3:45 and I'm not

1 going to start with arguments and charge at
2 3:45. So my sense is this, we'll finish the
3 case, if we're done around 3:00, 3:30, then
4 we'll review everything for tomorrow and
5 just start then.

6 MR. RIGALI: Arguments and charge?

7 THE COURT: Yes. It seems to make more
8 sense.

9 MS. SAPIRSTEIN: I agree. And in answer
10 to your question, Your Honor, I probably do
11 have about an hour with him but it could go
12 faster and I will probably call Mr. Johnson
13 for like three minutes, literally. I only
14 have two things.

15 THE COURT: No, no, that's fine. Okay,
16 so we'll sort of plan on it that way I
17 think.

18 MR. RIGALI: Right, I'm sorry. It just
19 took longer that I thought.

20 THE COURT: That's fine, no problem, I'm
21 fine with it. I just wanted to get it
22 straight. They're coming right in.

23 MS. SAPIRSTEIN: I just thought of

1 something. Can we come to sidebar for a
2 second while the jury's coming in?

3 THE COURT: Mm-hmm.

4 COURT OFFICER: Are you ready for the
5 jury?

6 THE COURT: Yes.

7 COURT OFFICER: All rise for the jurors.
8 You may be seated. Court is back in
9 session.

10 THE COURT: Thank you. Okay, Attorney
11 Sapirstein?

12 MS. SAPIRSTEIN: Thank you.

13 Q. Did Brian Johnson ever file a criminal
14 complaint against you?

15 A. I don't know.

16 Q. Well, let me narrow it down. Did Brian
17 Johnson file a criminal complaint against you for
18 allegedly threatening him on February 19th?

19 A. No.

20 Q. Now, did you ever hear from any of the
21 police officers to whom Brian Johnson allegedly
22 made that statement, did you ever hear them
23 repeat that statement?

1 A. Excuse me, making what statement?

2 Q. The statement that Brian Johnson felt
3 threatened by you and the quote about how "you
4 would fucking kill him if he came on your land".
5 Did you ever hear any of the police officers
6 involved in this case, that would be Police
7 Officer Forcier or Bean, repeat that statement?

8 A. Only during testimony.

9 Q. Excuse me?

10 A. Only during testimony in court.

11 Q. But not any other time?

12 A. No.

13 Q. And when that was done in testimony in
14 court, and I don't want to get into the details
15 of that hearing, but was that in response to
16 questions that you asked?

17 A. That would be in response to questions
18 my attorney asked.

19 Q. But it wasn't anything that Mr. Johnson
20 asked or said?

21 A. No.

22 Q. Now, you also allege in your
23 counterclaim that you suffered emotional distress

1because of Mr. Johnson's extreme and outrageous
2conduct?

3 A. That's correct.

4 Q. And what was the extreme and outrageous
5conduct?

6 A. He accused me of having committed a
7crime.

8 Q. So that was the extreme and outrageous
9conduct?

10 A. And basically attempt to kick me in my
11head, his repeated harassments.

12 Q. That repeated harassment, Mr. Frei?

13 A. The things I already talked about.

14 Q. Okay, but I believe in your counterclaim
15you only refer to what happened on February 19,
162011. So focusing on that day, what was Mr.
17Johnson's extreme and outrageous conduct?

18 A. When he claimed to the police that I
19said I'm going to fucking kill you, that I came
20out there and yelled at the people, and the fact
21that he and his drunken buddies assaulted me and
22also the fact that he tried to kick me in my
23head.

1 Q. Well, let's get back to the assault.
2 You agree with me that Brian Johnson never
3 touched you that day, right?

4 A. Yes.

5 Q. Okay. And he wasn't the individual you
6 identified who kicked, who kicked your feet out
7 from under you, right?

8 A. Yes.

9 Q. Was the fact that he was fishing in the
10 area, was that extreme and outrageous conduct?

11 A. No. It happens all the time.

12 Q. Now, you also allege that Brian Johnson
13 interfered with your civil rights?

14 A. Yes.

15 Q. What civil rights did he interfere with?

16 A. Basically in my opinion what he did was
17 trying to prevent me from putting critical
18 articles about him on the blog.

19 Q. Okay. And he did that in a way that you
20 just described during this trial, right?

21 A. Yes.

22 Q. And after February 19, 2011, did you
23 continue to post critical articles about Mr.

1 Johnson and his family on your blog?

2 A. I actually stopped.

3 Q. You stopped?

4 A. Yes.

5 Q. For how long a period of time?

6 A. Since he filed his complaint I have not
7 put one thing up on the blog which I actually
8 wrote. I only put stuff on the blog which was
9 written by other people and submitted to the
10 blog, that's it. I wanted to keep that going,
11 but I personally did not write one piece.

12 Q. Did you write anything after Mr.
13 Johnson's father passed away?

14 A. The only thing that I made, and I think
15 that was before February 19th...

16 Q. No, his father passed away in 2012, Mr.
17 Frei, so it would have been after February 19,
18 2011.

19 A. I think in my opinion that was important
20 enough to write something and I remember when I
21 heard about it, I actually did it with my Iphone,
22 two lines, selectman Earl Johnson died last night
23 or something like that.

1 Q. Did you post anything on your blog about
2his grave?

3 A. Did I?

4 Q. Yes.

5 A. There were probably seventy comments. I
6don't know if I left a comment myself.

7 Q. You don't remember if you left a comment
8yourself?

9 A. I don't recall. Maybe I did, maybe not.

10 Q. Do you recall posting something about
11either urinating or defecating on Earl Johnson's
12grave?

13 A. Certainly not.

14 Q. Was that posted on your blog?

15 A. By me?

16 Q. By anybody?

17 A. Probably.

18 Q. Now, you said that you went outside on
19February 19th to take your garbage out?

20 A. Yes.

21 Q. Do they have Saturday garbage pick up in
22Holland?

23 A. No.

1 Q. Do they have Sunday pick up in Holland?

2 A. No.

3 Q. And did you see anybody who was fishing
4that day look into your windows?

5 A. Yes.

6 Q. Who did you see?

7 A. Who?

8 Q. Mm-hmm.

9 A. Brian Johnson.

10 Q. He looked in your window?

11 A. Yes.

12 Q. How close was he to your house?

13 A. Maybe as close as about may fifty feet,
14forty feet.

15 Q. Fifty feet, so did he actually come on
16your property?

17 A. No.

18 Q. And when you say he looked in your
19window, do you really mean that he was looking in
20the direction of your house while he was on the
21lake?

22 A. Yes.

23 Q. Can you describe all of the damages that

1you have sustained, if any, as a result of any
2conduct by Mr. Johnson?

3 A. Let me try.

4 Q. I'm sorry?

5 A. I said I will try. After that incident
6I had severe headaches. I remember developing
7hemorrhoids. I remember...

8 Q. You're talking about what incident?

9 A. February 19th.

10 Q. Okay.

11 A. I remember waking up like four or five
12in the morning I had to use the bathroom usually
13I would just go back to sleep. I couldn't go
14back to sleep because it just all that hit me and
15I couldn't fall back to sleep.

16 Q. And what specifically did Mr. Johnson do
17that resulted in that?

18 A. I say it again, accusing me of having
19committed a crime.

20 Q. Did you see a doctor or any medical
21provider for any of these issues?

22 A. Yes I did.

23 Q. Who'd you see?

1 A. I went to Harrington Memorial as an
2emergency. They took x-rays and they suggested I
3should do physical therapy, which I did.

4 Q. And was that for your hip?

5 A. Yes.

6 Q. That was from hitting the ice?

7 A. Yes.

8 Q. Anything else?

9 A. They took x-rays and I learned that on
10my right arm, on my elbow and there's like skin
11covering your bone and that was ripped and it was
12very sensitive and I actually could not even wear
13like a jacket like this by itself would cause
14like a needle, like a pain. I had that for
15around a year and then it stopped and it went
16away. Today fortunately I don't have anything
17which would like permanent damage.

18 Q. But we agreed that it wasn't Mr. Johnson
19who allegedly kicked you, it was Mr. West, right?

20 A. That's correct but he was part of the
21group.

22 Q. Well but it wasn't Mr. Johnson that
23kicked you?

1 A. It was not Mr. Johnson, no.

2 Q. And what did Mr. Johnson do on the 19th
3 that harassed you?

4 MR. RIGALI: Is the question something
5 that he's already described?

6 THE COURT: I don't know.

7 MS. SAPIRSTEIN: Well he's already
8 described, I mean, he can tell me that I
9 guess.

10 THE COURT: Are you objecting to the
11 question?

12 MR. RIGALI: I'm objecting to the
13 question.

14 THE COURT: Alright. Overruled.

15 A. He came earning in the morning with six
16 of his friends, started his augers between 6:00
17 and 7:00, it was still dark. He shouted around
18 the house. He urinated on my land.

19 Q. Well, let me stop you there. Didn't you
20 testify earlier that Mr. Johnson never went on
21 your land?

22 A. What I mean by that is according to his
23 testimony and what I saw is he goes underneath

1the bushes as close as he can to the shoreline
2and then he urinates and when he does it he
3actually urinates on the property.

4 Q. So you have direct knowledge of the fact
5that Mr. Johnson urinated on your property on
6February 19th?

7 A. Everybody urinated.

8 Q. My question isn't about everybody, it's
9just about Mr. Johnson.

10 A. I would say no.

11 Q. Okay. So what other conduct, what else
12did Mr. Johnson do that harassed you on the 19th?

13 A. He tried to kick me in my head. He
14yelled at me get the fuck out of here right now.
15He had the guts to ask me if there is anybody
16else in the house so he wanted to make sure
17there's no witness before he actually gives me a
18gang beating with his buddies.

19 Q. Did anyone give you a gang beating that
20day?

21 A. Excuse me?

22 Q. Did anyone actually give you a gang
23beating that day, Mr. Frei?

1 A. No.

2 Q. Is that it?

3 A. That's pretty much it, yes.

4 MS. SAPIRSTEIN: Can I just consult with
5 my client for one moment please?

6 THE COURT: Sure.

7 MS. SAPIRSTEIN: I don't have any
8 further questions for Mr. Frei.

9 THE COURT: Thank you. Anything
10 further?

11 MR. RIGALI: Just very briefly, Your
12 Honor.

13 REDIRECT EXAMINATION BY MR. RIGALI:

14 Q. You were asked the question, Mr. Frei,
15 of what sort of injuries, emotional upset that
16 you had and you explained to the jury you went to
17 the hospital, you had x-rays taken, you had some
18 bruises, had a cut on your hand and so forth.
19 Did you...

20 A. I don't know if you ever had anything
21 really severe happening to you, but...

22 THE COURT: There isn't a question in
23 front of you. You've got to wait for a

1 question from your lawyer.

2 MR. RIGALI: I'm sorry, Your Honor.

3 A. Sorry.

4 Q. So, Mr. Frei, let's just talk about, you
5 know, your physical injuries. You said you went
6 to the hospital and thereafter you were examined
7 and you went and got physical therapy. How many,
8 if you recall, how many sessions of physical
9 therapy did you have, roughly?

10 A. I would say six, six to ten.

11 Q. This was for what? What area of your
12 body were you getting therapy for?

13 A. That was pain I had not only in my hip,
14 it actually went into my back.

15 Q. And was this from the bruises and
16 injuries that you suffered from the 19th?

17 A. Yes.

18 Q. Now, you were asked some questions about
19 emotional injuries and whether or not or to what
20 extent this affected you emotionally. Did this
21 affect you emotionally?

22 A. Yes it did.

23 Q. Could you tell the jury about that?

1First of all, were there any physical symptoms
2from just being emotionally upset?

3 A. I, as I already said, I had hemorrhoids,
4I had severe headaches.

5 Q. Okay. Now how about just emotionally?
6Setting aside any physical or other physical
7symptoms and so forth, how did this affect you?

8 A. I couldn't concentrate anymore. I
9remember doing research and I would sit on my
10computer and I read like four times the same
11thing and I had no idea what was in there and I
12would be tired during the day and could not sleep
13at night. I found myself, I actually reasoned
14myself, that if I wanted my life why would I be
15sad or anything because it would just be over and
16I think that's...

17 MR. RIGALI: No further questions.

18 THE COURT: Alright, thank you.

19 Anything further?

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

22 THE COURT: Alright. You can step down,
23 sir. Thank you. Any other witnesses,

1 Attorney Rigali?

2 MR. RIGALI: I have no other witnesses,
3 Your Honor. Thank you.

4 THE COURT: Alright. Are you resting?

5 MR. RIGALI: Yes, I'm sorry. Yes.

6 THE COURT: Okay. Any rebuttal?

7 MS. SAPIRSTEIN: Actually, I have some
8 motions before.

9 THE COURT: Okay, I'll see you at the
10 side.

11 MS. SAPIRSTEIN: Your Honor, I'd like to
12 call Brian Johnson to the stand please.

13 DIRECT EXAMINATION BY MS. SAPIRSTEIN:

14 Q. Mr. Johnson, you're still under oath.

15 Now you heard the tape that was played today?

16 A. Yes.

17 Q. Did you hear your voice on the tape?

18 A. Yes.

19 Q. Okay, can you tell us what you heard you
20 say?

21 A. I believe I said is there someone up in
22 the house and I believe I said something to the
23 effect of get away from us.

1 Q. Okay. And then there was a louder voice
2 in the foreground of the tape that said get out
3 of here, get the fuck out of here. Who was that?

4 A. That's my father-in-law, Al West.

5 MS. SAPIRSTEIN: I don't have any
6 further questions. Thank you.

7 THE COURT: Alright.

8 CROSS EXAMINATION BY MR. RIGALI:

9 Q. Was it the same Al West that Mr. Frei
10 has said kicked him?

11 A. Yes.

12 Q. Okay. And was it the same Al West that
13 was taking off his coat as Peter walked over to
14 you guys?

15 MS. SAPIRSTEIN: Objection.

16 THE COURT: Overruled.

17 A. Yes.

18 Q. And he did take off his coat as Peter
19 approached, right?

20 A. Yes because of the way Peter approached
21 him.

22 Q. Oh so, was Peter approaching him in some
23 threatening manner?

1 A. Yes.

2 Q. Okay.

3 MR. RIGALI: I have no further
4 questions.

5 THE COURT: Okay. Anything further.

6 MS. SAPIRSTEIN: Thank you, Your Honor.
7 I rest.

8 THE COURT: Alright. You may step
9 down, sir. Alright. Okay, ladies and
10 gentlemen, there's a number of legal matters
11 that I have to handle with the attorneys
12 before, the next stage of the trial is the
13 closing arguments and the instructions to
14 you and then obviously the deliberations.
15 The legal matters that I have to decide out
16 of your presence are probably going to take
17 quite some time. So rather than have you
18 wait here, I'm going to excuse you for the
19 day. Obviously you're going to have to come
20 back tomorrow morning, okay. So tomorrow
21 morning we will have the arguments of the
22 attorneys, the instructions on the law and
23 the you'll be given the case to deliberate,

1 okay. So I'm going to excuse you, and
2 again, don't talk about it with anybody,
3 okay?

4 COURT OFFICER: All rise for the jury.

5 THE COURT: Okay.

6 MR. RIGALI: Are we going to be talking
7 about instructions, Judge?

8 THE COURT: I am. Well, once I go
9 through her motions first and then we'll go
10 over them.

11 MR. RIGALI: I just want to clarify.

12 THE COURT: Yes, okay. Okay, Attorney
13 Sapirstein on your motions.

14 MS. SAPIRSTEIN: Thank you, Your Honor.
15 On the battery...

16 THE COURT: Okay, what count is that?
17 If you don't mind, if you have it.

18 MR. RIGALI: Two.

19 THE COURT: Two? Assault and battery?

20 MR. RIGALI: I can tell you
21 specifically.

22 THE COURT: I actually can find it. I
23 have the counterclaim here.

1 MS. SAPIRSTEIN: It is count one, I'm
2 sorry, count two.

3 THE COURT: It is count two, yes.

4 MS. SAPIRSTEIN: We move for a directed
5 verdict because one of the first elements is
6 that Johnson used force against Frei and
7 there is absolutely no evidence. In fact,
8 Mr. Frei testified more than once that Mr.
9 Johnson never touched him. So that's the
10 element of the claim that is not supported
11 by any evidence, so we would move for
12 directed verdict on that.

13 THE COURT: Okay, can I get a response
14 as to each one before you go on, Attorney
15 Rigali?

16 MR. RIGALI: Under joint venture
17 theory, Your Honor, I think there's
18 colorable evidence here which indicates that
19 these men are acting in concert. Based on,
20 even according to Mr. Johnson's most recent
21 testimony you've got his, I guess it's the
22 father-in-law or one of the other men
23 yelling, threatening things, get the F out

1 of here, so and so forth. There's evidence
2 of a kick that occurs right in front of Mr.
3 Johnson and so forth. So, and if you take
4 the totality of the circumstances I think
5 it's a jury question as to whether or not,
6 you know, all the men but particularly Mr.
7 Johnson with his history were there to
8 essentially stage a confrontation or to, you
9 know, intimidate and harass. And, you know,
10 they're drinking all day and so forth, so
11 I'm asking for one of the instructions which
12 I don't know if you've had a chance to read.

13 THE COURT: Right, I have that and this
14 is what you ask for in the instructions, I'm
15 not going to read it all, but you may find
16 Mr. Johnson legally responsible for having
17 committed an assault and battery if you also
18 find that Mr. Johnson was present at the
19 scene of the assault and battery, okay
20 that's fine, Mr. Johnson at some point knew
21 another intended to commit an assault and
22 battery or intended to commit an assault and
23 battery himself. Okay, there's no evidence

1 he intended to commit assault and battery
2 himself up to that point.

3 MR. RIGALI: Again, just for your
4 information, all I did was take the model,
5 you know, instruction. So the issue before
6 the Court isn't so much the wording of the
7 instruction. I don't think that...

8 THE COURT: But those are the elements,
9 aren't they?

10 MR. RIGALI: No, I don't think so
11 necessarily. Actually I just didn't have a
12 chance to rework that instruction to my
13 satisfaction, but the issue is whether or
14 not any reasonable juror could find on the
15 facts a joint enterprise here and again, I
16 think on all the...

17 THE COURT: Excuse me, I'm going to
18 pull up the instructions on joint venture.

19 MR. RIGALI: Based on all the facts
20 here, I mean I think it's very, very clear.
21 Let's separate all the past history and so
22 on and so forth, but, you know, you've got a
23 group, the reasonable inference is, right,

1 that you've got these men who are there,
2 they're harassing these guys, they come
3 there early in the morning. It's a question
4 of fact as to whether or not the positioning
5 of these guys on a long lake in a cove which
6 coincidentally happens to be, you know,
7 around this guy's house, whether or not, you
8 know, that's all part and parcel to this.
9 That's a question of fact. I don't think
10 that the Court can just arguably willy nilly
11 take that away from the jury and so if you
12 start with that as a proposition, okay, and
13 then you put on, you know, many, many hours
14 of drinking and ruckus behavior and so
15 forth, you've got a young lady that goes up
16 the hill before the assault, they say
17 disgusting things to her. It shows their
18 state of mind as a group. You don't see
19 people leaving the group after that was
20 said. And then you've got Peter, you know,
21 moments later you have now the victim coming
22 down and he approaches and one of the guys
23 starts, again, questions of fact, questions

1 of fact, by taking off his coat.

2 THE COURT: Right. What is the
3 evidence that, and again, I'm quoting from
4 your request for a jury instruction, which
5 is the third element, what is the evidence
6 that by agreement or understanding Mr.
7 Johnson was willing and available to help
8 the person who committed the assault and
9 battery if necessary? Is it simply because
10 he was standing there? I mean, what is
11 the...

12 MR. RIGALI: Well, that he A, was
13 standing there, and B, witnessed these
14 things in his presence and took part in them
15 verbally and immediately after there's
16 evidence that he came over to try to kick
17 him. So it looked like a gang effort, you
18 know. What difference is this than a street
19 fight in which one guy is fighting several
20 people. In a criminal case all of the
21 several at least have their case go to the
22 jury because of their presence and because
23 of their words and their actions and so

1 forth. It's a question of fact.

2 THE COURT: Alright. Anything else?

3 MS. SAPIRSTEIN: I don't think there's
4 any evidence, again, of force nor if I look
5 at Mr. Rigali's, even taking in the joint
6 venture, I think there's no evidence of
7 knowledge that another intends to commit a
8 crime or with intent to commit a crime
9 himself and by agreement or understanding
10 was willing and available to help if
11 necessary. There's absolutely no evidence
12 of either of those things. And there's
13 clearly no evidence of battery. And just
14 because...

15 THE COURT: There's no evidence of
16 battery, I mean, that's clear.

17 MR. RIGALI: Of direct battery.

18 THE COURT: Direct battery, yes. No, I
19 understand that.

20 MS. SAPIRSTEIN: But there's a claim
21 for assault and assault and battery.

22 THE COURT: Right, but he's saying the
23 assault and battery, the claim is made as a

1 joint venture essentially.

2 MS. SAPIRSTEIN: Which actually is a
3 matter of concern to me because I understand
4 that there is one paragraph in the
5 counterclaim that says in concert with
6 others assaulted and battered and beat Peter
7 Frei. There is actually no specific count
8 that goes to a joint venture. None of the,
9 and there's no allegation of a joint venture
10 in any of the counts specifically, including
11 the assault and assault and battery, and the
12 only allegation is that Brian Johnson in
13 joint concert with others did assault and
14 beat Peter Frei. It's not what Mr. Rigali
15 is saying today. What Mr. Rigali is saying
16 today is that Al West tripped...

17 THE COURT: No, I think that's okay. I
18 think that that's enough.

19 MS. SAPIRSTEIN: But I don't think
20 there's any evidence of the knowledge or of
21 the availability and willingness. I mean,
22 there's nothing here that supports that.

23 THE COURT: Let me just say this. I

1 think it's a pretty close call. I'm going
2 to deny it, let it go to the jury and I
3 guess because he was present. The second
4 element at some point knew another intended
5 to commit an assault and battery. I suppose
6 Al West taking his coat off, he could have,
7 if that's what he intended to do, but that's
8 a question of fact. And by agreement or
9 understanding he was willing and available
10 to help. That's a closer call. Alright.
11 That's denied on that count.

12 MS. SAPIRSTEIN: We also move for a
13 directed verdict on defamation, libel and
14 slander. In addition to publishing a false
15 and defamatory statement, and it's
16 questionable whether it was actually
17 published other than by Mr. Frei, Johnson
18 had to know the statement was false or act
19 in reckless disregard as to whether it was
20 false or act negligently in failing to
21 ascertain and then the defamatory statement
22 had to cause Mr. Frei economic loss. We
23 have two problems with that as far as proof.

1 One is that Mr. Johnson testified that he
2 felt threatened. There's no evidence of
3 basically the second element, that there was
4 a statement that was false that he acted in
5 reckless disregard or acted negligently and
6 more importantly, there's no damage. Peter
7 Frei testified there was no damage. And
8 then not only that but Peter Frei then
9 published the statement for all the world to
10 see. So if in fact he could get passed a
11 directed verdict on defamation, libel and
12 slander, I don't see how any fact finder
13 could find that it was Mr. Johnson's conduct
14 that caused any injury once he posted the
15 entire statement on his blog.

16 THE COURT: Alright.

17 MR. RIGALI: An inaccurate statement of
18 the law, I'm afraid to say. The accusation,
19 the false accusation of a crime does not
20 specifically need proof of any economic
21 damages is ridiculous. Secondly, the
22 argument that Mr. Frei, you know, further
23 broadcast the false information is a matter

1 of mitigation of damages, not whether or not
2 damages exist. So knowingly telling a
3 police officer in a report that you darn
4 well know is going to be a public record,
5 that you, you know, threatened to kill and
6 so on and so forth, that's pretty serious
7 stuff. I argue that should go to the jury.
8 And publication is not publication to the
9 world. Publication is a communication of
10 one individual.

11 THE COURT: Right. Okay, that's denied
12 and for those reasons.

13 MS. SAPIRSTEIN: Next, intentional
14 infliction of emotional distress. There's
15 no conduct that was extreme and outrageous,
16 that was beyond all possible bounds of
17 decency and utterly intolerable in a
18 civilized society. I gave Mr. Frei the
19 opportunity to tell me everything Mr.
20 Johnson did that day and nothing rises to
21 that level.

22 MR. RIGALI: I'd say it's a question of
23 fact. That's why we've got the precise

1 reason why we've got these people here, you
2 know. I mean, I don't want to go through
3 the vulgarities and all this other stuff,
4 but, you know, you attack a guy right side,
5 you circle a guy in his home, you trap him
6 there during the day, you're looking in his
7 windows, you wake him up at 6:00 in the
8 morning, one of your cohorts kicks him,
9 knocks him down, sends him with injuries to
10 the hospital, you try to kick his head in,
11 you call his girlfriend a fucking cunt, you
12 threaten, you tell false statements to the
13 police. I don't know, I mean, maybe they
14 think that's okay but I think that's a fact
15 question.

16 THE COURT: Alright.

17 MS. SAPIRSTEIN: Can I just respond for
18 a moment?

19 THE COURT: Yes.

20 MS. SAPIRSTEIN: Most of that was not
21 attributed to Mr. Johnson. Most of that,
22 quite frankly, didn't even come into
23 evidence in this trial. Some of it did,

1 some of it didn't. Looking in the windows?
2 Nobody went up and looked in the windows.
3 There was a lot of stuff that was promised
4 in the opening that didn't actually
5 materialize in the trial. Mr. Johnson, and
6 the only thing Mr. Frei said Mr. Johnson
7 did, was, well he said he said everything on
8 the tape, I'm not quite frankly sure that
9 that's extreme and outrageous in today's
10 world, but he also has to intend to inflict
11 emotional distress or knew or should have
12 known that it was likely to result, and the
13 emotional distress suffered by Frei had to
14 have been so severe of a nature that no
15 reasonable person could be expected to
16 endure it. I didn't hear any evidence of
17 that either. There was, unless I was at a
18 different trial, Your Honor, there wasn't
19 any evidence that they surrounded the house.
20 In fact, Mr. Frei testified that there was
21 absolutely no interaction. They were always
22 on public property except for two men that
23 he told to get off his property, until Mr.

1 Frei went out and confronted them. That
2 doesn't make any conduct by Mr. Johnson
3 extreme and outrageous. It might make
4 conduct by Mr. Frei extreme and outrageous.

5 THE COURT: Well, I mean, I'm looking
6 at the definition in the instructions of
7 extreme and outrageous, more than just work
8 a day insults, hurt feelings from bad
9 manners, annoyances or petty impressions.
10 Outrageousness means a high order of
11 recklessness, ruthlessness or deliberate
12 malevolence. As such, extreme and
13 outrageous encompasses particularly
14 reprehensible conduct. I think there's
15 enough to go to the jury, okay. So I'm
16 going to deny that. Anything else?

17 MS. SAPIRSTEIN: Yes actually.

18 THE COURT: Keep going.

19 MS. SAPIRSTEIN: A few more and we're
20 almost done. Abuse of process.

21 THE COURT: Yes.

22 MS. SAPIRSTEIN: There's no evidence
23 that, by Mr. Frei, there's no testimony by

1 Mr. Frei that this lawsuit, and that's
2 actually the only lawsuit Mr. Johnson ever
3 filed, we got that Mr. Frei, was filed for
4 an ulterior or illegitimate purpose. We do
5 acknowledge that this was a process. We're
6 there. If the stated objective was the
7 actual objective, which was compensation for
8 violation of the wiretapping statute, there
9 is no abuse of process. Even if, and
10 nothing came in to actually suggest this,
11 but even if Mr. Johnson used this lawsuit to
12 vex, annoy or harass Mr. Frei, that is not
13 enough for an ulterior purpose. It has to
14 be essentially a form of coercion and Mr.
15 Frei freely admitted more than once that he
16 recorded all of these individuals. He
17 thought the microphone was in plain view.
18 Johnson said until he was told that he was
19 recorded he didn't know and then Mr. Frei
20 went further and violated the law again by
21 disclosing it to other people. So it is
22 clearly not abuse of process.

23 MR. RIGALI: I think you got to

1 separate whether or not his conduct violates
2 the law from whether or not it's an abuse of
3 process. I think that there's, and this is
4 a good example, of a lawsuit being filed,
5 the primary purpose, it may be a legitimate
6 lawsuit in a sense that, you know, you can
7 get facts that would go to a jury on the
8 issue of harassment, defamation or whatever,
9 but that the real purpose behind it is to
10 intimidate and harass. Now remember, Your
11 Honor, that the lawsuit is filed at a time
12 after Mr. Johnson hears and learns that
13 there is a recording which is going to prove
14 he is a liar and made false statements to a
15 police officer, possibly exposing him to an
16 obstruction of justice count. Because...

17 THE COURT: I don't think there was any
18 evidence as to when the lawsuit was filed.

19 MR. RIGALI: It was certainly filed
20 after the incident.

21 THE COURT: It's filed after the
22 incident, yes.

23 MR. RIGALI: Right, so it's filed

1 after...

2 THE COURT: But there was no evidence
3 that it was filed after there was knowledge
4 of a tape or anything like that that I
5 heard. I mean, you and I may know that and
6 she may know that, but I didn't hear any
7 evidence.

8 MR. RIGALI: Right, but as far as dates
9 go, that's fine. I still think it is a
10 question of fact for the jury to consider in
11 all fairness. Again, if this is an extreme
12 and outrageous thing and that gets to go to
13 the jury, then why doesn't...

14 THE COURT: Well, what is the evidence
15 that he used the legal process for an
16 ulterior or illegitimate purpose? What is
17 that evidence?

18 MR. RIGALI: Ulterior, not illegitimate
19 but ulterior.

20 THE COURT: What is it?

21 MR. RIGALI: That he's still trying to
22 coerce and harass this guy. He's trying to
23 cover up the fact, you know, the best

1 offense, excuse me, the best defense is a
2 good offense. So here he is, the incident
3 occurs, okay, and they go their way, we
4 don't get into evidence, you know, all the
5 hearsay, what's going around the town and so
6 forth, that's when Mr. Frei learned a lot of
7 different things, but be that as it may,
8 some time after that clearly, and I think
9 Mr. Johnson testified to that, he learned
10 that through the police report or whatever,
11 that the police had a report out that he is
12 supposedly alleged that Frei made a death
13 threat towards him, okay, he learns this.
14 Now, he made the death threat on that day
15 but now it's in the police report and so
16 what's he going to do, you know. He
17 realizes, he's going to potentially,
18 potential criminal offenses there.

19 THE COURT: But there was no evidence
20 that the tape, when he found out about the
21 tape, he ran and filed a lawsuit. I'm
22 saying that how do you show for an ulterior
23 purpose if you don't have the timeline

1 there.

2 MR. RIGALI: Right, I see what you're
3 saying. I see what you're saying. I mean,
4 I think personally it's just a fair
5 inference as to how these things occurred
6 because it doesn't make sense otherwise,
7 right. I mean, you have when is the lawsuit
8 filed. We don't know when the lawsuit is
9 filed.

10 THE COURT: No.

11 MR. RIGALI: It could have been an hour
12 later, it could have been some time later.

13 THE COURT: Right. And we don't know
14 when it was in relation to him even knowing
15 there was a tape. So how do you show that
16 there was an ulterior purpose that, you've
17 described an ulterior purpose to him.

18 MR. RIGALI: Right.

19 THE COURT: So he wants to sue to be on
20 the offense because he knows now he's on
21 tape and it's going to come out that Mr.
22 Frei didn't say that, at least while the
23 tape was running. So, but you need that

1 timeline, don't you?

2 MR. RIGALI: Well it certainly would be
3 helpful to have it, but I don't know that
4 the failure to have it necessary is fatal to
5 it. I mean, you know, the jury's got to
6 have some inference here to be able to
7 figure out the sequence of events.

8 THE COURT: How? How would they?

9 MR. RIGALI: I don't know. I can't
10 answer that. I mean, I think, I mean, my
11 personal view is it's just a fair inference,
12 that's all. It's just fair inference,
13 that's all.

14 THE COURT: I'm going to think about
15 that one. You know, I like to have things
16 go to the jury if there's a doubt in my
17 mind. I'll give it some thought.

18 MR. RIGALI: Thank you, Your Honor.

19 THE COURT: I'm inclined to allow that,
20 but, alright. Obviously I will let you know
21 by tomorrow morning.

22 MS. SAPIRSTEIN: That would be good.

23 And finally...

1 THE COURT: Yes.

2 MS. SAPIRSTEIN: The Civil Rights Act.

3 THE COURT: Yes.

4 MS. SAPIRSTEIN: There's no evidence
5 that them fishing on the lake on public
6 property in a fishing derby, and that's all
7 this case is really about, February 19th.
8 All the other stuff, the background stuff,
9 that wasn't actually part of this case. But
10 even if it was, there's no evidence that...

11 THE COURT: What do you mean the
12 background things?

13 MS. SAPIRSTEIN: All of the stuff that
14 Mr. Frei testified to. All of the stuff we
15 went through in the harassment hearing.
16 This case is actually, if you look at the
17 pleadings, Your Honor, only relates to
18 February 19, 2011.

19 THE COURT: Right, but there was
20 evidence that Mr. Frei was putting on his
21 website negative things about Mr. Johnson
22 and Mr. Johnson's family.

23 MS. SAPIRSTEIN: Yes. But where's the

1 evidence that there was an attempt or an
2 interference by Mr. Johnson. Now we're
3 talking really about February 19th, that's
4 all that's in the pleadings.

5 THE COURT: Mm-hmm. Mm-hmm.

6 MS. SAPIRSTEIN: Or that the
7 interference was by threats, intimidation or
8 coercion. Where's that evidence? I didn't
9 hear anything that was that evidence. Mr.
10 Frei and Ms. Manning both testified that all
11 of the gentlemen had a right to be fishing
12 on that lake. The derby started, they had
13 the, they were allowed to be fishing on the
14 lake at the time they were fishing on the
15 lake. Mr. Johnson never entered Mr. Frei's
16 property. Mr. Johnson never approached Mr.
17 Frei. Mr. Frei approached Mr. Johnson. So
18 basically what we have on the 19th is a
19 bunch of guys drinking beer and fishing and
20 cooking in a public spot in a cove near not
21 only Mr. Frei's property but near the
22 property of some of the other people in the
23 group. There are other houses there. There

1 was no evidence that they picked this spot
2 because it was Mr. Frei's house. So I don't
3 see what evidence there is that there was an
4 attempt to interfere with Mr. Frei's posting
5 nor actually do we see a timeline of when he
6 posted what he posted. I've asked him a few
7 questions about dates and most of those were
8 quite a bit before this occurred. So I just
9 don't see the nexus.

10 THE COURT: Alright. Attorney Rigali?

11 MR. RIGALI: I mean, again, to me it's a
12 pretty basic issue that should go to the
13 jury. Now whether or not they view the
14 evidence as my honored colleague does here
15 or not, that's up to them, that's what
16 trials are all about. But there are
17 certainly facts to support that this man as
18 a journalist, whether it's self described or
19 otherwise, he says he spends thousands of
20 hours, we've got the evidence of the tape,
21 it shows a journalist bent to say the least.
22 It shows that he's very critical of Mr.
23 Johnson and others, you know, his family and

1 so forth. So he's exercising a
2 Constitutional right protected by both the
3 state and Article 16 as well as the First
4 Amendment of the United States. So there's
5 a protected right. Once you have the
6 protected right it's a fact question as to
7 whether or not what went on here, you know,
8 the harassment, the abuse, the whole scene
9 was a continuing effort to, you know,
10 threaten to intimidate and so forth. To
11 attempt to intimidate is all you really
12 need, his exercise of that right. The
13 second thing, by the way, is he also has a
14 right of privacy. He has in Massachusetts,
15 he has a Constitutional right. I mean, it's
16 a little bit amorphous, I'm not a
17 Constitutional scholar, you know. You look
18 at some of the cases and there's this
19 emergent Constitutional right of privacy.
20 There's no common law right, I don't
21 believe, in Massachusetts, there is in some
22 other jurisdictions. But in Massachusetts
23 there is a statute, and the statute does

1 recognize, you know, privacy, as does the
2 U.S. Constitution.

3 THE COURT: So how is that violated?

4 MR. RIGALI: One of the, you know, the
5 statutory right of privacy has a series of
6 elements to it and so forth, different types
7 of invasion, false light, this, that and the
8 other thing, and one of them is the right of
9 seclusion. So now, query as to whether or
10 not, for instance, if we had brought a
11 statutory cause of action for a violation of
12 his right of privacy under the Act and we
13 could have done that, I thought I was
14 getting a little cumbersome, so...

15 THE COURT: What does that mean, I
16 guess, seclusion that they couldn't be on
17 the lake because he lived there?

18 MR. RIGALI: No, no, no, no, no. I
19 mean, in the case law that I've cited to
20 you, you'll see cases where the Courts have
21 said it's a question of fact, as a matter of
22 fact, where there are people following
23 somebody close behind in their car and sort

1 of being intrusive to their physical space,
2 it states a question of fact as to whether
3 there is an invasion of privacy. Privacy in
4 that context meaning a right of seclusion,
5 meaning to have privacy about your person.
6 It doesn't mean trespassing.

7 THE COURT: Was there some evidence of
8 that?

9 MR. RIGALI: In this particular case?

10 THE COURT: Yeah.

11 MR. RIGALI: I think the whole day was
12 an insult to this man's privacy on his home.

13 THE COURT: Yeah, but I mean, aren't we
14 talking about they're out there fishing, I
15 assume there were other people out there
16 fishing in a fishing derby...

17 MR. RIGALI: Not in that area.

18 THE COURT: Okay, but I mean, they're
19 on an area...

20 MR. RIGALI: Nobody else is around
21 other than the thugs that came to give him a
22 hard time.

23 THE COURT: I don't want to argue the

1 case with you, but I'm just saying are you
2 arguing that by setting up their fishing
3 equipment where they did and being on their
4 ATVs and drinking and eating and all of
5 that, they violated his right to privacy?

6 MR. RIGALI: By getting there in the
7 morning, you know, making the drilling and
8 so forth, positioning things to, you know,
9 eat me to his house and so forth, these are
10 insulting, degrading things.

11 THE COURT: Well, I'm not disagreeing
12 with that but I'm not saying...

13 MR. RIGALI: I'm not saying that the
14 right of privacy was violated. I'm saying
15 that he had a Constitutional right to the
16 privacy and the peace of quiet.

17 THE COURT: Okay, but if it wasn't
18 violated then how is that relevant? I'm
19 going to deny it. Let's not even go there
20 because I'm going to deny the motion. I
21 think there's enough for the whole First
22 Amendment thing so it's denied. Okay. So
23 the only one left is the abuse of process

1 and I will give that a little thought and
2 let you know. Why don't, were there more?
3 Did you have any more motions?

4 MS. SAPIRSTEIN: I don't think there are
5 any more counts. Can I just say one more
6 thing about the abuse of process?

7 THE COURT: Yes.

8 MS. SAPIRSTEIN: Mr. Rigali said that
9 if he filed this to harass Mr. Frei that's a
10 violation, that's actually not. There's
11 case law, if I could just find that
12 particular one.

13 THE COURT: Is that in your...

14 MS. SAPIRSTEIN: It is, it's footnote
15 36. It's not enough for Frei to show that
16 Johnson used the process to vex, annoy or
17 harass Frei.

18 THE COURT: Right.

19 MS. SAPIRSTEIN: Such a motive does not
20 alone suffice to show ulterior purpose. The
21 whole point of abuse of process is to gain
22 some advantage other than through the
23 lawsuit like surrender of property or

1 payment of money are the examples that are
2 in the cases. There's no evidence of any of
3 that. He was secretly recorded, there's a
4 law, he filed a lawsuit. There's nothing
5 that says that he was doing it for any other
6 reason.

7 MR. RIGALI: I can tell you this,
8 Judge, it's not an appellate issue in Mr.
9 Frei's...

10 THE COURT: I tend to agree with her,
11 so I mean, that's how I'm thinking but I'll
12 read over the case and we'll go from there.
13 So I would expect that that would be allowed
14 at this point anyways, okay.

15 MR. RIGALI: I just don't want the
16 Court to spend a lot of time on it, that's
17 all.

18 THE COURT: Okay, I'll spend a little
19 time. Alright, can we go through the
20 request for jury instructions.

21 MR. RIGALI: Before we do that, can I
22 just make sure we can identify what requests
23 you have, Judge, so that...

1 THE COURT: Sure. I have submitted by,
2 I have Brian Johnson's proposed jury
3 instructions and they're numbered pages one
4 to twenty-one. And then I have from you
5 defendant's proposed jury instructions, ten
6 pages. And then there's a separate request
7 that you submitted today, defendant's
8 proposed jury instructions regarding secrecy
9 element of wiretap statute and then I think
10 there was one other...

11 MR. RIGALI: Yeah, on the adverse
12 inference.

13 THE COURT: Assault and battery.

14 MS. SAPIRSTEIN: I don't know if I have
15 all those.

16 THE COURT: Let me just find that one.

17 MR. RIGALI: Okay, I'm getting confused
18 here.

19 THE COURT: I'm sorry, assault count
20 one. And what you gave me is page 7 of 14,
21 8 of 14 and 9 of 14, but I don't know where
22 that came from.

23 MR. RIGALI: Right, the initial, again,

1 when I addressed the Court when I submitted
2 those.

3 THE COURT: You know what, you don't
4 have to stand up, okay, thank you though.
5 Neither one of you.

6 MR. RIGALI: Generally, at least in my
7 personal experience in litigation, if it's a
8 boilerplate charge I don't request the
9 charge, I mean, I know you're going to do
10 it, so.

11 THE COURT: Yes, there are, yes.

12 MR. RIGALI: I mean, there's no need
13 to, and so assault, assault and battery,
14 those are pretty basic. So initially when I
15 prepared the instructions I had prepared
16 them but then I thought, obviously this is
17 getting pretty technical, so I just deleted
18 the assault, assault and battery and so
19 forth. And I submitted the first packet to
20 you with a cover page to the Clerk and so
21 forth, and included within that packet
22 there's no assault, assault and battery and
23 so on. Then I thought, well you're going to

1 have to prepare them, these are pretty
2 boilerplate, so I just handed them in, if it
3 helps you, great, if not, don't worry about
4 it. I don't care to discuss the assault,
5 assault and battery stuff other than the
6 joint venture and the alternate forms of
7 assault.

8 THE COURT: Okay.

9 MS. SAPIRSTEIN: I don't think I have
10 all of yours.

11 THE COURT: We'll go through that. You
12 don't?

13 MS. SAPIRSTEIN: No. I have the first
14 sets, plaintiff's claim for wiretap
15 violation. It starts with 14 pages. I have
16 the assault, I think that's all I have.

17 MR. RIGALI: Okay, there should be,
18 okay.

19 THE COURT: The other one was submitted
20 today.

21 MR. RIGALI: Right, there's one, I have
22 some extra copies. So this is on the
23 secrecy element of the wiretap statute.

1 That was submitted today. And then the last
2 one was on the adverse permissible inference
3 instruction.

4 THE COURT: Oh, I don't know if I have
5 that one. Is that under the wiretap?

6 MR. RIGALI: No.

7 THE COURT: Oh, I don't have that.

8 MR. RIGALI: Okay, I may not give you
9 the original copy. I thought I had handed
10 that in.

11 THE COURT: Did he hand in another one?
12 Yes, I have that now. I didn't have that
13 before. Alright.

14 MR. RIGALI: Now, if I could just have
15 a second. I need to find Tani's request
16 here. I'm sorry.

17 THE COURT: It's okay.

18 MS. SAPIRSTEIN: When I started this
19 everything was so neatly organized. I
20 should have an extra copy.

21 MR. RIGALI: I think I got one right
22 here. Brian Johnson's proposed jury
23 instructions, here we go. Thank you.

1 THE COURT: Can we sort of do them at
2 the same time with, you know, each of yours,
3 okay, rather than hearing from one and then
4 the other and then going to his and going
5 back and forth again.

6 MR. RIGALI: I think that's the only
7 way that makes sense.

8 THE COURT: Okay. So the first one I
9 have is the wiretap violation, and I think
10 that the, well, let me, Attorney Sapirstein
11 seems most direct.

12 MS. SAPIRSTEIN: It's right out of the
13 statute.

14 THE COURT: It is. There's a
15 difference here. You say in your request,
16 Attorney Rigali, number two, the second
17 paragraph. Mr. Johnson must prove to you by
18 a preponderance of the evidence each of the
19 following elements, and then you go on to
20 say that the recording was done secretly,
21 that's fine, that's B, and Mr. Johnson's
22 privacy was thereby invaded. I don't see
23 that as a, that he has to prove all three.

1 MS. SAPIRSTEIN: He doesn't.

2 MR. RIGALI: Right, well that's the
3 crux of what I consider to be the issue of
4 first impression that you've really already
5 ruled on so I don't need to reargue that.

6 THE COURT: So take a look at, you have
7 Attorney Sapirstein's in front of you?

8 MR. RIGALI: Yes.

9 THE COURT: I see that you want several
10 more things in yours but tell me if you
11 disagree with hers and anything in there.

12 MR. RIGALI: Four. Well, no I guess as
13 long as the word secret is in there.

14 THE COURT: Yeah. There are actually
15 model instructions on this. Oh, I'm sorry,
16 there are not on the wiretapping.

17 MR. RIGALI: I was going to say, I wish
18 I could have found them. I spent hours
19 looking for them.

20 THE COURT: I'm sorry, I was on the
21 civil rights. Okay, so do you object to
22 hers as far as it goes?

23 MR. RIGALI: Well, I'm just going to

1 have, again, I don't want to belabor the
2 point, I have a general objection which I'd
3 like the record to reflect that Mr. Frei's
4 proposed instructions were disallowed. I
5 don't want to argue it. That same objection
6 is made with regards to, excuse me, Attorney
7 Sapirstein's proposed instruction for the
8 same reasons.

9 THE COURT: Okay.

10 MR. RIGALI: Now, as far as the
11 commentary on what's here, I think so long
12 as each of these phrases has the word secret
13 recording, I think I'm going to just leave
14 my objection as it stands, Judge.

15 THE COURT: Alright, but let me ask
16 this, on your instructions, your request on
17 page two, you have a lot more information
18 there. You have, for instance, the term
19 oral communication means speech. Is there
20 some dispute about, do they need to be
21 instructed about that? Secretly record, I
22 mean, Massachusetts law makes it unlawful
23 for a person to secretly record an oral

1 communication. So then you want me to say
2 the term oral communication means speech?

3 MR. RIGALI: Right, well I think this
4 is a legal question that you have to rule on
5 as the judge and that is whether or not the
6 remarks that you heard that were yelled, you
7 know, the vulgarities and the, I would
8 argue, the threatening, fighting words that
9 were yelled at him, whether or not in fact
10 they're speech. I think it's a legal
11 question. So I'm arguing to you on his
12 behalf that they're not protected speech.
13 That there is no prohibition under the
14 statute, there's no protection under the
15 statute for someone particularly under the
16 facts of the public scenario, yelling
17 obscenities in a threatening, violent manner
18 towards another person, that's my argument.
19 If you agree with that, I don't know that
20 it's a fact question, I think it, but, you
21 know, I think that's a legal question as to
22 whether you give the instruction or not. If
23 you think that, if the judge thinks that

1 fighting words are not speech, fighting in a
2 First Amendment context, are not speech also
3 in a wiretap then the jury gets the
4 instruction. It's for them to decide as to
5 whether or not this amounted to speech. I
6 think it's a legal question not a fact
7 question.

8 THE COURT: Alright. What do you?

9 MS. SAPIRSTEIN: I don't see the
10 distinction made anywhere in the wiretap
11 statute. Recording is recording.

12 THE COURT: Yeah.

13 MS. SAPIRSTEIN: I don't see any, I
14 have it right in front of me. This
15 prohibits recording and disclosing, or
16 disclosing.

17 THE COURT: Does it define oral
18 communication, yeah it does, speech.

19 MR. RIGALI: So the First Amendment
20 says, you know, no prohibitions against
21 speech. It doesn't define it and it doesn't
22 say except. It says, from the raw reading
23 of it. So judicial interpretation cuts out

1 an exception.

2 THE COURT: Right.

3 MR. RIGALI: And so I'm making...

4 THE COURT: But not under this statute
5 as far as you know?

6 MR. RIGALI: There is no case law at
7 this point, which is again why I spent hours
8 in preparing this.

9 THE COURT: Okay. I'm not going to
10 give number four then of your request, or
11 five. Number six, the term interception,
12 well I don't, do we need that in there at
13 this point?

14 MR. RIGALI: Well...

15 THE COURT: I'm going off of hers now.

16 MR. RIGALI: Right, if you, so long as
17 you define secrecy, that's fine by me. I
18 mean, I don't want this to be too
19 cumbersome, but the point is it's got to be
20 secret. There is a fact issue here as to
21 whether or not under the circumstances it
22 could be considered secret. So that's all I
23 want to do is make sure...

1 THE COURT: So that would be number
2 seven. Is that what you're requesting in
3 terms of secret or done secretly? It is not
4 a violation of the statute if the recording
5 was not done secretly.

6 MR. RIGALI: Yes. I would like you to
7 instruct on seven and my more recent
8 submission with regards to the secrecy
9 element of the wiretap statute sort of
10 rephrases some of this stuff, but it's on
11 the same...

12 THE COURT: Would you rather have the
13 rephrased one?

14 MR. RIGALI: Well, give me a second
15 here, Judge. This is how bad I am, I had
16 forgotten I put this into the original. I
17 think I'd go with the revised one that I did
18 this morning, Your Honor. I think it's just
19 easier to understand.

20 MS. SAPIRSTEIN: You're talking about
21 all of it?

22 MR. RIGALI: Yeah.

23 MS. SAPIRSTEIN: I would object to

1 almost all of it, so when you're ready to
2 hear me.

3 THE COURT: Okay, I'm ready.

4 MS. SAPIRSTEIN: You ready? Okay. I
5 think generally in jury instructions as well
6 as verdict forms simpler is better. There's
7 no legal authority for what Mr. Rigali is
8 asking you to do. The wiretap statute is
9 very clear. It has been interpreted by the
10 Supreme Judicial Court to be clear and
11 unambiguous. I don't know why we wouldn't
12 just say what's in the statute and not
13 belabor it. No one said in the statute, no
14 one said in my instruction that he had to be
15 asked permission, so that's on Melancon. So
16 all the stuff about announcing or making
17 permission or requesting permission, it says
18 the law makes it unlawful for a person to
19 secretly record an oral communication
20 without the consent of the person or people
21 being recorded. That's the statutory
22 language. I think this overcomplicates it
23 and then I think the last few parts, quite

1
1 frankly, are trying Mr. Rigali's case for
2 him. There's testimony by Mr. Frei that the
3 phone was in his pocket and the microphone
4 was outside. There's testimony by Mr.
5 Johnson that he didn't know he was being
6 recorded. They'll decide who they believe.
7 But, I mean, I think it borders on almost
8 ludicrous to define secret. I think people
9 know what secret means, that the person
10 being recorded didn't know they were being
11 recorded.

12 THE COURT: Okay. Anything else?

13 MR. RIGALI: Well, yeah. Commonwealth
14 v. Hyde is right on point and we've been
15 through this before, where in Hyde the SJC
16 said all that the motorist had to do was
17 hold up the camera.

18 THE COURT: Right, and obviously you
19 can argue that but, I mean, all of this...

20 MR. RIGALI: The question where do you
21 get the instruction. But the jury's not
22 going...

23 THE COURT: Right, that he made a

1 secret recording, that's not enough.

2 MR. RIGALI: The jury's not going to
3 know what secret means unless the Court
4 helps them along. I mean, the jury...

5 THE COURT: What's confusing about
6 secret? Why wouldn't they know what secret
7 means?

8 MS. SAPIRSTEIN: Exactly.

9 MR. RIGALI: Because counsel asked this
10 witness did you ask permission, no. Did
11 you, you know, tell them ahead of time that
12 you were going to record them. So a lot of
13 people say well that's...

14 THE COURT: Doesn't all that go to
15 whether or not it's secret?

16 MR. RIGALI: Exactly, it does. But in
17 the juror's mind, we've got a case that says
18 as a matter of law that that's irrelevant
19 and so now you've got six or seven, you
20 know, jurors who need to have a little bit
21 more of an understanding as to what secret
22 is and I think it's very important. Let's
23 put it this way, let's say I argue to the

1 jury this point without any legal backup
2 from the judge saying that's actually
3 correct and the jury's saying, of course
4 we're going to get an opposing argument from
5 counsel, so now we've got seven people
6 sitting there wondering well what is
7 required for secrecy. Does the guy have to
8 ask permission? Does he have to announce it
9 ahead of time? So these aren't, this is
10 actually a pretty fair balanced, you know,
11 request that says, you know, you can
12 consider that, whether there was disclosure
13 and so on and so forth but that's not
14 dispositive. You have to decide whether or
15 not a reasonable person under the
16 circumstances knew or had reason to know in
17 the same way that if you went into a bank or
18 even into this courtroom and there's a
19 security camera, you have reason to know.
20 You don't have to ask permission, you don't
21 have to be told, et cetera, et cetera, et
22 cetera.

23 THE COURT: Alright. Anything else on

1 that point?

2 MS. SAPIRSTEIN: No.

3 THE COURT: Well, okay.

4 MS. SAPIRSTEIN: I'm just concerned
5 because...

6 THE COURT: I'm not, I'll tell you, I
7 can see in your, the one you just submitted
8 today, Attorney Rigali, okay, number one I
9 think is okay except, no, number one's okay.
10 Number two, the recording need not have been
11 done with the permission of the person being
12 recorded.

13 MR. RIGALI: I mean, it's exactly the
14 facts in Hyde.

15 THE COURT: Alright. Okay. So up to
16 six I'm actually, okay, that seems
17 reasonable. Seven, no. I think that, have
18 you lost what I'm working off of?

19 MS. SAPIRSTEIN: I did, I'm sorry.

20 MR. RIGALI: Okay, that's from the
21 Glick v. Kungman First Circuit case.

22 THE COURT: But you're talking about,
23 now you're getting explicit in the facts of

1 this case. For example, a microphone or
2 recording device in plain view may be
3 sufficient to alert an individual to the
4 possibility that recording may be occurring.
5 Well there is a disputed fact as to whether
6 it was in plain view.

7 MR. RIGALI: Correct.

8 THE COURT: Alright. So I don't think
9 I would say that.

10 MR. RIGALI: A fair comment. How about
11 the second sentence?

12 MS. SAPIRSTEIN: Well wait, I just need
13 to, so you said yes to one, two, three,
14 four, five, six?

15 THE COURT: Well, I think one, two,
16 three, four, five, six makes sense, yeah.
17 But you can argue against that. I didn't
18 realize you didn't have your paper there.

19 MS. SAPIRSTEIN: I have it now. But
20 isn't it, aren't you going to instruct, Your
21 Honor, generally since it's my burden I have
22 to prove by a preponderance of the evidence?

23 THE COURT: Mm-hmm.

1 MS. SAPIRSTEIN: That, I mean, isn't it
2 sort of boilerplate upfront not just to this
3 statute that the plaintiff has to prove by a
4 preponderance of the evidence that he was
5 being recorded secretly. I don't see
6 anything in the case law in Massachusetts
7 that talks about requires proof that the
8 plaintiff did not know nor reasonably should
9 have known. I don't see where that is in
10 Hyde or anywhere else. The statute says you
11 can't record secretly, period. There's no
12 standard that the courts have promulgated
13 that says a reasonable person or a knew or
14 should have known.

15 THE COURT: Well, I mean...

16 MS. SAPIRSTEIN: I mean, that goes
17 throughout the law, I understand that.

18 THE COURT: Isn't that the Hyde case?

19 MR. RIGALI: Hyde and Glick and others.

20 MS. SAPIRSTEIN: Where in the Hyde
21 case?

22 THE COURT: Obviously number five. You
23 have to prove he didn't know, okay.

1 MS. SAPIRSTEIN: Well, we do have to
2 prove that and we say that. The law
3 requires, we say that once already, we say
4 we're alleging he violated it by secretly
5 making a recording, we actually say it
6 twice. Maybe now three times, and then we
7 say it again in each of the four provisions.
8 It just seems like it's putting undue
9 emphasis. I don't see anywhere in the Hyde
10 case where it says what Mr. Rigali says it
11 says, nor have I ever. But I'd love to see
12 it. I know the dissent disagrees with the
13 majority.

14 MR. RIGALI: No, it's not in the
15 dissent. It's in the majority in Hyde
16 clearly says all the motorist had to do was
17 hold up the recording device, end of story.

18 THE COURT: I kind of remember that. I
19 don't have the case right in front of me.
20 Do you have the case right there?

21 MS. SAPIRSTEIN: I do, and I'm looking
22 for it and I don't see it.

23 MR. RIGALI: And Glick, you know, Glick

1 is the First Circuit case that, you know,
2 here you have actually he's an attorney in
3 Boston Common, sees the police, I think they
4 arrested a guy, and the attorney felt that
5 it was rough stuff or some inappropriate
6 conduct by the police and he visibly had a,
7 like a video camera recording it.

8 THE COURT: But that wasn't recording
9 audio, was it?

10 MS. SAPIRSTEIN: No, that was a video
11 recording and it was in plain view and he
12 got charged with a crime for doing it, the
13 ACLU represented him...

14 MR. RIGALI: No, no, no. They sought a
15 criminal complaint against him, a show cause
16 hearing, for a violation of the
17 Massachusetts wiretap statute because there,
18 I thought it was because there was video and
19 audio, the complaint never issued. Glick
20 then sued for false, I think it was false
21 arrest, I think he was arrested and his
22 camera was confiscated or something, and he
23 was, and he won a civil judgment, and the

1 Glick case, the language is very clear that
2 says in Massachusetts all that's necessary
3 according to Hyde is if he had shown the
4 camera, here the camera was visible, it's
5 not secret, end of story.

6 MS. SAPIRSTEIN: I don't see that here.

7 THE COURT: Alright, well I'll take a
8 look at that. So you're saying that there's
9 no requirement reasonably should have known?

10 MS. SAPIRSTEIN: I don't see it, Judge.
11 I mean, here's the case.

12 THE COURT: I'll look at the case
13 tonight.

14 MR. RIGALI: I'm not saying, I'm not
15 saying that the language in Glick...

16 MS. SAPIRSTEIN: No, this is Hyde. I
17 don't have Glick. I have Hyde.

18 MR. RIGALI: I'm sorry, or Hyde, says
19 knew or reasonably should have known.

20 MS. SAPIRSTEIN: Right.

21 MR. RIGALI: I'm not saying that you're
22 going to find that in that case, but that's
23 exactly what it means. In other words, when

1 the Court says the statute says you can't
2 secretly record and if in fact, that doesn't
3 mean you need the permission, you don't need
4 to publicly announce, because there's those
5 interpretations and they cleared that up,
6 no, not necessary, we've addressed those in
7 one through six. But then they say all he
8 needed to do was hold up the camera and end
9 of story, okay. In other words, putting a
10 person on notice, a reasonable person giving
11 him reasonable notice of the possibility.
12 There's other cases, there's the famous
13 criminal case where a guy, a robber goes
14 into a convenience store and, you know, does
15 a robbery and there's a tape and there's an
16 audio portion to it and he wants a new trial
17 after his conviction because of the
18 violation of the wire, it's a suppression
19 issue, and he says I didn't know where was
20 an audio portion to the video camera when I
21 robbed this store, it's an interesting
22 argument, and the Court in that case said
23 the fact that it's supposed to put you on

1 notice, and that's it.

2 THE COURT: Okay.

3 MS. SAPIRSTEIN: Can I just, I'm sorry,
4 I really hate to do this but on page 599 of
5 Hyde it says, and I quote we conclude that
6 the legislature intended Chapter 272,
7 Section 99, I can give you a copy of this, I
8 have an extra copy, strictly to prohibit all
9 secret recordings by members of the public
10 including recordings of police officers or
11 public officials interacting with members of
12 the public when made without their
13 permission or knowledge. So I actually
14 think the permission language goes against
15 Hyde.

16 THE COURT: Without their permission or
17 knowledge.

18 MS. SAPIRSTEIN: Yes.

19 THE COURT: Okay. So without their
20 knowledge goes to did they know or should
21 they have known.

22 MR. RIGALI: I'm quoting from Hyde.
23 The problem here could have been avoided if

1 at the outset of the traffic stop the
2 defendant had simply informed the police of
3 his intention to tape record the encounter
4 or even held the tape recorder in plain
5 sight. This is in the majority.

6 MS. SAPIRSTEIN: I think that's Dicta.

7 MR. RIGALI: It's not Dicta. It's
8 right here in the main part of the majority
9 decision.

10 THE COURT: What page?

11 MR. RIGALI: I'll have to get help on
12 what page it is. It's about four sentences
13 up from where it says judgment affirmed.

14 THE COURT: Okay, well let me read that
15 over tonight. I'm not going to give seven,
16 I'm not going to give eight, nine is just,
17 it's the same as six as I see it.

18 MR. RIGALI: That is probably a repeat,
19 Judge.

20 THE COURT: And ten I'm already
21 basically saying that. Okay. Alright, I'll
22 let you know that in the morning too.

23 MR. RIGALI: Going back to seven?

1 THE COURT: Yes?

2 MR. RIGALI: Did you look at the second
3 sentence, Judge, as to whether or not you'd
4 think that would be helpful?

5 THE COURT: Well it may be, but that
6 also goes to whether I'm going to give the
7 first six or not, so I'll wait on that.

8 MS. SAPIRSTEIN: Also I think it's
9 different if you're walking into a bank or
10 convenience store and you're on camera than
11 being fishing a lake, we're not talking
12 about those situations.

13 THE COURT: No, but the issue is the
14 same, isn't it, whether or not the recording
15 is in plain view, although I don't think
16 that cameras in convenience, bank, stores,
17 maybe they audio record, I don't know. I
18 didn't think they did. I thought they just
19 video recorded, so it's a little different.

20 MS. SAPIRSTEIN: I think the issue is
21 different. I think it's actually an
22 expectation issue. I think we all know when
23 we go to the ATM you're being recorded. I

1 don't think that's news to anybody.

2 THE COURT: Well, it's just the plain
3 view that you're looking for, isn't it,
4 essentially?

5 MR. RIGALI: Yep.

6 THE COURT: Okay.

7 MR. RIGALI: One through six is fine,
8 Judge.

9 THE COURT: Alright. I'll take a look
10 at that. Alright, so that's the first.
11 Now, what about this necessity? You have
12 this whole request on the necessity?

13 MR. RIGALI: You have to determine,
14 Judge, whether or not the facts of the case
15 warrant a necessity instruction. Necessity
16 of course is a defense that comes up in some
17 cases and I've cited some of the case law
18 here as to when it does and so forth. It's
19 essentially a balancing of an interest,
20 whether or not there are competing harms and
21 benefits and so forth. You know, the
22 example, irrelevant to the facts of this
23 case are, you don't have a gun permit but

1 you see someone with a gun, they're
2 intending ill will or whatever, you tackle
3 the person, you take away the gun and you're
4 in possession and you've got a gun. So it's
5 a necessity defense that says okay I'm
6 technically in violation of the possession
7 of the firearms statute, the benefits and
8 the values of that outweigh, you know, my
9 breaking the law. You know, there's a fire
10 in a building, you break in to put it out,
11 it's a B&E. Okay. So in this particular
12 case, the argument is that Mr. Frei, you
13 know, has said I have been falsely accused
14 of crimes before by these people, I'm going
15 out into a situation where something may
16 happen. I don't know for sure what's going
17 to happen but I'm entitled to acquire
18 evidence to protect myself in the future as
19 to what might happen. I mean, the proof of
20 the pudding is sure enough he goes out
21 there, and according to the evidence, he
22 tells the police, Johnson tells the police
23 another lie, you know, yeah the guy came out

1 and threatened us and he threatened to kill
2 me, that's why I was upset, you know. So
3 somewhat anticipating that, the question is
4 if this is a wiretap violation whether or
5 not the jury should be able to decide
6 whether those are competing interests. You
7 know, whether Mr. Frei had the right, under
8 those circumstances, to, the right of
9 necessity to acquire evidence to protect
10 himself.

11 THE COURT: Okay. But most of those
12 examples, think all of the examples that
13 you gave and you gave one further one about
14 the dog, I think biting a child or something
15 and he goes on the land to trespass, they
16 all involve emergency type situations and I
17 don't see this as him going down there
18 because of any emergency.

19 MR. RIGALI: Yeah, I have to say there
20 is, there are, I'm aware of the arguments
21 against granting the instruction.

22 THE COURT: Okay, that's denied.

23 MR. RIGALI: Just for your, if you want

1 to make a pencil note, Judge, it's page 605
2 of Hyde.

3 THE COURT: Oh, thank you. Okay, so
4 then we're on to, well you have your, I
5 don't know if you have one, yeah, you have
6 one on battery here. I'm just following
7 along in sort of the order that the
8 complaint is in I guess. So battery, I have
9 a model instruction on battery that seems to
10 be exactly, almost exactly, what Attorney
11 Sapirstein has offered. Actually I think it
12 is exact with a few things missing that
13 aren't applicable. I mean, you left out a
14 few but...

15 MR. RIGALI: Again, so long as my only
16 suggestion, Judge, would be that there would
17 be a joint venture...

18 THE COURT: Yeah, I'm going to get to
19 that next. Okay, so the general instruction
20 on battery that is in the model instructions
21 is what I'm going to give. And again, as I
22 said, that's pretty much exactly what
23 Attorney Sapirstein has asked for other than

1 some sentences that just don't apply, for
2 example, touching of the plaintiff's
3 clothing or an object in the hands of the
4 plaintiff may constitute a battery, things
5 like that that are not, clearly not
6 applicable, I'm going to leave out. Okay,
7 so on the joint venture. So let me ask
8 this, Attorney Sapirstein, I know that you
9 disagree with the whole concept of joint
10 venture, but we're kind of beyond that. In
11 the instruction that he's proposed?

12 MS. SAPIRSTEIN: Well, I actually just
13 got this. So I would like an opportunity to
14 look at the cases. I do object to the joint
15 venture.

16 THE COURT: Mm-hmm.

17 MS. SAPIRSTEIN: Instruction being
18 given.

19 MR. RIGALI: It's on page nine of the
20 original submission.

21 MS. SAPIRSTEIN: Okay, I'm sorry.

22 THE COURT: Yeah, I have it on page
23 six. It says 6 of 10.

1 MS. SAPIRSTEIN: I don't have the one
2 with the 10, I have the 14.

3 MR. RIGALI: I'm sorry, I got it on 9
4 of 14.

5 THE COURT: Alright, so we can do that
6 tomorrow.

7 MR. RIGALI: Your Honor, if you don't
8 mind while you're on it, if you go to that,
9 and I'll just show this to Tani...

10 THE COURT: I'm on it.

11 MR. RIGALI: Again, I just took this, I
12 think it's the boilerplate one, I don't
13 think it applies perfectly but I do think it
14 could be crafted to be more appropriate so
15 that A would be the same, B...

16 MS. SAPIRSTEIN: Well, wouldn't we say
17 alleged assault and battery or not?

18 THE COURT: Well, either alleged or an
19 assault and battery.

20 MR. RIGALI: That's fine.

21 MS. SAPIRSTEIN: Of any as opposed to
22 the?

23 MR. RIGALI: You'll have to criticize

1 the model instruction.

2 THE COURT: So if you determine by a
3 preponderance of the evidence that someone
4 other than Mr. Johnson committed an assault
5 and battery, well, other than Mr. Johnson?

6 MS. SAPIRSTEIN: Mm-hmm.

7 THE COURT: I mean...

8 MR. RIGALI: If that's the evidence,
9 right?

10 THE COURT: Well Mr. Johnson clearly
11 didn't do it so, I mean...

12 MS. SAPIRSTEIN: That's the problem.

13 THE COURT: If you determine by a
14 preponderance of the evidence that someone,
15 I mean that someone committed an assault and
16 battery upon Mr. Frei you may find Mr.
17 Johnson legally responsible for having
18 committed that offense. Do you want other
19 than Mr. Johnson in there? That kind of
20 suggests, to me, that Mr. Johnson did it as
21 well.

22 MS. SAPIRSTEIN: I don't want other
23 than Mr. Johnson in there.

1 MR. RIGALI: No, I don't mind that
2 being out. It wasn't my intention, I just,
3 you know, I just wanted to make it clear
4 that I wasn't saying and never did say that
5 Mr. Johnson physically touched him, that's
6 all.

7 THE COURT: Okay, Mr. Johnson was
8 present at the scene of the assault and
9 battery committed upon Mr. Frei.

10 MS. SAPIRSTEIN: I don't think we
11 should say the assault and battery committed
12 upon Mr. Frei.

13 MR. RIGALI: Well there's a preliminary
14 finding though that they have to make. If
15 you determine...

16 THE COURT: If you determine...

17 MR. RIGALI: That an A&B was committed
18 by someone else then, okay, so.

19 THE COURT: Yeah, I think they got to
20 make that finding first.

21 MS. SAPIRSTEIN: Maybe we could clarify
22 that somehow, I don't know. I'll take a
23 look at it.

1 THE COURT: If you determine by a
2 preponderance of the evidence that someone
3 committed an assault and battery on Mr.
4 Frei.

5 MS. SAPIRSTEIN: Okay.

6 THE COURT: You may find Mr. Johnson
7 legally responsible for having committed
8 that offense if you also find that he was
9 present at the scene, that Mr. Johnson at
10 some point knew another intended to commit
11 an assault and battery. Now, what is this,
12 or intended to commit assault and battery
13 himself. I don't...

14 MR. RIGALI: Again, this is actually
15 part of the boilerplate instruction.

16 THE COURT: I know, and I didn't
17 understand it in there either. I mean, when
18 you're...

19 MR. RIGALI: Well, it goes to all
20 situations. So let's say a bunch of guys go
21 to beat somebody up, they're all intending
22 it and somebody else does the beating and
23 you hang back, you went there with the

1 intent.

2 THE COURT: Is there any evidence of
3 that?

4 MS. SAPIRSTEIN: No.

5 MR. RIGALI: Well, I guess that's a
6 fact issue. But going back to the beginning
7 of that B, should it say knew or had reason
8 to know?

9 MS. SAPIRSTEIN: No.

10 THE COURT: Let's see.

11 MR. RIGALI: I'm looking at acting in
12 concert, 8B.

13 THE COURT: You know, the only joint
14 venture instruction that I have is the
15 criminal one, and that says that the
16 defendant knowingly and intentionally
17 participated in some meaningful way in the
18 commission of the offense.

19 MR. RIGALI: I'd go with that one. I
20 don't know where I got this one, but it came
21 off...

22 MS. SAPIRSTEIN: That's why I want to
23 look at the cases.

1 MR. RIGALI: It came off the research
2 materials that were available to me. And
3 that's why I had some trouble with the
4 language itself. I'm happy that with what
5 you just read because I think that's more
6 online with...

7 THE COURT: You want to do that
8 tomorrow, I got it.

9 MS. SAPIRSTEIN: I do want to that
10 tomorrow, but actually I wasn't going to say
11 that. I just have a threshold question. Is
12 there a joint venture doctrine in civil
13 liability?

14 THE COURT: Well, you know, I thought
15 the exact same thing. I could not find
16 anything that suggested that there was, but
17 it made sense to me, the reason I thought it
18 made sense is that if you can be found
19 criminally responsible in a joint venture
20 situation, why wouldn't you be able to be
21 found civilly?

22 MS. SAPIRSTEIN: Because I think, and I
23 haven't done the research, but either my

1 associate or I will be doing it tonight, I
2 think that it probably goes to the mens rea
3 aspect of the criminal law, which is not
4 present in civil. I mean, I'm not aware,
5 and I guess that's why I sort of skimmed
6 over it when I saw it in the complaint.
7 I've never heard of it in a civil context.

8 THE COURT: Nor have I.

9 MS. SAPIRSTEIN: And, you know, unless
10 I can find, on the cases that Henry, that
11 Mr. Rigali cites are all criminal cases, I'm
12 not really comfortable with this whole
13 instruction, I haven't been since the
14 beginning, but I'm even less comfortable
15 now. So I'll do some research.

16 MR. RIGALI: I'll give you a perfect
17 example.

18 THE COURT: Do you have any civil cases
19 though?

20 MR. RIGALI: I don't have the cases
21 but, I mean, I think you're right on target.
22 I'll give you a perfect example. Years ago
23 I had a wrongful death case, civil case, in

1 which two kids were speeding and drag racing
2 with each other and so forth, one of the
3 cars goes out of control and strikes a kid
4 on a bicycle and kills him, it was awful,
5 civil liability on both.

6 THE COURT: Mm-hmm.

7 MR. RIGALI: Joint venture.

8 MS. SAPIRSTEIN: I would really love to
9 see some actual case law rather than
10 anecdotal support.

11 THE COURT: Well, we'll address that
12 tomorrow then and you can take a look at
13 that.

14 MS. SAPIRSTEIN: I will.

15 THE COURT: Okay, so hopefully we're
16 getting to the ones that are a little bit
17 more straightforward.

18 MR. RIGALI: I think we're beyond the
19 hump.

20 THE COURT: Okay. Defamation. I do
21 have, again, I have a model instruction on
22 defamation and I realize, I think that in
23 all of these instructions somebody suggested

1 and I'm going to do it, that I just refer to
2 people by name, Mr. Johnson, Mr. Frei.

3 MR. RIGALI: I think that's a good
4 idea.

5 THE COURT: And it does, it makes a
6 lot, because by the time you get done with
7 plaintiff and defendant and plaintiff in
8 counterclaim and so forth, it's, so I'm
9 looking first at, well I have both Attorney
10 Rigali's and I also have yours, Attorney
11 Sapirstein, on defamation.

12 MR. RIGALI: I think they're almost
13 identical. I mean, the basic.

14 THE COURT: Yes, I think they are.

15 MR. RIGALI: Well the first three or
16 four. I think I've added that number six, I
17 instruct you that under Mass. General Laws
18 275, et cetera, makes a criminal offense to
19 threaten another one's person or property
20 with a crime, as such, a threat to kill, and
21 I think you might say if you find that it
22 was made and blah, blah, blah, is a crime.
23 I don't think a lot of people know that.

1 THE COURT: Okay. Well, the officer
2 testified to that but I don't have any, do
3 you have a problem with that?

4 MS. SAPIRSTEIN: I don't think so.
5 I'll just look at the statute. I don't
6 think I have a problem with that.

7 MR. RIGALI: I have a copy of the
8 statute here if you want, of 275.

9 THE COURT: Well there is, let me ask
10 this, because the model instructions give,
11 do either of you have those, the model
12 instructions?

13 MS. SAPIRSTEIN: No, not with me.

14 THE COURT: From Superior Court?

15 MR. RIGALI: No.

16 THE COURT: Well, they talk about that
17 the defendant, in this case Mr. Johnson,
18 published a defamatory statement of and
19 concerning Mr. Frei, that Mr. Johnson knew
20 the statement was false, this is exactly
21 what's in yours as well, Attorney
22 Sapirstein, acted in reckless disregard,
23 acted negligently in failing to ascertain

1 whether it was true or false before
2 publishing it and that the defamatory
3 statement either caused Frei economic loss
4 or was the type that is actionable without
5 proof of economic loss.

6 MR. RIGALI: Could that be simplified
7 to delete the phrases that don't apply?

8 THE COURT: Well that's what I was
9 thinking.

10 MR. RIGALI: I don't see any negligence
11 here, why cloud it with the economic losses.
12 It's almost per se liability in a sense, if
13 they find that he made the statement and
14 published it to another person.

15 MS. SAPIRSTEIN: Are you, Your Honor,
16 reading from my proposed instructions? I'm
17 sorry, what page?

18 THE COURT: Eight and nine.

19 MS. SAPIRSTEIN: Eight and nine, well,
20 I guess I don't understand why those
21 wouldn't apply.

22 THE COURT: Why those what?

23 MS. SAPIRSTEIN: I'm sorry, I'm not

1 sure I understand the question.

2 THE COURT: Well, what I think he's
3 suggesting is if you read your number one,
4 Johnson published a false and defamatory
5 statement, okay, that's fine. Knew that the
6 statement was false or acted in reckless
7 disregard as to whether the statement was
8 true or false.

9 MS. SAPIRSTEIN: Yes.

10 THE COURT: Or and then three, it says
11 acted negligently in failing to ascertain
12 whether the statement was true or false.
13 Now there's no, before publishing it,
14 there's no evidence of that, is there?
15 Acted negligently in failing to ascertain?

16 MS. SAPIRSTEIN: No, there's not.

17 THE COURT: So what he's saying is why
18 don't we just eliminate that one.

19 MS. SAPIRSTEIN: Okay.

20 THE COURT: Alright. The defamatory
21 statement either caused Frei economic loss
22 or was of the type that is actionable
23 without proof of economic loss. Okay, so

1 then what you've cited on your next page,
2 footnote 20, a plaintiff is not required to
3 prove economic damages in connection with
4 statements that allege that the plaintiff
5 committed a crime.

6 MS. SAPIRSTEIN: Right, but I just
7 took a look at what Mr. Rigali handed me,
8 the statute, and actually it says if a
9 complaint is made to any such court or
10 justice, which I would take to...

11 THE COURT: Any such what?

12 MS. SAPIRSTEIN: Court or justice, and
13 we had testimony that Brian Johnson never
14 did that. He never filed a criminal
15 complaint.

16 MR. RIGALI: No, a threat to commit a
17 crime against another person does not
18 require that the threat be made to a justice
19 or a judge or whatever.

20 MS. SAPIRSTEIN: But that's what it
21 says here.

22 MR. RIGALI: I am telling you after
23 fifteen years as a state and federal

1 prosecutor and twenty more, twenty-five more
2 as a defense attorney, the courts do not
3 interpret the statute that way. It is a
4 threat to commit a crime, is it. Now there
5 may be other issues about having like
6 presentability and, you know, intent and so
7 on and so forth, but it is not something
8 that is just made to a magistrate or a
9 court.

10 MS. SAPIRSTEIN: Well, it says...

11 THE COURT: What statute are you
12 referring to?

13 MR. RIGALI: It's 275(2), it's sort of
14 chopped up actually. It's 275(2) and (4) I
15 think, or (2) and (5) or something like
16 that. Attorney Sapirstein's looking at
17 that.

18 MS. SAPIRSTEIN: That's what I'm
19 reading and that's what gave me pause. It
20 says if, it says complaint of threat,
21 complaint of threat to commit crime. If
22 complaint is made to any such court or
23 justice that a person has threatened to

1 commit a crime against a person or property
2 of another, such court or justice shall
3 examine the complainant and any witnesses
4 who may be produced on oath, reduce the
5 complaint to writing and cause it to be
6 subscribed by the complainant. Sounds to me
7 like you got to either go to the court or
8 the DA before it's a per se defamation, and
9 he didn't. Now, I could be wrong but that's
10 what the statute says and that's what Mr.
11 Rigali cited when he said it's a criminal
12 offense to threaten to commit a crime.

13 MR. RIGALI: Okay, I think the
14 confusion is, and I think there's plenty of
15 case law of what the elements of a threat to
16 commit a crime are, and those elements
17 always cite to the statute. What this
18 section says is it sets out the procedure
19 for what the Court has to do or should do
20 when someone complains of a threat to commit
21 a crime.

22 THE COURT: Yes, it does.

23 MR. RIGALI: But that is, and then it's

1 the next one, four or five, whatever it
2 says, you know, whoever does this gets six
3 months in jail and so forth.

4 THE COURT: Right.

5 MR. RIGALI: So not artfully done
6 perhaps but needless to say those are the
7 sections which are cited. So if you look at
8 the model instructions those are the cites
9 that come up.

10 THE COURT: Okay. Well, it says if a
11 complaint is made to any such court or
12 justice that a person has threatened to
13 commit a crime such court or justice shall
14 examine the complainant and any witnesses.
15 Alright, that's not the substance of the
16 crime.

17 MR. RIGALI: No.

18 THE COURT: That's the procedure, yeah,
19 I agree. Okay. So I'm not going to worry
20 about that but what about the defamation
21 here is that he supposedly, again, these are
22 all allegations, but I'm just for purposes
23 of talking about the instructions, that Mr.

1 Johnson alleged that Mr. Frei committed a
2 crime or said that he committed a crime by
3 alleging that he made this statement. So
4 when it says in number three the defamatory
5 statement either caused Frei economic loss
6 or was of the type that is actionable
7 without proof of economic loss, I mean, it
8 is the type that is actionable without proof
9 of economic loss, isn't it? I mean, there's
10 no other type.

11 MR. RIGALI: Oh it absolutely is.

12 THE COURT: So I'm not sure why I would
13 say to them either caused Frei economic loss
14 or is of the type that is actionable without
15 proof of economic loss, unless you want me
16 to give them both.

17 MR. RIGALI: No. I mean, if you go to
18 my proposed ones, there's, unfortunately
19 there's two number fives, this is on, well I
20 don't know what page number you've got,
21 Judge.

22 THE COURT: What page is it on?

23 MR. RIGALI: At the top it says

1 defamation count three.

2 THE COURT: Okay, on what page?

3 MR. RIGALI: Well, paragraph, I
4 numbered the paragraphs. So there's two
5 number fives.

6 THE COURT: Oh, page six and seven,
7 okay.

8 MR. RIGALI: I mean, I follow the same
9 thing, here they say, you know, if the
10 defamatory statement either caused economic
11 loss and so forth, and then the next one
12 says if it's a threat to commit a crime you
13 don't need the economic loss. So I agree, I
14 think we can simplify and delete that and
15 simply saying, you know, if he makes a
16 knowingly false or recklessly false
17 statement, if he tells another person about
18 it and if he, if you find by the
19 preponderance that he accused him falsely of
20 a crime, you know, that's it. That's it,
21 those are the elements. I mean, I've got in
22 that, you know, I instruct you as a matter
23 of law that the threat to commit a crime is

1 a violation, it's defamatory per se, those
2 are all correct statements. I don't know
3 how you want to handle those.

4 MS. SAPIRSTEIN: Why do we have to say
5 them so many times?

6 THE COURT: No, we don't. I'll only
7 say them once.

8 MR. RIGALI: I don't want them
9 repeated. These were put out as options so
10 you can circle one and cross out others.

11 THE COURT: Okay.

12 MS. SAPIRSTEIN: So what are doing on
13 defamation?

14 THE COURT: Well, I think that Attorney
15 Rigali's request, they mirror yours to a
16 point. Yours says a statement is defamatory
17 if it tends to hold Frei up to scorn,
18 hatred, ridicule or contempt but this is,
19 isn't this defamatory per se if they find
20 that he made it and that it is a crime? I
21 don't know that we need to get into all of
22 that description of what is a defamatory
23 statement. Because then you go on strained

1 and unnatural interpretations of statements
2 do not make a statement defamatory.

3 MS. SAPIRSTEIN: Mm-hmm.

4 THE COURT: I mean, I'll give it all
5 but I think it tends to kind of get
6 confusing.

7 MR. RIGALI: No, I'd ask that you not
8 because the down side is it's actually
9 confusing.

10 THE COURT: It is kind of confusing. I
11 mean, there's no allegation that he made any
12 defamatory statement except one, which was
13 that he said that Mr. Frei threatened to
14 kill him.

15 MS. SAPIRSTEIN: So you're suggesting
16 we take out those two paragraphs?

17 THE COURT: Yes.

18 MS. SAPIRSTEIN: On page nine?

19 THE COURT: Yes.

20 MR. RIGALI: And previously the ones
21 about economic loss.

22 THE COURT: Well, I didn't hear any
23 evidence of any economic loss.

1 MR. RIGALI: No, I mean the fact that
2 proof of economic loss is required.

3 THE COURT: Is not necessary.

4 MR. RIGALI: I'm just saying that part
5 goes out too because it...

6 THE COURT: And I would put in that a
7 plaintiff is not required to prove economic
8 damages in connection with a statement that
9 alleges that the plaintiff committed a
10 crime.

11 MR. RIGALI: Thank you.

12 THE COURT: I mean, I think that's what
13 the law is. But you have said it a little
14 bit, Attorney Rigali, a little bit probably
15 more understandable.

16 MR. RIGALI: I want you to write that
17 down, Judge, because I came up with more.

18 THE COURT: It's alright. It's on
19 record. At the end of this none of this
20 probably will be understandable, there's so
21 much of it. Alright, let me suggest this,
22 Attorney Sapirstein. Give that some
23 thought. I'm going to draft up tonight what

1 I'm going to give and then I can hear you
2 again in the morning briefly on anything
3 that you have given more thought to, okay?

4 MS. SAPIRSTEIN: Can we get them
5 emailed so we can look at them before we
6 come in. I think this jury's getting
7 annoyed.

8 THE COURT: Emailed?

9 MS. SAPIRSTEIN: Well, this jury seems
10 to be getting annoyed.

11 THE COURT: Yeah, a couple of them are.

12 MS. SAPIRSTEIN: Yeah, two of them.

13 THE COURT: Well, why don't we come in
14 at 8:30.

15 MS. SAPIRSTEIN: Okay.

16 THE COURT: Alright.

17 MS. SAPIRSTEIN: But the part about
18 pure opinions and all that, you're going to
19 give that, right?

20 THE COURT: About what?

21 MS. SAPIRSTEIN: Opinions, statements
22 of fact may be actionable but pure opinions
23 are not.

1 THE COURT: Pure opinions.

2 MS. SAPIRSTEIN: It's page ten.

3 THE COURT: Was it an opinion?

4 MS. SAPIRSTEIN: Well I don't know. I
5 tried to, I got into that a little bit.
6 Remember, this wasn't a statement that Brian
7 Johnson wrote down and published. It was
8 cops that he said it.

9 THE COURT: Yeah, I realize that the
10 first hurdle is that he said it.

11 MS. SAPIRSTEIN: So he could have said
12 something not exactly that, it could have
13 been his opinion and opinions aren't
14 actionable so I would really like to have
15 that in there.

16 THE COURT: Okay, alright.

17 MR. RIGALI: I feel strongly that
18 that's not fair, it's not right. The
19 testimony, if he wants to say I never made
20 the statement.

21 THE COURT: Well he did say that.

22 MR. RIGALI: That's fine, that's a fact
23 issue, but as far as whether it was an

1 opinion versus a fact, that is a statement
2 of fact. There is no other interpretation
3 of that whatsoever.

4 MS. SAPIRSTEIN: I don't think that's
5 necessarily true.

6 MR. RIGALI: If somebody says, in my
7 opinion, you know, I think such and such on
8 an issue, he didn't say in my opinion he
9 accused me of a crime.

10 MS. SAPIRSTEIN: You don't have to say
11 that actually and what you have to do is
12 examine the totality of the circumstances.
13 You don't have to say in my opinion. That's
14 quite frankly why I asked him whether he
15 felt threatened. He doesn't have to say the
16 words in my opinion in order to have it be
17 an opinion.

18 THE COURT: Right.

19 MS. SAPIRSTEIN: They get to decide
20 whether he was stating it as a matter of
21 fact, as in Peter Frei threatened to kill me
22 if we came on his property, as opposed to
23 what he testified to. They get to determine

1 the totality of the circumstances as well as
2 the police officer who said something like,
3 he said something like that. I mean, it
4 could have been, I don't know.

5 THE COURT: But he said, Mr. Johnson,
6 and again, you can correct me if I'm
7 misstating this, he said he never said that.
8 He said he never said that Mr. Frei
9 threatened to kill him if he came on my
10 property.

11 MS. SAPIRSTEIN: That's right, but he
12 said he felt threatened.

13 THE COURT: He said he felt threatened.

14 MS. SAPIRSTEIN: Correct.

15 THE COURT: So what is the evidence
16 that he said anything regarding an opinion?
17 I mean, he just denies he said the whole
18 statement.

19 MS. SAPIRSTEIN: Right.

20 THE COURT: And he said he felt
21 threatened.

22 MS. SAPIRSTEIN: But...

23 THE COURT: But he didn't say like well

1 I said, it was my opinion that he was going
2 to come on and kill me, you know what I
3 mean? Not that he'd have to say it was my
4 opinion but he didn't say he said anything
5 like that.

6 MR. RIGALI: It's his opinion that he
7 was threatened.

8 THE COURT: Well I know.

9 MR. RIGALI: It's not his opinion when
10 he makes a statement of fact.

11 THE COURT: But it's not like we're
12 taking a statement and looking at it and
13 saying is this a factual statement or is
14 this an opinion. He completely denies he
15 said the statement.

16 MS. SAPIRSTEIN: Right.

17 THE COURT: So how could the jury find
18 that it was an opinion? Either he said it
19 or he didn't say it. And if he said it, is
20 it an opinion.

21 MS. SAPIRSTEIN: I guess it depends on
22 what part of the statement they're saying
23 was defamatory. Was it...

1 MR. RIGALI: Stay off my property or
2 I'll f-ing kill you, that's what's in the
3 police report.

4 MS. SAPIRSTEIN: But there was
5 something before that in the police report,
6 I think.

7 MR. RIGALI: Frei came out onto the
8 property, onto the ice, and was yelling at
9 the group stating they were trespassing on
10 his property. Johnson said he felt
11 threatened, Johnson said he felt threatened
12 by Frei because Frei said stay off my
13 property or I'll f-ing kill you. Johnson
14 told me he was concerned for his safety
15 because of this threat. He further stated
16 he did not assault and so on and so forth.
17 These are not opinions.

18 MS. SAPIRSTEIN: So the only statement
19 that you're going to argue was threatening,
20 is defamatory, is quote "stay off my
21 property or I will fucking kill you".

22 MR. RIGALI: Yes, from a defamatory per
23 se the false accusation...

1 MS. SAPIRSTEIN: Okay, if that is in
2 fact true...

3 THE COURT: Yeah, I think that's all
4 the evidence was.

5 MS. SAPIRSTEIN: Well...

6 THE COURT: There wasn't any evidence
7 that there was some other statement that was
8 sort of an opinion or other statement even.
9 That's the statement, isn't it?

10 MR. RIGALI: Yes.

11 MS. SAPIRSTEIN: Then that's fine.

12 THE COURT: So I'm not going to give
13 the opinion section.

14 MS. SAPIRSTEIN: Okay.

15 THE COURT: Okay. So the damages...

16 MR. RIGALI: I'm okay with the rest of
17 it. It's the same thing I've got in mine.

18 THE COURT: Yes. It's right out of the
19 model instructions on damages, actual loss.

20 MS. SAPIRSTEIN: You're going to give
21 it to them?

22 THE COURT: Yeah, the part that you
23 wrote here on page ten, if you have found

1 that Mr. Frei has proven each of the
2 elements that I have given you then you may
3 award money damages and then it goes on to
4 the purpose and so forth. That whole
5 paragraph and then the next paragraph, you
6 may not award damages to Mr. Frei to punish
7 Mr. Johnson, yeah, I'll give that whole
8 paragraph, both of them.

9 MR. RIGALI: Agreed.

10 THE COURT: Okay. Alright, so on the
11 abuse of process, I don't want to take the
12 time to go through that because I think
13 that's probably out.

14 MR. RIGALI: I don't care.

15 MS. SAPIRSTEIN: What about the
16 emotional distress?

17 THE COURT: Yeah, I'm getting to that.
18 Okay. Oh yeah, you have it in a little
19 different than Attorney Rigali. Okay,
20 intentional infliction of emotional
21 distress. Did you submit anything on that?

22 MR. RIGALI: I don't think I did,
23 Judge, because I think it's one of those

1 boilerplate instructions, both intentional
2 and negligent. I don't think I did.

3 THE COURT: Alright. So intentional,
4 do you have Attorney Sapirstein's?

5 MR. RIGALI: I do, right in front of
6 me, yeah.

7 THE COURT: Okay. That looks like it's
8 from the model instructions as well.

9 MR. RIGALI: I'm okay with that.

10 THE COURT: Alright. So I will give
11 that, Attorney Sapirstein, as you have
12 requested it. Negligent infliction.

13 MR. RIGALI: I'm okay with this one too.

14 THE COURT: Mm-hmm. Okay. And assault
15 and oh, okay, assault and the civil rights.
16 Okay. So what about on the assault?

17 MR. RIGALI: I thought we did civil
18 rights.

19 THE COURT: We didn't do the civil
20 rights yet. No, we did the wiretap. The
21 assault, I have again, the model
22 instructions on civil assault.

23 MR. RIGALI: I'm not sure that there's a

1 bunch of sets of these model instructions
2 going around because I copied them exactly
3 and then I get in here and there's a little
4 word here...

5 THE COURT: Oh, you did, let's see.

6 MS. SAPIRSTEIN: Pretty close.

7 THE COURT: It looks like you have, you
8 did copy them exactly, except you did not,
9 yeah, you copied them exactly up until
10 paragraph, where you end with paragraph six.
11 There actually is more to the model
12 instructions than that.

13 MR. RIGALI: Okay.

14 THE COURT: The first element, you must
15 prove by a preponderance of the evidence
16 that Mr. Johnson engaged in an overt act,
17 the overt act, there's an explanation of
18 each element that you didn't give.

19 MR. RIGALI: More so than appears in
20 number five, paragraph five?

21 THE COURT: Yes, much more so.

22 MR. RIGALI: Okay.

23 THE COURT: It's four pages long in the

1 model instructions.

2 MR. RIGALI: My only concern is that
3 both theories of either attempted battery
4 or, you know, posing the eminent threat, so
5 long as both those pictures go to the jury,
6 I'm okay with the boilerplate language.

7 THE COURT: Yes, because you have
8 number three, which is the attempted
9 battery, number four, eminently threatened
10 battery, okay. It just goes into more
11 explanation of what number one, what an
12 overt act is, and what it says is the overt
13 act need not be substantial but mere words
14 are not enough to constitute the act.
15 However, words can affect a generally
16 inoffensive overt act such that together the
17 words and act equate to an assault. Second
18 element is that the defendant engaged in the
19 overt act intentionally. The intent that is
20 required for an assault is either the intent
21 to cause harmful or offensive contact with
22 Mr. Frei or to make Mr. Frei apprehensive of
23 immediate physical contact.

1 MS. SAPIRSTEIN: Yeah, that's in mine.

2 THE COURT: That's the model. So I was
3 going to give the whole thing. It just goes
4 through more explanation of each element.

5 MS. SAPIRSTEIN: I think I took out
6 some of the stuff that were completely
7 inapplicable to this case.

8 THE COURT: Yes, I did as well. Thus
9 if a person is asleep and learns of the
10 defendant's...

11 MS. SAPIRSTEIN: Right.

12 THE COURT: Yeah, I'm not going to say
13 that. Okay. So that's all set. So then
14 the last one is the...

15 MS. SAPIRSTEIN: Civil rights.

16 THE COURT: Civil Rights Act. And
17 there actually is a model instruction on
18 that as well. Thank God for these model
19 instructions or we'd be really writing a
20 lot. Did you use the model instruction,
21 either of you?

22 MS. SAPIRSTEIN: My associate did
23 these, but I'm pretty sure she did.

1 MR. RIGALI: I did.

2 MS. SAPIRSTEIN: I can't swear to it.
3 They look the same up until the examples.

4 THE COURT: Let's see.

5 MR. RIGALI: I have no fault with the
6 model instruction, however, it's just a
7 little, it's a little wordy. I mean, can
8 the Court just instruct them that...

9 THE COURT: A little wordy?

10 MR. RIGALI: Yeah, well, that the
11 freedom of expression is a Constitutional
12 and protected right, if they feel he had the
13 freedom of speech or freedom of expression,
14 that that is sufficient and then they have
15 to find the other things? If they don't
16 find he was exercising his right of freedom
17 of expression, I don't know.

18 THE COURT: Well, yeah, I mean, it says
19 under the model instructions for secured
20 right, it does define what a secured right
21 is but then in the last paragraph it says in
22 this case the plaintiff alleges that he was
23 engaged in or enjoying his right, I would

1 put in to free speech and expression.

2 MR. RIGALI: Right.

3 THE COURT: That right is secured by
4 the Constitution.

5 MR. RIGALI: Right.

6 THE COURT: So you mean leave out all
7 of the other definition of secured and so
8 forth?

9 MR. RIGALI: Well, I'm just wondering
10 if we could agree that, I mean, the issue I
11 don't think is whether or not Mr. Frei's
12 activities were protected, the issue is
13 whether there was intimidation, coercion,
14 whether the reason for these things
15 happening was to intimidate, but I don't
16 think, you know, an instruction defining
17 what the First Amendment rights are is
18 needed, if we could agree on the fact that
19 what he's doing on the blog is, comes within
20 the secured right of free expression.

21 MS. SAPIRSTEIN: I'd rather have you
22 instruct on the security.

23 THE COURT: Alright. Okay.

1 MS. SAPIRSTEIN: It's not that much.
2 Well, the sum total is a lot. That part is
3 not that much.

4 MR. RIGALI: There's a death by a
5 thousand papers.

6 THE COURT: No kidding. Okay, so the
7 rest of the model instruction just says
8 interference or attempted interference, so
9 that defines that. And then it defines
10 threats, intimidation or coercion. So if
11 you're fine with that, I mean, it is a
12 little wordy but they're going to have heard
13 so much already.

14 MS. SAPIRSTEIN: I'm fine with that.

15 MR. RIGALI: Yeah, they're going to be
16 sleeping. I would just ask the Court to
17 look at some of the, again, Judge, I think
18 it just saves time and to shorten it, if you
19 look at some of the suggestions that I've
20 made here. I'm looking at my page now that
21 says violation of Mass. civil rights at
22 count seven, boilerplate up front, a line
23 and then rights secured to Mr. Frei by the

1 Constitution, basically the free speech and
2 expression rights and the next page is the
3 privacy right, which I don't think we need
4 to go to. As a matter of fact, I'll
5 withdraw that.

6 THE COURT: Okay.

7 MR. RIGALI: But here, you know, as a
8 citizen of the United States and resident of
9 Massachusetts Mr. Frei has a right to
10 associate, speak freely, I mean...

11 MS. SAPIRSTEIN: I think once is
12 probably enough though as opposed to four
13 times.

14 MR. RIGALI: Well again, I don't think
15 all of them have to do it but it's just a
16 suggestion to the Court. I mean, at least
17 in the litigation I've had before you do a
18 bunch of these and then you say no, I'm
19 going to do two but not three, and I don't
20 mean that all four of these should go in.

21 MS. SAPIRSTEIN: I thought Your Honor
22 said that you were going to do the free
23 speech and expression.

1 THE COURT: Well, I was, and again, in
2 the model instructions it says in this case
3 the plaintiff alleges that he was engaged in
4 or enjoying his right to free speech and
5 expression, that right is secured by the
6 Constitution or the laws of the United
7 States of the Commonwealth or of the
8 Commonwealth. So I say that right in the...

9 MR. RIGALI: Right.

10 THE COURT: Okay.

11 MS. SAPIRSTEIN: There was no claim for
12 a secured right of privacy under Chapter
13 250.

14 THE COURT: He withdrew it, he withdrew
15 it so I'm not going to...now, you have also
16 one further request?

17 MR. RIGALI: I believe that's the
18 adverse inference...

19 THE COURT: Adverse inference from
20 missing witnesses.

21 MS. SAPIRSTEIN: I object to that.

22 THE COURT: Yes, I...

23 MR. RIGALI: Well, I would assume that

1 she would object to it, but it's pretty
2 clear in the law that if these different
3 elements are met, which they were in this
4 morning's testimony, that Mr. Frei is in
5 fact entitled to the adverse inference.

6 MS. SAPIRSTEIN: I guess I would argue
7 that they were met. I don't think our case
8 against Mr. Frei is weak. I don't think his
9 case against us is sufficiently strong and
10 I'm not sure who the absent witnesses you're
11 even talking about are.

12 MR. RIGALI: They're right there.
13 There's seven of them right up on the board.

14 MS. SAPIRSTEIN: Oh, I see. That was
15 your case against us, not our case against
16 you. Our case against you is just the
17 wiretapping.

18 MR. RIGALI: Right, and so if you read
19 down to 1(b), right, you have 1(a) and 1(b).

20 MS. SAPIRSTEIN: Right.

21 MR. RIGALI: Again, this is from the
22 model instruction, so 1(b) I think probably
23 is more applicable, alright. So Mr. Frei,

1 in other words, just get the instruction,
2 right...

3 MS. SAPIRSTEIN: I disagree quite
4 frankly, that the case was sufficiently
5 strong. It's his burden. I don't need to
6 call any witnesses at all. He has a burden
7 by preponderance of the evidence to prove
8 all of the claims that he brought. He could
9 just as easily have called them as me, so I
10 would object. I think it's really
11 prejudicial quite frankly, Your Honor.

12 THE COURT: Well what about that, that
13 it is his burden? It is Mr. Frei's burden
14 to prove the counterclaims.

15 MR. RIGALI: Whether it's in a criminal
16 case, a civil case, whatever, it is fair
17 game, if the Commonwealth has witnesses
18 that, you know, witnessed an incident or
19 whatever and they don't call them and that's
20 made clear that they're available, they
21 could have come in, you know, the defense
22 requests an instruction. The same thing...

23 THE COURT: Yeah, but that's the

1 Commonwealth's burden of proving that.

2 MR. RIGALI: Well, it's Frei's burden.
3 It's Frei's burden of proving that...

4 THE COURT: So why should he have to
5 call witnesses?

6 MR. RIGALI: He doesn't have to but his
7 failure to do so in an obvious...

8 MS. SAPIRSTEIN: No.

9 MR. RIGALI: Hold on, hold on, hold on.

10 MS. SAPIRSTEIN: Sorry.

11 MR. RIGALI: I hope this isn't, I hope
12 your idea of an adverse inference isn't a
13 new thing. I mean...

14 THE COURT: No, it isn't, but if he
15 doesn't have the burden why would you draw
16 an adverse inference against him when he has
17 no burden?

18 MR. RIGALI: In any case the party that
19 doesn't have the burden, that has the
20 burden, can still be the subject of an
21 adverse inference in any case. So the
22 Commonwealth has the burden in a case and
23 vice versa, and vice versa. It's a little

1 trickier in the criminal case.

2 THE COURT: So but what you're saying
3 then is the Commonwealth has the burden,
4 they don't call a witness.

5 MR. RIGALI: Right.

6 THE COURT: Okay, but in this, let me
7 turn it around to the facts of this but in a
8 criminal context, the Commonwealth has the
9 burden, the defendant doesn't call a
10 witness. Now the defendant can get an
11 instruction, or the Commonwealth rather, can
12 get an instruction that the defendant could
13 have called this witness but didn't?

14 MR. RIGALI: Very tricky in a criminal
15 case because unlike the civil, the defendant
16 has the right of silence, he has greater
17 Constitutional rights, okay. But the
18 failure, and here's the situation, you've
19 got a question of an allegation of an
20 assault and an assault and battery.
21 Supposedly...

22 THE COURT: And he has to prove it.

23 MR. RIGALI: And he has to prove it,

1 correct.

2 THE COURT: Okay.

3 MR. RIGALI: But there are seven
4 witnesses that were friends of Mr. Johnson
5 who were immediately present, none of them
6 showed up here to back him up. None of
7 them, I mean, if he didn't testify that's
8 one thing, but he testified.

9 THE COURT: But he doesn't have to
10 prove the case, so why would he have to, why
11 should an adverse inference be drawn against
12 him? I mean, I guess I have trouble
13 following that when he has no burden of
14 proof.

15 MR. RIGALI: Why in a criminal case, I
16 mean, again, I don't have the cites in front
17 of me, but they're legendary. I mean...

18 THE COURT: Yeah, but it's not against
19 the person who doesn't have the burden of
20 proof.

21 MR. RIGALI: No, it is. The
22 Commonwealth can call a, can request, under
23 certain circumstances, I mean, there's many,

1 many, many cases, the primary case law on
2 the point is criminal. That the
3 Commonwealth has, and the cases are very
4 clear, if the Commonwealth is to seek an
5 adverse interest against a defendant for the
6 failure of the defendant to call an
7 available witness and all these other
8 findings, then the Commonwealth can request
9 an adverse inference for the defendant's
10 failure to contact, you know, to call such
11 and such a witness. Those are criminal
12 cases. Those are criminal cases.

13 THE COURT: Okay, I guess I'd have to
14 see them. I'll take a look at it because
15 I'm not...

16 MR. RIGALI: If you give me two seconds
17 I think I have some of those cases here.

18 MS. SAPIRSTEIN: I've never, I mean, in
19 a civil case. I'm just standing up, I know
20 you said we don't have to but I've been
21 sitting for so long.

22 THE COURT: That's alright, you can sit
23 or stand.

1 MS. SAPIRSTEIN: I've never has this
2 request, but I've never had to call
3 witnesses to help bolster and present cross
4 examination, my opponent's case, and gotten
5 adverse inference. I've never seen it
6 before in the civil area.

7 THE COURT: Yeah, it doesn't make a lot
8 of sense to me but, I mean, maybe, I'll look
9 at it.

10 MR. RIGALI: This is a model, I mean,
11 again, there's model instructions right
12 here. There are numerous, numerous
13 citations.

14 THE COURT: What does it say?

15 MR. RIGALI: And, you know, here's a
16 case, actually I've got a copy, this is
17 where the Commonwealth, excuse me, where the
18 defense does not call a witness, it's right
19 there. All the cases.

20 MS. SAPIRSTEIN: Do you have one for
21 me?

22 MR. RIGALI: I only have a couple,
23 Tani. But these were the model

1 instructions.

2 MS. SAPIRSTEIN: Can I just look at it
3 then?

4 MR. RIGALI: Sure.

5 MS. SAPIRSTEIN: Thanks.

6 MR. RIGALI: And then here's, you now,
7 Lisa Leokos had this great book on evidence,
8 and I think it's Roden and somebody else
9 took it over so I don't remember the
10 authors, but on 3.62, failure to call a
11 witness, perhaps the most common example of
12 an adverse inference of this type involves
13 the failure to call a witness who would
14 normally be expected to be called, where a
15 party has knowledge of a person who can be
16 located, brought forward, who is friendly to
17 or at least not hostile, hostilely disposed
18 toward, the party who can be expected to
19 give testimony of distinct importance, the
20 party would naturally offer that person as a
21 witness. If then without explanation he
22 does not do so, the jury may, if they think
23 reasonable under the circumstances, infer

1 that the person had been called, who had
2 been called, would have given testimony
3 unfavorable to that party, that's why
4 they're not there. Case citations, they're
5 criminal cases. And by the way, I'll give
6 you, this is an SJC case from 1998. The
7 failure of the defendant to call its
8 president and controlling stockholder, the
9 person presumably most knowledgeable of the
10 facts in question, and present during the
11 entire trial.

12 THE COURT: Alright, so don't we have
13 to start with the premise that if the other
14 party's case is strong enough, that the non-
15 calling party would be naturally expected to
16 call the witness, such an inference may be
17 permitted even if the witness is available
18 to both parties. So you're saying that the
19 case is strong enough?

20 MR. RIGALI: Well, you've got Mr. Frei
21 and you've got Dana Manning and you've got
22 injuries, you got medical attention, so
23 you've got objective facts, which clearly...

1 THE COURT: Yeah, okay.

2 MR. RIGALI: Again...

3 THE COURT: No medical records, or you
4 don't mean the medical records, you mean
5 testimony.

6 MR. RIGALI: No, we have testimony, he
7 had medical treatment, okay, so that case
8 gets to the jury on assault and assault and
9 battery so it's strong enough so that a
10 normally, I mean, again, Mr. Frei's case
11 against Johnson is sufficiently strong
12 enough that Mr. Johnson would normally be
13 expected to call the missing witnesses. Why
14 wouldn't he call, if he's got seven
15 witnesses who presumably would testify that
16 none of this occurred, that the threat
17 wasn't made, that the assault never
18 occurred, that the A&B never occurred, why
19 wouldn't you call at least one of them?

20 THE COURT: Alright, I'll give it some
21 thought until tomorrow.

22 MS. SAPIRSTEIN: Do you want to be
23 heard by me at all on this?

1 THE COURT: Yeah.

2 MS. SAPIRSTEIN: I think we don't get
3 over the first hurdle. I think getting to a
4 jury doesn't necessarily mean that his case
5 was sufficiently strong that he'd normally
6 be expected to call the witnesses. He's got
7 the burden of proof, he could have called
8 them all, but even if you want to pass that
9 for a moment. I know that Mr. Rigali asked
10 him, asked Mr. Johnson, if everybody was
11 around. I didn't hear him ask if everybody
12 was available to come to this trial this
13 week, so even if you want to pass the first
14 two, we don't get passed the third, that
15 they're available. And nor did we get to
16 their absence not being explained by other
17 circumstances. So I'm not passing on the
18 first two, I'm just saying all four have to
19 be met and in answer to the expectation,
20 this is a credibility contest, let's call it
21 the way it is. They're either going to
22 believe Mr. Johnson or they're going to
23 believe Mr. Frei. So whether or not we get

1 to the expectation of calling other
2 witnesses, this case is against Mr. Johnson,
3 it's not against anyone else. Mr. Frei
4 accused Mr. Johnson of various things.
5 There's no evidence that Mr. Johnson touched
6 him, trespassed, did anything else, so why
7 would I call anybody else.

8 THE COURT: Alright, I'll take a look
9 at that.

10 MR. RIGALI: And I guess there's a
11 difference between getting the actual
12 instruction and me being able to argue it.
13 I do, unless you tell me I can't.

14 MS. SAPIRSTEIN: I would object to that
15 as well.

16 THE COURT: No, I will, okay, I'll do
17 that as well.

18 MR. RIGALI: Do you want, would you
19 like, Judge, just to save a little bit of
20 time, I do have a copy of, again, I call is
21 Leech and Leokos, the authors of Change, but
22 it's the relevant chapter.

23 THE COURT: Now, the proposed jury

1 instructions...

2 MS. SAPIRSTEIN: Verdict form?

3 THE COURT: I mean proposed verdict
4 slip, I apologize. Did you each have the
5 opportunity to look at each others?

6 MR. RIGALI: I did not.

7 MS. SAPIRSTEIN: I had a brief
8 opportunity to look at Mr. Rigali's this
9 morning right before trial.

10 THE COURT: Okay, let me just suggest
11 this and maybe you need to look at them
12 overnight. The wiretap count, I think that,
13 let's see, well your one, Attorney Rigali,
14 on the second, the alternate, that has the
15 privacy thing in it so I wouldn't give that.

16 MR. RIGALI: Oh right.

17 THE COURT: Do you have yours yet?

18 MS. SAPIRSTEIN: I have mine, I don't
19 have his. Now I have his, thank you.

20 THE COURT: Attorney Sapirstein's
21 breaks it down better, I think, because
22 there are different ways that you can
23 violate that statute. But in any event,

1 Attorney Sapirstein, there needs to be a
2 damage, there's no damages there.

3 MS. SAPIRSTEIN: We have damages at the
4 end. We can put them at the, but actually I
5 wanted to add punitive damages under the
6 wiretap because we do get those if you
7 prevail. There's a damage section and it's
8 probably not as elegant as it could be.

9 THE COURT: There's a damage section,
10 and is that at the end?

11 MS. SAPIRSTEIN: Page seven.

12 THE COURT: Oh, I see, oh, alright.

13 MS. SAPIRSTEIN: I can do it the other
14 way.

15 THE COURT: I think it's easier, no,
16 you don't have to because I think Attorney
17 Rigali did and I'll take a look at that
18 tonight, but for that reason I did find that
19 his were a little bit, I found them easier
20 to follow because when you get to the end of
21 yours and you got to go, if you answered yes
22 to 9, 10, 11, 12, it kind of gets confusing
23 flipping back and forth.

1 MS. SAPIRSTEIN: Right.

2 THE COURT: So just take a look at each
3 others, alright? I've looked at both of
4 them. I think that Attorney...

5 MR. RIGALI: I have no problem with her
6 proposal on the wiretap, so long as again,
7 we have some secrecy instructions.

8 THE COURT: Yep.

9 MR. RIGALI: Or not necessarily secrecy
10 instructions. You're going to give the
11 instructions but I think there's got to be
12 some, no I don't mention secrecy in a
13 specific one on the, I'm sorry, I'm a little
14 bit punch drunk here, I'm okay with Attorney
15 Sapirstein's suggestion here, because it has
16 secret recording, secret recording, I think
17 that's an important part that you'll handle
18 on the instructions.

19 THE COURT: Alright. Okay. Why don't
20 you look them over overnight? Most of the
21 ones that I looked at that I thought were
22 the easiest to follow were Attorney
23 Rigali's.

1 MR. RIGALI: Oh, as far as the assault,
2 the assault and battery, those?

3 THE COURT: All of them. All of them,
4 other than that wiretap one I had an issue
5 with. They're not largely different in a
6 lot of ways and so if you look them over and
7 you find some glaring differences, let me
8 know. I just thought his were easier to
9 follow because it has the damages on each
10 separate count. I don't think that, well
11 let me just say this, can you come in at
12 8:30?

13 MR. RIGALI: I can, sure.

14 THE COURT: Alright. So why don't you
15 come in at 8:30 and I'll address the
16 remainder of the instructions and then, Jay,
17 I'm probably going to use most of Attorney
18 Rigali's, but we'll feed in parts of
19 Attorney Sapirstein's but I'll give them to
20 you in the morning. And then if you have
21 any other additions that you want to make.
22 I mean, he'll have some time to work on the
23 jury verdict slip while you're doing your

1 closings.

2 MR. RIGALI: Jay, do you want me to
3 still email my proposed slips?

4 THE COURT: Oh, you didn't email them
5 yet?

6 MR. RIGALI: No, not at lunch, no.

7 THE COURT: You ate lunch?

8 MR. RIGALI: Downstairs, yes.

9 THE COURT: Yeah, email them because
10 it's much easier to, yeah.

11 MR. RIGALI: Oh, I'm with you.

12 THE COURT: One thing that you say in
13 here is every time you talk about damages, I
14 mean, generally I use just the word money.
15 I mean you have what amount of damages will
16 fairly compensate Mr. Frei.

17 MR. RIGALI: Money's fine by me. The
18 problem with these boilerplate things, in my
19 experiences, some of them talk in damage,
20 some of them talk money, some of them say
21 actual injury.

22 THE COURT: I know. Okay. Alright, so
23 come in at 8:30 and we'll take up everything

1 that's left and then go from there.

2 MR. RIGALI: Judge, thanks very much
3 for your patience.

4 THE COURT: Well thank you for all your
5 submissions. Very helpful. I mean that
6 seriously.

7

8 (HEARING CONCLUDED)

9

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