

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT
WESTERN DIVISION

Hampden, ss.

Docket No. 201143CV293

BRIAN JOHNSON,
Plaintiff

v.

PETER FREI,
Defendant

HEARING HELD ON FEBRUARY 28, 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 COURT: Good morning everybody.

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Okay, let me just backtrack a little bit on

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yesterday. I just want to make it clear

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that I did direct a verdict on the abuse of

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process, okay. I know I sort of took that

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under advisement. Is there anything else,

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did you get the jury instructions?

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MS. SAPIRSTEIN: Yes, Your Honor.

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THE COURT: Did you get a chance to look

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at them?

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MS. SAPIRSTEIN: Yes, Your Honor. I

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only actually have one comment, but other

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than that I'm fine.

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THE COURT: Okay, what comment do you

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have?

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MS. SAPIRSTEIN: My comment is on the

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wiretap violation.

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THE COURT: Yes.

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MS. SAPIRSTEIN: The paragraph right

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under number four that says in determining

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whether the recording was made secretly.

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THE COURT: Yes.

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MS. SAPIRSTEIN: I don't see that in

1 either the statute or Hyde, knew or should
2 have know. And actually what Hyde seems to
3 say is that it's a strict prohibition on all
4 secret recordings made without their
5 permission or knowledge. And then in the
6 footnote that actually Mr. Rigali pointed to
7 yesterday, twelve, they talk about whether
8 the motorist baited the cops and they said
9 that didn't really matter either so I just
10 don't see the reasonable person standard.

11 THE COURT: Reasonable person?

12 MS. SAPIRSTEIN: Well, that's basically,
13 I mean, knew or should have known. It
14 doesn't put the onus on, that would be my
15 only objection.

16 THE COURT: I have the Hyde case here.
17 I did read that page...

18 MR. RIGALI: I think it's page 606,
19 Judge.

20 THE COURT: Well I had it here but it
21 was 605. You know, when Hyde says, oh here
22 it is, on page 604 to 605, now you're saying
23 that's a footnote? No, that's not a

1 footnote. Yeah, the problem here could have
2 been avoided if at the outset of the traffic
3 stop the defendant had simply informed the
4 police of his intention to tape record the
5 encounter or even held the tape recorder in
6 plain sight. I suppose I could word that
7 differently and say if you find that the
8 tape recorder or part of it, I didn't want
9 to get into all that, but that suggests to
10 me that it's not secret if it was in plain
11 sight. Maybe I could word it differently
12 than that.

13 MS. SAPIRSTEIN: And I agree that that's
14 what it says. Of course, there's absolutely
15 no evidence here that the recorder was in
16 fact in plain sight, it was just a wire.

17 THE COURT: No. But that's why I put
18 knew or should have known. I don't know,
19 maybe it's knew?

20 MS. SAPIRSTEIN: I think that's a
21 tougher standard because I think, I really
22 think that the wiretap statute is really
23 essentially a strict liability, it puts the

1 onus on the recorder to either inform or
2 seek permission, and it does have the seek
3 permission language in there.

4 THE COURT: Yes. But doesn't that line
5 in there suggest that you don't have to seek
6 permission, if, for example in that case,
7 they had held the recorder up like that. I
8 mean, if he came out and held the recorder
9 up like that he doesn't have to seek
10 permission, does he?

11 MS. SAPIRSTEIN: That's true. But I
12 think in this case the concern is, I think
13 this is a harder standard for Mr. Johnson
14 than the statute or the Commonwealth v.
15 Hyde, under the facts of this case. I
16 wouldn't have a problem if Your Honor said
17 something like whether it was held in plain
18 view, because that's actually right out of
19 Hyde and that goes to the facts in this
20 case, but knew or should have known, I think
21 that goes beyond what Hyde does because
22 let's say Brian Johnson should have known
23 because he's had all these issues with Peter

1 Frei that he would record him when he came
2 on the ice. I think that goes beyond the
3 statute, that's my concern.

4 THE COURT: Alright. I thought that I
5 read, there were other cases, maybe Jackson,
6 I'm trying to remember the name of them, but
7 they talked about the fact that it would not
8 be a violation, for example, if somebody, I
9 think Attorney Rigali offered this example,
10 if somebody came into a bank and the cameras
11 are in plain view.

12 MS. SAPIRSTEIN: I don't have any issue
13 with the plain view language at all, because
14 that's what the Court said. My concern
15 is...

16 THE COURT: Alright, how do you think
17 that it would be better drafted there in
18 your opinion?

19 MS. SAPIRSTEIN: I would actually just
20 follow Hyde.

21 THE COURT: So what would you say?

22 MS. SAPIRSTEIN: I would say if he had
23 informed Mr. Johnson of his intention to

1 tape record the encounter or held the Iphone
2 in plain sight, that's what the law is,
3 that's what I would say. My concern, quite
4 frankly, because in the counterclaim case
5 all that stuff came in, the history, the
6 animosity. Maybe a juror would say well,
7 you know, they've had this history of
8 problems so he should have known based on
9 that that he might record them. I mean, I
10 think that's a contorted view of the
11 evidence but it's a possible one and that's
12 my concern. So I wouldn't have any problem
13 quoting Hyde at all, if he held it in plain
14 sight or if it was in plain sight.

15 MR. RIGALI: If I could be heard on
16 this, Judge.

17 THE COURT: Yeah, go ahead.

18 MR. RIGALI: First of all, if you look
19 at (d) in the proposal that we made, I
20 noticed that, I came away yesterday thinking
21 that you were going to instruct on some of
22 the things that we had suggested in Mr.
23 Frei's wiretap instructions. It is not a

1 violation of the statute if the recording
2 was not done secretly.

3 THE COURT: Oh no, well, I had written
4 no next to all of those when we were talking
5 about it.

6 MR. RIGALI: Well (d) says if you find,
7 if you find the microphone used to record
8 Mr. Johnson's remarks was in plain sight at
9 the time the recording was made, you may
10 consider that fact in determining whether
11 Mr. Johnson knew or reasonably should have
12 known whether he was being recorded.

13 THE COURT: Okay, what about that?

14 MS. SAPIRSTEIN: If you find...

15 THE COURT: If you find the
16 microphone...

17 MS. SAPIRSTEIN: I mean, I think that
18 goes, I think we're talking about the actual
19 tape recorder, which I think we can all
20 agree is larger and more obvious.

21 MR. RIGALI: But we're not talking about
22 that at all.

23 MS. SAPIRSTEIN: That's what Hyde is

1 talking about, Mr. Rigali.

2 THE COURT: Yeah, Hyde does talk about
3 the recorder.

4 MR. RIGALI: What we are talking about
5 in this case.

6 MS. SAPIRSTEIN: I know, but I don't
7 think that's the law in Massachusetts and my
8 concern, I don't have any problem with the
9 language right out of Hyde, which says if
10 the recorder was in plain view.

11 THE COURT: Alright. Well, you know
12 what, I think what I'm going to do is say
13 this, in determining whether the recording
14 was made secretly, you may consider whether
15 based on all of the circumstances Mr.
16 Johnson knew that he was being recorded.

17 MS. SAPIRSTEIN: That's fine, Your
18 Honor.

19 THE COURT: Okay?

20 MS. SAPIRSTEIN: Thank you.

21 THE COURT: Alright.

22 MS. SAPIRSTEIN: I don't have any other
23 problems.

1 THE COURT: Anything else on the rest of
2 them?

3 MS. SAPIRSTEIN: No, no other issues.

4 THE COURT: Okay, Attorney Rigali,
5 anything else on those instructions?

6 MR. RIGALI: Well, I guess not anything
7 I haven't stated.

8 THE COURT: Well, tell me what.

9 MR. RIGALI: Well, I guess, I mean,
10 again...

11 THE COURT: What about the aiding and
12 abetting, because that was...

13 MR. RIGALI: Before I move off of that,
14 not to beat a dead horse, but if you were to
15 look at (d) again, if the microphone used
16 was in plain sight you may consider that
17 fact in determining whether Mr. Johnson has
18 proved that the recording was secret. I
19 mean, I think that's a perfect instruction,
20 I think it's a fair instruction. I mean,
21 I'm not trying to ignore your remarks, but I
22 mean, really and truly. The alternative is
23 that it is, I suppose in some sense, sort of

1 a strict liability statute, but it's only a
2 strict liability statute on this point, and
3 there's been no secret that he made the
4 recording, there's no secret that he, you
5 know, published the recording. I mean,
6 that's not the issue, it never has been.
7 The issue is whether or not it was secretly
8 done. Now, there were other technical
9 issues about privacy and so forth, but you
10 made the ruling on that. But this is a key
11 point, and I really think that, I just think
12 a juror, looking at this, first of all,
13 think of this. You've got the three of us
14 and everybody else looks at the statute and
15 we're all scratching our heads and we see
16 the technical points of it, but you've got
17 six or seven people here, they're not going
18 to appreciate these nuances, which is okay,
19 we don't need to make them legal scholars,
20 but at the same time I think it's helpful to
21 them, it's important to say, look when we
22 say secret, I mean, the average person could
23 come away and say well geez no one told him,

1 it must have been secret. Well, that's not
2 true. I can argue that, I'm happy to do
3 that.

4 THE COURT: Well you can.

5 MR. RIGALI: But I just think that it
6 would be a little bit more helpful if the
7 Court said a little bit more about secrecy,
8 you know, that you don't need permission,
9 that you don't need consent and so forth.
10 You know, if you read an instruction that
11 says if it's done without his consent and
12 I'm a juror, end of story. I don't have any
13 evidence he consented. As a matter of fact,
14 the guy got up and said he didn't consent,
15 what's the next cause of action, you know.

16 THE COURT: Yeah, but the other part of
17 that sentence is that he made a secret
18 recording of him without his consent and
19 then in determining whether or not it was
20 secret, I know, you want me to set forth if
21 he saw the microphone...

22 MR. RIGALI: No, I don't care. I'm just
23 saying something more about secrecy should

1 be said.

2 THE COURT: Well, what do you suggest,
3 other than what you already suggested which
4 is to...

5 MR. RIGALI: Well I guess my point is
6 that in your instruction there's nothing
7 about secrecy.

8 THE COURT: In determining whether the
9 recording was made secretly, you may
10 consider whether based on all of the
11 circumstances Mr. Johnson knew that he was
12 being recorded.

13 MR. RIGALI: Okay, but then you go back
14 to one. Mr. Frei, you can find this guy
15 responsible, number one, that Mr. Frei made
16 a secret recording of him without his
17 consent. Okay, now again, you and I and
18 somebody who has studied this statute and
19 torn it apart for weeks or days or hours or
20 whatever, we now know secret's a big deal.
21 But I think the average, that is, proof of
22 secrecy is a key element. So all I'm asking
23 is that we do what we can to avoid the risk

1 of a juror saying, oh well, without his
2 consent that's, you know, no one asked him
3 his permission, you know.

4 THE COURT: I mean, do you stipulate to
5 all of that, that it was done without his
6 consent, that permission was not asked, you
7 know. I mean, there was no evidence of any
8 of that.

9 MR. RIGALI: Yes. I mean, I have no
10 problem with that. I will tell the jury in
11 my closing that it's not ever been a
12 question that he asked permission, that he
13 announced it or whatever, that's not ever
14 been an issue, it's never been.

15 THE COURT: Okay. So then if I say in
16 order for you to find in favor of Mr.
17 Johnson he has to prove by a preponderance
18 of the evidence at least one of the
19 following, that Mr. Frei made a secret
20 recording of him, take off without his
21 consent because there's not issue to that,
22 right?

23 MR. RIGALI: Exactly.

1 THE COURT: Okay, any problem with that?

2 MS. SAPIRSTEIN: As long as they know
3 that we stipulate that it was without his
4 consent and also...

5 THE COURT: No, I'm not going to say
6 that they stipulate to, he's going to admit
7 that in the closing, he's already admitted
8 it.

9 MR. RIGALI: He's admitted it on the
10 stand.

11 THE COURT: Alright, so that Mr. Frei
12 made a secret recording or that Mr. Frei
13 made a secret recording that violated his
14 personal or property interest, or number
15 three, or that Mr. Frei made a secret
16 recording of him and disclosed the contents
17 to another person. So we get rid of with
18 his consent, without his consent, I mean.

19 MS. SAPIRSTEIN: What about the privacy?
20 You're leaving in three, right?

21 THE COURT: Oh yeah, three and four.

22 MR. RIGALI: I don't even think you need
23 four to be honest with you.

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MS. SAPIRSTEIN: I do.

THE COURT: Well, he did disclose.

MS. SAPIRSTEIN: I think you need four.

MR. RIGALI: He agreed to that.

MS. SAPIRSTEIN: That's fine, but I
think you need four.

THE COURT: Yeah. I'm going to leave it
as is.

MS. SAPIRSTEIN: Thank you, Your Honor.

MR. RIGALI: So are you, but in number
one you'll delete the without his consent
part of it?

THE COURT: Yes. And four also.

MR. RIGALI: Okay, thank you.

THE COURT: So next what do you want to
talk about?

MR. RIGALI: Okay. The aiding and
abetting.

THE COURT: Yes. I took that out of the
model instructions.

MR. RIGALI: It's a tough one, because
aiding and abetting sort of has a
connotation and although it's explained...

1 THE COURT: But that's what it is now,
2 joint venture has changed to aiding and
3 abetting.

4 MR. RIGALI: I understand, yeah, there
5 was a Bartolo case or something, 2009, yeah.
6 I guess it just has that connotation of, you
7 know, a more active role. Whereas, I think
8 you and I and counsel would agree that the
9 cases in which I'll call it a joint venture
10 or liability for concerted action or joint
11 enterprise, what have you, isn't necessarily
12 reflected in these instructions. The
13 instructions suggest that more proof is
14 required than is actually required, you
15 know.

16 THE COURT: In what way?

17 MR. RIGALI: Well, you know, I'm looking
18 at page 3, Mr. Frei must prove, the
19 paragraph beginning with that.

20 THE COURT: Mm-hmm.

21 MR. RIGALI: That such participation may
22 take the form of aiding or assisting another
23 person in the commission of battery or

1 asking or encouraging another person to
2 commit the battery or helping to plan, I
3 mean again, these aren't part of the case.

4 THE COURT: Well, I know, but you know,
5 I have to tell you, in reading over all of
6 this last night, I was sort of rethinking my
7 denial of the motion for a directed verdict
8 here. I'm going to let it go to the jury,
9 but you know, I don't see it, I'll be honest
10 with you. So I mean, I'm not sure what
11 you're saying he did do to share the intent
12 and to, you know, intentionally participate
13 in this. I don't really see, I didn't
14 really see any evidence of it. I mean, I
15 think I got to tell them something because
16 if he's just standing there, I mean, it's
17 clear that the instructions say that mere
18 presence there or mere knowledge even that
19 the man was going to do it is not enough, so
20 I'm not sure what he did that fits into that
21 description, but.

22 MR. RIGALI: Alright, I'll just argue
23 the best I can.

1 THE COURT: Yeah, okay. I'll note your
2 objections. And anything else?

3 MR. RIGALI: I do thank you for letting
4 it go to the jury. On the defamation?

5 THE COURT: Yes.

6 MR. RIGALI: I realize these are sort of
7 boilerplate things, but really isn't the
8 case much like the wiretap case, you know,
9 there's a lot of elements I suppose but
10 really the only issue here is secrecy and
11 defamation is the same way. I mean, look at
12 number three, I thought we...

13 THE COURT: Number three?

14 MR. RIGALI: Yes. There is no economic
15 loss here that he's talking about and the
16 words that the defamatory statement either
17 caused this economic loss or was the type
18 actual, you know, without proof. If the
19 next sentence is an allegation of, if you go
20 over to the next page, these are not
21 numbered, but if you find by the
22 preponderance that Mr. Johnson falsely
23 accused, I think that's fine and then you go

up to the next one above it.

THE COURT: Alright, so do you think that if the, do you want me to leave out number three or do you want me to rearrange it so it doesn't say anything about economic loss?

MR. RIGALI: Right, here's what I would suggest, Your Honor. One and two are fine, the rest of the page of three goes out because all of that is really unnecessary.

THE COURT: Well, wait a minute. The rest of the page?

MR. RIGALI: Well, again...

THE COURT: In order to find the statement was published you must find Mr. Johnson, that goes out?

MR. RIGALI: Oh I'm sorry, no, no, I'm sorry. That goes in. Let's in my, I'll label that three. Your three I would suggest be taken out. The next paragraph, which isn't numbered, but I would take that out.

THE COURT: The next paragraph, the

1 statement is...

2 MR. RIGALI: Which begins a statement is
3 defamatory if it tends to...it doesn't
4 matter, they don't need to worry about that.
5 If it's an allegation of a crime, end of
6 story. So then if you go over to a strained
7 and unnatural, we don't need that. So if
8 you go over to the following, you go to your
9 paragraph which starts if you find by the
10 preponderance of the evidence that Mr.
11 Johnson falsely, that should be paragraph
12 four, and the next one above it, I instruct
13 you that, number five, should be the next
14 one, so that would be number five. And then
15 we go down to if you found and the rest of
16 it's fine.

17 THE COURT: Alright, what do you say
18 about that?

19 MS. SAPIRSTEIN: I didn't actually
20 follow all of that, I'm sorry. I'm really
21 sorry. I didn't get the numbers.

22 THE COURT: Alright, well this is what
23 he wants to do. Look at my page five on

1 defamation.

2 MS. SAPIRSTEIN: He wants to take out
3 number three.

4 THE COURT: Take out number three, so
5 let's start with that. Any problem with
6 that?

7 MS. SAPIRSTEIN: No, I don't have any
8 problem with that.

9 THE COURT: Alright, so that's out.

10 MS. SAPIRSTEIN: He wants to leave in
11 the next paragraph, publication.

12 MR. RIGALI: Which would be the new
13 number three.

14 THE COURT: Well, I'm not labeling
15 those.

16 MR. RIGALI: I'm just saying for
17 purposes of...

18 MS. SAPIRSTEIN: He wants to take out
19 the next paragraph.

20 THE COURT: Yes, do you have a problem
21 with that?

22 MS. SAPIRSTEIN: Well, not if the only
23 statement that he's going to argue in his

1 closing is the one...

2 THE COURT: Yes, it is, right?

3 MS. SAPIRSTEIN: The no, I don't.

4 THE COURT: The only statement is the
5 false accusation of a crime, is that
6 correct, Attorney Rigali?

7 MR. RIGALI: Up to this point in my
8 thinking it had been.

9 THE COURT: Well if something comes out
10 then that might come back in, but for now if
11 that's all, I mean, that's all the evidence
12 was, but if that's all you're going to argue
13 then that's out.

14 MR. RIGALI: Alright.

15 THE COURT: Alright. So that would mean
16 strained is out.

17 MR. RIGALI: Right.

18 MS. SAPIRSTEIN: Right.

19 MR. RIGALI: And then you go, I would
20 just reverse the next two paragraphs so if
21 you find by the preponderance would be new
22 paragraph number four.

23 THE COURT: Alright, that's fine.

1 MR. RIGALI: The one above it, new
2 paragraph number five.

3 MS. SAPIRSTEIN: Well, I'm not going to
4 number them.

5 THE COURT: That's okay.

6 MS. SAPIRSTEIN: I'm just going to
7 follow along and then the rest of it is
8 fine.

9 THE COURT: Okay.

10 MS. SAPIRSTEIN: But if something else
11 comes out in closing, it all comes back in.

12 THE COURT: Absolutely. You know what,
13 we'll talk again before, alright. So
14 Attorney Rigali, anything else?

15 MR. RIGALI: The only other thing I
16 guess is the adverse, well I guess I could
17 have one other thing.

18 THE COURT: Anything else on the
19 instructions? I'm getting, on these
20 instructions, I'm getting to the adverse
21 witness.

22 MR. RIGALI: Not on these instructions.

23 THE COURT: Okay, thank you. Now...

1 MR. RIGALI: Are you going to read the
2 stipulation, Judge, about the tape?

3 THE COURT: Yeah. The stipulation, I'm
4 going to read that during the, there's a
5 section in just the model instructions, what
6 is evidence and evidence is, you know, well,
7 I'm not going to go through it, but there is
8 a section on stipulations and I'm just going
9 to read that the plaintiff and the defendant
10 have agreed or stipulated and then I'm going
11 to read that the recording offered into
12 evidence, so forth.

13 MR. RIGALI: Thank you, Judge.

14 THE COURT: Exactly as you wrote it. I
15 did look over the, let me hear Attorney
16 Sapirstein on anything further on the absent
17 witness.

18 MS. SAPIRSTEIN: Okay. Both in the
19 handbook of evidence as well as in the
20 Graves case, the evidence in this case
21 doesn't support an adverse witness
22 inference. If you look at Graves, it's very
23 strict actually, and also there's a case

1 called Commonwealth v. Thomas, but the
2 Graves case is the one's that cited all the
3 time. So in the Graves case it was a
4 potential alibi witness. You have to have a
5 very strong case.

6 THE COURT: Okay, let's start with that
7 because I don't know about, I think you have
8 to have a strong case. I don't know about
9 very strong, but he has two witnesses that
10 say that they saw Mr. Johnson bring his foot
11 back.

12 MS. SAPIRSTEIN: That's correct, that's
13 what they say.

14 THE COURT: Okay, how much stronger
15 could it get?

16 MS. SAPIRSTEIN: Well, under Graves, a
17 lot stronger.

18 THE COURT: Tell me how.

19 MS. SAPIRSTEIN: The facts under Graves,
20 it was a rape. The rapist was known by the
21 victim for five years. The defendant
22 conceded he had no explanation why she might
23 lie about the accusation, he was placed at

1 the scene by the unrebuted eyewitness.
2 There were physical injuries that supported
3 it. The victim reported the incident
4 immediately to her brother, mother and
5 police officer and a nurse. The knife was
6 produced, physical evidence.

7 THE COURT: I know, but you're not going
8 to have any of that kind of physical
9 evidence in an assault.

10 MS. SAPIRSTEIN: I understand.

11 THE COURT: I mean, you're talking about
12 assault.

13 MS. SAPIRSTEIN: No, but I'm talking
14 about all the rest of it and what he didn't,
15 the person he didn't call was his alibi
16 witness.

17 THE COURT: Okay.

18 MS. SAPIRSTEIN: But there are other
19 factors.

20 THE COURT: Go ahead.

21 MS. SAPIRSTEIN: The evidence, the
22 purported evidence of the missing witnesses
23 is neither unimportant, collateral nor

1 cumulative. Mr. Johnson already denied that
2 he did it. So all they're going to do is
3 say he didn't see him do it, there's nothing
4 new that they can produce. Whether the
5 defendant has superior knowledge of the
6 identity of the witnesses, that's really not
7 applicable, and whether there's a plausible
8 reason in light of ordinary logic and
9 experience and the plausible reason in light
10 of ordinary logic and experience is that
11 it's not my burden. So why would I produce
12 cumulative witnesses who are going to say
13 the same thing that Mr. Johnson said so that
14 he can cross examine them.

15 THE COURT: But don't you think that, I
16 mean, you're talking about cumulative
17 witnesses. I guess I could see that if he
18 had one other and he didn't produce all
19 seven of them, especially Mr. West. If Mr.
20 West were the only other witness, I would
21 not even give the instruction. But he's an
22 interested party so I mean, yes, it's
23 cumulative but, I mean, you're talking about

1 other witnesses that were present that are
2 not being sued.

3 MS. SAPIRSTEIN: Right, which is also
4 interesting, quite frankly, that they're not
5 being sued. But it also, in the Thomas, I
6 think it's the Thomas case, which is 429
7 Mass. 146, because there's, it's just simply
8 corroborating evidence. That's all it would
9 be.

10 THE COURT: It would be corroborating
11 Mr. Johnson's position.

12 MS. SAPIRSTEIN: Right. So the cases
13 that are in the new handbook regarding civil
14 cases are things like if you have a person
15 injury case and there's no evidence of
16 physical examination for personal injuries,
17 that would be, you'd get an adverse
18 inference. In an action to establish
19 paternity, the fact that any party refuses
20 to submit to a genetic marker can be
21 admissible. It's basically when somebody
22 is, and actually quite frankly, Your Honor,
23 the Courts caution that because it can have

1 a seriously adverse effect on the non-
2 calling party, it should be invited only in
3 clear cases and with caution, circumvention
4 is especially called for, well that's
5 criminal. So the fact that we chose not to
6 produce people to corroborate Mr. Johnson's
7 testimony and actually, quite frankly, there
8 was other evidence about him not lifting his
9 foot. Dana Manning and Peter Frei testified
10 he did. The police officer, it's not in the
11 police reports. The police officer
12 testified that they never said that to him.

13 MR. RIGALI: Oh, I object.

14 THE COURT: Well, yeah, he did. He did,
15 but they filled out the statements right
16 afterwards and...

17 MS. SAPIRSTEIN: Right.

18 MR. RIGALI: If I may?

19 MS. SAPIRSTEIN: Can I just finish?

20 THE COURT: You really don't need to.

21 MR. RIGALI: He said it wasn't in his
22 report.

23 THE COURT: Can I just finish?

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THE COURT: It wasn't in his report.

There were apparently several things not in his report and other things that were in his report.

MR. RIGALI: Right. He didn't say they never told me that.

THE COURT: No, I know. They said that they told him. They both said they told him and it wasn't in his report.

MR. RIGALI: And that's what he said, he said it's not in the report, I don't remember. That's different than no, no, I remember and he specifically never told me this. That's a different thing.

THE COURT: Well, Mr. Johnson says that he didn't tell him something that is in the report, so I mean, you know.

MS. SAPIRSTEIN: Right.

MR. RIGALI: I understand.

THE COURT: Okay. Go ahead.

MS. SAPIRSTEIN: But I think that this is highly prejudicial and I think that Mr. Frei's case doesn't even get passed the

1 first barrier, which is the strength
2 element. There is a tape, presumably that
3 didn't tape, Ms. Manning was far away and
4 again, there's a really good reason why we
5 didn't call these witnesses. Why would I
6 call these witnesses. If this is a
7 credibility case, Mr. Johnson says one
8 thing, Mr. Frei says something else and his
9 girlfriend, who is clearly not unbiased,
10 supports him. So why would I call anybody
11 else on the ice to just simply corroborate
12 what he said and expose them to cross
13 examination.

14 THE COURT: Well, I know, but I guess
15 this would be my thought on it. These two
16 people have a long history of hostility, if
17 you will, toward each other, and you have
18 two people that yes, one is, I mean, I
19 suppose you could say that Ms. Manning is
20 biased, but you have two people that say
21 that they saw something and you have Mr.
22 Johnson that says that he didn't do it. I
23 would think that if there were other people

1 there that said he didn't do it, that you
2 would want to have them.

3 MS. SAPIRSTEIN: That's corroborating
4 testimony.

5 THE COURT: I know it is.

6 MS. SAPIRSTEIN: That's all it is.

7 THE COURT: But it's corroborating the
8 interested party who clearly doesn't like
9 Mr. Frei and Mr. Frei doesn't like him.

10 MS. SAPIRSTEIN: But it falls
11 specifically within one of those factors.
12 It's corroborating, it's nothing new or
13 different, it's just going to corroborate
14 what Mr. Johnson said and the strategic
15 reason for not doing it which is, why would
16 I call these witnesses, when Mr. Rigali
17 could have, to expose them to cross? I
18 mean, it's not my burden. Why would I do
19 that.

20 THE COURT: Alright.

21 MS. SAPIRSTEIN: And also, quite
22 frankly, I know Mr. Rigali said to Mr.
23 Johnson, so are they still around. And Mr.

1 Johnson said, yeah, they're still around. I
2 don't think that satisfies the availability
3 prong personally. So I would object if Your
4 Honor gives that instruction.

5 THE COURT: Alright, well I'll note your
6 objection. I'm looking at the model
7 instruction on it, which is pretty similar
8 to yours, but what it says is that, and what
9 I'm going to instruct, because I am going to
10 instruct it, if Mr. Johnson in his case did
11 not call a potential witness to testify and
12 four conditions are met, you may infer that
13 the witness' testimony would not be
14 favorable to him. The four conditions are
15 first, that Mr. Frei's case against Mr.
16 Johnson is strong. Second, that the absent
17 witness would be expected to offer important
18 testimony that would support Mr. Johnson's
19 position. Third, that the absent witness is
20 available to testify for Mr. Johnson. And
21 fourth, that the witness' absence is not
22 explained by any of the other circumstances
23 in the case. If any of these four

1 conditions has not been met then you may not
2 draw any inference from the witness'
3 absence. If all four conditions have been
4 met you may infer that the testimony would
5 not be favorable to Mr. Johnson if such an
6 inference is reasonable in this case and you
7 are persuaded by a preponderance of the
8 evidence that the inference is true. This
9 rule is based on common sense. And I am
10 going to rule as a matter of law that there
11 is a sufficient foundation for that.

12 MR. RIGALI: Thank you, Your Honor.

13 MS. SAPIRSTEIN: Please note my
14 objection for the record.

15 THE COURT: Oh, I do. I do.

16 MS. SAPIRSTEIN: Thank you.

17 MR. RIGALI: Thank you, Your Honor.

18 THE COURT: Now, I think that's it on
19 the instructions. Is it?

20 MR. RIGALI: I believe so.

21 THE COURT: Alright. Let me see here.
22 So I have the proposed verdict forms and I
23 do have your forms there, because I did make

1 a few changes that I just want to go over
2 with you.

3 MS. SAPIRSTEIN: I have Mr. Rigali's
4 because that's the one we were working off
5 of, right?

6 THE COURT: Yeah. Well, yours though,
7 the violation of the Massachusetts
8 wiretapping statute I'm going to use yours.

9 MS. SAPIRSTEIN: Okay. And we're going
10 to add the damages?

11 THE COURT: I'm going to add number
12 five, if you answered yes to questions 1, 2,
13 3 or 4, what amount of money would fairly
14 compensate Mr. Johnson for Mr. Frei's
15 violation of General Laws 272, Section 99.

16 MS. SAPIRSTEIN: And I'd also like a
17 punitive damage section as well because the
18 statute allows.

19 THE COURT: A what?

20 MS. SAPIRSTEIN: Punitive damage.

21 THE COURT: Oh, I'm sorry, yes, that's
22 correct. I think I just, did you have that
23 in your...

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MS. SAPIRSTEIN: I didn't.

THE COURT: Okay, so how do you want me to...

MS. SAPIRSTEIN: I raised it yesterday. I just put in what amount of punitive damages, if any, should be assessed against Mr. Frei.

THE COURT: Alright.

MR. RIGALI: If I may, Your Honor, just for the record, I'd certainly object to any instruction on punitive damage. I know it's in the statute, except my argument would be that unless there's some sort of actual damage that there's no call for any punitive damage.

THE COURT: Alright. I'll note your objection. What amount of punitive damages...

MS. SAPIRSTEIN: If any.

THE COURT: If any do you award.

MS. SAPIRSTEIN: Or should be assessed or do you award to Mr. Johnson or assessed against Mr. Frei, whatever makes the most

1 sense.

2 THE COURT: Alright. Okay, so that's
3 that one. Now, on the next one which is the
4 assault. What's the matter?

5 MR. RIGALI: I'm just a little bit, I'm
6 sorry, I'm a little bit unclear as to which
7 format we're using. I emailed a bunch to
8 you guys last night.

9 MS. SAPIRSTEIN: Which I don't have.

10 THE COURT: No, no, didn't you email
11 what you had submitted?

12 MR. RIGALI: Right.

13 MS. SAPIRSTEIN: Oh, okay.

14 THE COURT: That's what I'm onto now.

15 MR. RIGALI: Right, okay.

16 THE COURT: I'm using Attorney
17 Sapirstein's on number one. So then we go
18 to number two, which in your packet is
19 assault.

20 MS. SAPIRSTEIN: By attempted battery,
21 right?

22 THE COURT: By an attempted battery and
23 by an immediately threatened battery, I'm

1 just reading the label, assault counterclaim
2 count one.

3 MR. RIGALI: Right.

4 THE COURT: Alright. So I'm prepared to
5 give that page as is with a few, there's a
6 typo in there, but...

7 MR. RIGALI: Probably many, I'm sorry.

8 THE COURT: When you get to number
9 three, if Mr. Frei has proved the elements
10 of assault, I was going to get rid of the
11 word at least, he is entitled to an award of
12 nominal damages, what amount of, I wasn't
13 going to say will fairly compensate him for
14 his damages because I don't think that's the
15 standard on nominal damages.

16 MR. RIGALI: However you want to do it.

17 THE COURT: I was just going to put what
18 amount of nominal damages do you award Mr.
19 Frei.

20 MR. RIGALI: Okay. I guess the at least,
21 I don't want the Court obviously to suggest
22 that's he's at least entitled to something,
23 but at the same time, you know, there's a

1 difference between nominal damages, if
2 there's an assault then there's nominal
3 damages.

4 THE COURT: Right, that's why I say he
5 is entitled.

6 MR. RIGALI: Okay.

7 THE COURT: I just took out at least. I
8 mean, he is entitled.

9 MR. RIGALI: I understand. I just sort
10 of like the two words, that's all.

11 THE COURT: The next one, number four, I
12 just took out the word do and I put if you
13 find that his assault caused actual harm or
14 injury. I can leave in that actual harm or
15 injury sentence, I had put it in
16 parenthesis, what amount of money will
17 fairly compensate him for his actual harm or
18 injury.

19 MS. SAPIRSTEIN: That's fine with me. I
20 was going to separate it into two questions,
21 but that's probably cleaner, so that's fine.

22 THE COURT: Okay. Now, on the next one,
23 battery, assault and battery, I sort of

1 changed this and let me see what you think.
2 Instead of your first question I had changed
3 it to do you find by a preponderance of the
4 evidence that Mr. Frei suffered a battery on
5 February 19, 2011, because I think there's
6 been some, well I know there's been some
7 testimony that he slipped on the ice. So I
8 think they first have to make the
9 determination that there was a battery.

10 MR. RIGALI: It's sort of a cart before
11 the horse because there can't be a battery
12 unless they find these other things. There
13 has to be somebody intentionally touched
14 him.

15 THE COURT: Well I know, but those are
16 all in the instructions.

17 MR. RIGALI: The first is intent, right?
18 To do a battery, whether it's joint venture
19 or not, the first thing is there has to be
20 intentional conduct. The second thing is
21 there has to be an unpermitted touching,
22 right.

23 THE COURT: Yeah, those are in the

1 instructions though. Do you want me to
2 break down the instructions that much?

3 MR. RIGALI: No, but one and two,
4 basically you said you were going to change
5 things around, unless I misunderstood here.

6 THE COURT: Well, I wasn't going to go
7 into intended or there was a harmful or
8 permitted touching, I was just going to say
9 do you find he suffered a battery. I've
10 already given them the instructions on what
11 a battery is. I'll break it down if you
12 want.

13 MR. RIGALI: No, no, if you have done
14 that, I'm sorry, I misunderstood.

15 THE COURT: Yeah, when I give the
16 instructions on battery, well I gave them to
17 you, but the instructions are that there's
18 an intentional touching and that it's
19 unpermitted and so forth.

20 MR. RIGALI: Oh, I got you.

21 THE COURT: So I was just going to say
22 do you find that he suffered a battery but
23 do you want me to break it down?

1 MR. RIGALI: No, I'm good. I'm good.

2 THE COURT: Alright. So and then number
3 two, do you find by a preponderance of the
4 evidence that Mr. Johnson aided and abetted
5 another in committing that battery, and I
6 already know what your objection to that is
7 because you already made it. Number three,
8 if you answered yes to questions one and
9 two, Mr. Frei is entitled to an award of
10 nominal damages. What amount of nominal
11 damages do you award Mr. Frei. And then
12 number four, if you find, I'm going to have,
13 these will be typed up, you can look at them
14 before they actually go out there, I know
15 you're just listening, but if you find that
16 the battery caused actual harm or injury to
17 Mr. Frei and I can then, I'm sorry, not if
18 you find, I apologize, do you find that the
19 battery caused actual harm or injury to Mr.
20 Frei. And then that's going to be a yes or
21 no with, if it's no you stop, if it's yes
22 you go on to question five, which you don't
23 have on there. But question five is what

1 amount of money will fairly compensate Mr.
2 Frei for any actual harm or injury. So I
3 basically just broke that down into two.

4 MR. RIGALI: Right. Your first question
5 though is going to be do you find that there
6 was a battery.

7 THE COURT: Mmm.

8 MR. RIGALI: So are you going to repeat
9 that again here, because they wouldn't get
10 to this question unless they already found
11 that there was a battery.

12 MS. SAPIRSTEIN: That caused actual harm
13 is the fourth question.

14 THE COURT: Do you find that the battery
15 caused actual harm. They would not be at
16 question four if they answered no to
17 question one.

18 MR. RIGALI: I'm with you, okay.

19 THE COURT: Okay. Alright, so that's
20 that. Number, the defamation I'm going to
21 leave as is with the exception that I did
22 just substitute money for damages in
23 question three. Emotional distress, count

1 one, I crossed out the part that says, not
2 count one, paragraph one, that acting on his
3 own or in concert with others because I
4 don't, I don't know that we have like a
5 joint venture thing here to cause emotional
6 distress.

7 MR. RIGALI: Really? I don't know, I
8 think that the whole, I mean, regardless of
9 my personal feelings, I think that the
10 evidence is pretty strong that a jury could
11 take this as, you know, they select an elite
12 spot on a huge lake, show up on a day a
13 couple weeks after there's some, you know,
14 back and forth, you know...

15 THE COURT: No, I know, I know.

16 MR. RIGALI: And then they position
17 themselves, I mean, about the noise and
18 fishing who cares, you know, but they got
19 these eat me things and so on and so forth,
20 and then, you know, you got a young girl
21 walking, you know, the girlfriend walking...

22 THE COURT: Oh, I know.

23 MR. RIGALI: It's pretty nasty stuff and

1 then of course the question is whether they
2 sat up there to goad him and to be prepared
3 for some mischief, which I think is part of
4 a joint venture type of a thing. You know,
5 they got the eat me sign out there, you
6 know, I think my argument to the jury is
7 definitely going to be that, you know, this
8 is whether each and every person intended
9 some sort of harm there. This is certainly
10 a situation which was, you know, set up for
11 a purpose and the purpose overall was to
12 continue this intimidation and nonsense. I
13 mean, the eat me sign shows up and then it's
14 gone with the police come, you've got,
15 arguably, you've got an assault, the jury
16 can certainly believe that there was an
17 assault, that this guy comes out on the ice,
18 you know, there was an assault, that they're
19 lying to the police, they're trying to frame
20 him again or make a big deal out of this.
21 So, I mean, the whole thing is part of that
22 civil rights violation, it's part of the
23 emotional distress claims, they're sort of

1 intertwined there. So, I mean, personally I
2 don't think either, I mean, personally or
3 from a legal point of view, more
4 importantly, that there's not sufficient
5 facts. I think there are more than
6 sufficient facts. Now, the jury doesn't
7 have to buy it, again, that gets into the
8 personal thing.

9 THE COURT: Well I know that. Alright,
10 what do you have to say? I don't know,
11 maybe it should stay in.

12 MS. SAPIRSTEIN: I think under the
13 elements of intentional infliction of
14 emotional distress, I'm not aware of any
15 case law that would provide for aiding and
16 abetting. I think it's got to be his
17 conduct. The elements of intentional
18 infliction of emotional distress are that
19 his conduct was so extreme and outrageous
20 beyond all possible bounds of decency, blah,
21 blah, blah, and caused him emotional
22 distress. I don't think you get the same
23 aiding and abetting bit. I think it's

1 really more personal to the alleged person
2 doing it. I mean, I just don't see it and
3 I'm not sure there's any legal support for
4 that.

5 MR. RIGALI: Let me just throw this out.
6 Let's just change the facts a little bit
7 hypothetically and say that there's a
8 racially motivated incident.

9 MS. SAPIRSTEIN: But it's not.

10 MR. RIGALI: A gang of klu klux clan
11 people go out to threaten or intimidate some
12 guy, no literally, and one person is
13 identified and he's charged. Is it not
14 relevant that the gang activity, the group
15 activity, that's not even a relevant fact.
16 Now again, they're free to disregard it but
17 those are facts in support that there was a
18 group, that the group, it's different if he
19 came, isn't it a different case if he came
20 out there by himself? Isn't it a completely
21 different case? I mean, come on.

22 MS. SAPIRSTEIN: Let me just speak. Mr.
23 Rigali could have called all of these other

1 people and asked what their intent was.

2 This is an intent allegation and now what he
3 wants to do is because there was a group of
4 people, if somebody intended it they want to
5 attribute it to Mr. Johnson. I don't think
6 he can do that. This is an intent. He's
7 got to have the intent by his conduct to
8 reach a certain goal. There's no one who
9 has testified that there was any intent and
10 Mr. Rigali didn't bring in any of those
11 other people on the ice to say that they
12 intended to do anything. I just don't see
13 how you get there.

14 THE COURT: Is it a fair inference?

15 MS. SAPIRSTEIN: I don't see how you get
16 there.

17 THE COURT: Yeah, alright. I'm going to
18 scratch out that, I note your objection.

19 MR. RIGALI: Yes, thank you.

20 THE COURT: Emotional distress,
21 negligent infliction, that's fine as is, I
22 think, unless you have an objection.

23 MS. SAPIRSTEIN: I did actually.

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THE COURT: Alright.

MS. SAPIRSTEIN: I think I put something down here, I probably did it last night so I probably don't have any idea what I was talking about.

MR. RIGALI: While Tani's looking, the abuse of process one is out, right?

THE COURT: Yes.

MS. SAPIRSTEIN: I think the standard in negligence is a reasonable person standard so I had in my proposed form would a reasonable person have suffered emotional distress under the circumstances of this case. And I'll have to check my jury instructions to find out what my cite is, but I think...

MR. RIGALI: I have no problem with reasonable person going in.

MS. SAPIRSTEIN: Okay.

THE COURT: Alright, let me just, let's see, a reasonable person would have suffered emotional distress. Okay, so what do you want to be changed?

1 MS. SAPIRSTEIN: I want another, after
2 caused physical injury and emotional
3 distress, I would put in what a reasonable
4 person in Mr. Frei's, in the same or similar
5 circumstances. The case is Peyton v. Abbott
6 Labs.

7 THE COURT: Yes, okay. But I mean, how
8 do you want it worded?

9 MS. SAPIRSTEIN: Would a reasonable
10 person in the same or similar circumstances
11 have suffered emotional distress or under
12 the circumstances of this case is what I
13 asked for in my jury instructions. What a
14 reasonable...

15 THE COURT: So looking at number one
16 here from, I'm trying to stay only with
17 Attorney Rigali's because it's just easier,
18 but I'll feed yours into it. But looking at
19 number one on Attorney Rigali's, is that
20 okay?

21 MS. SAPIRSTEIN: Number one is okay.

22 THE COURT: Alright. And number two?

23 MS. SAPIRSTEIN: We can do it one of two

1 ways. We can say would a reasonable person
2 in the circumstances of this case have
3 suffered physical injury and emotional
4 distress.

5 THE COURT: Alright.

6 MS. SAPIRSTEIN: Then you would need the
7 causation.

8 THE COURT: Number two would be do you
9 find that a reasonable person...

10 MS. SAPIRSTEIN: Under the circumstances
11 of this case.

12 THE COURT: Under the circumstances of
13 this case would have...

14 MS. SAPIRSTEIN: Suffered emotional
15 distress.

16 THE COURT: Physical injury and
17 emotional distress?

18 MS. SAPIRSTEIN: I think it's just the
19 emotional distress, because if there's
20 physical injury then there's physical
21 injury. And then I think the next question
22 should be do you find that the negligence
23 caused physical injury and emotional

1 distress.

2 THE COURT: So actually paragraph number
3 two, or question two, you want to be
4 question three?

5 MS. SAPIRSTEIN: Correct.

6 THE COURT: Alright.

7 MS. SAPIRSTEIN: And then my two.

8 THE COURT: Your two is do you find that
9 a reasonable person under the circumstances
10 of this case would have suffered emotional
11 distress, and then there's the yes, no.

12 MS. SAPIRSTEIN: Right, and if the
13 answer is no, that's the end of the story.

14 THE COURT: Thank you got to stop.

15 MS. SAPIRSTEIN: Right.

16 THE COURT: And then you go on to
17 Attorney Rigali's number two which is now
18 number three.

19 MS. SAPIRSTEIN: Correct. Thank you,
20 Your Honor.

21 THE COURT: Okay, and then number four
22 is the damages.

23 MS. SAPIRSTEIN: Right.

1 THE COURT: Okay, how about civil
2 rights.

3 MR. RIGALI: Your Honor, you'll be
4 giving a normal instruction on what physical
5 injury constitutes in this case? It doesn't
6 have to be a broken leg.

7 THE COURT: Compensatory damages. Let
8 me just see what I say about physical
9 injury.

10 MR. RIGALI: This is in connection with
11 the negligent infliction case. It just
12 means a physical symptom, a manifestation,
13 some physical manifestation, that's all.

14 THE COURT: Well, let me find it to make
15 sure. Yes, plaintiff must prove not only,
16 well I got to change that, Mr. Frei must
17 prove not only distress but also that the
18 distress manifested itself in physical
19 symptoms or objective symptomology. And
20 then in her request, the rest of her request
21 on this instruction says in order to show
22 physical harm as evidenced by objective
23 symptomology expert medical testimony may be

1 required. I don't think that's true.

2 MS. SAPIRSTEIN: That's actually in the
3 model instructions I think.

4 MR. RIGALI: Well it may be, but it's
5 not required in this particular case.

6 MS. SAPIRSTEIN: Well, I think it's
7 required for a negligent infliction of
8 emotional distress.

9 THE COURT: It says may be required.

10 MS. SAPIRSTEIN: May be, right, that's
11 the Sullivan v. Boston Gas case, 13 Mass.
12 129.

13 MR. RIGALI: You can't take a quote of a
14 case out of context. The issue here is, you
15 know, a person goes through an arguably
16 traumatic emotional stress and then says I
17 lost sleep, I lost weight, I gained weight,
18 you know, that's all you need. That's a
19 curve, it's something that really could be
20 very confusing, you know.

21 THE COURT: Well, let me just say this,
22 yesterday you agreed with this instruction,
23 so I don't know if you missed that but I'm

1 going to take that out. I didn't think that
2 that was called for either.

3 MR. RIGALI: Okay. And the only other
4 thing I would say...

5 MS. SAPIRSTEIN: Can you excuse me for
6 one second please? Can you note my
7 objection for the record?

8 THE COURT: Oh, yes. All of these
9 objections.

10 MS. SAPIRSTEIN: Thank you.

11 MR. RIGALI: The only other thing I
12 would ask, Your Honor, is instead of
13 physical injuries said physical symptoms,
14 that's all.

15 THE COURT: I think it says physical
16 symptomology.

17 MR. RIGALI: Right, in the slip, on the
18 slip.

19 THE COURT: On the slip, okay.

20 MR. RIGALI: So what's now number three,
21 some sort of...

22 THE COURT: Are we on negligent
23 infliction?

1 MR. RIGALI: Right. I mean, it really
2 should read...

3 THE COURT: Well, that's what you wrote,
4 caused physical injury.

5 MR. RIGALI: Right, well in hindsight,
6 and we're crafting over these things, I
7 think it really should say cause emotional
8 distress and some manifestation of an
9 objective physical symptom.

10 THE COURT: Let me find, okay. I'll
11 word it the way it's worded in the
12 instruction, which is, as soon as I flip
13 back to it, in physical symptoms, do you
14 find Mr. Johnson's negligence caused
15 physical symptoms or objective symptomology
16 and emotional distress. Okay?

17 MR. RIGALI: Thank you, Judge.

18 THE COURT: Now, what about the last
19 one, civil rights? Attorney Sapirstein?

20 MS. SAPIRSTEIN: That's fine, Your
21 Honor.

22 THE COURT: Okay. That's yours,
23 Attorney Rigali, so that's what we'll go

1 with. Okay, so it's probably going to take
2 him a bit to type that up. Is there
3 anything else? Well, let me just ask a few
4 other questions. Do you want to have all
5 seven of them decide this or do you want me
6 to reduce the jury? If it's seven, it will
7 be six out of seven have to agree and
8 generally what we do is put that after each
9 question, if six out of seven. I'm not
10 going to do that, there are too many
11 questions. I'm just going to have them put
12 at the beginning if six out of seven agree
13 to, you know, that particular question then
14 you have answered it and you can move on.
15 So do you care?

16 MR. RIGALI: I would go for the six out
17 of, you know, for the full seven. I think
18 it's awful to have people sit here for three
19 days.

20 MS. SAPIRSTEIN: Seven is fine.

21 THE COURT: Alright, so it will be six
22 out of seven.

23 MS. SAPIRSTEIN: How long for closings?

1 I'm going to be brief. I'm just asking.

2 THE COURT: How long would you like?

3 MS. SAPIRSTEIN: How long...

4 THE COURT: Let's put it this way, the
5 SJC gives you fifteen minutes, so.

6 MS. SAPIRSTEIN: Yeah, I definitely won't
7 be longer than fifteen minutes.

8 THE COURT: Alright.

9 MR. RIGALI: I'm sure I'll be longer
10 than fifteen minutes. I got a lot of causes
11 of action I got to address, but probably a
12 half hour.

13 THE COURT: Yeah, okay. Now, do you
14 expect to respond to his?

15 MS. SAPIRSTEIN: No, not unless there's
16 something that I really feel the need to.

17 THE COURT: I mean, technically you're
18 going to go first as the defendant, then
19 you'll go as the plaintiff, then you'll go
20 as the plaintiff, if you want to. Can you
21 just do it all at once?

22 MS. SAPIRSTEIN: Can we consolidate it?

23 THE COURT: Pardon me?

1 MS. SAPIRSTEIN: Can we consolidate it
2 maybe?

3 THE COURT: That's what I mean. Can you
4 address everything in your closing and then
5 she'll address everything in hers.

6 MR. RIGALI: How about this, the bulk of
7 the evidence in this case, and quite frankly
8 I think the biggest things that the jury has
9 to decide upon and that they maybe have to
10 wrestle with are the counterclaims.

11 THE COURT: Of course.

12 MR. RIGALI: So how about if we let
13 counsel for Mr. Johnson go first and then I
14 can wrap...

15 THE COURT: No, I'm not going to do
16 that.

17 MS. SAPIRSTEIN: No.

18 THE COURT: She's the plaintiff.

19 MS. SAPIRSTEIN: No, I'm the plaintiff.

20 MR. RIGALI: Well so is he a plaintiff.

21 THE COURT: Well I know, but, I mean,
22 that's why I'm saying that after her, you're
23 going to go first and then she's going to go

1 second and then you could go again, I guess,
2 because technically you're the plaintiff in
3 the counterclaims.

4 MR. RIGALI: I'd like to actually
5 reserve that right. Obviously if I had a
6 comment it would be a few minutes tops. I
7 mean, I know the rules, it's a rebuttal, it
8 should be brief and so forth.

9 THE COURT: It is.

10 MS. SAPIRSTEIN: Your Honor, if you
11 could maybe apologize to the jury for all us
12 for how long. I mean, I just noticed the
13 expressions on their faces and I'm really
14 concerned about it, quite frankly.

15 THE COURT: I know. Well, okay, I will.

16 MR. RIGALI: I think we'll all do it.

17 MS. SAPIRSTEIN: I'm going to apologize
18 in my closing.

19 THE COURT: I will just, I will tell
20 them that I had matters to, I won't even
21 tell them that it was on this case. I will
22 tell them that I had matters to attend to
23 and I'm sorry they had to wait. I will.

1 MS. SAPIRSTEIN: Thank you.

2 THE COURT: Okay. So now I need Jay.
3 We're actually ready and I need Jay.

4 MR. RIGALI: Are we going to bring that
5 jury in immediately?

6 THE COURT: I was going to.

7 MR. RIGALI: Can I just have two minutes
8 to visit a room and I'll be right back?

9 THE COURT: Go ahead. People that are
10 here for the wage attachments, I believe
11 you're going to be sent to another courtroom
12 but if you could stay here for a minute
13 because the clerk is going to, it's probably
14 what he's dealing with right now is finding
15 out what courtroom you're going to go to,
16 okay.

17 MS. SAPIRSTEIN: Can we move the podium
18 in front of the jury box?

19 THE COURT: Sure. Chris, can that
20 podium go in front of the jury box?

21 RESPONSE: Sure, wherever you want it.

22 THE CLERK: Anyone who's here for the
23 wage attachments, courtroom four, two doors

1 down.

2 THE COURT: Alright. Are we ready to
3 bring the jury in?

4 MS. SAPIRSTEIN: I just want to renew my
5 motions for directed verdict please.

6 THE COURT: Okay.

7 MS. SAPIRSTEIN: Thank you.

8 THE COURT: Plaintiff has renewed her
9 motions for a directed verdict, that is
10 denied. Defendant has renewed his motion
11 for a directed verdict and that is denied.
12 Obviously except for the one that I already
13 allowed, which is abuse of process.

14 Alright, we're all ready for the jury.

15 Okay, good morning, ladies and gentlemen. I
16 feel like I'm always apologizing to you for
17 our timeline here, and I do apologize, but
18 there are other things going on that I have
19 to deal with and sometimes something comes
20 up and it just takes a little bit longer
21 than we always think, so again, my
22 apologies. It's not the fault of the
23 parties or anything, there's just some

1 things that I have to attend to in the
2 morning. Okay, so we're ready to get to the
3 last part of the trial, which is the closing
4 arguments and then the instructions on the
5 law. Okay, so Attorney Rigali.

6 MR. RIGALI: Thank you. I'm going to
7 share with you a story of my grandson
8 sitting on my lap during the Superbowl
9 that's relevant to what's going on here
10 today. We're sitting there right before
11 dinner and fresh chocolate chip cookies are
12 just coming out of the oven and like most
13 eight year old boys, that's a pretty
14 attractive lure. The rule is we have to
15 have dinner first before we have cookies.
16 And in the midst of this game, my grandson
17 excuses himself to go to the bathroom,
18 there's a lavatory by the kitchen and he
19 comes back with chocolate on his hands and
20 crumbs on his mouth and the fresh aroma of
21 baked chocolate chip cookies on his breath.
22 And, you know, no great sin for a little guy
23 to not to be able to withstand that impulse.

1 But it was clear what happened. It's a
2 clear inference of what happened. In this,
3 of course here we make everything more
4 complicated in court. Here the term is
5 circumstantial evidence, but it's pretty
6 clear what happened here. Now, that's an
7 analogous situation to what's happening here
8 because you're going to be able to, you're
9 going to be required to make some reasonable
10 inferences of what actually happened based
11 on the facts that you know. Now, I can't
12 thank you enough for your patience. If I've
13 said or done anything during the course of
14 the trial, if I've offended or frustrated
15 you, all I ask is that you not hold that
16 against my client, Mr. Frei, as is Mr.
17 Johnson. Bear in mind that in this
18 particular case Mr. Johnson sued Mr. Frei
19 and vice versa. This is how it all began.
20 The incident that was described to you on
21 February 19th occurred and he sued, Mr.
22 Johnson sued Mr. Frei. Why would he do
23 that? I mean, the deal is there was a tape

1 recording made of a conversation, not a
2 secret one in particular, at least that's my
3 argument to you, but what he do that day.
4 Was it because he had been caught red handed
5 lying to the police, because that tape shows
6 exactly what kind of guy Mr. Johnson is.
7 But it also shows he was lying, that he made
8 a false statement to the police, that he
9 lied, that he accused Johnson, excuse me,
10 that he accused Mr. Frei of committed a
11 crime, threatened to murder, threatened to
12 kill. You recall a quote, you know, if I
13 came on his property he'll f-ing kill me. I
14 mean, one thing is clear about the tape is
15 that every sound, every statement made by
16 Mr. Frei was on there. There was no death
17 threat, there was no threat, there was no
18 threats whatsoever by Mr. Frei, if you
19 recall from that tape. So we know two
20 things, at the time that this lawsuit began
21 by Mr. Johnson, all we knew was two things,
22 all he knew was two things, at the time he
23 spoke with the police all he knew was that

1 he lied. And once he turned up a few weeks
2 later or whatever it was that Mr. Frei in
3 fact had a tape, now he knew he was caught.
4 So is a good defense the best offense? So
5 he files a suit against Mr. Frei who hadn't
6 filed a suit at that point. You can imagine
7 his reaction, are you kidding me. Are you
8 kidding me. These people come to my home,
9 there's no question that it was a public
10 lake, there's no question there's a fishing
11 derby. All these questions about well was
12 it on public property, well big deal,
13 there's no question about that. Those are
14 not the issues. But these people come to my
15 property, or my home, they surround, they
16 position themselves close around my home,
17 they're looking in my direction, all these
18 big guys out there on the ice, who've got
19 insulting signs pointed at me, not anyplace
20 else, pointed at me and my girlfriend, the
21 person that I love are in the house and they
22 camp out there and I go out on the ice to
23 tell them, you know, you can't trespass, I'm

1 concerned about maybe somebody doing some
2 damage, these guys have been drinking all
3 day, to my car, I'm [INAUDIBLE]. So I go up
4 there to check it out and I put my rubbish
5 out, get my mail, so forth, come back and
6 just remind them, hey, I don't want you to
7 trespass, you can't trespass, and you'll
8 hear him talk to I guess a couple of other
9 fellows, [INAUDIBLE], there's no problem
10 with those guys, there's no allegation they
11 were mean to him or attacked him or anything
12 like that. But now as he's walking across
13 the ice in this path, which is a clear path,
14 and this is interesting, of the lake that is
15 arguably miles long, look at the size, you
16 know that this is a distance of about six
17 hundred feet or so, you know. Isn't it
18 interesting that they happen to pick that
19 spot right there as [INAUDIBLE]. The tape
20 proves a lot of different things. Your jobs
21 are to determine, you've heard sort of two
22 points of view. Your jobs are to determine
23 what happened, is some compensation

1 necessary and how much. That's really what
2 it boils down to. What happened, in other
3 words, sort out the facts, who you believe,
4 who you don't believe. Is the case is
5 proved to your satisfaction, are they not
6 proved to your satisfaction. People have
7 burdens of proof here in the courtroom
8 obviously to instruct you on. What
9 happened, and regardless of what happened,
10 is some compensation necessary. It could be
11 you'll find, yeah, I think this happened but
12 I don't really think it's worth, I agree
13 that this incident, you know, an assault
14 occurred, an assault and battery,
15 defamation, whatever it may be. I agree
16 there's, but I don't think it's worth
17 anything. What happened is the first task.
18 Do you find that there was an assault. Do
19 you find that there was a defamation.
20 That's the first part. Then the question
21 comes, because you don't need to find out,
22 is it a compensable, is compensation in
23 order. You don't need to decide that. You

1 can decide that, you know, the case wasn't
2 proved. So that's it, what happened, is
3 compensation in order and if so, how much.
4 So we're getting to the complaint and you're
5 going to, the Court will obviously review
6 these things with you, but this is where
7 your attention has to be focused. There is
8 what is called a wiretap count, assault,
9 assault and battery, defamation [INAUDIBLE],
10 and there are counts for emotional distress
11 and there's a [INAUDIBLE]. But that's
12 essentially, those are the physical things
13 here. When I say that you have to decide
14 what happened, it's not like you're going to
15 go back and write a narrative, yeah I think
16 this is it, the real issue is has a wiretap
17 violation been proven. Has an assault been
18 proven, has any of these things been proven.
19 That's when I say what happened,
20 [INAUDIBLE], these each have a legal
21 definition. You don't know what the
22 definition is, the Judge tells you that.
23 We're done, we've done our closing, the

1 Judge will give you by law definitions and
2 instructions [INAUDIBLE] the evidence on.
3 In order to find such and such, you must
4 find such and such. So the first, now Mr.
5 Johnson sued Mr. Frei for a wiretap
6 violation. The Judge will tell you what
7 that means and what the elements are and so
8 forth, and the question I have, the only
9 question, there's no, there's never been an
10 issue as to whether or not Mr. Frei recorded
11 the men out on the ice, including Mr.
12 Johnson. That's never been an issue,
13 admitted from day one. It's never been an
14 issue that he didn't go out and ask
15 permission to record, that he didn't go out
16 and tell them I'm making a recording as I'm
17 coming down the hill. You know, he's coming
18 down, as he's coming down the hill, hey by
19 the way I'm coming towards you and I'm
20 making, you know, you don't have to do that.
21 In order words, the recording has to be
22 secret, whoever makes a secret recording of
23 another individual. So the question is,

1 well what's secret. You don't have to ask
2 permission for something to be secret. You
3 don't have to alert them ahead of time for
4 something to be secret. If there's anything
5 about Mr. Frei, it is he is not a secret
6 person. He is a journalist, he publishes
7 things and so forth. He is the antithesis
8 of secrecy. So here you have a phone that's
9 in a pocket that's irrelevant in my
10 judgment, it's your judgment that matters,
11 but you have a microphone that's in plain
12 view on the outside of a black jacket. It's
13 black on white, it's as clear as black on
14 white. You've got a white microphone and a
15 series of wires and so forth hanging down.
16 Mr. Johnson said I'm a few feet away from
17 him, you know, for this confrontation, and
18 you know, what is secret about it. It's
19 sort of in plain view. Now, is there
20 anything that suggests that the setting
21 itself involves some element of secrecy.
22 Right, and I'm going to show you what's
23 secret. You know, well if I'm coming over

1 to this juror and I whisper in his ear, then
2 there's a setting that sort of suggests,
3 there's an environment, there's
4 circumstances which would, say yeah, that
5 was sort of intended to be confidential or
6 whatever. There's nothing about that here,
7 about a guy on a lake yelling hey get the F
8 out of here and dah, dah, dah, dah, dah.
9 Loud on a lake, there's no secrecy
10 environment here. So my argument to you is
11 that if you go up to somebody with a
12 microphone in plain view and you start
13 talking to them, that's not a secret, it
14 doesn't meet the definition of the statute
15 and I think the Judge will essentially give
16 you some instructions on that. If you come
17 into the courtroom and you see a camera,
18 whether you know you're being recorded or
19 not, you can't say it's secret, both because
20 of the circumstances as well as what's
21 plainly visible by way of the court
22 recording device, okay. And whether or not
23 as a for instance just with the history of

1 these two men, you know, whether or not it's
2 likely one would always be recording what
3 the other said, that's a factor you can take
4 into consideration too as to whether he knew
5 or should have known, reasonably should have
6 known that there was some sort of a
7 recording going on with a microphone hanging
8 from the outside of the jacket. So that's
9 the wire tap case. To prove the wiretap,
10 there's a burden, there's no question that
11 there was recording. You might, if you go
12 into the jury room and say oh there's a
13 recording so, you know, he's guilty of that
14 and we're going to fine him. Not enough.
15 Mr. Frei said he didn't intend there to be
16 any secrecy about what he was doing. Dana
17 Manning said we didn't intend to be secret
18 about this, there was no intention to be
19 secret. They got the microphone on the
20 outside of the jacket. If they wanted to be
21 secret they could have hid the microphone.
22 If you walk around with a microphone in
23 somebody's face. Now, the assault and the

1 assault and battery. An assault is an
2 attempted battery. A battery the Court will
3 tell you is an intentional or unintentional
4 unpermitted touching. So if you poke
5 somebody, you know, is that considered or
6 whatever, that could be battery. It doesn't
7 have to be, you know, you crash in his
8 skull. So an assault is an attempted
9 battery. It's when you take a swing and you
10 miss or you get ready, as the evidence in
11 this case [INAUDIBLE], where Mr. Johnson
12 drew his foot back when Mr. Frei was
13 [INAUDIBLE], that's what I believe is an
14 assault. It's an attempted battery or it's
15 an action, an intentional action, which puts
16 someone into a fear of immediate harm in
17 which Mr. Frei said my body's in for a real
18 heavy beating [INAUDIBLE]. Evidence on
19 defamation. To accuse somebody falsely of a
20 crime is defamation, period. Now what you
21 do with that, what you think you should
22 compensate a person for, that's a different
23 [INAUDIBLE]. The preliminary issue is are

1 these [INAUDIBLE] met to your satisfaction.
2 And the Judge will tell you that the false
3 accusation of a crime means defamation
4 occurred, end of story. End of story. So
5 now Mr. Johnson said well I never said that.
6 Well that's a question of fact because you
7 guys [INAUDIBLE]. But if you find as the
8 police officer wrote in the report that
9 that's exactly what happened. Of course
10 you'd have to find the police officer was
11 lying [INAUDIBLE] in his report. So you'll
12 straighten that out. But a defamation is a
13 false accusation under oath, excuse me, a
14 false accusation of a crime and there's no
15 other allegation. Oh did he [INAUDIBLE],
16 did he use vulgarities. But that's not the
17 case. Mr. Frei's case against Mr. Johnson
18 hinges on false accusations. These other
19 two, emotional distress and civil rights are
20 sort of tied together. The civil right
21 cause of action deals with Mr. Frei's,
22 what's called the First Amendment right of
23 free speech or of free expression and that

1 is his website. That he posts a lot of
2 information there as a phenomenal public
3 service to the Town of Holland, from the
4 kids to the seniors and so forth, to have
5 all that public information available on one
6 spot. It's a part of that and you were
7 introduced to that for a reason because that
8 is free speech, that's free expression,
9 including the political stuff, including
10 criticism. Now Mr. Frei is the type of guy
11 that is very upset and very concerned about
12 what he perceives to be either public
13 corruption or incompetence or rudeness or
14 what have you by public officials. And he
15 gave you a couple of examples having nothing
16 to do with Mr. Johnson about a truck stop
17 and a few other things. These are things
18 that are of concern to him. And he has made
19 some specific and pointed exposés, research
20 and so forth which is published on that web
21 about Mr. Johnson and his family. And you
22 heard that Mr. Johnson has confronted him on
23 it. This Mr. Johnson has confronted him on

1 these things, right. Knock off that
2 bullshit on the web. Now, that might have
3 been said some time in the past but there's
4 a consistent pattern here by these other
5 incidents which were, you know, you see the
6 evidence of. So then the question is well
7 so you have a Constitutional right, a right
8 of free expression, and the question then is
9 did Mr. Johnson attempt, doesn't matter if
10 he did, we're not saying that it shut Mr.
11 Frei up, but did he attempt to. Did he
12 attempt to influence Mr. Frei's exercise of
13 his right by intimidation or coercion or
14 threats. And so the evidence, and then with
15 all of these causes of action, if you will,
16 what was the impact? Is what happened on
17 February 19th the type of facts, the type of
18 events, the type of insults and so forth,
19 that is likely to cause you to become pretty
20 emotionally upset. So those two things all
21 go together. Now, the issue, part of the
22 issue on whether or not this is a, was done
23 by design, that is to say where they fished

1 and what they did, you have to determine
2 that. You're going to have to sort of
3 figure that out as to whether or not, this
4 was just as Mr. Johnson will allege to you,
5 hey it's just a bunch of buddies and me
6 going on out and having a few beers and some
7 riz, and you know, fishing. That's all it
8 was. That's all it was. You know, I mean,
9 it's up to you. You have to make a decision
10 based on the evidence. So what evidence is
11 there that would help you determine whether
12 or not there's a little bit more to this.
13 Well, first of all, you have the long
14 history between these guys. And you
15 certainly have, Mr. Johnson, certainly has a
16 reason to be angry, frustration, bitter, a
17 little bit hostile towards Mr. Frei, okay,
18 because it's been going on for years. But
19 most importantly, in recent weeks prior, I
20 mean, very close by the way, it was the
21 middle of January so it's just like a month
22 before, there's a couple of incidents that
23 occur and then there's another incident that

1 occurs a week or two before, which again Mr.
2 Johnson attempts to bully and intimidate Mr.
3 Frei. One of those incidents occurs in the
4 middle of January. Mr. Frei gets a tip from
5 somebody else in the town, you can assume
6 that maybe others in the town aren't happy
7 with the way things are going in that town,
8 I think that's fair. And he gets a tip that
9 there's a, you know, a backhoe operator or a
10 loader operator, or whatever it was, at a
11 particular location and he wants to go down
12 and he's going to do an article about that
13 allegation that there is an unlicensed
14 backhoe operator or a heavy equipment
15 operator, you know, using public equipment.
16 You know, maybe no great sin by itself, but
17 at the same time it's wrong. It is wrong.
18 Public officials in particular need to
19 follow the rules just like you and I, okay.
20 If you were operating that piece of
21 equipment or operating your car without a
22 license, you know, the police stop you,
23 you're going to get in trouble. So Mr.

1 Johnson, excuse me, Mr. Frei simply goes
2 down to take a picture of that, no knowing
3 who's in it or whatever, but, you know,
4 you're a journalist, you want to have a
5 picture in your article just like in the
6 newspapers, you know, you read an article,
7 it's an eye catcher, so I'm going to take a
8 picture of this piece of heavy equipment.
9 He takes the picture, a man gets out and we
10 don't know all the details, really not
11 terribly relevant details, you know, your
12 job today, but someone operated a piece of
13 highway equipment, certainly someone
14 probably under reasonable inferences is
15 under Mr. Johnson's employ, was operating a
16 piece of highway equipment, gets out of
17 there and is upset with Frei, swats his
18 camera out of, a cell phone camera I guess
19 it was, out of his hands and whatever. Frei
20 then goes over to the police department to
21 make a statement and while he's in the Town
22 Hall, I think it's the Town Hall, downstairs
23 or something like that, while he's there

1 outside the police office in the little ante
2 chamber, within minutes who comes by but Mr.
3 Johnson. Now where did that come from?
4 Johnson wasn't there. His office isn't in
5 the building. There's a fair inference that
6 the driver called his boss and said hey, you
7 know, that clown's down here again, you
8 know. So Mr. Frei doesn't confront or
9 intimidate or act aggressively against Mr.
10 Johnson. There's never been any evidence of
11 that. But Mr. Johnson comes over to Frei,
12 right, goes in the police department, like
13 walks in like he owns the place, goes behind
14 the doors, comes back out and then gets
15 right in Mr. Frei's face with his cell
16 phone, click, click, click, click and he
17 calls him an f-ing loser. On a prior
18 incident, somewhat more dated, you know,
19 you're in the Town Clerk's Office and you're
20 just doing a little research and a guy in a
21 loud voice comes in and in front of the Town
22 Clerk and maybe whoever else was there and
23 calls you a scumbag, white trash, I mean,

1 you know. So and then of course right
2 before, just probably less than two weeks
3 before there's a snowstorm and now we've got
4 public equipment being used to remove snow
5 from the driveway of Mr. Johnson's father.
6 So there's an article about that and as a
7 result, what does Mr. Johnson do, he doesn't
8 just blow it off and say ah, it's not
9 hurting anybody. No, he calls Mr. Frei up on
10 his phone and calls him all sorts of names,
11 f-ing this and f-ing that, you're the
12 dumbest person I know. You know what, it's
13 not an f-ing backhoe it's an f-ing raider, a
14 different type of heavy equipment. I mean,
15 what kind of frat boy immature nonsense is
16 this. And then a couple weeks later it just
17 so happens that Mr. Johnson and at least
18 four members of his highway department show
19 up at Mr. Frei's home, what a coincidence,
20 on a lake, you know. And position a bunch
21 of quads or ATV's with, I mean, whatever it
22 is, it's not a pleasant favorable sign, it's
23 a derogatory negative insult. And it's

1 pointed right at their house. Now, not the
2 greatest crime in the world, but that's not
3 the point. The point is what was their
4 intentions in doing that. What was their
5 intentions. Now, Mr. Johnson says well my
6 buddy Mr. Rikowski has a place nearby and
7 that's why we went there. Where is Mr.
8 Rikowski. Why didn't he come to court. We
9 have no evidence that Mr. Rikowski or
10 whatever his name is has a place there.
11 There's no evidence of that. Where's Mr.
12 Rikowski. There's two Rikowski's there
13 actually and one of them apparently owns
14 this. Now this disappeared right after the
15 incident before the police got there. Why
16 would it go anywhere. If this is, let's say
17 this belonged to a kid and he liked the
18 phrase and he plows snow for his neighbors
19 and he puts eat me on it because it means
20 that he's going to get that snow off your
21 lawn or off your driveway. But where is he
22 to come in and give us an explanation to it.
23 All these guys are around here, where are

1 they. Where are they. Mr. Johnson says I
2 never touched this guy, he slipped and fell,
3 nobody tripped him, that's not my voice,
4 that's not my voice on the tape telling him
5 to get the fuck out of here, oh no, that was
6 somebody, where are they. Oh, that's my
7 father-in-law, the father-in-law that Mr.
8 Frei says kicked him and knocked him down.
9 Why didn't he come in. Why didn't Al West
10 come in and say, no he was right in front of
11 us and he just slipped. And by the way,
12 that's my voice on the tape. Why didn't one
13 of these guys, out of seven men, why doesn't
14 one of them come in and say no there was no
15 assault. Oh we already know he's a liar,
16 alright. He's proven himself to be a liar,
17 caught red handed eating chocolate chip
18 cookies. Caught red handed, evidence all
19 over. Didn't know it at the time but the
20 evidence spawned a lawsuit, he thought well
21 maybe I'll intimidate him a little bit more
22 and back him off and I'll sue him. I'll
23 make up some nonsense that it was a secret

1 recording in the middle of a public lake in
2 broad daylight in front of all my friends,
3 I'll say that was a secret. Give me a
4 break. To prove emotional distress the
5 Court will tell you that, particularly by
6 verbal [INAUDIBLE], that the distress has to
7 be outrageous beyond the normal and
8 reasonable realms of decency and so forth,
9 beyond what any reasonable person should be
10 expecting or words to that effect. I hope
11 that, and I hope you hope, that our society,
12 and you are the conscience of our society,
13 you're here to reflect sort of the
14 contemporary standards of decency, I hope
15 our community is not at a point yet,
16 notwithstanding all the stuff that we see on
17 TV's and internets and, you know, so forth
18 and our movies today, I hope we're not at a
19 point where it's okay to be calling your
20 loved one a fucking cunt, yelling it out
21 publicly and an ugly fat bitch and I hope
22 we're not at a point where it's okay to, you
23 know, assault somebody and to show up on

1 their property and humiliate and degrade
2 them or at least attempt to do so by
3 pointing disgusting signs at them. The
4 motive is clear here. I hope that you don't
5 trip up on that instruction about, you know,
6 beyond the realms of normal decency and so
7 forth. Mr. Johnson, you got to decide who
8 to believe here a little bit right. So what
9 objective criteria are out there. Let's
10 assume both these guys are liars and they're
11 full of self interest. What objective
12 criteria is available to help you decide,
13 okay. You have the tape. You have the key
14 piece of evidence that of course Mr. Johnson
15 doesn't want this to be known. He just
16 wants to know that he somehow got heard, by
17 the fact that he was recording. Now, in the
18 defamation claim Mr. Frei has to show that
19 the false statement, the false accusation
20 was made and bingo that's the end of it.
21 And of course the findings to find that
22 [INAUDIBLE] whether the cause of action was
23 proven. But Mr. Frei also has to show that

1 he had been damaged by it and I think it's
2 relevant for you to consider that at some
3 point after the incident Mr. Frei
4 [INAUDIBLE], I mean, this sort of, he sort
5 of hung himself here in a sense. Not
6 really, but he contributed to it. It wasn't
7 that the false accusation was in a public
8 police report so it was public information
9 but it looks like Mr. Frei probably got it
10 out to the public more than the public look
11 at the statement. That's a relevant thing
12 for you to think about it, that's called
13 mitigation. That's relevant, there's been no
14 secret about that. The result in this case,
15 the conclusion of this case, isn't going to
16 change the effect of the free world for the
17 next several months. This is important to
18 these people, it's important to Mr. Frei
19 particularly because as is very clear in his
20 testimony, he has been through a long ordeal
21 and this is it. He is fed up with
22 everything. He has told you that other
23 things have happened, he has not been able

1 to prove, he has not been able to establish,
2 that he was elated when he mistakenly
3 thought after he had been kicked to the
4 ground his girlfriend had actually gotten it
5 on the video. And like myself, who's
6 totally incompetent with some of these
7 electronic devices, she hit the pause button
8 when she thought she was hitting record and
9 it didn't come out. So but they have the
10 tape. What does the tape tell you. Well,
11 the police report, again, did the police
12 officer have an axe to grind. You know, why
13 should you believe the police officer's
14 report. The police officer works in town.
15 The police officer works with the highway
16 department on a regular basis, okay. He
17 knows Mr. Johnson, I mean, he's head of the
18 highway department. So road crews, road
19 repairs, whatever it is, they have a police
20 officer. These guys have to work together
21 every day. There's no evidence of any
22 hostility between these two guys. So
23 Officer Forcier testifies and he says, you

1 know, I got a call for an assault, I have no
2 clue what's going on, I'm working a plain
3 clothes job, some other job, we got one
4 officer, I respond, I'm a back up or
5 whatever, but I go out on the ice and at
6 some point in the transaction goes out on
7 the ice and talks with Mr. Johnson and say
8 to him, well, what happened guys. And, you
9 know was there an altercation. Oh no. We
10 got seven hammered guys out there who have
11 been drinking all day, urinating all over
12 Mr. Frei's property, you know, again the
13 bounds of decency, but oh no, nothing
14 happened, there was no altercation. Well,
15 you know, he slipped and fell. But then
16 you've got, so he makes note of this, you
17 know, he doesn't have a recorder taking
18 verbatim what the guys say. He's there, you
19 know, no one's dead, no one got shot,
20 clubbed or stabbed, he's just taking a
21 summary, noting things in his mind and later
22 goes back to the office and, you know, types
23 it up in a report and so forth. So not

1 everything is in that report, you know, for
2 instance, both Dana Manning and Peter Frei
3 said yeah, we told them about, you know,
4 that Mr. Johnson was about to kick Peter
5 that Dana saw it and we know that Peter
6 certainly saw it from up close. They didn't
7 happen to put that it but they also said to
8 us, look, we're not going to do anything, we
9 didn't see anything, if you guys want to
10 pursue this you can go to court on your own
11 or whatever. If you want to do statements,
12 give us those statements, we'll put it with
13 the police report and so forth, and so they
14 did. They did. So it sort of explains why
15 maybe every little thing that Peter and Dana
16 said to the police isn't in the report. But
17 it doesn't explain how it is that a non-
18 hostile witness, so to speak, the police
19 officer, puts in a quote from Mr. Johnson,
20 you go on my property and I'll fucking kill
21 you. So there's several other things there
22 too. In the police report it says Mr. Frei
23 approached us sort of in a threatening

1 manner. He was loud, he was threatening.
2 The tape, you heard the tape. He wasn't
3 loud or threatening. He threatened to kill
4 me. He didn't threaten to kill him. Now
5 the real question that the tape, and by the
6 way, we have stipulated, everybody here, the
7 two parties, Mr. Johnson, Mr. Frei, so that
8 there's no question in your mind, there's no
9 funny business with the tape, alright.
10 There's no deletions, there's no editing,
11 there's not cutting and snipping, okay. It
12 is not a question for you to decide, it is
13 agreed by everybody here, and the Judge will
14 read your the stipulation which we have
15 written up that says you decide what
16 happened, but as far as the tape goes the
17 tape is an accurate, unadulterated, unedited
18 tape. So there's no question, you know,
19 sometimes we all get to thinking oh I wonder
20 if this, you can't wonder about that point,
21 okay. There's no funny business that
22 occurred with the tape. The tape is
23 accurate as far as what is depicted there,

1 and on that tape there is no death threat.
2 None. Did it miss, did it not record Mr.
3 Frei. Everything that Mr. Frei said, in
4 other words, was somebody so far away from
5 the microphone that their voice wasn't
6 picked up? No. This is attributed to Mr.
7 Frei and it's right, it's on his chest, it's
8 very close by, and you can, and of all the
9 voices his voice comes out the loudest,
10 right. His foot falls as he's walking, when
11 he hits the ground, ugh, you know, after
12 he's been assaulted and so forth. So right
13 away you know, I mean, just sort of common
14 sense, but you know who you can believe and
15 you can't here. It's the cookie jar
16 situation if you will. You know, he says
17 he's threatening, he's doing this and he's
18 doing that and so forth, the evidence just
19 doesn't, it does not absolutely bear it up.
20 Now, you remember on the TV shows, say
21 there's some guy he's a school teacher, you
22 know, he's a normal guy and he works hard
23 and he's built a house and he's very proud

1 of it, he's got his wife and kids, they live
2 there, and, you know, the developer, the
3 greedy developer comes and buys all the
4 property around and he has got a development
5 that he's going to make millions of dollars
6 on but he needs the school teacher's
7 property, he needs that parcel. So in the
8 beginning he says to the school teacher,
9 hey, I'm doing this big development, can I
10 buy your property. And the homeowner says,
11 well, you know, it's not for sale. It's
12 near and dear to me, it's not for sale. Oh,
13 I'm sorry. So maybe a month goes by and the
14 developer comes back and says hey, I'll pay
15 you twice as much, I'm going to make
16 millions with my development I'm sure, I'll
17 pay you twice as much as your house is
18 worth, and no, I'm not interested. So now
19 the developer realizes he's going to lose
20 some millions on the TV show, starts to
21 ratchet it up a little bit, and now he gets
22 a couple of big guys to come with him, they
23 go to visit the teacher and they say you

1 know, accidents happen, are you sure you
2 don't want to sell to me because, you know,
3 it's a difficult world out there, accidents
4 can happen, kids can get hit by cars, you
5 know, just terrible things can happen. And
6 the homeowner says, come on, what's going
7 on, I'm not selling to you, period. So
8 knock it off. And a week later maybe
9 there's a postcard in the mail with a
10 picture of that homeowner's little boy on
11 his bicycle and a note that says hey I took
12 a picture of your child and I thought you'd
13 enjoy it, you know. And the homeowner says,
14 whoa, whoa, whoa, whoa, sent by the
15 developer. And the homeowner says whoa,
16 whoa, wait a second here. I'm not
17 tolerating this and he goes to the police
18 and he says this guy's threatening me, he's
19 intimidating me. He's intimidating me to do
20 something I just don't want to do, I don't
21 want to sell my property. You can't do
22 that. This is ridiculous. And the police
23 talk with the developer, what's the

1 developer going to say. What are you
2 talking about, you know, I'm a family guy, I
3 got this cute picture of his kid and I just
4 sent it to him. The facts when they put
5 that photograph that came in the mail and
6 printed it, in a different light, and what
7 Mr. Frei is saying here is the facts,
8 there's no question this is a public lake
9 and public property and so forth, but the
10 facts create a very, very different story.
11 A final point, the law permits under certain
12 circumstances a person to be held
13 responsible, equally responsible for the
14 conduct of another if certain circumstances
15 are met. And so there's never been an
16 allegation that Mr. Johnson physically hit
17 and knocked to the ground Mr. Frei. There's
18 never been an allegation of any kind to
19 that, okay. The allegation is that this was
20 a concerted effort to do it, it was a joint
21 enterprise of sorts. That all of the men
22 who were there were sort of in on, knew what
23 was going on, were sort of in on this

1 hostility and clearly the father-in-law was,
2 alright, and that's a certainly reasonable
3 inference, okay. But they knew what was
4 going on. These are, four of these guys are
5 highway department workers so here these
6 guys are, excuse me, yeah, four of them plus
7 the boss, so you've got Mr. Johnson and four
8 of his employees, employees, guys that work
9 for him, show up, right, and I think it's
10 fair to say that everybody's aware of the
11 hostility, everybody there was aware of the
12 hostility between Mr. Johnson and Mr. Frei,
13 okay. If they're highway department workers
14 they probably were very well aware of the
15 recent incidents that occurred with another
16 highway worker. So they all show up giving
17 a message, giving a message. If the point
18 being that if you are present, if you are
19 aware then, and you participate, or you were
20 ready, willing and able to participate, then
21 you are equally responsible and my argument
22 to you is that on these facts, on these
23 circumstances, Mr. Johnson should be equally

1 responsible for the battery, the kick to the
2 knee that knocked down Mr. Frei, he should
3 be equally responsible for what another man
4 did on the facts of this case, under the
5 circumstances of this case. You know, if a
6 gang of people come to assault somebody and
7 they're going there for that purpose or at
8 least they're in a situation where that's
9 likely to occur, these men were out for
10 mischief, they were out for mischief,
11 there's no question about it, eat me signs
12 and everything else establish it, location,
13 they're out for mischief, so the natural and
14 foundable consequences of that are that when
15 the mischief occurs and now before the
16 assault occurs, somebody's taking off a
17 jacket, getting ready to street fight,
18 right, getting ready to get into a fist
19 fight, no one's at that point saying, whoa,
20 whoa, whoa, wait a minute, wait a minute,
21 this isn't, we're just fishing here. No.
22 That guys gets out, one or more people are
23 yelling at him, get the F out of here, get

1 the F out of here and so forth, and then
2 what does Frei do, he's just, I mean, the
3 inference is here, I'm getting out of here,
4 I just don't want you trespassing on my
5 property, that's it. He turns, smack, he's
6 hit, he goes down and now Mr. Johnson, Mr.
7 Johnson comes to him and is ready to kick
8 him and now the mistake that Dana made
9 really saves Peter Frei from a serious
10 beating because he says oh, wait a minute,
11 you're all being videotaped at which point
12 Mr. Johnson freezes, he freezes, okay.
13 Saved him, Mr. Frei saved himself. I argue
14 to you that if you are present, ready,
15 willing and able to help you're all
16 responsible. The gang people go to commit
17 mischief and one does and a couple guys
18 don't. You know, kids are breaking windows
19 at the school and there's two or three
20 there, they're egging them on, are present
21 or laughing and encouraging them or
22 whatever, they're just as responsible under
23 the law. The Court will tell you about that

1 in language about what's known as aiding and
2 abetting. Members of the jury, I want to
3 thank you very, very much for your time.
4 The Judge is a very busy person. She has a
5 boss like all of us, they give her a lot of
6 work, a lot of it's spent on outside of your
7 presence and ours. I would ask you to,
8 besides thanking you for your patience, I'd
9 ask you to just think of this final thing.
10 It may seem to be a petty thing and I know
11 that you have lives of your own, you know,
12 when your colleagues in the jury pool walked
13 out and ugh, you know, why wasn't I, I'd sit
14 on juries that probably had pretty much the
15 same reaction, but this is important to
16 these people. This is a truly important
17 thing for these people. And, you know,
18 lives' paths have brought all of you
19 together as sort of the judges of the facts
20 of this particular case. What is a citizen
21 to do but come before you or some other
22 group of independent unbiased people and say
23 to you, look, this is what happened. This

1 is what's been happening. I didn't want
2 this. I'm just a journalist, I'm just an
3 interested citizen to try to do the right
4 thing for my town, try to tell people what
5 was going on, to inform them of what was
6 going on and all I've got is grief. All I
7 have got is grief, insults, harassment,
8 intimidation and so forth, which escalates
9 over a period of time to the point that now
10 they come to my house, they come to my
11 house. To the point now that there's a
12 letter, a photograph in the mailbox. What's
13 a person to do with that. They got to come
14 to you. You were seated and selected
15 because of two things. We felt that you had
16 brains and you have a heart, that you had
17 feelings. It's those feelings and a sense
18 of well, you know, if this happened to me or
19 to anybody that I know, is it reasonable
20 that someone would be upset, very, very
21 upset and you heard Mr. Frei say very upset.
22 I'm depressed, it affected my physical
23 health, I couldn't sleep. He didn't have

1 the economic losses, you know, which is
2 fine, but as far as the emotional burden on
3 him, you know, if you find that that
4 occurred I would certainly argue vehemently
5 that you do find that that occurred, you're
6 entitled to fairly compensate him for that
7 and I think you should. But if he, but if
8 he can't come here, if any person can't come
9 to a jury then where do they go. Where do
10 they go. What's a person to do but to come
11 to you. Now you may say oh this is such a
12 petty thing, why are they bothering us with
13 this. Well, where else are they going to
14 go. And if in fact you perceive it to be
15 such a petty insignificant thing, then what
16 hope does that give to the rest of us that
17 at some point want justice. We want a fair
18 shake, that's all. A fair shake. Thank you
19 very much.

20 THE COURT: Alright, thank you.
21 Attorney Sapirstein?

22 MS. SAPIRSTEIN: Thank you, Your Honor.
23 Good morning, ladies and gentlemen. And we

1 also want to thank you for your patience and
2 all of us want to apologize for the extended
3 trial in this case. I know that when we
4 selected we thought it would be over
5 yesterday and all of us apologize that
6 you're still here today. I want to just
7 stray from my remarks for a second and I am
8 actually going to be very brief. Mr. Rigali
9 referred in his closing to a photo in a
10 mailbox with kids on it. There's no
11 evidence that that ever happened in this
12 case. There's no testimony that that ever
13 happened and in fact it didn't happen.
14 There was no photograph of any child put in
15 his mailbox in this case. Now Mr. Frei has
16 accused Mr. Johnson of assault, assault and
17 battery, defamation, emotional infliction
18 of, emotional distress, negligent infliction
19 of emotional distress and violation of his
20 civil rights, and all of those counts were
21 filed after Mr. Johnson filed his one count
22 of violation of the wiretap statute. In his
23 opening Mr. Rigali promised you and in fact

1 I think the diagram is still on the board
2 with that thought, he promised you that
3 there were more facts than the fact of men
4 drinking and fishing in a fishing derby.
5 And actually quite frankly after two days of
6 trial, there are no more facts other than
7 the fact that seven or eight men were
8 fishing in a fishing derby and drinking on a
9 public property. You saw the videotape,
10 there were people drilling holes in the ice
11 and fishing. That's all you saw because
12 that's all that happened, they were fishing.
13 Were the guys fishing, drinking, yes. No
14 one went onto Peter Frei's property except
15 for two trespassers who came and when Mr.
16 Frei came out and said you're on my property
17 they said I'm sorry and they got off. No
18 one had any interaction with Mr. Frei or Ms.
19 Manning from 6:30, 6:45 in the morning until
20 Mr. Frei approached them on the ice. No one
21 was at his house, no one on his property, no
22 one did anything, and no one looked in his
23 windows. They might have looked in the

1 direction of the house, but that's about it.
2 So Mr. Frei comes out on the ice and
3 confronts a group of guys and the question
4 that you have to ask yourselves is why, why
5 would anybody do that. He said he was
6 taking the trash out but he also said that
7 there's no Saturday or Sunday pick up. So
8 he goes up to them on the ice and when he
9 was entering the ice, he testified today,
10 that he slipped. The ice was slippery. He
11 slips going onto the ice, goes up to them,
12 and you heard the tape, he starts talking to
13 them, he initiates the conversation and gets
14 right in their faces. They're on public
15 property participating in a fishing derby
16 and they had every right to be there, they
17 had every right to be on any section of that
18 lake, regardless of the size of the lake.
19 Then he accuses someone of kicking him when
20 he was coming back to his house on the ice
21 and falling. When he first made the
22 accusation it was Tom Laplante and then it
23 was Al West. We didn't see any pictures of

1 any bruise that he got from being kicked,
2 and these are guys who have cleats on out on
3 the ice, wouldn't you think there would be a
4 bruise on the back of his leg. When I asked
5 him why, he said he didn't think of it. But
6 he did think to bring in a picture of the
7 bruise on his hand when he fell. The other
8 explanation of why you don't see a picture
9 of the bruise on the back of his leg is
10 because he didn't have one, because it never
11 happened. Peter Frei slipped on the ice and
12 fell, it was slippery. There's no bruise to
13 the back of his leg, there's no evidence of
14 any bruise to the back of his leg other than
15 his testimony. He also alleged that Brian
16 Johnson picked up his foot as if to kick
17 him, and Dana Manning looking from her
18 house, which was several feet away, we
19 actually never got an idea of the distance,
20 she can identify him, Brian Johnson, in this
21 group of men who are all wearing parkas and
22 heats and winter coats. But that doesn't
23 appear in either of the police reports.

1 Officer Forcier doesn't put that in his
2 report, Officer Bean doesn't put that in his
3 report. Again, you have to abide the
4 credibility of the witnesses and the
5 credibility of the evidence. But ask
6 yourself is it credible from that distance
7 to determine if anyone to put their foot and
8 whether or not it was Brian Johnson and ask
9 yourselves why it wasn't in either of the
10 police reports. They didn't see what
11 happened. So there are other guys, there
12 are going to be Luke, Kyle and Mike who live
13 on the south side of the lake and actually
14 in the videotape there were other passes on
15 the south side of the lake. There were no
16 confrontations with anyone else between
17 these guys and anyone who lived there. And
18 you heard the tape. Peter Frei started the
19 discussion and actually sort of throughout
20 the tape. Does he sound fearful to you?
21 Does he sound intimidated to you? Or did he
22 actually sound gleeful, laughing and after
23 he fell getting up and yelling yahoo. Now

1 there was testimony that Johnson was on the
2 tape and Al West was the loudest voice on
3 the tape. Peter Frei didn't sue Al West,
4 who was presumably the guy who kicked him.
5 Peter Frei didn't sue Brian Johnson until
6 Brian Johnson sued for being secretly
7 recorded. So I want to ask you, what is
8 intimidating about guys fishing, drinking
9 and eating on the ice on a public lake who
10 never approach you and never approach your
11 house. It's undisputed that Brian Johnson
12 never touched Peter Frei. Peter Frei
13 testified to that. Brian Johnson testified
14 to that. Peter Frei also testified that he
15 was so intimidated by this group of
16 fishermen that he stopped posting things on
17 his blog but we know that's not true because
18 this all happened on February 19th and he
19 posted the tape that he took on February
20 19th, he posted the police report which we
21 got after February 19th and he posted
22 something about Earl Johnson's death. So we
23 know he posted things after the, after he

1 was allegedly intimidated by all these
2 gentlemen. Johnson was there to fish.
3 That's all he was there to do. In his
4 statement to the police Johnson testified
5 that he felt threatened and he did because
6 Frei is associated with someone who
7 threatened to kill his kids, so he felt
8 threatened. Johnson denied that he said
9 Peter Frei said if you don't get off my
10 fucking land I'll kill you or come on my
11 fucking land. Officer Forcier wasn't sure
12 exactly what Brian Johnson said. But if
13 Peter Frei was so concerned about that
14 comment, why did he post the whole police
15 report on his blog and distribute it to the
16 public at large. And if he was truly
17 intimidated and fearful, why didn't he just
18 call the police and say these guys are
19 bothering me, can you do something about it.
20 So we would submit that none of those
21 counterclaims have been proven by any
22 evidence that was introduced in this case
23 and we would ask that you find for the

1 defendant, Mr. Johnson, on assault, assault
2 and battery, defamation, emotional distress
3 and civil rights. As far as the taping, I'm
4 going to be even briefer. There was a
5 recording, there was no consent, there was
6 no permission, the phone was in his pocket,
7 there's testimony that the microphone wire
8 was on the outside of his jacket. It is
9 undisputed that Peter Frei made the tape and
10 disclosed it, just like he did to Officer
11 Forcier who told him it wasn't a good idea
12 because he could violate the law. He posted
13 it on the Holland blog and he gave it to a
14 reporter. Now, Brian Johnson didn't suffer
15 lost income and quite frankly didn't even
16 suffer severe emotional distress as a result
17 of that recording, and he testified to that.
18 But the wiretapping statute also allow
19 punitive damages. Peter Frei went out on
20 the lake to incite. He recorded it
21 secretly, he violated the law. He's not
22 above the law, he should be held to the same
23 standard as every one of us. So we would

1 ask for a defense verdict on the
2 counterclaims, we would ask for a verdict
3 for Mr. Johnson on the wiretap and we would
4 ask that he be assessed punitive damages so
5 he stops recording people who have private
6 lives to go fishing on lakes. And again, I
7 really do appreciate all of your work.
8 Thank you.

9 THE COURT: Okay, thank you, Attorney
10 Sapirstein. Do you want to see me at the
11 bench?

12 MR. RIGALI: No, I have just another
13 remark to make, Your Honor.

14 THE COURT: Well, come over to the side.
15 Alright, Attorney Rigali, go ahead.

16 MR. RIGALI: Very briefly, ladies and
17 gentlemen. So again, the argument is that
18 Mr. Frei shouldn't be punished by the
19 closing remarks of [INAUDIBLE] so under all
20 that you've heard you got to decide,
21 [INAUDIBLE] punish [INAUDIBLE] or is Mr.
22 Johnson [INAUDIBLE].

23 THE COURT: Alright. Thank you. Okay,

1 ladies and gentlemen, I am going to start to
2 instruct you on the law that applies to the
3 case. The instructions are probably going
4 to take about an hour and forgive me, but
5 I'm going to have to read many of them to
6 you because it's just too much for me to
7 remember. So I'm going to just say to you
8 know if you want to get up, stretch, if you
9 need to use the restroom, anything like
10 that, I would appreciate it if you'd do it
11 now unless it's an emergency because once I
12 start I'm just going to keep going and then
13 once I'm done with the instructions you'll
14 be given the case to start deliberating,
15 okay. Anyone needs to get up, do anything,
16 walk around? Of course. Here you go.
17 Would anyone else like a glass of water?
18 Oh, people have water with them, okay. Just
19 one. Okay, ladies and gentlemen, you're
20 about to begin your final duty, which is to
21 decide the fact issues of this case. Before
22 you do that I'm going to instruct you on the
23 law. It was obvious to me throughout the

1 trial that you faithfully discharged your
2 duty to listen to all the evidence and to
3 observe the witnesses. I would ask that you
4 now give me the same close attention as I
5 instruct you on the law. My function as the
6 judge in this case has been to see that the
7 trial was conducted fairly, orderly and
8 efficiently. It was also my responsibility
9 to rule on what you may consider as evidence
10 and to instruct you now as I am doing on the
11 law. It is your duty as jurors to accept
12 the law as I state it to you. You should
13 consider all of these instructions as a
14 whole. You may not ignore any one
15 instruction or give special attention to any
16 one instruction. You must follow the law as
17 I give it to you, whether you agree with it
18 or not. If it takes me a bit longer to
19 explain some aspects of the law than others,
20 or if I repeat myself, you're not to give
21 that portion of the instructions any more
22 weight or importance than the other parts.
23 It just simply means that some things take a

1 bit longer to explain than others and there
2 might be some common areas of overlap in the
3 law. It was the duty of both of the lawyers
4 in this case to object when the other side
5 offered evidence which that lawyer believed
6 was not admissible under our rules of
7 evidence. They also had an obligation to
8 speak to me at the sidebar about questions
9 of law which the law requires me to rule on
10 our of your hearing. The purpose of such
11 sidebars and objections and conferences is
12 not to keep relevant information from you.
13 It is just the opposite. The purpose is to
14 make sure that what you do hear is relevant
15 to the case and that the evidence is
16 presented in a way that gives you a fair
17 opportunity to evaluate its worth. You
18 should not draw any inference, favorable or
19 unfavorable, to either attorney or his or
20 her client for objecting to proposed
21 evidence or requesting sidebar conferences.
22 That is both the function and the
23 responsibility of the attorneys in the case.

1 Your function as the jury is to determine
2 the facts of the case. You are the sole and
3 exclusive judges of the facts. You alone
4 will determine what evidence to accept, how
5 important any evidence is that you do accept
6 and what conclusions to draw from all of the
7 believable evidence. You must apply the law
8 as I give it to you to the facts as you
9 determine them to be in order to decide
10 whether each party has proved his case. You
11 should determine the facts based solely on a
12 fair consideration of the evidence. You are
13 to be completely fair and impartial and are
14 not to be swayed by prejudice, sympathy,
15 personal likes or dislikes toward either
16 side. You are not to allow yourselves to be
17 influenced because the claims might be
18 popular or unpopular with the public. You
19 are not to decide this case based on
20 anything that you may have read or heard or
21 seen outside of the courtroom. You're not to
22 engage any guesswork about any unanswered
23 questions that remain in your mind or to

1 speculate about what the real facts may or
2 may not be if they were not introduced in
3 evidence in this case. You should not
4 consider anything that I have said or done
5 during the trial in ruling on any motions or
6 objections or any comments to the attorneys
7 or in setting forth the law in these
8 instructions as any indication of my opinion
9 as to how you should decide the case. If
10 you believe that I have expressed or hinted
11 at any view about the facts of the case,
12 please disregard it. I have no opinion
13 about what the facts of the case are or what
14 your verdict ought to be. That is solely,
15 exclusively and constitutionally your duty
16 and your responsibility. Now you are to
17 decide the facts solely from the evidence
18 admitted in the case and not from any
19 suspicion or conjecture about matters not
20 admitted in evidence. The evidence consists
21 of the testimony of the witnesses as we
22 recall it, any documents or items that were
23 marked as exhibits which you will have with

1 you in the deliberation room and any fact on
2 which the lawyers have agreed. You alone
3 will decide the weight, that is the value
4 and the importance of the testimony and the
5 exhibits to help you make your ultimate
6 judgment about whether each party has proved
7 his case. You are not required to believe
8 or disbelieve something simply because it is
9 written on a piece of paper or appears in a
10 photograph. Whether to believe what an
11 exhibit purports to show and how much weight
12 to give the exhibit is entirely for you to
13 decide. Of course the quality or the
14 strength of the proof is not determined by
15 the sheer volume of evidence or the number
16 of witnesses or exhibits. It is the weight
17 of the evidence, its strength intending to
18 prove the issue at stake that is important.
19 You might find that a smaller number of
20 witnesses who testified to a particular fact
21 are more believable than a larger number of
22 witnesses who testified to the opposite or
23 vice versa. Some things that occur during a

1 trial are not evidence and you may not
2 consider them as evidence in deciding the
3 facts of this case. A question put to a
4 witness, no matter how artfully is phrased,
5 is never evidence. Only the answers are
6 evidence. Also you may not consider any
7 answer that I struck from the record and
8 told you to disregard. Anything that you
9 may have read or seen or heard when the
10 court was not in session is not evidence.
11 The opening statements and the closing
12 arguments of the attorneys are not evidence.
13 They are only intended to assist you in
14 understanding the positions and the
15 contentions of the parties. My instructions
16 on the law and anything that I have said or
17 done during the course of the trial is not
18 evidence. If the lawyers have referred to
19 the evidence in a way that differs from your
20 memory, it is your collective recollection
21 that controls. Consider the evidence as a
22 whole. Do not make up your mind about what
23 the verdict should be until after you have

1 gone to the jury room to deliberate and
2 discuss the case among your fellow jurors.
3 Keep an open mind until then. Now, the
4 plaintiff, or I should say both parties,
5 have agreed or stipulated that the recording
6 that was offered into evidence relative to
7 the events of February 19, 2011 is a true,
8 accurate and complete recording of the audio
9 content contained therein. The parties
10 stipulate that the tape has not been edited,
11 altered or modified in any way. This means
12 that they both agree that that is a fact.
13 You are therefore to treat this fact as
14 undisputed and to be what it purports to be.
15 Now there are two types of evidence that you
16 may use to determine the facts of a case,
17 there is direct evidence and circumstantial
18 evidence. You have direct evidence when a
19 witness testifies directly about the fact
20 that is to be proved based on what he or she
21 claims to have seen or heard or felt with
22 his or her own senses and the only question
23 is whether or not you believe the witness.

1 You have circumstantial evidence where the
2 witness cannot testify directly about the
3 fact that is to be proved but you are
4 presented with other facts and then asked to
5 draw reasonable inferences or conclusions
6 from them about the fact that is to be
7 proved. I'm going to give you an example of
8 that which I hope makes it a little more
9 clear. Your daughter might tell you one
10 morning that she sees the mailman or the
11 mail carrier woman at the mailbox. That is
12 direct evidence that the mailman has been to
13 the mailbox. On the other hand, she might
14 tell you only that she sees mail in the
15 mailbox. That is circumstantial evidence
16 that the mailman has been to the mailbox.
17 Nobody has seen him there but you can infer
18 from the fact that there is mail in the
19 mailbox that the mailman was there. There
20 are two rules to keep in mind about
21 circumstantial evidence. The first rule is
22 that you can draw inferences or conclusions
23 only from facts that have been proved to you

1 and the second rule is that any inferences
2 or conclusions that you do draw must be
3 reasonable and natural based on your common
4 sense and life experience. Now it is your
5 duty to decide any disputed questions of
6 fact. You will have to determine which
7 witnesses to believe and how much weight or
8 importance to give their testimony. You
9 should give the testimony of each witness
10 whatever degree of belief and importance
11 that you judge it is fairly entitled to
12 receive. You are the sole judges of the
13 credibility, the believability of the
14 witnesses and if there are any conflicts in
15 the testimony it is your function to resolve
16 those conflicts and to determine where the
17 truth lies. You may believe everything a
18 witness says or only part of it or none of
19 it. In deciding whether to believe a
20 witness and how much importance to give that
21 witness' testimony you must look at all of
22 the evidence drawing on your own common
23 sense and life experience. Often it may not

1 be what a witness says but how the witness
2 says it that might give you a clue as to
3 whether or not to accept his or her version
4 of an event as believable. You properly may
5 consider a witness' appearance and demeanor
6 on the witness stand, frankness or lack of
7 frankness in testifying and whether his or
8 her testimony is reasonable or unreasonable,
9 probable or improbable. You may take into
10 account how good an opportunity the witness
11 had to observe the facts about which he or
12 she testifies, the degree of intelligence
13 shown by the witness and whether the
14 witness' memory seems accurate. You may
15 also consider the witness' motive for
16 testifying, whether he or she displays any
17 bias in testifying and whether or not he or
18 she has any interest in the outcome of the
19 case. This is an area where you as jurors
20 have a great contribution to make to our
21 system of justice. Without thinking much
22 about it, all of you who will decide this
23 case have been training yourselves since

1 childhood to determine how much of what you
2 hear you believe and whom you believe. You
3 are to use all of your life experience, your
4 good judgment, your common sense, in
5 filtering the testimony and evidence from
6 this trial and in deciding what you do
7 believe and what you do not believe. The
8 fact that a witness may have some interest
9 in the outcome of this case does not mean
10 that the witness is not trying to tell you
11 the truth as he or she recalls it or
12 believes it to be. But the witness'
13 interest is a factor that you may consider
14 along with all of the other factors in
15 deciding issues of credibility. Where there
16 are inconsistencies or discrepancies in a
17 witness' testimony or between the testimony
18 of different witnesses that may or may not
19 cause you to discredit such testimony. Keep
20 in mind that innocent mistakes of memory do
21 happen. Sometimes people forget things, get
22 confused, remember an event differently and
23 sometimes people are just not truthful. In

1 weighing such discrepancies you should
2 consider whether they involve important
3 facts or only minor details and whether the
4 discrepancies result from innocent lapses of
5 memory or intentional falsehoods. Now in
6 this case you have heard some reference to a
7 potential witness or witnesses who did not
8 testify. If Mr. Johnson in this case did
9 not call a potential witness to testify and
10 four conditions are met, you may infer that
11 the witness' testimony would not be
12 favorable to him. The four conditions are
13 first, that Mr. Frei's case against Mr.
14 Johnson is strong. Second, that the absent
15 witness would be expected to offer important
16 testimony that would support Mr. Johnson's
17 position. Third, that the absent witness is
18 available to testify for Mr. Johnson. And
19 fourth, that the witness' absence is not
20 explained by any of the other circumstances
21 in the case. If any of these four
22 conditions has not been met, then you may
23 not draw any inference from the witness'

1 absence. If all four conditions have been
2 met, you may infer that the testimony would
3 not be favorable to Mr. Johnson. If such an
4 inference is reasonable in this case and you
5 are persuaded by a preponderance of the
6 evidence that the inference is true. This
7 rule is based on common sense. Now, the
8 burden of proof in a civil case is that a
9 plaintiff must prove his case or her case,
10 his case, I'm sorry, by a preponderance of
11 the evidence. This is a less strict
12 standard than is applied in criminal cases
13 where the prosecution must prove its case
14 beyond a reasonable doubt. By contrast, in
15 a civil case such as this one, the parties
16 are not required to prove their claims
17 beyond a reasonable doubt. In a civil case
18 the party bearing the burden of proof meets
19 the burden when he shows it to be true by a
20 preponderance of the evidence. The standard
21 of a preponderance of the evidence means
22 such evidence which when considered and
23 compared to any opposed to it produces in

1 your mind a belief that what is sought to
2 proved is more probably true than not.
3 Simply stated, a matter has been proved by a
4 preponderance of the evidence if you
5 determine after you have weighed all of the
6 evidence that the matter is more probably
7 true than not. Stated another way, if you
8 were to put all of the credible evidence on
9 opposite sides of a pair of scales, the
10 plaintiff or the party having the burden of
11 proof with that claim must produce enough
12 evidence to make the scales tip in his
13 favor. If the party fails to do this then
14 you must return a verdict for the other
15 party on that claim. I'm going to now go
16 over the elements of each of the claims that
17 have been brought. In this, this first
18 claim I'm going to go over and these are
19 not, well, I'm just giving them in the order
20 that they were requested, in this case, on
21 the wiretap violation, okay, and Mr. Johnson
22 is alleging that Mr. Frei violated the
23 Massachusetts wiretap statute by secretly

1 making a recording of him and disclosing its
2 contents. In pertinent part, the
3 Massachusetts wiretap statute provides that
4 any aggrieved person whose oral or wire
5 communications were intercepted, disclosed
6 or used except as permitted by this section
7 or whose personal or property interest or
8 privacy were violated by means of an
9 interception, again as permitted or
10 authorized by this section, shall have a
11 civil cause of action against the person who
12 so intercepts, discloses or uses such
13 communication or who so violates his
14 personal, property or privacy interest and
15 shall be entitled to money damages. In
16 order for you to find in favor of Mr.
17 Johnson, he has to prove by a preponderance
18 of the evidence at least one of the
19 following. That Mr. Frei made a secret
20 recording of him, or that Mr. Frei made a
21 secret recording that violated his personal
22 or property interest, or that Mr. Frei made
23 a secret recording that violated his

1 privacy, or that Mr. Frei made a secret
2 recording of him and disclosed the contents
3 to another person. In determining whether
4 the recording was made secretly, you may
5 consider whether based on all of the
6 circumstances Mr. Johnson knew that he was
7 being recorded. If you find that Mr.
8 Johnson has proved that Mr. Frei violated
9 the Massachusetts wiretap statute as it has
10 just been explained, then you may award Mr.
11 Johnson actual damages at the rate of one
12 hundred dollars per day for each day of
13 violation or one thousand dollars, whichever
14 is higher. You may also award punitive
15 damages. Punitive damages are different
16 from compensatory damages. Unlike
17 compensatory damages which compensates
18 someone for the harm they have suffered, the
19 purpose of punitive damages is to punish Mr.
20 Frei for conduct that is outrageous because
21 of Mr. Frei's evil motive or reckless
22 indifference to the rights of others.
23 Punitive damages are appropriate where Mr.

1 Frei's conduct is extraordinary and warrants
2 condemnation and deterrence. If you do
3 aware punitive damages, you should fix the
4 amount by using calm discretion and sound
5 reason. The next cause of action is brought
6 by Mr. Frei against Mr. Johnson and that is
7 the claim of assault. Mr. Frei claims that
8 Mr. Johnson assaulted him and that he
9 suffered harm or injury from the assault for
10 which he seeks to recover compensatory
11 damages in this case. So I will just
12 explain to you the civil tort of assault and
13 then explain what Mr. Frei must prove in
14 order to recover damages. An assault may be
15 committed in either of two ways. It is
16 either an attempted battery or an
17 immediately threatened battery. A battery
18 is a harmful or an unpermitted touching of
19 another person. So an assault can be either
20 an attempt to use some degree of physical
21 force on another person, for example, by
22 throwing a punch at someone, or it can be a
23 demonstration of an apparent intent to use

1 immediate force on another person, for
2 example, by coming at someone with fists
3 flying. Mr. Frei may prevail on the assault
4 claim if he proves either form of assault.
5 In order to establish the first form of
6 assault, which is an attempted battery, Mr.
7 Frei must prove by a preponderance of the
8 evidence that Mr. Johnson intended to commit
9 a battery, that is a harmful or an
10 unpermitted touching upon Mr. Frei, took
11 some overt step toward accomplishing that
12 intent and came reasonably close to doing
13 so. In order to prove the second form of
14 assault, an eminently threatened battery,
15 Mr. Frei must prove by a preponderance of
16 the evidence that Mr. Johnson intended to
17 put Mr. Frei in apprehension of an eminent
18 battery and engaged in some conduct toward
19 Mr. Frei which Mr. Frei reasonably perceived
20 as eminently threatening a battery. Thus in
21 order to prevail on the assault claim, Mr.
22 Frei must prove the following by a
23 preponderance of the evidence. First, that

1 Mr. Johnson engaged in an overt act
2 constituting an attempted battery or an
3 immediately threatened battery. Second,
4 that Mr. Johnson intentionally committed
5 this overt act as opposed to having done so
6 negligently or accidentally. Third, that as
7 a result of Mr. Johnson's actions, Mr. Frei
8 apprehended immediate physical contact and
9 fourth, that Mr. Johnson's assault was a
10 cause of Mr. Frei's injury or harm. So the
11 first element Mr. Frei must prove by a
12 preponderance of the evidence is that Mr.
13 Johnson engaged in an overt act. An overt
14 act need not be substantial but mere words
15 are not enough to constitute the requisite
16 act. However, words can affect a generally
17 inoffensive overt act such that together the
18 words and the act equate to an assault.
19 The second element that Mr. Frei must prove
20 by a preponderance of the evidence is that
21 Mr. Johnson engaged in the overt act
22 intentionally. Intent means a person's
23 objective or purpose. The intent that is

1 required for an assault is either the intent
2 to cause harmful or offensive contact with
3 Mr. Frei or to make Mr. Frei apprehensive of
4 immediate physical contact. Mr. Frei does
5 not have to prove that Mr. Johnson intended
6 any particular harm or injury which might
7 have resulted from the assault. The third
8 element Mr. Frei must prove by a
9 preponderance of the evidence is that Mr.
10 Johnson's overt act resulted in Mr. Frei
11 apprehending immediate physical contact.
12 Apprehension in this context means that Mr.
13 Frei perceived or comprehended approaching
14 contact by Mr. Johnson. Mr. Frei's
15 apprehension must be reasonable. In other
16 words, Mr. Frei must persuade you that a
17 reasonable person would become apprehensive
18 in the face of the defendant's threatening
19 conduct. Apprehension is not necessarily
20 synonymous with fear, a courageous person
21 who does not fear another may still be
22 apprehensive. Mr. Frei must be aware of Mr.
23 Johnson's conduct to be apprehensive. The

1 fourth element Mr. Frei must prove by a
2 preponderance of the evidence is that Mr.
3 Johnson caused Mr. Frei to sustain injury or
4 harm. Mr. Johnson's conduct was the factual
5 cause of Mr. Frei's injury or loss if the
6 loss would not have occurred absent Mr.
7 Johnson's assault. In other words, if the
8 harm would have occurred anyways, Mr.
9 Johnson is not liable. If Mr. Frei has
10 proved the elements of assault, he is
11 entitled to nominal damages even without
12 proof of actual damages. Now the next claim
13 that is brought by Mr. Frei is a battery.
14 Mr. Frei alleges that someone other than Mr.
15 Johnson committed a battery against him on
16 February 19, 2011. Battery is the
17 intentional and unjustified use of force
18 against another person however slight. In
19 order for Mr. Frei to recover damages for
20 the battery allegation he must establish by
21 a preponderance of the evidence the
22 following elements. That force was used
23 against him, that the force was

1 intentionally used as opposed to negligently
2 or accidentally, that the force used against
3 Mr. Frei was without justification or excuse
4 and that the battery was a cause of injury
5 to Mr. Frei. Now here there was no evidence
6 that Mr. Johnson directly used force against
7 Mr. Frei. Mr. Frei alleges that Mr. Johnson
8 aided or abetted another individual in
9 committing the battery. If you determine by
10 a preponderance of the evidence that someone
11 committed a battery against Mr. Frei on
12 February 19, 2011, you may find Mr. Johnson
13 legally responsible for that act if you find
14 that Mr. Frei has proven by a preponderance
15 of the evidence first that Mr. Johnson
16 knowingly and intentionally participated in
17 the battery in some meaningful way and
18 second that Mr. Johnson did so with the
19 intent required for the battery. Mr. Frei
20 must prove that Mr. Johnson intentionally
21 participated in the battery as something
22 that he wished to bring about and sought by
23 his actions to make succeed. Such

1 participation may take the form of aiding or
2 assisting another person in the commission
3 of the battery or asking or encouraging
4 another person to commit the battery or
5 helping to plan the battery or agreeing to
6 stand by or near the scene of the battery to
7 act as a lookout or agreeing to provide aide
8 or assistance in committing the battery or
9 agreeing to help in escaping if such help
10 becomes necessary. An agreement to help if
11 needed does not need to be made through a
12 formal or explicit written or oral advanced
13 plan or agreement. It is enough to act
14 consciously together before or during the
15 crime with the intent of making the crime
16 succeed. Mr. Frei must also prove by a
17 preponderance of the evidence that at the
18 time Mr. Johnson knowingly participated in
19 the commission of the battery, he had the
20 shared intent required for this act. You
21 are permitted but not required to infer Mr.
22 Johnson's mental state or intent from his
23 knowledge of the circumstances. The

1 inferences that you draw must be reasonable
2 and you may rely on your experience and
3 common sense in determining from the
4 evidence Mr. Johnson's knowledge and intent.
5 Mere presence at the scene of the battery is
6 not enough to find Mr. Johnson liable.
7 Presence alone does not establish Mr.
8 Johnson knowing participation in the battery
9 even if he knew about the intended act in
10 advance and took no steps to prevent it.
11 Mere knowledge that the battery was to be
12 committed is not sufficient to find Mr.
13 Johnson liable. Mr. Frei must prove that
14 Mr. Johnson had more than mere association
15 with the person who committed the battery.
16 He must prove more than a failure to take
17 appropriate steps to prevent the commission
18 of the battery. Some active participation
19 in or furtherance of the battery is required
20 in order to prove Mr. Johnson liable. Mr.
21 Frei must prove by a preponderance of the
22 evidence that the battery caused him to
23 sustain injury. The battery was the factual

1 cause of Mr. Frei's injury if the injury
2 would not have occurred absent the battery.
3 If you determine the battery was committed,
4 that Mr. Johnson aided and abetted another
5 in the commission of that battery and that
6 the battery caused injury to Mr. Frei, you
7 must determine Mr. Frei's damages. Mr. Frei
8 is entitled to recover for physical injury
9 and suffering, humiliation, indignity and
10 injury to his feelings as long as he has
11 established that these injuries were a
12 result of the battery. He is entitled to
13 recover for nominal damages even in the
14 absence of proof of actual damages. Nominal
15 damages is a small sum in order to recognize
16 that the battery did occur. The next claim
17 that Mr. Frei has brought against Mr.
18 Johnson is defamation. Mr. Frei has alleged
19 that Mr. Johnson defamed him by accusing him
20 of committing a crime. In order to prevail
21 on this claim for defamation, Mr. Frei must
22 prove to you by a preponderance of the
23 evidence each of the following elements.

1 One, that Mr. Johnson published a defamatory
2 statement of and concerning Mr. Frei and
3 two, that Mr. Johnson knew that the
4 statement was false or acted in reckless
5 disregard as to whether the statement was
6 true or false. In order to find that the
7 statement was published, you must find that
8 Mr. Johnson communicated the statement to
9 some third party other than Mr. Frei. There
10 is no requirement that the statement be
11 communicated to a large number of people.
12 If you find by a preponderance of the
13 evidence that Mr. Johnson falsely accused
14 Mr. Frei of committing a crime, Mr. Frei
15 need not prove any economic loss. A knowing
16 false accusation of crime made to another is
17 defamatory per se and does not require proof
18 of economic or special damages. I instruct
19 you that Mass. General Laws Chapter 275,
20 Sections 2 and 4 make it a criminal offense
21 to threaten another's person or property
22 with a crime. As such, a threat to kill
23 another is a crime. If you have found that

1 Mr. Frei has proven each of the elements
2 that I have given you then you may award
3 money damages. The purpose of compensatory
4 damages is to afford the equivalent in money
5 for the actual loss caused by the wrong of
6 another. Thus in order to obtain damages
7 Mr. Frei must have proven to you by a
8 preponderance of the evidence that he
9 suffered actual injury as a result of Mr.
10 Johnson's defamatory publication. Actual
11 injury includes not only out of pocket loss
12 but also impairment to Mr. Frei's reputation
13 and standing in the community, emotional
14 distress, personal humiliation, shame and
15 disgrace and mental for the defamation. You
16 may not award damages to Mr. Frei to punish
17 Mr. Johnson. You must consider what amount
18 of money would be full, fair and reasonable
19 based on all of the evidence. As a result,
20 you should award damages only for harm
21 caused by Mr. Johnson's wrongful conduct and
22 damages should not be duplicative. The
23 amount of damages should be based on just

1 and reasonable inferences even though there
2 may be an element of uncertainty in your
3 determination. The next claim that Mr. Frei
4 has brought against Mr. Johnson is that Mr.
5 Johnson intentionally or recklessly caused
6 infliction of emotional distress. In order
7 to recover Mr. Frei must prove by a
8 preponderance of the evidence that Mr.
9 Johnson either intended to inflict emotional
10 distress or knew or should have known that
11 emotional distress was likely to result from
12 his conduct. Also that Mr. Johnson's
13 conduct was extreme and outrageous, was
14 beyond all possible bounds of decency and
15 was utterly intolerable in a civilized
16 society. Third, he must prove that Mr.
17 Johnson's conduct caused his emotional
18 distress and fourth, that the emotional
19 distress suffered by Mr. Frei was severe and
20 of a nature that no reasonable person could
21 be expected to endure it. In order to prove
22 intentional infliction of severe emotional
23 distress, Mr. Frei must prove that Johnson

1 acted either with the desire or knowledge
2 that emotional distress would result from
3 his conduct or that he should have known
4 that his conduct would cause Frei to suffer
5 emotional distress. Extreme and outrageous
6 conduct is more than just workday insults,
7 hurt feelings from bad manners, annoyances
8 or petty oppressions. Outrageousness means
9 a high order of recklessness, ruthlessness
10 or deliberate malevolence. As such, extreme
11 and outrageous encompasses particularly
12 reprehensible conduct. What is extreme
13 and outrageous is for you to consider given
14 all of the facts. If you find that Mr. Frei
15 has satisfied each and every element of his
16 claim for intentional infliction of
17 emotional distress you must consider the
18 issue of damages. The rule of damages is a
19 practical instrumentality for the
20 administration of justice. Its object is to
21 afford the equivalent in money for the
22 actual loss caused by the wrong of another.
23 You must consider what amount of money would

1 be full, fair and reasonable based on all of
2 the evidence. The next claim is Mr. Frei's
3 claim against Mr. Johnson for negligent
4 infliction of emotional distress. Mr. Frei
5 claims that Mr. Johnson negligently
6 inflicted emotional distress on him. In
7 order to recover on this claim for negligent
8 infliction of emotional distress, Mr. Frei
9 must prove by a preponderance of the
10 evidence the following elements. That Mr.
11 Johnson was negligent, that Mr. Frei
12 experienced emotional distress, that Mr.
13 Johnson's negligence caused Mr. Frei's
14 emotional distress, that Mr. Frei
15 experienced physical harm manifested by an
16 objective symptomology and that a reasonable
17 person would have suffered emotional
18 distress under the circumstances of this
19 case. A claim for negligent infliction of
20 emotional distress must do more than allege
21 mere upset, dismay, humiliation, grief and
22 anger. Mr. Frei must prove not only
23 distress but also that the distress

1 manifested itself in physical symptoms or
2 objective symptomology. The last claim that
3 Mr. Frei has brought against Mr. Johnson is
4 the claim of a civil rights violation. Mr.
5 Frei alleges that Mr. Johnson violated the
6 Massachusetts Civil Rights Act which
7 provides in pertinent part any person whose
8 exercise or enjoyment of rights secured by
9 the Constitution or laws of the United
10 States or of rights secured by the
11 Constitution or laws of the Commonwealth has
12 been interfered with or attempted to be
13 interfered with by any person by means of
14 threats, intimidation or coercion may bring
15 an action for money damages. In order to
16 prevail on a claim under the Massachusetts
17 Civil Rights Act, Mr. Frei must prove by a
18 preponderance of the evidence the following
19 three elements. One, that his exercise or,
20 that his exercise or enjoyment, I'm sorry,
21 let me back that up. He must prove his
22 exercise or enjoyment of rights secured by
23 the Constitution or laws of either the

1 United States or the Commonwealth, two has
2 been interfered with or attempted to be
3 interfered with by Mr. Johnson, and three,
4 the interference or attempted interference
5 was by threats, intimidation or coercion.
6 To establish the first element of the claim,
7 Mr. Frei must prove by a preponderance of
8 the evidence that he was engaged in the
9 exercise or enjoyment of rights secured by
10 the Constitution or by the laws of the
11 United States or of the Commonwealth. The
12 term secured means created by, arising under
13 or dependent upon rather than fully
14 protected. A right is secured by the
15 Constitution or laws if it emanates from the
16 Constitution or from the laws. If it finds
17 its source in the Constitution or the laws
18 of the United States or of the Commonwealth.
19 In this case Mr. Frei alleges that he was
20 engaged in or enjoying his right to free
21 speech and expression, that right is secured
22 by the Constitution or the laws of the
23 United States and the Commonwealth. To

1 establish the second element of his claim,
2 Mr. Frei must prove by a preponderance of
3 the evidence that Mr. Johnson interfered
4 with or attempted to interfere with Mr.
5 Frei's right to free speech and expression.
6 To interfere means to hinder, impede,
7 intrude or meddle in the affairs of another.
8 The Massachusetts Civil Rights Act contains
9 no requirement that a person specifically
10 intend to deprive another of a secured right
11 in order to be liable under that Act. Thus
12 Mr. Frei is not required to prove that Mr.
13 Johnson specifically intended to interfere
14 or attempted to interfere with his
15 engagement in or enjoyment of a secured
16 right. The third element of Mr. Frei's
17 claim is that Mr. Johnson interfered with or
18 attempted to interfere with Mr. Frei's
19 enjoyment of secured rights by threats,
20 intimidation or coercion. The Massachusetts
21 Civil Rights Act protects rights secured by
22 the Constitution or laws of the United
23 States only against interference or

1 attempted interference by threats,
2 intimidation or coercion. Those words must
3 be applied according to their natural
4 connotation that a forcing submission by
5 conduct calculated to frighten, harass or
6 humiliate. When considering whether Mr.
7 Johnson threatened, intimidated or coerced
8 Mr. Frei, you are to consider the issue
9 under an objective standard. That is,
10 whether a reasonable person in Mr. Frei's
11 circumstances would be threatened,
12 intimidated or coerced by Mr. Johnson's
13 conduct. In determining how a reasonable
14 person would react in the same
15 circumstances, you may consider how other
16 persons actually responded to events in this
17 case. The term threat involves the
18 intentional exertion of pressure to make
19 another fearful or apprehensive of injury or
20 harm. The term intimidation means putting
21 in fear for the purpose of compelling or
22 deterring conduct. The term coercion means
23 the application to another of such force,

1 either physical, economic or moral, as to
2 constrain him to do against his will
3 something that he would not otherwise have
4 done. Stated differently, coercion is the
5 active domination of another's will or the
6 use of physical, economic or moral force to
7 compel another to act or assent or to
8 refrain from acting or assenting. If you
9 find that Mr. Frei has proven the elements
10 of this claim he is entitled to compensatory
11 damages. And I instructed you a little bit
12 earlier about what compensatory damages
13 were. Okay, ladies and gentlemen, let me
14 thank you very much for your attention
15 during those instructions. Could I see the
16 attorneys at the side for a minute? We're
17 just, ladies and gentlemen, making a few
18 last typographical corrections in the
19 paperwork that's coming to you. Alright, so
20 before we go any further and give you the
21 case to deliberate, I'm going to appoint a
22 foreperson and that is going to be juror
23 number thirty-two, Daniel Brown. You're

1 just in the special seat. There's no extra
2 pay, a few extra duties. The duties are
3 that first of all, you have to make sure
4 that all of the jurors get a fair chance to
5 deliberate, express their opinions, talk,
6 all of that. And then if there are any
7 questions that the jury has, you'll have a
8 pad and paper in there, you will be the one
9 to write them out, give it to the court
10 officer and they'll bring it into the court.
11 You're also going to be the one to fill out
12 what we call the jury verdict slips. There
13 is a jury verdict slip for each claim, a
14 separate slip. Actually, some of them are
15 two pages because there are a series of
16 questions. I'm going, could he have one of
17 those just to look at while you're making a
18 final. I'm going to give you one to look at
19 just so you have an idea of what I'm talking
20 about. They're all the same except for
21 there are different questions pertaining to
22 the different, which one are you giving him?
23 Defamation, okay. Okay, so you'll see on

1 the top it says, I'm sort of just speaking
2 to all of you, but Mr. Brown has it in front
3 of him, it just says jury verdict slip and
4 then it says defamation, that's the count
5 that you're dealing with on this slip. So
6 the first question is do you find by a
7 preponderance of the evidence that on
8 February 19, 2011 Mr. Johnson knowingly and
9 falsely accused Mr. Frei of having committed
10 a crime. Now, there are seven of you in
11 there. You do not have to be unanimous but
12 six out of seven have to agree on an answer.
13 As you go through the questions, it does not
14 have to be the same six out of seven but you
15 have to have six people answering one way or
16 the other in order to check off an answer.
17 So if six people agree to yes then you check
18 off yes and you go on to the next question.
19 If six people agree to no, as you can see
20 what's written right below there, if your
21 answer is no, stop here, so you will not
22 fill out the balance of the questions on
23 that slip, okay, then you just go on to the

1 next slip. If your answer is yes, you go on
2 to question two, and again when six out of
3 seven have agreed, you check off that answer
4 and depending upon what the answer is you
5 either keep going or you stop. Okay? And
6 it's the same on each, as to each claim,
7 obviously the questions are different. You
8 know what I noticed we don't have here, we
9 need a place for the foreman to date and
10 sign. You know what, in doing all of these
11 apparently we neglected to put a place for
12 you to date and sign. Can you do me a
13 favor, as you fill out each slip, can you
14 just write your name as foreman and write
15 the date on the bottom or at the end of each
16 slip, okay. I'm sorry that we, there was a
17 lot to do here so we missed that. And if
18 you do reach damages in any of the counts,
19 you have to write out the damages amount in
20 figures and also in words. Okay? You have
21 any questions about that that come right to
22 mind right away? Okay, alright, very good.
23 So why don't we take that one back and then

1 we can give it to all of you together in a
2 group. Okay. Okay, so you want to swear in
3 the court officers please?

4 (COURT OFFICER SWORN)

5 THE COURT: Alright, so ladies and
6 gentlemen, if you follow the court officer,
7 he's going to take you to the deliberation
8 room. All of the exhibits are going to come
9 in with you as are these jury verdict forms,
10 okay. Okay, thank you.

11 MR. RIGALI: I understand that the
12 question is that they either want to have a
13 transcript of the tape or they'd like to
14 listen to the tape. They're not going to
15 get the transcript.

16 THE COURT: Right.

17 MR. RIGALI: And we don't have a means
18 by which to play the tape.

19 THE COURT: Well, that's the first
20 issue. Go ahead.

21 MR. RIGALI: So my suggestion would be
22 that wherever they listen to the tape, so
23 long as they're together and no one else is

1 in the room this complies with the law.

2 THE COURT: Would be right in here.

3 MR. RIGALI: So the easiest thing, I
4 think, would be to just plug it into the
5 computer here in this courtroom, obviously
6 none of us being here, face the speakers
7 towards them, it's seven minutes, it's not a
8 big deal.

9 THE COURT: Someone would have to be
10 here to run it. Or we can all be here and
11 they can listen to it, the same as they did,
12 I don't know how to.

13 MR. RIGALI: Well, we could waive, we
14 could put this all on the record as we are
15 and waive the presence of say the clerk or
16 some other independent person to facilitate
17 the playing of the tape.

18 THE COURT: Well obviously no comment.
19 He would just start it and sit there and
20 then stop it. Is that a problem?

21 MS. SAPIRSTEIN: No, it's no problem.

22 MR. RIGALI: I have no problem.

23 THE COURT: That is not the only

1 question, however. I will have the clerk
2 mark this as exhibit A for identification,
3 but the question is could we have a copy of
4 the elements of the laws that were mentioned
5 during the instructions, specifically,
6 compensation.

7 MS. SAPIRSTEIN: There is no law
8 regarding compensation.

9 MR. RIGALI: Well, they want the
10 instructions on compensation.

11 MS. SAPIRSTEIN: For each count?

12 THE COURT: Well, I think they want the
13 elements. I don't know if this means do
14 they only want compensation or do they want
15 the elements or just compensation.

16 MS. SAPIRSTEIN: Well, the elements are
17 on the verdict form basically.

18 THE COURT: Right, sort of, yeah.

19 MS. SAPIRSTEIN: No, I think...

20 THE COURT: Do we have a copy of the
21 elements of the laws that were mentioned
22 during the instructions and then there's a
23 period, specifically compensation, period.

1 MS. SAPIRSTEIN: And the only two laws
2 that, laws would have been the civil rights
3 statute and the wiretap. Everything else is
4 common law.

5 THE COURT: You think they mean laws
6 strictly or?

7 MS. SAPIRSTEIN: This is actually quite
8 a bizarre question, I don't know the answer.
9 But that's, I mean, otherwise I guess you
10 could give them a copy of the jury
11 instructions.

12 THE COURT: I can. I'd have to redo
13 some of them. I was reading off of things
14 that were crossed out.

15 MR. RIGALI: I personally think that
16 it's not necessary to do that. I would say
17 to them if you have a specific question
18 about a particular cause of action, you
19 know, what's a battery, what's this or that,
20 I'd be glad to reinstruct you if the
21 consensus is that would be helpful. As far
22 as the compensation goes, you could probably
23 do that in a paragraph. That in the causes

1 of action in which, you know, for
2 compensation you have, you know, the
3 wiretap, actually you might ask them if
4 there was a particular one and if they say,
5 you know, emotional distress or civil rights
6 then you can, it's only like three lines,
7 you could just read that and say this is
8 what the rule is, entitled either to nominal
9 damages or compensatory damages, these are,
10 humiliation, dah, dah, dah, dah, you know,
11 personal injury, out of pocket. That's
12 pretty brief.

13 THE COURT: Yeah, I think that that, if
14 you think anything else, I think does make
15 sense, to call them back out here and just
16 tell them that if they have a question about
17 a particular claim that I will reinstruct
18 them on that claim or if they have a
19 question about a particular type of damages
20 I'll reinstruct them on that.

21 MS. SAPIRSTEIN: That's fine.

22 THE COURT: You know, they had to have
23 just walked in the door and write it down.

1 Sometimes they write them down and then by
2 the time you get back to answer them, they
3 say never mind. But I'll have them come out
4 and, I guess have them come out. Oh, but we
5 want to resolve the CD. So maybe when they
6 come out and I tell them that, they can stay
7 out here and listen to the CD. So let's not
8 bring them out until we have that all, you
9 know, booted up and ready.

10 THE CLERK: It's in the room.

11 THE COURT: Oh, it's in there. Alright.

12 MR. RIGALI: You know, with all the
13 electronic communication aspects of current
14 society, you wonder, on bigger trials, these
15 big white collar crime things or any other
16 more complex litigation, how that is made
17 available to the jury in a jury room.

18 MS. SAPIRSTEIN: Federal courts are all
19 equipped.

20 MR. RIGALI: Right, the federal courts
21 are, but you still need someone to plug in a
22 tape or to do this or to do that.

23 MS. SAPIRSTEIN: Yeah, the clerk does

1 it.

2 MR. RIGALI: The clerk does it in the
3 jury room?

4 MS. SAPIRSTEIN: Well, I don't know
5 about the jury room, but in the court.

6 MR. RIGALI: That's my question. You
7 know, there's an evolving technology with
8 which the law sort of has to catch up with,
9 you know.

10 THE COURT: Right. They probably know
11 how to do it more than we do.

12 MR. RIGALI: Yes.

13 THE COURT: Depending upon the age, I
14 don't mean this jury.

15 MR. RIGALI: I was going to say, they
16 had millions to build a courthouse there
17 with the most up to date stuff.

18 THE COURT: Can we award less than one
19 hundred dollars for wiretapping charge if we
20 said yes.

21 MS. SAPIRSTEIN: No.

22 THE COURT: I don't think they can
23 either.

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MR. RIGALI: I think that's the minimum.

THE COURT: Pardon me?

MR. RIGALI: I think that's the minimum.

THE COURT: It is.

MS. SAPIRSTEIN: It is.

THE COURT: You want me to just tell
them no?

MS. SAPIRSTEIN: Yes.

THE COURT: Okay. Why don't you mark
this for B for identification.

THE CLERK: We have A, B, C and D for ID
already, so this is E.

THE COURT: Alright.

MR. RIGALI: I bet you they'll be all
done by the time this gets straightened out.

THE COURT: Or have a few more
questions.

MR. RIGALI: You can't fault them. It's
overwhelming.

THE COURT: It's complicated for us.

MR. RIGALI: And from a learning theory
point of view, if you teach, you know, like
I teach at the colleges and universities,

1 you become very conscious of how you
2 communicate technical terms and how people
3 absorb them. When you think about juries,
4 you go oh my gosh. I've often thought when
5 I was working, you know, doing homicide
6 cases, for second prong malice and those
7 types of things, those really unique things,
8 if you sat a hundred law students and gave a
9 jury charge and then did a, and said okay,
10 write out this, this, this, whether you
11 could take the statistical, like to get a
12 sociologist to get in there and crunch the
13 numbers as to whether or not it's even
14 intelligible.

15 THE COURT: I know. Sometimes when
16 you're reading them you think that. You
17 think, this doesn't even make sense to me.
18 I don't mean these instruction, because
19 these were very good, but some of them.

20 THE CLERK: Is this a data CD or audio?

21 MR. RIGALI: I think it's audio. I've
22 played it in my office.

23 THE COURT: Did you play it on your

1 computer?

2 MR. RIGALI: Yeah, and I'm totally
3 illiterate. I just threw it in and hit a
4 button.

5 THE COURT: Can you stop it and put it
6 back to the beginning? Okay, so is it
7 agreed then, first of all, I will, when the
8 jury comes out I will read them the first
9 question and then tell them that if they
10 have a request for specific elements to be
11 read, if they need to rehear specific
12 elements of a specific claim, I'll
13 reinstruct them on that and if they need to
14 hear specific types of compensation I'll
15 reinstruct them on that, okay?

16 MS. SAPIRSTEIN: Okay.

17 THE COURT: But this is kind of general.
18 I'm not going to say that, but, and then the
19 second question, can we award less than one
20 hundred dollars for wiretapping charge if we
21 say yes, and I'm just going to say no,
22 that's the minimum. Any problem with that?

23 MS. SAPIRSTEIN: No.

1 THE COURT: Alright. Okay, they can
2 come out.

3 MR. RIGALI: Well...

4 THE COURT: Okay, wait a minute.

5 MR. RIGALI: I guess the question is, if
6 they, I guess that's fair, I was going to
7 say if they think it's worth less than...

8 MS. SAPIRSTEIN: It doesn't matter, the
9 statute says minimum.

10 THE COURT: Yeah, okay. No, we're not
11 going to record while they're listening,
12 okay, because it's sort of part of the
13 deliberations.

14 MR. RIGALI: I don't to even be here.

15 THE COURT: You're not. Nobody's going
16 to be here except for the clerk, but he's
17 not going to record it either. It's not
18 going to be on the record.

19 THE CLERK: If they want me to rewind
20 it, play it again, rewind it, play it again,
21 I can do that.

22 MR. RIGALI: Oh yes, understood.

23 COURT OFFICER: All rise for the jurors

1 please.

2 THE COURT: Okay, ladies and gentlemen,
3 I have your two questions. The first one,
4 which we've marked D for identification,
5 says could we have a copy of the elements of
6 the laws that were mentioned during the
7 instructions, specifically compensation.
8 Let me just say this to you, and if it comes
9 down to you need a reinstruction on certain
10 claims or certain elements, or certain types
11 of compensation, I'm happy to do that. You
12 know, they've all agreed, and I will do
13 that, but if you could narrow it down just a
14 little bit it would be helpful, okay.
15 Question number two, which we've marked E
16 for identification, can we award less than
17 one hundred dollars for wiretapping charge
18 if we say yes. Okay, the answer to that is
19 no. The one hundred dollars is a minimum,
20 okay. And my understanding is you would
21 like to hear the tape recording again.
22 Okay. We're going to have you stay in here
23 because given the great technical expertise

1 of the trial court we can only play it in
2 here. So everyone's going to leave except
3 for the clerk, okay, who is going to run it
4 for you and you can hear it as many times as
5 you like but don't say anything because the
6 clerk will be here and obviously he's not
7 part of your deliberations, so, you know,
8 just listen to it as much as you like and
9 then if you're going to discuss it, you've
10 got to go back in the deliberation room.
11 Okay? Alright. So everyone will step out
12 then and the clerk will play the recording.
13 Okay, we'll bring the jury in. They have a
14 verdict. Okay, all set.

15 COURT OFFICER: All rise. Would the
16 jurors and defendants remaining standing,
17 all others sit down.

18 THE CLERK: Mr. Foreperson, have at
19 least six of your number reached a verdict.

20 MR. FOREPERSON: Yes.

21 THE CLERK: Would you hand the verdict
22 slips to the court officer please.

23 THE COURT: Okay. I think, well you can

1 record the verdicts, there's one that I'll
2 have to see you at the side before they
3 leave, but it may be corrected. Go ahead
4 and record the verdicts.

5 THE CLERK: I'm going to put them in
6 order, Your Honor. Mr. Foreperson and
7 members of the jury, hearken to your verdict
8 as the Court records it in civil action
9 number 1143CV293, the case of Brian Johnson
10 v. Peter Frei, question one, violation of
11 Massachusetts wiretapping statute under
12 M.G.L. 272, Section 99, question one, did
13 Peter Frei make a secret recording of Brian
14 Johnson, answer, yes. Question two, did
15 Frei make a secret recording that violated
16 the personal or property interest of
17 Johnson, answer, no. Number three, did Frei
18 make a secret recording that violated
19 Johnson's privacy, answer, no. Question
20 four, did Frei make a secret recording of
21 Johnson without Johnson's consent and
22 disclose the contents of such recording to
23 another person, answer, yes. Question five,

1 what amount of money would fairly compensate
2 Mr. Johnson for Mr. Frei's violation of
3 Mass. General Laws 272, Section 99, answer,
4 one hundred dollars. Question six, what
5 amount of punitive damages, if any, do you
6 award against Mr. Frei, answer, zero
7 dollars. Signed Daniel Brown, Foreman. So
8 say you, Mr. Foreperson, that is the verdict
9 of at least six of your number as to that
10 count?

11 MR. FOREPERSON: Yes.

12 THE CLERK: And so say you, members of
13 the jury?

14 JURY: Yes.

15 THE CLERK: As to the counterclaim,
16 count one, assault by attempted battery.
17 Question one, do you find by a preponderance
18 of the evidence that on February 19, 2011
19 Mr. Johnson intended to commit a battery
20 that is harmful or unpermitted touching of
21 Mr. Frei, answer, no. Assault by an
22 immediate threatened battery. Question one,
23 do you find by a preponderance of the

1 evidence that on February 19, 2011 Mr.
2 Johnson intentionally committed an overt act
3 toward Mr. Frei, answer, no. Signed,
4 Foreman Daniel Brown, February 28, 2013. So
5 say you that's the verdict of at least six
6 of your number, Mr. Foreperson.

7 MR. FOREPERSON: Yes.

8 THE CLERK: And so say you, members of
9 the jury?

10 JURY: Yes.

11 THE CLERK: Counterclaim count two,
12 assault and battery. Question one, do you
13 find by a preponderance of the evidence that
14 while acting on his own or in concert with
15 others on February 19, 2011 Mr. Johnson
16 intended to commit a battery upon Mr. Frei,
17 answer, no. Signed, Daniel Brown, Foreman.
18 So say you that that's the verdict of the
19 six of your number, Mr. Foreman?

20 MR. FOREMAN: Yes.

21 THE CLERK: And so say you, members of
22 the jury?

23 JURY: Yes.

1 THE CLERK: Counterclaim count three,
2 defamation. Question one, do you find by a
3 preponderance of the evidence that on
4 February 19, 2011 Mr. Johnson knowingly and
5 falsely accused Mr. Frei of having committed
6 a crime, answer, yes. Question two, do you
7 find by a preponderance of the evidence that
8 Mr. Johnson communicated said knowing and
9 false accusation of a crime to at least one
10 other person, answer, yes. Question three,
11 what amount of money will fairly compensate
12 Mr. Frei for the harm caused by Mr.
13 Johnson's defamation, answer...

14 THE COURT: That one I'm going to have
15 send you back out on. I will just let you
16 know that the answer in words says five
17 hundred dollars, the answer in numbers says
18 one hundred dollars. So I'm going to have
19 to send you back out on that one, okay.

20 THE CLERK: Thank you, Your Honor.
21 Counterclaim count four, intentional
22 emotional distress. Question one, do you
23 find by a preponderance of the evidence that

1 on February 19, 2011 Mr. Johnson intended to
2 commit, intended to inflict emotional
3 distress or knew or should have reasonably
4 known that emotional distress was likely to
5 result from his conduct, answer, yes.

6 Question two, do you find Mr. Johnson's
7 conduct was extreme and outrageous, was
8 beyond the bounds of decency and intolerable
9 in a civilized society, answer, yes.

10 Question three, do you find Mr. Johnson's
11 conduct caused Mr. Frei emotional distress,
12 answer, no. Signed, Daniel Brown, Foreman.
13 So say that that's the verdict of at least
14 six of your number, Mr. Foreman?

15 MR. FOREMAN: Yes.

16 THE COURT: And so say you, members of
17 the jury?

18 JURY: Yes.

19 THE CLERK: Counterclaim count five,
20 negligent infliction of emotional distress.
21 Question one, do you find by the
22 preponderance of the evidence that on
23 February 19, 2011 Mr. Johnson acted

1 negligently toward Mr. Frei, answer, yes.

2 Question two, do you find that a reasonable

3 person under the circumstances of this case

4 would have suffered emotional distress,

5 answer, yes. Question three, do you find

6 that Mr. Johnson's negligence caused

7 physical symptoms or objective symptomology

8 of injury and emotional distress to Mr.

9 Frei, answer, no. Signed, Daniel Brown,

10 Foreman. Do say you, Mr. Foreman, that's the

11 verdict of at least six of your number?

12 MR. FOREMAN: Yes.

13 THE CLERK: And so say you, members of

14 the jury?

15 JURY: Yes.

16 THE CLERK: And lastly, counterclaim

17 count seven, civil rights violation.

18 Question one, do you find by a preponderance

19 of the evidence that Mr. Frei exercised or

20 enjoyed rights secured to him by the

21 Constitution or laws of the United States or

22 by the Constitution or laws of the

23 Commonwealth of Massachusetts, answer, yes.

1 Question two, do you find by a preponderance
2 of the evidence that Mr. Johnson interfered
3 with or attempted to interfere with those
4 rights, answer, yes. Question three, do you
5 find that the interference or attempted
6 interference was by threats, intimidation or
7 coercion, answer, yes. Question four, what
8 amount of money will fairly compensate Mr.
9 Frei for the harm caused by Mr. Johnson
10 having violated Mr. Frei's civil rights,
11 answer, one thousand five hundred dollars
12 and zero cents. Signed, Daniel Brown,
13 Foreman. And you say that that's the verdict
14 of at least six of your number, Mr. Foreman?

15 MR. FOREMAN: Yes.

16 THE CLERK: And so say you, members of
17 the jury?

18 JURY: Yes.

19 THE COURT: Alright, thank you. Ladies
20 and gentlemen, I'm going to send you back to
21 the jury room on that one verdict slip that
22 is inconsistent so you have a chance to get
23 it consistent. Okay.

1 COURT OFFICER: All rise for the jury
2 please.

3 THE COURT: You can all stay right
4 there, I'm just going to call one of the
5 motions that's here but you don't have to
6 move.

7 COURT OFFICER: Court is back in
8 session. You may be seated.

9 THE CLERK: Mr. Foreperson, have you
10 reached a verdict as to the counterclaim
11 count three, defamation as to damages?

12 MR. FOREPERSON: Yes.

13 THE CLERK: I'll just read the questions
14 again, Your Honor. This was as to count
15 three of the counterclaim dealing with
16 defamation. Question one, do you find by
17 the preponderance of the evidence that on
18 February 19, 2011 Mr. Johnson knowingly and
19 falsely accused Mr. Frei of having committed
20 a crime, answer, yes. Do you find by the
21 preponderance of the evidence that Mr.
22 Johnson communicated said knowing and false
23 accusation of crime to at least one other

1 person, answer, yes. Question three, what
2 amount of money will fairly compensate Mr.
3 Frei for the harm caused by Mr. Johnson's
4 defamation, answer, one hundred dollars and
5 zero cents. So say you that that's the
6 verdict of at least six of your number, Mr.
7 Foreperson?

8 MR. FOREPERSON: Yes.

9 THE CLERK: And so say you, members of
10 the jury?

11 JURY: Yes.

12 THE COURT: Okay. Thank you. Ladies
13 and gentlemen, thank you very much for your
14 service. I am going to come in the back and
15 just talk with you for a minute or two, so
16 I'll have the court officer bring you out
17 and I'll meet you back there, okay.

18 MR. RIGALI: Well, I'm not going to
19 argue it, Judge, I'll just file that for the
20 record. It's a request for judgment NOV on
21 the wiretap case. I think it's the same as
22 the directed verdict standard as I
23 understand, I'd argue it's against the

1 weight of the evidence.

2 THE COURT: Alright. That's denied.

3 MR. RIGALI: Thanks. With regards to...

4 THE COURT: You're welcome.

5 MR. RIGALI: As I said, I wasn't going
6 to argue it, but we have to do our jobs.

7 THE COURT: Yes.

8 MR. RIGALI: And then what I would
9 propose on the attorneys' fees that we
10 submit affidavits within ten days or
11 whatever to the Court for approval.

12 THE COURT: Is there attorney's fees on
13 the...

14 MS. SAPIRSTEIN: Just for the
15 wiretapping that I'm aware of.

16 THE COURT: Just the wiretapping. Is
17 there attorney's fees for civil rights?

18 MR. RIGALI: Civil rights and
19 wiretapping.

20 THE COURT: I couldn't remember. If
21 there is, you can both submit them.

22 MR. RIGALI: So within ten days we'll
23 get those to you?

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THE COURT: Is that good?

MS. SAPIRSTEIN: Ten days is fine.

THE COURT: And do you want to have a hearing?

MR. RIGALI: Unless you think there's one necessary.

THE COURT: I don't know. I guess if I look at both of them and I have, yeah, I'll have it set up for a hearing. I would prefer to have a hearing, just so that each of you can challenge the others, I guess, unless they both cancel each other out, I don't know.

MS. SAPIRSTEIN: Also I'd like to move verbally and I will be filing written motions for a judgment notwithstanding the verdict on both the civil rights and the defamation counts.

THE COURT: Do you want me to rule on it before you submit the...

MS. SAPIRSTEIN: I was actually going to do a little brief because I do have ten days.

1 THE COURT: Yeah, okay. Alright. So you
2 have ten days to file it.

3 MS. SAPIRSTEIN: Unless you're going to
4 allow them, then I won't file the brief.

5 THE COURT: Why don't you submit the
6 brief within ten days and do the affidavits
7 on attorney's fees within ten days. So
8 what's the ten day date there?

9 MS. SAPIRSTEIN: March 9th, right?

10 THE COURT: March 9th, that's a
11 Saturday. You'd have to go the 11th, the
12 next business day. By the 11th, okay?

13 MS. SAPIRSTEIN: Yes, Your Honor, thank
14 you.

15 THE COURT: You're welcome. Thank you
16 both.

17 MR. RIGALI: Thank you, Your Honor.

18 THE COURT: Oh, Attorney Rigali, what do
19 you want to do about those big, do you keep
20 those big, keep them for the appeal period?

21 MR. RIGALI: Can I make a suggestion?

22 THE COURT: Oh, we're going to keep it
23 until the appeal period is over.

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MR. RIGALI: Oh, alright, I was going to say we can substitute smaller copies, it's easier for storage, but it's up to you.

THE COURT: It's only thirty days after judgment issues. So we'll keep them for now. Oh, it's ten I'm told.

MR. RIGALI: Yes, ten.

THE COURT: Ten for the notice of appeal, yeah.

MR. RIGALI: If it's okay either myself or Mr. Frei will be in and out to grab the TV. Thank you very much.

(HEARING CONCLUDED)

I, Roxanne C. Costigan, Registered Professional Reporter, do hereby certify that the foregoing testimony prepared from designated portions of cassettes furnished by the parties herein is true and accurate to the best of my knowledge and belief.

Date

Roxanne C. Costigan