

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

District Court Department
Palmer Division
Civil Action No.: 1143CV293

BRIAN JOHNSON)
)
 PLAINTIFF)
)
 v.)
)
 PETER FREI)
)
 DEFENDANT)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION FOR ATTORNEY'S FEES

Brian Johnson, the Plaintiff in the above-captioned matter ("Johnson"), hereby opposes the Defendant's Motion for Attorney's Fees.

The Defendant, Peter Frei ("Defendant") is requesting \$50,287.78 in legal fees and \$3,092.79 in costs, which includes \$2,500.00 for a tape authentication expert who did not testify at trial. The Defendant is purportedly seeking attorney's fees pursuant to G.L.c. 12 §11I (the "Civil Rights Act"). While a prevailing party may be awarded reasonable attorney's fees under the Civil Rights Act, a request for an award of attorney's fees is limited to the fees associated with representation regarding the claims under the Civil Rights Act. There is no legal authority to support an award for legal fees associated with defending the wiretapping claim by Johnson against Defendant or those associated with any of the other counterclaims by Defendant against Johnson.

The burden is on the Defendant to identify the time spent on claims under the Civil Rights Act. While the Defendant focuses on one factor for determining the appropriateness of a fee award, which is the level of success achieved, the

Defendant fails to consider the time spent on pursuing the claim under the Civil Rights Act versus the time spent on defending the wiretapping claim and pursuing the other counterclaims for which an award of attorney's fees is not available.

"Attorneys' fees normally should not be awarded for time spent in litigating (or preparing to litigate) unsuccessful, severable claims." *Alfonso v. Aufiero*, 66 F.Supp.2d 183, 194 (D. Mass 1999), *internal citations omitted*. Counsel for the Defendant makes no attempt to differentiate between time spent on claims under the Civil Rights Act from time spent litigating other claims, including the defense of the wiretapping claim.

In addition to failing to distinguish between time spent on the claim under the Civil Rights Act, counsel for Defendant included in his Motion unproductive and unnecessary hours. The following entries are examples of time spent on claims other than the Civil Rights Act claim, constitute unproductive or unnecessary billing or are non-core tasks:

Date	Description	Hrs/Rate	Amount	
8/19/2011	Research cases, Com v. Hyde; Com v. Montgomery; G.L.c. 272 Sec 99, etc.	2.00 235.00/hr.	470.00	(defense of wiretap claim)
8/23/2011	Research: review 3 pages of citations	0.75 235.00/hr.	176.25	(unable to determine)
8/29/2011	Research, prep pleading 1 st draft	2.25 235.00/hr.	528.75	(unable to determine)
8/30/2011	Rev. Hyde, research abuse of process, obstruction of justice, perjury, subornation, civil rights, numerous phone calls, emails, finalize pleading 9 a.m. – 1 p.m.	4.00 235.00/hr.	940.00	(unable to determine amount of time spent pursuing the civil rights claim)

9/2/2011	Email, review 1 st Cir GILK	0.50 235.00/hr.	117.50	(defense of wiretap claim)
9/6/2011	Rec/rev letter and 13 pages of research cases	1.25 235.00/hr.	293.75	(unable to determine)
12/30/2011	Palmer District Court; review file and docket entries; obtain print out of docket sheet	0.50 235.00/hr.	117.50	(unable to determine)
1/3/2012	Email, request copies of Palmer D. Ct pleadings, etc; start prep Case Management CF on 1/12	0.25 235.00/hr.	58.75	(unable to determine)
1/4/2012	Rec/review numerous docs/pleadings from PF; Review material regarding plaintiffs possible recovery of legal fees as part of case from 17C Mass Practice Sec 61, Crosland – old hospital case from 1987 (hosp phone not an intercepting device) 14 pages of attachments	1.25 235.00/hr.	293.75	(unable to determine)
1/11/2012	Prep for Case Mgmnt CF; research "Necessity" possibility; Research MA case law re: 99Q, etc; Vieux, Barbaza, Handanian, Birliglia, Pine v. Rust, etc. 2:30-5 pm	2.50 235.00/hr.	587.50	(defense of wiretap claim)
1/12/2012	Court – Prep for court; research privacy statute for possible relevance; Meet w/client following court	1.00 235.00/hr.	295.00	(unable to determine)
1/17/2012	Rec/rev docket entries for criminal harassment case; Frei vs. Brian Johnson; Case # 1143 RO 079; filed 3/15/11, dismissed by court	0.50 235.00/hr.	117.50	(unable to determine)

on 8/12/11

1/18/2012	Status of Superior Court case; CD going to steno for transcript prep	0.10 235.00/hr.	23.50	(unable to determine)
1/25/2012	Research: Necessity defense; Lafave Crim Law, 3 rd edition	0.25 235.00/hr.	58.75	(defense of wiretap claim)
2/1/2012	Research status inquiry	0.20 235.00/hr.	47.00	(unable to determine)
2/16/2012	Met w/ redacted	1.00 235.00/hr.	235.00	(unable to determine)
2/17/2012	Email re 13 th Amendment, rt to enforce contracts, etc – attachment re: aggrieved person w/citations	0.25 235.00/hr.	58.75	(unable to determine)
2/22/2012	Research issues 2/22 and 2/23 re: aggrieved person, Hyde, Marshall dissent, etc.	0.50 235.00/hr.	117.50	(defense of wiretap claim)
2/23/2012	Marshall and Cody dissenting opinions in Com v Hyde; stading (SIC) vs aggrieved persons ?	0.20 235.00/hr.	47.00	(defense of wiretap claim)
3/19/2012	TC w/Peter	0.25 235.00/hr.	58.75	(unable to determine)
3/27/2012	Rec/rev legislative history	0.25 235.00/hr.	58.75	(defense of wiretap claim)
4/12/2012	Extensive review/research; download documents	1.50 235.00/hr.	352.50	(unable to determine)
4/20/2012	Research numerous cases on Casemaker – wiretap, privacy, etc.	1.50 235.00/hr.	352.50	(defense of wiretap claim)
	Research Lubanksi and related wilf & mal BKR	0.75 235.00/hr.	176.25	(defense of wiretap claim)

cases; also do casemaker search for all superior ct cases involving "wiretap, civil and 99Q"; find only 2 cases; TC Atty Eric Komblum who handled Lubanski in casemaker; EK reports wiretap aspect handled by Atty Brad Moir of Westfield 568-1957. end 10:38 am

4/25/2012	8:00 a.m. start – continue research in prep of meeting; office meeting from 10 a.m. to 1:50 p.m.; discuss case and status and strategy.	5.00 235.00/hr.	1,175.00	(unable to determine)
4/26/2012	Research all afternoon; 12:30 p.m. – 5:30 p.m.; numerous cases reviewed and printed from Casemaker, Prep and serve RFP; email and copy around 5:30; sent status by mail	5.00 235.00/hr.	1,175.00	(unable to determine)
4/27/2012	Organize file and research; review Glik; make calls to Attys Lesser, Newman, Sibbison, ACLU Boston, Wendy refers me to Patricia Dejunas w/whom I spoke late in the day and to whom I emailed a fact summary; she suggest ANT-SLAP may apply to the bog cites; Wendy not taking cases; David Hoose not able to help; tom Lesser finds case interesting suggest I contact Bill on his return Tuesday; spent late morning reviewing Peter's web site, going over statements, etc.	6.00 235.00/hr.	1,410.00	(defense of wiretap claim)

Essentially full day on this case 9:25 a.m. – 5:25 p.m., less 2 hours for unrelated matters.

5/1/2012	Lengthy discussion with ACLU Atty. Sarah Wunsch in Boston; Discuss causes of action an constitutional issues; suggests speaking with Attys Howard Friedman and David Milton in Boston; (617) 742-4100; discuss several state and federal cases; Blood, Glik, Frisbie v. Schultz, Com v. Adams	1.00 235.00/hr.	235.00	(defense of wiretap claim)
5/14/2012	Monday, all day 8:30 a.m. – 10:30 p.m. – research	12.00 235.00/hr.	2,820.11	(unable to determine)
5/15/2012	Tuesday – all day; 8:30 a.m. – 7:30 p.m.; Research and draft memos	11.00 235.00/hr.	2,350.00	(unable to determine)
5/16/2012	Finish draft of pleadings; file by mail, copies to Peter and Atty Sapirstein 7:30 a.m. – 5:30 p.m.	10.00 235.00/hr.	2,350.00	(unable to determine)
6/12/2012	Receive call from Atty Sapirstein re	0.34 235.00/hr.	78.73	(unable to determine)
6/15/2012	Prep PTC memo; receive/rev Atty Sapirstein Opposition to Motion Dismiss, etc	2.50 235.00/hr.	587.50	(defense of wiretap claim)
6/19/2012	Court – prep for hearing on opposition to P mot SJ; Def Mot Dismiss, PTC Memo, etc. – Attending hearing in front of Judge Poehler in Palmer District – end at 4:15 p.m. Prep time 3 hrs, court time 1 hr, total 4	3.00 235.00/hr.	705.00	(defense of wiretap claim)

	hours			
	Palmer District Court: Hearing Motion Dismiss; Motion SJ – Poehler	1.00 235.00/hr.	235.00	(defense of wiretap claim)
9/7/2012	TC – client	0.10 235.00/hr.	23.50	(unable to determine)
10/25/2012	Pre-trial Conference in Palmer D. Ct.; following CF re trial prep; 1:50-2:50 p.m., plus travel back and forth to Springfield	1.00 295.00/hr	295.00	(unable to determine)
11/8/2012	Research/prep/file motion to reschedule trial date; sere (SIC) counsel for plaintiff, obtain assent; file motion in court via fax; emails Motions approved by court. New trial dates.	1.42 235.00/hr.	332.92	(non-core)
11/21/2012	Research: Article 16 MA Dec Rights; rec/rev motion	1.25 235.00/hr.	293.75	(unable to determine)
1/14/2013	Office; research, trial prep.	6.00 235.00/hr.	1,410.00	(unable to determine)
1/23/2013	Several calls to court re availability of internet in district court; HC Law Lib; calls re jurisdiction; Clerk Mag Arnelli, Barb Burton, Kevin Claffey, etc.	1.00 235.00/hr.	235.00	(non-core)
1/29/2013	TC court Springfield D. Ct re Internet access.	.20 235.00/hr.	47.00	(non-core)
1/30/2013	Prep for trial; prep forms for trial subpoenas, sheriff letter, motions in limine, directed verdict, Judgment NOV and for involuntary dismissal per MA Rules of Civ. Pro.; Prep witness list;	3.00 235.00/hr.	705.00	(unable to determine)

	review witness statements and testimony; review jurisdictional issues, pendent jurisdiction, etc. 4:; - 7:00 p.m.			
2/1/2013	Prep and send trial subpoena to Sheriff for Holland Police Dept. Witnesses	0.50 235.00/hr.	117.50	(non-core)
2/5/2013	Office – continue trial prep; re tape expert; tc expert; harassment transcript; identify constitutional/statutory "right" for civ rights cc; research jury instructions; motions in limine; sequester, etc. 10 am – 3 pm	5.00 235.00/hr.	1,175.00	(unable to determine)
2/6/2013	9:30 a.m. – Trial prep; tc M. Sankiewicz, audio expert; subpoena Dana; emails 2/client; etc	4.00 235.00/hr.	940.00	(defense of wiretap claim/non-core)
2/7/2013	Receive/rev Constitutional Rights documents from client	0.20 235.00/hr.	47.00	(unable to determine)
2/13/2013	Prep for trial; research and drafting; phone to Southbridge PD; prep and send new subpoena to Southbridge PD; Hampden County Law Library	1.75 235.00/hr.	411.25	(unable to determine/ non-core)
2/18/2013	Trial Prep – elements; Jury Instructions	5.00 235.00/hr.	1,175.00	(unable to determine)
2/19/2013	Client meeting 7:30 a.m. – 11:30 a.m., trial prep, 2 p.m. meeting w/Atty Sapirstein at her office	6.00 235.00/hr.	1,410.00	(unable to determine)
2/20/2013	Trial prep at office: start	4.83	1,135.83	(unable to

	reading transcripts of harassment case; draft motion dir. Verdict and 1 st draft of memo; research recusal cases: email Worcester sheriff re correction on Beane subpoena 3:00 p.m. – 7:30 p.m.	235.00/hr.		determine)
2/21/2013	Office – TC Mike Stankiewicz – 12:37 p.m. received/review rept and CV via email; download and copy; tml for Atty Sapirstein at 1:36 p.m.; received DEP action vs. Town; start rev and prep exhibits @ 1:38 p.m.; finalize recusal; tc with Atty Sapirstein; will met Monday; discuss witnesses, exhibits and tape authentication; all to be done Monday afternoon; informed Atty re intended use of TV and blog; work on revised dire verd memo	2.50 235.00/hr.	587.50	(unable to determine/ non-core)
	Start 6 a.m. – review recusal cases; harassment transcript; law library at 10:45 a.m. – 12:25 p.m. – research, jury instructions, privacy, clerk's office (Diane) re available flatscreen; she called alter and ha ok from Chief security Ken O'Connor; check with security at court entrance; check with Michelle in Bar Association; park across street (\$4.50 – no charge); return to office 12:30	5.25 235.00/hr.	1,233.75	(unable to determine/ non-core)

2/22/2013	Continue Transcript review; print memo in support of dir verdict; review wiretap cases, Pine v Rust, etc. end at 6:33 p.m.	3.00 235.00/hr.	705.00	(unable to determine/ non-core)
2/23/2013	Saturday – 8 a.m. – 10:15, review and highlight final harassment transcript; 11 a.m. – 1 p.m. discuss various issues; (4 hours) 2:00 p.m. @ office, start jury instructions – end at 8:00 p.m.	11.00 235.00/hr.	2,585.00	(unable to determine)
2/24/2013	Trial prep, Sunday from 10:15 a.m. – 5:30 p.m. Primarily worked on jury instructions.	7.25 235.00/hr.	1,703.75	(unable to determine)
2/25/2013	Trial prep all day; 8:30 a.m. to 10:30 p.m.	14.00 235.00/hr.	3,290.00	(unable to determine)
2/26/2013	6 a.m. review case file, testimony, etc. prep. Testimony; leave for ct @ 8:45 a.m. arrive Springfield D. Ct. hand pre-trial matters through most of morning; impanel jury; pre-Forcier testimony during lunch; 2 pm openings, Forcier; Johnson testimony; Peter on stand for direct by Atty Sapirstein; start x-exam at 4:30 p.m. or so, introduce two exhibits; following court, review events of day through 5:15 p.m.; return to office; prepare special verdict slips; research and prepare jury instruction re adverse inference from missing witness. 6 am – 9:30 p.m = 15 hours: court 7 hours; out of court 8	7.00 295.00/hr	2,065.00	(unable to determine)

	hours			
2/26/2013	Trial prep	8.00 235.00/hr.	1,880.00	(unable to determine)
2/27/2013	6 a.m. trial prep; re-organize testimony, etc; jury instruction; leave early for office; make changes to dir verd memo; type instruction; court for 9 am, break at 1; 2 pm – 4:30 pm finish trial, jury instructions; verdict slips; defend against mot dir verdict; after curt; return to office, email proposed verdict slips to Asst Clerk-Mag John Stocks; prune file for take home materials needed for closing argument and other docs needed for court tomorrow at 8:30 a.m. leave office at 6:52 p.m. 7 hrs court; 5 hrs out of court; 12 hours through 6:52 pm	7.00 295.00/hr	2,065.00	(unable to determine/ non-core)
	Out of court hours on trial day #2	5.00 235.00/hr.	1,175.00	(unable to determine)
2/28/2013	Out of court hours on last day of trial	3.50 235.00/hr.	822.50	(unable to determine)
	6 a.m. – 7:30 a.m. prep closing, final motions; 8:30 – 2:30 court; finalize jury instructions; closing, post trial motion n.o.v.; brief cf after court; 3.5 hours w/client and/or prep for trial finish; 5 hours in court	5.00 295.00/hr	1,475.00	(unable to determine)
3/7/2013	TC with counsel for plaintiff re atty fees; judgment not filed by clerk as of today; research atty fees;	2.50 235.00/hr.	587.50	(unable to determine)

judgment not filed by clerk
as of today; research atty
fee, conflict issue, research
268A; tc investigator
Steven Cole, prep
opposition to award of pl
fees

Hours should be eliminated if the records are not sufficiently precise as to the tasks accomplished or the claim pursued to allow the Court to assess whether the time spent was reasonable. *Id.*

In awarding a fee to a prevailing party, the Court should initially employ the lodestar method to calculate fees. The Court should start with the contemporaneous billing records. *Bogan v. City of Boston*, 489 F.3d 417, 426 (1st Cir. 2007). Duplicative, unproductive or excessive hours should then be subtracted. *Id.* The resulting number of hours should then be multiplied by the prevailing attorney rate in the community. It is appropriate to make further adjustments as a result of the degree of success obtained.

In determining a reasonable attorney's fees award, this Court should consider "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, [and the result obtained.]" *Haufler v. Zotos*, 71 Mass. App. Ct. 1109 (2008), *internal citations omitted*. "[C]ompensable hours may be reduced if the time spent was wholly disproportionate to the interests at stake." *Killeen v. Westban Hotel Venture, L.P.*, 69 Mass. App. Ct. 784, 792 (2007), *internal citations omitted*.

Thus in the instant case, this Court should initially consider the contemporaneous billing record provided by counsel. The Court must then deduct the time spent on the defense of the wiretapping claim and the pursuit of the unsuccessful claims. The time spent on the successful defamation claim should also be deducted as it is not sufficiently related to the claim under the Civil Rights Act. This analysis of time spent on the Civil Rights Act claim as opposed

to the other claims cannot be accurately performed by examining the records provided by counsel for Defendant. Counsel for the Defendant did not differentiate and/or identify time spent on the Civil Rights Act claim as opposed to the defense of the original claim and the pursuit of the unsuccessful counterclaims. Counsel for the Defendant could have assisted the Court in this analysis by identifying and deducting the time spent on other claims. Counsel for the Defendant failed to do this. Rather counsel for the Defendant identified the total hours spent on multiple task and claims. It is not reasonable to expect this Court to accurately determine any appropriate attorney's fees award based on this record.

In addition, the total amount of fees requested, \$50,287.78, is dramatically disproportionate to the amount recovered for the violation of the Civil Rights Act, which was \$1,500.00. It is established that when a fee request "appears dramatically disproportionate to the results the litigation produced, as it does here, the judge must focus with precision on the relationship between the time invested and the results achieved in order to insure that 'the time spent was [not] wholly disproportionate to the interests at stake.'" *Board of Trustees of the Sea Grass Village Condominium v. Bergquist*, 2009 WL 1900424 (Mass.App.Div.) June 25, 2009. Thus, as the fee requested is dramatically disproportionate to the damage award under the Civil Rights Act, this Court should focus on the relationship between the time spent and the results obtained in determining what amount, if any, should be awarded for attorney's fees. In seeking an award of attorney's fees greatly disproportionate to the minimal award of damages obtained, the Defendant cites to *Norris v. Murphy*, 287 F. Supp.2d 111 (D.Mass. 2003) for the proposition that an award of attorney's fees should not be reduced to reflect the value of the jury award. This reliance is misplaced. Of significance to the *Norris* court was that the case involved police misconduct. ("In sum, given that the instant case involved police misconduct, the jury found that the Defendant police officer in fact violated the Plaintiff's rights under the MCRA, the Court is clearly justified in awarding attorney's fees and costs under

Massachusetts Gen. L. c. 12, 11I and shall do so.") *Id.* at 117. The instant case does not involve police misconduct.

The *Norris* court also noted that in awarding attorney's fees, Massachusetts courts focus on "'what the services were objectively worth' by considering a variety of factors including the nature of the case, the time and labor required, the amount of damages involved, the result obtained, the experience and reputation of the attorney, the usual price charged by other attorneys for similar work, and the amount of awards granted in other cases." *Id.* at 116.

Based upon the submission by the Defendant, no attorney's fees should be awarded. The bill submitted to the Court for consideration does not provide any breakdown of time spent for the Civil Rights Act claim. Rather, the submitted bill reflects time spent on defending the wiretapping claim for which no fees should be awarded. In addition, the bill reflects time expended on litigating the other counterclaims for which no fees should be awarded. Finally the bill reflects time expended for research without identifying to which claims the research related and preparation for trial without reflecting the specific claims for which counsel prepared.

The record as submitted by counsel prevents this Court from appropriately analyzing the amount of any fee awards. As it is the burden of counsel to submit appropriate records for the determination of a fee award and counsel has failed to submit appropriate records, Defendant's Motion for Attorney Fees should be denied.

Respectfully submitted,

The Plaintiff,
Brian Johnson,
By his attorney,

Tani E. Sapirstein

Tani E. Sapirstein, Esq.

BBO No. 236850

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Dated: March 21, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was served upon the following via first class mail to:

Henry L. Rigali, Esq.
78 Maple Street
Springfield, MA 01105-1813

Dated: March 21, 2013

Tani E. Sapirstein

Tani E. Sapirstein