

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

HAMPDEN, SS

PALMER DISTRICT COURT
DOCKET NO: 1143 CV 0293

BRIAN JOHNSON
Plaintiff

vs.

PETER FREI
Defendant

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICTS**

Rule 50(b), Mass. R. Civ. Pro.

THE STANDARD

The grounds for directing a verdict and for judgment notwithstanding verdict are the same. *Birbiglia v. Saint Vincent Hospital, Inc.*, 427 Mass. 80, 83 (1998). The test is whether the evidence, construed against Johnson, as the moving party, without regard to weight, justifies a verdict for Frei, as the non-moving party. *Bonin v. Chestnut Hill Towers Realty Corp.*, 392 Mass. 58, 59 (1984), quoting *D'Annolfo v. Stoneham Hous. Auth.*, [375 Mass. 650, 657 (1978)]. The judge's duty is to evaluate whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the [non-movant].' *Turnpike Motors, Inc. v. Newbury Group, Inc.*, 413 Mass. 119, 121 (1992), quoting *Dobos v. Driscoll*, 404 Mass. 634, 656, cert. denied sub nom. *Kehoe v. Dobos*, 493 U.S. 850 (1989). *O'Brien v. Pearson*, 449 Mass. 377, 383 (2007).

Courts should grant judgment n.o.v. "cautiously and sparingly," *Netherwood v. American Federal of State, County & Municipal Employees*, 53 Mass. App. Ct. 11, 20 (2001), only if the trial judge firmly believes that the jury failed to exercise honest and

reasonable judgment, applying the controlling principles of the law and only if reasonable people could have reached but one conclusion. *Pariwala v. Pariwala Corp*, 64 Mass. App. Ct. 663, 675, rev. denied, 2005).

THE ELEMENTS

To establish his civil rights claim, Frei had to prove by the preponderance that (1) his exercise or enjoyment of rights secured by the Constitution or laws of either the United States or of the Commonwealth, (2) had been interfered with, or attempted to be interfered with, and (3) that the interference or attempted interference was by ‘threats, intimidation or coercion.’ *Haufler v. Zotos*, 446 Mass 489, 504 (2006). The statute is to be construed liberally and a reasonable person standard is used to determine whether Johnson’s conduct toward Frei (and, in this case, his girlfriend) constituted threats, intimidation or coercion under the act. *Id.*, @ 505 (cases cited defining each of the three, separate alternatives).

Threatening, intimidating, or coercive actions directed at third parties should be included in considering any conduct that forms the basis of a claim under the civil rights acts” *Id.*, @ 503 - 504 (citations omitted).

THE EVIDENCE

Frei alleged Johnson attempted to interfere with his First Amendment and Article 16 rights of free expression by threats, intimidation or coercion and of his right to privacy. The jury saw and heard evidence of Frei’s public, interactive website or ‘blog’ in which he criticized Johnson’s conduct and work as a town official. They heard evidence Frei had been openly critical of the highway department, its employees (several of whom were present with Johnson on the ice), and of Johnson’s father in his

capacity as Chairperson of the Holland Board of Selectmen. Jurors heard evidence of a series of confrontations Johnson initiated against Frei, of debasing phone calls initiated by Johnson, of vulgar and aggressive name-calling in the Town Clerk's office initiated by Johnson, etc., all of which led up to the February 19, 2011 incident, including Johnson's statement to the effect that Frei needed to knock off the "b...s..." on his website.

The jury both heard and saw pictures of how Johnson and his drinking buddies positioned themselves around Frei's remote, lakeside home in the early morning hours of February 19, 2011. They heard how Johnson and several highway department co-workers - spent the day drinking on the ice, urinating on Frei's land, all the while displaying a vulgar sign directed at Frei's home. The jury was free to view this as innocent coincidence and equally free to reasonably infer the choice of location and actions were intended to send Frei a message - that they knew where he lived - that they intended to threaten, intimidate or coerce Frei or to goad him into a confrontation in which he was vulnerable and outnumbered. Plaintiff's suggestion Frei initiated the confrontation by going out on the ice and that Johnson and his cronies at all times remained on public property are facts the jury was free to consider and reject.

Jurors heard evidence from which they could reasonably infer that at some point Johnson knew Frei's girlfriend was with Frei inside his home at the time (i.e., not only did Johnson see Dana Manning exit Frei's home that afternoon, but before this he identified his voice on the tape as saying words to the effect "...isn't there someone else in the house..?"). The jury heard how Johnson and his friends sought to debase and humiliate Frei's girlfriend with gross vulgarities (calling her "fat, bitch, cunt, and combinations thereof...") and threats (... "you better watch out girl...").

The jury heard first-hand how Johnson and his drunken cohorts - with whom the jury reasonably could have found Johnson was acting in concert (ex. an ATV owned and operated by one of the men bearing the "EAT ME" sign disappeared after the incident and before the police arrived; Johnson's companions included other highway workers, friends and family likely to share Johnson's ill will toward Frei) - treated Frei when he came out on the on the ice when he simply asked them not to trespass on his property. The jury heard what Frei said and the non-threatening tone of his voice. Likewise the jury heard and was free to draw reasonable inferences from the tape recorded, aggressive and loud shouts for Frei to "get the fuck out of here.." The jury heard how Johnson defamed and falsely accused Frei of committing a crime (i.e., threat to kill), how Johnson sought to discredit Frei by lying to the police and by falsely telling the police Frei was the aggressor.¹

Considered in its totality, such evidence is more than sufficient to permit a reasonable juror to find evidence of an actual or potential physical confrontation accompanied by a threat of harm. *Hauffer v. Zotos*, 446 Mass @ 503 - 505 (cases cited). *Planned Parenthood League of Mass, Inc. v Blake*, 417 Mass. 467, 474-75 (1994)(rejecting argument that facts did not establish an actual or potential physical

¹ Although not necessary to establish an actual or potential physical confrontation accompanied by the threat of harm, the jury also heard the following evidence: 1. Frei's home is in a remote, private setting with few if any neighbors (i.e., potential witnesses) around in the winter season; 2. one of Johnson's companions taking off his coat as if getting ready to physically confront Frei; 3. someone kicking Frei from behind, knocking him to the ground; 4. taped sounds of what Frei described as being knocked to the ground; 5. Johnson approaching Frei in an aggressive manner while Frei was on the ground as if to kick him in the head; 6. Johnson and the others backing off when Frei told the group their actions were being recorded; and 7. Frei being frightened and fearful that he was going to get a beating. The fact that the jury found the evidence insufficient to satisfy Frei's burden to prove assault related charges does not prevent it from considering such evidence in relation to his civil rights claim.

confrontation accompanied by the threat of harm); *Swansea Dev. Corp. V. City of Taunton*, 423 Mass. 390, 396 n. 11 (1996)(coercion not involving physical force may violate Act). *Redgrave v. Boston Symphony Orchestra*, supra; *Miller v. Town of Hull*, 878 F.2d 523 (1st Cir. 1989), cert denied, 110 S. Ct. 501 (town selectmen violated 1st Amendment rights of members of town Redevelopment Authority who were removed from appointive office for voting contrary to selectmen wishes regarding elderly housing project).

Finally, the jurors heard and found evidence of intentional conduct. According to its verdict slip, the jury specifically found Johnson “intended to inflict emotional distress on Frei and that Johnson’s conduct was extreme, outrageous, beyond the bounds of decency and intolerable in a civilized society.”

SUMMARY AND CONCLUSION

For the reasons aforesaid, Johnson’s motion for judgment notwithstanding verdict should be denied.

Respectfully Submitted,
The Defendant, by his attorney,

August 2, 2013

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Certificate of Service

I certify a copy of the foregoing document was served upon the Plaintiff by delivery in hand to his attorney, namely, upon Tani E. Saperstein, c/o Saperstein & Saperstein, P.C., 1350 Main Street, 12th Floor, Springfield, MA 01103, this 2nd day of August, 2013.

Henry L. Rigali, Esq.