

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT
WESTERN DIVISION

Hampden, ss.

Docket No. 201143CV293

BRIAN JOHNSON,
Plaintiff

v.

PETER FREI,
Defendant

HEARING HELD ON OCTOBER 25, 2013 AT
SPRINGFIELD DISTRICT COURT

Tani Sapirstein, Esq.,
Representing the Plaintiff

Henry Rigali, Esq.,
Representing the Defendant

(Transcript Prepared from Tape)

Roxanne C. Costigan

THE COURT: Please identify yourselves for the record.

MS. SAPIRSTEIN: Tani Sapirstein, I represent Brian Johnson.

THE COURT: Thank you.

MR. RIGALI: Henry Rigali, I represent Peter Frei.

THE COURT: Okay.

MR. RIGALI: And if it's alright with the Court, Mr. Frei will join me at the counsel's table.

THE COURT: Absolutely. Okay, so I have, oh boy, I'll apologize that I have not read you, I did read your motions once way back when they were going to be heard and then things were postponed a little bit for some other motions to come in and be heard, so obviously I'm going to have to read them again, but I have, first I have the defendant's motion for attorney's fees and leave to file late and that was filed I think back in March and then I also have a copy of the plaintiff's motion for

attorney's fees and the memorandum of law in support thereof. And then I have a second supplemental affidavit filed by Attorney Rigali today. Is there anything else?

MR. RIGALI: There should be a, if I may, Your Honor, the order of events according to my memory, which I wouldn't suggest anybody rely upon, however, was plaintiff filed a motion for attorney's fees, the defendant filed a motion for attorney's fees and an opposition to plaintiff's motion.

THE COURT: Yes, I do have that.

MR. RIGALI: Subsequent to that on Mr. Frei's behalf I filed a supplemental motion for attorney's fees and supplemental opposition.

THE COURT: Okay.

MR. RIGALI: So that's the second major sort of filing and then the third was sort of, you know, catch up from the last time we were here until today.

THE COURT: Okay. So I'm going to just

try and put them in order, plaintiff's motion for attorney's fees, defendant's motion for attorney's fees and request to file late and then defendant's no, that's an opposition to a motion to strike.

Defendant's supplement to motion for attorney's fees and supplement to opposition. Okay, now I get it.

Defendant's opposition to plaintiff's motion to strike affidavit. I will sort through all of these and put them in the right order. I think the Clerk has just been collecting them and putting them in a big pile to be honest with you, so, but I did read through the original ones that were filed back in March when I thought that we were going to have a hearing. So let me hear first from Attorney Sapirstein.

MS. SAPIRSTEIN: Thank you, Your Honor. The plaintiff Brian Johnson prevailed on his wiretapping count. This case actually started out as a wiretapping violation case.

THE COURT: Yes.

MS. SAPIRSTEIN: Under 272 Section 99 the plaintiff is entitled to attorney's fees if the plaintiff prevails.

THE COURT: Yes.

MS. SAPIRSTEIN: So we submitted our bills which were maintained contemporaneously with the tasks done, our hourly fee to the Town is \$150.00 an hour, and we are seeking \$16,455.00, that represents 73.2 hours for me and 42.8 hours for my associate.

THE COURT: Okay, and that is all in the affidavit and the attachments?

MS. SAPIRSTEIN: Correct, which we attached our time slips records.

THE COURT: Mm-hmm, I have those.

MS. SAPIRSTEIN: There's some costs but not very significant ones. So those are the records that we kept contemporaneously with the tasks. We did deduct a small amount that didn't have to with the actual wiretapping statute. I think it had to do with, we took off \$945.00 because we didn't

believe it went to the wiretapping statute. But the statute's clear, the verdict was clear, these are clearly reasonable fees for a full trial and all of the pretrial discovery so we would ask that this Court award fees of \$16,455.00.

THE COURT: Okay. Let me hear, Attorney Rigali, let me hear your opposition to that first and then I'll hear your request for fees and her opposition.

MR. RIGALI: Thank you, Judge. First of all, I have no problem with the amount of the fees.

THE COURT: Mm-hmm.

MR. RIGALI: In the sense that, at least with the hourly rates of the fees. For someone of Attorney Sapirstein's caliber, which I consider to be extremely high, to be charging \$150.00 an hour is under I think what the standard rate would be. So I have no problem with the hourly rate. I have two issues, however. One is if you read the statute, and this would be, this is all in

the brief so again, I'll just highlight the points I've made there. Essentially the wiretapping statute says an aggrieved person who wins the case gets to get their attorney's fees. An aggrieved person is someone who has incurred the expense, and this issues of course opens up a very complicated collateral issue. I'm taking the position on Mr. Frei's behalf that because another party, in this case the Town, is paying the bill, that he's not an aggrieved person. He has no out-of-pocket legal fees and so he shouldn't be entitled to legal fees. And I say this under the statute and there's a few cases which I've cited to the Court where Courts have interpreted who is an aggrieved party for purposes of awarding legal fees in different litigation and there's a series of factors, but the primary one, as I read the case law, is whether the person is out-of-pocket the money or is obligated to pay that money, okay. So that's one thing.

THE COURT: Okay.

MR. RIGALI: And again, the brief handles is better than I will on an oral argument.

THE COURT: Mm-hmm, I was just looking for the statute to see if it was right here handy but...

MR. RIGALI: I think it's quoted in the footnote of our brief but it's 272, 99Q I believe, but, so I think quite frankly that's a very strong argument, that's number one, but that's obviously the Court's call. The second thing is that in the succession of the filings, we filed a motion for attorney's fees, included a big invoice and so forth, Attorney Sapirstein opposed and pointed out a good point which I had not, which I had missed, and that was that in multi-complaint cause of action cases, the Courts are not obligated to award attorney's fees nor are losing defendants obligated to pay attorney's fees for causes, for time spent on causes of action other than that

particular statute which allows and justifies the fees, so in this case the civil rights case.

THE COURT: Mm-hmm.

MR. RIGALI: And so we supplemented that and in my affidavit I say, you know, that's correct and so I've gone through the affidavit and made changes, but again, I'll address this a little bit later on this afternoon. However, the point is well taken and it cuts both ways. One of the points that counsel raises in opposing our invoice is that it's very difficult to tell what per line item goes with this case or that case and so, and she makes the point that it is in fact our burden, it is the movant's burden to establish this and again, it works both ways. Time spent by Attorney Sapirstein, who again, did a superb job on the case as far as I'm concerned, so this is not a reflection of the quality of her work, but time spent as reflected in the invoice shows hours billed for other than the

wiretap case, in the same manner that my original invoice shows time spent for instance on the wire case, researching the history of the wiretap statute and so on and so forth. And so one of the supplements that I gave you today is a quick analysis of Attorney Sapirstein's invoice and this is entitled questionable fees contained in invoice submitted by Attorney Sapirstein in support of plaintiff's motion for attorney's fees, it's just a one page sheet that I gave to the clerk shortly before coming in here today.

THE COURT: Okay, I'm not, let me find that because I only had one thing handed to me that was new today.

MR. RIGALI: That might have been all stapled together. There were three of them actually. There's an affidavit.

THE COURT: I have the affidavit, attorney's second supplemental affidavit, I have that.

MR. RIGALI: Attached to that should be

an invoice which says exhibit four.

THE COURT: Yep.

MR. RIGALI: And then there's another piece of paper, I can give you a copy of it right here, Judge, if it saves time.

THE COURT: What is it? Let me see if I have it.

MR. RIGALI: If I can approach?

THE COURT: Sure.

MS. SAPIRSTEIN: Your Honor, I object to the Court considering this.

THE COURT: Well, let me see what it is first. I don't even know, oh maybe that was attached. I thought you were talking about another pleading. Yes, I do have that. So you're objecting to him considering, me considering anything filed today?

MS. SAPIRSTEIN: Yes, and I'll tell you why.

THE COURT: Alright, why?

MS. SAPIRSTEIN: First of all, Your Honor set deadlines for motions for attorney's fees and that deadline was about

a year and a half ago. This hearing was postponed until Your Honor ruled on the JNOV.

THE COURT: Mm-hmm.

MS. SAPIRSTEIN: I just got this two minutes ago.

THE COURT: Mm-hmm.

MS. SAPIRSTEIN: Literally.

THE COURT: Well I think he only filed it two minutes ago.

MS. SAPIRSTEIN: So I haven't had an opportunity to review it, I haven't had an opportunity to respond to it and I think quite frankly it's manifestly unfair for pleadings to continually be filed after the deadline without asking leave of the Court and without an opportunity for me to review and oppose them. Now, we knew about this hearing six weeks ago and Mr. Rigali has had my bills since about a year ago, maybe a little bit less and his own bill, his own supplemental bill, other than a couple of entries following the JNOV decision were all

from April, July and September and August. So I guess the question is, why couldn't Mr. Rigali have either asked me for my assent for him to file supplemental pleadings, ask the Court for leave to file supplemental pleadings. I mean, the rules of civil procedure do apply in the District Court, and then given me an opportunity to oppose them. This is basically not trial by ambush, because it's not a trial, but this has been a pattern in this case, filing the attorney's fees motion late, filing a supplemental attorney's fees motion without either consulting with me and asking for my assent or asking for leave from the Court, and quite frankly, at some point it becomes unfair to the plaintiff to have to continually respond to brand new pleadings when I step up for a hearing, because I too prepared for this hearing, Your Honor.

THE COURT: Right. Okay, well let me ask Attorney Rigali what he has to say to that.

MR. RIGALI: I have no problem, first of all, just to sort of correct the record here, we were here on I think April 18th ready to go, you know, for the hearing on attorney's fees. At that point in time there was emerging information as to whether or not plaintiff had incurred any legal fees, meaning that there was some, quite a bit of cat and mouse stuff going on, I'm not trying to cast dispersions, about whether the Town was paying this. Counsel for the plaintiff wouldn't comment on that, you know, very evasive and so forth, and so we then set upon, because it's a very relevant issue for the reasons we've put in our brief, to look into that situation. So that was on, that was just a few days before the 18th. Counsel came in on the 18th asking for time to review some additional pleadings that we had filed and so forth, but the real reason was I think that they had also been served with subpoenas to have Town officials come on the 18th with those records. But

setting that aside, we found out on, it wasn't until July 25th, more than three months after the hearing, the delayed hearing on 4/18, that the judgment issued, that just the physical judgment, the civil judgment issued. On July 30th there was motion for judgment NOV. We filed an opposition in August, there was a hearing on September 11th and that motion, excuse me, the order denying the plaintiff's motion for judgment NOV was less than two weeks ago.

THE COURT: Right.

MR. RIGALI: Now, the time spent according to the case law defending and pursuing an action for legal fees is to be included, including today's hearing, and so all that you have before you today, and I have no problem whatsoever with the Court allowing counsel, you know, whatever time the Court thinks is appropriate to respond to anything that's new, including, and by the way, the things that are new are my legal bills from 4/12 to today, no surprise

that those would be submitted today, under the law, and somewhat of a breakdown of Attorney Sapirstein's legal bill, which is already on file with the Court, there's nothing new there. I did that as a courtesy to the Court to sort of isolate out the items which are clearly not wiretap related items, that's all. So there's absolutely nothing here, I don't think there's any pattern of late filings. We had one late filing because we had a computer breakdown on one day, I filed the thing the next day, so there's a little bit of, I think, exaggeration which is fine.

THE COURT: Alright. I'm going to accept it. I mean, it does have his bill right up until today and the part that you've entitled questionable fees, you know, I think he could have rose and made that argument and pointed each one out as, instead he's just listed them.

MS. SAPIRSTEIN: Well, but the problem is that...

THE COURT: I mean, you can respond.

MS. SAPIRSTEIN: I understand, but the problem with that, Your Honor, is I filed my motion for attorney's fees in March.

THE COURT: Okay.

MS. SAPIRSTEIN: And Mr. Rigali filed an opposition.

THE COURT: Mm-hmm.

MS. SAPIRSTEIN: And one would think that all of that that he has on there could have been raised appropriately in his opposition, which is what I did in my opposition. And as far as the pattern, the pattern wasn't the one day late filing because of the computer mistake. The pattern was filing a supplemental motion for attorney's fees based on my opposition without leave of the Court and then filing this. I guess my question is, I can understand perhaps filing or requesting fees from October 16th to today because we didn't know what we were going to be doing, but to go back to April.

THE COURT: Well, are these, are these, excuse me, I'm sorry, are these supplemental times that you spent in addition to your...

MR. RIGALI: Right, again, we've got, you've got my original invoice was submitted in March.

THE COURT: Right.

MR. RIGALI: Okay, and then we submitted, because that contained errors...

THE COURT: Right.

MR. RIGALI: Which I thought was a good thing to admit, we submitted a supplemental one in April and so all this does is it just brings the Court from April to today, that's all.

MS. SAPIRSTEIN: And the question is, why didn't we bring the Court from April to September 11th before today so that I would have an opportunity to respond.

THE COURT: Well, I will give you an opportunity to respond without dragging this on.

MS. SAPIRSTEIN: In writing?

THE COURT: In writing, yes, I will.

MS. SAPIRSTEIN: That's fine. Thank you.

THE COURT: One final day, but, you know, I mean, okay.

MR. RIGALI: I don't know of any other way you could do it, quite frankly.

THE COURT: Well, I think her point is that some of the court dates that you put in here or dates that you billed for are prior, long prior to today.

MR. RIGALI: Right, so what's, but the alternative is this, Judge, what's the alternative? Is the alternative to, you have to prepare for today.

THE COURT: Right.

MR. RIGALI: You had to prepare for a judgment NOV, which was two weeks ago, I mean the order came out. You know, you want, it makes no sense to have repetitive filings. So, I mean, I realize different people could approach this differently and with all due respect, I think this is

actually quite proper and it makes the most sense and it saves the most time.

THE COURT: Alright. I'm going to let you respond. So this is in addition to your earlier?

MR. RIGALI: Correct.

MS. SAPIRSTEIN: And I think my issue is not supplementing the bill. My issue is the timing of supplementing the bill.

THE COURT: Yeah, I got that.

MS. SAPIRSTEIN: And as opposed to maybe even yesterday? Or last week, or quite frankly, for most of these entries, in September, so that I would walk into Court and have a pleading served.

THE COURT: Right. I will give you a chance to respond in writing.

MS. SAPIRSTEIN: Thank you.

THE COURT: Alright.

MR. RIGALI: But I think...

THE COURT: Go ahead.

MR. RIGALI: So the argument, going back to this late filing, so-called, the wiretap

statute allows attorney's fees for prosecution of the wiretap statute and what I've done here and again, just as an effort to save time, if the Court pulls out Attorney Sapirstein's original invoice you see any number of items which are for the civil rights case, there's a lot of them you couldn't tell, I didn't even put those in. I think the legal fee is so low by the hourly rate I didn't want to just spent time on things that were just obscure. But these seem to be quite clear, and so I would just ask the Court to consider that. If the Court intends to consider the argument of the plaintiff that time spent, for instance, defending the wiretap case and the hours that went into that shouldn't be included in Mr. Frei's civil rights attorney's fees, then likewise I think it should be, that's all.

THE COURT: Okay, and is your bill broken down that way though?

MR. RIGALI: My bill, the second one is.

So the second one I have...

THE COURT: You have delineated which time was spent on which issue?

MR. RIGALI: Right, and that's point number one, I believe. So again, addressing the issue of my opposition to plaintiff's attorney's fees, one is the smaller argument and that is sort of the itemization argument. But the other is the entitlement argument and again, those, that matter has been briefed. Now, it gets pretty complicated because as the Court is probably aware in the area of municipal law, a municipality does have the right to indemnify under certain circumstances its officials, employees and so forth, and those indemnification statutes are found in General Laws Chapter 258, Sections 9 and 13. Section 13, I have this in, I'm doing this from memory, Judge.

THE COURT: Is it in your brief though?

MR. RIGALI: I don't believe these are in the brief. These are matters I've been

sort of researching on the last couple of days so I didn't to submit a new brief and so forth, but if you look at 258, Sections 9, which pertains to some circumstances, and 13, what you find is this. In 13 I think the law basically says a municipality, and I'll paraphrase this, shall indemnify someone who's a governmental official who's charged with certain offenses or incurs certain fees in the performance of his duties for things which occur during the scope of his work. So if the tax collector of Palmer has an argument with a taxpayer and the taxpayer sues the tax collector, the tax collector doesn't, you know, obviously it would discourage anyone from being in public service, so that statute is there which mandates that that municipality for the most part defend and indemnify the individual town official who's a defendant, except for civil rights violations and for I think intentional torts. Section 9 says a municipality may, so Section 9 is

discretionary, and it essentially says a Town may elect to indemnify an employee who is sued for intentional conduct, for wrongdoing, for civil rights violations and the like. So I'm assuming, and you heard the evidence, you know, perception is reality, I have a bias perception of these facts as an advocate, my perception is that nothing occurred here in the course of Mr. Johnson's official duties. Period. He comes out on the ice on whatever morning, a Sunday morning, it's five o'clock in the morning, he's drinking beer with his buddies, they're barbecuing, they're having a great time, they're ice fishing, I don't see this as his official duties. There are some prior incidents that were mentioned about threats and vulgarities and phone calls and the like, none of that occurred as part of, you know, while plowing the roads or while supervising a truck, or, you know, whatever his duties were as the highway supervisor. So 9 is the saving grace, if

there is one, for the Town to avoid an ethics violation because it would be under Chapter 268A, Section 2 a per se violation of the ethics laws for the selectmen to use public funds to pay anybody for their private expenses unless this is pursuant to some public purpose. It would be a violation for the selectmen to do that. It would be likewise in the same paragraph, again, these are in my brief, a violation for Mr. Johnson to receive it. So those are, that's a conflict of interest statute. I'm not quite satisfied that it necessarily is dispositive of this issue but it is a relevant factor I think for the Court to bear in mind. The issue here is whether or not, as far as plaintiff's motion for legal fees goes, whether or not they're entitled to them. Now again, I can chip away at some I think are unfair, but setting that aside, the big argument is they weren't incurred and therefore Mr. Johnson is not entitled to reimbursement or not entitled to his award

for legal fees because he didn't have any legal fees.

THE COURT: Mm-hmm.

MR. RIGALI: Now, then we get into a somewhat side issue as to whether or not it was proper, it might be proper for the Town to pay it...

THE COURT: But why do I have to decide that?

MR. RIGALI: I don't know that you do.

THE COURT: I don't think I do.

MR. RIGALI: If the Town's payment is proper, then the Town is not an aggrieved party, the Town doesn't get reimbursement, so if it's proper then the Town is indemnified, these are not expenses incurred by Mr. Johnson, end of story. If it's improper then I agree, maybe that's another tribunal, another hearing, another day.

THE COURT: Right.

MR. RIGALI: Okay. Alright. So again, Your Honor, not an aggrieved person, the conflict of interest situation I think is

relevant for the Court to keep in mind, and the itemization argument.

THE COURT: Okay, thank you. Anything in response?

MS. SAPIRSTEIN: Yes. First of all, Mr. Johnson is the aggrieved person under the wiretap statute and the jury found that. The aggrieved person under the wiretap statute is the person who is recorded without his consent. There's a jury verdict on that, there's a judgment on that. Mr. Johnson is the aggrieved person under the wiretap statute. The case, there's one case that Mr. Rigali, unless I'm missing something, cites for his argument that the plaintiff hadn't incurred legal fees, and that case actually seems to go the other way, that's the Lincoln Street Realty case which said that the legal aid organization could be the appropriate recipient of fee awards for an indigent client, because the Court goes on to say, incurred means personally obligated to pay. Now, there's

absolutely no evidence in this hearing that Mr. Johnson was not personally obligated to pay the fees. Whether or not someone else pays the fees for someone who's personally obligated to pay them is something that hasn't been addressed, but there's no evidence here and I know that Mr. Rigali subpoenaed the Town's records and I know that the checks came from the Town of Holland, but that's not actually the inquiry. According to Mr. Rigali's own brief the inquiry is who is personally obligated to pay the fees, and we don't have any evidence that Mr. Johnson wasn't. So it would be no different than if I have an agreement to pay somebody something and my uncle pays for it, that doesn't mean that I'm not personally obligated to pay for it. So we would agree, we would argue that Mr. Johnson is clearly the aggrieved person and the jury actually found that and there have been no post trial motions that overturn that and that there's no evidence on the

part of anyone that he wasn't personally obligated to pay the fees. So he fits well within the wiretapping statute and I think Your Honor is right, the issue of whether it's a conflict of interest or an ethical violation is not before this tribunal. It may not be before any tribunal. So we would say that we fit well within the statute, and actually I made a mistake on the amount of fees, I think I left off costs, I think it's \$16,550.00, but it's in my paperwork. Thank you, Your Honor.

THE COURT: Alright. Can I just ask a question as a practical matter?

MS. SAPIRSTEIN: Practical?

THE COURT: Yeah, practical. If I were to agree with you that, I'm not saying I do, but if I were in the end, that personally obligated to pay trumps, so to speak, and so Mr. Frei has an award of attorney's fees against him, who does, who does that get paid to?

MS. SAPIRSTEIN: Well, that would get

paid to whoever paid the fees and that would wipe out the personal obligation of Mr. Johnson to pay the fees.

THE COURT: So it would get paid...

MS. SAPIRSTEIN: So let's say it would get paid to Mr. Johnson, because he's the plaintiff in this case, and then what he does with them, for example, to reimburse somebody who might have paid something he was legally obligated to pay for, would be his business, but he is personally obligated to pay the fees.

THE COURT: Right.

MS. SAPIRSTEIN: Or at least there's no evidence that he's not.

THE COURT: But as a practical matter if the Town didn't come after him for the fees, he's just getting the money. I'm just curious. This has nothing to do with how I would decide it, it makes no difference to me, that's something that can be sorted out at the end. I was just sort of curious as to...

MS. SAPIRSTEIN: Well, Mr. Rigali could have called a witness in to discuss what arrangement, if any, there was between Mr. Johnson and the Town of Holland to reimburse them for the fees.

THE COURT: Okay.

MS. SAPIRSTEIN: But as I said, there's no evidence now that he's not personally obligated, regardless of who paid them.

THE COURT: That will be for another day, if and when it happens. Okay.

MR. RIGALI: Can I comment though? We were supposed to be here on the 18th of April. I subpoenaed three witnesses, three Town officials, one was the selectman, for the very purpose of, you know, determining who is paying the bills and at that hearing at which no one showed, subpoenaed people, no one showed, we could have had that colloquy if we wanted to. This is a continuation of that hearing. So this is, to me, I don't know how to phrase this, this is disturbing to me as an officer of the

court because what counsel is saying is pretty cute. What she's saying is there's no evidence that he doesn't have a personal obligation, as if the evidence which is before the Court now showing that the Town paid these bills, which was, you know, the big secret that's never going to be disclosed, a motion to strike my affidavit to ask for a hearing on this very point, which is now moot. I mean, this is a closely, they didn't want this information out, Judge, clearly and so now what we've got is an inference perhaps that Mr. Johnson has a personal obligation to pay this. I'd like counsel to state on the record that in fact that is the case because otherwise we're just playing more games here. And if in fact that is the case then I want to continue the hearing and have those witnesses come forward because much of the time that I have spent and the money of this gentleman that I have spent is running around chasing after Town officials, leaving

phone messages, issuing Freedom of Information Act requests, issuing subpoenas, all of which are snubbed, calling Ben Coyle, Ken Albano and other attorneys for the Town saying don't you want to talk about this, there are serious issues, and by the way, where are my records, and if in fact money is to be spent for legal fees that has to be done as a result of an executive session meeting for which records I subpoenaed which were not filed, which were not provided. One of which was provided was totally out of compliance with the law. So the question is this, Judge, if in fact counsel wants to make a representation here on her oath that in fact this man is personally obligated then I want an extended hearing because I don't believe it. On the other hand, if it's not an issue, if it's not an issue, then I don't think the Court needs to consider it. The evidence is very clear, this is a, and I respect the Court and counsel, but this is a dog and pony show.

You cannot come into this Court and for months either deny or head your bets or evade the point blank question, who's paying the bills and now come in and say oh, we haven't had a chance to prove it when we filed a motion for it, when we filed a request for a hearing on it, when we asked witnesses to come here, none of whom did. One without my permission, what was Selectman Kennedy because on the 17th at 4:30 or 5:00 in the afternoon when I spoke with him the day before the attorney fee hearing on the 18th, he said he had two doctor's appointments the next day and admitted to me on the phone for the first time that yes, and I'll state this on the record, that the Town was in fact paying Mr. Frei's legal fees and they now knew it was a mistake. Excuse me, Mr. Johnson.

MS. SAPIRSTEIN: I'm going to object, this is testimony and hearsay.

MR. RIGALI: No, this is important. This is important.

THE COURT: Let's get down to what we're going to do about it. I mean, if that is the crux of the issue, whether he has a personal obligation to pay and that's your argument then I am going to let them find out whether he has a personal obligation pay because I think I need to know that.

MS. SAPIRSTEIN: I don't think that is the crux of the argument and quite frankly...

THE COURT: You said that was the crux of the argument.

MS. SAPIRSTEIN: I said that Mr. Rigali said that was, and I pointed to the cases that he cited in his brief.

THE COURT: Right.

MS. SAPIRSTEIN: That said what incurred, Mr. Rigali was actually arguing that Mr. Johnson's not an aggrieved person and I think that we can put by the wayside. But I have copies of the subpoenas that he served and the letters that he served and what he represented to this Court about

people not showing up, in his letter he said you can avoid the necessity of appearing in Springfield District Court by providing the records to the Court ahead of time, and they were. So nobody dodged subpoenas, they did exactly what Mr. Rigali told them to do, all of the records and in fact quite frankly records that go back to 2009, which have nothing to do in this case, are in the Court's file.

THE COURT: Mm-hmm.

MS. SAPIRSTEIN: If Mr. Rigali wanted to call someone in to talk about the relationship between the Town and Mr. Johnson and why the Town paid the fees and who was ultimately responsible he could have done that. I'm not here to testify, Your Honor. I'm representing the Town.

THE COURT: I know.

MR. RIGALI: My point is...

MS. SAPIRSTEIN: I'm sorry, Mr. Johnson, I'm getting confused myself now. I'm representing Mr. Johnson.

MR. RIGALI: My point is, Judge, all of the records were not produced.

MS. SAPIRSTEIN: That's not true.

MR. RIGALI: If you give me all the records then you don't need to come. They weren't all produced, that's my point, okay. I mean, why would you have a record keeper come if they gave you the records, so that's my point.

THE COURT: How did you know that they weren't all produced?

MR. RIGALI: Well because I now have them and I've had the chance to go over them, okay.

THE COURT: Okay.

MS. SAPIRSTEIN: They've been here since April 18th, since before the first hearing. They've been sitting in the file.

THE COURT: I don't want to recreate the whole history of it, but when you sent the subpoena and you said...

MR. RIGALI: Be here on the 18th.

THE COURT: You don't need to appear if

all the records are here, and then the records were sent and you're saying now that that wasn't all of the records?

MR. RIGALI: I don't believe they are all the records, no.

THE COURT: Okay. So, but you've gotten the rest of the records since, is that what you base your belief on?

MR. RIGALI: No. I base my, no, I base my belief on the way in which government records are to be maintained by statute. Every public meeting as you know has to be posted, there has to be a warrant with an agenda.

THE COURT: Mm-hmm.

MR. RIGALI: If there is a decision to go into executive session, those executive session, there has to be a vote to go into executive session, there has to be a polling and minutes are kept of the executive session, okay.

THE COURT: Okay. And those were not in the records?

MR. RIGALI: Not all of them, no. And the critical one, in fact, where...

THE COURT: How do you know that they were done?

MR. RIGALI: Because they have the dates on which the meetings occurred.

THE COURT: No, but how do you know that they correctly complied with the law in keeping minutes.

MR. RIGALI: Because I don't have the records from those dates. I mean, again, this is getting a little bit far fueled, if this were the hearing on the propriety of the Town paying the fees and so forth, you know, I'd be ready to go on that, but once the records were produced which showed that the Town was in fact paying the bills, I mean, I don't think it's our burden to show that it's his personal obligation. He's an aggrieved person under the statute for the wiretap violation. He's not an aggrieved person for a person entitled to legal fees for the reasons which I expressed. Now if

counsel again wants to quit dancing around and tell all of us that yes, this man has a personal obligation, that's fine, I want a hearing on that. If, on the other hand, she says no this was an indemnification, this was a decision that was made by the Town at or about the time that Mr. Frei brought a harassment case against Mr. Johnson and was incurring legal fees and so forth, okay. If you look at the timing when all of this occurred, it's at about that time. So as I've said in my brief, it looks to me, it's a reasonable inference, that what the Town decided here was they had a slam dunk violation and way to get their legal fees back, some of them, recoup them from Mr. Frei on the wiretap violation and within a week or two of getting the complaint, you know, I contacted counsel and I said, you know, do you really want to go forward, does the Town really want to, do you want to go forward on this, what's going to happen is I'm going to counterclaim with civil rights

and a bunch of other actions, there's going to be a hearing, there won't be any summary judgment, they're going to get a couple hundred bucks in damages and there's going to be tens of thousands of dollars of legal fees on a case, no disrespect to my client, that shouldn't be in court. This is ridiculous. This is just frat boy conduct that, you know, it's an embarrassment to the town official but at the same time shouldn't occupy the Court, summarily rejected. So, again, I'm getting a little bit far off field, my point is...

MS. SAPIRSTEIN: Also settlement negotiations aren't supposed to come here.

THE COURT: Yeah, let me just say this. Let me look at what I have here first. If it's going to make a difference, we'll have a further hearing.

MR. RIGALI: Thank you.

THE COURT: Alright. So Attorney Sapirstein, how much time do you need to respond if at all to the attorney's second

supplemental affidavit in support of motion for attorney's fees?

MS. SAPIRSTEIN: Well, I would normally not need very much time but unfortunately next week is, I probably need two weeks.

THE COURT: Two weeks?

MS. SAPIRSTEIN: Two weeks.

THE COURT: November 8th.

MS. SAPIRSTEIN: Thank you.

THE COURT: Okay, I'll take it all under advisement. Look it all over, if there's a further hearing, I mean, I'll issue a decision. If you want to ask for a further hearing, that's fine. Okay?

MR. RIGALI: Alright. Did the Court want to hear...

MS. SAPIRSTEIN: I didn't hear the last part because printer was printing. You said you would issue a decision and what?

THE COURT: And then if you want to ask for a further hearing if you think it needs a further hearing after that, that's fine.

MR. RIGALI: Okay, just so I'm on the

same wavelength with the Court here and I apologize, we've heard...

THE COURT: Did I miss a motion, is that what you're saying?

MR. RIGALI: I think so, yes. I think we've got plaintiff's motion for attorney's fees and why we opposed it and one of those things was a complicated issue of not being entitled.

THE COURT: Yes. So I didn't hear defendant's motion for attorney's fees?

MS. SAPIRSTEIN: Right.

THE COURT: I'm very sorry.

MR. RIGALI: Well, in respect to Tani, her opposition to mine.

THE COURT: Okay, can you do in ten minutes?

MR. RIGALI: I can.

THE COURT: Because I have a continued hearing at 2:30 on a violation of probation.

MS. SAPIRSTEIN: I actually can't because this hearing can be an evidentiary hearing and in fact I have case law that

says that I get to cross examine the attorney, and I've actually been in this situation. Judge Moriarty puts us on the stand, as well as Mr. Frei. So I can't do it in ten minutes.

THE COURT: Alright.

MS. SAPIRSTEIN: I'm sorry.

MR. RIGALI: I think it's the Court's discretion as to whether or not it's going to have an evidentiary hearing.

THE COURT: Let me see...

MS. SAPIRSTEIN: A case?

THE COURT: Yeah, let me see the case please.

MR. RIGALI: Again, if in fact counsel intended an evidentiary hearing today to call myself or Mr. Frei as a witness, it might have been nice to get a heads up, you know.

MS. SAPIRSTEIN: Here you go, Mr. Rigali. Your Honor, it's on page 321.

THE COURT: 321?

MS. SAPIRSTEIN: At the bottom. Mine's

highlighted, but it says the amount of fees, well it's actually page nine at the top.

THE COURT: Oh thank you, nine, I got it.

MS. SAPIRSTEIN: And actually, Your Honor, I never thought about doing this until I was in Worcester County and Judge Moriarty had both attorneys put under oath and had us testify to our fees. So it's actually pretty common.

THE COURT: Okay.

MR. RIGALI: I'm reading this to say that where the defendants were permitted to, so I think that's a call that the Court can make assuming that the Court's not satisfied with the documentary evidence and the affidavits which have been presented. I don't know how common this is, quite honestly. I can't say as I've had tons of experience with attorney's fees cases, but I can tell you it's the first time that I've ever heard of an attorney being cross examined and this raises all sorts of

attorney/client issues I would think and complicates things further. If the Court has questions that aren't satisfied by the affidavits, I could perhaps understand that but I think this is, I just object to this at this point, Judge. I'd like to finish the argument, get the Court's rulings on the fees based on the papers, if there's no further, you know, it could very well be that the Court might decide that plaintiff's not entitled to legal fees and has questions of its own with regard to the defense, at which point it can delete or, you know, remove things from our bill. We can appeal that as part of the appellate process. She can appeal or we can appeal if there's going to be an appeal, I hope not, the denial of the Court's, you know, decision to permit cross examination by counsel. I mean, I've never even heard of such a thing.

THE COURT: Well, let me ask you, is there something that says, a case that says it's mandatory at request?

MS. SAPIRSTEIN: No.

THE COURT: I don't see that right here.

MS. SAPIRSTEIN: No, it's not mandatory.

THE COURT: Okay.

MS. SAPIRSTEIN: But it's also not uncommon, and there have been, well, I told you was anecdotal.

THE COURT: No, I understand.

MS. SAPIRSTEIN: I mean, for example, if in fact the bills, you could actually tell what Mr. Rigali was actually billing for as far as each claim, which was one of your initial questions, Your Honor.

THE COURT: Yeah, but he said it was broken down.

MS. SAPIRSTEIN: But it's not.

THE COURT: Oh.

MS. SAPIRSTEIN: And if you look at...

THE COURT: Where is the second, alright, that's what I'm looking for.

MS. SAPIRSTEIN: I can tell you where the second one is in my pleading binder, but I'm not sure where it is in the Court's. I

think he filed it on April 10th, the supplemental. And if you look at the bill that's attached...

THE COURT: I don't have anything yet filed April 10th, so give me a minute. I've got the March one.

MS. SAPIRSTEIN: Also as an ancillary issue, we don't know how much, if anything, Mr. Frei has actually paid Mr. Rigali for these legal fees.

THE COURT: Well...

MS. SAPIRSTEIN: So if he has paid nothing or less than the fifty thousand dollars Mr. Rigali is looking for, that's an issue.

THE COURT: Does that go to the incurred?

MS. SAPIRSTEIN: It does.

THE COURT: Whether it's been incurred?

MS. SAPIRSTEIN: It does, oddly, it does, it goes to the incurred. So let's say some were forgiven or some weren't paid or a discount was given, and actually on the

invoice that Mr. Rigali produced the amount received is blacked out, two payments, October, 2012 and 2/14/2013, that's clearly not an attorney/client privilege.

MR. RIGALI: I think all payments were blacked out.

MS. SAPIRSTEIN: Well, those are the only ones I see. But when you find the motion I can direct you to some of the entries where it's impossible to tell what Mr. Rigali did for eight, nine, ten, eleven hours, and what went to the Civil Rights Act and what went to other things.

THE COURT: Alright, why don't you, I can't seem to find that, I hope that it's here.

MR. RIGALI: I have a copy here, Judge.

THE COURT: No, I'm looking still.

MS. SAPIRSTEIN: It's called supplement to motion for attorney's fees and supplement opposition to award of plaintiff's attorney's fees with three exhibits, and supplemental affidavit.

THE COURT: I do have it, supplement to motion for attorney's fees, yes, I have it.

MS. SAPIRSTEIN: So if you go to that invoice.

THE COURT: Yep.

MS. SAPIRSTEIN: So for example, let's start on August 19th.

THE COURT: Yep.

MS. SAPIRSTEIN: Research cases Commonwealth v. Hyde, Commonwealth v. Montgomery, that's the wiretapping statute, that's not the Civil Rights Act.

THE COURT: And what does the half next to it mean, a half hour?

MS. SAPIRSTEIN: No, half of the time. So instead of two hours, it's one hour.

THE COURT: Oh, half the time, that's what that means.

MS. SAPIRSTEIN: But there's nothing else on there other than the wiretap issue.

THE COURT: What do you mean there's nothing else on there? He blacked out what else he had.

MS. SAPIRSTEIN: Right, so all that is there for you to consider, Your Honor, is his work dealing with the wiretap statute.

THE COURT: Okay.

MS. SAPIRSTEIN: He doesn't get fees for that.

THE COURT: Right.

MS. SAPIRSTEIN: Okay. And then prepare first draft, I'm assuming that's of the complaint but only one count is the Civil Rights Act. And if you go to the next page, he went to the Palmer District Court and he reviewed apparently the file and docket on the harassment claim, which actually has nothing to do with the civil rights action because that case was found in favor of Brian Johnson. Then on 1/4/2012 we don't understand, I don't understand how that goes to the Civil Rights Act. It looks like, again, it goes to the wiretapping statute since they're talking about an intercepting device. Then the next page, some of the stuff, quite frankly, is administrative and

it's strange that it's on here at all.

THE COURT: What do you mean?

MS. SAPIRSTEIN: Things like status of Superior Court case, CD going to steno for transcript on 1/18. I mean, stuff that really is small cents but it's really an administrative function which is clearly excluded from attorney's fees. Then he has witness interviews but he doesn't tell us to what count or counts those go. Then there's stuff involving the 13th Amendment. Then there's stuff involving research issues, aggrieved person, Hyde, Marshall descent, that's all wiretapping. Then on the next page, there's a telephone conversation with his client, but more than these smaller amounts are the ones where in April research all afternoon, five hours, and he took away half. Or organize file and research and he took away half.

THE COURT: Where are you? April of what year?

MS. SAPIRSTEIN: I'm sorry, 2012. Page

four of the invoice.

THE COURT: Okay. I went up to 13.

MS. SAPIRSTEIN: And then there are entries on page five, like May 14th, May 15th, all day, 8:30 to 7:30, research and draft memos, eleven hours. So, you know, quite frankly, I don't usually put opposing counsel on the stand but I don't see how there's any way any of us can tell what part of these tasks went to the Civil Rights Act and what part went to the other counterclaims, research that Mr. Rigali did into counts that he rejected bringing. There's absolutely no way to tell, and you know, we're talking about thousands of dollars, we're not talking about hundreds of dollars. I mean, there's some stuff here that, again, I think doesn't go to the Civil Rights Act but it's fifty-three dollars. I mean, I don't really care about that but I do care about fifty thousand dollars. This is a bill for fifty thousand dollars to the Town of Holland.

THE COURT: Okay.

MS. SAPIRSTEIN: He got fifteen hundred dollars on the Civil Rights Act and won the defamation and everything else was dismissed and the case law is really clear, that if you can't tell, the burden's not on you, Your Honor, it's on Mr. Rigali. He has to tell us which of these acts and how much time he spent on the Civil Rights Act.

THE COURT: I'm going to ask what might be a silly question, but can the two of you sit down and figure this out between you rather than having an evidentiary hearing?

MS. SAPIRSTEIN: We can try to. We can certainly try to. I mean, I filed my opposition to his original motion on this basis and this is his second attempt. You know, this is no different than any other case you bring where there are some counts you get your attorney's fees and some counts you don't. You have to tell the Court what you did under the counts you get for your attorney's fees for and what you did under

the counts you don't get your attorney's fees for. It's really pretty simple. But, you know, to put this in front of Your Honor and say eleven hours and we'll just take off five, I don't understand how a reasonable decision can even be made based on these records, so that's why I wanted to call Mr. Rigali to the stand so he could tell us how much time on these days he spent on the civil rights action. I'm not going to get into attorney/client privilege. I'm not going to get into what he and Mr. Frei talked about, I would never do that. But we all have a right to know how much time really went to the civil rights count and how much went to everything else. So maybe we can, I guess is my short answer. I'll talk to my client.

MR. RIGALI: Two things, Judge. You have my affidavit and if that affidavit satisfies the Court, the hours are there. I have this satchel here, Judge, of the records which I brought today. On this case

there are three of these, okay.

THE COURT: I don't doubt it.

MR. RIGALI: So, I have the affidavit, so the basis is in the affidavit and this is the reason why this is not, this is not simple, counsel wants to make it simple, but it's not. On page two of our brief, which is defendant's supplemental motion, civil rights and related claims, as the prevailing party the defendant is entitled to reasonable fees and so on and so forth. Unlike the federal statute, Massachusetts it is mandatory rather than permissive and while an award of fees should be for the civil rights claim the Court need not segregate out fees and costs related to other claims where the factual predicates of the civil rights claim are the same, citing a Supreme Court case, and two Supreme Judicial Court cases, Twin Fires and so forth, a judge can award amounts related to developing closely analogous facts and so forth. The Demarzo case, amounts relating to

counts arising from a chain of events are recoverable. Plaintiff need not obtain a final favorable determination of his constitutional claims in order to claim attorney's fees under 1988 which is the federal one and the Mass. statute as you know closely patterns itself after that. It is enough that constitutional claims are substantial and arise from the same nucleus of facts on which the state law claims are based, again, cases cited. So and then there's an argument about, you know, common core of facts. There's actually a couple mistakes there that I've made. In one case I, in one paragraph I say that Mr. Johnson's voice was not heard on the tape, that's actually an error. But the case law, Your Honor, makes it very clear and we've made the argument that, you know, you take like the Glick case, which is a wiretap case, it's also a civil rights case. It's the premier civil rights case in which a wiretap defendant got a hundred and fifty thousand

dollar civil judgment for violating civil rights due to the improper enforcement of the, okay, so you cannot, and as an officer of this court I did the best I could to delineate what was and what wasn't and I took if, I don't remember, forty-five hours, I believe it was, ten thousand and some-odd dollars, from the first billing in which I genuinely felt was either questionable or what have you, that was time split on working both or whatever. So I would caution the Court, I think you have discretion as to whether or not you want to have a hearing on this. I think we ought to go on the papers as they are and let the chips fall where they may.

THE COURT: Alright. I'm going to go on the papers as they are at least for now.

MS. SAPIRSTEIN: I'm going to object, Your Honor, for the record.

THE COURT: Alright, so your motion for an evidentiary hearing is denied without prejudice and let me see what if I think

that I need an evidentiary hearing on some of it I'll let you know.

MS. SAPIRSTEIN: If I could just direct your attention to a case that I cited, and that's the Alfonzo case, which is a District Court of Massachusetts, it says that 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. And again, when you have entries of eleven hours trial prep, I just...

THE COURT: So maybe if it's not specific enough it gets excluded.

MS. SAPIRSTEIN: That would be fine.

THE COURT: Let me just look at it all, okay. Let me take it all under advisement.

MR. RIGALI: And I guess you have to look at both of them, Judge.

THE COURT: I will.

MR. RIGALI: So if somebody puts down five hours trial prep and that's it, if that

doesn't cut it on one side, I guess it doesn't work on the other, that the word of officers of the court that they dissented appropriately is just not worth the paper that it's printed on.

MS. SAPIRSTEIN: Actually, that's actually not what the case law says. Nobody is calling into question anybody's ethics or misrepresentation to the Court. The case law is very clear that it is the lawyer's burden.

MR. RIGALI: And when the lawyer signs an affidavit under the penalties of perjury that these are the facts, that's evidence. Thank you, Judge.

THE COURT: I'll take it all under advisement. Thank you.

(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