

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

1 THE COURT: Please identify yourselves
2 for the record.

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

5 THE COURT: Thank you.

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

8 THE COURT: Okay.

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

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

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

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

13 THE COURT: Yes, I do have that.

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

18 THE COURT: Okay.

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

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

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

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

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

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

23 THE COURT: Yes.

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

4 THE COURT: Yes.

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

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

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

16 THE COURT: Mm-hmm, I have those.

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

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

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

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

14 THE COURT: Mm-hmm.

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

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

1 THE COURT: Okay.

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

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

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

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

4 THE COURT: Mm-hmm.

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

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

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

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

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

23 MR. RIGALI: Attached to that should be

1 an invoice which says exhibit four.

2 THE COURT: Yep.

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

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

8 MR. RIGALI: If I can approach?

9 THE COURT: Sure.

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

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

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

20 THE COURT: Alright, why?

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

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

4 THE COURT: Mm-hmm.

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

7 THE COURT: Mm-hmm.

8 MS. SAPIRSTEIN: Literally.

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

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

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

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

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

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

12 THE COURT: Right.

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

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

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

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

1 THE COURT: I mean, you can respond.

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

5 THE COURT: Okay.

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

8 THE COURT: Mm-hmm.

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

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

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

7 THE COURT: Right.

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

10 THE COURT: Right.

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

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

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

23 MS. SAPIRSTEIN: In writing?

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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

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

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

6 MR. RIGALI: Correct.

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

10 THE COURT: Yeah, I got that.

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

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

18 MS. SAPIRSTEIN: Thank you.

19 THE COURT: Alright.

20 MR. RIGALI: But I think...

21 THE COURT: Go ahead.

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

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

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

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

1 So the second one I have...

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

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

21 THE COURT: Is it in your brief though?

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

1 sort of researching on the last couple of
2 days so I didn't to submit a new brief and
3 so forth, but if you look at 258, Sections
4 9, which pertains to some circumstances, and
5 13, what you find is this. In 13 I think
6 the law basically says a municipality, and
7 I'll paraphrase this, shall indemnify
8 someone who's a governmental official who's
9 charged with certain offenses or incurs
10 certain fees in the performance of his
11 duties for things which occur during the
12 scope of his work. So if the tax collector
13 of Palmer has an argument with a taxpayer
14 and the taxpayer sues the tax collector, the
15 tax collector doesn't, you know, obviously
16 it would discourage anyone from being in
17 public service, so that statute is there
18 which mandates that that municipality for
19 the most part defend and indemnify the
20 individual town official who's a defendant,
21 except for civil rights violations and for I
22 think intentional torts. Section 9 says a
23 municipality may, so Section 9 is

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

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

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

3 THE COURT: Mm-hmm.

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

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

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

11 THE COURT: I don't think I do.

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

20 THE COURT: Right.

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

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

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

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

1 absolutely no evidence in this hearing that
2 Mr. Johnson was not personally obligated to
3 pay the fees. Whether or not someone else
4 pays the fees for someone who's personally
5 obligated to pay them is something that
6 hasn't been addressed, but there's no
7 evidence here and I know that Mr. Rigali
8 subpoenaed the Town's records and I know
9 that the checks came from the Town of
10 Holland, but that's not actually the
11 inquiry. According to Mr. Rigali's own
12 brief the inquiry is who is personally
13 obligated to pay the fees, and we don't have
14 any evidence that Mr. Johnson wasn't. So it
15 would be no different than if I have an
16 agreement to pay somebody something and my
17 uncle pays for it, that doesn't mean that
18 I'm not personally obligated to pay for it.
19 So we would agree, we would argue that Mr.
20 Johnson is clearly the aggrieved person and
21 the jury actually found that and there have
22 been no post trial motions that overturn
23 that and that there's no evidence on the

1 part of anyone that he wasn't personally
2 obligated to pay the fees. So he fits well
3 within the wiretapping statute and I think
4 Your Honor is right, the issue of whether
5 it's a conflict of interest or an ethical
6 violation is not before this tribunal. It
7 may not be before any tribunal. So we would
8 say that we fit well within the statute, and
9 actually I made a mistake on the amount of
10 fees, I think I left off costs, I think it's
11 \$16,550.00, but it's in my paperwork. Thank
12 you, Your Honor.

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

15 MS. SAPIRSTEIN: Practical?

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

23 MS. SAPIRSTEIN: Well, that would get

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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...

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

6 THE COURT: Okay.

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

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

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

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

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

1 You cannot come into this Court and for
2 months either deny or head your bets or
3 evade the point blank question, who's paying
4 the bills and now come in and say oh, we
5 haven't had a chance to prove it when we
6 filed a motion for it, when we filed a
7 request for a hearing on it, when we asked
8 witnesses to come here, none of whom did.
9 One without my permission, what was
10 Selectman Kennedy because on the 17th at
11 4:30 or 5:00 in the afternoon when I spoke
12 with him the day before the attorney fee
13 hearing on the 18th, he said he had two
14 doctor's appointments the next day and
15 admitted to me on the phone for the first
16 time that yes, and I'll state this on the
17 record, that the Town was in fact paying Mr.
18 Frei's legal fees and they now knew it was a
19 mistake. Excuse me, Mr. Johnson.

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

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

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

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

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

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

16 THE COURT: Right.

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

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

11 THE COURT: Mm-hmm.

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

19 THE COURT: I know.

20 MR. RIGALI: My point is...

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

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

3 MS. SAPIRSTEIN: That's not true.

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

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

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

15 THE COURT: Okay.

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

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

22 MR. RIGALI: Be here on the 18th.

23 THE COURT: You don't need to appear if

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

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

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

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

15 THE COURT: Mm-hmm.

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

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

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

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

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

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

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

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

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

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

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

20 MR. RIGALI: Thank you.

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

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

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

6 THE COURT: Two weeks?

7 MS. SAPIRSTEIN: Two weeks.

8 THE COURT: November 8th.

9 MS. SAPIRSTEIN: Thank you.

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

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

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

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

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

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

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

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

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

12 MS. SAPIRSTEIN: Right.

13 THE COURT: I'm very sorry.

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

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

18 MR. RIGALI: I can.

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

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

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

6 THE COURT: Alright.

7 MS. SAPIRSTEIN: I'm sorry.

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

11 THE COURT: Let me see...

12 MS. SAPIRSTEIN: A case?

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

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

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

22 THE COURT: 321?

23 MS. SAPIRSTEIN: At the bottom. Mine's

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

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

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

11 THE COURT: Okay.

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

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

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

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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

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

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

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

11 THE COURT: Well...

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

16 THE COURT: Does that go to the
17 incurred?

18 MS. SAPIRSTEIN: It does.

19 THE COURT: Whether it's been incurred?

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

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

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

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

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

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

18 THE COURT: No, I'm looking still.

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

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

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

5 THE COURT: Yep.

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

8 THE COURT: Yep.

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

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

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

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

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

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

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

4 THE COURT: Okay.

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

7 THE COURT: Right.

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

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

2 THE COURT: What do you mean?

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

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

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

1 four of the invoice.

2 THE COURT: Okay. I went up to 13.

3 MS. SAPIRSTEIN: And then there are
4 entries on page five, like May 14th, May
5 15th, all day, 8:30 to 7:30, research and
6 draft memos, eleven hours. So, you know,
7 quite frankly, I don't usually put opposing
8 counsel on the stand but I don't see how
9 there's any way any of us can tell what part
10 of these tasks went to the Civil Rights Act
11 and what part went to the other
12 counterclaims, research that Mr. Rigali did
13 into counts that he rejected bringing.
14 There's absolutely no way to tell, and you
15 know, we're talking about thousands of
16 dollars, we're not talking about hundreds of
17 dollars. I mean, there's some stuff here
18 that, again, I think doesn't go to the Civil
19 Rights Act but it's fifty-three dollars. I
20 mean, I don't really care about that but I
21 do care about fifty thousand dollars. This
22 is a bill for fifty thousand dollars to the
23 Town of Holland.

1 THE COURT: Okay.

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

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

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

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

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

1 there are three of these, okay.

2 THE COURT: I don't doubt it.

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

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

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

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

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

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

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

3 MS. SAPIRSTEIN: If I could just direct
4 your attention to a case that I cited, and
5 that's the Alfonzo case, which is a District
6 Court of Massachusetts, it says that hours
7 should be eliminated if the records are not
8 sufficiently precise as to the tasks
9 accomplished or the claim pursued to allow
10 the Court to assess whether the time spent
11 was reasonable. And again, when you have
12 entries of eleven hours trial prep, I
13 just...

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

16 MS. SAPIRSTEIN: That would be fine.

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

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

21 THE COURT: I will.

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

1
1 doesn't cut it on one side, I guess it
2 doesn't work on the other, that the word of
3 officers of the court that they dissented
4 appropriately is just not worth the paper
5 that it's printed on.

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

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

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

18
19 (HEARING CONCLUDED)
20

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