

## COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

DISTRICT COURT DEPT.  
OF THE TRIAL COURT  
PALMER DIVISION  
DOCKET NO. 1143 CV 293

BRIAN JOHNSON,  
Plaintiff,  
  
vs.  
  
PETER FREI,  
Defendant.

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MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S AND DEFENDANT'S  
MOTIONS FOR ATTORNEY'S FEES

BACKGROUND

This case began with a Complaint containing a single count, violation of G.L. c. 272, § 99Q (the wiretapping statute). The defendant responded with eight counterclaims: assault, assault and battery, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, abuse of process, obstruction of justice and a civil rights claim. Following a 2½ day jury trial, the jury awarded the plaintiff \$100 on the wiretapping claim. The jury awarded the defendant \$1,500 on the civil rights claim (G.L. c. 12, §§ 11H and 11I) and \$100 on the defamation claim. Both G.L. c. 272, § 99Q and G.L. c. 12, §§ 11H provide for an award of attorney's fees to the successful party. Both the plaintiff and the defendant have moved for awards of attorney's fees.<sup>1</sup>

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<sup>1</sup>The parties have filed numerous motions and oppositions regarding attorney's fees including, Plaintiff's Motion for Award of Attorney's fees and costs and Memorandum in Support thereof, Defendant's Motion for Attorney's fees and Affidavit in Support thereof, Defendant's Opposition to Award of Plaintiff's Attorney's fees, Plaintiff's Motion to Strike Affidavit in Support of Defendant's Opposition to Award Plaintiff's Attorney's fees and Memorandum of Law in Support thereof, Defendant's Opposition to Plaintiff's Motion to Strike Affidavit and Incorporated Memorandum of law, Defendant's Affidavit in Support of his

PLAINTIFF'S REQUEST FOR ATTORNEY'S FEES

With regard to attorney's fees, G.L. c. 272, § 99Q reads as follows:

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person . . .

3. a reasonable attorney's fee and other litigation disbursements reasonably incurred . . .

The plaintiff's attorney has filed an affidavit of attorney's fees and costs totaling \$16,550.21.

The defendant objects on the grounds that the plaintiff is not an aggrieved person pursuant to the statute and further that because the Town of Holland paid the plaintiff's attorney's fees he has not "incurred" any such fees therefore, any award to him would be unjust.

The defendant first contends that the plaintiff is not an aggrieved person under § 99 Q.

*The short answer to that argument is that the defendant testified that he recorded the plaintiff and the jury so found.<sup>2</sup>*

In support of his argument that the plaintiff incurred no attorney's fees the defendant cites the case of *Lincoln Street Realty Co. v. Green*, 374 Mass. 630 (1978). *Lincoln* involved a situation where a tenant successfully defended a summary process action brought by his landlord. The lease provided that if the tenant were successful the landlord would have to pay any

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Opposition to Award Plaintiff's Attorney's fees, Plaintiff's Opposition to Defendant's Motion for Attorney's fees, Defendant's Supplement to Motion for Attorney's fees and Supplement to Opposition to Award of Plaintiff's Attorney's fees, Attorney's Supplemental Affidavit in Support of Defendant's Motion for Attorney's fees, Attorney's Second Supplemental Affidavit in Support of Defendant's Motion for Attorney's fees and Plaintiff's Opposition to Defendant's Second Supplemental Motion for Attorney's fees.

<sup>2</sup>The jury answered special questions with regard to each count. In connection with the plaintiff's claim under G.L. c. 272, § 99 Q, the jury answered "yes" to the question "[D]id Peter Frei make a secret recording of Brian Johnson?"

reasonable attorney's fees incurred by the tenant. The tenant however, had been represented by a "publicly funded legal service organization" which did not bill him. The court framed the issue as follows:

The issue presented for review is therefore whether a person represented by an attorney who does not charge his clients may recover attorney's fees under a contractual clause which provides that the prevailing party shall recover reasonable attorney's fees incurred.

In holding that the tenant could not recover attorney's fees pursuant to the contract where he was not personally liable for the bill, the court distinguished cases where attorney's fees are authorized by statute from those which are based on a contract as follows, " [W]hile we agree that when attorney's fees are statutorily authorized legal service organizations are entitled to receive such awards, (citation omitted) we conclude that, because of the different policy considerations involved, legal service organizations are not appropriate recipients of fee awards made pursuant to a contractual provision allowing recovery of attorney's fees incurred." *Id.* at 631-632. (emphasis in original). The court also noted that the purpose behind the statutorily authorized attorney's fees is one of "encouraging private enforcement of particular laws chosen by the Legislature, deterring illegal conduct in connection with these laws, and punishing those who violate these laws." *Id.* at 632.

More on point to the case at bar is *Torres v. Attorney General*, 391 Mass. 1 (1984). In *Torres*, the plaintiff was successful in obtaining a \$100 award of exemplary damages against the defendant for a violation of G.L. c. 66A, the Fair Information Practices Act. Pursuant to G.L. c. 214, § 3B,<sup>3</sup> a violation of c. 66A carries with it "such costs and reasonable attorney's fees as may be incurred in said action." The defendant argued that because Torres had been represented by a legal services organization and had not incurred any attorney's fee, he was not entitled to an

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<sup>3</sup>G.L. c. 214, § 3B provides in pertinent part that "[A]ny holder, as that term is defined in chapter sixty-six A, which violates any provision of said chapter sixty-six A, shall be liable to any individual who suffers any damage . . . Notwithstanding any liability for actual damages as may be shown, such holder shall be liable for exemplary damages of not less than one hundred dollars for such violation together with such costs and reasonable attorney's fees as may be incurred in said action."

*award of attorney's fees. The Court rejected this argument and awarded Torres attorney's fees reasoning that*

*the Legislature allows attorney's fees to a successful litigant in such cases to encourage private enforcement of the law and to encourage the government to comply with the law at the risk of a financial loss to it if it does not. These legislative goals have been given more weight in construing the word "incurred" in the context of such statutes than has the meaning of the word in a debtor-creditor sense.*

*Id.* at 15.

*See also Moon v. Trust Insurance Co.*, 2000 Mass. App. Ct. 89 (2000) citing *Torres v. Attorney General*, *supra*, in holding that an insured whose attorney represented him without charge in a PIP claim under G.L. c. 90, § 34M, was entitled to collect attorney's fees under that statute even though he had not incurred any. Noting that the *Torres* decision was based on the Legislative purpose of, among other things, encouraging compliance with the law by the government, the *Moon* court concluded "that the award of attorney's fees to an unpaid party as provided in G.L. c. 90, § 34M is similarly designed to encourage compliance with the law by insurance companies."

*Id.* at 93.

Here, the Legislative purpose of G.L. c. 272, § 99 is set forth in the preamble which states in part as follows: "[T]he general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited."

Based on the holding in *Torres v. Attorney General*, *supra* and the clear Legislative purpose of § 99, I conclude that the plaintiff is entitled to an award of attorney's fees despite the fact that he did not personally pay those fees.

The defendant next argues that the plaintiff is not entitled to fees incurred for defending the defendant's eight counterclaims, that the amount claimed should be reduced because the bulk of it was time spent defending the counterclaims and that the court should consider that the

*plaintiff rejected pre trial settlement offers.*<sup>4</sup>

The plaintiff does not contest that he is entitled to attorney's fees incurred only in prosecuting his claim and not in defending the counterclaims. His attorney submitted an affidavit with an attached bill detailing 114.10 hours spent, the work performed, and her hourly rate of \$150.<sup>5</sup> Her total request for attorneys fees is \$16,455.00 plus costs of \$95.21.

In calculating an award of attorney's fees the lodestar method is used. See *Butera Auburn, LLC v. Williams*, 83 Mass. App. Ct. 496, 504 (2012). That method provides as a starting point, "[A] fair market rate for time reasonably spent preparing and litigating a case . . ." *Fontaine v. Ebtec Corporation*, 415 Mass. 309, 326 (1988). The method is set forth in *Stowe v. Bologna*, 417 Mass. 199 (1994) as follows:

The first component of the basic measure amount is the amount of time reasonably expended on the case. The judge should begin his inquiry with the amount of time documented by the plaintiff's attorney. Then the judge decides whether this amount of time was reasonably expended. The judge should not only consider the plaintiff's financial interests at stake but also the plaintiff's other interests sought to be protected by the statute in question and the public interest in having persons with valid claims under the statute represented by competent legal counsel. The second component of the basic measure amount is the amount of a reasonable hourly rate. This amount should be the average rate in the community for similar work by attorneys with the same years' experience.

*Id.* at 203-204 (internal citations omitted).

"A judge must examine a number of factors to determine whether an award of attorney's fees and costs is reasonable. See, e.g., *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979). While the amount of a reasonable attorney's fee is largely discretionary, a judge 'should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual

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<sup>4</sup>The defendant did not cite to any authority in support of his argument that in awarding attorney's fees the court should take into consideration the plaintiff's rejection of his settlement offer.

<sup>5</sup>Some of the time spent was by her associate who for the most part also billed at \$150.00 per hour.

price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases.' *Id.* 'No one factor is determinative, and a factor-by-factor analysis, although helpful, is not required.' *Berman v. Linnane*, 434 Mass. 301, 303 (2001)." *Twin Fires Inv., LLC v. Morgan Stanley Dean Witter*, 445 Mass. 411, 429-430 (2005). The judge is "not required to review and allow or disallow each individual item in the bill, but [can] consider the bill as a whole." *Berman v. Linnane*, *supra* at 303 (2001). The party seeking fees bears the burden of establishing the fair market rate and time reasonably spent. *Society of Jesus of New England v. Boston Landmark Commission*, 411 Mass. 754, 759 (1992).

Here, the plaintiff's claim was not overly complex (although there is little in the way of case law interpreting § 99)<sup>6</sup> and the result obtained was minimal in a monetary sense.<sup>7</sup> The rate charged by the plaintiff's attorney, \$150/hr. (one that was apparently negotiated with the Town of Holland) is far below what an attorney with her reputation, experience and ability would be expected to charge for similar services. In fact, the defendant's attorney, whose experience, ability and reputation equals that of plaintiff's attorney, charged \$235/hr. out of court and \$295/hr. in court. Despite the reasonableness of the billable rate, the attorney's fee requested by plaintiff is one hundred and sixty times the amount recovered.<sup>8</sup> Absent actual damages (of which

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<sup>6</sup>In his supplemental argument in opposition to an award of plaintiff's legal fees, the defendant states that, "[P]roof of the wiretap case at trial was far from complex." Yet in his attorney's affidavit in support of his own request for attorney's fees, he states, "[T]his case raised novel and complicated issues of first impression pertaining to civil actions under the Massachusetts Wiretap Law, G.L. c. 272, § 99."

<sup>7</sup>G.L. c. 272, § 99 provides for an award of "actual damages but not less than liquidated damages computed at the rate of \$100 per day for each day of violation or \$1000, whichever is higher . . ." The evidence was that the defendant secretly tape recorded the plaintiff on one occasion. Therefore, absent actual damages (of which none were presented), \$100 was the maximum that could have been awarded unless the jury awarded punitive damages.

<sup>8</sup>I point out this discrepancy between the amount recovered and the amount of attorney's fees requested as one factor in the analysis. I am mindful of the fact that "[f]ee-shifting provisions in general reflect a legislative judgment that 'the public as a whole has an interest in the vindication of the rights conferred by the statutes.'" Thus, while the 'results obtained' in litigation are a 'preeminent consideration in the fee-adjustment process,' such results can consist of 'a plaintiff's success claim by claim, or [of] the relief actually achieved, or [of] the societal

the plaintiff had no proof) or punitive damages, the maximum that the plaintiff could collect was \$100.00 per day of violation up to \$1,000.00. Here, the plaintiff had proof of only one violation, therefore the most he could have expected to be awarded, again absent punitive damages, was \$100. In addition, some of the time spent by plaintiff's attorney, as detailed in her affidavit, was work done in connection with the counterclaims. For example, drafting answers to counterclaims (date of work 9/16/11), researching civil rights law (2/22/13, 2/28/13) and drafting the motion for judgment notwithstanding the verdict (3/4/13 - 3/6/13) reflect hours spent on the civil rights claims. Fees for all of the trial preparation time and trial attendance time are requested yet part of that time has to reflect time spent on the eight counterclaims. (See work detailed on the following dates: 2/14/13, 2/19/13, 2/20/13, 2/21/13, 2/25/13, 2/26/13, 2/27/13 and 2/28/13). Some work entries are not specific enough for me to determine what claim was worked on. Some of the time billed by plaintiff's attorney's associate was billed at \$175/hr. rather than \$150/hr. I have gone through all of the plaintiff's time records and deducted hours clearly spent on the civil rights claim. In addition, where it was unclear which claim was being worked on (such as trial preparation) I allotted one-third of the time to the wiretapping claim<sup>9</sup>. Based on all of the foregoing, I find that a reasonable attorney's fee is \$8,455.00 and award the plaintiff that amount plus \$95.21 in costs.<sup>10</sup>

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importance of the right which has been vindicated, or [of] all of these measures in combination.” (internal quotes and citations omitted). *Diaz v. Jiten Hotel Management, Inc.*, 13-1444 (1<sup>st</sup> Cir. 12-18-2013).

<sup>9</sup>I allotted one-third of the time to the wiretapping claim, one-third to the civil rights claim and one-third to the other seven claims brought by the defendant. This was done in connection with the defendant's request as well where it was impossible to tell which claim was being worked on.

<sup>10</sup>I am assuming that the attorney's fees and costs will be repaid to the Town of Holland. In this regard, the defendant benefits from the contract between the plaintiff's attorney and the Town of Holland fixing her hourly rate at \$150.00.

DEFENDANT'S REQUEST FOR ATTORNEY'S FEES

With regard to defendant's request for attorney's fees G.L. c. 12, § 111 provides that

Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

In support of his request for attorney's fees the defendant submitted an affidavit of his attorney detailing 242 hours spent, the work performed and rate charged (\$235/hr. out of court, \$295/hr. in court) amounting to \$60,430.57. Thereafter, he submitted a supplement to his motion for attorney's fees requesting \$49,855.50 with a revised time record reflecting his concession that work done on the wiretapping claim was not recoverable. He then submitted a second supplemental affidavit in the amount of \$3,120.00 for time spent since April 12, 2013 on the attorney's fee request and on discovering whether the Town of Holland paid the plaintiff's legal bills. He further submitted affidavits from two local attorneys attesting to the standard rates for attorneys in the community with experience comparable to defendant's attorney. Costs requested amount to \$3,092.79.

The plaintiff does not contest the hourly rate charged by the defendant's attorney and I find that it is a reasonable rate. The plaintiff does however, contest the reasonableness of the amount of time the defendant's attorney spent on the civil right's claim. As detailed above, the lodestar method is used to evaluate a fee application. The defendant's claims were not overly complex. The civil rights claim revolved almost entirely around one incident that occurred on a lake next to the defendant's home during a fishing derby. The amount recovered by the defendant on the civil rights claim, \$1,500, was minimal.

"[W]hen a fee request appears on its face dramatically disproportionate to the results the litigation produced, as it does here, the judge must focus with precision on the relationship between the time invested and the results achieved in order to insure that the 'time spent was [not] wholly disproportionate to the interests at stake.' (citation omitted)." *Killeen v. Westban Hotel*, 69 Mass. App. Ct. 784, 796 (2007).

Although successful on the civil rights claim, the defendant was unsuccessful on several



other claims including assault, assault and battery, negligent and intentional infliction of emotional distress, abuse of process and obstruction of justice.<sup>11</sup> While he was awarded \$100 on the defamation claim, that claim does not provide for an award of attorney's fees. Time was obviously spent on all of these issues and I do not find that the time spent on these other issues was so "inextricably intertwined" with the time spent on the civil rights claim that they could not be separated. *Ross v. Continental Resources*, 73 Mass. App. Ct. 497, 516 (2009). For example, an entry on defendant's attorney's affidavit dated 2/23/13 allots 6 hours for starting jury instructions; another entry dated 2/24/13 allots 7.25 hours for work done primarily on jury instructions. In the request for jury instructions filed with the court, two pages out of ten are requests for instructions pertaining to the civil rights claim. Many of the entries in the affidavit (including the supplemental affidavit) are not specific as to which claims were being worked on. For example, "5/14/12 Monday, all day 8:30 a.m. - 10:30 p.m. - research"; 5/15/13 Tuesday - all day; 8:30 a.m. - 7:30 p.m.; Research and draft memos"; "5/16/12 Finish draft of pleadings; file by mail, copies to Peter and Atty Saperstein 7:30 a.m. - 5:30 p.m.". Admittedly, defendant's counsel did reduce these hours by half in his supplemental affidavit (by writing in "½" next to each entry) but given that there were so many claims other than the civil rights claim more detail is needed. Just reducing entries by one-half the time does not give enough specificity and it seems unlikely that each time entry would be reduced by exactly one-half. All of the time entries combine many tasks under a block of hours and in many cases it is impossible to segregate the work done on the civil rights claim (by time) from work done on any other claim. While I appreciate that defendant's attorney filed an affidavit regarding his fees it seems apparent that even he is unsure of how much time was spent on the civil rights claims as opposed to the other claims. For example, while it appears that the defendant's attorney may have kept contemporaneous time records, he did not detail in many entries exactly which claims he worked on, e.g., "5/14/2012 Monday, all day 8:30 a.m. - 10:30 p.m. - research". To simply reduce each of these types of entries by one-half a year later seems somewhat arbitrary. In pages six through nine of defendant's attorney's time records he does not reduce any of the time (even by one-half)

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<sup>11</sup>The defendant's claim of obstruction of justice was dismissed on motion of the plaintiff and his claim of abuse of process was directed out at trial.

yet some of that time is clearly related to claims other than civil rights. The defendant's attorney has also requested approximately 43.25 hours in connection with his requests for attorney's fees and opposition to plaintiff's requests, which I see as excessive. Based on all of the above, I find that a reasonable attorney's fee is \$16,024.65 and award the defendant that amount.

With regard to the costs requested by the defendant, one is for \$2,500 for an expert who did not testify at trial. Apparently, the defendant tried to have the plaintiff stipulate to the audio CD of the wiretapping, which the plaintiff did, but not until the day before trial when the expert fees had already been incurred. In considering the matter of costs the court in *Linthicum v. Archambault*, 379 Mass. 381 (1979) stated as follows:

The issue, however, is whether actual cost, i.e., the amount which the expert witness has charged the plaintiff, is recoverable or whether some discretion resides in the judge as to the amount to be paid as costs. Although the word "incurred" as used in a contract has been construed to mean "personally obligated to pay," where it is the statutory policy to award reasonable costs incurred, the trial judge has discretion to set the amount to be awarded even if the plaintiff is personally obligated to pay the amount billed. Where the award of costs is statutorily authorized, judges are vested with discretion either expressly or by judicial construction in determining the size of the award. Of course, consideration should be given to factors such as the time spent by the expert in testimony, the number of appearances, preparation time, the degree of learning and skill possessed by that witness, as well as the assistance such testimony gave to the trier of fact.

*Id.* at 389-390.

Here, the expert did not testify so there was no court appearance to consider. The defendant has produced no information about the expert other than he charged \$2,500. Therefore, I cannot make a determination of the expert's qualifications. The defendant did produce a bill from the expert indicating that he spent 24 hours analyzing the defendant's iphone recording (which, in my recollection, lasted less than 10 minutes). The bill further indicates that the expert spent 8 hours preparing a report and for a deposition. While I am not aware that any deposition took place, eight hours seems excessive as does the 24 hours for analyzing the iphone recording. I am awarding \$1,000 in costs for the expert. The remainder of the defendant's costs are awarded with the exception of the Worcester County Sheriff fee. The award of fees to the defendant is

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\$1,522.01.

ORDER

It is hereby ORDERED that the plaintiff is awarded \$8,455.00 in attorney's fees and \$95.21 in costs. It is further ORDERED that the defendant is awarded \$16,024.65 in attorney's fees and \$1,522.01 in costs.

So ordered.

January 9, 2014

A handwritten signature in black ink, reading "Patricia T. Poehler". The signature is written in a cursive, flowing style.

Patricia T. Poehler

Associate Justice of the District Court