

## Problems with the Massachusetts Wiretap law or how a Fishing Derby May Have Hooked Holland Town Officials

Relative to the editorial "Court case questions wiretap law" appearing in May 15<sup>th</sup> publication of the Springfield Republican, and the Dziewit case now pending in the Springfield District Court, let the public beware: a violation of the MA wiretap statute may have both criminal and civil repercussions.

In addition to criminal sanctions faced by Ms. Dziewit, the statute provides an "aggrieved person" the right to file a civil law suit for monetary damages. According to two different judges sitting in the Palmer District Court judges an "aggrieved person" is basically someone who's voice was recorded without his/her knowledge. The statute mandates payment of statutory damages and payment of the "victim's" legal fees.

The statute has more problems than raised by the newspaper's well written editorial.

In the matter of *Johnson v. Frei*, Palmer District Court, Civil Action # 1143 CV 293, litigated to a jury verdict in the civil session of the Springfield District Court last year, there was evidence to show Johnson, the elected highway surveyor (i.e., superintendent) for the Town of Holland, had a history of threatening and hassling Frei, a town resident. Frei had been publically critical of the actions of Holland officials, including Johnson. Johnson didn't like it and retaliated with abusive language and conduct.

On the day of the annual town fishing derby, Johnson and fellow Town highway workers just happened to set up shop on the ice surrounding Frei's remote lakeside cabin. In full view of all to see, they fished; drank; publically urinated and trespassed on his property. An ATV with a vulgar message painted on its plow blade faced Frei's home. Johnson's message to Frei was clear: I have friends and we know where you live. The boys got no rise from Frei. However, Frei took notice when a few of the as drunken trespassers started off in the direction of his parked vehicle, a car that had been vandalized shortly after a previous confrontation with Johnson. Frei decided to tell them to knock it off. Being out numbered and having been the victim of previous false accusations by Johnson, Frei thought it best to protect himself by preserving what might be said or done when he spoke with them.

With cell phone on record in his pocket, Frei left his home, walked a short distance to where the men had gathered on the ice and asked them not to trespass on his property. Johnson's cohorts immediately began shouting obscenities and threats at Frei. There was evidence that he was kicked and knocked to the ground by one of them, fortunately escaping with only minor physical injury. Frei retreated to his home.

Phone calls were made. Holland police responded. Frei, and a friend who had witnessed the events from inside Frei's cottage told the police what happened. The police interviewed team Johnson separately. Not surprisingly, Johnson's version of the story was quite different. He told the police he and his friends were minding their own business, fishing on the lake when Frei came out and angrily threatened to kill them. Johnson told the police Frei's actions put him in fear of his life. The ATV with the vulgar sign disappeared just before the police arrived - but not before being photographed.

On reading Johnson's account in the police incident report a few days later, Frei was shocked but not surprised. He denied having threatened Johnson or anyone else. He told the police he had a tape of the entire incident that not only exonerated Frei but proved beyond any doubt Johnson had lied, provided materially false information to police officers acting in their official capacities (G.L. c. 269 Sec. 13A) and had falsely accused him of a crime (i.e., threat to kill: G.L. c. 275 Sec. 2 - 5). The police, fellow municipal employees in the small hamlet of Holland, familiar with the history between the two men (and, lest we point out, who work with Johnson daily), declined Frei's offer. To their credit, nor did they pursue criminal wiretap charges against Frei.

Word of the incident traveled. According to the evidence at trial, Johnson spread rumors around town that Frei had been the instigator, aggressor and all around bad-guy. Determined to let the voting public know the truth, Frei posted the tape on the town blog. One might think such a disclosure would have a somewhat humbling effect upon Mr. Johnson's subsequent decision making but it turns out ice fishing is not for the faint of heart.

Events were reported to Johnson's cronies on the Board of Selectmen. Irrefutable, publically available evidence of Johnson's lies and misdeeds notwithstanding, the elected public officials of Holland were outraged with Frei. The very audacity of this citizen do-gooder! They were not about to let the very fabric of civilized society's privacy interest protected by our wiretap law be torn asunder by the likes of Frei. So they met in private, and not only voted to hire town counsel to go after Frei but authorized the use of public tax dollars to vindicate Johnson for what was clearly an off duty, non-employment related incident. The heck with G.L. c. 268 § 23(b)(2)(i) and (ii). Is collusion spelled with one "I" or two ?

Johnson thereafter sued Frei for a civil violation of the wiretap statute. And won. As in the *Glik* and *Hyde* cases, the Massachusetts wire tap statute requires pre-recording 'notice' to the person being recorded, not their permission. Shortly after the judge instructed the jury that they, like it or not, had to follow the law as given to them by judge, the jurors asked if they could award Johnson less than the mandatory \$100 minimum required by the wiretap statute. The judge told them they could not.

And so, despite the undisputed fact that Johnson's frat boy nonsense toward Frei occurred in a very public place and was in no shape, manner or form in any way connected to anything "private," the jury awarded Johnson the minimum statutory damages mandated by the statute: \$100. Again, following the law - and we must follow the law - the judge further ordered Frei to pay Johnson's legal fees - even though thanks to his buddies on the Selectboard, he didn't have any.

The jury verdict was not the result of jurors looking for an early weekend start. Despite Frei's arguments that the wiretap statute was intended to protect us from unwarranted invasions of 'privacy' and that Johnson's words and conduct was anything but private, separate district court judges ruled the wiretap law does not require proof of a violation of

privacy in the traditional sense of the word. Regardless of the context, recording an individual's statements without that individual's knowledge is all that is required. Neither the facts or context matter. It appears to be a strict liability situation.

This makes for difficult situations. Your college aged son the political science major goes to Boston Common to take in a political candidate's stump speech. He records it on a cell phone in his shirt pocket, a *per se* violation of both the criminal and civil violation of the Mass. Wiretap statute. As with Ms. Dziewit, *Hyde* and *Glik*, no violation if your son held the cell phone or other recording device in view of the speaker thereby putting the speaker on notice she was being recorded.

Is an individual who threatens another over the phone entitled to the protection of the wiretap statute? You're having a tiff with your neighbor. She cherishes her first edition collection of Steven King novels. She also has a screw loose and threatens to burn down your home. You tell the police. They interview the neighbor. She meets them at the door with fresh cookies, denies all and smiles benignly as she tells them none of your other neighbors mind you mowing your lawn at midnight, naked. Avoiding direct eye contact, the police inform you they can't do anything about the arson threat because there is no evidence other than your say-so. Hands on holstered weapons, eyes scanning about nervously as you stand dumbfounded in your front door, they work their way backwards to their cruiser and drive away. Your phone rings. It's your neighbor. "Last straw," she says and describes how she intends to burn your place to the ground, hopefully with you in it.

You record the conversation on your answering machine and bring it to the police. Your neighbor is arrested for making a threat. You are placed in an adjoining cell for the wiretap violation. Your son the political science student, thinks you are the coolest mom ever and bails you out just in time for the sheriff to serve you with your neighbor's civil wiretap complaint.

Although in a special verdict slip, the jury found Johnson's conduct toward Frei was intended - or was reasonably likely - to cause Frei emotional distress, was "extreme and outrageous, was beyond the bounds of decency and intolerable in a civilized society..." your neighbor can cite the precedent of *Johnson v. Frei*, and win mandatory minimum damages and an award of legal fees.

Post Mortem:

Frei's appeal of Johnson's wiretap verdict, minimal damage award and not so minimal award for legal fees is pending.

Johnson's appeal of the jury's defamation and civil rights verdicts in favor of Frei against Johnson, the damage award the jury gave to Frei and the order of the court that Johnson pay Frei's legal fees is pending.

The State Ethics Commission's investigation of Johnson's receipt and the Town's payment of Johnson's legal fees with public funds, voted and approved by Johnson's fellow town officials, is pending.