

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, SS.

DISTRICT COURT DEPARTMENT
PALMER DIVISION
CIVIL ACTION NO. 1143CV293

Brian Johnson,)
Plaintiff)
v.) **MOTION IN LIMINE**
Peter Frei,)
Defendant)

Now comes the defendant, Peter Frei, in the above captioned matter and hereby moves this court to grant his motion in limine. In support of his request, Frei states as follows:

Introduction

This civil suit was initiated by Johnson, claiming damages for Frei's surreptitious recording of a short encounter in a public place between him and Frei. Frei used said recording to prove that Johnson lied to the police, falsely claiming Frei had threatened to kill him and that Johnson would be afraid for his life because of it. Frei is running an interactive blog on which he criticized Johnson for his illegal conduct as the elected Highway Surveyor of the town of Holland.

Frei levied several counterclaims against Johnson. One of the counterclaims was settled during jury trial by this Court's grant of Johnson's motion for a directed verdict. This counterclaim, alleging Johnson abused the legal process for an ulterior motive was remanded by the Appeals Court of the Commonwealth on Frei's pro-se cross-appeal.

After the jury trial, Frei learned that Johnson's private lawsuit was financed with town resources. This fact was brought to the trial judges attention before the final judgment issued and is mentioned in this Court's MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTION FOR ATTORNEY'S FEES.

After a two year investigation by the State Ethics Commission ("the Commission"), the Commission issued a Public Education Letter ("PEL").

In said PEL, the Commission found Johnson violated the Conflict of Interest Law by accepting \$23,023.00 in town funds to pay his attorney, Tani Sapirstein, to represent him in Court.

Said PEL further states that Johnson filed suit against Frei for the ulterior motive to "deter" and "discourage" Frei from further local political activism with his interactive blog, and filing petitions, both protected activities under the Constitution of the United States and this Commonwealth.

To succeed with his abuse of process counter-claim, Frei must prove that Johnson used the legal process for an ulterior motive; hence, Johnson is trying to keep the PEL out by claiming that the PEL constitutes "hearsay" and would be inadmissible under the rules of evidence. Frei claims that the PEL is a public record and therefore an exemption to the "hearsay" rule.

A similar effort on the side of Johnson to keep said PEL out of the record on appeal failed. Said PEL is clearly part of the record.

Johnson is trying to proffer inconsistent statements under oath to different entities; towards the Ethics Commission, Johnson tried to justify his suit as an effort to "deter" and "discourage" Frei from further petitioning activity, and towards the jury in the upcoming trial he intends to deny having made this statement under oath as it would seal his faith in the matter at hand.

It is a legal principal that inconsistent statements under oath are considered perjury.

Per this Court's request, Frei will also list other documents in this motion he intends to introduce into evidence during trial under the same rules.

Frei may also use evidence that was submitted during trial in 2013.

Argument

Frei will introduce certified copies as provided in General Law c.233, § 76, of the following documents, all of which are public records and as such admissible as an exception to the hearsay rule:

- I. Public Education Letter issued by the State Ethics Commission,
- II. Jury Verdict Slip docket 1143 CV 293,
- III. MEMORANDUM AND ORDER PURSUANT TO RULE 1:28 in the matter Brian Johnson vs. Peter Frei, docket 17-P-218,
- IV. Police report about the incident of February 19, 2011.

During the pre-trial hearing of August 29, 2019, Johnson's counsel claimed the PEL to be inadmissible under the hearsay rule. She must have missed the fact that Proposed Mass R Evid 803(8) creates a hearsay exception for:

Public records and reports.
Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and

proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. § 8.12, page 651, Handbook of Massachusetts Evidence, 2018 Edition.

General Laws c. 4, § 7, definitions of statutory terms, statutory construction, par. Twenty-sixth, defines "public records" in part as:

...all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose....

The Supreme Judicial Court has recognized that "[p]ublic records are broadly defined and include all documentary materials made or received by an officer or employee of any corporation or public entity of the Commonwealth, unless one of [the] statutory exemptions is applicable." *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993). There are thirteen statutory exemptions from the definition of public records.

The question whether a certain document qualifies as a public record is also relevant when an individual files a public record request to a governmental entity and such entity is unwilling to produce the sought document. The answer is the same as it is here; either it is a public record, or it is not.

The SJC has held that the "fundamental purpose" of the Public Records Law is "to ensure public access to government documents." *Gen. Elec. Co. v. Dep't of Env'tl. Protection*, 429 Mass. 798, 801 (1999).

Accordingly, this Court must abide by "a presumption that the record sought to be offered in evidence is public," and must place the burden upon Johnson's counsel "to prove with specificity the exemption which applies." *Id.*, quoting G.L. c. 66, § 10(c).

Official records may be admitted in evidence in certain instances as evidence of the truth of the facts recorded therein ¹/, under a common-law exception to the hearsay rule, § 8.12.1, page 651, Handbook of Massachusetts Evidence, 2018 Edition.

There is no doubt that the PEL and other documents Frei intends to introduce into evidence during trial are public records.

Necessity for the Record Holder of the State Ethics Commission to attend the trial and testify.

What Frei needs to get into evidence at trial to prove his counterclaim for abuse of process is Johnson's statement(s) and testimony under oath to the State Ethics Commission, that he filed his civil suit against Frei, "to deter future lawsuit," (PEL, p.2), and, "such an action could discourage Frei from continuing litigation against the Town and its officials," (PEL, p.2), and furthermore, the State Ethics Commission's conclusion based on Johnson's testimony under oath, "Town resources may not be used to fund private lawsuits in an effort to interfere with the exercise of citizens' rights." (PEL, p.4).

1 According to the PEL, Johnson filed his suit against Frei to "deter" and "discourage" Frei from exercising his Constitutional Rights, hence, he sued Frei for an ulterior motive.

Code of Massachusetts Regulation ("CMR") offers a way to impeach Johnson in the event he misrepresents the PEL with his testimony during trial.

Johnson's testimony and other communications provided to the Commission during the preliminary investigation is confidential pursuant to General Law, c. 268B, § 4.

However, once Johnson misrepresents the PEL, 930 CMR 3.01 8(c) and (d) will release the record holder of the State Ethics Commission, or the person testifying in court on behalf of the Commission, from the constraints of General Law c. 268B, § 4; CMR 3.01 8(c) and 8(d) provide,

(c) in the event that the recipient of a Commission advisory opinion, Commission advice in any form (written, oral, or electronic), or private educational communication from the Commission in any form (written, oral, or electronic) materially misrepresents the contents of such opinion, advice, or communication to any person, the Commission, acting through the Executive Director, may disclose the Commission's opinion, advice, or communication, and any documents submitted to the Commission by the recipient of the opinion, advice, or communication, or anyone acting on behalf of the recipient; and

(d) if an advisory opinion, Commission advice in any form (written, oral, or electronic), or private educational communication from the Commission in any form (written, oral, or electronic) is issued to a person who is subsequently the subject of a preliminary inquiry concerning the same or similar matters, and the Commission votes to find reasonable cause and authorizes adjudicatory proceedings, the opinion,

advice, or communication may be disclosed and used as evidence.

The PEL, is included in the broad inclusive definition of documents described in subsection 3.01, and Johnson is one of the recipients. Consequently said subsections (c) and (d) are applicable to the PEL.

Request for a judicial admission Frei intends to submit to this court during trial.

In response to presiding judge's question during the pre-trial hearing of August 29, 2019, whether there are other proceedings ongoing between the parties of this matter, Johnson's attorney Tani Sapirstein was quick to mention that she is being sued by Frei in Federal District Court, commenting that she is represented by attorneys and not appearing pro se, adding the question to the presiding judge, "you know what they say.."

I assume that what she implied was that Frei is a fool representing him self.

That might be, however, Frei is not a liar as she is!

At the outset, Frei filed a pre-answer motion to dismiss as Johnson failed to plea a violation of his personal or property interests or his privacy, a requirement to file a civil suit for damages in connection with a wiretap claim. Sapirstein, to keep her frivolous lawsuit alive, delivered her first lie.

In her opposition, she quoted a criminal case and claimed the quote pertained to a civil matter.

The wiretap statute declares any recording a crime, not only the recordings which violate the recorded individual's personal or property interests or his privacy. In the case she quoted in her opposition, *Commonwealth v. Hyde*, 454 Mass. 594 (2001), Hyde tried to convince the Appeals Court to overturn his conviction arguing that he did not violate any of the surreptitiously recorded police officer's personal or property interests or privacy.

The SJC opined correctly that a violation of the police officer's personal or property interests or privacy was not required to convict him and affirmed.

Sapirstein quoted the SJC and claimed the quote pertained to the civil remedy of the wiretap statute General Law c. 272, § 99 Q, when in fact the quote pertains to the criminal subsection, General Law c. 272 § 99 C 1.

Sapirstein did not stop there. On Appeal, Frei used case law to the point in his brief:

As to the phrase "aggrieved person" or "person aggrieved," when it appears in the General Laws, it denotes private rather than governmental or public interest. [...] G.L. c. 272, Section 99Q, provides a civil remedy for an "aggrieved person" whose private interests are violated by an unlawful wiretap interception. See *Pine v. Rust*, 404 Mass. 411, 414 (1989).
Commonwealth v. Dowd, 37 Mass. App. Ct. 164, (1994).

Sapirstein simply but falsely claimed that her case, *Hyde Id.* Overruled Frei's case, *Dowd Id.* However, the two cases have no history with each other, NONE!

This was just another lie by Sapirstein to keep her frivolous case alive and dupe the panel of justice of the Appeals Court! And amazingly it worked again!

Massachusetts is one of the few states which declares any surreptitious recording a crime. Jonson tried to press charges against Frei but failed!

Being surreptitiously recorded does not necessary give Johnson a reason to sue Frei in civil court for damages, unless he can claim that Frei violated one of his personal or property interests or his privacy. In other words, Johnson needs to meet the definition of an aggrieved person as defined in General Law c. 272, § 99(B)(6). Frei needed to have violated one of Johnson's personal or property interests or his privacy. None of these Frei did according to the jury verdict; the recording took place in public on Hamilton Reservoir where Johnson had no expectation of privacy.

Johnson has not a personal right not to be surreptitiously recorded. Surreptitiously recording another in Massachusetts is a public wrong. Tani Sapirstein, Johnson's attorney, lied to the courts, made up her own case-law, and got away with it... she fooled a total of eight judges and my own attorney.

Incompetence is the worst form of corruption.

Frei will ask this court for a judicial admission to the fact that Johnson never had a valid claim as he is not an aggrieved person according to the definition of an aggrieved person, General Law c. 272, § 99(B)(6).

WHEREFORE, clearly, both Massachusetts law and proposed rules of evidence dictate admissibility of all documents Frei seeks to put in evidence. Denying Frei his rights would be unfair, prejudicial, and a miscarriage of justice.

Respectfully written and submitted by the defendant,

Peter Frei
101 Maybrook Road
Holland, MA 01521
phone (413) 245 4660
September 17, 2019,

Peter Frei

CERTIFICATE OF SERVICE: I hereby certify that a true copy of the above document was served upon the following by First Class Mail, postage prepaid:
Tani E. Sapirstein,
Sapirstein & Sapirstein, P.C.
1331 Main Street, 2nd Floor
Springfield, MA 01103

September 17, 2019,

Peter Frei