

**UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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C.A. No. 10-1389

JAMES N. THIVIERGE, PRO SE

Plaintiff /Appellee

v.

TOWN OF AMESBURY, MAYOR KEZER, TOWN ASSESSOR, TOWN  
CLERK: AGENT OF THE LIBRARY

Defendants/Appellants

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ON APPEAL FROM A DECISION BY THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF  
MASSACHUSETTS

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**BRIEF OF DEFENDANTS – APPELLANTS**

**TOWN OF AMESBURY,  
MAYOR THATCHER KEZER, TOWN ASSESSOR, TOWN  
CLERK: AGENT OF THE LIBRARY**

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## JURISDICTIONAL STATEMENT

The Complaint in this matter raised a federal question under 42 U.S.C. §1983. The plaintiff has appealed a jury verdict in favor of the defendants in February, 2010.

## ISSUE PRESENTED FOR REVIEW

1. Is Thivierge's appeal untimely?
2. Did the removal of the case from Massachusetts Superior Court (Essex County) to the United States District Court for the District of Massachusetts violate the plaintiff's due process rights?
3. Did Thivierge waive his argument that the jury verdict went against the weight of the evidence by failing to file a motion for judgment notwithstanding the verdict?
4. Did Thivierge waive his objections to the jury instructions and jury verdict form?

## STATEMENT OF THE CASE

The plaintiff, James Thivierge ("Thivierge") filed a complaint alleging that a September, 2007 "No Trespass" order from the Amesbury Public Library and an December 19, 2007 Order from the Amesbury Mayor's office to provide notice and obtain approval prior to entering Amesbury Town Hall during daytime hours violates his right to assembly, free speech and petition the government for redress

of grievances pursuant to the First Amendment to the United States Constitution and the Massachusetts Declaration of Rights.

The Orders were issued after a lengthy history of Thivierge engaging in sexual harassment and verbal harassment to Amesbury Library staff and patrons. Ultimately, the verbal harassment became abuse and, at times, threatening. Thivierge also engaged in sexual harassment of a member of the Town Hall Accounting Department and verbal harassment of the Town Clerk. Prior to the issuance of the December 19, 2007 Order, his behavior deteriorated to the point where, in the course of a screaming verbal tirade against the Town Clerk, he advanced in a threatening manner towards her, prompting not only her to request police assistance, but employees in another office to call “911” for help.

A citizen who engages in behavior that is disruptive, abusive and threatening should not be permitted to use the First Amendment as a battering ram against a municipality’s efforts to protect its employees. The only government building he has been prohibited from entering is the Library, a non-public forum, and the order barring him came after a lengthy history of inappropriate behavior. As for the remaining public facilities in Amesbury, he has been directed to contact the Mayor’s office prior to entering the facilities in daytime hours, so that the Mayor may direct an employee to assist the employees of the applicable facility in the event Thivierge becomes disruptive or threatening again. The Order has no effect

on his ability to: freely attend public meetings, which occur in the evening; telephone town officials with comments, questions or requests; email town officials with comments, questions or requests; and send regular mail to town officials with comments, questions or requests. The Order is therefore narrowly drawn to protect public employees while allowing Thivierge to continue conduct business with the Town.

### STATEMENT OF FACTS

#### A. The Library

The Amesbury Public Library has a Patron Behavior Policy which prohibits:

1. Creating a disturbance by making noise, (either vocally or with electronic equipment) or engaging in other disruptive conduct, including running, horseplay and fighting (MGL, Ch. 272, Sec. 41).
- V. Interfering with another person's right to use the library or with the library staff's performance of their duties.
3. Harassing or intimidation of other patrons or library staff members by threatening or sexual language and/or actions.

Appendix, Exhibits Volume, p.5 (hereinafter references to the Exhibits Volume will be cited in the following format: "A., 5").

The Patron Behavior Policy is posted in four places: two on the main level of the library, one on the top level which is the children's room and one on the lower level, which is the genealogy meeting room. Appendix, Transcript Volume 2, 101 (hereinafter references to the Transcript Volumes shall be cited in the following format: "T2, \_\_").

James Thivierge is a former Town of Amesbury official. T1, p.18.

Thivierge has been an increasingly frequent Library visitor over the past decade, sometimes visiting up to three or four times in one day and four to five days in one week. T2, 222, 238, 278. In addition to visiting, he would telephone a couple of times a day. T2, 222.

In approximately 2000 or 2001, Marjorie Walker (“Walker”), the Young Adult Librarian, observed Thivierge making comments with sexual overtones to teenage girls who were preparing to model in a fashion show on the front steps of the Library. T2, 221-23, 232-33. The young girls were visibly upset. T2, 223.

Walker fetched Marc Lankin (“Lankin”), who was the Library Director at the time, to assist her. T2, 223. Lankin came downstairs and escorted Thivierge away from the area. Id. The incident disgusted and sickened Walker. T2, 224.

Michaela Pelletier (“Pelletier”), who has worked at the Library since 1988 and served as Head of Circulation since 1990, observed Thivierge openly leering at female patrons who were bending over to pick up library books. T2, 225. He would approach female teenage patrons and speak to them about their clothing and how attractive they were. T2, 278. The teenagers would appear “extremely uncomfortable” such that Pelletier would feel compelled to intervene, distract Thivierge and draw him away from the teenage girls. T2, 279. Pelletier could recall three or four instances in 2007 alone. T2, 279. Thivierge would also engage

adult female patrons and speak to them in very close proximity, sometimes prompting them to back away. T2, 280. On one occasion, Pelletier felt the need to intervene on behalf of an adult female patron to whom Thivierge was making comments about her attire. T2, 280.

Library staff members also became the target of Thivierge's harassing conduct. Thivierge told Laurie Pierce ("Pierce"), an administrative assistant, that she "certainly filled out her sweater." T2, 281. Pierce was flustered and upset by the comment. Id. She left the area and went into one of the nearby staff offices. Id.

Pelletier was also one of the targets of his inappropriate conduct. T2, 284. He would make comments to her about how attractive she was, or how she looked in a particular dress or sweater. Id. He would stand near her and leer at her. Id. When she attempted to get away from him, she would look back to find him staring pointedly at her backside. Id. His behavior made her uncomfortable and nervous. Id. Over time, if he was in her area of the Library, she would avoid going in the stacks for fear he would follow her. T2, 284-85.

On July 29, 2005, Lankin sent a letter to Thivierge stating that Thivierge had engaged in a manner not acceptable by the standards of the Amesbury Public Library sexual harassment policy. Appendix, Exhibits Volume, p.5 (hereinafter references to the Exhibits Volume will be cited in the following format: "A., 5").

The letter directed Thivierge to stop such behavior. Id. Thivierge received the letter and discussed it with Lankin. T2, 243-46.

In 2006, Thivierge stared pointedly at the backside of Jennifer Hinderer, a former Library staff member, when she bent over to pick something up. T2, 225. He commented loudly: “Nice!” Id. He also told Pelletier she had a nice sweater. Id., 226.

On another occasion, Thivierge called Walker over to look at a photograph of an older gentleman marrying a young woman. T2, 227. He was sitting down and Walker was bent over him. T2, 227-28. He leered up at her, and said, “You know what he’s after. You know what he is going to get.” Id. Walker was sickened. Id. She reported the comment to the Acting Library Director. T2, 228. She never directly confronted Thivierge, because former Library Director Lankin had told the staff not to do so, and instead to report all incidents to him. T2, 236. Thivierge would also place himself uncomfortably close to Walker. T2, 241. When she tried to move away, he would close the distance between them. Id.

Also in early 2006, Sarah Seamans (“Seamans”), a Circulation Assistant since November, 2000, observed Thivierge make a comment about another librarian’s backside as she bent over unloading a delivery of books. T1, 142. He said “Nice,” loudly enough for the librarian to hear and blush in response. Id. Also in 2006, Seamans had an encounter with Thivierge on a day when Seamans

was wearing a skirt that reached her knees. T1, 142-43. She was standing at the Circulation Desk, which was open on one side to the public. Id. As he was leaving the building, Thivierge turned and remarked “wow, Sarah has legs.” T1, 143. The remark made Seamans uncomfortable and she reported it to the Library Director. Id.

In July, 2007, Seamans was putting out periodicals when she notices Thivierge staring at her legs. Id. He asked her if her shoes, Crocs, were as comfortable as “everyone says they are?” Id. The attention to her clothing made her uncomfortable. Id.

In September, 2007, Thivierge approached Seamans as she was unlocking the library door in the morning and complimented her on an outfit she had worn a few days earlier, describing it in such detail that she felt uncomfortable. T1, 144.

In early 2006, Thivierge approached Pierce and commented that Pierce had lost weight in a tone that made her uncomfortable and uneasy. T2, 210-11. In January, 2007, Thivierge approached Pierce and told her “you have a lot of sweaters; you wear a different one everyday. Do you own a sweater factory?” T2, 211. Pierce answered politely that she liked sweaters, and moved away from him. Id. She reported the incidents to the Library Director each occasion. Id. She began to avoid going near Thivierge, which interfered with her ability to perform her job in a timely manner. T2, 213-214. Thivierge would regularly sit at a table right

outside her office door and on the way to the restrooms. T2, 218. She did not object directly to Thivierge when he made those comments because the Library Director had advised her not to get into a direct confrontation with him. T2, 217.

Clare Dombrowski (“Dombrowski”), the Children’s Librarian, met Thivierge when she began working at the library in January, 2007. T2, 248-49. During their first conversation, he commented that she had a nice body. T2, 249. She felt the comment was inappropriate and attempted to end the conversation. Id. A few weeks later, he called her on the telephone while she was at work and asked her out. T2, 250. She declined the invitation. Id. She filed a report with the police department, because she felt his conduct was becoming inappropriate and she wanted a record of the incident. Id. In August, 2007, he spoke to her about Attorney General Martha Coakley, who had just become Attorney General, commenting that Attorney Coakley had a nice behind. T2, 250-51. He told her about the code words he used for women’s behinds and that one woman should be named “Wow” because she had a nice rear end. T2, 251. Dombrowski again filed a report with the Police Department. Id. She also reported the incident, as well as the prior incident, to her supervisor. Id. Thivierge would frequently invade her personal space by leaning over the reference desk to get nearer to her or coming around the side. Id. His behavior bothered Dombrowski to the point where she altered her manner of dress and had heightened awareness of who was around in

the parking lot when she left the library. T2, 252. She found that his attentions interfered with her ability to do her work, and she found herself distracted as she tried to keep track of where he was. Id.

When Patricia DiTullio, the current Library Director, began to work for the Amesbury Public Library in 2007, she received several complaints about Thivierge from staff members, including Laurie Pierce, Margie Walker, Clare Dombrowski, Sarah Seamans and Michaela Pelletier. T2, 260. She is responsible for administering the Library Policy on Patron Behavior. Id. After the incidents began increasing in frequency, DiTullio advised the Mayor of the situation in August, 2007. T2, 265. When the behavior continued and her staff became increasingly concerned, she called the Mayor and told him that she thought they needed to take action. Id. The Mayor referred her to the Police Department and an officer began an investigation into the allegations against Thivierge. T2, 266. The Police Department then issued a No Trespass Order to Thivierge. Id. The library staff was told to contact the police if Thivierge came back to the library. Id.

Thivierge would frequently invade Dombrowski's personal space by leaning over the Reference Desk or standing uncomfortably close. T2, 251. Dombrowski would deliberately move away or try to place an object between her and Thivierge. Id. If she attempted to move away, he would get closer. Id.

On February 28, 2007, after receiving complaints from Library employees, Kendra Amaral, Chief of Staff to Mayor Thatcher Kezer, sent a letter to Thivierge providing a second and final warning that he has been acting in an unacceptable manner towards the female members of the library staff. She informed Thivierge that if he did not cease to act in such a manner, he would be banned from entering the library. A.2. In a letter dated March 21, 2007, Thivierge requested to meet with Library Trustees regarding the allegations against him. T2, 198. Thivierge thereafter met with the Library Trustees. Id.

In the last few years, Library employees have observed Thivierge's behavior to escalate from inappropriate to hostile and threatening. T2, 285. Thivierge would demand help from the reference librarians finding public documents in the Library. T2, 228, 285-86. If Walker could not produce immediately produce copies of the documents he requested, he would get upset and angry, yelling and cursing and shaking his fist in her face as he complained that they should have the documents. T2, 228-29, 285-86. Walker would feel scared. T2, 230. Other patrons would stare. T3, 122. If Pelletier witnessed the incidents, she would report them to whoever the Director of Acting Director was at the time. T2, 285. This behavior left her frightened and concerned for her physical welfare. T2, 287.

Ultimately, an investigating officer from the Police Department determined that a No Trespass Notice should be issued. On September 14, 2007, Thivierge

was served with a “No Trespass” notice prohibiting him from returning to the Amesbury Public Library. A.3.

#### **B. Town Hall**

Mr. Thivierge’s attentions to female Town employees were not confined to the library. Elizabeth Nikas is the Assistant Town Accountant for the Town of Amesbury. T3, 388. From 2004-2009, Nikas worked as the Senior Bookkeeper in the Accounting Office at Town Hall. Id. Her job did not require her to interact with the public, but she would occasionally encounter members of the public passing through her office to go to the Water Billing Office in the same room. Id.

Prior to December 19, 2007, Nikas would sometimes encounter Thivierge in passing in the hallway. T3, 390. On one occasion when Nikas ran into him, Thivierge asked her if she was eating. Id. Nikas replied that she was and weighed the same that she always had. Id. Thivierge advised her that she looked very frail and that she should eat more. Id. The next time Nikas bumped into him, he asked her if she had gained weight. Id. As he asked, he was looking up and down her body in a leering manner. Id. “He commented that she was looking more substantial.” Id. His tone of voice was “creepy” and made her uncomfortable and she felt awkward. T3, 392.

On another occasion, Nikas was stopped by Thivierge, who advised her that he felt compelled to write her a poem in French. Id. He proceeded to recite the poem in French. Id. The poem was in French and after he completed reciting it, he told her that it meant that her eyes were blue, her hair was blonde and she had small stature. Id. Nikas felt very uncomfortable and excused herself as soon as possible. Id. at 393. Nikas reported what had happened to her supervisor and thereafter actively avoided being near him. On another occasion Thivierge then approached Nikas' mother and recited to her the poem he had written for her daughter. T3, 393.

Thivierge has a long history of coming to the Town Clerk's office and berating the Town Clerk, Bonnijo Kitchin and her predecessor, loudly for what he feels are her shortcomings in the performance of their job. T1, 109-111. In September 2001, for example, on the day of an election, Thivierge began screaming at Kitchin's predecessor, asking her for public records. Id. She told him she needed to open the polls, but she would assist him after that. T1, 110. He waived a newspaper and screamed that he wanted her to handle his request "right now." Id. He was three to four inches away from the woman. Id. She was in tears and visibly upset. Id. In watching the incident unfold, Kitchin also became upset and nervous for the then-Town Clerk. Id. He filed public records requests and then would look at the response compiled for him and fling it at the Town Clerk

staff. T1, 124. He would then turn around, walk out and say "I don't need that."

Id.

Thivierge would also visit the Assessor's office on a regular basis, requesting copies of the same document over and over. T1, 127-128. He would become agitated, yelling and pounding on public counter if the Assessor could not give him the answer he wanted. Id.

On December 18, 2007, Thivierge came into the Assessor's office. T1, 129. He requested a copy of FY2008 Recap Sheet and asked to speak to her about it. Id. Thivierge wanted the Assessor to tell him what would happen in the following year's budget regarding new growth, which, as that point, she was unable to answer. Id.

Thivierge seemed agitated and began to scream at her. T1, 129. He demanded to know what the Mayor was going to do about it. Id. She responded that she didn't know and suggested that he ask the Mayor. Id. She told her secretary to warn the Mayor's office that Thivierge was on his way. Id. She had never done that before, either with regard to Thivierge or anyone else. Id. at 130.

Thivierge left the Assessor's office and a moment later, Marino stepped out of her office and heard screaming. T1, 130. She told her assistant to call 911. T1, 131. She headed to the Town Clerk's Office to see if the Town Clerk was alright, but Thivierge emerged from the Town Clerk's Office as she approached and

“flew” out of the Town Hall doors. Id. Marino observed Kitchin to look “very upset” and she herself was “very frightened.” T1, 131. Marino is afraid to be alone with Thivierge. T1, 132. As a seasoned Assessor, she has seen citizens become upset in her office before, but she has never before been afraid for her safety. T1, 132.

Thivierge had gone into the Town Clerk’s office and asked for Kitchin. T1, 112. She approached the public counter and asked him what she could do for him. Id. He asked her to look at a document and tell him if it was a public record or not. Id. He showed her the document, which appeared to be an email from City Councilor to Thivierge. Id. Thivierge demanded that Kitchin remove her name from the email, but Kitchin explained that she could not because the City had an ordinance requiring that Councilor’s emails be sent to her. T1, 112-13. Thivierge became angry and “hollered” at Kitchin that she was the Town Clerk and she could take her name off. T1, 113. Kitchin advised him to discuss it with the City Councilor because she could not go into someone else’s email and remove herself. Id. Thivierge continued to yell at her. T1, 113-14.

At that point, Thivierge came around the public counter and advanced upon Kitchin, continuing even when she backed away from him. Id. He came towards her pointing and yelling that she could do it. T1, 114.

Kitchin turned to a member of her staff and asked that she call the police. Id. She was nervous and afraid for her safety. At the same time, Marino went back into her office, still unsure where the screaming was coming from, and asked her clerk to call “911.” T1, 131.

Thivierge picked up his bag off the floor, shoved his papers into his bag and yelled “FUCK YOU!” T1, 115. He walked out of the Town Clerk’s office. Id.

The incident in the Town Clerk’s office was so loud, the Town Assessor could hear through her closed door down the hall and came to ask Kitchin if she was okay. Id. Both Marino and Kitchin filed a police report regarding the incident. Id. Kitchin remains afraid of Thivierge. T1, 117. Marino is also concerned that Thivierge’s behavior will escalate to more aggressive behavior, even violence, and is uncomfortable at the thought of being alone with him. T1, 132.

On December 19, 2007, Thivierge was served with a “No Trespass” Notice which limits Thivierge from entering any town facility during the regular business day by requiring him to submit written notice and get approval to enter a town facility before he does so, and places no restriction on Thivierge’s access to public meetings at night, so long as he does not approach or harass Town employees.

A.4.

No Boards or Commissions have regular meetings in Town Hall during the weekday. T3, 16. No Boards or Commissions have regular meetings in the Library. Id. No boards have meetings in any other town facility during the weekday. Id. Amesbury boards and commissions typically meet after business hours, starting between 6:00 p.m. and 7:00 p.m., some as late as 7:30 p.m. T3, 17.

Thivierge is able to access public record requests by mail, e-mail, or phone call. T3, 27. Meetings are posted not only in the Town Clerk's Office, but online and often in the newspaper. T3, 27. Public records are also available on the Town website, including the current annual report, budget, capital improvement, as well as reports from prior years, union contracts and other general documents. T3, 32.

On December 26, 2007, Thivierge filed a complaint in Essex Superior Court. On January 25, 2008, the defendants removed the complaint to the U.S. District Court for the District of Massachusetts. The Plaintiff filed a Motion for Preliminary Injunction on March 21, 2008, which he amended on March 24, 2008. The Court denied the motion on April 3, 2008. Thivierge filed a Motion to Amend the Complaint on April 11, 2008 and another motion for Preliminary Injunction on April 15, 2008, both of which the defendants opposed. The Court denied the Motion to Amend on April 29, 2008 and referred the Motion for Preliminary Injunction to Magistrate Judge Dein. By agreement of the parties at the July 3, 2008 hearing, Thivierge was allowed to visit Town Hall from 11:00 a.m. to 1:00

p.m. while the litigation was pending. Magistrate Judge Dein recorded the agreement within her Report and Recommendation, otherwise denying the Motion for Preliminary Injunction and Motions for Clarification filed by Thivierge. The Recommendation was adopted by the U.S. District Court on July 22, 2008. All parties filed motions for summary judgment on November 21, 2008 and oppositions thereto on December 8 and 10, 2008 respectively, and a reply by the defendants to Thivierge's opposition to their motion for summary judgment on December 18, 2008. A hearing was held on the motions on December 18, 2008. The Court denied Thivierge's Motion for Summary Judgment on that day. The Court denied the defendants' Motion for Summary Judgment on September 25, 2009. A jury trial was held on February 1-4, 2010. A defense verdict was returned on February 4, 2010. Judgment entered on February 8, 2010. Thivierge filed a Notice of Appeal on March 10, 2010.

#### SUMMARY OF THE ARGUMENT

Thivierge filed his Notice of Appeal two days after the deadline to file a Notice of Appeal had expired in this matter and further failed to file any timely motions to justify his late filing. The appeal should therefore be dismissed.

Thivierge argues that his due process rights were violated when this action was removed from Massachusetts Superior Court to the United States District Court for the District of Massachusetts without providing him notice of a hearing

before doing so. The procedure for removal is clearly detailed in 28 U.S.C. §§1441(c) and 1446 and no hearing is called for in the civil context. Furthermore, Thivierge had the opportunity to argue for remand to state court and failed to exercise it. His belated complaints are untimely at the appellate level.

The majority of the substance of the appeal is an extended argument that the jury verdict was against the weight of the evidence. Thivierge failed, however, to file a motion for judgment notwithstanding the verdict or a motion for a new trial and has therefore waived any such argument. His pro se status does not serve as license to ignore such procedural requirements.

Thivierge further argues that the District Court erred by excluding annual reports from the evidence presented to the jury. A review of the transcript reveals, however, that it is Thivierge who excluded the reports from the evidence by simply forgetting to have them admitted. The only time the issue of the reports is even discussed was not as to the admission of the reports themselves, but instead regarding questions Thivierge sought to pose to the Mayor on cross-examination, which the Court ruled irrelevant.

Thivierge contends that the jury instructions and special verdict form were erroneous, as evidenced by the return of an “inconsistent verdict.” In fact, the jury returned the special verdict form filled out consistently in favor of the Town, but answered a question in favor of the Town that it need not have answered. For the

sake of clarity, the Court directed the jury to re-deliberate and fill out the form as originally directed. The jury did so. Thivierge also complains that he simply did not have enough time to review and understand the jury instructions. The Court was extraordinarily generous and lenient with Thivierge throughout the trial. His inability to understand the jury instructions may lie with his pro se status, but his decision to proceed pro se may be not used as an excuse to undermine a jury verdict.

## ARGUMENT

### I. Thivierge's Appeal is Untimely

Judgment in this matter entered on February 8, 2010. Pursuant to Fed.R.App.P. 4(a)(1)(A), the "notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Thivierge failed to file his Notice of Appeal until March 10, 2010, two days after the deadline to file a timely appeal had expired. While the time to file the Notice of Appeal may be enlarged under certain circumstances under Fed.R.App.P.4(a)(4)-(6), no such circumstances are applicable here. Thivierge's pro se status does not excuse his failure to file a timely appeal.

Pro se litigants are bound by the same rules as litigants represented by counsel. See Eagle Eye Fishing Corp. v. United States Dep't of Commerce, 20 F.3d 503, 506 (1st Cir.1994) (explaining that "the right of self-representation is not a

license not to comply with relevant rules" (citation and internal quotation marks omitted)); FDIC v. Anchor Props., 13 F.3d 27, 31 (1st Cir.1994) ("We have consistently held that a litigant's pro se status [does not] absolve him from compliance with [either] the Federal Rules of Civil Procedure [or] a district court's procedural rules." (citation and internal quotation marks omitted)). While courts tend to be lenient with pro se plaintiffs, it is well established that pro se litigants are bound by the same rules as litigants represented by counsel. Feinstein v. Moses, 951 F.2d 16, 21 (1st Cir. 1991).

The appeal should therefore be dismissed on the basis that it was not timely filed.

## II. Thivierge's Allegations of Violations of Due Process During the Removal Process Are Misplaced

Thivierge belatedly complains that his due process rights were violated when the case was removed to the U.S. District Court from Essex Superior Court. As grounds for his argument, he asserts that he was not sent any notice of a removal hearing. The procedure for removal of a state court complaint including federal claims to a federal court is well-established. 28 U.S.C. §§1441(c), 1446. A hearing occurs if there is not summary remand in criminal prosecution pursuant to 28 U.S.C. 1446(5), but there is no similar requirement in civil cases. Furthermore, a plaintiff displeased by removal may bring an action to remand the matter to state court within 30 days of removal pursuant to 28 U.S.C. §1447(c). Thivierge did not

choose to do so. To the extent he relies on his pro se status as an excuse for the reason he did not, pro se status does not serve as a license to disregard the law. Feinstein, 951 F.2d at 21.

**III. Thivierge Waived His Argument That The Jury Verdict Went Against The Weight Of The Evidence By Failing To File the Appropriate Motions**

The majority of the arguments raised in the brief filed by Thivierge essentially challenge the ultimate conclusion reached by the jury, rather than cite to any specific legal error allegedly made by the Court. He contends that the following issues were not properly considered: (1) the evidence he submitted with regard to his allegation that his right to vote was infringed by the December, 2007 No Trespass Order (Thivierge Brief, p.16); (2) that full access to all municipal buildings should have been restored to him (Thivierge Brief, p.20); (3) the No Trespass Orders contained defamatory statements against him (Thivierge Brief, p.21-23); (4) that multiple Town officials engaged in a conspiracy against him over the course of three mayoral administrations (Thivierge Brief, p.23-24); (5) that liability should be imposed by the Town for negligent training (Thivierge Brief, p.25-28).

To the extent Thivierge is arguing that the jury verdict was not supported by the weight of the evidence, such argument may not be raised on appeal, as he did not raise it in a motion for judgment notwithstanding the verdict or in a motion for new

trial pursuant to Fed.R.Civ.P. 59(a). Puerto Rico Aqueduct & Sewer Auth. v. Constructora Lluch, Inc., 169 F.3d 68, 82 (1st Cir.1999) (“A motion for a new trial must be made in the first instance before the trial court, particularly where the weight of the evidence is at issue.... The failure to move for a new trial waives the issue on appeal.”) (citations omitted); Velazquez v. Figueroa-Gomez, 996 F.2d 425, 426-27 (1st Cir.1993) (failure to move for judgment notwithstanding the verdict and for a new trial pursuant to Rule 59(a) results in waiver of challenge to sufficiency or weight of evidence).

As Thivierge failed to take the appropriate procedural steps to preserve such issues on appeal, he has waived them and may not raise them now for the first time.

#### IV. Thivierge Failed to Introduce Evidence and Cannot Now Argue that the Error Lies with the Court

Thivierge contends that the Court erred in refusing to admit annual reports for the Town of Amesbury. In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings. As it “is a quintessential judgment call” the Court of Appeals gives trial judges “considerable leeway in deciding whether the contested evidence” is relevant, “reversing only on a showing of abuse of discretion.” Bielunas v. F/V Misty Dawn, Inc., 621 F.3d 72,

76 (1st Cir. 2010) (internal citations omitted); see Morales Feliciano v. Rullán, 378 F.3d 42, 57 (1st Cir.2004).

In the instant case, a review of the transcript reveals that Thivierge did not attempt to introduce the annual reports. Although he attempted to interrogate the Mayor regarding issues related to the annual reports, the Court sustained counsel's objection to the information as irrelevant. T1, 98-103. Even Thivierge admits that her ruling may not have been an "abuse of discretion" (Thivierge Brief, p.19). The Court provided Thivierge with the opportunity to articulate why even his questioning of Mayor Kezer regarding the annual reports was relevant, but his explanation was difficult, to say the least, to comprehend. T1, 98-103. The Court was well within its discretion to rule that the line of questioning was irrelevant, and had the question arisen, the introduction of the annual reports themselves. Although Thivierge may have become lost in the fog of trial, he has lost the opportunity to present the evidence that he now contends was crucial to his case and cannot unfairly blame the Court for his own error.

**V. Thivierge Waived Any Objections to the Jury Instructions and Special Verdict Form**

Thiverige contends that the jury instructions were flawed, because the jury returned a verdict that the Court initially referred to as "inconsistent." T3, 498. The first two questions on the verdict slip required the jury to determine whether the Town had violated Thivierge's First Amendment rights when it restricted him

in his access to municipal facilities. Addendum, p.1-2. The jury answered these two questions “No.” Addendum, p.1. The third question asked if the jury found that violating Thivierge’s First Amendment right was a substantial motivating factor for restricting his access to town facilities, would the Town had issued the order regardless due to the misconduct by Thivierge. Id. The jury answered this question “Yes” despite the fact that they had answered the previous two questions in the negative. Id. The Court diligently questioned the jury regarding the verdict to ensure that the jury had not been confused. T3, 498-503. To satisfy the Court’s concerns, the jury submitted a revised jury slip in which Question 3 was left unanswered. Addendum, p.3-4.

Nevertheless, Thivierge protests that the jury instructions and verdict form were confusing and that he did not have enough time to review and understand them. It is settled law that a party who fails to lodge a proper objection to an omitted jury instruction waives the issue on appeal. Fed.R.Civ.P. 51 (“No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict”); Poulin v. Greer, 18 F.3d 979, 982 (1st Cir.1994) (counsel’s failure to object to the omission of a requested jury instruction waived the issue on appeal).

Furthermore, where a special verdict form is used pursuant to Fed.R.Civ.P. 49(a), a failure to object to omissions in interrogatories constitutes a waiver of jury

trial on those issues. Fed.R.Civ.P.49(a)(3); see also Pielet v. Pielet, 686 F.2d 1210, 1218 (7th Cir.1982) (“[I]f the trial court ‘omits any issue of fact raised by the pleadings or by the evidence’ ... each party waives the right to a jury trial of the omitted issue unless he demands its submission before the jury retires.”) (quoting Rule 49(a)), cert. denied, 459 U.S. 1107 (1983); Cote v. Estate of Butler, 518 F.2d 157, 160 (2d Cir.1975) (same). An adversely affected party, having failed to take prompt corrective action, must forever remain silent. United States v. DiPietro, 936 F.2d 6, 11-12 (1st Cir.1991); Reilly v. United States, 863 F.2d 149, 160-61 (1st Cir.1988).

Thivierge further contends that he was unable to review and understand the jury instructions in the time he was provided. Proceeding pro se was a decision made by the plaintiff and having a difficult time comprehending the instructions is an obvious risk of such a decision. In the instant case, the District Court was very generous in providing accommodations to Thivierge under its discretion to provide leniency to a pro se party. Hughes v. Rowe, 449 U.S. 5, 9 (1980). Nevertheless, the business of justice must be pursued efficiently and the Court could not provide him with yet further time to review jury instructions beyond that already provided to the parties without holding the jury for an additional day, possibly days. The decision to proceed was well within the discretion of the Court.

## CONCLUSION

For the foregoing reasons, the Defendant-Appellee, Town of Amesbury requests that this Court dismiss the appeal for want of appellate jurisdiction or affirm the verdict entered in the District Court and enter judgment in favor of the Defendant-Appellee.

## DEFENDANTS-APPELLANTS

By their attorneys,

/s/ Katharine I. Doyle

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7) (B) because this brief contains 6,076 words, excluding the parts of the brief exempted by Fed.R.App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared with a proportionally spaced typeface of 14 points.

**CERTIFICATE OF SERVICE**

I hereby certify that on January 18, 2011, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I further certify that on January 18, 2011, I served a copy of the foregoing document on the following party by U.S. Mail:

Mr. James Thivierge  
106 Friend Street  
Apt. 12  
Amesbury, MA 01913

/s/Katharine I. Doyle

413359/AMES/0013

## **ADDENDUM**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JAMES THIVIERGE, )  
Plaintiff, )  
v. ) CIVIL ACTION NO. 08-10123-PBS  
TOWN OF AMESBURY, )  
Defendant. )

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VERDICT FORM

[Answer Q.1 - Q.2]

The Town

Q.1. Did plaintiff prove that the Town violated his First Amendment rights when it issued the no trespass order barring him from the library?

Yes  No

Q.2. Did the plaintiff prove that the Town violated his First Amendment rights when it restricted his right to enter Town Hall and other Town facilities?

Yes  No

Q.3. If you find that plaintiff's First Amendment rights were a substantial motivating factor in causing the "No Trespass" order restricting plaintiff's access to town facilities in Q.2, did the Town prove that it would have issued the order regardless due to misconduct on plaintiff's part?

Yes  No

Q.4. If you answered "yes" to Q.1 or Q.2, and "no" to Q.3 (if applicable), did any such violation of First Amendment rights proximately cause plaintiff any damages?

\_\_\_\_\_ Yes \_\_\_\_\_ No

Q.5. If you answered Q.4 yes, what amount of compensatory damages (including nominal damages) do you award to plaintiff for any past constitutional violation?

\_\_\_\_\_ (Dollars)

\_\_\_\_\_ (Words)

(Only award damages for the period of time, if any, you find the restrictions were unreasonable.)

Q.6. If you found the past restrictions were reasonable, do you find that the future restriction as to the Town Facilities is reasonable?

Yes \_\_\_\_\_ No

I certify that the answers to the above questions are unanimous.

  
\_\_\_\_\_  
Foreperson

Date:

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

\_\_\_\_\_  
JAMES THIVIERGE, )  
Plaintiff, )  
 )  
v. ) CIVIL ACTION NO. 08-10123-PBS  
 )  
TOWN OF AMESBURY, )  
Defendant. )  
\_\_\_\_\_

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VERDICT FORM

[Answer Q.1 - Q.2]

The Town

Q.1. Did plaintiff prove that the Town violated his First Amendment rights when it issued the no trespass order barring him from the library?

\_\_\_\_\_ Yes  No

Q.2. Did the plaintiff prove that the Town violated his First Amendment rights when it restricted his right to enter Town Hall and other Town facilities?

\_\_\_\_\_ Yes  No

Q.3. If you find that plaintiff's First Amendment rights were a substantial motivating factor in causing the "No Trespass" order restricting plaintiff's access to town facilities in Q.2, did the Town prove that it would have issued the order regardless due to misconduct on plaintiff's part?

\_\_\_\_\_ Yes \_\_\_\_\_ No

Q.4. If you answered "yes" to Q.1 or Q.2, and "no" to Q.3 (if applicable), did any such violation of First Amendment rights proximately cause plaintiff any damages?

\_\_\_\_\_ Yes \_\_\_\_\_ No

Q.5. If you answered Q.4 yes, what amount of compensatory damages (including nominal damages) do you award to plaintiff for any past constitutional violation?

\_\_\_\_\_ (Dollars)

\_\_\_\_\_ (Words)

(Only award damages for the period of time, if any, you find the restrictions were unreasonable.)

Q.6. If you found the past restrictions were reasonable, do you find that the future restriction as to the Town Facilities is reasonable?

Yes \_\_\_\_\_ No

I certify that the answers to the above questions are unanimous.

Robert F. Walker  
Foreperson

Date: 2/4/10