

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MASSACHUSETTS

CIVIL ACTION: 03-CV-11895-MLW

**François Gouin, Jr.**

Plaintiff

v.

**Dori C. Gouin, Esq., a/k/a Dori Faith Chadbourne, in her professional and individual capacities,  
John G. DiPiano, Esq., in his partnership, professional, and individual capacities,  
Mauser & Mauser,**

**Timothy M. Mauser, Esq., in his partnership, professional, and individual capacities  
Martha D. Mauser, Esq., in her partnership, professional, and individual capacities  
Susan James, in her official and individual capacities,  
City of Boston  
Defendants**

---

**PLAINTIFF'S OPPOSITION TO SUZANNE [A/K/A SUSAN] JAMES'**  
**MOTION FOR RECONSIDERATION (#78) OF MEMORANDUM AND ORDER OF**  
**SEPTEMBER 2004 DENYING JAMES' MOTION TO DISMISS (#21)**

Now comes Plaintiff François Gouin, Jr. ["Gouin"], of Massachusetts and opposes Suzanne [a/k/a Susan] James' Motion for Reconsideration of Memorandum and Order of September 2004 denying James' Motion to Dismiss (Paper #21). A supporting affidavit accompanies this pleading, above the certification of service at the bottom of this document.

As grounds for opposing James' Motion for Reconsideration, Gouin states that:

- (1) James' recitation of the facts of the complained-of event is inaccurate,
- (2) James is not entitled to qualified immunity,
- (3) on the facts alleged by the plaintiff, Defendant Detective James can be liable for malicious prosecution,
  - a. James states that "actual malice" is the fourth element for a common-law malicious prosecution claim and provides four citations to support that representation. The citations do not, however, support James' proposition. It is well-settled in Massachusetts that there is a difference between "malice" and "actual malice."
  - b. James wrongly asserts that Plaintiff did not aver "one fact . . . that supports [his] allegations that James knew of any improper motive by Chadbourne and/or DiPiano, or that James acted with actual malice when she filed the application for criminal complaint."

- (4) there is evidence that James used legal process to accomplish some ulterior purpose, and in so doing, can be liable for abuse of process,
- (5) Gouin stated sufficient facts to demonstrate the existence and scope of a conspiracy,
  - a. Invidious discriminatory animus is not an element of §1985(a). It was a judge-created element in Griffin v. Breckenridge, 403 U.S. 88, 102 (1971),
- (6) James can be liable for intentional infliction of emotional distress,
- (7) The doctrine of *respondeat superior* applies to Gouin's §1983 claims where the supervisors' conduct or inaction amounted to a reckless or callous indifference to Gouin's constitutional rights. It also applies to Gouin's common-law or pendent claims, thereby making dismissal of his claims against Susan/Suzanne James in her official capacity inappropriate. In Count 3, the City is sued for its own actions.

In support of his opposition, Gouin argues the facts and the law and its application below.

**NOTE**

Gouin incorporates herein by reference his objections to the Reports and Recommendations made by this court regarding the defendants and his six memoranda in opposition to the six motions to dismiss.

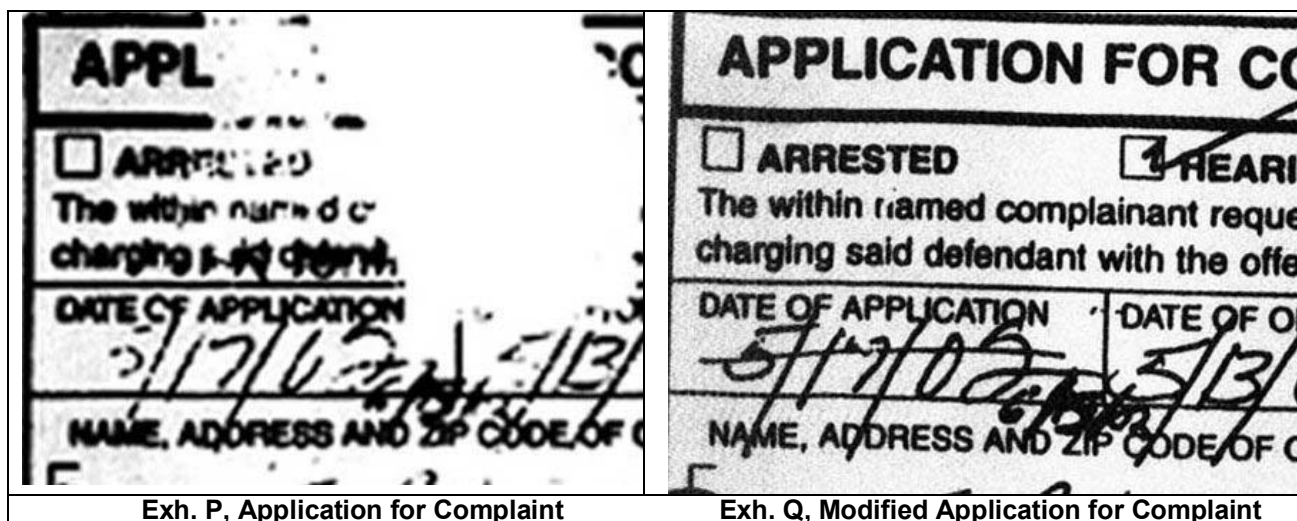
**1. James' recitation of the facts of the complained-of event is inaccurate.**

In ¶135 of Gouin's Complaint, his counsel wrote:

On 17 May 2002, Detective James filed an Application for Complaint, identifying Dori as the Co-Complainant [**Exhibit P, Application for Complaint and Exhibit Q, modified application**].

While counsel might have written "that the date of her Application for Complaint was 17 May 2002,"

Complaint Exhibits P and Q are the best evidence there is of where the truth lies.



Upon closer inspection, Gouin contends that we cannot tell when the date "5/17/02" was written. We also cannot tell when "6/15/02" was written. Tht date ***might*** also be 6/10/02." Gouin does know that he visited James at the Area A-1 police station within a week or so after the event on 5/13/02 and that no application for a criminal complaint had yet been filed.

Complaint Exhibit P(1 of 3) shows **(a)** that a "Sgt. H.D." allegedly signed page 1 of the three-page Compl.Exh. P on 6/10/02; if 6/10/02 is accurate, then the inserted date "6/15/02" in the field "Date of Application" is INaccurate, regardless of whether written by accident or intention, **(b)** that the court received the application on "2002 Jun 14," **(c)** that the very fuzzy numeral "5" which appears to be correcting the "Date of Application" on page 2 of Complaint Exhibit P might be "0," making the revised Date of Application "6/10/02," and **(d)** that the court hearing was scheduled for "7/15/02."

Complaint Exhibit Q(1 of 3) shows **(a)** that a "Sgt. H.D." allegedly signed page 1 of the three-page Compl.Exh.Q on 7/12/02, **(b)** that the court received the application on "2002 Jul 16," and **(c)** that the court hearing was scheduled for "7/22/02."

It is therefore reasonable to conclude that the Application for Criminal Complaint had ***not*** been filed either on 17 May 2002 or by the time Gouin and his counsel visited James at the Area A-1 police station and told her the details described in Compl. at ¶41:

Gouin told Detective James **(a)** that a judge in the Suffolk Division of the Probate & Family Court ordered Gouin to make available the condominium for inspection by a real estate appraiser on 13 May 2002. **(b)** that the Massachusetts court gave Dori a choice to attend the appraisal if she so chose, **(c)**.that Dori gave him no notice that she would attend, **(d)** that Dori's purpose was to try to entrap Gouin into having contact with her outside of the court, **(e)** that Dori had levied false charges against him on 5 January 2001, and **(f)** that he brought suit in federal court against the BPD officers as well as Dori and the other defendants.

Therefore James had "full knowledge and documentary and statutory evidence of the truth of Gouin's defenses ***before*** James filed the Application for Criminal Complaint in court.

## **2. James is not entitled to qualified immunity.**

"[G]overnment officials performing discretionary functions are shielded from liability for

civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known” [Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)]<sup>1/</sup>, <sup>2/</sup> and a plaintiff’s allegation of a violation of clearly established law precludes dismissal before the commencement of discovery. Anderson v. Creighton, 483 U.S. 635, 640 (1986).

[Because the] resolution of the issues of whether probable cause existed for the [officers] to arrest Gouin . . . and whether [they] acted in an objectively reasonable manner [had to] await the development of the facts of [that] case through discovery, . . . [d]ismissal of the plaintiff’s civil rights claims on the grounds of the defendant officers’ asserted qualified immunity was not warranted at [that] stage of the proceedings.

Gouin v. Gouin, et al, No. 2001-10890, Memorandum and Order on Four Motions, Paper #46, slip op. at 28 (Dist.Ct., Boston, March 21, 2002) (Collings, U.S.M.J.) [“Gouin #1”].

Moreover, “[w]hile courts normally determine whether qualified immunity is available prior to trial, there are cases where a jury needs to resolve crucial factual questions before a court can resolve the qualified immunity question.” Jarrett v. Town of Yarmouth, 309 F.3d 54, 2002.C01.0000378 at ¶44 <<http://www.versuslaw.com>> (1st Cir. 2002), a case cited by the defendants in the case at Bar and citing Kelley v. LaForce, 288 F.3d 1, 7 (1st Cir. 2002). Kelley also held, at page 7:

...“Although [w]e recognize that the immunity question should be resolved, where possi-

---

<sup>1</sup> “[T]he district court identified a two-part test for determining whether an official is entitled to qualified immunity: (1) whether the law was clearly established at the time the action was taken; and (2) if so, whether the official knew or reasonably should have known that the action or inaction would violate petitioner’s constitutional rights.” Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 2001.C01.0000225 at ¶19 <<http://www.versuslaw.com>> (1st Cir. 2001), citing Harlow, 457 U.S. 800, 818 (1981). In Starlight, the applicability of the dormant Commerce Clause to Puerto Rico was determined not to have been clearly established at the time of Soto’s enforcement.

<sup>2</sup> Suboh v. District Attorney’s Office of the Suffolk Dist., 298 F.3d 81, 2002.C01.0000275 at ¶42 <<http://www.versuslaw.com>> (1st Cir. 2002) (internal citations omitted) wrote “We use a three-part test to determine whether an official is entitled to qualified immunity”: **(1)** “whether the plaintiff’s allegations, if true, establish a constitutional violation,” **(2)** “whether the right was clearly established at the time of the alleged violation,” **(3)** “whether a reasonable officer, similarly situated, would understand that the challenged conduct violated that established right.” “[W]hether a right is clearly established is an issue of law for the court to decide [*id.*, citing Elder v. Holloway, 510 U.S. 510, 516 (1994)], but “[t]he reasonableness inquiry is also a legal determination, although it may entail preliminary factual determinations if there are disputed material facts (which should be left for a jury). Suboh, citing Swain v. Spinney, 117 F.3d 1, 10 (1st Cir. 1997).

The same three-part test is in Hudson v. Maloney, 326 F.Supp.2d 206, 209 (D.Mass. 2004), a case cited by the defendants, but for a different proposition.

ble, in advance of trial, pre-trial resolution sometimes will be impossible because of a dispute as to material facts. In such a case, the factual issues must be decided by the trier of fact, thereby precluding summary judgment. **Only after the facts have been settled can the court determine whether the actions were objectively reasonable so as to fall under the qualified immunity umbrella.**" (alteration in original) (footnote and citations omitted) (quoting Swain v. Spinney, 117 F.3d 1, 9-10 (1st Cir. 1997)) (internal quotation marks omitted); St. Hilaire v. City of Laconia, 71 F.3d 20, 24 n. 1 (1st Cir. 1995) ("The ultimate question of whether a reasonable police officer, on the basis of information known to him, could have believed his actions were in accord with constitutional rights is a question of law, subject to resolution **by the judge not the jury. But if there is a factual dispute, that factual dispute must be resolved by a fact finder.**" (quoting Prokey v. Watkins, 942 F.2d 67, 82 (1st Cir. 1991)) (internal quotation marks omitted)).

Suboh v. Borgioli, 298 F.Supp.2d 192, 2004.DMA.0000004 at ¶35 <<http://www.versuslaw.com>> , slip op. at 13-14 (D.Mass. 2004) (emphasis supplied), another case cited in the instant action by the defendants at page 7 of their memorandum for a proposition **contrary** to the law of the case.

Clearly where there is a factual dispute, the issue of whether Susan or Suzanne James is entitled to qualified immunity must go a jury. For instance, to Gouin, it is clear that James' act was not discretionary. It was mandatory. And Defendant Detective James both clearly ignored the nondiscretionary procedural safeguards set out explicitly in the guidelines relied upon and followed by the Boston Police Rules.<sup>3/</sup>

In sum, the so-called discretionary function exception . . . does not protect all governmental activities involving an element of choice. United.States v. Gaubert, 499 U.S. 315, 335 (1991) (Scalia, J., concurring), citing Berkovitz, 486 U.S. at 536-37. According to the police arrest guide-

3

**3.3 ARREST GUIDELINES**

**A. The decision to arrest**

...

3. The decision to arrest must be based on whether probable cause exists that the crime occurred, **not** on whether the victim wishes to seek complaints or wishes to testify at a future date.

**Figure 2. Domestic Violence Guidelines, §3.3(A)(3) (emphasis in original) [Exh. C] and also in the Massachusetts Domestic Violence Handbook at page 138 [Exh. D-4] (Mass. Executive Office of Public Safety, Boston, 2002),**

So, clearly, if an arresting officer must not arrest on the basis that "the victim wishes to seek complaints," then James, who was **not** an arresting officer, but a detective, to base her decision to file an application for a criminal complaint against Gouin on Dori's wish to seek a complaint was absolutely contrary to Massachusetts public policy and specifically to the Domestic Violence Guidelines, vigorously adhered to statewide since promulgated in 1991.

lines, James had no choice and the discretionary function exception is, therefore, unavailable to protect Susan James. “And any discretion [James] might have enjoyed to negligently carry out a commanded [investigation] ‘can hardly be said to be grounded in regulatory policy.’” Irving v. United States, 162 F.3d 154, 180 (1st Cir. 1998), quoting Gaubert, at 323.

James is therefore neither entitled to qualified immunity, for she knowingly violated Gouin’s clearly established rights, nor to the shield afforded by the discretionary function exception, given that any discretion James might have had was so-called professional, nongovernmental discretion which falls outside the protection of the discretionary function exception. See Collazo v. United States, 850 F.2d 1, 3 (1st Cir. 1988).

In fact, James’ Motion to Dismiss does not meet the standards for such a motion, given that it does not describe the functions or conduct of her job, does not identify the act that James baldly asserts was “reasonable” or “mistaken,” does not identify any guidelines or standards by which she was to perform the alleged investigation which she claimed she performed.

The act James does identify as being “objectively reasonable” is the act that is 180 degrees opposite the Rule 3.3. ARREST GUIDELINE. See note 4, *supra*, in the margin. If arresting officers were not to base probable cause that a crime occurred on whether the alleged victim (here, Dori) wishes to seek complaints or wishes to testify at a future date, certainly Detective James should not have filed on behalf of Dori an Application for Criminal Complaint solely because Dori wished it . . . and this James admitted repeatedly in her Motion to Dismiss [Paper #21] (*passim*) and in her Motion for Reconsider [Paper #78], at 9. See Table 1, on pages 7-8, in Gouin’s Opposition to Paper #77, the City of Boston’s Motion for Reconsideration.

The issuance of the application for a criminal complaint against Gouin was contrary to Massachusetts public policy and specifically to the *Domestic Violence Guidelines*, promulgated in 1991. See in Figure 2, *supra*, the warning not to base probable cause on a wish by the alleged vic-

tim for a complaint to issue. *DV Guidelines*, §3.3(A)(3). James ignored the guideline.

James relies upon a unique interpretation of M.G.L. c. 209A §5A,<sup>4/</sup> which has not yet been interpreted by the Massachusetts Court, making this a case of first impression.<sup>5/</sup> To reach her interpretation, she threw out one-third of the statute; that is, of the three paragraphs composing the statute, James threw out the second and then charged Gouin with violating here in Massachusetts a restraining order issued in Maine.

Gouin contends that the Commonwealth may not give, in accordance with ¶1 of G.L. c. 209A, §5A, full faith and credit to the Maine order because that order was never filed in any court in Massachusetts with or without the affidavit required of Dori by the ¶2 of G.L. c. 209A, §5A. Further, ¶1 is clearly to be used by arresting officers in usually exigent circumstances. Those exigent circumstances do not exist for the detective, who did not come into the case until after the “reported event” had concluded. Clearly, again, where there are no exigent circumstances, ¶1 is not mutually exclusive of ¶2. There would be no purpose of including ¶2, if ¶1 were not dependent upon it. Thus, ¶1 is triggered only if the procedure in ¶2 has been followed. Here, where ¶2 was not followed, ¶1 may not and cannot apply.

---

<sup>4</sup> Massachusetts G.L. c. 209A reads:

Any protection order issued by another jurisdiction, as defined in section one, shall be given full faith and credit throughout the commonwealth and enforced as if it were issued in the commonwealth for as long as the order is in effect in the issuing jurisdiction.

A person entitled to protection under a protection order issued by another jurisdiction may file such order in the superior court department or the Boston municipal court department or any division of the probate and family or district court departments by filing with the court a certified copy of such order. . . . Such person shall swear under oath in an affidavit, to the best of such person's knowledge, that such order is presently in effect as written. Upon request by a law enforcement agency, the register or clerk of such court shall provide a certified copy of the protection order issued by the other jurisdiction.

A law enforcement officer may presume the validity of, and enforce in accordance with section six, a copy of a protection order issued by another jurisdiction which has been provided to the law enforcement officer by any source; provided, however, that the officer is also provided with a statement by the person protected by the order that such order remains in effect. Law enforcement officers may rely on such statement by the person protected by such order.

<sup>5</sup> Section 5A also does not appear on the Criminal Complaint against Gouin -- only §7 and §3B do -- but §5A was argued by the assistant district attorney at the hearing on Gouin's motion to dismiss and relied upon by the court.

Significantly, the *Handbook*, at pp. 19-20 [*see* Fig. 3, Gouin's Opp. to City's Mot. to Dism.], used at the police academy, proves that the police officers are taught about ¶1 and ¶3 of §5A of chapter 209A, and incorrectly about ¶2. The first and third paragraphs (the latter coupled with §6 [Opp. Exhs. A-2,3,4]) are clearly for arresting officers. Given that "[a]ll words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant, or superfluous" [U.S.A. v. Ven-Fuel, 758 F.2d 741, 751-752 (1st Cir. 1985), and cases gathered], ¶2 must also be part of the statutory scheme. Therefore, the Editor's Note on p.20 of the *Handbook* which instructs officers to ignore ¶2 of §5A recklessly disregards, with deliberate indifference, a suspect's rights to constitutional equal protection. In fact, §5A IS unconstitutional because it does not require that NOTICE be given to the accused. An example appears in the margin at note 2 of Gouin's Opposition to the City of Boston's Motion to Dismiss [Opp. to C/B Mot. Dism.].

Moreover, where James has repeatedly claimed that she brought the Application for Complaint forward and signed the Complaint on behalf of Dori because Dori was in Maine but wanted the complaint, James' acts can be deemed ministerial. *See* Table 1 in Opp. to C/B Mot. Dism.

[Absolute or qualified] immunity . . . is available only to officials performing discretionary, rather than ministerial, acts. *See, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993) (refusing absolute immunity under Federal law where job did not involve discretionary judgment); Breault v. Chairman of Board of Fire Commrs. of Springfield, 401 Mass. 26, 33 (1987) (refusing qualified immunity under Federal and State law), *cert. denied sub nom. Forastiere v. Breault*, 485 U.S. 906 (1988). Determining whether an act is discretionary or ministerial is a question of law for the court. *See Breault v. Chairman of the Fire Commrs. of Springfield, supra* at 32, 513 N.E.2d 1277. **An act is discretionary when it "fails to specify the precise action that the official must take in each instance."** *Id.* at 34 n. 8, 513 N.E.2d 1277, quoting from Davis v. Scherer, 468 U.S. 183, 196 n. 14, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984).

Cady v. Marcella,<sup>6</sup> 49 Mass.App.Ct. 334, 339, *cert denied* 432 Mass. 1107 (2000). Although the *Domestic Violence Guidelines and Handbook*, published by Commonwealth Police

<sup>6</sup> Cady v. Marcella is a case relied upon by James in her argument against Gouin's claim for James' abuse of process [James Mem. for Recon. at 13].

Services and followed by the BPD, do not explicitly state “the precise action that the official must take in each instance,” they do state explicitly, as noted in Fig. 2, *supra*, that which a police officer must explicitly not do, to wit, “**The decision to arrest must be based on whether probable cause exists that the crime occurred, not on whether the victim wishes to seek complaints or wishes to testify at a future date.**”

When Susan James did that for which the so-called victim Dori wished and violated the explicit “not-to-do” order, she failed to perform a mandatory function, not a discretionary one, thus making qualified immunity unavailable to her. “Discretionary functions are limited to ‘discretionary conduct that involves policy making or planning.’” *Doe ex rel. Doe v. Yunits*, 2001 WL 664947 at 2, (Mass.Super. 2/26/2001) (Gants, J.), quoting *Harry Stoller & Co. v. Lowell*, 412 Mass. 139, 141 (1992).

Gouin incorporates in entirety herein by reference his extensive dissertation on this subject, particularly the facts, from his Opposition to James’ Motion to Dismiss, *passim* [Paper 33].

**3. On the facts alleged by the plaintiff, Defendant Detective James can be liable for malicious prosecution.**

In her argument to convince this court to find that the facts in Gouin’s Complaint are inadequate to establish “actual malice,” James misrepresents the status of the law. Gouin herein enumerates the offending arguments and argues his position below them.

**a. James states that “actual malice” is the fourth element for a common-law malicious prosecution claim and provides four citations to support that representation.<sup>7</sup> The citations do not, however, support James’ proposition. It is well-settled in Massachusetts that there is a difference between “malice” and “actual malice.”**

James cites “*Felix v. Lugas*, WL 1775996 (D.Mass 3/2/2004) (Woodlock, J.)” for the proposition that Judge Woodlock iterated four elements for malicious prosecution. The judge did

<sup>7</sup> *Felix v. Lugas*, 2004 U.S. Dist. LEXIS 15520 (D.Mass 2004) (Woodlock, J.); *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001); *Correllas v. Viveiros*, 410 Mass. 314, 572 N.E.2d 7 (1991), *Santiago v. Fenton*, 891 F.2d 373, 1989.C01.40039 <<http://www.versuslaw.com>> (1st Cir. 1989).

*not*. The document cited was a Report and Recommendation [“R&R”] written by Chief Magistrate-Judge Marianne B. Bowler and ultimately adopted by Judge Woodlock [Exh. A].<sup>8/</sup>

In setting out the four alleged elements of a malicious prosecution claim, Magistrate-Judge Bowler [at slip op. at 4] quoted Nieves v. McSweeney, 241 F.3d 46, 53, 2001.C01.0000068 <<http://www.versuslaw.com>> (1st Cir. 2001), quoting Correllas v. Viveiros, 410 Mass. 314, 572 N.E.2d 7 (1991), but the words “actual malice” do *not* appear there. The court in Correllas wrote:

To prove malicious prosecution, Correllas must show that Viveiros instituted criminal proceedings against her with malice and without probable cause and that those proceedings terminated in favor of Correllas.

Correllas v. Viveiros, 410 Mass. at 318, 572 N.E.2d at 10, citing Beecy v. Pucciarelli, 387 Mass. 589, 593-594, 441 N.E.2d 1035 (1982), in which the phrase “actual malice” *also* does *not* appear.

. . . To succeed on a claim of malice in a malicious prosecution action, the Beecys must demonstrate that (1) Mr. Pucciarelli knew that there was no probable cause for the prosecution and (2) Mr. Pucciarelli either personally acted with an improper motive *or* he knew that Filene's was motivated by malice. (FN9).

Beecy, 387 Mass. at 593-594, 441 N.E.2d at 1038 (internal cites omitted) (emphasis supplied).

The court in Felix v. Lugas [at slip op. 5] quoted not only item “(2)” that Gouin quoted immediately above, the court in Felix also cited Gouin v. Gouin, 249 F.2d 62, 71 (D.Mass. 2003) [“Gouin I”] for the same proposition. In Gouin I, the malicious-prosecution claim remains alive and well.

The Beecys emphasize that the existence of malice may be inferred from the lack of probable cause. . . . The rationale for allowing such an inference is that in some cases the **“lack of probable cause may be so obvious that the logical inference is that the prosecution resulted not from an error, but from malice.”** R.E. Mallen & V.B. Levit, [Legal Malpractice], § 59, at 124 [(2d ed. 1981)]. See also Wills v. Noyes, 12 Pick. 324, 326 (1832).

Beecy, 387 Mass. at 594-595, 441 N.E.2d at 1039 (internal cites omitted) (emphasis supplied).

In fact, it is well-settled in Massachusetts that there is difference between “malice” and “actual malice.” For instance, the court Beecy discussed Wills v. Noyes, 12 Pick. 324, 328 (1832):

---

<sup>8</sup> Exhibit A is a version of the 59-page Docket Sheet from which irrelevant entries have been redacted. The true caption of the case is Felix v. Department of Justice et al, not Felix v. Lugas, as James avers. The defendants in Felix numbered over 100, of which Trooper Lugas was but one.

“The malice necessary to be shown in order to maintain this [malicious prosecution] action, is not necessarily revenge or other base and malignant passion. What ever is done wilfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in **legal contemplation malicious**. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means, or, in the language of the charge, to do a wrong and unlawful act knowing it to be such, constitutes **legal malice**” (emphasis supplied). *Id.* Our reasoning in Wills demonstrates that an improper motive is essential. . . . **That improper motive may be one of vexation, harassment, annoyance, or attempting to achieve an unlawful end or a lawful end through an unlawful means...**

Beecy, 387 Mass. at 595 n. 9, 441 N.E.2d at 1041 n. 9.

And in Santiago v. Fenton, 891 F.2d 373, 1989.C01.40039 at ¶110 <<http://www.versus-law.com>>; (1st Cir. 1989), once again, the phrase “actual malice” does not appear. Instead, the court there wrote “acted maliciously.” To satisfy that element, the court said Santiago had only to present evidence of “**a personal grudge**” or a “cover up [of] excessive force” used by the police. Santiago, 1989.C01.40039 at ¶103 (emphasis supplied). “If the jury had believed Santiago,” the court continued, “it reasonably could have found malice. The state common law claim of malicious prosecution should therefore not have been dismissed.” *Id.* at ¶¶103-104.

... Malicious prosecution also involves perverse use of the litigation process, but the central idea is that the party charged with malicious prosecution lacked probable cause in launching the action complained of.

Kaplan v. Petricca, 2000 WL 33159205 at 4 n. 5, No. CA991916B (Mass.Super. Aug. 21, 2000), citing Silvia v. Building Inspector of West Bridgewater, 35 Mass.App.Ct. 451, 453 (1993).

To prevail in an action arising from a labor dispute, the plaintiff must prove actual malice. Aarco, Inc. v. Baynes, 391 Mass. 560, 562 (1984). . . . **Actual malice** requires knowledge that a statement is false or reckless disregard of whether or not it is false. *Id.* at 563. The test for malice is subjective, and a plaintiff must prove that the defendant entertained serious doubts about the veracity of the statements. Lyons v. New Mass Media, Inc., [390 Mass. 51], 57 [(1983)]. A jury may infer malice from the circumstances, however, even if a defendant testifies or otherwise protests his good faith. Aarco, Inc. v. Baynes, *supra* at 564.

Sheraton Boston Corp. v. Bozzotto, 1995 WL 1308161 at 5, No. CA 9303405F (Mass.Super. Aug. 18, 1995) (emphasis supplied), defining “actual malice” in a labor dispute.

Finally, “Actual malice requires knowledge that a statement is false or reckless disregard of whether or not it is false.” Id. Gouin contends

- (a) that James knew that the Application for Complaint was based on the false statements to the 911 calltaker by DiPiano [¶27 and Exh. I], in reckless disregard of Gouin’s rights,
- (b) that James had learned that the Maine order had not been filed in Massachusetts,
- (c) that James recklessly disregarded the falsity of what she learned through the May 13<sup>th</sup> 911 report, the tape of the 911 call, and the May 13<sup>th</sup> incident report [Compl. Exh. I, J, L, respectively] and
- (d) that James’ handwritten notes are circumstantial evidence that James knew she did **not** have probable cause, that she knew there was **no crime** in Massachusetts, that she so informed Dori, that she knew the State of Maine did **not** take jurisdiction over the alleged violation of the Maine restraining order, and that she decided to file the Application when James’ superiors saw the opportunity to use Dori’s new complaint as an opportunity to use it to gain a collateral advantage in Gouin I [Compl. Exhs. O, P, and Q].<sup>9</sup>

“[A] person acts with malice when he acts ‘primarily for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.’” Felix, WL 1775996 at 4, quoting Nelson v. Miller, 227 Kan. 271, 607 P.2d 438, 442 (1980). “A wilful act is done intentionally and by design, in contrast to that which is thoughtless or accidental’ and ‘[a] malicious act is done with cruelty, hostility, or revenge in mind.’” Felix, WL 1775996 at 5, quoting Com. v. Rumkin, 55 Mass.App.Ct. 635, 773 N.E.2d 988, 992 n. 3 (2002).

**b. James wrongly asserts that Plaintiff did not aver “one fact . . . that supports [his] allegations that James know of any improper motive by Chadbourne and/or DiPiano, or that James acted with actual malice when she filed the application for criminal complaint.”**

First, James admits [James’ Mot. Reconsider at 5] that the heightened pleading standard was undermined by both Swierkiewicz v. Sorema N.A., 534 U.S. 50 (2002) and Educadores Puer-

<sup>9</sup> “[C]onspiracy may be, and usually is, proved by circumstantial evidence.” Com. v. Costa, 55 Mass.App.Ct. 901, 902, 769 N.E.2d 338, 340 (2002), quoting Com. v. Stasiun, 349 Mass. 38, 50, 206 N.E.2d 672 (1965) “Direct evidence of a conspiracy . . . is rarely available and, typically, the government must rely on circumstantial evidence.” Com. v. Costa, 55 Mass.App.Ct. at 902, 769 N.E.2d at 340, quoting Com. v. Camerano, 42 Mass.App.Ct. 363, 366, 677 N.E.2d 678 (1997).

torriqueños en Acción v. Hernandez, 367 F.3d 61 (1st Cir. 2004). She also admits that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). Short and plain statements of the claims showing that the pleader is entitled to relief is all that is required under the notice pleading of Fed. Rule Civ. Proc. 8(a)(2).

Had James needed a more definite statement, then she could have filed a motion seeking more definite statements. Complaint Exhibit O (1 of 3) is most telling, better than any statement Gouin could have articulated. In that exhibit, Susan/Suzanne James herself wrote in the field “Facts of Complaint” only one fact: “**VICTIM WANTS TO TAKE OUT A COMPLAINT AGAINST SUSPECT.**” This is a reason contrary not only to the *Domestic Violence Guidelines*, §3.3(A)(3) but also to the instruction in the *Massachusetts Domestic Violence Handbook* at 138.

Where Dori’s desire to bring a complaint against Gouin, then still her husband, was insufficient to establish probable cause to arrest him by an officer responding to a 911 call about alleged domestic violence at the scene of the alleged event, Dori’s desire certainly did not establish probable cause to initiate a criminal complaint against Gouin by a detective, James, who was not even at the scene nor investigated the incident. Had James done so, she would have learned that there was **no** active restraining order issued by a Massachusetts court but also **no** active restraining order both issued by a Maine court and filed here, in Massachusetts.

If due process has still any significance in our system of justice, then the failure of notice by a Massachusetts statute that the Maine order – which, by the way, primarily informed Gouin that he was to stay away from Dori’s home in Cumberland Center, Maine, and her office in Portland, Maine – was good here in Massachusetts and the failure of notice by Dori that she intended to arrive intentionally where Gouin was ordered to be by a Massachusetts court, then Susan James

also further violated the due process clause by ignoring ¶2 of §5A of c. 209A and failing to be fundamentally fair. (Note: It was Dori's motion, written by DiPiano, which requested the order commanding Gouin to make the condominium available [Compl. ¶20 and Compl. Exh. F]).<sup>10</sup>

Thus, given that James initiated the application and criminal complaint on the basis of a forbidden reason can only lead to two possible inferences:

- either James was incompetent, which precludes her from being protected by qualified immunity [Anderson v. Creighton, 483 U.S. 635, 638 (1987) (“Qualified immunity protects ‘all but the plainly incompetent OR those who knowingly violate the law’”) (emphasis supplied), quoting Malley v. Briggs, 475 U.S. 335, 341 (1986); Stephens v. Executive Office of Health and Human Services, 57 Mass.App.Ct. 1114, 785 N.E.2d 427 (2003), quoting Malley for the same proposition,
- or James acted knowingly with an improper motive and malice, or maliciously. Given the evidence of James' incompetence, to which her notes and other documents give testament, qualified immunity cannot protect her. Given also that Rule 3.3 is explicit, her “actual malice” argument cannot protect her from Gouin's malicious-prosecution claim.

Further, on p. 2 of Compl. Exhs. P and Q, James wrote, “**VICTIM STATES SUSPECT VIOLATED ACTIVE RESTRAINING ORDER (NO CONTACT #PORDC-PA-2001-0035 ISSUED ON 04/12/02 OUT OF PORTLAND DIST CT EXPIRES 4/12/04. VICTIM OBSERVED SUSPECT IN HALLWAY VIDEOTAPING HER.**” Knowing this and assuming that James knew that Gouin did not expect Dori to arrive in Boston for the appraisal, Susan James' action has strong whiffs of entrapment by Dori and aiding and abetting of entrapment by James. Both of which are unlawful. Com. v. Costa, 55 Mass.App.Ct. 901, 902, 769 N.E.2d 338, 340 (2002), quoting Com. v. Cook, 10 Mass.App.Ct. 668, 673, 411 N.E.2d 1326, 1330 (1980) (“[a]ccomplice and conspiratorial liability are not synonymous, and one can be an accomplice aiding in the commission of a substantive offense without necessarily conspiring to commit it”).

---

<sup>10</sup> See Table 1 (particularly Items 10-19) in Gouin's Opposition to DiPiano's Motion to Reconsider. Originally DiPiano, in an email on April 9<sup>th</sup>, wrote that Dori intended to appear at an inspection on April 11<sup>th</sup> and that he anticipated no problem (*see id.* Exh A), but the inspection did not go forward on that date. Gouin could not get a protective order. (*See id.* at Table 1, Items 11 and 12.) The next day, April 12<sup>th</sup>, Dori got a final restraining order in Portland, ME, against Gouin. On May 2d, DiPiano filed a motion to compel the inspection. In that motion he did not request leave for Dori to attend. Notwithstanding that failure, the court wrote, “Husband **shall** make the ... property available” and the “Wife **may** be present” on May 13<sup>th</sup> for the inspection. It is the failure of DiPiano to give notice of Dori's intention to appear on May 13<sup>th</sup> about which Gouin has complained. Significant is that the court did not say what Gouin was to do were Dori to attend.

That which James does not state is that a month prior to her filing the twice-amended Application for Complaint, Gouin told her the facts he alleged in ¶41. (She does not deny Gouin and his counsel speaking to her at the Area A-1 police station.) She also does not say that on the day Gouin and his counsel met with her,

- (a) James, with several other detectives present in what appeared to be a recreation or relaxation room at the station, viewed the audiovideo tape Gouin made during “the May 13<sup>th</sup> event,”
- (b) James saw the Probate & Family Court order that commanded Gouin to “make the Boston property available to Wife’s real estate appraiser and Wife’s attorney at 10:00 AM on May 13, 2002 . . .” [Compl. ¶21 and Compl. Exh. G (2 of 2)], which is why Gouin was waiting at the Boston property when his wife, Dori, and subsequently one of her divorce attorneys, John DiPiano, arrived at the property and immediately called 911 to report falsely that Gouin was violating a Maine restraining order,
- (c) James learned from Gouin about the criminal complaint brought against him on 5 January 2001 and dismissed at the end of April 2001, after which he brought suit against two other Area A-1 police officers. This prior suit, Gouin I, cited in Felix, gave the impetus to James for bringing the second criminal complaint against Gouin.

Clearly, the inferences and “genuinely disputed facts,” which must be resolved in favor of Gouin, the nonmoving party [Felix, at 3, citing Mullins v. Raytheon Company, 164 F.3d 696, 698 (1st Cir. 1999)], are not only that James was retaliating against Gouin for suing her fellow officers [Compl. at ¶72], but also that her counsel would find it helpful in Gouin I if Gouin were found guilty in the criminal case underlying the instant action.<sup>11</sup>/

Detective James also failed to reveal:

- (d) that on 22 July 2002, while in a hearing room at Boston Municipal Court for a show-cause hearing, James “blew her stack” at Gouin’s counsel and told Gouin she was “going to get [him],”

---

<sup>11</sup> Counsel has good reason to believe that one or more of James’ supervisors told James to bring the Application for Complaint forward for this latter reason, namely, that it would be helpful in Gouin I if Gouin were found guilty of violating the Maine order. The City and its Police Department could do this if they ignored the second paragraph of §5A and then charged Gouin with violating chapter 209A, §7 (through which §5A claims are prosecuted). Given that a “209A” charge – which requires no *mens rea* and has no safeguards against entrapment by an alleged victim -- are treacherous to even the most innocent of defendants, it must have appeared to the BPD and the City that a “Guilty” verdict would be a shoo-in. It would have been, had Gouin not vigorously fought for 1+ anxious years in the BMC, the Mass. Appeals Court, and the BMC again before the second criminal case against him was dismissed.

- (e) that James' behavior was so out of control that the hearing officer suspended the hearing and led her, the Boston Police Department BMC-duty-officer, and Dori out of the hearing room, leaving Gouin and his counsel alone in the room,
- (f) that the hearing officer, the members of the BPD, and Dori went into the "duty officers" room and conducted *ex parte* communications, and
- (g) that they returned after around 20 minutes with the second, older, hearing officer.

In sum, James did not have probable cause, acted with malice, and now erringly or intentionally claims that she did not know all the facts before she both signed and filed the Application for Complaint at the BMC on 17 May 2002 – despite Compl. Exh. P bearing the date stamp showing that the Application was not received by the BMC until 10 June 2002.

**4. There is evidence that James used legal process to accomplish some ulterior purpose, and in so doing, can be liable for abuse of process.**

First, Gouin incorporates herein this issue his argument in issue 3(b) immediately above.

Second, Cady, *supra*, in which the plaintiff's claim of abuse of process was not dismissed, was, curiously, relied upon by James even though the fact pattern was not parallel in any way to the instant case. And in Ladd v. Polidoro, another case upon which James relied, the plaintiff was entitled to a directed verdict on the defendants' abuse of process claim even though the specific basis for claim was not stated in a written motion.

“One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process” . . .

Ladd v. Polidoro, 424 Mass. 196, 198 (1997), quoting Restatement (Second) of Torts § 682, at 474 (1977). “The ulterior motive may be shown by showing a direct demand for **collateral advantage**; or it may be inferred from what is said or done about the process.” Ladd,” at 198 (emphasis supplied), quoting W.L. Prosser & W.P. Keeton, Torts §121, at 899 (5th ed. 1984). “[A]buse of process has been described as a form of coercion to obtain a collateral advantage, . . .” Vittands v. Sudduth, 49 Mass.App.Ct. 401, 406 (2000). And,

. . . [w]here . . . an attachment is obtained in an action where the party seeking the attachment knows the claim is groundless, it is contended that proof of an ulterior motive is not an essential element of the claim.

Ladd, 424 Mass. at 198-199.

A novel issue is presented in Sheraton Boston Corp. v. Bozzotto, 1995 WL 1308161, No. CA 9303405F (Mass.Super. 1995) (Smith, J.) (summary judgment denied as to the claim for abuse of process). It appears applicable to Dori in the present case, and perhaps to Susan James, too.

The novel issue presented by these facts is whether a person can be held liable for abuse of process if he procures the initiation of a court proceeding by a third party in order to effectuate his ulterior or illegitimate purpose.<sup>12</sup> . . . See Alexander v. Unification Church Of America, 634 F .2d 673, 678 (2nd Cir.1980) ("The New York courts appear to proceed on the reasonable assumption that a person is liable for abuse of process, as he would be liable for malicious prosecution, if he procures the initiation of a proceeding by a third party") (citations omitted). While not controlling on this court, the reasoning of the Alexander court is compelling. The evil that the tort addresses is the misuse or perversion of lawful process in order to achieve an ulterior motive. Whether the abuser personally commences the legal action or uses a willing third person, the evil is the same. The evil is the same even if the abuser manipulates or dupes the third party into commencing the legal process, as appears to be the situation in this case. . . . The fact that a person is cunning enough to use another person's lawful process to gain an ulterior motive should not protect that person from liability for the abuse of process which he committed.

Thus, the Court finds that the plaintiff has raised an arguable claim for abuse of process and that the plaintiff's submissions provide ample factual support. The issue of the defendants' motives is a factual issue for the jury. Accordingly, the Court denies summary judgment on Count I of the complaint.

Sheraton, 1995 WL 1308161 (Mass.Super. 1995), slip op. at 4. The questions raised are: Which one was the dupe? Under Sheraton, if Dori was a process abuser who used James, as Gouin contends, then Dori is liable. Is Detective James, too, liable? Of abuse of process? a joint venturer? A conspirator? Gouin contends all, i.e., James is a process abuser, too, for without James, the abuse of process could not have occurred. The same questions might be asked of DiPiano.

Additionally, James argues [James' Memo in Recon. at 14] that the facts gave her "prob-

---

<sup>12</sup> "The Sheraton has offered no Massachusetts statute or case law that would allow a non-party to a suit to be held liable in such circumstances nor have the defendants pointed to any Massachusetts case or statute which stands for the opposite proposition. However, Sheraton cited to a New York decision which indicates that, at least in New York, the tort will lie against someone who uses a third party to initiate the abusive law suit." Sheraton Boston, slip op. at 4.

able cause to bring the complaint against the Plaintiff on Chadbourne's behalf," but probable cause has ***no*** role to play in an action for abuse of process:

An action for abuse of process lies when an officer uses a lawful criminal process to accomplish an unlawful purpose. Powers v. Leno, 24 Mass. App. Ct. 381 (1987). It is a distinct claim from false arrest and malicious prosecution to the extent that it can be held to lie regardless of whether there was probable cause or whether the proceedings terminated in favor of the charged party. Quaranto v. Silverman, 345 Mass. 423, 426 (1963); Carroll v. Gillespie, 14 Mass.App.Ct. 12 (1982).

Santiago, *supra*, at ¶110.

James' ulterior motive, as described above, was to retaliate against Gouin for filing against her fellow police offices [Compl. at ¶72], and that filing occurred ***before, not after***, James signed and filed the Application for Complaint.

#### **5. Gouin stated sufficient facts to demonstrate the existence and the scope of a conspiracy.**

Gouin incorporates herein this issue by reference the facts from his pleadings, including those herein this opposition.

[U]nder Massachusetts law, there is a cause of action for civil conspiracy where two or more parties act in concert with each other or pursuant to a common design to commit a tortious act, or give substantial assistance and encouragement to each other's tortious conduct. Kyte v. Phillip Morris, Inc., 408 Mass. 162, 166-67 (1990); Kurker v. Hill, 44 Mass.App. 184, 188-89 (1998). See also Restatement (Second) of Torts, § 876 (1979). . . . Liability may extend to those who merely assisted in or encouraged the tortious act and does not necessarily require proof of an explicit agreement between defendants. Kyte v. Phillip Morris, Inc., 408 Mass. at 167-68; Massachusetts Laborers Health & Welfare Fund v. Phillip Morris, Inc., 62 F.Supp.2d 236, 244 (D.Mass.1999). A tacit understanding is sufficient, and it may be inferred from the conduct of the parties, as proof of conspiracy commonly rests on circumstantial evidence. "The inferences from the evidence need not be inescapable; they need only be reasonable." Commonwealth v. Camerano, 42 Mass.App. 363, 366 (1997).

Ellis v. Varney, 2004 WL 574827, at 49 (Mass.Super. 2004)

"The heart of a conspiracy is the formulation of the unlawful agreement or combination." Commonwealth v. Cantres, 405 Mass. 238, 244, 540 N.E.2d 149 (1989), quoting from Commonwealth v. Pero, 402 Mass. 476, 478, 524 N.E.2d 63 (1988). But a conspiracy rarely wears its heart on its sleeve. Thus we have no explicit proof of the defendant's "agreeing" in so many words with Curtis to join in the scheme, although we have much about transactions with M & S, the defendant's company. Agreement, however, may be

instinct in the situation as a whole, and proved by circumstantial means. See Commonwealth v. Nelson, 370 Mass. 192, 200-201, 346 N.E.2d 839 (1976); Commonwealth v. Cook, 10 Mass.App.Ct. 668, 675, 411 N.E.2d 1326 (1980). It is enough if the parties come even tacitly to an understanding, and this may be inferred from a course of conduct having a common design. See Direct Sales Co. v. United States, 319 U.S. 703, 714 (1943). Finally, "[t]he step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy." Id. at 713 (Rutledge, J.).

Com. v. Melanson, 53 Mass.App.Ct. 576, 580-581, 760 N.E.2d 794, 798 (2002).

Commonwealth v. Smith, 163 Mass. 411, 417-418, 40 N.E. 189 (1895) ("A conspiracy may be proved by circumstantial evidence, and this is the usual mode of proving it, since it is not often that direct evidence can be had. The acts of different persons who are shown to have known each other, or to have been in communication with each other, directed toward the accomplishment of the same object ... may be satisfactory proof of a conspiracy."). . . . We think it so clear as not to require discussion that the evidence in this case was sufficient to warrant a rational jury in concluding beyond a reasonable doubt that Corridori, Leuci and Boria had all conspired with each other to rob Winston's Pharmacy.

Com. v. Corridori, 11 Mass.App.Ct. 469, 476, 417 N.E.2d 969, 974-975 (1981) (internal citations of opinions dating from 1921 through 1976 omitted).

In support of its conspiracy claim, West Boylston must show direct or circumstantial evidence that reasonably tends to prove that the alleged conspirators had "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984); Ben Elfman & Son, Inc. v. Criterion Mills, Inc., 774 F.Supp. 683, 686 (D.Mass.1991). See also Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir.1996).

West Boylston Cinema Corp. v. Paramount Pictures Corp., 2000 WL 1468513 at 10 (Mass.Super. 2000).\<sup>13</sup>/

**b. Invidious discriminatory animus is not an element of §1985. It was a judge-created element in Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).**

<sup>13</sup> James references Slotnick v. Stavisky [*sic*], 560 F.2d 31 (1st Cir. 1977), regarding "insufficient allegations of conspiracy in complaint." Ironically, two of the defendants, Burton Pike and Harold Stavisky, were later suspended from the practice of law. Matter of Stavisky, 7 Mass. Att'y Disc. R. 277 (1991) (three months).

James also cited Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980), in which "[a]ll six attorneys knew that the allegations against Slotnick were false." But no more is revealed in the case. Thus the case is useless to use one way or the other against Gouin's position. Slotnick had been institutionalized in a mental-health facility. Gouin incorporates herein by reference the arguments regarding Garfinkle on pages 6-7 in PLAINTIFF'S OPPOSITION AND MEMORANDUM IN SUPPORT OF HIS OPPOSITION TO MOTION TO DISMISS BY DEFENDANT JOHN DiPIANO.

Gouin incorporates herein by reference his legal arguments set forth in Issue 3 (“The So-Called Fifth Element, ‘Invidiously Discriminatory Motivation’”), on page 7 of Paper 70: Plaintiff’s Objections and Memorandum Supporting His Objections to the Report and Recommendation (#67) on the Motions to Dismiss by Suzanne James (#21) and the City of Boston (#23).

James also argues [James’ Mem. for Recon. at 16] that Gouin has no facts to support his claim of conspiracy. That is frivolously argued and simply untrue. See note 6 of his opposition to James’ motion to dismiss. There Gouin contends (1) that Susan/Suzanne James told Dori to go to court in Maine because it was a Maine order [see Go TO CT IN ME at Compl. Exh. O (3 of 3)], (2) that Dori went to court in Maine [see VICTIM will be Going to CT IN ME at Compl. Exh. O (2 of 3)], (3) that the court in Maine told her, Nothing happened in Maine, (4) that Dori contacted James again and told her that the Maine court said that the ball was in the Massachusetts’ court, and (5) only then, on 14 June 2002 at 9:34 A.M. [Exh. P] did James decide to bring the complaint forward and file the application in the BMC. James had time – a month -- to check out the statute and did not!

Significant also is that James concluded Dori was a victim and not merely a complainant. The law is to assume a defendant is innocent until proven guilty. That James did not follow the law is indicative of her invidious gender bias and consequent invidious discrimination of men in the courts. The incidence of such invidious discrimination has been noticed in the general public: "Women are not [read, *no longer*] men's life partners, but rivals favored by law." Paul Craig Roberts,<sup>14</sup> in "The Wars We Can't Afford to Lose," citing Professor Richard T. Hise,<sup>15</sup> *The War*

---

<sup>14</sup> Dr. Roberts is John M. Olin Fellow at the Institute for Political Economy and Research Fellow at the Independent Institute. He is a former associate editor of the Wall Street Journal and a former assistant secretary of the U.S. Treasury. He is the co-author of *The Tyranny of Good Intentions*. For his article on 11 October 2004 in the Washington Times, see Exhibit B, attached hereto this opposition.

<sup>15</sup> “Texas A&M University professor Dr. Richard T. Hise launches a sociocultural campaign against the fairer sex, who, in the good doctor’s estimation, isn’t quite so fair, after all. He presents an in-depth investigation that examines the psychogenic warfare covertly waged against men in American culture—via liberal legislation and the media—over the past 30 years. Citing feminist “propaganda,” Hise painstakingly deconstructs what he views as Feminist America’s male-discrimination agenda to enforce gender homogenization in both society and the workforce, which he finds emasculating. A lazy cynic or garden-variety bleeding heart might dismiss this disconcerting exposé as the sour

*Against Men: Why Women Are Winning and What Men Must Do If America Is to Survive* [Oakland, OR: Elderberry Press, February 2004], ISBN: 1930859619.

**6. James can be liable for intentional infliction of emotional distress. Where Gouin was emotionally injured while defendants were committing another tort, dismissal of Gouin's count for intentional infliction of emotional distress is inappropriate.**

"When the injury is emotional, as well as physical, damages compensate for worry, grief, stress, humiliation, anxiety and emotional scarring." Doe v. Clinton, 1996 WL 1185103 at \*2 (Mass.Super. 1996) (Kottmyer, J.), citing Wagenmann v. Adams, 829 F.2d 196, 221 (1st Cir.1987).

"Extreme and outrageous conduct is not required if the emotional distress resulted from the commission of another tort." American Velodur Metal, Inc. v. Schinabek, 20 Mass.App.Ct. 460, 470-471 (1985), *cert. denied*, 396 Mass. 101 (1985), *cert. denied*, 475 U.S. 1018 (1986). Notwithstanding that extreme and outrageous conduct is not an element Gouin must satisfy, given the circumstances of this case, even were the court to assume that he did have to satisfy it, he could, under Agis v. Howard Johnson Co., 371 Mass. 140, 141 (1976) and Boyle, *infra*:

Although "hurt feelings resulting from bad manners, or relatively minor annoyances do not justify recovery for intentional or reckless infliction of emotional distress," claims should go to the jury "if reasonable people could differ on whether the conduct is 'extreme and outrageous.'" Boyle v. Wenk, 378 Mass. 592, 595-97 (1979). Under this lenient standard, courts have allowed claims to go forward in cases not particularly more shocking than the one at hand. For example, in Agis, the plaintiff was a waitress employed at the defendant's restaurant. Agis, 371 Mass. at 141 (1976). The manager called a meeting of the wait staff and announced that he knew one of them was stealing from the restaurant, and that "until the person or persons responsible were discovered, he would begin firing all the present waitresses in alphabetical order, starting with the letter 'A.'" The manager then fired Agis, the plaintiff. Id. The court held that this sufficiently stated an emotional distress claim. Id. at 145. In Boyle, the court held that it was for a jury to decide whether the plaintiff had an emotional distress claim against a defendant who repeatedly called and harassed her even though she was recovering from a stay in the hospital and repeatedly begged the defendant to leave her alone. See Boyle, 378 Mass. at 593-94.

Columbus v. Biggio, 76 F.Supp.2d 43, 56-57 (D.Mass. 1999).

As a direct result of being wrongly prosecuted for a non-crime for over one year, Gouin was caused to suffer embarrassment, worry, grief, stress, humiliation, anxiety, fear, loss of trust,

---

grapes of a very bitter man, but an objective reader will find extremely fascinating insights from the frontlines of the War of the Sexes. Unquestionably, this is a worthy read, regardless of which banner you wave".—Harold Rodriguez

feelings of betrayal, shock, and emotional scarring, all compensable as emotional distress . . . and all of a much more serious nature than the emotional distress suffered by either Agis or Boyle.

**7. The doctrine of respondeat superior applies to Gouin's §1983 claims where the supervisors' conduct or inaction amounted to a reckless or callous indifference to Gouin's constitutional rights. It also applies to Gouin's common-law or pendent claims, thereby making dismissal of his claims against Susan/Suzanne James in her official capacity inappropriate. In Count 3, the City is sued for its own actions.**

A supervisor may be liable under §1983 if his "conduct or inaction amounted to a reckless or callous indifference to the constitutional rights of others." Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 48 (1st Cir.1999), quoting Gutierrez-Rodriguez v. Cartagena, *supra* at 562. "An official displays such reckless or callous indifference when it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights." Germany v. Vance, 868 F.2d 9, 18 (1st Cir.1989). . . . "Indifference that rises to the level of being deliberate, reckless, or callous suffices to establish [supervisory] liability under §1983." Febus-Rodriguez v. Betancourt-Lebron, *supra* at 92 n. 4, quoting Gutierrez-Rodriguez v. Cartagena, *supra*.

Clancy v. McCabe, 441 Mass. 311, 318, 805 N.E.2d 484, 490-491 (2004).

. . . the Monell Court stated that §1983 authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom ha[d] not received formal approval through the body's official decisionmaking channels." of [Monell v. DSS of the City of N.Y., 436 U.S. 658,] 690-691 [(1978)].

. . . The Monell Court stated that a municipality could be held liable only when its "lawmakers or those whose edicts or acts may fairly be said to represent official policy" cause the constitutional harm. Id. at 694.

. . . Following Monell, the Supreme Court set out to clarify the circumstances under which an act or acts of a government official represent official policy. (internal cites omitted). In Pembaur v. Cincinnati, 475 U.S. 469, 480(1986), a plurality of the Court stated that "municipal liability may be imposed for a single decision by [a] municipal policymaker[ ] under appropriate circumstances." . . .

In St. Louis v. Praprotnik, 485 U.S. 112, 127 1988), the Court stated: "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality.... If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality...."

Smith v. City of Boston, 413 Mass. 607, 610-611, 602 N.E.2d 198, 200 (1992).

WHEREFORE Gouin prays that Suzanne/Susan James' Motion for Reconsideration be DENIED.

Respectfully submitted,  
FRANÇOIS GOUIN, JR.,  
By his attorney,

15 November 2004

/s/ Barbara C. Johnson <barbaracjohnson@worldnet.att.net>  
Barbara C. Johnson, Esq., BBO #549972  
6 Appletree Lane  
Andover, MA 01810-4102  
978-474-0833

**AFFIDAVIT**

I, Barbara C. Johnson, Esq., hereby depose that all statements and observations I attribute to myself saying or observing are true, and all other statements are true upon information and belief.  
Sworn under the pains and penalties of perjury.

15 November 2004

/s/ Barbara C. Johnson <barbaracjohnson@worldnet.att.net>  
Barbara C. Johnson, Esq., BBO #549972