

**PLAINTIFF FRANÇOIS GOUIN, JR.'S, LOCAL RULE 56.1 STATEMENT OF FACTS
IN SUPPORT OF HIS OPPOSITION TO DEFENDANTS TONER AND
McMAHON'S MOTION FOR SUMMARY JUDGMENT**
(with counsel's affidavit below and Gouin's affidavit in separate document)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 01-CV-10890-RBC

François Gouin, Jr.
Plaintiff

v

Dori C. Gouin, Esq., in her professional and individual capacities,
Todd D. Posey,
William R. Toner, in his official and individual capacities,
Edward McMahon, in his official and individual capacities,
City of Boston,
Paul F. Evans, Police Commissioner of Boston, Mass., in his official and individual capacities,
John Does,
Jane Doe,
Defendants

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**PLAINTIFF FRANÇOIS GOUIN, JR.'S, LOCAL RULE 56.1 STATEMENT OF FACTS  
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MOTION FOR SUMMARY JUDGMENT**  
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Now comes François Gouin, Jr. ["Gouin"], and opposes Defendants Toner and McMahon's Motion for Summary Judgment. Pursuant to Local Rule 56.1, Gouin submits in this document a concise statement of material facts of records as to which he contends there are genuine issues of material facts in dispute, which must be tried to a jury.

This document is in two parts: In Part I, Gouin controverts the defendants' statements. In Part II, he lists the facts that he claims to be in dispute.

**Part I:** Gouin also herein controverts approximately two-thirds of the 28 statements of facts Defendants Toner and McMahon contend are both material and undisputed. Gouin has put those 28 facts into a grid, *infra*, in which he identifies which statements are material and not and which statements are in dispute and not. Beyond the initial erroneous assertion, there are numerous problems with Defendants Toner and McMahon's presentation. Their problems are:

- (1) Defendants Toner and McMahon did not identify the claim to which each alleged fact was material.
- (2) Defendants Toner and McMahon were either ignorant of property law or ignored it in order to find justification for their department's or city's arrest-preferred policy, namely, that once an object is attached to real property, it becomes a part of the real property.<sup>1/</sup>
- (3) Because the condo was owned by Gouin, he had a right to drill or not to drill into any part of it. Drilling was not an illegal act. The defendants' assertion that it was an unlawful act on its own or an act of burglary is an erroneous conclusion of law.<sup>2/</sup> Therefore each of the statements [T&M's Statements ##6, 7, 11, 12, 13, and footnote 2] regarding alleged drilling by Gouin is immaterial for any purpose and material only to the issue of
  - whether the defendant officers were ignorant of the law and if so, whether their ignorance caused Gouin's deprivation of rights,
  - whether they intentionally ignored the law so as to feign justification for the arrest or
  - whether they were simply following their department's or city's arrest-preferred policy or
  - whether they intentionally deprived Gouin of his property rights.
- (4) Defendants Toner and McMahon did not consider the rights of Gouin, a property owner, to wit,
  - (a) to enter his home at any hour and not be charged with breaking and entering,
  - (b) to change locks in his home,
  - (c) to renovate his home [**Exh. F, photos**],
  - (d) to use his tools, such as a drill and screwdriver to accomplish the renovations and not be charged with carrying burglarious tools.
- (5) Ignoring Gouin's homeowner's rights, Defendants Toner and McMahon told Gouin he had no right to be in his home, when, in fact, Gouin had a right to enter and be in his home, and then deprived him of his constitutional right to be safe in his home and to protect both himself and his home.

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<sup>1</sup> Examples of this are mirrors screwed into walls over fireplaces, chandeliers screwed into ceilings, window shutters screwed onto exterior walls, and locks screwed into doors, windows, and cabinets.

<sup>2</sup> Although Defendant Officer McMahon told Gouin about Dori's new restraining order, of which Gouin, not having been served, was unaware, McMahon told Gouin he was being arrested for breaking and entering [Pl. Compl. Exh. A, p. 4, lines 12-13; p. 5, lines 1-3; and p. 9, lines 5-6]:

“We're not arresting you for that. You're not suppose to be at this residence. Okay. And your not suppose to be drilling into the house, into the door . . . To gain entry. That's what you're being arrested for”

Pl. Compl. Exh. A, p. 9, lines 7-12.

- (6) Defendants Toner and McMahon did not act reasonably when they arrested and handcuffed Gouin and removed him from his home, knowing that his wife was in another State (Maine), knowing that Gouin had not been served with a restraining order, and knowing that Gouin had a right to be in his own home. Proof is in the following dialogue:
- (a) Defendant Todd Posey [“told”] Defendant Officer McMahon that Dori had obtained a new restraining order “yesterday” [on Thursday, January 4, 2001] [Pl. Compl. Exh. A, p. 3, lines 23-25],
  - (b) Defendant Officer Toner told Gouin that the new restraining order was “in effect” [Pl. Compl. Exh. A, p. 4, lines 10-11],
  - (c) Gouin told Defendant Officer Toner, “I wasn’t aware there was a restraining order” [Pl. Compl. Exh. A, p. 4, lines 12-13],
  - (d) Defendant Officer Toner tells Defendant McMahon that “[Dori] still has a current restraining order against him. He wasn’t served, but it got slowed down in court” [Pl. Compl. Exh. A, p. 5, lines 2-3],
  - (e) Defendant Officer McMahon said, “Okay” [Pl. Compl. Exh. A, p. 5, line 4],
  - (f) Defendant Officer McMahon orders Gouin, “Sir, you want to stand up and put your hands behind your back?” [Pl. Compl. Exh. A, p. 5, lines 5-6].
- (7) Defense counsel misrepresented to this court that Officer Toner’s and McMahon’s **perjurious** statements [T&M’s Exh. A, pp. 33, 44; T&M’s Exh. E] at a probable cause hearing was an admission by Gouin of drilling on January 5, 2001.<sup>3</sup> In fact, those statements passed off as Gouin’s statements are not merely hearsay, they are intentionally perjurious hearsay. Proof that Toner and McMahon lied and that Gouin did not make such an admission on January 5, 2001 is at Pl. Compl. Exh. A, p. 5, a transcript of the tape of the event. A comparison of the tape and Toner’s and McMahon’s testimony:
- (a) one officer asked the other, “He [“Gouin”] was drilling today too? [Pl. Compl. Exh. A, p. 5, lines 5-6],
  - (b) the other officer answered, “Yeah.” [Pl. Compl. Exh. A, p. 5, line 15],
  - (c) Gouin said, “No, I didn’t drill yesterday. I had a locksmith” [Pl. Compl. Exh. A, p. 5, lines 16-17],
  - (d) One of the police officers asked Gouin, “I’m sorry you were drilling today, too?” [Pl. Compl. Exh. A, p. 5, lines 18-19],

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<sup>3</sup> There is no excuse for defense counsel attributing Toner’s and McMahon’s lies to Gouin. Gouin was not allowed to impeach either officer at the probable cause hearing with the tape [T&M’s Exh. A, p. 46, lines 5-8]. The officers’ counsel has had the complaint and transcript since this case was filed, as well as a copy of the tape shortly thereafter.

- (e) Gouin replied, “No. Just --”, and in the middle of his answer, was interrupted by an officer. See Gouin’s denial of drilling also at T&M’s Exh. D, p. 119, lines 7-11, 20-21, and p. 196, line 17;
- (f) the officer absolutely did **not** listen to Gouin’s denial [Pl. Compl. Exh. A, p. 5, line 20], and began asking Gouin about the contents of his bag Gouin, “What have you got in here sir?” [Pl. Compl. Exh. A, p. 5, line 21],
- (g) the officer absolutely did **not** listen to Gouin’s denial. for had he would not have said, “You should have went to a neighbor's before you start drilling (in-audible) you're really not suppose to be here” [Pl. Compl. Exh. A, p. 3, lines],
- (8) Defendants Toner and McMahon failed to produce an affidavit by Posey with their motion for summary. The did, however, excerpt and include 33 pages from the 309 page transcript of Posey’s deposition [T&M’s Exh. B].
- (9) Defendants Toner and McMahon also rely on Defendant Todd Posey’s unreliable deposition testimony, for example, Toner and McMahon’s Statements ## 5, 6, 7, 12, all presume that Posey did, indeed, hear “drilling,” when the record clearly shows that Posey could have mistaken the squealing sound of the front door to the building for drilling. Proof of this will be heard on the tape, but in the meantime, can be seen at [Pl. Compl. Exh. A, p. 5, lines 18-19].
- After Gouin was handcuffed, making it impossible to use his hands, one officer asked Gouin, “What have you got in here sir?” Gouin’s answer was drowned out by what the tape transcriber described as “drilling” [Pl. Compl. Exh. A, p. 5, lines 22]. At his deposition, Gouin identified that noise as being the squealing of the front door ” [**Exh. M, ¶5, Gouin's Affidavit**].
- (10) Defendants Toner and McMahon incorporated into their Statement of Facts their own untruths: for instance, they wrote that Dori and Posey complained to the 911 call-taker that Gouin “was breaking into the residence” [T&M Statement #8]. The Boston Police Department Incident History shows clearly
- (a) that Posey said that Gouin requested him to leave and that his sister, Dori, told him he could live there [T&M Exh. C] and
- (b) that Dori told the police she had a restraining order against him to stay away from the condo – and that was untrue – and that her “ex-husband” – that was also untrue – “drilled his way into the address” – and that was untrue.

In sum, of the 28 alleged material facts, 8 are material and undisputed, 7 are material and disputed, 3 are immaterial and undisputed, 10 are immaterial and disputed, and footnote 2 is also immaterial and disputed. The fact types are easily distinguishable in the table set out below.

| <b>TABLE 1.<sup>4/</sup><br/>TONER AND McMAHON'S FACTS</b>                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
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| <b>MATERIAL FACTS</b>                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <b>IMMATERIAL FACTS</b>                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <b>Undisputed</b>                                                                                                                                                                                                                                                                           | <b>Disputed<br/>in whole or in part</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>Undisputed</b>                                                                                                                                    | <b>Disputed<br/>in whole or in part</b>                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p><b>2.</b> The Plaintiff's purpose in going to the condominium was to move back into the property. Ex. D, Pl.Dep. p.96</p> <p><b>Note:</b> Toner and McMahon numbered each of their facts. The number "2," for instance, in this block matches the number of this fact in their list.</p> | <p><b>8.</b> Defendants Dori C. Gouin ("Chadbourne") and Posey made emergency telephone calls to the Boston Police Department, stating that the Plaintiff was breaking into the residence, and officers Toner and McMahon responded. Ex. C, Boston Police Incident History; Ex. A, pp.10-11; Pl. Compl. ¶21.</p> <p><b>Posey did not complain to the 911 call-taker of a breaking into the residence. [T&amp;M's Exh. C].</b></p> <p><b>Dori <i>falsely</i> alleged that there was an RO commanding Gouin to stay away from the condo. No such RO had been served on Gouin. Dori was living in Maine and Posey did not have standing to get an RO against Gouin. [T&amp;M's Exh. C].</b></p> | <p><b>3.</b> The last time he had spent the evening at the condominium was on December 13, 1999. Ex. D, p.73. □</p>                                  | <p><b>1.</b> At 5:30 in the morning on January 5, 2001, the Plaintiff went to the scene of the incident and his arrest, a condominium located at 58 Temple Street in Boston. Pl. Compl. generally.</p> <p><b>Gouin went to the condo, but it had not become to him a "scene" of anything and certainly not of an "incident" or an "arrest."</b></p> <p><b>T&amp;M's Statement #1 was simply for effect, to put Gouin in a bad light in the court's eyes. It was offensive.</b></p> |
| <p><b>9.</b> When the officers got to 58 Temple Street, the Plaintiff was sitting on the stairs in the common hallway. Ex. A, pp.11, 40; Ex. D, p. 110.</p>                                                                                                                                 | <p><b>16.</b> When the Plaintiff was arrested, the arrest was professional and courteous. Ex. B, p.269, 292; Ex. D, pp. 133, 138.</p> <p><b>Gouin said they were like "gentlemen." The words "professional and courteous" do not appear on pages 133 or 138 of T&amp;M's Exh. D. Significant is what Gouin said on lines page 129-130 of that exhibit. T&amp;M's Exh. B is Posey's deposition, no Gouin's. Gouin's counsel cannot resist raising the question, How can an unlawful arrest be professional?</b></p>                                                                                                                                                                           | <p><b>4.</b> Upon his arrival, the Plaintiff had a drill, screwdriver, and paperwork in his briefcase. Ex. A, p.70; Ex. D, pp.98, 100.</p>           | <p><b>5.</b> The Plaintiff tried to obtain access to the condominium, with Defendant Todd Posey ("Posey") sleeping in side. Ex. A, Probable Cause Hearing, p.12. fn2</p> <p><b>Gouin had no knowledge Posey was inside the condo. Compl. ¶20. His purpose was NOT to go in while Posey was sleeping, if, indeed, Posey was.</b></p>                                                                                                                                                |
| <p><b>17.</b> The Plaintiff did not want to be touched, and was offended he was handcuffed. Ex. D, p. 150.</p>                                                                                                                                                                              | <p><b>18.</b> Plaintiff did not suffer any physical injuries from the officers' arrest. Ex. D, p. 153. □</p> <p><b>Gouin DID suffer physical injuries. See <u>Answers to William Toner's Interrogatory #6a and #6c, attached hereto as Exh. A.</u></b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p><b>14.</b> Plaintiff admits that he removed the lock and placed it in his coat pocket while he waited for the police to arrive. Ex. D, p. 120</p> | <p><b>footnote 2c.</b> Further, the Plaintiff himself has conflicting testimony on the issue of whether he drilled on January 5, 2001.</p> <p><b>The third sentence of the footnote does not identify where the allegedly conflicting testimony might be found.</b></p>                                                                                                                                                                                                            |

<sup>4</sup> Shaded blocks are Toner and McMahon's facts that Gouin disputes. The white blocks below them are Gouin's controverting and explanatory statements. Supplementing these are four exhibits attached to this pleading:

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| <p><b>22.</b> The Plaintiff was holding a tape recorder during the incident, it was on and captured the conversations of officers Toner and McMahon. Pl. Ans. Counterclaim ¶14; Pl. Fifth Aff. Def. to Counterclaim; Pl. Mot. Dism. p.1. There was no express consent given by either Officer Toner or McMahon to tape. Ex. D, p.131; Pl. Mot. Dism. p. 2; Pl. Ans. Counterclaim ¶14.</p> | <p><b>19.</b> A criminal complaint was brought against the Plaintiff for breaking and entering, malicious destruction of property and possession of burglarious tools. Ex. A, pp. 15, 28-30.</p> <p><b>No such criminal complaint with the charges stated in T&amp;M's Statement #19 was produced either voluntarily or in response to Gouin's requests.</b></p> <p><b>The criminal complaint that Gouin received charged that he</b></p> <p>(a) maliciously destroyed property (the lock attached to Gouin's real property),</p> <p>(b) had possession of burglarious tools (Gouin's drill),</p> <p>(c) attempted to violate a 209A,</p> <p>(d) violated a 209A order.</p> <p>[Compl. ¶55]</p> <p><b><u>Exh. B, Application for Criminal Complaint (signed by Toner) and Criminal Complaint, attached heret</u></b></p> <p>The defendant officers did not include with their 56.1 statements a copy of the criminal complaint because the real one does not support <u>T&amp;M's Statement #19</u>.</p> <p>Toner denies signing the criminal complaint Gouin received <u>[T&amp;M's Exh. A, p. 28, lines 11-12]</u>.</p> | <p><b>footnote 2a</b> The Plaintiff disputes that he drilled into the lock, and testified that he rang the buzzer and went to leave when Posey opened the door. Ex. D, p. 102.</p> | <p><b>6.</b> The drilling woke Posey. Ex. B, Posey Dep., p.270; Pl. Compl. Ex. A, p. 5.</p> <p><b>At his deposition, Posey said he heard "drilling." T&amp;M's Ex. B, Posey Dep., p. 107. See Compl. Ex. A, p. 5, lines 22, where transcriber heard "drilling" after Gouin had already been handcuffed.</b></p> <p><b>Yet in his depo, Posey admitted that he saw Gouin "'unscrew' the lock from the door" [Exh. D, p. 77, line 22].</b></p> <p><b>See also T&amp;M's Exh. B, p. 271, lines 21-23, where Posey deposed, "I saw him remove it with a screwdriver after I called the police and we were waiting for the police officer." And Posey continued, "He removed the lock before the police arrived, I believe" [T&amp;M's Exh. B, p. 272, line 2-3]. Which is what Gouin said.</b></p> <p>On p. 5 of <u>Compl. Exh. A</u>, Posey speech is not memorialized; nor is there any discussion referring or related to Posey. Therefore, T&amp;M's reference to <u>Pl. Compl. Ex. A, p. 5</u> is curious.</p> |
| <p><b>23.</b> Plaintiff never asked either Toner or McMahon if he could tape the incident. Ex. D, p. 131.</p>                                                                                                                                                                                                                                                                             | <p><b>20.</b> Posey has never discussed the incident with the police officers, and had no conversation with anyone prior to calling "911". Ex. B, pp. 265-266.</p> <p>On p. 265, Posey did not say he "never discussed the incident with the police officers"; he said he did not recall doing that <u>[T&amp;M's Ex. B, p. 265, lines 10-11]</u>. In other words, he might have, he just does not remember whether he did. Similarly on <u>lines 2-3 on p. 283</u> of that exhibit</p> <p>Yet, Posey did go to the police department after the incident, but he did "not remember why," although it was related in some fashion to the incident <u>[Id. from p. 281, line 24, to-p. 283, line 3]</u>.</p> <p>The absence of "shavings" on the police report or the evidence list is noteworthy.</p>                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                    | <p><b>7.</b> When Posey heard the drilling noise, he went to the door, opened it, and saw the Plaintiff with a drill in his hand. Ex. B, pp. 107, 177, 271.</p> <p>This is a credibility question, a question for a jury. Discussed more, <i>infra</i>.</p> <p>See <u>Exh. D, p. 77, line 22</u>, where Posey admitted he saw Gouin UNSCREW the lock. See also <u>T&amp;M's Exh. B, p. 271, line 21-23</u>, where Posey deposed, "I saw him remove it with a screwdriver after I called the police and we were waiting for the police officer." And Posey continued, "He removed the lock before the police arrived, I believe" <u>[T&amp;M's Exh. B, p. 272, line 2-3]</u>. Which is what Gouin said.</p>                                                                                                                                                                                                                                                                                                      |

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| <p>25. Posey did not inform the officers that the Plaintiff had a tape recorder and was taping. Ex. B, p. 291</p>                                                                                                                                                                                                                                                                    | <p>21. Posey did not enter into a conspiracy with the officers against the Plaintiff. Ex. B, p. 283.</p> <p><b>This is a conclusion of law and not a proper statement of fact. Given</b></p> <ul style="list-style-type: none"> <li>• that T&amp;M's Statement 20 is untrue and</li> <li>• that neither Posey nor the officers answered the appropriate interrogatories or produced the appropriate documents in 2002 [see Gouin's Motions to Compel, Papers 84, 86, 87, 90],</li> </ul>                                                                           |  | <p>10. It became evident to officers Toner and McMahon that the Plaintiff had tried to obtain access to the condominium by drilling. Ex. A, pp. 13, 32-33, 35, 40, 44; 61-62; Ex. C; Ex. E; Ex. A to Pl. Compl., p.5.</p> <p><b>This is self-serving and involves two states of mind, making this a credibility question for a jury which must determine if there is support for the officers' conclusion. It is not a proper statement of fact.</b></p>                                                                                                              |
| <p>26. The officers first discovered that the Plaintiff had taped the incident, without their consent, at the police station. Ex. A, p.45; Ex. D, p. 156; Ex. E.</p> <p>NOTE: Although Gouin put this into the UNdisputed column, Posey did depose that he did "not know for sure" whether he told the officers that Gouin was already taping. <b>[Exh. D, p. 298, line 17].</b></p> | <p>Posey's recent admission in his deposition that he did have communication with the police after the incident [<b>T&amp;M's Ex. B, 281-283</b>] invites further inquiry on this subject, suggests that there had been discussions that could be construed as part of a conspiracy.</p> <p>24. Posey did not consent to Plaintiff taping their conversations. Ex. B, p. 266; Ex. D, p. 109.</p> <p>In his depo, Posey did not deny that Gouin asked for his consent. Posey said he did not recall him asking permission <b>[Exh. D, p. 179, lines 20-21].</b></p> |  | <p>11. The Plaintiff admitted to officers Toner and McMahon that he had drilled into the lock. Ex. A, pp. 33, 44-45, 62, Ex. E.</p> <p><b>Gouin absolutely did not admit to the officers that he had drilled into the lock. Statement #11 is but a parroting of the officers' perjurious testimony. Given that the entire event between Gouin and the officers was recorded, why, Gouin asks, is not the officers' counsel pointing to the pages and line numbers on which the alleged admission appears? She could not because there never was an admission.</b></p> |
| <p>27. Officer McMahon thought that Plaintiff's tape recorder was a cell phone. Ex. A, p. 45; Ex. E.</p>                                                                                                                                                                                                                                                                             | <p><b>"He was waiving [sic] the recorder in my face. Yes, I was aware that he was recording [id. at p. 180, line 2-3].</b></p> <p>Gouin denies waving the recorder and states that when Gouin asked for Posey's assent to his turning the recorder on, Posey never said yes or no, giving Gouin reason to assume Posey had consented. [<b>T&amp;M Exh. D, Gouin's Depo., p. 109</b>]</p>                                                                                                                                                                           |  | <p>12. The Plaintiff also told Posey that he had a right to be drilling into the property. Ex. B, p. 280.</p> <p><b>This is a credibility question, a question for a jury.</b></p>                                                                                                                                                                                                                                                                                                                                                                                    |
| <p style="text-align: center;"><b><u>Summary of Categories</u></b></p> <p>Three of the eight <b>Material Undisputed</b> facts state the purpose of Gouin returning to the marital home ["the condo"], where he was located when the police officers arrived at the condo, Gouin's perception that he found being handcuffed offensive because he did not want to be touched.</p>     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |  | <p>13. Officers Toner and McMahon saw substantial evidence that the Plaintiff had drilled the condominium lock, including the drill itself, the damaged lock, and metal shavings on the floor. Ex. A, pp. 32, 35, 36, 40, 44-45, 62.</p> <p><b>Gouin denies seeing shavings [T&amp;M Exh. D, p. 121].</b></p> <p><b>The officers also did NOT see the lockset until Gouin was booked at the station [T&amp;M Exh. D, p. 136].</b></p>                                                                                                                                 |

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| <p>The last five of the <b><u>Material Undisputed</u></b> facts are related to Gouin's tape recorder, that it captured the conversation of the event, that neither officer was asked for his consent or did consent to being taped, and that Posey did not tell the officers that Gouin was taping.</p> <p>Nowhere in their facts do the officers admit that Gouin's tape was already on before they arrived. Nor do they call attention to the fact that <u>T&amp;M's Exh. E, Toner's police report, p. 3</u>, reveals that "Officer McMahon observed the suspect holding what he thought was a cellphone." The remainder of the police report contains excuses to cover up McMahon's embarrassment for not having been able to distinguish between a cellphone and a tape recorder.</p> <p>Whether the taping violated the State wiretapping statute in these circumstances, i.e., where the tape was already recording <b><u>before</u></b> the police arrived, is an issue of first impression. Clearly the Suffolk County Office of the District Attorney determined that there was no violation, because no such charge was brought forward against Gouin – despite Officer Toner writing [on page 3] in his report that such a charge had been brought.</p> <p>The <b><u>Material Disputed</u></b> facts are about the 911 calls, the demeanor of the officers, the criminal complaint, Gouin's injuries, and the distancing of the police from Posey so as to derail the conspiracy claim.</p> <p>The <b><u>Immaterial Undisputed</u></b> facts are related to the physical items Gouin had with him when arrested.</p> <p>The <b><u>Immaterial Disputed</u></b> facts are primarily about Gouin's drill.</p> | <p>Assuming arguendo that the lock was drilled, it was Gouin's. He could do anything with it he desired. Possession of the drill to renovate a bedroom is lawful [T&amp;M's Exh. D, p. 96]. And if there were in front of the door metal shavings, as Toner contended for the first time a year after the incident, why were they not taken as evidence? Because there were none? Because there was no proof when those shavings got there? Because it was obvious they did not come from the lock? Clearly these are issues for a jury.</p> <p>15. The emergency calls and the evidence led the officers to conclude that the Plaintiff was not supposed to be at 58 Temple Street, and he was arrested. Ex. A, p. 56, 61; Ex. E; Ex. F, Boston Police Department Arrest Booking Form. The Plaintiff was told he was being arrested for breaking and entering. Ex. A, pp. 15, 49, 56; Ex. B, p.278; Ex. D, p.129.</p> <p>This is self-serving, fails to list what evidence they had, and involves two states of mind, presenting both fact and credibility questions for a jury, which must determine if there is support for the officers' conclusions. It is not a proper statement of fact.</p> <p>As to the B&amp;E, see <i>supra</i> T&amp;M's Statement #19 and Gouin's controverting statement and note 2, <i>supra</i>.</p> <p>28. Plaintiff attaches the transcript of the illegal tape to his complaint. Pl. Compl., Ex. A</p> <p>The above statement is a conclusion of law and not the type of fact contemplated by Rule 56.1. Notwithstanding that comment, Gouin states that the tape he recorded on January 5, 2001, is not illegal.</p> |
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**Toner and McMahon's facts as they relate to Counts 1, 2, and 3:** In sum, they challenge none of the facts that Gouin iterates in Counts 1, 2, and 3, Gouin therefore moves, pursuant to

F.R.Civ.P. 56(c) for partial summary judgment on those three counts on the issue of liability against Officers Toner and McMahon.

**Toner and McMahon's facts as they relate to Count 4:** The officers contend that Posey had no conversation with them after January 5, 2001. They themselves do not deny, however, having conversation with Posey after that date. In his oppositions to the motions to dismiss, Gouin did satisfy this court that he had made out a *prima facie* case of conspiracy. That *prima facie* case has not been challenged by the facts in the officers' Local Rule 56.1 list of facts.

Further, because conspiracies can be and generally are proven primarily with circumstantial evidence, the determination, at the very least, of whether a conspiracy existed must be given to a jury.

**Toner and McMahon's facts as they relate to Count 5:** Should this court grant Gouin a partial summary judgment on the issue of the officers' liability, then the City would also be liable for refusing or neglecting to prevent the deprivation of Gouin of his constitutional rights.

**Toner and McMahon's facts as they relate to Counts 6 through 13:** Defendant Officers Toner and McMahon challenge none of the facts that Gouin iterates in Counts 6-13. Gouin therefore moves for partial summary judgment on Counts 6 through 13 on the issue of liability against Officers Toner and McMahon.

## **Part II: LIST OF DISPUTED FACTS**

- 1. Whether Dori had a restraining order against Gouin to stay away from the Boston property ["the condo"].** In her "911" call to the police, Dori told the police on 5 January 2001 that she did [Pl. Compl. Exh. A., p. 5, lines 2-3<sup>5</sup>; T&M's Exh. C; see also Pl. Compl. ¶¶ 31-32. Compare Compl. Exh. B, p. 135, lines 3-8]. Gouin contends that she did not have an order from any court pursuant to any statute commanding him to stay away from the Boston property, i.e., the marital home, which she had vacated when moving to Maine during the previous Spring and Summer [Pl. Compl. ¶¶ 16-17, 33-35; Pl. Compl. Exh. B, p. 129, lines 18-19, and p. 157,

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<sup>5</sup> "She still has a current restraining order against him. He wasn't served, but it got slowed down in Court" [Pl. Compl. Exh. A., p. 5, lines 2-3].

line 11, through p. 158, line 24; and p. 201, line 21, through p. 202, line 8].<sup>6/</sup> Were there an order giving her exclusive use and possession of the property, Dori would not have needed a new 209A order to restrain Gouin from going there [Pl. Compl. ¶¶ 19, 33-35; Pl. Compl. Exh. B, p. 157, lines 11-23 and p. 158, lines 1-9].<sup>7/</sup>

2. **Whether Toner and McMahon knew or should have known whether Gouin was a co-owner of the condo.** At a probable cause hearing a year after the incident, Officer Toner denied knowing Gouin was a co-owner [T&M Exh. A., p. 30-31]. On 1/5/01, Todd told 911 that the condo was owned by both Dori and Jake [Pl. Compl. Exh. A., p. 1, lines 16-18], Jake told one officer (McMahon) the other officer (Toner) had a copy of the deed [Pl. Compl. ¶39; Pl. Compl. Exh. A., p. 4, line 16], on 1/5/01, Jake asked officer for a copy of the lease Todd claimed he had [Id., at p. 4, lines 23-25].
3. **Whether Gouin drilled into the condominium door.** Gouin denied drilling into the condo door [Pl. Compl. Exh. A, p. 5; T&M's Exh. D, p. 119, lines 7-11, 20-21]. Toner and McMahon assert as undisputed that Gouin did drill. See the officers' Statement #10 with the references they supplied for alleged support: Ex. A, pp. 13, 32-33, 35, 40, 44; 61-62; Ex. C; Ex. E. Toner and McMahon also assert that Gouin admitted to the officers that he had drilled into the lock and write that support for the statement may be found in Ex. A, pp. 33, 44-45, 62, Ex. E. **None** of the references supplied by the officers' counsel supports the assertions alleged by the officers. What happened is Dori, who was in Maine, told Toner, who told McMahon that Gouin had drilled [Pl. Comp. Exh. A, p. 5, lines 14-15]. Then Gouin was asked about whether he was drilling and he denied it both times [id. at lines 16-20]:

**POLICE OFFICER: He was drilling today too?**

**POLICE OFFICER: Yeah.**

**JAKE: No, I didn't drill yesterday. I had a locksmith.**

**POLICE OFFICER: I'm sorry you were drilling today too?**

**JAKE: No. Just – [interrupted by officer on other subject]**

**TABLE 2.  
TONER'S AND McMAHON'S REFERENCES ALLEGEDLY GIVING SUPPORT  
TO THE SO-CALLED UNDISPUTED STATEMENTS  
DO NOT SUPPORT THOSE STATEMENTS**

**TONER'S AND McMAHON'S REFERENCES FOR THEIR ASSERTION  
THAT GOUIN HAD DRILLED INTO THE LOCK**

| No. | T&M's References | line #s | Excerpts from exhibits | Gouin's controverting remarks |
|-----|------------------|---------|------------------------|-------------------------------|
|-----|------------------|---------|------------------------|-------------------------------|

<sup>6</sup> Merrill's admission is a "**judicial admission [which was] binding upon [her] client.**" Liacos, *Handbook of Massachusetts Evidence*, at §2.5, p. 34, citing *Lucia v. Water & Sewer Commissioners of Medford*, 332 Mass. 468 (1955); *Lewis v. Sumner*, 54 Mass. (13 Metc) 269 (1847) (judicial admission "may be made . . . by remarks or statements made by counsel during the trial.")

<sup>7</sup> Undisputed are the facts (a) that the 209A restraining order to which the judge was referring had expired on 13 December 2000, several weeks prior to Gouin seeking entry into the former marital home on 5 January 2001 and (b) that the new restraining order of January 4, 2001, had not yet been served [Pl. Compl. ¶ 36 and Pl. Compl. Exh. B, p. 136, lines 21-22].

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(with counsel's affidavit below and Gouin's affidavit in separate document)**

|   |                                                                                                           |             |                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|---|-----------------------------------------------------------------------------------------------------------|-------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | T&M's Exh. A, p. 13                                                                                       | lines 11-13 | <p><b>A. Yes, [Posey] said he was paying rent and he was living there, he had moved in, and that he was awakened by the sound of the door being drilled out.</b></p>                                                                                                                                                                                                                               | <p>Gouin testified and deposed that the squealing of the outer door may be mistaken for a drilling sound. The transcriber, too, thought so, and transcribed the door squealing as "drilling" when Gouin was already handcuffed and clearly unable to drill anything. <u>Pl. Compl.Exh.A. p. 5, line 22.</u></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 2 | <p><b>T&amp;M's Exh. A, p. 32</b></p> <p>Dori's lawyer, Raymond Sayeg, was questioning Officer Toner.</p> | lines 1-8   | <p><b>Q. Upon arriving at the scene, you went upstairs and saw the door yourself, correct?</b></p> <p><b>A. Yes, sir.</b></p> <p><b>Q. You saw a drilled-out lock, correct?</b></p> <p><b>A. Yes, sir.</b></p> <p><b>Q. You saw shavings on the floor in front of the lock?</b></p> <p><b>A. Yes, sir.</b></p>                                                                                     | <p>Toner could not have seen a "drilled-out lock." In his police incident report [T&amp;M's Exh. E], Toner wrote that it was while searching Gouin during the booking process that he "recovered" a "damaged lockset", as well as a drill and a screwdriver from Gouin's briefcase. See the word "eventually" on line 14. Eventually was at the booking process <u>after</u> the arrest of Gouin.</p> <p>Toner had no way of knowing <u>when</u> the "shavings," if any, had gotten on the floor. Gouin contends that if there were shavings, they got on the floor when Dori drilled the lock the day before. Gouin's contention is consistent with Posey's remark to the officers "She came in in the morning and she changed the locks back" [Pl.Compl. Exh. A, p. 3, lines 24-25].</p> |
| 3 | <p><b>T&amp;M's Exh. A, p. 33</b></p> <p>Dori's lawyer, Raymond Sayeg, was questioning Officer Toner.</p> | lines 7-10  | <p><b>Q. In fact, sir, do you recall where you found the lock to that door?</b></p> <p><b>A. My partner patted down Mr. Gouin, and the lockset was in his jacket pocket.</b></p>                                                                                                                                                                                                                   | <p>As noted above, on page 2 of Toner's BPD police report [T&amp;M Exh. E], Toner wrote that it was while searching Gouin during the booking process that he "recovered" a "damaged lockset", as well as a drill and a screwdriver from Gouin's briefcase.</p> <p>Clearly the pat-down was a fabrication for the probable-cause hearing<sup>8</sup></p>                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 4 | <p><b>T&amp;M's Exh. A, p. 40</b></p> <p>Gouin's lawyer, Johnson, was questioning Officer McMahon.</p>    | lines 8-17  | <p><b>... when you got to Temple Street, ... [w]hat did you do?</b></p> <p><b>A. ...we observed that the suspect was sitting on the stairs with the door lock drilled out, with the shavings on the ground.</b></p> <p><b>Q. And how did you conclude that the door lock was drilled out?</b></p> <p><b>A. I saw the drill sticking out of the suspect's little briefcase he was carrying.</b></p> | <p>McMahon stated on page 66:</p> <p><b>Q. When you got to the scene and you saw the drill, did you confiscate that drill?</b></p> <p><b>A. Yes, we did. When we got back to the booking desk, we confiscated it.</b></p> <p>In his affidavit, Gouin stated that his drill was not "sticking out of [his] briefcase." <b>[Gouin affidavit, Exh. M, ¶13, attached hereto].</b></p>                                                                                                                                                                                                                                                                                                                                                                                                          |

<sup>8</sup> . Whether Atty. Sayeg, who knew Gouin had subpoenaed Toner, knew that Toner would commit perjury is unknown. Gouin's counsel will not speculate on what might have been the ethical obligations of Toner's counsel, who was also present at the hearing, but did not examine any witnesses. The extent of Toner's preparation for the hearing is unknown.

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(with counsel's affidavit below and Gouin's affidavit in separate document)**

|    |                                                                                  |             |                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|----|----------------------------------------------------------------------------------|-------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5  | T&M's Exh. A, p. 44<br>Gouin's lawyer, Johnson, was questioning Officer McMahon. | lines 15-21 | <p><b>Q. Did you observe who drilled the lock?</b><br/> <b>THE COURT: No. Officer, did you ask Mr. Gouin if he drilled the lock?</b><br/> <b>THE WITNESS: I believe we did, your Honor.</b><br/> <b>THE COURT: And what was the response?</b><br/> <b>THE WITNESS: He admitted to it.</b></p>                             | <p>The intrusion and suggestibility of the Court's questioning led to a less-desirable result than that which might have been achieved by Johnson's direct questioning. Notwithstanding that observation, Officer McMahon answered to the suggestive question with a falsity.</p> <p>The tape and transcript of the January 5<sup>th</sup> event clearly show that Gouin never admitted to drilling the lock. Gouin was not allowed to impeach the witness McMahon with the tape or the transcript.<sup>9/</sup></p>                                 |
| 6a | T&M's Exh. A, p. 61<br>Gouin's lawyer, Johnson, was questioning Officer McMahon. | lines 16-22 | <p><b>Q. So you relied on what you heard from the dispatcher, and you relied on seeing something at the scene that you said were drill shavings, but you didn't see Mr. Gouin do it, so how did you, how did you make the leap between seeing the shavings and assuming that they were caused there by Mr. Gouin?</b></p> | <p>McMahon and Toner had <b><i>not two but five</i></b> sources of information upon which he could have relied:</p> <ol style="list-style-type: none"> <li>(1) Posey's 911 call,<sup>10/</sup></li> <li>(2) Dori's 911 call,<sup>11/</sup></li> <li>(3) Gouin's information to the officers,<sup>12/</sup></li> <li>(4) Gouin's paperwork (expired restraining order, envelope showing Dori's then-current address, a copy of the deed to the property of which Gouin was co-owner), and</li> <li>(5) McMahon's and Toner's observations.</li> </ol> |
| 6b | T&M's Exh. A, p. 62<br>Gouin's lawyer, Johnson, was questioning Officer McMahon. | lines 3-7   | <p><b>A. I believe the 911 call stated someone was drilling into the lock set, and when I saw the drill and the shavings there on the ground, I determined Mr. Gouin basically admitted that he did it.</b></p>                                                                                                           | <p>It was Dori who told the 911 call-taker [T&amp;M Exh. C]. Dori's words became the walking orders of the morning. The officer then used her interpretation of the evidence at the scene rather than their own observations and a proper interpretation of them.<sup>13/</sup></p>                                                                                                                                                                                                                                                                  |

<sup>9</sup> The hearing was to determine whether there was probable cause to bring a criminal complaint against Dori Chadbourne Gouin for false reporting to the police, pursuant to M.G.L. c. 269 §13A. Given that the officers had already been sued in the instant action, they appeared to be more interested in protecting their interests in this case than in revealing the truth about what actually happened on January 5<sup>th</sup>, 2001. Given that they were so cooperative with answering Attorney Sayeg's questions with untruths is circumstantial evidence that they had, indeed, been in communication with Posey, Dori, and her counsel prior to the hearing. As a result of the "new" story about "shavings," which are notably absent from each and every page of the incident reports, the focus of the hearing came off of Dori and onto the lock. The focus should have been on what Dori told the officers and whether the officers had probable cause to bring a false reporting charge against her and not whether there was probably cause to arrest Gouin. The case against Gouin had already been dismissed. The BMC judge was not aware of this until two-thirds of the hearing had been conducted [T&M Exh. A, page 69].

<sup>10</sup> If McMahon had paid attention to the 911 call, he would have known that Posey told the 911 call-taker, "It's owned. And I believe it's under both their names" [T&M Exh. C]. They would have known not to arrest Gouin for "breaking and entering his own property or for malicious destruction of property. It was perfectly lawful for him to go to his home at any time during any 24-hour period.

<sup>11</sup> Because Dori was in Maine, all of her information except that about the as-yet-unserved restraining order, was hearsay from Posey. Posey could talk for himself. Dori is the one who first used the word "drill." There is ***no*** evidence in the 911 transcript of Posey's call. Posey used the word only after Dori had told the officers – and, of course, the 911 call-taker [T&M Exh. C]. Thereafter, Posey was Charlie McCarthy to Dori's Edgar Bergen: As Dori told Posey something on the phone, Posey would turn and say it to Gouin [Pl. Compl. Exh. A, p. 2, lines 1-10].

<sup>12</sup> McMahon and Toner ignored what Gouin had to say and the paperwork he shared with them [Pl. Compl. Exh. A]. To ignore the male is invidious gender discrimination. Accustomed to working under the customary but official arrest-preferred policy, Toner and McMahon – Gouin contends – always ignore the male. Males are not to be listened to under the Domestic Violence Guidelines, BPD's DV rules and regulations. Had they listened to Posey or paid attention to Gouin's deed, the officers would have known that Gouin was a co-owner of the property, had a right to be there, and a right to enter

<sup>13</sup> On the morning of 5 January 2001, Dori told Posey and then Posey told the officers that Gouin had no legal

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|-----------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|--------------------------|-------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 7                                                                                                                                 | T&M's Exh. C<br>911 Incident History                                                |                          | "[Dori] . . . sts he has drilled his way into the address abv. illegally."                                                          | This exhibit proves that Dori is the person who made the accusation that Gouin drilled his way into the condo, <u>not</u> Posey, and who told the police that Gouin was there illegally.                                                                                                                                                                                      |
| 8                                                                                                                                 | T&M's Exh. E<br>Toner's police report                                               |                          | Replete with falsities.                                                                                                             | There are more inaccuracies in the police report than there are accuracies. Toner's and McMahon's testimony at the probable-cause hearing is in conflict with Toner's report and the January 5 <sup>th</sup> tape and transcript, as well as the 911 incident report.                                                                                                         |
| <b>TONER'S AND McMAHON'S REFERENCES FOR THEIR ASSERTION THAT GOUIN ADMITTED TO THE OFFICERS THAT HE HAD DRILLED INTO THE LOCK</b> |                                                                                     |                          |                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                               |
| 9                                                                                                                                 | T&M's Exh. A, p. 33<br>Dori's lawyer, Raymond Sayeg, was questioning Officer Toner. | lines 11-13              | <b>Q. Okay. And, in fact, did Mr. Gouin make a statement to you that he drilled out the lock?</b><br>A. Yes, he did. <sup>14/</sup> | The two times Toner could have heard Gouin was on 1/5/01 and at the probable-cause hearing at the BMC on 1/29/02. Both events were taped and transcribed and contain no admission of drilling by Gouin. Proof positive that Gouin made <b>NO</b> such admission. The officers' defense counsel points in T&M's Rule 56.1 Statement only to an officer's outright fabrication. |
| 10                                                                                                                                | T&M's Exh. A, p. 44<br>Gouin's lawyer was questioning Officer McMahon.              | lines 15-21              | See Item 5, <i>supra</i>                                                                                                            | See Item 5, <i>supra</i>                                                                                                                                                                                                                                                                                                                                                      |
| 11                                                                                                                                | T&M's Exh. A, pp. 44 and 45<br>Gouin's lawyer was questioning Officer McMahon.      | line 44:24-<br>line 45:2 | <b>Q. You're a hundred percent sure Mr. Gouin admitted to that, drilling the lock?</b><br>A. Yes.                                   | There is not one piece of paper that shows Gouin made such an admission. See Items, <i>passim, supra</i> . This is yet one more prevarication by one of the officers.                                                                                                                                                                                                         |
| 12                                                                                                                                | T&M's Exh. A, p. 62<br>Gouin's lawyer was questioning Officer McMahon.              | lines 3-7                | See Item 6b, <i>supra</i>                                                                                                           | See Item 6b, <i>supra</i>                                                                                                                                                                                                                                                                                                                                                     |

rights to be at 58 Temple Street [Pl. Compl. Exh. A, p. 2, line 7].

<sup>14</sup> Immediately after that answer, Attorney Sayeg asked, "Based on that information, you decided to charge him and arrest him at that time?" Toner replied, "Yes, sir." [T&M Exh. A, p. 33, lines 14-16]. Given that the statements in both Item 3 and Item 9 were gross falsities, Toner's affirmative reply to Sayeg was still another lie.

Toner perpetuated his lie at T&M Exh. A, p. 35, lines 16-17, in answer to Gouin's counsel's question on lines 10-11:

**Q. Did you arrest Mr. Gouin because you saw shavings on the floor?**

**A. No, ma'am, it was a preponderance of physical evidence. We also saw the damaged lock.**

**Q. And what was damaged about that lock?**

**A. It was drilled out.**

As noted above, Toner wrote in his report that he did not recover the "damaged lock" until the booking process. The so-called damaged lock could not have been the reason for Gouin's arrest. The most Toner could have seen was a hole where a lockset had been, but he had no reason to believe that it was Gouin who caused the hole. Toner had only spoken to Dori prior to arresting Gouin and Dori was in Cumberland Center, Maine, not in Boston. She had seen nothing in Boston on January 5<sup>th</sup>, 2001.

|    |                                     |  |                                                                                                                                                                                                                                                                                                |
|----|-------------------------------------|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 13 | T&M's Exh. E<br>BPD Incident Report |  | See Item 8, <i>supra</i><br><b>Replete with falsities.</b><br><br>There are more inaccuracies in the police report than there are accuracies. Toner's and McMahon's testimony at the probable-cause hearing and the January 5 <sup>th</sup> tape and transcript impeach the report thoroughly. |
|----|-------------------------------------|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

4. **Whether there were “shavings” on the floor in front of the condo door.** At a probable cause hearing, Officer Toner declared there were shavings on the floor in front of the door [T&M's Exh. A, p. 32, lines 6-8]. McMahon also testified there were “shavings on the ground” [Id., at p. 40, 12-13]. Neither Toner nor McMahon took the shavings for evidence of the alleged drilling and alleged breaking and entering [T&M's Exh. F, p. 4, inventory list].
5. **Assuming there were “shavings” on the floor in front of the condo door, when did they get there, on 4 January 2001, when Dori and/or Posey made entry to the locked condo, or on 5 January 2001, when Gouin went to the condo and found that his key would not turn in the lock?** At their depositions, both Dori and Posey deposed that a locksmith changed the lock on 1/4/01, but
- neither of them recalled the name of the locksmith or the company of the locksmith [**Exh. D, Posey's deposition, p. 38, lines 3, 12; Exh. E, Dori's deposition, pp.122, 130**],
  - neither of them recalled who called the locksmith [**Exh. D, p.38, line 14; p. 39, lines 2-3; Exh. E, pp. 121-123**]; Posey did not know who arranged for the locksmith [**Exh. D, p.61, line 16**]. At **Exh. D, p. 61, line 22**, he did not recall who met the locksmith at the condo. At **Exh. D, p. 39, line 19**, he did not recall whether he or Dori were at the condo first,
  - neither of them recalled which of them paid the locksmith [**Exh. D, p. 38, lines 5-6** (“I didn't pay the lock -- oh, I don't know if I paid the locksmith”); **lines 8-9** (“Either Dori or I paid the locksmith, but I don't know how he was paid”); **p. 61, lines 5-7, 19; and also on p. 79, line 5. [Exh. E, pp. 130, 132]**]. Posey also did not recall buying the lock [**Exh. D, p. 62, line 7**],
  - Dori did not recall the amount either one of them paid the locksmith [**Exh. E, pp. 132, 136-137**], but Dori wanted \$140 for replacing the lock [**Exh. E, p. 139**] and she did not know what kind of a lock was bought [**Exh. E, pp. 156-157**].
  - Dori did not recall whether the locksmith was paid in cash or by check or credit card [**Exh. E, pp.130, 133-134, 151**],
  - neither of them produced a receipt or a cancelled check for the payment of the locksmith [**Exh. D, p. 38, lines 2-9; Exh. E, p. 130**]; neither of them produced Gouin's lock that was removed on January 4, 2001 by either Dori or Posey,
  - Dori did not recall what the locksmith looked like – other than male, average, and Caucasian [**Exh. E, pp. 129, 131, 150**] – and did not recall what the locksmith wore for clothing [**Exh. E, p.131 (a jacket, maybe)**],
  - Posey admitted that Dori changed the lock [**Posey's Answer to Complaint at ¶19**]

(Paper #58)].

- Dori does have a drill, a non-functioning one, she claims [**Exh. E, p.155**],

However, on January 5<sup>th</sup>, Posey told one of the officers (believed to be Toner), “[Dori] came in in the morning and she changed the locks back” [Pl. Compl. Exh. A, p. 3, lines 24-25]. He said nothing of a locksmith. Gouin deposed that Dori possessed a drill, a larger and more powerful drill than Gouin had [**Exh. M, ¶15, Gouin's affidavit**].

6. **Whether Posey gave his consent to the tape-recording by Jake.** During his deposition, when asked what he said to Posey while he was in the entryway, Gouin answered, “I told him I wanted to start the tape recorder, and he didn’t object to that so I started the tape recorder. And then everything else that was said was on the tape in that transcript” [T&M Exh. D, Gouin’s depo., p. 104, lines 2-6]. At his deposition, Posey claimed that Gouin was “waiving the tape recorder” [**Exh. D, Posey's depo, p 180; Posey's Answer to Complaint, dated 2 May 2002, ¶¶ 22, 28, 65,73 (Paper #58)**].
7. **Whether McMahon or Toner listened to Gouin on 5 January 2001.** The little or no attention the police pay to the accused male is indicative of the invidious gender discrimination against men practiced habitually by the police as a result of their alleged training in how to respond to alleged domestic violence incidents. [See **Exh. G, Office of Justice Grant to Encourage Arrest Policies and Enforcement of Protection Orders Program; Exh. H, 42 U.S.C. §10409, Appropriations; Exh. I, 42 U.S.C. §10410, Grants for State domestic violence coalitions; Exh. J, 42 U.S.C. §10415, Model State leadership grants for domestic violence intervention**].<sup>15/</sup> See also **Exh. K, Domestic Violence Law Enforcement Guidelines 2002 (Revised)**. The Boston Police Department DV guidelines are almost identical to the latter, and for that reason are not included here.
  - Gouin gave Toner copies of the deed to the property and the expired RO [**Exh. A, p. 4, lines 16-17; T&M's Exh. A, p. 70, lines 18-19; p. 74, lines 17-19, 24; p.75, line 1**]. At the probable-cause hearing, Toner denied seeing the deed [T&M's Exh. A, p. 26, lines 9, 11], despite Toner having told him that he was putting Gouin's paperwork into his briefcase [Compl. Exh. A, p. 10, lines 1-2]. Posey saw Gouin give the expired RO to “one of the officers: (he did “not remember which”) [**Exh. D, p. 275, lines 19-20**],
  - Gouin showed McMahon the envelope and pointed to the return address, which was Dori's Maine address [Pl. Compl. ¶ 39, Compl. Exh. A, p. 4, lines 15-18], and told McMahon that he had given copies of the deed and the expired restraining order to Toner [*id.*]. At the probable-cause hearing, McMahon averred that he did not know about the deed [T&M's Exh. A, p. 46, line 19].

<sup>15</sup> The custom and policy of the police is to treat all calls between a husband and a wife as a Domestic Violence call, whether or not the event is “violent.” This one was treated as a full-fledged DV call, with the preferred-arrest policy running at full throttle [T&M's Exh. C] even though Posey clearly told the 911 call-taker that it was not violent: “[I]t's not violent.” [ **Transcript of 911 tape, Exh. C, line 5, attached hereto**].

- Gouin told the officers that he wanted to see Posey's "lease or something along those lines" [Compl. ¶40; Pl. Compl.Exh. A, p. 3, lines 23-25]. Both McMahon and Toner ignored his request [T&M Exh. A], but admits that Gouin made the request,
- it was undisputed that Dori's new RO had not been served, yet each officer told Gouin he had no right to be at the condo [Compl.Exh. A, p. 5, lines 24-25; p. 9, line 8]:

POLICE OFFICER: . . . you're really not suppose to be here [Exh. A, p. 5, lines 24-25].

POLICE OFFICER: . . . you're not suppose to be at this residence. Okay. [Exh. A, p. 9, line 8].

Invidious gender discrimination, at an all-time high in the family-law courts and succored by law enforcement, is also pronounced by the lack of services for abused men; e.g.:

#### H. Referrals

1. Provide information, including phone numbers, about local resources such as the battered women's programs, for emergency shelter and counseling services. Also, officers should know whether it is the District Attorney's Office or the local battered women's program (or both) that administer the advocacy program to assist domestic violence victims in the local court. Provide the advocate's number(s) to the victim.
2. It is advisable that departments have referral information preprinted, so that it can be distributed along with the Abused Person's Notice of Rights card. Referral information can be typed onto the card, or stapled to it.

**Figure 1.**  
***Domestic Violations Guidelines, sec. 4.1, p. 16 (Exec. Off. Pub.Safety, 2002)***

Under the domestic violence laws, the males of society are a protected class and entitled to have their claims subject to strict scrutiny by this court.<sup>16/</sup> Males are so distinct in this Age of Hysteria that boys have to suffer "Boys Are Stupid" T-shirts and an attorney-general has sponsored a contest in which children must disparage their fathers to win. The winning pictures were to be displayed on highway billboards. A promo billboard is in Figure 2. This court must acknowledge that discrimination against males is invidious, and that invidious discrimination was at work when Toner and McMahon arrested Gouin without a warrant and without probable cause and without a crime having been committed.

8. **Whether Defendant Toner swore out and signed the Complaint alleging that Gouin (a) maliciously destroyed property (the lock attached to Gouin's real property), (b) had possession of burglarious tools (Gouin's drill), (c) attempted to violate a 209A and (d) violated a 209A order.** See **Exh. B.** By describing at Statement #19 a complaint with dif-

<sup>16</sup> Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 1993.SCT.40439 at ¶91, ¶91 nn. 15-18 <<http://www.versuslaw.com>>; (1993) (women seeking abortions are not a class for purposes of §1985(3)).

To satisfy the class-based animus requirement of § 1985(3), the conspirators' conduct need not be motivated by hostility toward individual women. As women are unquestionably a protected class, that requirement -- as well as the central purpose of the statute -- is satisfied if the conspiracy is aimed at conduct that only members of the protected class have the capacity to perform. It is not necessary that the intended effect upon women be the sole purpose of the conspiracy. It is enough that the conspiracy be motivated "at least in part" by its adverse effects upon women.

Id. ¶96.

ferent charges, the officers implicitly denied swearing out a criminal complaint for these four charges. In his Answer at ¶55 (Paper 51), Toner wrote:



*Figure 2.*

**A billboard in Michigan.**

**It would never have been conceivable but for the federal government and its bonus incentives to the individual States to enact and enforce cognate State laws encouraging arrests and the hate of all men who are dads.**

The Defendant admits he signed an application for criminal complaint against the Plaintiff for (a) malicious destruction of property; and (b) possession of burglarious tools. The Defendant denies the remaining allegations contained in paragraph 55 of the Complaint.

In his Answer at ¶55 (Paper 50), McMahon wrote:

The Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 55 of the Complaint.

Clearly there is a dispute as to the charges brought against Gouin. As members of the prosecution team, they have avoided identifying who of that team caused Gouin to be charged with violating other criminal statutes. Another BPD officer's name is on the application, but it is not clear he is the individual who added the two 209A counts. Of course, it might have been a member of the Office of the Suffolk County District Attorney ["DA"]. But who made the decision not to charge Gouin with the crime for which he was arrested?

Gouin's hairy assertion is that someone from the DA told the BPD officers that where Gouin owned the property, he could not be charged with B&E, day or night, of the property – as Toner wrote in his police report – or with "to gain entry" – as McMahon told Gouin while arresting him. So there was no probable cause to arrest Gouin on the bases that either Toner or McMahon gave.

#### **4.2 THE ROLE OF THE SUPERVISOR**

##### **A. Assurances for practice**

Supervisors will ensure that the provisions of the statute and these guidelines are met. Specifically supervisors will assure that:

1. Dispatch logs will be reviewed to ensure that an incident report has been filed, even in cases where no arrest was made. Calls, which are received as allegations of domestic violence or a domestic disturbance, will not be reclassified because no probable cause to arrest existed. Incident reports **will be filed** in those cases.
2. A supervisor, or his or her designee within the department who is specially trained to review domestic violence cases, in order to ensure that the provisions of M.G.L. c. 209A and these guidelines are met will carefully review incident and arrest reports. If upon review of an incident report it is believed that probable cause exists, the supervisor will ensure that criminal charges are initiated according to the statute and these guidelines.
3. Whenever a department identifies a particular case as posing significant danger, that case will be discussed at roll call.

##### **B. Referrals**

Supervisors will ascertain that appropriate referrals were provided to the victim.

##### **C. Follow-up investigations**

Regarding follow-up investigations, supervisors shall:

1. Determine whether a follow-up investigation is needed. For instance, if the report indicates a history of abuse, it is likely that additional criminal charges should be pursued.
2. If so indicated, the supervisor shall ensure that a follow-up investigation is

**Figure 3.**  
***Domestic Violations Guidelines, sec. 4.2, p. 18 (Exec. Off. Pub.Safety, 2002)***

And now Toner or McMahon admit that there was no active 209A restraining order, and the ADA agreed to dismiss those charges when the ADA learned of that fact.

And, of course, Toner and the DA's office had no bases to bring the two charges Toner does admit to bringing against Gouin, namely, malicious destruction of property and possession of burglarious tools. Assuming *arguendo* that Gouin drilled a lock, it was his lock, it had been attached to *his* real property, and he could do to it as he wished. There was absolutely no malicious destruction of property . . . which is the reason the DA also dismissed that count. The second charge that Toner admits bringing, possession of burglarious tools, is based on Gouin's drill being deemed at some point in the future a burglarious tool. Well, we know a shoe can be a weapon if the foot when shod kicks someone but the shoe is a shoe is a shoe when it is used for walking. Similarly, with a drill. A drill used for renovating a bedroom, which is what Gouin had been in the middle of doing, is but a drill. Without a charge of burglary being brought against him, his drill cannot be deemed a burglarious tool. So the DA dismissed that count, too.<sup>17/</sup>

<sup>17</sup> Crackel v. Allstate Insurance Company, 92 P.3d 882, 429 Ariz. Adv. Reports 13 (App.Div. 2, 2004) ("We also conclude that a litigant may commit abuse of process while merely defending an underlying action"); Nienstedt v. Wetzel, 651 P.2d 876, 881, 133 Ariz. 348 (App. 1982) (Claims of abuse of process need not pre-date the present complaint. "It is the subsequent misuse which constitutes the misconduct for which liability is imposed"); Ghotra v. Bandila Shipping Inc., 113 F.3d 1050, 97 Cal. Daily Op. Serv. 3567 (9th Cir. 05/13/1997). Morn v. City of Phoenix, 152 Ariz. 164,

9. **Whether Defendants City of Boston and Boston Police Department negligently trained Defendants Toner and McMahon.** Their supervisors at every level failed to perform their responsibilities. See Figure 4, *infra*, an excerpt from the Executive of Public Safety Domestic Violence Guidelines, as revised in 2000. In this case, the officers arrested a man for breaking and entering his own house, but the DA evidently declined to bring that unsustainable charge against Gouin [**Exh. B, criminal complaint**]. Toner's application for the malicious destruction of property also failed, for the property was attached to Gouin's own real estate [**Exh. B, application**]. His supervisor(s) should have caught that equally unsustainable charge, for, notwithstanding Gouin's denial of destroying anything. And Toner's charge of possession of burglarious tools suffered the same fate. Without a charge of burglary, Gouin's tools were simply tools, not burglarious tools. Toner now denies responsibility for the two 209A related charges and is evidently unwilling to acknowledge his obligation as a member of the prosecution team. His supervisor(s) should have caught those charges, too, as being improper, for there were no active ROs against Gouin on January 5<sup>th</sup>, 2001.

Further, Toner and McMahon thoughtlessly treated the incident as a Domestic Violence incident, although it was not one. Dori, Gouin's wife, was in Maine. She was in no danger of imminent physical harm. And Todd Posey, who apparently had been allowed by his step-sister Dori to be in the house on January 5<sup>th</sup>, did not have a 209A order against Gouin. Nor could he have had one. He had no standing to be granted a 209A RO against Gouin: Posey was neither a member of Gouin's family nor someone with a requisite relationship with Gouin. As **Exh. C, transcripts of the two 911 calls**, reveals, Posey explicitly told the BPD 911 call-taker: "[I]t's not violent." Toner and McMahon's supervisor(s) should have taken note of that legal and procedural problem.

10. **Whether there was a reasonable, valid basis for the warrantless arrest of Gouin on 5 January 2001 by BPD Officers Toner and McMahon.** See discussion, *supra*.

**B. Arrest: mandatory or preferred**

An officer's authority or mandate to arrest is set forth in M.G.L. c. 209A, § 6 (7).

1. In the interest of immediacy, and the statutory mandate to arrest, officers shall make a warrantless arrest of any person the officer witnesses or has probable cause to believe has violated an emergency, temporary or permanent vacate, refrain from abuse, stay away or no-contact order or judgment, a suspension and surrender order, or protection order issued by **any** jurisdiction.
2. When there are no refrain from abuse, vacate, stay-away or no-contact orders or judgments in effect, arrest shall be the preferred response whenever an officer witnesses or has probable cause to believe that a person:

*Figure 4.*

**Domestic Violations Guidelines, sec. 3.3 p. 9 (Exec. Off. Pub. Safety, 2002).**

**The underlined words are underlined in the original.**

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730 P.2d 873 (liability established where legal process used to accomplish a purpose for which it is not designed). Summary judgment is not appropriate where issues of negligence and motive are involved. Ghotra. See also Town of Port Deposit v. Petetit, 113 Md. App. 401, 414 (1997) (matter was not suited for summary judgment because it involved issues of intent and motive, and inferences were to be drawn by a jury).

11. **Whether the tape of the arrest was legal or illegal.** Defendant officers contend that it is illegal Gouin contends it is legal. It was not being secretly recorded. Gouin began taping prior to the arrival of the police officers at the condo. Posey alleged that Gouin was waiving the tape recorder in front of him. Gouin denies this [**Exh. M, ¶¶17-18, Gouin Affidavit**]. The officers walked in on a session between Posey and Gouin which Gouin was recording. The officers were simply not observant. McMahon saw the recorder in Gouin's hand. He thought it was a cellphone and never asked Gouin to stop recording [**T&M's Exh. E**].
12. **None of the facts averred by Gouin in his count for malicious prosecution has been controverted by Officers Toner and McMahon or the City of Boston.** Gouin seeks, pursuant to F.R.Civ.P. 56(c), partial summary judgment as to liability for this cause of action against them.
13. **None of the facts averred by Gouin in his count for malicious abuse of process has been controverted by Officers Toner and McMahon or the City of Boston.** Gouin seeks, pursuant to F.R.Civ.P. 56(c), partial summary judgment as to liability for this cause of action against them.
14. **None of the facts averred by Gouin in his count for violating his rights under the Massachusetts Civil Rights Act (M.G.L. c. 12, sec. 11I) has been controverted by Officers Toner and McMahon or the City of Boston.** Gouin seeks, pursuant to F.R.Civ.P. 56(c), partial summary judgment as to liability for this cause of action against them.
15. **None of the facts averred by Gouin in his count for false arrest and imprisonment has been controverted by Officers Toner and McMahon or the City of Boston.** Gouin seeks, pursuant to F.R.Civ.P. 56(c), partial summary judgment as to liability for this cause of action against them.
16. **Whether Officer McMahon kicked the jail cell in which Gouin was sleeping.** [**Pl. Compl. ¶108**].
17. **None of the facts averred by Gouin in his count for battery has been controverted by Officers Toner and McMahon or the City of Boston.** Gouin seeks, pursuant to F.R.Civ.P. 56(c), partial summary judgment as to liability for this cause of action against them.
18. **Although none of the facts averred by Gouin in his count for conspiracy has been explicitly controverted, some of them, however, appear to be implicitly controverted.** Where implicit controverting is insufficient to overcome Gouin's explicit and overwhelming circumstantial evidence for this cause of action, Gouin seeks, pursuant to F.R.Civ.P. 56(c), partial summary judgment as to liability is appropriate for this cause of action.
19. **None of the facts averred by Gouin in his count for intentional infliction of emotional distress has been controverted by Officers Toner and McMahon or the City of Boston.** Gouin seeks, pursuant to F.R.Civ.P. 56(c), partial summary judgment as to liability for this cause of action against them.

WHEREFORE, Gouin prays Toner and McMahon's motion for summary judgment be DENIED.

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

30 November 2004

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

**AFFIDAVIT BY BARBARA C. JOHNSON**

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.

I also hereby depose that all exhibits attached to Gouin's Local Rule 56.1 Statement of Facts in Support of his Opposition to Defendants Toner and McMahon's Motion for Summary Judgment and referred to in the within pleading are true and accurate copies of those I have kept in the ordinary course of business.

Sworn under the pains and penalties of perjury.

30 November 2004

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