

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, OPPOSITION TO**  
**DEFENDANTS TONER AND McMAHON'S MOTION FOR SUMMARY JUDGMENT**  
**(with counsel's affidavit; Gouin's affidavit is Exhibit M attached to his 56.1 facts)**

Now comes François Gouin, Jr. ["Gouin"], and opposes Defendants Toner and McMahon's Motion for Summary Judgment.

As grounds for his opposition, Gouin states there are genuine issues of material facts, some of which go to intent and motive and all of which must be tried to a jury.

In support, Gouin incorporates by reference the facts set forth in his opposition to Toner and McMahon's Local Rule 56.1 Statement of Facts.

**ARGUMENTS**

**1. Where Toner and McMahon deprived Gouin of his clearly established constitutional rights and their conduct was not objectively reasonable, qualified immunity is not available as protection for them.**

Given that it is undisputed that Gouin was deprived of clearly established constitutional rights, the question remaining is whether Toner's and McMahon's actions were reasonable. De-

defendants cite St. Hilaire v. City of Laconia, 71 F.3d 20, 24 (1st Cir. 1995), for this proposition.

While, according to St. Hilaire, at 24, mistakes are precluded from being deemed unreasonable, incompetence is not. "Qualified immunity protects `all but the plainly incompetent OR those who knowingly violate the law.'" Anderson v. Creighton, 483 U.S. 635, 638 (1987), quoting Malley v. Briggs, 475 U.S. 335, 341 (1986).

So, what did Toner and McMahon know and when? And what then did Toner and McMahon do? Were their actions objectively reasonable? To answer those questions, the following actions require scrutiny.

1. McMahon testified that he and Toner<sup>1</sup>/ relied on two things, to wit, "[o]n what the 911 call stated, and what we observed at the scene" [T&M's Exh. A, p. 61, lines 10-11; also lines 13-15]. Given that Gouin gave McMahon a copy of a deed to the property which showed that Gouin and his wife, Dori, were joint owners, was it reasonable for McMahon to avoid using that knowledge and to arrest Gouin for being at his home [Compl. Exh. A, p. 7, lines 7-9] ? No.

And given that Gouin told Toner that he had given McMahon a copy of the deed and that McMahon was holding it at that moment [T&M's Exh. A, p. 4, line 16], was it reasonable for Toner to avoid using that knowledge,

- (a) to arrest Gouin for being at his home [Compl. Exh. A, p. 7, lines 7-9],
- (b) to charge Gouin with maliciously destroying his own property, to wit, the lock, which became Gouin's jointly with Dori the moment the lock was inserted into the front door of his residence [Compl. Exh. A, p. 7, lines 8-9],
- (c) to charge Gouin with breaking and entering his own home [Compl. Exh. A, p. 7, lines 11-12] ?

No. Toner's actions were also not reasonable.

2. Todd Posey phoned 911 [T&M's Exh. C, p. 4, line 16] and informed the 911 call-

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<sup>1</sup> McMahon used the pronoun "we." Given that Toner was his partner, Gouin assumes that McMahon was speaking for both officers.

taker that there was “a domestic disagreement [and] . . . it's not violent.” [Exh. C (page 1 of 3)].

Gouin's Opposition to T&M's Local Rule 56.1 Statement of Fact.<sup>2/</sup> Given that Todd was the stepbrother of Gouin's then-estranged wife and not one of the family or household members in Figure 1 who had standing to be granted a restraining order pursuant to M.G.L. c. 209A, he could not be a person with a valid 209A restraining order and could also not be calling about a domestic disagreement that was subject to the domestic violence statute.

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| <p><b>B. Family or household members</b></p> <ol style="list-style-type: none"><li>1. Persons who are or were married to one another;</li><li>2. Persons who are or were residing together in the same household;</li><li>3. Persons who are or were related by blood or marriage;</li><li>4. Persons who have a child in common regardless of whether they have ever married or lived together; or</li><li>5. Persons who are or have been in a substantive dating or engagement relationship*.</li></ol> <p>*Includes same sex relationships.</p> |
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| <p style="text-align: center;"><b>Figure 1</b><br/><b><i>Domestic Violence Law Enforcement Guidelines 2000 (revised), §2.1(b), p. 5</i></b><br/><b><i>and substantively the same on page 1 of Boston Police Academy Training</i></b><br/><b><i>Bulletin 5-90, entitled Reporting Procedures for Cases of Domestic Violence</i></b></p> |
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Was it reasonable for Toner and McMahon (a) to tell Gouin that he was “not suppose [sic] to be here” [Compl. Exh. A, p. 7, lines 11-12] and (b) to charge Gouin with an “attempt to commit the offense of Violation of a 209A Order and Trespass, pursuant to M.G.L. c. 274, §6, when Posey, the named “victim,” did not have a 209A RO against Gouin? No, of course not. See **Exh. B (the Application for Complaint at p. 1 of 5, attached to Gouin's Opp to T&M's 56.1 Facts)**, the field labeled “**NAME OF VICTIM,**” in which Todd Posey's name appears.<sup>3/</sup>

Was it reasonable for Toner and McMahon to charge Gouin with a violation of an abuse prevention order, pursuant to M.G.L. c. 209A, §3B, when Posey, the named “victim,” did not

<sup>2</sup> Hereafter abbreviated as [Gouin's Opp to T&M's 56.1 Facts]. Exhibits attached to Gouin's 56.1 Facts are boldfaced.

<sup>3</sup> The fact that Dori had a restraining order that had not yet been served is irrelevant. She was three hours away in Maine, had no basis for the new restraining order, and Gouin was nowhere near her.

have a 209A RO against Gouin? No, of course it was not reasonable. Toner was not even able to name a victim of the alleged violation of the non-existent restraining order. *See* the blank field labeled “**NAME OF VICTIM**” for the fourth charge on the application. Was it objectively reasonable for Toner to charge a violation of a 209A without a victim? No, not at all reasonable.

Was it reasonable for Toner and McMahon to charge Gouin, pursuant to M.G.L. c. 266, §49, with possessing a burglarious tool, to wit, his drill for use in completing the renovation of the back bedroom, when there was no charge of burglary or breaking and entering? No, no. This is also not reasonable. This is analogous to deeming a shoe a dangerous weapon when there has been no kick. A shoe ordinarily is a shoe is a shoe is a shoe, good for walking. Significant, too, is that there was no victim. On the application, Toner wrote the Commonwealth was the victim. Is it objectively reasonable to conclude that the Commonwealth is injured or victimized by someone who is carrying an ordinary drill used in construction, without anything more?

Was it reasonable for Toner and McMahon to charge Gouin, pursuant to M.G.L. c. 266, §127A, with the malicious destruction of “**VICTIM TODD POSEY'S**” lock (over \$250) when Posey did not even own the lock? No, of course not. *See* Posey's admissions that he neither bought nor paid for the lock, nor knew the cost of the lock [**Exh. D, attached to Gouin's Opp to T&M's 56.1 Facts, p. 38, lines 5-6, 8-9; p. 61, lines 5-7, 19; p. 62, line 7; p. 79, line 5**].

Was it reasonable for Toner and McMahon to change the alleged victim from Posey in the Application for Complaint to Gouin's estranged wife, Dori Gouin, in the Criminal Complaint for the first of the four charges? *See* **Exh. B, the Criminal Complaint at p. 3 of 5, attached to Gouin's Opp to T&M's 56.1 Facts**. She was not named a victim in the Application for Complaint. **Id., at p. 1 of 5**. Who changed the victim from Posey to Dori? Someone who typed the Complaint or someone from the Boston Police Department or the BMC's Clerk's Office or the Office of the Suffolk County District Attorney?

While the “who” may never be known, it was clearly someone who knew that Posey did not own the lock that was in the front door of the subject Boston real property owned jointly by Gouin and his wife! But whoever did change “Posey” to “Dori” did not understand—at least, so it appears -- that because the condo was jointly owned by Gouin and Dori, so was the front-door lock, too, jointly owned! Because the lock was as much Gouin’s as it was Dori’s, Gouin could not be charged with maliciously destroying it!

It appears also that neither Toner nor McMahon had been properly trained to know the subtleties of property or criminal law. And if they had been properly trained and they *did* know those subtleties, then they ignored them and invidiously discriminated against Gouin and brought criminal charges against him because he was a male.

Toner and McMahon had, after all, been instructed, as other police officers are, to arrest as often as possible and to keep accurate records of those arrests made under the Domestic Violence laws. Those records would be used by the City of Boston and the Commonwealth to comply with not only the State law but also Chapter 110, Family Violence Prevention and Services, of Title 42 of the United States Code. *See, e.g., Exhs. H, I, J, and G, attached to Gouin's Opp to T&M's 56.1 Facts.*

To increase the number of arrests was the mutual goal. The loyal police officers would benefit personally by being paid time-and-a-half for court time, the time they would spend in court during the prosecution of each case, whether validly brought forward or not. The goal of the City and the Commonwealth was to receive more money from the federal government the following year. This is the dark reason the police – not only in Area A-1 but across the Commonwealth – refuse to enforce M.G.L. c. 269, §13A, false reporting to the police: it would cut down on the number of arrests and convictions. Gouin knows Area A-1 refuses to enforce a 269:13A, for he tried many times to get the police to bring a false-reporting charge against his estranged wife.<sup>4</sup>

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<sup>4</sup> This was the primary reason for Gouin and his counsel contacting Margot Hill, commander-in-chief of the Domes-

In this case, the City of Boston had, in FY2000, received a grant from the Encourage Arrest Policies and Enforcement of Protection Orders Program [**Exh. G**], and therefore had contractual obligations to meet. So Toner and McMahon were but one of the many police partnerships striving to increase their contribution to the municipal police department.<sup>5/</sup> In fact, as the data in the margin at note 4 demonstrate, the Commonwealth has received as much as \$148,653,543 from as many as 430 grants in one year. Multiple grants, multiple programs, all favoring women and the arrest and conviction of men. Many of the men are as innocent as Gouin has been. They are simply fungible consumables for law enforcement entities to use as statistics to attract money from the federal government.

Was it objectively reasonable for Toner to listen to Dori, who was calling from Maine, where she had moved with the children to and was employed there? *See* Compl. ¶¶16-17. Dori certainly could not have been in fear of imminent, serious physical harm by Gouin's attempt to access his own Boston residence. To Gouin, the condo had been vacant since Dori and the children left half-a-year earlier. It was only around that fortuitous date, January 3d, that he saw boxes in it, which made it appear that Posey was using it as a storage place for his belongings. Gouin had shown McMahon the envelope with Dori's then-current Maine address as the return address [Compl. Exh. A at 15-18]. Was it objectively reasonable for Toner and McMahon to ignore this important piece of evidence? No! The person with the temporary still ineffective RO was Dori, not Posey, and she was in Maine, not on Beacon Hill in Boston. And the person who was storing boxes was Posey, but he had no lease, a fact which Toner and McMahon ignored. Was it objec-

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tic Violence Unit of the Bureau of Investigative Services of the Boston Police Department

<sup>5</sup> The following statistics were procured from <http://www.ojp.usdoj.gov/fy2003grants/map/ma.htm#top>, <http://www.ojp.usdoj.gov/fy2002grants/map/ma.htm#top>, <http://www.ojp.usdoj.gov/fy2001grants/map/ma.htm#top>, and so on. In FY 2003, for example, the Commonwealth received \$148,653,543 from a total of 411 grants. In FY2002, the Commonwealth received \$110,312,028 from a total of 430 grants. In FY2002, the City of Boston law enforcement received from the Enforcement of Protection Orders Program \$2,456,876 in grants for discretionary use. Grant #1999WEVXK009. In FY2001, the City of Boston law enforcement received from the Enforcement of Protec-

tively reasonable for them to have ignored the fact that Posey had no lease, no paper to say that he was there lawfully? All they had was a female voice from Maine on a phone. Was it objectively reasonable for Toner and McMahon to listen to her – simply because she was a female – and ignore both Gouin's documentary evidence of ownership and an expired RO, as well as the physical evidence of the condo being unlivd-in and its back bedroom being renovated – simply because he was a male?

Was it objectively reasonable for Toner and McMahon to believe the female, Dori, that the condo was occupied by her brother, when the condo was devoid of furniture, i.e., that is, there were no tables, no chairs, no beds, no clothes in the closets, no food in the refrigerator? All this being provable by photos taken on January 3d, two days prior to the offending event of January 5<sup>th</sup>, 2001, and produced to the defense counsel. See **Exh. F, photos, attached to Gouin's Opp to T&M's 56.1 Facts**. See **Exh. D, Posey's deposition, p. 72, lines 21-23; p. 73, lines 1-4, 10, 16-23** (no picture of an air mattress, for it was not there). Gouin's estranged wife, Dori, did not have exclusive use of that property [Compl. ¶¶ 33-35; Compl. Exh. B, p. 129, lines 18-19; p. 157, lines 11-23; p. 158, lines 1-9; p. 201, lines 1-9 through p. 202, line 8]. Was it objectively reasonable for Toner and McMahon not to investigate who owned the property and not to try to learn whether there was an order to stay away from the condo which Gouin was allegedly violating? Again, No.

It certainly was not objectively reasonable to arrest, strip search, and falsely imprison a man on a charge of violating a restraining order that was non-existent, and to name someone, Posey, as a victim who never had a restraining order against the man, Gouin. No, it was not. Toner and McMahon simply arrested Gouin because he would be another profitable statistic for the City and its police department . . . as well as for the Commonwealth.

For the above reasons, Toner and McMahon are not entitled to qualified immunity. In

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tion Orders Program an Enhancement Grant Award of \$350,000. See **Exhs. G (grant), and H, I, J (statutes)**.

sum, all the repetitious talk about restraining orders – active or otherwise – is clearly just an unfiltered smokescreen. Toner and McMahon did not name Dori as a victim of the falsely alleged violations of the alleged 209A restraining orders. The lock was as much Gouin's property as it was Dori's. And at all times, his drill was a drill, a drill, a drill.<sup>6/</sup> There was no burglary or breaking and entering charge and the drill could not be metamorphosed into a burglarious tool.

See **Exh. B, the Application for Complaint and Criminal Complaint**. Given that nothing that Toner and McMahon did was objectively reasonable, they are not entitled to qualified immunity.

**a. Although Toner wrote the Application for Complaint, McMahon was his partner in responding to Posey's and Dori's 911 calls, and as such is subject to the same liability as Toner is.**

Although the following case is an excessive-force case, it is analogous to the instant case in that an officer who does not take reasonable steps to stop the wrongdoing by one officer may be held liable for nonfeasance. Gouin contends that McMahon is equally responsible with Toner for both the fallacious and unconstitutional Application for Complaint and the Criminal Complaint against Gouin.

In the Federal civil rights context, "[a]n officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held liable under [42 U.S.C. §] 1983 for his nonfeasance." Gaudreault v. Salem, 923 F.2d 203, 207 n. 3 (1st Cir.1990), *cert. denied*, 500 U.S. 956 (1991). See O'Neill v. Krzeminski, *supra* at 11; Bruner v. Dunaway, 684 F.2d 422, 425 (6th Cir.1982), *cert. denied*, 459 U.S. 1171 (1983); Byrd v. Brishke, 466 F.2d 6, 10-11 (7th Cir.1972); Hathaway v. Stone, 687 F.Supp. 708, 712 (D.Mass.1988); Bibbo v. Mulhern, 621 F.Supp. 1018, 1025 (D.Mass. 1985). (FN6) The same principle appropriately applies under the State Civil Rights Act. See Batchelder v. Allied Stores Corp., 393 Mass. 819, 822-823, 473 N.E.2d 1128 (1985). The failure of the non-battering defendants to intervene to protect Smith's rights, when they knew that they had a duty to do so, independently supports the conclusion that all the defendants violated Smith's civil rights.

Com. v. Adams, 416 Mass. 558, 565-566, 624 N.E.2d 102,106 (1993).

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<sup>6</sup> Posey's 911 call was devoid of any allegation of breaking and entering or of drilling. See **Exh. C (1 of 3)**. It was Dori, who was in Maine, who alleged in her 911 call that Gouin "drilled his way in." See **Exh. C (2 of 3)**.

**2. Where Toner and McMahon's warrantless arrest of Gouin was not supported by probable cause, the arrest was impermissible and deprived Gouin of his fundamental liberty interest, his Fourth Amendment right to be free from unreasonable seizure of his person, amongst his other constitutional rights.**

Probable cause exists when "the facts and circumstances within the police officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the [plaintiff] had committed or was committing an offense." Rivera v. Murphy, 979 F.2d 259, 263 (1st Cir. 1992), and cases cited.

So wrote the officers in their memorandum supporting their motion for summary judgment, at 7-8.

Gouin does not debate that law. That which Gouin contends is that even assuming *arguendo* that the information the officers received was reasonably trustworthy, it was *insufficient* to warrant a prudent person believing that Gouin had committed or was committing an offense. The undisputed information is the following:

- The officers knew there was no effective restraining order;
- the new temporary restraining order, obtained the day before by the wife, Dori, had not yet been served upon Gouin, and was thus not yet in effect'
- Toner had the deed to the property in his hand [Compl. Exh. A, p. 4, lines 15-17];
- McMahon had been informed by Gouin that Toner had the deed to the property in his hand [id.]; and
- Posey had no restraining order and never had had any restraining order against Gouin.

In dispute are the following pieces of information:

- whether the officers' so-called observation of "metal shavings" was fabricated for the probable-cause hearing;
- the probable-cause hearing was one at which Gouin was attempting to get the court to issue a criminal complaint against Dori for falsely reporting to the police – because the BPD refused his on several occasions to issue one;
- the motive of the police and the court is clear: it accrues to their financial advantage and/or benefit to let all the allegations of violations of 209A restraining orders go forward even though the allegations might be false. The more arrests and/or prosecutions and/or convictions they get, the more federal money goes into their pockets. To get higher numbers of arrest, prosecutions, and convictions, the courts must find probable cause, whether or not probable cause is extant.

As a result, Toner and McMahon were confident their story of shavings would stand up and probable cause would be found. They needed the shavings story specifically because the in-

formation the officers received from Dori and Posey was insufficient to warrant a prudent person believing that Gouin had committed or was committing an offense.

The one flaw with the shavings story is that it did not allow for the possibility that shavings could have fallen to the floor while Dori and/or Posey were getting access to the condo on Thursday, January 4<sup>th</sup>, 2001. Given that the inconsistencies in Dori's and Posey's stories as to how they achieved access to the condo are so abundant, shavings from the lock being drilled is as consistent with the notion that Dori and/or Posey drilled the lock to make entry on Thursday, January 4<sup>th</sup><sup>7</sup> as with the notion that Gouin drilled the lock to make entry on Friday, January 5<sup>th</sup>.<sup>8</sup> Such ambiguity precludes the conclusion that their actions were objectively reasonable. Given that Dori was in Maine and Gouin was within their reach, Toner and McMahon conformed to the official policy and custom of arresting males in a so-called DV situation.<sup>9</sup>

As the officers wrote at p. 8 of the memorandum in support of summary judgment:

When an arrest is challenged on the basis of lack of probable cause, the arrest is "deemed objectively reasonable unless there clearly was no probable cause at the time the arrest was made." Sheehy v. Town of Plymouth, 191 F.3d 15, 19 (1st Cir. 1999), quoting Topp v. Wolkowski, 994 F.2d 45, 48 (1st Cir. 1993).

Clearly there was no probable cause to make a warrantless arrest in the criminal case underlying the instant case.<sup>10</sup> Where there is no probable cause, the warrantless arrest deprived

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<sup>7</sup> Dori admitted she had a drill; she claimed, however, that it was nonfunctional [**Exh. E, Dori's depo., p.155**],

<sup>8</sup> The likelihood is greater that if there were shavings, they were there from Thursday rather than Friday, because if Dori and/or Posey drilled, they had to drill all the way through the lock because there was no one inside the condo to open the door for them. On Friday, Posey claims to have been woken up "by Gouin drilling" – which might have been the squealing of the outside door as it was opened -- and then to have opened the door and seen Gouin. In fact, Posey admitted twice to seeing Gouin unscrew and remove the lock after he, Posey, had opened the door [**Exh. D, p. 77, line 22**; and T&M's Exh. B, p. 271, lines 21-23; p. 272, line 2-3]. SO the likelihood of shavings –if any – is greater that they were from Dori's and Posey's activities, not Gouin's.

<sup>9</sup> In **Exh. C**, Posey told the 911 call-taker, "The problem is, there is a domestic disagreement. . . . it's not violent." It appears that the call-taker with some justification assumed it was a DV call. The officers failed to correct that misperception in the Incident Report filed by Toner. It can only be assumed that like the policy that prefers arrest, there is an official custom or policy that commands officers to categorize cases as DV cases even when they are not, such as the underlying criminal action here. Instead of saying, "When in doubt, cut it out," the line is, "When in doubt, count it in." The latter leads to greater revenues from federal government grants.

<sup>10</sup> The officers want us to believe that "professional and courteous" behavior [**T&M's Mem. for SJ, at 8**] is sufficient

Gouin of his Fourth Amendment right to be free from unreasonable seizure. Santiago v. Fenton, 891 F.2d 373 (1<sup>st</sup> Cir. 1989) (“An action for abuse of process when an officer uses a lawful criminal process to accomplish an unlawful purpose”). Gouin has suffered similarly in this case.

**3. Where “the right of an individual to be free from physical restraint is a paradigmatic fundamental right” and Toner and McMahon deprived Gouin of that right, in so doing, they violated Gouin’s Fourteenth Amendment rights.**

“ “[S]ubstantive due process” prevents the government from engaging in conduct that “shocks the conscience,” Rochin v. California, 342 U.S. 165, 172 (1952)<sup>11</sup>, or interferes with rights “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325-326 (1937).’ United States v. Salerno, 481 U.S. 739, 746 (1987).” Aime v. Commonwealth, 414 Mass. 667, 673 (1993).

Com. v. Knapp, 441 Mass. 157, 164, 804 N.E.2d 885, 891 (2004).

The right of an individual to be free from physical restraint is a paradigmatic fundamental right. “[F]reedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.’” Kansas v. Hendricks, 521 U.S. 346, 356 (1997), quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

Id. That fundamental right is recognized also in Massachusetts: “Freedom from physical restraint is a fundamental right.” Querubin v. Com., 440 Mass. 108, 112, 795 N.E.2d 534, 539 (2003). *See also* Lippay v. Christos, 996 F.2d 1490, 1502-03 (3d Cir. 1993) (discussing Fourth Amendment standards in case involving arrest based on warrant), and Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 1995.C01.0000635 <<http://www.versuslaw.com>> (1st Cir. 1995) (discussing Fourteenth Amendment right to be free from criminal prosecution without due process of law).

Where Gouin was falsely arrested and imprisoned and strip-searched when no crime whatsoever was committed does, indeed, shock the conscience. If this court has any doubt whatsoever,

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to support a warrantless arrest. Gouin’s response is, “Courtesy, as the defendants suggest, does not make a warrantless arrest lawful” [**Exh. M, ¶20, Gouin’s affidavit**]. For instance, during a Revolution, an executioner with a professional demeanor can politely order, “Please put your head on the guillotine.” His courteous and professional manner did not make the beheading lawful.

<sup>11</sup> Rochin was a case involving the warrantless arrest of the defendant in home . . . as well as “the forcible emptying [his] stomach to obtain evidence for use against him in a criminal prosecution.” Bielawski v. Personnel Adm’r of Div. of Personnel Admin., 422 Mass. 459, 467, 663 N.E.2d 821, 827 (1996).

the issue as to whether the officers' conduct is outrageous must be given to jury of Gouin's peers.

**4. Where Gouin was not given his Miranda rights at any time, his Fifth Amendment rights were violated.**

The Miranda Warning section of the Prisoner Booking Form, on page 3 of Exh. F attached to Toner and McMahon's Local Rule 56.1 Statement of Facts, is unsigned. McMahon's name is, indeed, typed on the form, apparently in anticipation of giving Gouin his Fifth Amendment Miranda rights, but they were never given. The Prisoner Property form, too, is also unsigned, as well as inaccurate because of its incompleteness [*see T&M Exh. D, p. 151-152*].

**5. On the facts alleged by the plaintiff, Defendants Toner and McMahon can be liable for malicious prosecution.**

To convince this court to find that the facts in Gouin's Complaint are inadequate to establish "actual malice," the officers misrepresent the status of the law. Gouin herein enumerates the offending arguments and argues his position below them.

**a. Toner and McMahon state that "actual malice" is the fourth element for a common-law malicious prosecution claim and provides four citations to support that representation.<sup>12</sup> The citations do not, however, support the officers' proposition. It is well-settled in Massachusetts that there is a difference between "malice" and "actual malice."**

Toner & McMahon cite "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 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].

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

<sup>12</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). **NOTE:** The true caption of Felix v. Lugas is Felix v.

<<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 [at slip op. 5] quoted not only item “(2)” that Gouin quoted immediately above, the court in Felix also cited the instant case, Gouin v. Gouin, 249 F.Supp.2d 62, 71 (D.Mass. 2003), for the same proposition.

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):

“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**”

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Department of Justice et al. The defendants in Felix numbered over 100, of which Trooper Lugas was but one.

(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, 387 (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*, at 388 (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.*

**... 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). Probable cause is, of course, what Toner and McMahon did *not* have before they launched the action of which Gouin complains.

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, . . .* 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. Under *Sheraton*, Toner and McMahon did, indeed, have “actual malice” where they had knowledge that their statements were false or in reckless disregard of whether or not they were false. *Id.* For example,

(a) Toner and McMahon knew that the Application for Complaint was based on the

false statements to the 911 call-taker by Dori [**Exh. C**], in reckless disregard of Gouin's rights,

- (b) Toner and McMahon had learned that Gouin had a deed to the Boston property, despite their denial of that fact [Compl. Exh. A]
- (c) Toner and McMahon recklessly disregarded that Gouin was a joint owner of the property
- (d) Toner and McMahon recklessly disregarded that Posey never had a restraining order against Gouin, and therefore the situation to which they were responding was not a domestic violence incident [**Exh. C**] and
- (e) Toner and McMahon learned (i) that they did not have probable cause, and that was the reason the charges on the Criminal Complaint differ from those on the Application for Complaint and (ii) that no crime had been committed, and
- (f) Toner decided to file the Application because they were performing the mandatory task of strict prosecution of all domestic violence incidents and their superiors saw the opportunity to enhance their DV statistics so that the federal grant of money would increase in the next fiscal year [**Exhs. G, H, I, and J, attached to Gouin's Opp. to T&M's 56.1 Facts**].<sup>13/</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).

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

- either Toner and McMahon were incompetent, which precludes them 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 know-

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<sup>13</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).

ingly 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 Toner and McMahon acted knowingly with an improper motive and malice, or maliciously.

Either inference is sufficient to preclude them from being protected by qualified immunity, but both are troublesome. Assuming the officers *were* competent, why would they, with valuable mid-life careers, bring such obviously baseless charges as those brought against Gouin? Was the extra court-time, as Gouin’s counsel originally concluded, worth it? Or were Toner and McMahon prosecuting Gouin as custom and official policy demanded, namely, to increase the number of arrests, prosecutions, and/or convictions so that the City’s and the BPD’s grant-seeking capability would be enhanced by Gouin being found guilty in the criminal case underlying the instant action? The answer to either question leads, of course, to money as the motive or the purpose of bringing forward a malicious prosecution. Only the quantity of money differs.

The bottom line in either case is the same: Toner and McMahon did not have probable cause, and that lack of probable cause is so obvious that, coupled with the City and the BPD’s motive to attract more federal money, an inference is warranted that the criminal complaint was made with malice.

For purposes of analysis in malicious prosecution cases, the negative prerequisite of want of probable cause to complain has been taken to mean a lack of probable cause so obvious that an inference is warranted that the complaint was made with malice. Beecy v. Pucciarelli, 387 Mass. 589, 593-594 (1982). Foley v. Polaroid Corp., 400 Mass. 82, 100-101 (1987).

Conway v. Smerling, 37 Mass.App.Ct. 1, 5 (1994).

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

First, Gouin incorporates herein by reference his argument in issue 5 immediately above.

Second, Cady, *supra*, in which the plaintiff’s claim of abuse of process was not dismissed,

was, curiously, relied upon by Toner and McMahon even though the fact pattern was not parallel in any way to the instant case. And in Ladd v. Polidoro, another case upon which Toner and McMahon 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 the officers, 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>14/</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

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<sup>14</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.

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 were a process abuser who used the officers, as Gouin contends, then Dori is liable. Are the officers, too, liable? Of abuse of process? as joint venturers? as conspirators? Gouin contends all, i.e., the officers, too, are process abusers, for without them, the abuse of process could not have occurred. The same questions might be asked of Posey.

Additionally, Toner and McMahon argue that the facts gave them “probable cause to bring the complaint against the Plaintiff,” 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.

Toner and McMahon's ulterior motive, as described above, was both for their personal benefit (court overtime pay) and the collateral advantage the City of Boston and the BPD would gain when seeking more monies from the federal government.

**7. Gouin stated sufficient facts to demonstrate the existence and the scope of a conspiracy both under State law and 42 U.S.C. §1985(3).**

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) (emphasis supplied).\<sup>15</sup>/

"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. . . . 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

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<sup>15</sup> The officers cite Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980), and Slotnick v. Stavisky [*sic*], 560 F.2d 31 (1st Cir. 1977), for the proposition that there are insufficient allegations of conspiracy in Gouin's complaint. Garfinkle had petitioned the court to find Slotnick in contempt for violating an order prohibiting Slotnick from slandering Garfinkle. Slotnick, who had been institutionalized in a mental-health facility, then sued six attorneys but failed to plead any facts whatsoever supporting his claim that they conspired to commit him. The six private attorneys only participated in litigation. Id. at 166. Three of the six did not testify; they only appeared in court. Two of them represented their associate, Garfinkle. No more is revealed in the case. Subsequently, in Matter of Stavisky, 7 Mass. Att'y Disc. R. 277 (1991), two of the Garfinkle defendants were suspended from the practice of law.

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).

**a. Invidious discriminatory animus is, under *Bray*, *infra*, not an element of conspiracy pursuant to the SECOND clause of §1985(3). Invidious discriminatory animus was created by judicial fiat as an element for conspiracy pursuant to the FIRST clause of §1985(3) in *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).**

Section 1985(3) of Title 42 of the United States Code has three clauses. The subsection of the statute reads in entirety:

**(3) Depriving persons of rights or privileges**

**[Clause 1]** If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

**[Clause 2]** or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws;

**[Clause 3]** or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The first clause of §1985(3) is broad in scope. Because “the [first clause of the] statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others.” Griffin v. Breckenridge, 403 U.S. (Miss.)

88, 1971.SCT.42106 at ¶42 <<http://www.versuslaw.com>> (1971). So, to guard against §1985(3) becoming a “general federal tort law,” the Court in Griffin imposed a fifth element -- invidious discriminatory animus – to make out a *prima facie* case for conspiracy pursuant to Clause 1.

A decade later, the Court in Kush v. Rutledge, 460 U.S. 719 (1983), declined to impose the judicially created *animus* requirement onto list of elements needed to make out a claim for a conspiracy pursuant to the second clause of §1985(3).

Commenting upon Kush still another decade later, Justice Stevens in Bray v. Alexandria Women's Health Clinic, 113 S.Ct, 753, 1993.SCT.40439 <<http://www.versuslaw.com>> (1993), wrote, “Kush suggests that Griffin 's strictly construed class-based animus requirement, developed for the first clause of § 1985(3), should not limit the very different second clause.” Bray at ¶128 (Stevens, J., with whom Justice Blackmun, joins, dissenting). “”There is no suggestion in the opinion that its reasoning applies to any other portion of §1985.” Bray, at ¶129, citing Kush, 460 U.S., at 726. “[O]f greatest importance, the statutory language that provides the textual basis for the ‘class-based, invidiously discriminatory animus’ requirement simply does not appear in the portion of the statute that applies to this case.” 460 U.S., at 726.

In Bray, the alleged conspiracy was of a different type than that in Griffin. Similarly, so is the conspiracy presented in the case at bar.<sup>16/</sup> According to Bray, a clause-2 conspiracy is one that

... seeks by force of numbers to prevent local officials from protecting the victims' constitutional rights presents exactly the kind of pernicious combination that the second clause of § 1985(3) was designed to counteract. As we recognized in Griffin, the second clause of § 1985(3) explicitly concerns such interference with state officials and for that reason does not duplicate the coverage of the first clause. *Griffin*, 403 U.S., at 99.

Bray, at ¶12 (Stevens, J., with whom Justice Blackmun, joins, dissenting).

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<sup>16</sup> This story is really a story of two conspiracies. See tnote 17, *infra*, for details.

Limited to conspiracies that are sufficiently massive to supplant local law enforcement authorities, the second clause requires no further restriction to honor the congressional purpose of creating an effective civil rights remedy without federalizing all tort law.

Id., at ¶130. In sum, a clause-2 conspiracy differs from a clause-1 conspiracy in that it requires state action: it “entails both a violation of the victims' constitutional rights and state involvement.”<sup>17</sup> Id. And the conspiracy here entails the constitutional rights of men involved in domestic relationships, the violations thereof not only by Dori and Posey and the individual officers but also by government itself.<sup>18</sup> The action by the Commonwealth and the City was embarked upon when Congress enacted legislation appropriating monies for federal grants [see **Exhs. H, I, and J, diverse sections from c.110 of Title 42, and Exh. G, a grant to encourage arrest policies**] to entice this Commonwealth and other States to follow the federal Domestic Violence laws enacted in this Age

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<sup>17</sup> This story is really a story of two conspiracies. The birth of one conspiracy to do away with the rights of men -- as opposed to the rights of women -- to due process occurred when chapter 110 of Title 42 of the United States Code was put into effect to affect the alleged behavior of men involved in a “domestic” circumstance. [See **Exhs. H, I, J, and G, attached to Gouin's Opp to T&M's 56.1 Facts.**] States such as Massachusetts and cities such as Boston took the federal challenge and crafted, respectively, Domestic Violence Law Enforcement Guidelines [see **Exh. K**] and the Boston Police Department [“BPD”] “Reporting Procedures for Cases of Domestic Violence,” Training Bulletin 5-90, and other training bulletins. Federal monies were the reward for denying due process to alleged domestic abusers, many of whom had been victims of false allegations.

The federal government's powerful DV program to do away with due process for men came to bear locally on January 5, 2001. On that date, encouraged and enabled by federal and state DV law to hinder Gouin's access to justice, the BPD categorized the January 5<sup>th</sup> incident at Gouin's home as a DV event, despite it not being one. The categorization occurred because of a number of happenings:

- (1) Posey calling in a “domestic disagreement” [Exh. C (1 of 3)],
- (2) the immediate, subsequent 911 call from Maine by the estranged wife, Dori, talking about an expired restraining order and a new one that had not yet been served [Exh. C (bottom of 2 of 3)],
- (3) the 911 call-taker responding with a knee-jerk reaction and assuming it was a DV call [id.], and
- (4) Toner and McMahon learning that Dori had no restraining order yet in effect and that she was in Maine, but still treating the incident as a DV event, all that was needed to trigger the official municipal and State arrest-preferred policy and score one more report to satisfy the requirements for Boston and the Commonwealth to get more federal monies.

In this way Toner and McMahon insinuated themselves into the other conspiracy, the one begun by Dori and Posey. Their ulterior motive together in this conspiracy was to “prevent or hinder” Gouin from having free access to his own property and from exercising his fundamental right to liberty.

<sup>18</sup> Gouin did not sue the federal government because the State and the City have had a choice of accepting or not the monetary fruits of the federal program. And since 1991, when the Executive Office of Public Safety mandated the incorporation of the Domestic Violence Law Enforcement Guidelines, the City had not only the opportunity but also the power and means to challenge them but did not. One of the many reasons was, of course, the federal statutory and grant money, such as its share of the \$148,653,543 the Commonwealth received in FY2003.

of Hysteria and to adopt their own cognates.

The DV laws to which Gouin refers are those created in and for Massachusetts. They allow restraining orders to issue in the absence of due-process rights. Statistically those victimized by the loss of due process are primarily and overwhelmingly males, amongst them Gouin. Without a requirement of *mens rea* for charging and convicting for alleged violations a DV restraining order, an innocent person can be convicted on solely the state of mind of his accuser. To the Commonwealth, municipalities, including the Defendant City here, and the diverse entities in the world of DV, the collateral advantage of trumping due process is to reap handsome monetary benefits annually from the federal government. Such monetary awards encourage a distortion of justice, such as that seen in the instant case. For example, Gouin's experiences sued upon here ["Gouin I"] and in the companion case ["Gouin II"] show that one does not even have to have an effective restraining order against one to be arrested, charged, and prosecuted under the DV laws.

The incidence of such invidious gender discrimination is widespread, and has been noticed in the general public: "Women are not [*sic*, read, *no longer*] men's life partners, but rivals favored by law." Paul Craig Roberts,<sup>19</sup> in "The Wars We Can't Afford to Lose," citing Professor Richard T. Hise,<sup>20</sup> *The War Against Men: Why Women Are Winning and What Men Must Do If America Is to Survive* [Oakland, OR: Elderberry Press, February 2004], ISBN: 1930859619. [**Exh. L, attached to Gouin's Opp. to T&M's 56.1 Facts**].

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<sup>19</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 **Exh. L, attached to Gouin's Opp. to T&M's 56.1 Facts**

<sup>20</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

Toner and McMahon also argue that Gouin has no facts to support his claim of conspiracy. Gouin's contention is a frivolous argument and clearly nonreflective of the truth.

**8. Toner and McMahon 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).

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grapes of a very bitter man, but an objective reader will find extremely fascinating insights from the frontlines of the

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, 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.

**9. Gouin has made out a *prima facie* case under the Massachusetts Civil Rights Act, M.G.L. c. 12 §11I**

Toner and McMahon argue that if they are given qualified immunity against Gouin's §1983 claims, they are entitled to that same immunity against Gouin's State law claim for the violation of his State civil rights. Gouin, therefore, incorporates herein by reference his entire argument regarding qualified immunity.

Toner and McMahon take issue only with the last element of making out a claim under the Massachusetts Civil Rights Act, i.e., whether the interference or attempted interference by the officers was by "threats, intimidation or coercion."<sup>21/</sup> Sarvis v. Boston Safe Deposit and Trust Co., 47 Mass.App.Ct. 86, 92, 711 N.E.2d 911, 917 (1999). "Use of the disjunctive 'or' indicates that a plaintiff need establish only one of the three alternatives." Id. (internal cite omitted).

What Toner and McMahon do not say is that a claim for an arrest made without probable cause is, however, actionable under M.G.L. c. 12, § 11I. Noel v. Town of Plymouth, 895 F.Supp. 346, 355 (D.Mass. 1995) (denying summary judgment), citing Santiago v. Fenton, 891 F.2d at 387.

Notwithstanding the holding in Noel, Gouin states: Here, Gouin was someone going home to continue the renovation of the back bedroom of his condo, specifically to put up the trim around the windows and doors so that the new insulation would be enclosed, and to install the new baseboards above the new oak planking he had laid [**Exh. F, photos**]. Suddenly police were summoned there by his wife, calling from her domicile in Maine, and by his stepbrother-in-law, who had ap-

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War of the Sexes. Unquestionably, this is a worthy read, regardless of which banner you wave".—Harold Rodriguez

parently newly ensconced himself into Gouins' vacant condo. And even more suddenly, without any basis whatsoever, two officers told him he had no right to be there and no right to gain entry into his own home, proceeded to handcuff and arrest him, place him in a cruiser, install him in a holding cell, and ultimately to be strip-searched.

In this case, the fear was great: it was fear primarily of the unknown. Gouin was not someone familiar with the criminal justice system, not someone who had ever been handcuffed, jailed, or strip-searched, not someone who gets his jollies or entertainment from TV or the movies. Just an ordinary person whose only knowledge of the police was from newspaper descriptions of alleged police brutality. Fear of the unknown. It becomes very real when one is personally faced with the potential of that brutality. Tell him he should not have felt threatened. Tell him he should not have felt intimidated. Tell him he should not have felt coerced. There is not one act or one word by either of the police officers that was not threatening, intimidating, or coercive. Tell him he was wrong. This was not an experience about which you would want to hear him say, "Try it, you'll like it." To him, he dared not say a word or do a thing in his defense that might be construed as suspect or provocative or in his defense. Every act and word of those armed officers was overbearing. They were not throwing rose petals.

**10. Defendants' argument for summary judgment is one that advocates one standard for men and another for women, which constitutes invidious gender discrimination and cannot be a proper legal argument, making summary judgment on Gouin's claim for assault and battery inappropriate and unsustainable.**

Assault and battery is defined as the "intentional and unjustified use of force upon the person of another, however slight, or the intentional doing of a wanton or grossly negligent act causing personal injury to another." *Commonwealth v. McCan*, 277 Mass. 199, 203, 178 N.E. 633, 634 (1931).

Noel, 895 F.Supp. at 354. Dean v. Worcester, 924 F.2d 364, 369 (1st Cir.1991).

Where there is not one shred of evidence that can metamorphose the warrantless and

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<sup>21</sup> See Compl. at ¶96 n.15, for definitions of threats, intimidation or coercion as pled.

unwarranted arrest of Gouin into a valid or lawful arrest, any amount of unconsented-to touching was too much. Too, the assault McMahon committed upon Gouin while he was partially sleeping in the holding cell [T&M's Exh. D, p. 133-135] was also unjustified. Were defense counsel to be locked in a cell and be woken by someone banging on the cell bars, sheer terror would go through her and she would use every woman's victim advocate to argue shrilly and indignantly that she was offended by the fear she suffered as a result thereof and any unconsented-to touching. Particularly if there were no reason for her to be locked in a cell in the first place. This, of course, is what c. 209A restraining orders are all about. A statement to a court that "his blue eyes frightened her" is sufficient both to be awarded an RO and to put the man's name on a list of so-called "abusers" for ever. The two standards of justice and law are unacceptable and must not be countenanced by this or any other court. To countenance two standards -- one for men and one for women -- would constitute unlawful invidious gender discrimination.

It is all too easy for a municipal defense lawyer to minimize the gross unlawfulness of what someone like Gouin was caused to suffer on January 5, 2001. If the officers had been properly trained or were not under official orders to arrest whenever responding to an alleged DV incident, Gouin would not be making claims against the officers and the City. To make it appear that Gouin is committing some wrong by making a claim against them is shameful, particularly where it was, in fact, the unconstitutional official policies of the City and its police department -- and consequently its officers, too, though but small cogs in a multibillion dollar DV industry -- who were doing wrong from the moment the 911 call-taker took Posey's and Dori's 911 phonecalls.

**11. Without probable cause, Toner and McMahon had no "legal privilege" to confine Gouin, making summary judgment on the claim of false imprisonment inappropriate.**

"Under Massachusetts common law, it is a continuing tort for an officer to unlawfully arrest and detain a person." Noel, 895 F.Supp. at 354 (denying summary judgment against two offi-

cers because there are disputed issues of fact concerning the basis for the arrest). Here, the defendant officers argue both that they had a “legal privilege” [T&M Mem. at 22] to confine Gouin, but do not explain the source of that so-called privilege, and that the record does not support Gouin’s claim. Though the officers’ arguments do not pass the relatively-recently-coined “sniff test,” Gouin’s counsel feels compelled to respond more fully . . . just in case she is missing “something,” given that the seemingly specious arguments are set forth by an allegedly respected municipal law department.

False imprisonment consists of “(1) intentional and (2) unjustified (3) confinement of a person, (4) directly or indirectly (5) of which the person confined is conscious or is harmed by such confinement.” Ball v. Wal-Mart, 102 F. Supp.2d at 55 (quoting Noel v. Town of Plymouth, 895 F. Supp. at 354)). Police officers may be liable for this tort “unless the police officer had a legal justification” for the restraint. Rose v. Town of Concord, 971 F. Supp. 47, 51 (D.Mass. 1997) (citing Wax v. McGrath, 255 Mass. 340, 342, 151 N.E. 317, 318 (1926)). Such justification exists if the officer had probable cause to arrest the suspect. See Rose v. Town of Concord, 971 F. Supp. at 51-52 (dismissing false imprisonment claim against police where officers reasonably believed plaintiff had committed a felony).

Sietins v. Joseph, 238 F.Supp.2d 366, 2003.DMA.0000103 < <http://www.versuslaw.com> > at ¶75 (D.Mass. 01/06/2003). Gouin has met each and every one of those elements.

Thus, given that not one charge brought by the officers against Gouin can be substantiated under any theory of law, no arrest and/or imprisonment of Gouin can be construed as a “legal privilege.” The police defendants had no probable cause to arrest Gouin. His confinement in the cruiser, the Area A-1 station, the BMC, and the Nashua Street jail was nothing but unlawful, and there never was any justification in sight. His confinement was intentional and unlawful. It might even have been sadistic: the police failed to send as they promised his wallet to court with him. Gouin had money to make bail in that wallet. That bail should not have been required, given that he had no prior encounter with the police of any city or town is an issue for perhaps his next life. Consequently, their motion for summary judgment on his claim for false imprisonment must fail.

**12. Toner and McMahon are not entitled to summary judgment on their counterclaim**

**for the alleged violation of M.G.L. c. 272 ¶ 99. (Defense counsel mistakenly wrote "271")**

The only reason the taping was unbeknownst to the officers was because McMahon was unable to distinguish between a cellphone and a tape-recorder. McMahon even saw it close-up when he handcuffed Gouin, but was unable to discern what it was. One can only reasonably conclude that his training at the academy as an observer was inadequate or that his personal skill at observation was inadequate for the essential functions of his job.

The statute upon which the officers rely and which their counsel argued follows. Note that it is silent as to the circumstance when police officers walk into an event where recording is already underway.

"The term 'aggrieved person' means any individual who was a party to an intercepted wire or oral communication...or who would otherwise have standing to complain that his personal or property interest or privacy was invaded in the course of an interception". Mass. Gen. L. c. 272, §99 B 6.

". . . any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception...shall have a civil cause of action against any person who so intercepts, discloses or uses such communication or who so violates his personal, property or privacy interest." Mass. Gen. L. c. 272, §99 Q.

First, the officers were not parties to an intercepted wire or oral communication. They are not aggrieved persons. It was not Toner's or McMahon's oral communications that were intercepted. It was Gouin's and Posey's. (Posey, of course, consented to the interruption, if not, the interception.) So, it was Toner and McMahon who did the intercepting of an oral communication between Posey and Gouin. Gouin is the one who was aggrieved. The officers walked into what was essentially the equivalent of a "recording studio."

Second, neither Toner nor McMahon had a personal interest in what they said . . . or at least should not have. Third, neither Toner nor McMahon had a property interest in what they said

. . . or at least should not have. Fourth, neither Toner nor McMahon had a reasonable expectation of privacy in what they said . . . or at least should not have. Every police officer on a call expects to have to disclose and/or produce his notes, expects to have his words to a dispatcher disclosed and/or produced, expects to have his police report scrutinized with a “fine tooth comb,” expects to be examined and cross-examined as to what was done and said when “on the job.”

This is not similar, as the officers argue, to the situation in Com. v. Hyde, 434 Mass. 594, 750 N.E.2d 963 (2001), in which Hyde turned his recorder on after he was stopped in a “routine traffic stop” and then continued surreptitiously to tape record the encounter.

Further, in Hyde, the record indicated that Hyde fully intended “to use the recording as proof in his subsequent complaint of police misconduct.” 434 Mass at 601, 750 N.E.2d at 968. That is not the case here. Having been victimized by the lies of his estranged wife and her three counsel and other of her agents on numerous occasions – all documented – Gouin began carrying the recorder as his witness to expected and unexpected events – such as his unanticipated encounter with Posey on January 5<sup>th</sup> [T&M's Exh. D, p. 140]. Gouin told Posey and sought and got his consent to the recording, which Gouin fully intended to use in his own defense should Posey lie about what occurred at the condo. So it was purely by chance that the police walked in while Gouin was recording openly. [Notwithstanding that Gouin denies waving his rape recorder in Posey's face, see Exh. D, p. 179, lines 20-21; p. 180, line 2-3; and T&M Exh. D, Gouin's Depo., p. 109].

After that, it is clear that it was Gouin who was the only aggrieved person in sight.

Moreover, any harm, imagined or otherwise, was caused by the officers' own incompetence and/or their own negligence. Also, the officers suffered no actual damages and given the substandard quality of their performance and unconstitutional acts, whether they should receive punitive damages is a question that must be given to a jury . . . unless this court sees fit to award Gouin summary judgment pursuant to F.R.Civ.P. Rule 56(c) on the officers' counterclaim.

WHEREFORE, Gouin prays both that Toner and McMahon's motion for summary judgment be DENIED on all claims and that Gouin be granted summary judgment in accordance with Rule 56(c) on the officers' counterclaim under M.G.L. c. 272 ¶ 99.

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

28 November 2004

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**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.

28 November 2004

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