UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BETH E. SHEA, Plaintiff, v. R. BRADFORD PORTER and others. Defendants.	CIVIL ACTION NO. 1:08-cv-12148-FDS

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HER MOTION FOR RECONSIDERATION OF THE DENIAL OF HER MOTION FOR A NEW TRIAL.

The plaintiff Beth E. Shea files this memorandum in support of her motion for reconsideration of the Court's denial of her Motion for New Trial. Plaintiff also relies on, and incorporates herein, her September 30, 2013 Memorandum (Paper 338) ("Post Trial Brief"). This memorandum sets out the constitutional power of a district court judge to grant a new trial and then delineates the governing First Circuit precedent including a procedural history of the *Jennings v. Jones* Fourth Amendment excessive force case, including the district court judge's initial grant of JMOL, the First Circuit's reversal of the JMOL, the district judge's grant of the motion for new trial and the First Circuit's affirmance of the latter exercise of the trial judge's discretion. The Memorandum then sets out evidentiary bases warranting a reasoned conclusion that the jury's verdicts were against the weight of the credible evidence.

Constitutional Power

> The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence.

Byrd v. Blue Ridge Rural Elec. Co-op., Inc., 356 U.S. 525, 540 (1958).

> The Seventh Amendment[1], also controls the allocation of authority to review verdicts, the issue of concern here…. The … Reexamination Clause does not inhibit the authority of trial judges to grant new trials for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. Rule Civ. Proc. 59(a). That authority is large. … The power of the English common law trial courts to grant a new trial for a variety of reasons with a view to the attainment of justice was well established prior to the establishment of our Government. … The exercise of the trial court's power to set aside the jury's verdict and grant a new trial is not in derogation of the right of trial by jury but is one of the historic safeguards of that right… If it should clearly appear that the jury have committed a gross error, or have acted from improper motives, … it is as much the duty of the court to interfere, to prevent the wrong, as in any other case… . "The trial judge in the federal system," we have reaffirmed, "has ... discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Byrd*, 356 U.S., at 540….

Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432-33 (1996).

While it is true the trial judge is not empowered to substitute his vote for that of the jury, the "focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury." *See Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944). Hence a Rule 59 "motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, … or that, for other reasons, the trial was not fair to the [moving] party…". *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

First Circuit standards for exercise of the District Court's Rule 59 discretion.

Jennings v. Jones, 587 F. 3d 430 (1st Cir. 2009) and *Kearns v. Keystone Shipping Co.*, 863 F. 3d 177 (1st Cir. 1988) govern.

Even assuming there was conflicting evidence[2] on Porter's burden of proof as to a

[1] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

[2] The inference necessarily drawn by the jury that Porter had reasonable cause to believe he had witnessed an arrestable offense on Centre Lane was not supported by evidence. There was no conflicting evidence to sort through

reasonable belief there was probable cause to arrest Beth Shea on Centre Lane—and plaintiff contends there was not—there is clear objective evidence, beyond the mere demeanor of the witnesses, that "lean[s] so heavily in the other direction so as to justify a district judge in ordering a new trial," on the basis the verdict was against the demonstrable weight of credible evidence. *Jennings,* 587 F. 3d at 439.

> [T]he district court has "broad legal authority" when considering a motion for new trial. …[The court has] the power and duty (emphasis supplied) to order a new trial whenever, in its judgment, the action is required in order to prevent injustice…. When deciding whether to grant a new trial, district court is free to independently weigh the evidence…. The trial judge, upon considering a motion for new trial, may consider the credibility of the witnesses who have testified and, of course, will consider the weight of the evidence…. [O]n a motion for new trial on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the evidence for himself."

Id. at 436. As Circuit Court Justice Lipez' concurring opinion emphasizes, "[i]n deciding whether to grant [a motion for new trial], the district court is entitled to make its own judgment about the strength of the evidence, including the credibility of witnesses." *Id.* at 445.

Even assuming Porter to have had probable cause to make an arrest, "[i]n the face of overwhelming testimony and evidence that conflicted with … [Porter's] version of events, and the strong impeaching factors that … [were] brought out at trial," the Court should determine that the verdict of no liability for excessive force "constituted a gross miscarriage of justice." *Kearns v. Keytone Shipping Co*., 863 F.2d. 177, 181 (1st Cir. 1988).

In *Jennings v. Pare,* 2008 WL 2202429 (D. R.I. 2008) aff'd *Jennings v. Jones*, 587 F.3d 430 (1st Cir. 2009) following a jury verdict awarding damages to Jennings for excessive force in the course of a lawful arrest, the district court granted the defendant's motion for a new trial.

---

as Porter's testimony did not establish a predicate for any reasonable belief or expert opinion. This is not a situation where the evidence might equally support contrary verdicts. *See Freeman v. Package Mach. Co.,* 865 F.2d 1331, 1333-34 (1st Cir.1988).

Jennings sued seeking damages for excessive force allegedly applied by a Rhode Island state trooper in subduing Jennings following his undisputed lawful arrest.[3] Unlike the case at bar, in *Jennings* there was no issue as to probable cause to arrest and the sole contested issue was the reasonableness of the force in executing the arrest. In the course of subduing the plaintiff, the defendant state trooper, in accordance with his training, had applied the so-called "ankle technique," resulting in a fracture of the plaintiff's ankle which had recently been surgically repaired. The plaintiff's version was that

[3] The procedural history of this 2003 case is noteworthy. At the close of plaintiff's evidence, the defendant moved for judgment as a matter of law predicated on qualified immunity. Without addressing the affirmative defense the trial judge denied the motion on the excessive force claim, because:

> There was testimony as to Trooper Jones that he continued twisting the ankle of Mr. Jennings even after Mr. Jennings had been subdued and even after Mr. Jennings says that he told him that he'd had a previous injury to the ankle and he was breaking the ankle. So as to Detective Jones, there's enough evidence from which a jury at this point could conclude that the force was excessive.

Jennings v. Jones, 499 F.3d 2, 6 (1st Cir. 2007). Upon the close of all evidence, Judge Torres denied the trooper's renewed JMOL motion on the excessive force claim on the basis that:

> [W]e have very different versions as to what happened. According to Mr. Jennings, Trooper Jones grabbed his ankle, he wasn't kicking, he wasn't doing anything that would warrant it. Trooper Jones grabbed his ankle, twisted his ankle, he told him that he had had previous surgery on the ankle, and that the ankle, he was in the process of breaking his ankle. And according to Mr. Jennings, Trooper Jones actually increased the pressure on the ankle and broke his ankle.... If the jury accepts Mr. Jennings' version, it might very well find that Trooper Jones used excessive force.

Id. Following a general jury verdict for the plaintiff awarding $301,100 damages, the trial judge granted the trooper's renewed JMOL motion on his affirmative defense of qualified immunity and decided the trooper's Rule 59 motion for a new trial and for a remitter had been mooted. *Id.* at 6-7. In *dicta* and disclaiming any reliance thereon in ruling on the JMOL motion, Judge Torres "stated that the testimony of the police officers was more credible than the contrary testimony of Jennings, …[and his two supporting witnesses who had] testified that Jones *increased* his force after Jennings ceased resisting." *Id.* at 8, 10 (emphasis original). In granting judgment on the affirmative defense, the trial judge held that "the relevant law was not clearly established and a reasonable officer would not have believed the force was excessive." *Id.* at 8. In its *de novo* review, First Circuit reversed the JMOL, vacated the judgment, reinstated the jury verdict and instructed the trial court to rule on the motions for new trial and for remitter. *Id.* at 4, 20-21. In light of the general verdict, in ruling on the JMOL motion the trial judge failed to take "the facts in the light most favorable to the jury verdict … [which were] that Jones increased the force he used to restrain Jennings after Jennings had ceased to resist and after Jennings had announced his prior ankle injury…[; and, it was] that increased use of force [which] broke Jennings' ankle." *Id.* at 9, 10. Applying that presumed finding by the jury, on its three part application of the *Saucier v. Katz*, 533 U.S. 194 (2001) analysis, the First Circuit held: (i) there was a factual basis in the evidence for the jury "to have exercised its common sense … to find that Jones used excessive force by increasing pressure on Jennings' ankle after Jennings stopped resisting for several seconds and stated that Jones was using force that hurt his previously injured ankle," thus establishing prong one a violation of the "right to be free from an unreasonable seizure"(*id* at 15, 16); (ii) "a reasonable police officer would not have required case law on point to be on notice that …[increasing the force when the arrestee had stopped resisting] was unlawful" (*id.* at 16); and, (iii) while "a reasonable officer in Jones' circumstances [arguably might] believe … it was lawful to *maintain* the level of force he used even after …[Jennings] ceased resisting, …an objectively reasonable officer … would not have believed that it was lawful to *increase* the amount of force that he used after Jennings ceased resisting and stated Jones was hurting him." *Id.* at 19. (emphasis original).

> at the time his ankle was broken, he had stopped resisting and had been subdued but that Jones, nevertheless, increased the pressure that he was exerting on Jennings' ankle. Jones, on the other hand, claims that he maintained his grip on Jennings' ankle because Jennings continued to actively resist arrest but that he did not increase the pressure that he was exerting.

Jennings v. Pare, 2008 WL 2202429, *2 (D. R.I. 2008).

The plaintiff's version was supported by two witnesses. The trooper's version that the plaintiff did not in fact cease to resist was supported by three witnesses. This was a case of conflicting evidence and credibility of several witnesses that the jury resolved in favor of the plaintiff. Nonetheless the district court judge granted the Rule 59 motion for a new trial. He explained

> that the jury's [general] verdict …[must be assumed to be] based on a finding that Jones increased the force applied in utilizing the "ankle turn control technique" after Jennings had been subdued. [In that case] Jones' motion for a new trial should be granted because, in this Court's opinion, **such a finding would have been contrary to the clear weight of the credible evidence.**

Id. at *3 (emphasis added).

The district court judge assayed the conflicting evidence presented to the jury which included a videotaped recording.[4] The plaintiff's testimony of the use of increased force after he had ceased resisting and had been subdued was corroborated by two witnesses. In his individual review of the same evidence weighed by the jury, the judge determined that "neither … [corroborating witness] was in any position to observe [trooper] Jones' actions … or more specifically, what Jones was doing to Jennings' ankle." *Id.* at **3,4. The judge also determined that "doubts regarding [one witness'] ability to have observed what happened are reinforced by" his prior inconsistent testimony about the location of the alleged wrongdoing. *Id.* The judge found that even assuming the two corroborating witnesses

[4] Only "[p]ortions of the event, lasting about one minute, were captured … on videotape with sound…. [The trial judge had initially found] the videotape does not clearly show what happened between the time that Jennings was wrestled to the floor and the time that his ankle was broken." *Jennings v. Jones*, 587 F. 3d 430, 440 (1st Cir. 2009).

> had been able to observe Jones' hold on Jennings' ankle, it is difficult to see how they could have determined the degree of force that Jones was exerting and whether Jones was increasing the force or merely maintaining the hold.

Id. A decision whether to grant a new trial came down to the credibility of the plaintiff and the defendant. *Id.* The trial judge found the defendant's "testimony to be more credible based on the demeanor of the two witnesses and for several other reasons." *Id.*

> First, Jennings' credibility was undermined by his testimony, that in the events leading up to the struggle, he gripped the smoke shop counter because troopers instructed him to do so when the videotape plainly shows him gripping the counter in a clear effort to prevent troopers from escorting him to a seat while they conducted the search.
> In addition, Jennings' testimony that he had stopped struggling when his ankle was broken was contradicted not only by Jones, but also by troopers James Demers, Wilfred Hill, and Kenneth Buoniauto who testified that, after being taken to the floor, Jennings continued to kick at them.
> Jennings' testimony that he ceased resisting after being wrestled to the floor also is somewhat inconsistent with the combativeness he displayed in announcing that he was "not being arrested" and boasting, when he finally was escorted from the smoke shop, that: "It took ten of you to take me down."
> In short, the weight of the credible evidence supports Jones' testimony that he maintained his hold on Jennings' ankle because Jennings continued to resist but that he did not increase the force being exerted.

Id. at 4.

After a second trial resulting in a defendant's verdict, the plaintiff appealed the trial court's grant of a new trial. *Jennings v. Jones*, 587 F. 3d 430 (1st Cir. 2009). In light of the prior appeal (*see* note 3 *supra*), the First Circuit explained the vastly different power and authority of the trial judge under each of Rule 50 and Rule 59.

> A district court's power to grant a motion for a new trial is much broader than its power to grant a JMOL. … A trial court may grant a new trial on the basis that the verdict is against the weight of the evidence. … Further, "the district court has the power and duty to order a new trial whenever, in its judgment, the action is required in order to prevent injustice." *Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 181 (1st Cir.1988)…. When deciding whether to grant a new trial, a district court is free to independently weigh the evidence… "The trial judge, upon considering a motion for new trial, may consider the credibility of the witnesses who had testified and, of course, will consider the weight of the evidence."... "On a motion for a new trial on the ground that the verdict is against the weight of the evidence, the judge is free to weigh the evidence for himself.".

> …
> [Of course] a "district judge cannot displace a jury's verdict merely because he disagrees with it" or because "a contrary verdict may have been equally ... supportable." …[T]rial judges do not sit as thirteenth jurors, empowered to reject any verdict with which they disagree.
> …
> It would also be inconsistent with our law on the trial court's power to grant new trials to require that all inferences be drawn in favor of the verdict. Indeed, as we have repeatedly recognized, a trial judge may order a new trial "even where the verdict is supported by substantial evidence…
> …
> [A]pplication of the JMOL standard to motions for a new trial puts the new trial standard far too high.
> …
> In some cases, the evidence might preclude judgment as a matter of law and yet lean so heavily in the other direction so as to justify a district judge in ordering a new trial.

Id. at 436-439 (quotations and citations omitted).

The First Circuit upheld the district court's grant of a new trial on the basis "even if the jury verdict had unambiguously rested on the increased force theory, that theory would have been contrary to the weight of the evidence." *Id.* at 441. The First Circuit held:

> The district judge's explanation of his holding was carefully reasoned and grounded in the evidence. The district court discussed in detail the testimony of the key witnesses, and his opinion both recites the correct legal standards and shows careful reflection.

Id.

There was no abuse of discretion in holding that a verdict relying on the testimony of the plaintiff and his two witnesses "would have been against the weight of the evidence." *Id.* at 442.

> The [district] court's conclusion did not rest entirely on its assessment of the witnesses's demeanor on the stand. To the contrary, the district court systematically measured their statements against clear, objective evidence [including the judge's evaluation of the videotape] and found that "neither Monroe nor Piccoli was in any position to observe Jones' actions or what was taking place during the struggle….
> …
> This is not a case of mere conflicting testimony. Nor does it involve a mere question of a witness's demeanor…. The district judge cited clear, objective evidence disproving the witnesses' statements. …Factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story.

> The district judge then turned his comprehensive assessment of the available evidence to the testimony of "[t]he only two people in a position to know" whether there had been an increase in pressure: Jennings and Jones.
>
> Jennings and Jones testified at the trial. The district judge found Jennings's credibility undermined not only by his demeanor but also by (1) his assertion that he had held onto the counter on the instructions of law enforcement, a claim that was clearly contradicted by the security videotape; (2) his testimony that he ceased struggling after his ankle was broken, which no fewer than four state troopers contradicted; and (3) the overall "combativeness" suggested by his pronouncements before and after the encounter, which was "somewhat inconsistent" with his claim that he offered no resistance once he had been brought to the floor. …These are all reasoned assessments. Ultimately, Jennings's repeated instances of disputed or deceptive testimony prompted the district court to find that Jones offered the more credible account on the issue of increased force. … *Kearns*, 863 F.2d at 181 (affirming district court's grant of a new trial "[i]n the face of overwhelming testimony and evidence that conflicted with [plaintiff's] version of events").

Id. at 443-444.

Kearns v. Keystone Shipping Co., 863 F. 2d. 177 (1st Cir. 1988) is also on point. In this employment age-discrimination case, the plaintiff's burden of proof rested essentially on his testimony including an alleged, disputed conversation with his supervisor as to the predicate age discriminatory motive. Plaintiff's case in chief was in stark conflict with the testimony of the defendant employer's four witnesses. The defendant also introduced work records demonstrating that the supervisor "was not even on board … on the day that Kearns alleged their conversation about his age took place." *Id.* at 180. Granted leave to put on rebuttal evidence, Kearns then changed his testimony about the date of the alleged conversation. *Id.* at 180-81. After the three day trial, the jury returned a verdict for the plaintiff awarding him $99,000 in damages. Judge Mazzone granted defendant's motion for a new trial on the ground that the "verdict … was so clearly against the weight of the evidence as to constitute a gross miscarriage of justice." *Id.* at 181. In its affirmance of Judge Mazzone' s grant of a new trial, the First Circuit explained:

> Keystone argued that Kearns failed to introduce any evidence of discriminatory motive, and failed to introduce any testimony that corroborated his statements concerning his work record and the key conversation with Garthwaite. Keystone also pointed out that Kearns alleged no ill treatment by Garthwaite when Garthwaite had daily supervision of his regular watches, but only later, when their rotations occasionally overlapped and Garthwaite supervised Kearns' overtime work. Most persuasively, Keystone argued that Kearns impeached his credibility when he changed his testimony after Keystone introduced evidence showing that Garthwaite was not on board the Energy Independence on the day Kearns initially claimed their conversation took place. Our review of the record leads us to agree with the trial court's ruling that the clear weight of the evidence favors the defendant. In the face of overwhelming testimony and evidence that conflicted with Kearns' version of events, and the strong impeaching factors that Keystone brought out at trial, it was not an abuse of discretion for the trial court to determine that the verdict constituted a gross miscarriage of justice.

Id. at 181.

FALSE ARREST VERDICT.

The jury verdict that Porter satisfied his burden of proof was not supported by any evidence that an objectively reasonable officer would have believed he had probable cause to arrest Beth Shea for the events on Centre Lane; in all events the verdict was against the demonstrable weight of credible evidence.

The issue presented to the jury focused on whether the observations and actions of a reasonable plainclothes state police detective on Centre Lane justified a reasonable belief he had witnessed Beth Shea committing a violent felony, an assault on Tracy Gorfinkle by means of a dangerous weapon. The percipient evidence consisted of what Porter saw and heard and his actions. In addition there was Porter's opinion evidence, the expert opinion of Richard Mears and the expert opinion of Shawn Barbale, nominally as to only excessive force.

As set forth in the Post Trial Brief, the totality of the facts and circumstances then known to Porter did not provide an objectively reasonable basis for a prudent Massachusetts State Police detective to believe that Beth Shea had committed either an attempted battery or a threatened battery.

Porter, a plain clothes state police detective, taking a personal hour, had driven home in his unmarked police car before the end of his shift to relieve Tracy Gorfinkle, his friend and

neighbor who was babysitting his 15 month old son. It was a warm, late afternoon a little before 5:00pm on June 5, 2007. He was standing on the sidewalk on Centre Lane a two way street in Milton, chatting with Ms. Gorfinkle. Porter's son and Gorfinkle's teenage daughter were apparently nearby. Porter had been facing Ms. Gorfinkle when she said "oh, my God;" at which point Porter turned around in the direction Gorfinkle was facing and first saw a Jeep Grand Cherokee coming down the street at what he testified he believed was a high rate of speed. Between the sidewalk and the street is a grass berm approximately a couple of feet wide. Porter observed Gorfinkle step across the berm and then step onto the street while at the same time making a hand motion or signal to the driver of the Grand Cherokee. It is undisputed Gorfinkle was trying to get Shea's attention. Then in all of "a second or two," Porter observed Beth Shea respond to Gorfinkle's hand motion, alter the direction of her car from the driving lane toward the side of the road and with no squealing of brakes or any noise whatsoever come to a complete stop a few feet away from Gorfinkle who was standing on the roadway. Porter had heard no other voices or sounds whether of distress, fear or apprehension of any kind from Ms. Gorfinkle or her teenage daughter. He had no percipient evidence, whether visual or aural, no sound, action, expression or gesture allowing any inference that Ms. Gorfinkle had been put in immediate fear of bodily harm. Nor did Porter see Ms. Shea mouth anything or make any gesture, hostile or otherwise, in either "the two to three seconds" he observed her driving "straight down" (Tr. 3-75) Centre Lane or in the one or two seconds it took her to stop in response to Ms. Gorfinkle's hand motion. In short, Porter had no evidence or reason to believe that this was anything other than the interaction of two strangers in which one, his friend the pedestrian, had stepped from the sidewalk across the berm onto the roadway and made a hand gesture to the motorist who responded in all of one or two seconds by turning (or accepting

Porter's words veering) toward the pedestrian and coming safely and silently to a complete stop. Nor did Porter testify to seeing any dipping of the jeep's front end or hearing any stressing of shocks or struts or of any metal that common sense and ordinary experience suggest accompanies a sudden and rapid deceleration of the several thousands of pounds of an SUV from a high rate of speed to a complete stop in one to two seconds. Nor did Porter present any evidence of tire marks from a sudden braking.

Porter's testified that the crime of assault with a deadly weapon had been committed when Beth Shea "swerved her vehicle at Ms. Gorfinkle." (Tr.3-73:1-2). He testified he did not need a statement from the alleged victim to have probable cause to arrest Beth Shea for assault with a deadly weapon. (Tr. 3-157:2-7). Porter admitted there could be no probable cause for this major felony without having a basis to believe Ms. Gorfinkle had been put in immediate fear of bodily harm. (see Tr. 3-158). Impeaching his prior testimony, Porter insisted that his "observations of Ms. Gorfinkle's reaction" provided him a sufficient basis for him to have probable cause to arrest Beth Shea. (*Id.*). But he had no such observations.

On day four of trial Porter backtracked on when he had probable cause. He admitted that having observed the events ending with Beth Shea's car coming to a stop on the roadway he did not have a sufficient basis from all the events to that point in time and his observations of those events to determine there was probable cause to make an arrest for assault with a deadly weapon. (Tr. 4-32:1-19). Porter then claimed that while still on Centre Lane he had an epiphany and subsequently determined he did have probable cause to arrest Ms. Shea for assault with a deadly weapon. (Tr. 4-35:3-25, 4-36:1-6). Yet Porter did not then attempt to place Ms. Shea under arrest or even instruct her to not to go. Indeed when questioned by the Court Porter admitted that Ms. Shea was free to go.

Porter repeatedly offered his opinion that he "had witnessed" an assault with a dangerous weapon on Centre Lane. (See, e.g., Tr. 3-73, 81, 92, 111, 125, 134, 137). But other than Ms. Shea's actions in responding to the woman who had stepped into the street and made a hand signal to her by first turning her car toward the woman and then coming silently to a complete stop on the street in all of one or two seconds, Porter did not testify to any observations even conceivably warranting an inference of intent to run Ms. Gorfinkle down. As to a threatened battery—given the Court's instructions—Porter had heard or seen nothing to believe Ms. Gorfinkle experienced any fear of being run over. And Porter had no observation that the Jeep SUV had been used so as to actually endanger Ms. Gorfinkle's safety. Nor did Porter have any evidence that Ms. Shea took actions intended by her to cause fear to Ms. Gorfinkle.[5]

The Court must find that a reasonable, off duty state police detective who had witnessed an assault with a dangerous weapon would immediately place the suspect under arrest. At a minimum a reasonable officer would instruct a suspect not to move. A reasonable officer would witnessed a violent felony would not say that the suspect was free to go. This same reasonable officer who had just witnessed an assault with a dangerous weapon followed by the suspect fleeing the scene would have called in the offense and commenced a pursuit with lights and/or siren.

[5] The Court held there was no error in its instructions on probable cause. The Court ruled that intent for purposes of G.L. c. 265§15B under the attempted battery requires proof of a specific *mens rea* to "actually intend to harm the person," but that under the threatened battery theory, the specific intent may be inferred by "a hostile act [that constitutes]… objectively menacing conduct." Bench Ruling at 4-5. Intent to put a person in fear of being shot, a threatened battery, may be inferred by shooting bullets from a gun in the direction of the victim. *Comm. v. Musgrave*, 38 Mass. App. Ct. 519 (1995). In *Musgrave*, a police officer was "scared stiff" and thought he "was going to be shot," from the objectively menacing situation of a defendant holding a gun with the barrel moving toward him. The gun however was an inoperable pellet pistol. There was no evidence that the defendant had intended to shoot the officer. The defendant was tried and convicted under G.L. c. 265§15B, the threatened battery theory, under instructions almost verbatim with the instructions given to the jury in this case. The defendant did not object to the instructions. The Appeals Court reversed the defendant's conviction. It is one thing to allow an inference of a specific intent to put someone in fear of immediate bodily harm from the act of firing bullets from an operable gun in the direction of the alleged victim. But the fear of being shot when no shots were fired and the purported weapon was an inoperable pellet gun, however objectively menacing the circumstances, standing alone cannot support an inference to put the victim in immediate fear of bodily harm.

The expert opinion of Richard Mears was credible, admissible as to the ultimate issue and was that Porter did not have probable cause to arrest Beth Shea for assault with a deadly weapon or for any offense. (Tr. 4:107:6-24-110).

Porter called Shawn Barbale as an expert witness. Mr. Kittredge elicited, and the jury was informed, that Mr. Barbale had an opinion to a reasonable degree of police procedure certainty as to whether Porter had "probable cause to arrest Ms. Shea for assault with a deadly weapon." (Tr. 6-57:19-24.) Because Barbale's expert report was limited to the use of force, the Court sustained plaintiff's objection to the question and would not permit him to inform the jury of that opinion. (Tr. 6-58:1-21). But allowed to offer an opinion as to reasonable force Mr. Barbale opined that "based on the totality of the circumstances," Porter's breaking of the window was a reasonable amount of force to arrest Ms. Shea for assault with a dangerous weapon. (Tr. 6-59-60). The totality of the circumstances on which Barbale relied included Ms. Shea's "indifference towards Trooper Porter's requests for a driver's license" (6-59:10-20)-which did not occur—and that that Porter

> was an officer who observed a felony being committed in his presence, the felony being assault with a dangerous weapon, to wit, an automobile an officer would be reasonable in believing that if this person were allowed to continue this action, it could further endanger the motoring public or pedestrian traffic. He had a duty to react and take action on that felony, and basically there was no other way that that was going to occur, and it is an acceptable police practice to use a flashlight or a mag light, as we refer to it in police work, to break a motor vehicle window

(Tr. 6-60:6-15). Barbale informed the jury that because Ms. Shea "was a dangerous criminal" (Tr. 6-77:3-6) who fled the scene after she had committed an "assault upon an innocent third party," Porter would have been justified to have considered the use of deadly force to arrest Ms. Shea. (Tr.6-83-84).[6]

[6] While plaintiff failed to request an admonition or instruction to the jury, from the view of hindsight the jury should have been told not to take any of Barbale's predicates as proof or evidence, and specifically that they should not give

There is substantial evidence to support the Court's determination that Porter was not credible. The only admissible expert evidence of Richard Mears as the lack of probable cause for any arrest was credible. The Court must conclude that a verdict predicated on the existence of probable cause to make an arrest for assault with a deadly weapon is against the demonstrable weight of credible evidence.

If and to the extent the verdict was predicated on the jury's determination that Porter had probable cause to arrest Beth Shea for the events on Centre Lane, it too is against the demonstrable weight of credible evidence.

The expert opinion of Richard Mears was that Porter did not "properly identify himself as a police officer." (Tr. 4-107:25-108:1-5, 10-16). The overwhelming evidence was that an objectively reasonable police officer could not have believed he had properly identified himself as a police officer, and hence there could be no probable cause for any of the *malum prohibita* crimes of resisting arrest, failure of a motor vehicle operator to stop and failure to identify herself to a police officer.

The alleged crime of failure to stop for the police was completely baseless. Porter admitted that Beth Shea had come to a complete stop before he first commanded her to "stop the vehicle." She did not refuse or neglect to stop when signaled to do so by a police officer.

Porter's testimony that he had properly and adequately identified himself as a police officer is contradicted by his own testimony and frontally inconsistent with Ms. Shea's credible testimony. Porter who was not in uniform repeatedly insisted that Ms. She had to have known he was a police officer because he kept pointing to his badge and gun at the waistline of his pants. But Porter testified that Beth Shea was crying, and just would not look at him. Ms. Shea's

---

any weight to Mr. Barbale's apparent opinion that Porter had probable cause to arrest Beth Shea for assault with a dangerous weapon. *See, e.g.*, precatory instruction regarding Mears' testimony. Tr. 4-121:14-20.

testimony that she did not realize the man yelling at her was a police officer was credible. Porter was out of control, his face was red and he loudly yelled: "state police, roll down your window" while repeatedly banging on Ms. Shea's window. While the car was stationary and while he could see and hear Ms. Shea crying hysterically, Porter never asked the motorist for her license and registration, never took out his state police identification card and held it to the window. Porter never told Ms. Shea she was under arrest, never told her she was not free to go. The overwhelming weight of credible evidence is that she did not know Porter was a police officer.

The alleged crime of refusal to identify oneself to a police officer was baseless. It was undisputed that Porter never asked Ms. Shea for her license and registration and the overwhelming weight of credible evidence is that she did not know Porter was a police officer and that Porter had failed to properly identify himself as a police officer.

The alleged crime of resisting arrest is baseless for a host of reasons. This alleged crime like the others purportedly was committed on Centre Lane. Porter admitted Ms. Shea was free to go. Porter did not instruct Ms. Shea not to leave much less inform her she was under arrest and the overwhelming weight of credible evidence is that she did not know Porter was a police officer.

The overwhelming weight of credible evidence is there was no probable cause to arrest Ms. Shea for reckless operation of a motor vehicle. Whatever rate of speed she was driving, Ms. Shea was able to respond to Ms. Gorfinkle's hand gestures and come to a complete stop within one or two seconds. There was no squealing or screeching of brakes, no testimony of the front end of the vehicle dipping, no burning of rubber. Therefore there was no basis to believe the plaintiff's manner of driving was "very likely" to result in the death or serious injury of Ms. Gorfinkle—who was not on the safe harbor of the sidewalk. Ms. Shea's attentiveness in

immediately responding to Ms. Gorfinkle's attempt to get her attention belies any contention, much less a reasonable belief, that she was ignoring or inattentive to the operative circumstances.

EXCESSIVE FORCE VERDICT.

The verdict that Beth Shea failed to satisfy her burden of proof as to the events on Clifton Road and the use of excessive force was against the demonstrable weight of credible evidence.

The overwhelming weight of credible evidence is that Porter did not have probable cause for an arrest or to make an investigatory stop on Clifton Road. Porter did not contradict Ms. Shea's version of events on Clifton Road and Ms. Shea's version was corroborated by several disinterested witnesses.

The overwhelming weight of credible evidence in summary is as follows. Seeing police flashers and siren Ms. Shea had pulled over and stopped behind Mrs. Flanagan on Clifton Road. The plain clothes Porter, as he had on Centre Lane, again failed to properly identify himself as police officer. Porter was out of control. He was screaming at Beth Shea, repeatedly calling her "a fuck'n bitch," and demanding she "get out of the fuck'n car." He was so violent that notwithstanding the plainly visible flashers of his unmarked car, there were a number of 911 calls to the Milton police. Continuing his loud and profane tirade, Porter repeatedly punched the driver's side window leaving his blood from his injured fist on the cracked but intact safety window glass. Ms. Shea then dialed 911. Porter then returned to his unmarked car, did not call for back up but retrieved a large, almost baton sized metal flashlight. Still not having properly identified himself as police officer, Porter demanded that Ms. Shea roll down the window or he would break it. Porter did not then inform Beth Shea she was under arrest. While her car was completely stopped, Porter refused Ms. Shea's plea to wait for the Milton police. Instead continuing to swear at Beth Shea who was inches away and sobbing hysterically, Porter

repeatedly smashed his flashlight against the window. Porter eventually broke the window showering Ms. Shea with glass shards in her face and hair. Porter reached through the hole in the window, unlocked the driver's door and with Beth Shea cowering and leaning away toward the passenger seat Porter then reached in and put the transmission shifter into the park position.

The driver's door was now open and both the car and Ms. Shea were now completely under his control. But Porter did not remove the key from the ignition and wait for the arrival of the Milton police. Porter still did not tell Ms. Shea that she was under arrest.

Instead Porter repeatedly screamed: "you're fuck'n mine." Ms. Shea cried out to Mrs. Flanagan: "help call the police." Porter took Ms. Shea's phone from her, violently grabbed her by one wrist, yanked her out of the car and tossed her to the ground. Somewhere around the front of Ms. Shea's car and visible to Mrs. Flanagan, Porter pursued Ms. Shea as she clambered to her feet. Continuing to curse: "you're fuck'n mine," Porter groped Ms. Shea's breasts, leaving bloodstains from his bloody fist on the chest area of her shirt. Beth Shea felt violated and cried: "What are you doing?" to which Porter repeated: "you're fuck'n mine" and this time groped Ms. Shea in her groin, leaving bloodstains from his cut hand this time on the crotch of her pants. As Beth Shea tried to walk away she caught the eye of Mrs. Flanagan and begged her to call the police. Porter then grabbed Ms. Shea from behind and handcuffed her.

Ms. Shea suffered injuries to her wrists, cuts and abrasions to her face and back. Ms. Shea suffered severe emotional distress.

When the Milton police arrived Ms. Shea was sobbing and told the Milton Police she feared for her life. Even after the arrival of the Milton police, Porter was out of control as he loudly objected to the Milton police taking Ms. Shea into their custody and insisting "She's fuck'n mine, your're not taking her."

While Porter had no memory of swearing or cursing, each of Ms. Shea, Kevin Burke and Eugene Irwin and the 911 recording corroborates that the young trooper was out of control, screaming and cursing at Beth Shea as she cowered in her car. While Porter could not recall under oath if he had used his fist to strike the window, Mr. Irwin's testimony confirmed Ms. Shea's testimony that Porter repeatedly punched the window with his fist all the while screaming "about as loud as anyone could scream: 'you fucking bitch, get out of the car.'" Mr. Irwin also testified that Porter's hand was bloody before he broke the window with the flashlight and he corroborated that Porter had violently "ripped …[Beth Shea] out of the car [and] threw her to the ground." Based on his observations, Lieutenant King of the Milton police believed the blood on Ms. Shea's shirt was probably from Porter's hand.

While Porter denied only that he had touched Ms. Shea in "any inappropriate way," he did not deny that he touched either her or her crotch. But Mr. Irwin's testimony corroborated the sexual assault. When Mr. Kittredge tried to sow doubt about exactly where Porter had grabbed Ms. Shea, Mr. Irwin was clear that Porter "had his hands around the area [of her breasts] when he pulled her out of the car" and that when Porter threw Ms. Shea to the ground he seemed to have had one hand or two between her legs.

Mrs. Flanagan's testimony and contemporaneous 911 call made in response to Beth Shea's plea to call the police were compelling. She corroborated that Porter was "beating" and "harassing" Ms. Shea. Mrs. Flanagan testified that she called 911 because "she was afraid …[Ms. Shea] was going to be harmed."

Richard Mears' expert testimony was credible, admissible as to the ultimate issue and was that Porter's use of force was not reasonable under the circumstances. (Tr. 4-113:19-24, 114): if there was no crime Porter "had no right to use any force." (Tr. 4-114:15.). Mr. Mears explained

if any force was necessary, assuming a crime had been committed, Porter's use of force was excessive under the circumstances. Mears credibly testified that assuming a valid basis to seize Ms. Shea, Porter violated the standard constitutional protocol mandating the minimum use of force under the circumstances.

The opinion testimony of Shawn Barbale was that given the violent crime Beth Shea had committed, Porter would have been justified to have used deadly force. In all events, Barbale's opinion was that Porter was justified under the circumstances in breaking the window. Barbale offered no justification or excuse for yanking a sobbing, middle aged woman out of her car and violently throwing her to the ground, after Porter had the car door open and had put the car in park. The Court should discount entirely the weight of Mr. Barbale's testimony.

The overwhelming weight of the credible evidence is that Porter had no right to use any force on Clifton Road. There is no evidence that Beth Shea actively resisted arrest, or attempted to evade arrest by flight, or that Beth Shea posed an immediate threat to either Porter's physical safety or to public safety. Even crediting Porter's testimony that he had probable cause to arrest Beth Shea and that he had to break the window, his subsequent forcible dragging of the sobbing, frightened Beth Shea out of her car, and then slamming her onto the roadway was clearly an unreasonable use of force to effect an arrest under the circumstances.

Porter's groping of Ms. Shea's breasts and crotch was an inexcusable, unconsented violent battery.

The testimony of the eyewitnesses uniformly discredit Porter's testimony, confirm that Porter was out of control, screaming obscenities and that he violently assaulted and battered Beth Shea without excuse or privilege.

The verdict that Beth Shea did not meet her burden of proof as to her excessive force claim is against the clear weight of the credible evidence. The verdict constitutes a gross miscarriage of justice and cannot stand.

CONCLUSION.

This Court has the authority and duty under the Seventh Amendment and within the clearly delineated bounds of First Circuit precedent to grant the motion for a new trial on both her false arrest and excessive force claims because each verdict was against the clear weight of credible evidence or alternatively because Ms. Shea was treated so unfairly that the verdict resulted in a gross or blatant miscarriage of justice.

WHEREFORE the plaintiff Beth E. Shea requests the Court to grant her Motion for reconsideration and grant her a new trial on her false arrest and excessive force claims.

Respectfully submitted,
BETH E. SHEA,
Plaintiff,
by her attorney,

January 2, 2014

/s/ Richard A. Goren
Richard A. Goren, Esq. BBO #203700
Law Office of Richard Goren
101 Federal Street Suite 1900
Boston MA 02110
617-261-8585
rgoren@richardgorenlaw.com

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and that paper copies will be sent to those non-registered participants (if any) on January 2, 2014.

/s/ Richard A. Goren