

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD BANKS, et al	: NO 3:08-1110
	: (CAPUTO, D.J.)
	:
Vs	: (MANNION, M.J.)
	:
KAREN GALLAGER, et al	:
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EDWARD J. KRAFT, JR.,	: NO: 3:08-1177
Plaintiff	:
	: (CAPUTO, D.J.)
Vs.	: (MANNION, M.J.)
	:
KAREN GALLAGER, et al	:
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**COUNTERSTATEMENT OF FACTS IN OPPOSITION TO THE
MOTION FOR PARTIAL SUMMARY JUDGMENT OF
DEFENDANTS, DICKSON CITY, WILLIAM STADNITSKI, KAREN
GALLAGHER AND ANTHONY MARIANO FILED ON BEHALF OF
RICHARD BANKS AND JUDY BANKS.**

AND NOW comes the Plaintiffs, Richard Banks, Judy Banks, Roger McCarren and Larry Meyer, and file this Counterstatement of Facts in Opposition to the Motion for Summary Judgment of the Defendants, as follows:

1. Denied. It is admitted that a group of gun carrying advocates agreed to meet at the Old Country Buffet in Dixon City to have dinner together, for fellowship and for a “meet and greet” R.

Banks, 28-29;¹ not only were the Plaintiffs participating in this “meet and greet”, but many of them had their spouses and their children with them.

2. It is agreed that, as with any social event being coordinated between multiple participants, this “meet and greet” dinner at the Old Country Buffet was planned prior to May 9, 2008;

3. It is admitted only that the police received three phone calls before they eventually arrived at the Old Country Buffet;

4. Admitted.

5. It is admitted that Mariano spoke to one of the complainants and then confronted the group. By way of further answer, according to the testimony of Larry Meyer, Mariano

¹ Throughout the defendant’s statement of facts, there are numerous violations of L.R. 56.1. First these “facts” are laced with editorial comments and conclusory allegations by the author. For example, “Fact” #3 starts with “not surprisingly”; # 5 states that “...some of whom then voluntarily accompanied the officers”, when the voluntariness of the act is the main issue in the case. In addition, many of the “statements” do not contain a reference to the portion of the record where the information can be found, i.e., No. 1, No. 2, No. 5, No. 8, No. 34, No. 36, No. 44. On multiple occasions throughout the Statement of Facts the reference is merely to Exhibit 1 which is Mariano’s Deposition, without reference to any specific page number, apparently leaving it Plaintiff’s Counsel and this Court to muddle through the 104 pages of deposition testimony looking for the language quoted by the Defense Lawyer. Rather than interpose the above objections each and every time this occurs, the Plaintiff wishes to reserve an ongoing objection to these multiple violations of the Local Rule.

approached the group, dressed in his full police uniform including guns, handcuffs, magazines, pepper spray and badge and ordered, "Everybody with a gun, outside." Meyer N.T. 13. Furthermore, Mariano did not tell the individuals that they were not required to accompany him to the vestibule, Mariano, p. 27. In addition, at the time Mariano arrived and made his entrance into the restaurant, he had no reason to believe that the Plaintiffs were terrorists, or psychopathic or that they posed a threat to the other patrons inside the restaurant period. Mariano N.T. 22-23

6. Denied that the Plaintiffs were "invited to go to the vestibule." See Meyer Deposition p. 13. It is admitted that Larry Meyer otherwise testified as otherwise referenced in this allegation. By way of further answer, various individuals, before accompanying Mariano into the vestibule, asked Mariano "... what do we got to come outside with you for". Although Mariano gave his reason, he did not advise them that they were not required to accompany him. Mariano, N.T. 26-27.

7. Denied. Mariano himself testified that Banks was one of the individuals at the table he approached. Mariano, p. 28.

8. Admitted that the Plaintiff brought a video camera to the restaurant, as Mrs. Banks normally carried a video camera with her in her purse. R. Banks 56.

9. Admitted only insofar as it is consistent with what Exhibit 4 actually demonstrates. It is admitted that Mrs. Banks began to video and audio record the incident which was taking place in the vestibule. It is denied that such an encounter was “orchestrated” or such recording was in violation of any Wiretapping Laws, since no reasonable person would have any expectation of privacy in the “packed” Old Country Buffet at dinner time.

10. Admitted that permission was neither sought nor granted, because such permission in a “packed” public restaurant is not required since nobody there has any reasonable expectation of privacy, the very lynchpin of the Pennsylvania Wiretapping Laws.

11. This is not a material fact, but it is admitted that, after asking a friend to watch her children, Mrs. Banks did utter the statement attributed to her.

12. Admitted.

13. Admitted.

14. Admitted that Mrs. Banks never requested the permission of any of the participants. By way of further answer, Defendant, Mariano was aware that Mrs. Banks was taping the incident, and neither requested nor demanded that the taping stop, nor did he advise Mrs. Banks that he did not consent to it. Mariano, N.T. 37.

15. Denied. Mrs. Banks was indeed a participant in the conversation in the vestibule when Mariano asked her what she was doing and why she was doing it and was further involved in the conversation when Gallagher eventually demanded that she stop recording it. Exhibit 4.

16. It is admitted that Officer Gallagher first requested and then illegally demanded that Mrs. Banks stop recording.

17. Whether the parties were arguing is not a material fact. Nonetheless, it is admitted that Mr. Banks and Gallagher had a discussion about what could and could not be legally done with a video camera in the “packed” Old County Buffet. Furthermore, the request was not that Mrs. Banks stop audio recording, but, rather, that she stop recording. J. Banks, N.T.23-24

18. Admitted only insofar as is consistent with what is actually shown, depicted and recorded on Exhibit 4.

19. It is admitted that Mrs. Banks did stop recording when Gallagher made it clear that it was not a request but a demand and it is also admitted that Gallagher threatened to arrest Mrs. Banks for violating Wiretapping Laws. It is denied that Gallagher limited her request to cessation to the recording of the audio portion of the encounter.

20. Admitted.

21. Admitted. At the same time, he did not tell Mrs. Banks that it was acceptable to continue recording the incident, nor did he do anything to prevent Gallagher from threatening to arrest Mrs. Banks if she did not stop recording; nor did he contradict Gallagher when she stated that “we” do not consent to the taping”. Mariano N.T. 48.

22. Admitted only insofar as this allegation properly and correctly quotes the language of Exhibit 4 without any embellishment or interpretation by Defendants (which it does). See exhibit #4.

23. Admitted, but the “request” was preceded by the order from Mariano that “What I need from all you guys...”. In addition, at about this time, Mariano ordered that the door leading into the

restaurant be closed, thereby confining the individuals who were in the vestibule. Exhibit #4.

24. Admitted, referencing, of course, the firearm that was visibly displayed on his hip.

25. Denied as stated. As pointed out above, the statement was preceded by the statement that “What I **need** from **all** you guys...”. Exhibit #4.

26. Except for the editorial content, it is admitted that some member(s) of the detained group made statement skin to what is alleged.

27. The content of the question is admitted. The motive of Mariano is denied.

28. Aside from the editorial content, it is admitted that Banks did not announce that he was a federal firearms dealer, because he was not asked.

29. Admitted that back up was requested.

30. Denied as stated. As noted above, this request was preceded by the statement that Mariano “needed” ID from everybody, and this was after Mariano ordered the door to be closed. Exhibit #4. In addition, when Mr. Banks exercised his constitutional rights by

refusing to produce written identification, Mariano ordered that “Here’s what we’ll do. We’ll ‘deal’ with you in a second”. Exhibit #4.

31. It is admitted that Mr. Banks exercised his constitutional rights by refusing to produce written identification.

32. Admitted.

33. Admitted.

34. Admitted.

35. Denied. Rather, Gallagher and another unidentified law enforcement officer approached Mr. McCarren, Gallagher told Mr. McCarren that it was illegal for him to be carrying a gun that was “registered” to him, she advised Mr. McCarren that there was no such law regarding the gifting of firearms, Mr. McCarren stated that “your kidding, right”, Gallagher responded “No, I’m not”. Mr. McCarren responded with “This is bullshit”, and Gallagher stated “If you don’t step outside I will arrest you”. McCarren, N.T. 36-40.

36. Denied as stated. As set forth in the preceding, Mr. McCarren did accompany Officer Gallagher outside but it was only under threat of arrest. Id.

37. Admitted.

38. It is only that Gallagher instructed Mr. McCarren to face the wall, place his hands against the wall and at that time the firearm was retrieved from Mr. McCarren's holster. McCarren N.T. 42. In addition to that, Officer Gallagher illegally patted down Mr. McCarren, stuck her hands in his pocket, pulled out his wallet, his cell phone and papers. Id. 42.

39. Admitted that within five (5) or ten (10) minutes after the firearm was confiscated from Mr. McCarren, Mrs. McCarren came back to where Mr. McCarren was located with the firearm in her possession. McCarren N.T. 46.

40. Admitted, but Mr. Banks was handcuffed and taken into custody and placed in the back of the police car before the officers spoke with either the Assistant District Attorney or the Chief.

41. Admitted that the Chief so testified.

42. Admitted.

43. It is admitted that the officers underwent the Act 120 training and annual updates.

44. It is admitted that the Plaintiff filed a lawsuit alleging the various claims set forth in paragraph 44. The editorial portion of this "Statement of Fact" is denied.

45. The Defendant Stadnitski, as the Chief of Police of Dickson City, has a policy, that if becomes aware that a citizen is carrying a firearm that alone gives him the legal right to stop that citizen and demand identification. Stadnitski N.T. 44-45.

46. He did not know if the law permitted him to do that, and he did not care, for if that turned out to be a bad arrest, he would worry about that later. Id., N.T. 46

Respectfully submitted:

WORTH, MAGEE & FISHER, P.C.

/s/ Robert J. Magee, Esquire

Robert J. Magee, Esquire

Attorney for Plaintiff

Court I.D. #: 30911

2610 Walbert Avenue

Allentown, PA 18104

Telephone #: 610-437-4896

Facsimile #: 610-433-3955

Certificate of Service

I, Robert J. Magee, Esquire, hereby certify that the within Counterstatement of Facts in Opposition to the Motion for Partial Summary Judgment of Defendant, Dickson City, filed on behalf of Richard Banks, Judy Banks, Roger McCarren and Larry Meyer has been filed electronically and is available for viewing and downloading from the ECF System. I further certify that service of the within documents upon the individuals identified below was effected by electronic service by virtue of such filing pursuant to LR 5.7.

Johanna L. Gelb, Esquire
GELB LAW FIRM
538 Spruce Street, Suite 600
Scranton, PA 18503

Joseph F. McNulty, Jr., Esquire
1245 S. Cedar Crest Blvd.
Suite 300
Allentown, PA 18103

9-21-09
Date:

/s/ Robert J. Magee, Esquire
Robert J. Magee, Esquire
WORTH, MAGEE & FISHER, P.C.
Attorney for the Plaintiff
rmagee@fast.net
2610 Walbert Avenue
Allentown, PA 18104
Telephone #: 610-437-4896
Facsimile #: 610-433-3955
I.D. # 30911