

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

RICHARD BANKS, JUDY BANKS, ROGER	:	
MCCARREN and LARRY MEYER,	:	
	:	
Plaintiffs	:	
	:	CIVIL ACTION NO. 3:08-1110
vs.	:	
	:	(CAPUTO, D.J.)
KAREN GALLAGHER, ANTHONY	:	(MANNION, M.J.)
MARIANO, WILLIAM STADNITSKI and	:	
DICKSON CITY BOROUGH,	:	
	:	
Defendants	:	
EDWARD J. KRAFT, JR.,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 3:08-1177
	:	
vs.	:	(CAPUTO, D.J.)
	:	(MANNION, M.J.)
KAREN GALLAGHER, ANTHONY	:	
MARIANO, and DICKSON CITY BOROUGH,	:	(ELECTRONICALLY FILED)
	:	
Defendants.	:	
	:	

**DEFENDANT ANTHONY MARIANO'S SHORT AND CONCISE
STATEMENT OF FACTS IN SUPPORT OF HIS MOTION FOR PARTIAL
SUMMARY JUDGMENT**

AND NOW, comes the Defendant, Anthony Mariano, by and through his counsel, Post & Schell, P.C., and pursuant to Local Rule 56.1, files the within Short and Concise Statement of Facts in support of his Motion for Partial Summary Judgment, and in support thereof states the following:

1. Plaintiffs, members of a group of gun advocates, seeking to advance the cause of "Open Carry" in Pennsylvania, planned and then followed through on a plan to

bring as many as ten gun carrying members to the packed Old Country Buffet in Dickson City during the dinner hour.

2. The incident was orchestrated prior to May 9, 2008.

3. Not surprisingly, numerous patrons were worried and afraid and police received multiple calls to respond. Exhibit 1.

4. In response to the 911 calls, two patrol officers, Officers Gallagher and Mariano arrived at the Old Country Buffet in Dickson City. Exhibit 1.

5. The officers spoke with one of the complainants, and then requested the opportunity to speak with members of the group, some of whom then voluntarily accompanied the officers to a vestibule for privacy.

6. After being invited to go to the vestibule at the restaurant, not all those in the group carrying weapons did. In fact, pursuant to the testimony of Plaintiff Larry Meyer, one of his gun-carrying colleagues simply chose to ignore the request of Officer Mariano and continued to sit at the table. Exhibit 2 at pp.13-14.

7. Plaintiff Richard Banks (hereinafter "Mr. Banks") was not present at the time Officer Mariano requested the group members to accompany him. Rather, he heard from colleagues at the table that the Officer had been present and chose to walk to the vestibule voluntarily. Exhibit 3 at pp. 52 -53.

8. The armed group which included Plaintiffs brought a video camera to the restaurant. Said video camera was operated by Plaintiff Judy Banks (hereinafter "Mrs. Banks"). Exhibit 4 was previously mailed to the Court as "Exhibit 5" to Defendants' Response in Opposition to Plaintiff Kraft's Motion for Summary Judgment.

9. Shortly after Officers Mariano and Gallagher arrived, Mrs. Banks began to video- and audio-record the orchestrated encounter with police in violation of wire-tapping laws. Exhibit 4.

10. Mrs. Banks began video- and audio-taping the events before even entering the vestibule, and without seeking or being granted the permission of Officer Gallagher or Officer Mariano. Exhibit 4.

11. Mrs. Banks asked a friend to watch her children, saying that she was “taping the *whole* thing.” Exhibit 4.

12. While audio- and video-taping the encounter, Mrs. Banks followed all the individuals who chose to enter the vestibule into the vestibule. Mrs. Banks voluntarily entered the vestibule without being invited, after the other Plaintiffs had already gone into the vestibule. Exhibit 5 at p. 10. Following the taping, she left the vestibule and returned to her table. *Id.* at 27-28.

13. When asked why she was videotaping the encounter, Mrs. Banks answered, “Because I can.” Exhibit 4.

14. Mrs. Banks never requested the permission of any of the participants of the conversation in the vestibule while in the presence of the officers to video- or audio-tape their conversation. Exhibit 4.

15. Mrs. Banks was not a participant of the conversation in the vestibule, and in fact, showed up after the conversation had begun and was a spectator. Exhibit 4.

16. Officer Gallagher asked Mrs. Banks to stop recording her voice, as she did not give permission for such a recording. Exhibit 4; Exhibit 6 at pp. 89-91.

17. While Officer Gallagher was speaking with Mrs. Banks, explaining why she had to turn off the audio-recording portion of her video, Mr. Banks began arguing with Officer Gallagher. Exhibit 4.

18. Mr. Banks asserted that the group was conversing with the officers voluntarily, and because the Officers' conversation in the vestibule with the group was consensual, Mrs. Banks had a right to audio- and video-record the conversation, regardless of whether Officer Gallagher gave permission for such audio-recording or not. Exhibit 4.

19. Mrs. Banks refused to stop recording until Officer Gallagher demanded that she do so, informing her that she was in violation of Wiretapping laws by audio recording Officer Gallagher's voice without her permission. Exhibit 4; Exhibit 6 at pp. 89-91.

20. Only then did Mrs. Banks cease video- and audio-recording the encounter.

21. Defendant Officer Mariano did not take part in the request that Mrs. Banks cease video- or audio-recording the encounter. Exhibit 4.

22. Mr. Banks asserted that the police officers had no right to ask for weapons permit and that the group had an absolute right to carry firearms wherever they pleased. Exhibit 4.

23. The officers advised the group members of their fellow citizens' concerns and inquired if anyone was carrying concealed. Those individuals were asked if they would like to provide the license to carry to the officers. Exhibit 4.

24. Mr. Banks said, "I'm not concealing." Exhibit 4.

25. Officer Mariano made clear that he was not requesting identification from the individuals who were open carrying. Exhibit 4.

26. When asked why the group was assembled in such a large number in a family restaurant with firearms at their sides, the Plaintiffs shortly and pointedly asserted that it was simply because they had a right to do so. Exhibit 4.

27. In a further attempt to dispel the Officers' concerns about the well being of the patrons and employees of the restaurant, Officer Mariano asked if any members of the group were police officers or had a job title that would require them to carry firearms or belonged to some sort of organization. Exhibit 4.

28. The Plaintiffs evaded the question, and Mr. Banks did not tell the officers at that time that he was a federal firearms dealer. Exhibit 4.

29. Due to the officers' concerns about the size of the group and the fact that they were all carrying weapons, officer back-up was requested. Exhibit 6 at pp. 176-178.

30. The group was also asked if they would like to provide some form of identification to the police officers, and certain members of the group voluntarily complied, including Plaintiff Larry Meyer and with the exception of Mr. Banks. Exhibit 4.

31. Mr. Banks persisted in being purposely evasive, maintaining that he was not required to provide any sort of paper identification. Exhibit 4.

32. It was later determined that Mr. Banks was carrying concealed and that he was a federal firearms dealer. Exhibit 6 at p. 105.

33. Some of the identifications were run through the police department communications center to make sure none of the prohibitions against gun owning in Pennsylvania applied to these gentlemen. Exhibit 1 at pp. 54-57.

34. On running the identifications, it was determined that the weapon held by Plaintiff Roger McCarren was not sold to him.

35. Officer Gallagher returned to the restaurant, where Mr. McCarren had returned, and asked if he would join her outside to speak regarding the ownership of the firearm. She asked that he join her outside both to give him some privacy and so that she could hear him clearly, due to the noise in the restaurant. Exhibit 6 at pp. 121-122.

36. Mr. McCarren agreed to go outside.

37. When Officer Gallagher let Mr. McCarren know that she believed he could not carry the handgun because only the person who purchased the gun could carry it, she also let him know that she would have to remove the handgun from his holster. Exhibit 6 at 123-124.

38. For the safety of Mr. McCarren, herself, her fellow officers, and other individuals present, Officer Gallagher asked that Mr. McCarren face the wall while she removed his gun from its holster. Exhibit 6 at 123-124.

39. After removing the gun, Officer Gallagher spoke with Mrs. McCarren and let her know that the gun could be immediately released to her because it was documented as being sold to her. Exhibit 6 at pp. 125-126.

40. At various times throughout the encounter, officers spoke with Assistant District Attorney Corey Kolcharno and their then Police Chief Stadnitski. Exhibit 6 at 118, 144, 172, 192.

41. In his thirty-seven (37) years of serving the force, Defendant Chief Stadnitski had never encountered an incident like the one at bar. Exhibit 7 at pp. 31-32

42. However, relying on the advice relayed from the officers to the ADA and to him, Chief Stadnitski used his best judgment to inform the officers as to the lawfulness of their actions and how to best handle the situation. Exhibit 6 at pp. 172, 192-193.

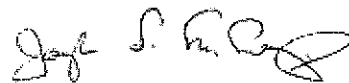
43. In addition to following the recommendations of Police Chief Stadnitski, Officers Gallagher and Mariano relied upon their informed judgment, having undergone the required Act 120 training and annual updates under the direction of Chief Stadnitski. Exhibit 1 at pp. 102-104; Exhibit 7 at pp. 10-16.

44. Despite Defendant Stadnitski's, Officer Gallagher's, and Officer Mariano's lawful actions that day and their best efforts to best protect the interests of the patrons of the restaurant, other citizens, and the Plaintiffs, Plaintiffs filed suit alleging federal constitutional violations, Pennsylvania state constitutional violations, and alleging that Officers Mariano and Gallagher conspired with each other to violate Plaintiffs' constitutional rights.

Respectfully submitted,

POST & SCHELL, P.C.

By:



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CERTIFICATE OF SERVICE

I, Joseph F. McNulty, Jr., Esquire do hereby certify that I caused a true and correct copy of the foregoing document(s) to be served upon the following designated person(s) via Electronic Service on the date set forth below:

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