ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
NO. 96-2035

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KELLI SWAIN,
Plaintiff-Appellant

v.

LAURA SPINNEY, EDWARD HAYES
and THE TOWN OF NORTH READING
Defendant-Appellees

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ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

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# BRIEF OF THE DEFENDANTS-APPELLEES

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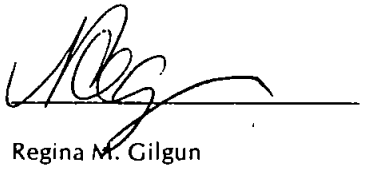
Douglas I. Louison,
BBO# 545191
Regina M. Gilgun,
BBO# 565246
MERRICK & LOUISON
67 Batterymarch Street
Boston, MA 02110
(617) 439-0305

**CERTIFICATE OF SERVICE**

I, Regina M. Gilgun, do hereby certify that on December 30, 1996, I served the foregoing by causing two copies of the same to be mailed, postage prepaid, directed to Michael E. Tyler, Esquire, 430 Boston Street, Suite 104, Topsfield, MA 01983 and Michael Edward Casey, Esquire, 60 Rantoul Street - #707N, Beverly, MA 01915.



Regina M. Gilgun

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## STATUTES

## I. STATEMENT OF THE ISSUE PRESENTED

Whether the District Court correctly dismissed all claims against the defendants, Spinney, Hayes and the Town of North Reading as the plaintiff failed to state a claim for which relief may be granted.

Specifically, whether the defendants violated the plaintiff's civil rights by conducting a strip search of her person while she was in the custody of the North Reading Police; whether the individual defendants, Hayes and Spinney, must be qualifiedly immune from liability; and whether the Town of North Reading had a custom, practice or policy which was deliberately indifferent to the rights of its citizens.

## II. STATEMENT OF THE CASE

On July 5, 1996, the District Court (O'Toole, J.) dismissed all claims with prejudice against the defendants. The plaintiff, Kelli Swain, appeals the District Court's dismissal by way of Summary Judgment of the Federal and State civil rights claims against the defendants, Laura Spinney, (hereinafter, "Spinney"), Edward Hayes (hereinafter, "Hayes") and the Town of North Reading (hereinafter, "Town").

## III. STATEMENT OF THE FACTS

The defendants adopt the plaintiff's "Agreed Upon Facts". (P.4 of Appellant's Brief and Supplement.)

Further, the defendants offer the following:

The plaintiff by her own admission states that there was no sort of a cavity search conducted on her person while in the custody of the North Reading Police. (Record Appendix, page 99);

The plaintiff dropped marijuana on the grass beside the motor vehicle after her boyfriend's motor vehicle was pulled over by the North Reading Police. (Record Appendix pages 85-86);

A female matron, Laura Spinney, conducted the strip search, no one else was present, the door was closed and the plaintiff was allowed to keep her bra on. (Record Appendix page 99);

The defendant, Laura Spinney who performed the strip search of the plaintiff was very polite and apologetic to the plaintiff when conducting the search. (Record Appendix page 97);

The defendant, Laura Spinney never touched the plaintiff while conducting the strip search. (Record Appendix page 99);

On the day of the strip search, the plaintiff was charged with possession of a Class D substance, receiving stolen property over $250.00 and shoplifting. (Record Appendix page 62).

## IV. ARGUMENT

### THE DISTRICT COURT CORRECTLY DISMISSED CLAIMS AGAINST THE DEFENDANTS AS THE PLAINTIFF FAILED TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED

#### 1. The Strip Search of the Plaintiff was Constitutional

##### A. 42 U.S.C., Section 1983

The leading cases in the analyzing the constitutionality of strip searches, Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979) and U.S. v. Klein, 522 F.2d 296 (1975) foreclose plaintiff's argument that the strip search of her person by the defendants was unconstitutional.

In Klein, the Court authorized a search of Klein as he was charged with possession of cocaine. Similar to the plaintiff in this case, Klein was instructed to bend over and was examined visually. Id. By comparison, the plaintiff, Swain, was charged with possession of marijuana, was accompanying her boyfriend who was recently reported to have been shoplifting and was found to have rolling paper in her purse. This being the case, the defendants strip search was constitutional.

Further, in applying the analysis of the Wolfish case, the plaintiff has failed to prove that the strip search was unconstitutional.

In Bell v. Wolfish, the U.S. Supreme Court evaluated the reasonableness of strip searches under the Fourth Amendment. Wolfish involved a class action challenge of, among other things, the practice of body cavity viewing of inmates visits with people from outside the prison. In upholding the constitutionality of the search, the Court established a balancing test to determine the constitutionality of searches. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861 (1979). The Court went on to find:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Id. 558, 99 S.Ct. at 1884.

In view of the facts of the case at bar, it is clear that upon performing a balancing test of the need for the search, against her personal rights, the need to search outweighed her privacy rights. The plaintiff had thrown, in an attempt to conceal it from the police officer, illegal contraband.

Further, when considering the scope of the intrusion, the fact that the search was conducted by a female and the plaintiff was allowed to keep her bra on suggests that the least intrusive approach possible was used. Furthermore, the plaintiff testified herself that Matron Spinney never touched her person during the search.

With regard to the manner in which the strip search was conducted, it is clear that it was conducted in a most professional fashion. The plaintiff testified at her deposition that Matron Spinney was very kind during the search and never touched her.

Further, the search was clearly justified as the plaintiff was an arrestee charged with possession of marijuana and with shoplifting. Both of these offenses would create a reasonable suspicion\probable cause to the officers that she was concealing either a weapon or contraband. Even more so, the fact that the plaintiff threw the bag of marijuana when she exited the motor vehicle contributes to the officer's heightened suspicion that the plaintiff was concealing evidence.

Lastly, with regard to the place in which the search was conducted, as it was conducted in a female holding cell with the door shut and solely in the presence of the matron, the defendants

could not have provided a more private and appropriate place to conduct the search.

Based on this application of the Wolfish balancing test it is clear that the strip search of the plaintiff was warranted and constitutional. Id.

**B. Massachusetts Civil Rights Act, G.L. c. 12 Section 11 H and I**

As the plaintiff has failed to substantiate a claim against the defendants for violation of her Federal Civil Rights, the plaintiff's claim against the defendants pursuant to the Massachusetts Civil Rights Act must also fail.

The Massachusetts counterpart to the Federal Civil Rights Act, requires the additional burden on the plaintiff to prove a violation of her rights by threats, intimidation and coercion, and as the plaintiff has failed to articulate any such conduct by the defendants, such action must fail. G.L. c 12, Section 11H and I, Willits v. Roman Catholic Archbishop of Boston, 411 Mass. 202, 210 (1991). Generally, relief under the MCRA will be granted where the threat, intimidation, or coercion involves either a physical confrontation accompanied by a threat of harm, or the loss of a contract right. Willits, supra at 210; Bally v. Northeastern University, 403 Mass. 713, 719 (1989). The plaintiff has failed to present any evidence to support her claim that the defendants, Town, Spinney or Hayes, engaged in acts that constituted threats, intimidation or coercion, let alone in the context of a physical confrontation or resulting in the loss of a contract right.

**2. The Defendants Spinney And Hayes In Their Individual Capacity Must Be Qualifiedly Immune From Liability**

In the case of Siegert v. Gilley, 500 U.S. 226 (1991), the defendant raised as here the defense of qualified immunity and the Supreme Court held that it was not necessary to address the defense of qualified immunity as the claim failed at analytically earlier stage. As in the case

at bar, the plaintiff failed to establish a claim for the violation of any rights secured by the Constitution as discussed above and therefore the claims against Spinney and Hayes must be dismissed, and a qualified immunity analysis is not necessary.

If, however, this Court finds that the plaintiff's constitutional rights were violated, then the defendants are still qualifiedly immune from liability as the right not to be strip searched was not clearly established at the time of the search. Qualified immunity protects government officials, such as the defendants, Hayes and Spinney, "from liability for civil damages insofar as their conduct does not violate **clearly established statutory or constitutional rights** of which a reasonable person would have known". Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Thus, "[e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard". Davis v. Scherer, 468 U.S. 183, 190 (1984).

It must be determined whether the right at issue was "clearly established" at the time of the alleged violation. In this context, a right is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 482 U.S. 635, 640 (1987). Next, the Court must "determine whether Defendants reasonably should have comprehended that their specific actions transgressed those 'clearly established' rights". Amsden v. Moran, 904 F. 2d 748, 752 (1st Cir. 1990).

The state of the law surrounding the constitutionality of strip searches at the time the plaintiff was searched was such that the defendants acted properly in conducting the search based on Klein and Wolfish. If it is determined that the law has since changed, the defendants, Spinney and Hayes must be qualifiedly immune from liability.

Contrary to plaintiff's argument that the Court erred by dismissing the pendent state civil rights claim, G.L.c 12, Section 11H, based on the ruling in Rodriques v. Furtado, 410 Mass. 878 (1991), the defendants Spinney and Hayes were properly dismissed based on qualified immunity. The facts of Rodriques differ drastically from the case at bar. In Rodriques, the plaintiff was subjected to an internal cavity search. Id. The plaintiff, Swain, was not subjected to such an intrusion, but instead to a visual strip search. The plaintiff's argument that the individual defendants can not be qualifiedly immune from liability based on the holding in Rodriques is clearly misplaced.

Further, the plaintiff alleges that Lt. Hayes acted with a malicious state of mind when he ordered the strip search. This Court has stated, the "applicable standard" when applying the defense of qualified immunity requires a an objective analysis and therefore:

> "Because qualified immunity does not address the substantive viability of a section 1983 claim, but rather the objective reasonableness of a defendant's actions, a plaintiff who is entitled to prevail on the merits is not necessarily entitled to prevail on the issue of qualified immunity." Amsden v. Moran, 904 F. 2d 748, 751 (1st Cir. 1990).

Therefore, Lt. Hayes' state of mind would not be at issue.

3. **The Plaintiff Has Failed to State a Claim Against The Town of North Reading**

The Court properly dismissed the defendant, Town of North Reading, from this action as the plaintiff has failed to allege anything which would give rise to liability under 42 U.S.C. Section 1983. The plaintiff merely stated broad claims against the defendant, Town of North Reading without setting forth the basis thereof.

The plaintiff asserts that her Federal Constitutional rights were violated as the Town was negligent in training and supervising defendants, Spinney and Hayes.

Initially, to prevail on a Section 1983 claim, "a plaintiff must show that he or she was

deprived of a right, privilege or immunity secured by the Constitution or laws of the United States by a person acting under color of state law". Pittsley v. Warish, 1927 F. 2d 3, 6 (1st Cir.), cert denied, 112 S. Ct. 226 (1991) (citations omitted). A plaintiff may not sue a local government or its officials under a theory of respondeat superior pursuant to Section 1983. Monell v. Dept. of Social Services, 436 U.S. 658, 691 (1978). The plaintiff may not, therefore, simply include the Town of North Reading as a defendant and hope to impute the actions of individual police officers to it through respondeat superior.

Moreover, the civil rights violation asserted against the Town of North Reading merely alleges negligence in supervising and training its employees which is not enough to escalate to a civil rights violation. Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under Sec. 1983. Only where a failure to train reflects a deliberate or conscious choice by a municipality can a city be liable for such a failure under Sec. 1983. City of Canton v. Harris, 489 U.S. 378, 389 (1985).

Further to succeed against a municipality in a Section 1983 case, a plaintiff must prove that the alleged constitutional injury directly resulted from an official policy or well settled practice. Monell v. Dept. of Social Services, 436 U.S. 658, 690-694 (1978).

The evidence and facts as asserted by the plaintiff fall far short of substantiating a custom or policy creating a constitutional injury by the Town of North Reading. In fact, after a review of the policies and procedures of the Town of North Reading it is clear that they are constitutional based on the above Wolfish balancing test.

Furthermore, the plaintiff's claim of a violation of the Massachusetts Civil Rights Act

against the Town of North Reading, is not viable for a claim based on the doctrine of respondeat superior. Lyons v. National Car Rental Systems, Inc. 30 F.3d 240, 245-247 (1st Cir 1994). Therefore, Swain's claim against the defendant must be predicated on the Town's failure to adequately train, supervise, and discipline its police officers. The plaintiff fails, however, to allege any facts which indicate that the Town negligently trained, supervised, or disciplined its police officers. Even if she had, mere negligence in employing and supervising police officers does not constitute threats, intimidation, or coercion. Hathaway v. Stone, 687 F. Supp. 708, 711 (D.Mass. 1988).

**CONCLUSION:**

For the above stated reasons, the defendants move that this Court affirm the decision of the District Court as the plaintiff has failed to state a claim for which relief may be granted.

Respectfully submitted
Defendants- Appellees
By their attorney,

Douglas I. Louison,
BBO# 545191
Regina M. Gilgun,
BBO# 565246
MERRICK and LOUISON
67 Batterymarch Street
Boston, MA 02110
(617) 439-0305