No 20-894

In the

Supreme Court of the United States

Barbara Andersen
Petitioner

v.

Village of Glenview, Rick Gimbel
And Jacob Popkov
Respondents

On petition for writ of certiorari to the United States Court of Appeals to the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:
Barbara Andersen,
1007 Longmeadow Lane
Western Springs, IL 60558
708-805-1123

QUESTIONS PRESENTED

The following questions of review are presented herein:

(a) Whether the trial court properly disregarded Andersen's Motion to Strike relative to the Motions to Dismiss filed by the Respondents herein.

(b) Whether the trial court properly dismissed portions of Andersen's Complaint against the Village of Glenview and Detective Popkov pursuant to a Motion to Dismiss; and

(c) Whether the trial court properly dismissed Andersen's Complaint pursuant to the Motion for Summary Judgment by Gimbel, the Village of Glenview and Detective Popkov.

PARTIES TO THIS PROCEEDING

Petitioner, Barbara Andersen, was the plaintiff at the trial court and the appellant before the Seventh Circuit Court of Appeals. There is no further applicable parent company or corporate disclosure required.

Respondents, Detective Popkov[1] and Rick Gimbel, were defendants at the trial court level and Appellees before the Seventh Circuit Court of Appeals. There are no further applicable parent company or corporate disclosures required.

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1 Andersen is not seeking certiorari against the Village of Glenview under her *Monell* claims.

RELATED PROCEEDINGS

Barbara Andersen v. Rick Gimbel, Village of Glenview and Jacob Popkov, 1:17-cv-05761 (trial court proceeding granting motion to dismiss and motion for summary judgment and related motions) (final judgment entered September 9, 2019)

Barbara Andersen v. Rick Gimbel, Village of Glenview and Jacob Popkov, 19-2738 (Seventh Circuit affirming rulings of the trial court)(judgment entered July 21, 2020)

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JURISDICTION

The ruling by the Seventh Circuit was entered on July 21, 2020; Andersen is filing this petition by U.S. Mail on December 16, 2020 (within 150 days of the Seventh Circuit ruling in compliance with the Covid 150 filing deadline). The jurisdiction of this Court is evoked pursuant 28 U.S.C. § 1254 to review the final judgment of the Seventh District Court of Appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

720 ILCS 5/26.5-0.1

"Harass" or "harassing" means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances, that would cause a reasonable person emotional distress and does cause emotional distress to another.

720 ILCS 5/26.5-2 Harassment by telephone.

(a) A person commits harassment by telephone when he or she uses telephone communication for any of the following purposes:

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(2) Making a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number;

720 ILCS 5/26.5-5- Sentence

(a) Except as provided in subsection (b), a person who violates any of the provisions of

Section 26.5-1, 26.5-2, or 26.5-3 of this Article is guilty of a Class B misdemeanor. Except as provided in subsection (b), a second or subsequent violation of Section 26.5-1, 26.5-2, or 26.5-3 of this Article is a Class A misdemeanor, for which the court shall impose a minimum of 14 days in jail or, if public or community service is established in the county in which the offender was convicted, 240 hours of public or community service.

(b) In any of the following circumstances, a person who violates Section 26.5-1, 26.5-2, or 26.5-3 of this Article shall be guilty of a Class 4 felony: ...

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(4) In the course of the offense, the offender threatened to kill the victim or any member of the victim's family or household.

720 ILCS 5/12-7.3 - Stalking

(a) A person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to:

(1) fear for his or her safety or the safety of a third person; or

(2) suffer other emotional distress.

(c) Definitions. For purposes of this Section:

(3) "Emotional distress" means significant mental suffering, anxiety or alarm.

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(8) "Reasonable person" means a person in the victim's situation.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This appeal relates to the dismissal of Barbara Andersen's case in the Northern District of Illinois and affirmation by the Seventh Circuit Court of Appeals. Andersen filed suit in the Northern District following the dismissal of criminal charges sought by her ex-husband, Rick Gimbel, against Andersen her for purported stalking and felony telephone harassment. Andersen filed claims against Rick Gimbel ("Gimbel") and Detective Popkov ("Popkov") relative to their wrongful conduct surrounding the arrest and two year prosecution. Claims included Section 1983 claims and Illinois state-based tort claims (i.e. intentional infliction of emotional distress, malicious prosecution, etc.)

Here, prior to being arrested, Andersen made multiple efforts to have her ex-husband, Gimbel, stop contacting her. She blocked him on phone, e-mail, text, and demanded communication by U.S. Mail only as to any matters relative to her minor children. This was due to the fact that (a) Andersen had experienced Gimbel trying to set-up false charges against Andersen in the past so as to use same in an effort to gain further custody rights in Andersen's minor children and to take vengeance on Andersen for asking for a divorce years prior; (b) had been a victim of his post-divorce harassment for years; (c) knew that (as he had done in the past) use his contacts as an emergency room with the Glenview Police Department to harass Andersen (because of his connections with them) in lieu of going to the domestic relations judge (where Gimbel had no influence); and (d) was a great actor in playing the fake victim. Effectively, what Gimbel would do was harass Andersen in

a variety of fashions and then wait for an explosion. In 2015, after being blocked as above, he decided to harass Andersen's minor son in order to provoke Andersen with his finger on the record button. Now, five years later, Andersen still waits for justice for being the victim of expensive litigation in two forums (criminal and domestic relations; costs (i.e. expert fees/children attorneys' fees); emotional distress of five years of litigation; and lost business opportunity in dealing with five years of harassment and constant litigation (still ongoing in domestic relations) thanks to the fallacious charges.

Indeed, prior to being arrested for the absurd criminal charges, Andersen had filed three complaints against Gimbel with the Glenview Police Department and, further, had filed motions in her custody case requesting that one of the two (or both) direct Gimbel to leave Andersen and her minor children alone. Yet, instead of Gimbel being charged with stalking/harassment, Andersen was. It was absurd.

Despite the statements of the lower courts herein, this was not a contentious divorce at the beginning. Rather, Andersen waived child support and alimony; drafted/entered (as a litigation attorney) a joint and simple divorce; agreed to joint custody; and had *de minimis* contact with Gimbel. Andersen wanted nothing to do with Gimbel and did the above to accomplish that objective. Andersen does not appreciate the characterizations of the trial court and the Seventh Circuit as to the divorce and/or the parties. This was intended to be a simple divorce... with one objective.... to get rid of Gimbel even if that meant waiving substantial financial

matters. Obviously, no good deed goes unpunished as is evidenced by the fact that Andersen is here and is still being harassed in domestic relations court.

Amazingly, Andersen cannot get a trial as to her claims against Gimbel and Popkov. What the trial court and Seventh Circuit did was basically take self-serving arguments/affidavits by the Respondents, accepted contested evidence, and ignore Andersen's counter-affidavits. And they did so even though Andersen (a) they knew that the trial court in the criminal case threw out the charges at trial based on the lack of credibility of Gimbel/Detective Popkov; (b) that Detective Popkov had perjured himself at the criminal trial... and it was so bad that trial had to be adjourned so that Andersen could order the transcript; (c) there was obvious coaching by the Village of Glenview attorneys in the criminal trial despite an order by the criminal judge that they were to not communicate with their clients during trial;[2] and (d) there was clear evidence (including expert testimony) of evidence tampering/destruction of evidence by Gimbel, a clear violation of a preservation order entered by the criminal court; and (e) Andersen contested the authenticity of the audio files that the Respondents tendered with their motions (and certainly never conceded were authentic as required by the rules of civil procedure).

Indeed, how is it that the lower courts herein dismissed the charges knowing: that there were allegations/testimony of perjury by Gimbel/Popkov? Why did the

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[2] These are the same attorneys who represent the Village of Glenview and Popkov here. Despite not being the State, they were retained before the criminal matter was even concluded. Andersen has asserted and maintains herein that they did so because they knew that they had falsely arrested Andersen and were coaching their clients in offering testimony to assist the prosecution and to be adversarial to Andersen.

lower courts not conclude that Andersen was not entitled to a trial; that there were questions of credibility and material fact which should have precluded dispositive motions from being granted; and wholly ignore Andersen's counter arguments and affidavits? This was particularly inappropriate given that they knew that the criminal court had thrown out the criminal charges at trial (which were reduced from three felony charges to one misdemeanor by this point in time) without Andersen having any need to put on a defense at trial; the criminal court did so based on the lack of credibility of Gimbel/Popkov. Why would the lower courts herein give credibility to self-serving affidavits of Respondents when the criminal court, after hearing the full testimony for itself and observing their demeanors, effectively found Gimbel/Popkov are perjurers and manipulators?

This was not justice. This was shameful railroading by highly paid counsel funded by two sets of insurance carriers representing the Respondents and offering more perjured testimony in an effort to escape civil liability. Andersen asks that this Court reverse and remand this matter to the trial court so that she can actually have a substantive trial based on the credibility of witnesses and a full hearing of contested issues of fact relative to evidence/fact.

REASONS FOR GRANTING CERTIORARI

Here, Andersen asserts that it was clear that there were disputed, material question relative to evidence and testimony which should have resulted in: (a) a denial of self-serving motion practice by Respondents and (b) a trial on the merits. Andersen asserts herein that the lower courts did not follow the applicable procedural rules and precedent which should have resulted in a denial of the motion practice by Respondents. Specifically, Andersen believes that the trial court: (a) wrongfully denied Andersen's motion to strike contested audio files at the motion to dismiss stage that were not only not "concededly authentic", but were challenged by expert testimony; (b) wrongfully granted partial judgment at the motion to dismiss stage to the Village of Glenview and Popkov; and (c) wrongfully granted judgment as to the balance of the claims at the summary judgment stage. Indeed, particularly egregious from the perspective of Andersen, is that the lower courts even dismissed the intentional infliction of emotional distress claim against Gimbel who had engaged in a multi-year harassment campaign against Andersen (and her minor children)...in both criminal court and in domestic relations court under his fake victim routine.

The legal points that Andersen asks this Court to consider in her request for reversal as as follows:

I. The Lower Courts Erred in Their Motion to Dismiss Rulings

This section of the argument challenges the dismissal of claims against Popkov and Gimbel pursuant to Rule 12(b)(6). Fed.R.Civ.P. 12(b)(6). First, Andersen challenges Judge Tharp's denial of Andersen's motion to strike evidence

(namely an audio tape a videotape of the interrogation interview) relative to this motion. Second, Andersen challenges the dismissal of Andersen's False Arrest claims against Popkov (Count VI) and Conspiracy to Falsely Arrest against Gimbel (Count VII). Third, Andersen challenges the dismissal of her Constitutional Right to Familial Relations against Popkov (Count III) and Conspiracy against Gimbel (Count IV). Fourth, Andersen challenges the dismissal of her Illinois claims for malicious prosecution against Popkov (Count VIII) and conspiracy against Gimbel (Count X).

A. Appellate Standard of Review of the Trial Court's Dismissal Pursuant to a Motion to Dismiss

Given that the Complaint was partially stricken pursuant to a Rule 12(b)(6) motion relative to the sufficiency of the pleadings, the trial Court's dismissal is subject to *de novo* review. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014); *Doermer v. Callen*, 847 F.3d 522, 527 (7th Cir. 2017).

B. General Standard Relative to Rule 12(B)(6) Motions

"A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." *Camasta*, 761 F.3d at 736; *see also Roake v. Forest Preserve Dist. of Cook Cnty.*, 849 F.3d 342, 345–46 (7th Cir. 2017). Under Rule 12(b)(6), Andersen was required to plead the following:

> To survive a Rule 12(b)(6) motion, a complaint must 'state a claim to relief that is plausible on its face.' A complaint satisfies this standard when its factual allegations 'raise a right to relief above the speculative level.' ...'[T]he complaint taken as a whole must establish a nonnegligible probability that the claim is valid, though it need not be

> so great a probability as such terms as 'preponderance of the evidence' connote... '[P]laintiff must give enough details about the subject-matter of the case to present a story that holds together.'...When deciding a motion to dismiss under Rule 12(b)(6), the court takes all facts alleged by the plaintiff as true and draws all reasonable inferences from those facts in the plaintiff's favor, although conclusory allegations that merely recite the elements of a claim are not entitled to this presumption of truth.

Ware v. Lake County Sheriff's Office, 2017 WL 914755, *1 (N.D.Ill. 2017)(internal citations omitted); *Oakland Police and Fire Retirement System v. Mayer Brown LLP*, 861 F.3d 644, 649 (7th Cir. 2017) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. To rise above the 'speculative level' of plausibility, the complaint must make more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.' The plausibility requirement, however, 'does not impose a probability requirement,' and the claims may proceed even if they seem unlikely to succeed.")(internal citations omitted). "In other words, the court will ask itself *could* these things have happened, not *did* they happen." *Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 905 (N.D. Ill. 2013); *see also Catinella v. Cnty. of Cook, Ill.*, 881 F.3d 514, 517 (7th Cir. 2018)(citation omitted). "Plausibility in this context does not imply that a court 'should decide whose version to believe, or which version is more likely than not.'" *Reid,,* 964 F. Supp. 2d at 905(internal citations omitted).

In this regard, the Courts have further articulated:

> A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of the complaint, not the merits of the case. To survive a Rule 12(b)(6) motion to dismiss, the complaint first

> must comply with Rule 8(a) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief" (Fed.R.Civ.P. 8(a)(2)), such that the defendant is given "fair notice of what the * * * claim is and the grounds upon which it rests." Second, the factual allegations in the complaint must be sufficient to raise the possibility of relief above the "speculative level," assuming that all of the allegations in the complaint are true. '[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.' The Court accepts as true all of the well-pleaded facts alleged by the plaintiff and all reasonable inferences that can be drawn therefrom.

Gvozden v. Mill Run Tours, Inc., 2011 WL 1118704, *2 (N.D.Ill 2011)(internal citations omitted); *Spearman v. Elizondo*, 230 F.Supp.3d 888, 891-892 (N.D.Ill. 2016); *Gupta v. Owens*, 2014 WL 1031471, *2 (N.D.Ill. 2014); *Huerta v. Village of Carol Stream*, 2009 WL 2747279, *1 (N.D.Ill. 2009); *Gardunio v. Town of Cicero*, 674 F.Supp.2d 976, 983 (N.D.Ill. 2009); *Wardell v. City of Chicago*, 75 F.Supp.2d 851, 854 (N.D. 2009); *Al Matar v. Borchardt*, 2017 WL 2214993, *3 (N.D.Ill. 2017); *see also Alexander v. U.S.*, 721 F.3d 418, 422 (7th Cir. (Ind.) 2013).

A motion to dismiss is only appropriate if "no relief could be granted under any set of facts that could be proved consistent with the allegations"; *Conditioned Ocular Enhancement v. Bonaventura*, 458 F. Supp. 2d 704, 707 (N.D.Ill. 2006). Further, the Court must construe all well-plead facts in favor of the nonmoving party. *Roake*, 849 F.3d at 345.

There is no heightened Rule 9(b) pleading standard for Section 1983 claims. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993); *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014)(finding heightened pleading inapplicable to Section 1983 claims); *Simpson v. Nickel*, 450

F.3rd 303, 306 (7th Cir. 2006)("[T]here are no heightened pleading requirements for suits under that statute [Section 1983]. Facts need not be "established" or even alleged (fact-pleading is unnecessary); a plaintiff receives the benefit of any fact that could be established later consistent with the complaint's allegations.")(internal citations omitted).

C. The Trial Court Erred in Denying Andersen's Motion to Strike the Audio Tapes and Video-Tape Relative to the Motion to Dismiss

At the summary judgment stage, in response to Andersen's second motion to strike various statements and evidence attached to the Rule 56.1 Statement, Judge Tharp denied the motion as moot on the basis that he did not review same. However, at the prior motion to dismiss, Judge Tharp had denied Andersen's motion to strike and, further, relied on the contents of the audio tapes in his ruling. Andersen contends that this was improper under F.R.Civ.P 12(d).

First, the Complaint alleges that Gimbel purposefully destroyed text messages between Gimbel and Andersen's minor son despite a preservation order. Second, the Complaint alleges that Gimbel also collected, handled and altered the audio files. Third, in the Motion to Strike, Andersen advised the trial court that Andersen had retained both during the criminal trial and herein forensic expert, Jerry Saperstein. Andersen explained that the audio tapes were "highly contested" and, further, that Jerry Saperstein had already provided testimony that demonstrated that: (a) the Glenview Police Department allowed Rick Gimbel to collect/handle the audio files, including his own and those tendered by third parties, before they were tendered to the police; (b) that the original audio files were all

destroyed and, therefore, impossible for any forensic expert to properly review for authentication purposes; and (c) that Rick Gimbel had altered the audio files prior to tendering same to the Glenview Police Department. Andersen further explained that the Sotos Law Firm would have been aware of this testimony based on the fact that they sat in on the trial. When Andersen re-argued this issue at the motion for summary judgment, Andersen attached a copy of Jerry Saperstein's report and trial testimony. The testimony of Saperstein clearly supported Andersen's position that Gimbel tampered with exculpatory defense evidence in his effort to have Andersen convicted based on his fabricated criminal charges.

Andersen also objected to the audio tapes and Motion to Dismiss on the basis that they were improper at the Motion to Dismiss stage, i.e. a stage that should be only assessed based on the allegations of the Complaint and under Rule 8(a). Andersen noted in her Motion to Strike that the Motions to Dismiss were improper given that they argued facts outside of the pleading and, as such, was effectively a Motion for Summary Judgment. Andersen objected in that there was no effort by the Glenview/Popkov to: (a) convert the motion into a Motion for Summary Judgment and/or (b) to properly authenticate the audio files in a Rule 56.1 Statement and, further, no opportunity for Andersen to respond to same. F.R.Civ.P 12(d)(noting that such a motion should either strike exhibits or should convert the motion to a motion for summary judgment when extrinsic evidence is offered); *Traffic Tech, Inc. v. Jared Kreiter and Total Transportation*, 2016 WL 4011229, *2 (N.D.Ill. 2016); *Franks v. MGM Oil, Inc.*, 2010 WL 3613983, *2-3 (N.D. 2010); *Con-*

Way Cent Exp. Inc. v. Fujisawa U.S.A., Inc., 1992 WL 1992 WL 168553, *3-4 (N.D.Ill. 1992)(noting that the court was limited to only considering the complaint itself in a motion to dismiss); *Widmar v. Sun Chemical Corp.*, 2012 WL 1378657, *4 (N.D.Ill. 2012); *Peregrine Options v. Farley, Inc.*, 1993 WL 489739, Fn. 2 (N.D.Ill. 1993). Andersen also argued that the audio tapes did not fall within any of the "narrow" Rule 12(b)(6) exceptions to attaching exhibits to a Rule 12(b)(6) motion and were certainly not "concededly authentic". *Franks*, 2010 WL 3613983 at *2-3; *Con-Way Cent Exp Inc.*, 1992 WL 168553 at 4; *Gardunio*, 674 F.Supp.2d at 983.

In sum, it was error for Judge Tharp (a) to consider the contested audio tapes at the Motion to Dismiss stage; (b) to effectively consider the Motion to Dismiss as a Motion for Summary Judgment without any motion to convert filed; (c) to consider the audio files without compliance with Rule 56.1, including an affidavit establishing authenticity of the audio files; (d) to ignore Andersen's objections that the audio files were not "concededly" authentic, but rather were tampered with by Gimbel (as were the text messages to Andersen's minor son); and (e) to deprive Andersen of the opportunity to respond to a Rule 56.1 Statement and the report of Jerry Saperstein to show the clear evidence of evidence tampering.

Likewise, at this stage of the litigation, Andersen certainly objected to any purported video recording of herself from her interrogation at the Glenview Police Station. Again, Andersen repeats her procedural arguments from above. Further, at this early stage of the litigation, Andersen certainly had not had the opportunity for her expert to review the recording for authenticity and/or completeness.

In sum, it was error for Judge Tharp to deny Andersen's Motion to Strike and, further, to consider this contested evidence relative to the Motions to Dismiss generally and, specifically, relative to the issues of Andersen's Section 1983 False Arrest Claim and the issue of probable cause.

D. The Seventh Circuit Glossed Over the Motion to Strike in Its Ruling

When Andersen re-raised the issue to the Seventh Circuit they opined as follows:

> Ordinarily, district courts are confined to the pleadings on such a motion, but courts may consider outside exhibits that are central to the plaintiff's claim and referred to in the complaint, even if supplied by the defendants. See *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). Those were the grounds that the court found to apply here, having concluded that the recordings were central to Andersen's claims and there was no dispute about their authenticity.[3]

Andersen v. Vill. of Glenview, 821 F. App'x 625, 627-628 (7th Cir. 2020). First, the Seventh Circuit erred in opining that "there was no dispute about their authenticity". Here, not only did Andersen maintain that the audio tapes were not "concededly" authentic, she argued that she had an expert to establish that they were tampered with. Thus, the Seventh Circuit improperly glossed over Andersen's Motion to Strike. There is no question that the lower courts: (a) should not have accepted the audio tapes attached to the motion to dismiss as they did and/or (b) listen to the audio tapes as they did. The Respondents clearly and knowingly

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[3] Andersen will address the comment by the Seventh Circuit "but the court took care to point out that even without taking into account the content of the recordings, the complaint's allegations failed to show a lack of probable cause" *infra*.

tendered tampered evidence to prejudice the lower courts. The lower courts accepted same in violation of basic rules of procedure and, quite frankly, without using common sense.

E. The Trial Court Erred in Dismissing Andersen's Section 1983 False Arrest Claim Against Popkov (Count VI)[4] and Conspiracy to Falsely Arrest Claim Against Popkov and Gimbel (Count VII)

The Northern District recognizes that an arrest without probable cause is an unreasonable seizure prohibited by the Fourth Amendment. *Gardunio*, 674 F.Supp.2d at 984. Probable cause exists "when 'the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." *Id* at 984-985. To make this determination, the trial court "steps into the shoes of a reasonable person in the position of the officer'". *Id.* The probable cause inquiry is objective in nature; however, facts within the officer's knowledge are also to be considered. *Id*; *Gupta*, 2014 WL 1031471 at *3.

1. A Motion to Dismiss Relative to Probable Cause Was Procedurally Improper

A motion to dismiss based on probable cause is typically procedurally improper. *Meerbrey v. Marshall Field and Co*, 139 Ill.2d 455, 475, 564 N.E.2d 1222, 1231-32 (Ill. 1990). Indeed, given that facts relative to probable cause relative to Section 1983 false arrest claims often involve questions of fact, it is usually a matter is left for the jury. *Gonzalez v. City of Elgin*, 578 F.3d 526 (7th Cir. 2009); *Chelios v.*

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[4] Andersen did not appealing the dismissal of Count V, the Illinois state based false arrest claim.

Heavener, 520 F.3d 678, 686-688 (7th Cir 2008); *Brokaw v. Mercer Cnty*, 235 F.3d 1000, 1017 (7th Cir. 2000); *Gupta*, 2014 WL 1031471 at *3; *Myvett v. Chicago Police Detective Edward Heerdt*, 232 F.Supp.3d 1005, 1025 (N.D.Ill. 2017); *Rusinowski v. Village of Hinsdale,* 835 F.Fupp.2d 641, 649-650 (N.D.Ill. 2011).

2. <u>There Was No Probable Cause For Arresting Andersen (Relative to Section 1983 False Arrest Claim Against Popkov (Count VI); Conspiracy to False Arrest Against Popkov and Gimbel (Count VII) State Malicious Prosecution Claim (VIII) and Conspiracy to Maliciously Prosecute Against Popkov and Gimbel (Count X))</u>

Here, Popkov does not challenge that he had probable cause for stalking, i.e. the only charge that Andersen was charged with at the time of her arrest and the contained within the criminal complaint. 720 ILCS 5/12-7.3. Likewise, there is no genuine dispute that Andersen was not charged with felony telephone harassment with intent to kill until the indictment stage. 720 ILCS 5/26.5-2; 720 ILCS 5/26.5-5. Finally, at this point in time, there is no genuine dispute that no one had any good faith basis to charge Andersen with any felony charge.

Notwithstanding the above, Judge Tharp nevertheless found that it was sufficient to only secure probable cause for the reduced, misdemeanor charge of telephone harassment that ultimately went to trial. Further, Judge Tharp found that Popkov's interviews of third parties and Gimbel supported probable cause. Judge Tharp then relies on this Court's decision *Reynolds v. Jamison*, 488 F.3d 756, 761 (7th Cir. 2007) for the conclusion that he could rule on the issue of probable cause at the Motion to Dismiss stage.

There are several problems with Judge Tharp's opinion. First, this was a

motion to dismiss; the *Reynolds* decision involved a motion for summary judgment. *Reynolds*, 488 F.3d at 756. As such, it was improper for Judge Tharp to ignore what stage of the litigation and, further, the fact that such conclusions could be reached without sworn testimony. *See cases cited supra.* Indeed, Andersen certainly does not concede in her Complaint that there was probable cause relative to any charge... felony or misdemeanor.

Second, as noted above, Judge Tharp's review of audio files are challenged. *See case cited supra.* Third, had this motion been presented as a Motion for Summary Judgment, Andersen would have challenged the relevancy of any witness interviews given that they were not relevant to the charge of telephone harassment[5]. Here, as discussed in the criminal court, Gimbel was the sole, putative claimant/victim relative to the telephone harassment charge. Fourth, had the issue of probable cause been properly presented as a factual issue at trial, Andersen would have factually challenged the purported "witness" accounts relative to this charge; notably, none of these purported third party "witnesses" came to the criminal trial.

Fifth, Judge Tharp ignores the fact that part of the probable cause analysis requires putting oneself in the shoes of Popkov and, in doing so, considering the knowledge of Popkov at the time of the arrest. *Gardunio*, 674 F.Supp.2d at 984; *Gupta*, 2014 WL 1031471 at *3. In this regard, even accepting Judge Tharp's

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[5] Judge Tharp appears to have reached this conclusion outside of the allegations of the Complaint. However, this conclusion is not supported by the criminal court record.

opinion arguendo that Popkov was only required to have probable cause relative to the misdemeanor charge of harassment, a factual dispute as to Popkov's reasonableness nevertheless remains.

Turning to the misdemeanor charge of telephone harassment, Popkov was required to determine whether Gimbel was "harassed" as defined by the statute. This was a necessary element of the charge. 720 ILCS 5/26.5-0.1 (" 'Harass' or 'harassing' means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances, that would cause a reasonable person emotional distress and does cause emotional distress to another."). Because the definition of "harass" requires that Gimbel suffer from emotional distress, Popkov must establish probable cause relative to this factor[6]. *Beauchamp v. City of Noblesville Indiana*, 320 F.3d 733, 745-746 (7th Cir. 2003)(requiring probable cause be established on "every element of a crime").

Yet again, the Complaint certainly does not concede that Gimbel suffered from emotional distress; so again, why did Judge Tharp consider this issue pursuant to a Motion to Dismiss? Indeed, the Complaint clearly alleges that Andersen told Popkov that the charges were a ploy for custody; that Gimbel was not a victim; that Andersen had filed multiple complaints both with the Glenview Police Department and in domestic relations division relative to his harassment of

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[6] A stalking charge also contained "emotional distress" as a necessary element of the charge. 720 ILCS 5/12-7.3(a)(2). Further, this felony charge required proving significant emotional distress. and 720 ILCS 5/12-7.3 (c) ("Emotional distress" means significant mental suffering, anxiety or alarm.")(emphasis added).

Andersen and his attempt to set Andersen up for criminal charges as part of his scheme to secure greater custody rights in Andersen's minor children. Notwithstanding Andersen told him this and offered to give him documented evidence[7] of same (pleadings, the text messages by Gimbel, the police reports, the e-mails, phone records), Popkov cast Andersen's statements off as "irrelevant".

However, Popkov cannot simply ignore facts that are presented to him and, thereinafter, claim the benefit of having probable cause. Rather, he was obligated to conduct further research as to whether Gimbel was truly emotionally distressed or, rather, was feigning emotional distress for the improper purpose of harassing Andersen. *Neiman v. Keane*, 232 F.3d 577, 581 (7th Cir. 2000)("If a reasonable officer should be suspicious that the putative victims' complaints are not reliable, then the officer is obliged to conduct a further examination of the complaint."); *Myvett*, 232 F.Supp.3d at 1025 (officer's state of mind is irrelevant for probable cause except for the facts that he knows). Indeed, even if this Court were to consider the audio tapes over Andersen's objection, the tapes send a clear message--leave me alone not vice versa. Obviously, Popkov should have known that Andersen was reacting to something that Gimbel had done. Yet, notwithstanding that, he could not bother himself to question Gimbel as to the events that led up to the calls.

Finally, the Complaint also clearly alleges that no one from the Glenview Police Department contacted Andersen relative to Gimbel's August 2015 complaint.

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[7] Indeed, all Popkov had to do was take a few minutes to internally review Andersen's three police reports that existed in the Glenview Police Department records to partially verify Andersen's statements.

Rather, they simply collected Gimbel's evidence and waited in the weeds for another set of calls. In other words, the Complaint clearly alleges that Andersen believes that she was set-up by both Gimbel and the Glenview Police Department. In this regard, Gimbel just needed to push harass Andersen one more time and get a recorded response and then "Bingo"...here come the criminal charges! The conduct of the officer who took Gimbel's August 2015 complaint was also the subject of scrutiny in the underlying criminal trial.

In sum, the Complaint clearly alleges that Popkov had knowledge of facts at the time of the arrest that he chose to ignore at the time of arrest even though they undermined the necessary elements of the relevant criminal charges. To the extent that he wishes to claim that he did not have such knowledge, he is free to present a contested version of facts to a jury and let them resolve the issues of credibility and probable cause.

F. The Seventh Circuit Erred in Affirming Probable Cause When There Were Question of Fact as to the Reasonableness of Same, With or Without Considering the Audio Tapes

Here, the Seventh Circuit again glosses over the trial court's ruling by trying to undo the damage that the trial court allowed/caused in listening to the contested audio tapes. The Seventh Circuit concludes that based on the allegations of the complaint that they could find probable cause simply by virtue of the fact that Andersen alleged that Gimbel called the police and provided the audio tapes to Popkov:

> Andersen's complaint alleged that Gimbel filed a police report stating that he was being harassed through voicemail messages, submitted recordings of them (though the complaint does not specifically describe

> what they contained), and forwarded a log of his incoming calls. See *Woods v. City of Chi.*, 234 F.3d 979, 996 (7th Cir. 2000) ("[W]e have consistently held that an identification or a report from a single, credible victim or eyewitness can provide the basis for probable cause."). It also alleged that Andersen called Gimbel's boss (which he reported to the police) and "several" other people in an angered attempt to stop what she perceived as Gimbel harassing her, which would have been reflected on the logs and recordings that Detective Popkov received. Taken altogether, these alleged facts positioned Popkov **(or, more generally, any reasonable police officer) to believe that Andersen had engaged in telephone harassment.** In short, Andersen's allegations could not support a claim that Detective Popkov lacked probable cause to arrest her.

Andersen, 821 F. App'x at 627-628. Here, the Seventh Circuit makes a determination of "reasonableness", i.e. a contested issue of material fact at the pleading stage and disregards all of the above precedent which makes such a finding improper. In addition, both lower courts ignored the fact that the complaint clearly alleged that both Gimbel and Popkov were perjurers; that a criminal court that threw out their testimony based on the lack of Gimbel/Popkov's lack of credibility; that Gimbel tampered with criminal evidence; that Andersen was the victim not vice versa; that Popkov ignored the harassing text messages that Gimbel sent Andersen's son; and that Popkov ignored the fact that Andersen had made three police complaints and filed a motion for a protective order in the custody litigation against Gimbel asking that someone (i.e. the police or the court) direct Gimbel to cease contacting her directly or indirectly. In other words, it was absurd for the lower courts to find Popkov "reasonable" as a matter or law and/or given that there were certainly issues of material fact that undermined his claim that he was "reasonable". The lower courts effectively let a fake victim and a dirty cop get away

with it. It was and is shameful.

G. The Lower Courts Erred in Dismissing Andersen's Constitutional Claims Relative to Her Constitutional Claim for Familial Relations Against Popkov (Count III) and Conspiracy against Gimbel (Count IV)

Next, Andersen maintains that the trial court erred in dismissing her claims against Popkov for the deprivation of her children at the bond court proceedings for 30 days. In making its ruling, the trial court recognized that this conduct could prompt constitutional claims under due process analysis. *Brokaw*, 235 F.3d at 1017; *Hernandez v. Foster*, 657 F3d 463, 478 (7th Cir. 2011); *Wallis v. Spencer*, 202 F.3d 1126, 1137 (9th Cir. 2000); *Troxel v. Granville*, 530 U.S. 57, 74-75 (2000); *Gregory v. City of Evanston*, 2006 WL 3718044, *4 (N.D.Ill. 2006). However, after agreeing with Andersen, Judge Tharp nevertheless struck the claim on the basis that Andersen had not alleged sufficient facts to support it under F.R.Civ.P 9(b). Specifically, Judge Tharp opines that Andersen could not plead "upon information and belief" that Popkov and Gimbel told the State's Attorney that Andersen was mentally unwell because this was insufficient for a claim of "fraud" and, thus, subject to F.R.Civ.P 9(b).[8] Judge Tharp relies on *United States. ex rel Bogina v. Medline Indus. Inc.*, 809 F.3d 365, 370 (9th Cir. 2016), a False Claims Act decision, and *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. V. Walgreen Co.*, 631 F3d 436, 443 (7th Cir. 2011) for his position that Andersen is required to plead under Fed.R.Civ.P 9(b).

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[8] After the bond hearing, the State's Attorney backed off of this allegation given that allegations of mental health were counterintuitive to the mens rea crime that they were attempting to prosecute her for. This issue was litigated during the criminal litigation. Judge Edidin ultimately barred all derogatory attacks.

First, as discussed *supra*, Section 1983 is only subject to the pleading obligations of Rule 8(a). Rule 9(b) has been expressly rejected in the context of Section 1983 claims. See cases cited supra. In light of that, there is no issue with Andersen pleading "upon information and belief" Popkov and/or Gimbel (or, in reality, both) solicited the young State's Attorney at the bond hearing to seek a mental health evaluation against Andersen and, further, order Andersen to lose custody rights during that time period.

Second, the Complaint very clearly alleges that Gimbel has been publicly attacking Andersen with this allegation for years in an effort to harass her. Indeed, this Court does not need to take Andersen's word for it, written documentation exists to show that even Gimbel has sent e-mails on the subject. Further, this Court can clearly see that Gimbel is falsely telling the bond court that he had plans to take the children on a trip to the football game. This is in clear contradiction of Andersen telling him "no"... or at least until she was conveniently arrested.

Third, Andersen plead "upon information and belief" only because she was not in the room where this conversation occurred. However, Andersen can tell this Court that Popkov also mocked Andersen while in custody with derogatory mental health comments; both Gimbel and Popkov were present at the bond hearing; and both Gimbel and Popkov went in the side conference room to confer with the State's Attorney. As such, the logical inference from such facts is that they were the sole source of those opinions. There was no one else there at the courthouse.

Fourth, this is not the subject of motion practice in any regard. For example, let's say that Gimbel and Popkov were to have filed a motion for summary judgment denying that they said such comments. Then, this State's Attorney suffered from acute memory loss (as the State's Attorney who was at the police station did in his deposition testimony as to who told her that Andersen was mentally unwell. Here, Andersen has told this Court very clearly that there are multiple examples of Popkov and Gimbel lying under oath, tampering with evidence and acting in a deceptive fashion. There would nonetheless be a factual dispute for the jury to sort through. In addition, they are in the best position (as the criminal court did before throwing out the charges) to weigh the credibility of the witnesses and watch their mannerisms while they try to spin their yarn.

Fifth, Andersen has already explained in the Complaint that she crossed her arms in disbelief and annoyance when she heard these comments. If this Court were standing in Andersen's shoes and they heard some young attorney making absurd mental health comments while contemporaneously asking that you be charged with felony crimes, you too would think that the scene was a farce. In any event, why would the comments of a young attorney negate the fact that Popkov and Gimbel were the source of this information in the first place. This Court has recognized that the chain of events does not break when a police officer (and presumably the conspiring complainant) mislead the State's Attorney. *See by analogy Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988)(recognizing that an officer is not relieved of liability where a State's Attorney proceeds to a grand

jury based on the deception of the police officer); *Brokaw*, 235 F.3d at 1014 ("moving force" behind the deprivation of one's familial rights are also subject to liability under Section 1983).

When asked to review the above points, the Seventh Circuit yet again "rubber stamped" the trial court's decision without any substantive analysis. Specifically, they noted:

> The district court was right to dismiss the other claims that it did too. No allegations plausibly linked any statements by Detective Popkov [**7] to the bond court's decision to remove Andersen's children from her care. The state law malicious prosecution claim failed because "the chain of causation [was] broken by [the] indictment," and the complaint did not sufficiently allege any post-arrest actions by Detective Popkov that influenced the prosecutor's decision to indict. *Colbert v. City of Chi.*, 851 F.3d 649, 655 (7th Cir. 2017) (emphasis omitted).

Andersen, 821 F. App'x at 628. Not only did the Seventh Circuit wholly disregard most of the above points, the Seventh Circuit does not explain how on earth they could have made this ruling at the motion to dismiss stage based strictly on the allegations of the complaint. Rather, in a cursory fashion, the Seventh Circuit argues that the trial court was correct in that the Complaint purportedly did not link Popkov with the statements. First, this is not true. Second, this was easily curable in that he and Gimbel were in the back room coaching the young and inexperienced State's Attorney as to what to say at the bond hearing (even though her mental health request was counterintuitive to bringing mens rea claims at the same time. Third, any purported deficiency in the pleading was curable by amendment. Fourth, Gimbel has certainly argued that Gimbel and Popkov,

together, were the "moving forces" influencing the State's Attorneys such that dismissal was inappropriate... particularly at the motion to dismiss stage.

H. The Lower Courts Erred in Finding That the Grand Jury Indictment Further Defeated Andersen's State Malicious Prosecution Claims Count VIII) and conspiracy against Gimbel (Count X)

Next, Andersen challenges the dismissal of Andersen's state malicious prosecution count.[9] In this regard, Judge Tharp reincorporates that his finding of probable cause defeats this claim. As such, Andersen reincorporates her argument relative to probable cause herein by reference.

Moreover, Judge Tharp then adds that the fact that there was a grand jury proceeding conclusively establishes the existence of probable cause. In this regard, Judge Tharp cites to relies largely on *Colbert v. City of Chicago*, 851 F.3d 649 (7th Cir. 2017) to support his decision. However, the *Colbert* decision was responding to a motion for summary judgment, not a motion to dismiss. Again, Andersen was not required to plead all of her evidence at this stage of the litigation; nor was Andersen given any Rule 56.1 statement to respond to relative to the conduct of Popkov.[10]

While this may be true in some contexts, this Court has recognized that this

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[9] Andersen does not appeal the dismissal of the Section 1983 Claim for Malicious Prosecution. (Count IX).

[10] For example, the Complaint does not delve into the fact that Popkov was ordered to bring in forensically sound, original audio files for Andersen's expert to review. Instead, Popkov brought in audio files that were labeled "original", but were actually another set of forensically unsound copies. Had Andersen been properly presented with a motion for summary judgment, she could have added this fact in her Statement of Additional Facts as another example of how Popkov acted dishonestly post-arrest and post-indictment.

is not true where the police officer deliberately supplied misleading information that influenced the decision of the State's Attorney. First, as discussed above, the Complaint clearly states that she told Popkov information that put him on notice to make further inquiry that Gimbel was feigning victimization and emotional distress and, further, that his real motivation behind the charges was to attempt to use the charges as custody ploy to gain greater custody rights in Andersen's minor children. Popkov was not in simply negligent in the performance in his investigation. Rather, he purposefully turned a blind charge on facts which would have made an objectively reasonable person suspect. Thus, when a police officer has knowledge of evidence that he knows undermines the charges and does not disclose them to the State's Attorney, that officer cannot later claim immunity from liability and the causation chain remains intact. *Jones*, 856 F.2d at 994. "[A police officer] cannot hide behind the officials whom they have defrauded."

Second, Popkov's conduct was so biased against Andersen that Andersen sought to speak with the supervisors and the State's Attorney. Rather than allow Andersen the ability to speak attorney to attorney with the State's Attorney, Popkov obstructed access to the State's Attorney when he arrived. Had Andersen been allowed to speak with the State's Attorney, Popkov might have a good excuse to claim that the chain of causation was broken. However, by blocking Andersen's access to the State's Attorney at the Glenview Police Department and hiding critical facts from the State's Attorney, Popkov purposefully left the State's Attorney in the dark.

Third, as this Court can see, Popkov not only made the arrest but signed a verified complaint against Andersen for stalking. Here, Popkov did so despite the fact that he had no personal knowledge of anything between Andersen and Gimbel. Moreover, Popkov did so knowing that the officer involved with the August 2015 complaint did not warn Andersen that Gimbel was soliciting criminal charges against her and/or that the Glenview Police Department advised Gimbel that they would press charges if he received more calls. In effect, the Glenview Police Department was helping and encouraging Gimbel to entrap Andersen. All Gimbel had to do was harass Andersen so that she reacted and thereinafter catch her on a recording. Further, Popkov signed the complaint even though he, himself, questioned the validity of such a charge immediately prior to Andersen's arrest. Finally, Popkov knew that Andersen had told him extensively about Gimbel's harassment of her and Gimbel's custody agenda; despite that, Popkov purposefully did not disclose that to the grand jury in his testimony.

Fourth, as noted above, the "emotional distress" of Gimbel was a necessary element of the charge itself. Conversely, it was not merely exculpatory information as Judge Tharp asserts. For Popkov to testify that Gimbel suffered "emotional distress" after harassing Andersen at length is absurd. *See discussion supra.*

Fifth, while Popkov may be able to claim the benefit of immunity relative to his grand jury and trial testimony[11], his conduct is nevertheless relevant. For example, it goes to rebutting the presumption of probable cause. *Fabiano v. City of*

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11 Likewise, Popkov's creation of a fictitious police report goes to his credibility and goes to rebutting the presumption of probable cause.

Palos Hills, 336 Ill.App.3d 635, 655, 784 N.E.2d 258, 277 (Ill.App. 2003). Further, it goes to his credibility/impeachment both for purposes of considering his sworn statements to this Court and, further, in assessing the weight of his trial testimony. Finally, it again shows that the chain of probable cause is not broken for purposes of a malicious prosecution claim. *Jones*, 856 F.2d at 994; *Ewing v. O'Brien*, 60 F.Supp.2d 813, 816-817 (N.D.Ill. 1999).

Sixth, the e-mails of the Glenview Police Department show that they were mocking Gimbel prior to the criminal trial. The question is why would Popkov (and two other officers) nevertheless voluntarily testify at the criminal trial when they were privately commenting as to the frequency and frivolity of Gimbel's police complaints? Likewise, why did they conceal their concerns relative to Gimbel at the criminal trial?

Seventh, Judge Tharp claims that the audio tapes show that Andersen threatened Gimbel. Again, Andersen incorporates by reference her argument relative to the audio tapes herein. Further, the State's Attorney and the police both recognized at trial that Andersen never "threatened" anyone as contemplated by the telephone harassment statute. Further, the excerpt "You're dead" when taken in its proper context was never a death threat; it was a figure of speech. This was also recognized in the underlying criminal case by both the Glenview Police and the State's Attorney. Yet, despite this fact, Popkov concealed the fact that the expression "You're dead" was taken out of context and not, in fact, a death threat. Likewise, Popkov did not disclose to the grand jury that he did not personally

believe that there were sufficient facts to support a stalking charge.[12]

Finally, notwithstanding whether or not there is a threat or harassment, **all** of the elements of the crime must be satisfied before arrest and prosecution. As discussed above, there were no facts to establish "emotional distress" as defined by either of the relevant statutes. See discussion *supra*. Further, the question of whether something is a "threat" or "harassment" as defined by these statutes are contested factual questions for the jury to decide after being presented with all of the evidence and making credibility assessments.

Here, despite Judge Tharp's statement, Andersen does simply allege misconduct relative to the arrest but misconduct both after the arrest and the indictment. Moreover, under Rule 8(a), Andersen is not required to plead all of her evidence. Thus, it was incorrect for Judge Tharp to assume at the Motion to Dismiss stage that the Complaint was an exhaustive list.

Here, again, the Seventh Circuit made no effort to address the above points. Rather, they simply concluded: "The state law malicious prosecution claim failed because "the chain of causation [was] broken by [the] indictment," and the complaint did not sufficiently allege any post-arrest actions by Detective Popkov that influenced the prosecutor's decision to indict. *Colbert*, 851 F.3d at 655

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[12] Judge Tharp opines that Popkov was not dishonest because he concludes that the e-mail wherein Popkov made the admission concerned picking up the children. However, at this point in time, Popkov already had the audio files for some time. The e-mail demonstrates that Gimbel was attempting to offer Popkov other "evidence" in addition to the audio files to bolster a stalking charge. Indeed, this differing view of this e-mails demonstrates that this is a contested factual issue and, conversely, not something that should be addressed via motion practice.

(emphasis omitted)" *Andersen*, 821 F. App'x at 628. Here, Andersen has clearly alleged and argued that Popkov mislead the State's Attorney in bringing the charges. Moreover and again, this was not something to be decided at the motion to dismiss stage and/or with prejudice. Rather, the role of Popkov relative to the State's Attorney conduct was a contested question of fact that should not have been addressed by a Rule 12(b)(6) motion.

II. The Trial Court Erred in Granting Popkov and Gimbel's Motion for Summary Judgment

A. Standard of Review of the Trial Court's Dismissal Pursuant to a Motions for Summary Judgment

This Court is also to review the granting of summary judgment under the *de novo* standard. *Colbert,* 851 F.3d at 653. "Summary judgment is not a substitute for a trial on the merits, nor is it a vehicle for resolving factual disputes. Therefore, in considering a motion for summary judgment, we draw all reasonable inferences in favor of the non-movant. If genuine doubts remain, and a reasonable factfinder could find for the party opposing the motion, summary judgment is inappropriate." *Rising-Moon v. Wilson*, 2005 U.S. Dist. LEXIS 13955, *22 (S.D.Ind. 2005). "[I]t is trial by jury that is guaranteed by the Constitution, not trial by affidavit." *Southern United States Trade Association v. Unidentified Parties*, 2012 WL 579439 579439, *2-3 (E.D.La. 2012).

In addition, the trial court does not make credibility determinations, weigh evidence or decide which inferences to draw from facts in motions for summary judgment. *Washington v. Haupert*, 481 F.3d 543, 550 (7th Cir. 2007). Where a record contains credibility questions and competing versions of the facts, the matter

"should be sorted out by the trier of fact". *Paz v. Wauconda Healthcare*, 464 F.3d 659, 665 (7th Cir. 2006); *see also Southern United States Trade Association*, 2012 WL 579439 at *2-3 (finding that where defendants' motion for summary judgment offered a self-serving affidavit and their credibility was at issue summary judgment should be denied); *Fulkerson v. Tompkins State Bank*, 2012 WL 4520251, *7 (C.D.Ill. 2012)(noting nonmovant's affidavit is entitled to more weight at the summary judgment stage).

B. Defendants' Credibility is in Question in these Proceedings

At this point in time, Andersen has provided multiple examples of Popkov and Gimbel lying under oath, tampering with evidence and otherwise acting in a dishonest fashion. Yet notwithstanding same, Judge Tharp ignored much of Andersen's affidavit while accepted the self-serving testimony of Popkov and Gimbel? By doing so, Judge Tharp indirectly placed himself in the position of the jury and, in doing so, improperly made credibility decisions and weighed evidence in his summary judgment opinion. This was improper....particularly given that Popkov and Gimbel were known perjurers already from the criminal case. Did the federal court seriously think that Popkov and Gimbel would not perjure themselves again? *See cases cited supra.*

C. Judge Tharp Does Not Disregard The Audio Tapes

In his opinion relative to the motion for summary judgment, Judge Tharp states that he does not rely on the audio tapes. This is not correct. As addressed above, Judge Tharp considered the audio tapes at the motion relative to the

question of probable cause. In this summary judgment opinion, Judge Tharp reincorporated his Motion to Dismiss opinion by reference and reaffirms his finding relative to probable cause. So why is it that Judge Tharp still does not address Jerry Saperstein's authenticity challenge relative to the audio tapes either relative to the issue of probable cause and his reliance on improper evidence? He does not explain.

D. Judge Tharp's Ignores His Prior Conclusions Relative to the IIED Claim Against Gimbel (Count II)

In his opinion relative to the motion to dismiss, Judge Tharp recognized Andersen as having plead a claim for IIED. In doing so, Judge Tharp recognized that the variety of allegations of harassment showed a pattern of harassment. Namely, Judge Tharp agreed with Andersen that making defamatory comments about Andersen's mental health to third parties, his efforts to have Andersen arrested and prosecuted, his requests to the State's Attorney to have Andersen's mental health evaluated, his refusal to drop the frivolous charges, his efforts to revoke the bond were all "extreme and outrageous" for purposes of an IIED claim. When Judge Tharp issued his original opinion, his finding relative to probable cause had not bearing relative to this claim. Conversely, Judge Tharp does not opine that the IIED claims are somehow contingent upon only the issue of Andersen's 24 hour detainment.

So why is it that now, "as a matter of law", Judge Tharp has changed his view of the allegations? Nothing has changed between his ruling relative to the Motion to Dismiss and the Motion for Summary Judgment other than an additional

discussion relative to the 24 hour detainment issue. Indeed, as noted by Andersen, Gimbel largely avoids the IIED claim in his motion for summary judgment. Here the evidence shows that Gimbel has harassed Andersen with the police for years, smeared Andersen's good name, had her children taken away, deprived her of her trip to Disney, subjected her to years of litigation in domestic relations court, financially destroyed her, pursued the charges even after Judge Vega recognized the charges as a ploy for sole custody, deleted exculpatory evidence and tampered with the audio files. There is bountiful evidence for a jury to consider relative to an IIED claim. *Feltmeier v. Feltmeier*, 207 Ill.2d 263, 273, 798 N.E.2d 75, 82 (Ill. 2003)(noting that where there is an abuse of power, IIED claim is particularly appropriate in claim between ex-spouses); *see also Jiang v. Levette*, 2015 WL 9480478, *4-5 (E.D. Mo. 2015)(finding charging of false crimes without reasonable belief was sufficient to allege outrageousness for IIED claim); *Parish v. City of Elkhart*, 614 F.3d 677, 683 *7th Cir. 2010 (Ind.))(noting that IIED claim was proper where plaintiff claimed false arrest, evidence tampering and destruction, and perjured statements made during prosecution of the plaintiff); *Beaman v. Souk*, 2011 WL 832506, *13-14 (C.D. Ill. 2011)(noting that malicious prosecution can form the basis of a IIED claim).

Furthermore, probable cause has nothing to do with the IIED claims relative to Gimbel. Likewise, there is no legal basis for this opinion. Here, even assuming *arguendo* that Popkov had acted good faith relative to Gimbel's complaints, he might be excused from liability under a finding that he had probable cause.

However, that has no bearing on whether Gimbel also had a good faith basis to bring the complaint in the first place. Again, Andersen has alleged and provided verified statements to demonstrate that Gimbel was a false victim who set Andersen up for the criminal charges by refusing to cease contacting her in an effort to create a reaction. Even Judge Vega, who had been on Andersen's case for many years before the charges, recognized Gimbel as a fake victim who "set up" Andersen. Indeed, how can Gimbel claim that he is being harassed when the reaction is in response to his harassment? Likewise, Gimbel demonstrated that it was a custody ploy himself when he immediately filed his petition for greater custody rights.

Indeed, even if Judge Tharp were correct, the question of Gimbel's "emotional distress" is a necessary element of the harassment charge. Obviously the issue of Gimbel's purported "emotional distress" is a contested issue of fact.

From Andersen's perspective, the holding of the Seventh Circuit was specious and offensive relative to the IIED count:

> Last was Andersen's intentional infliction of emotional distress claim against Gimbel. *HN9* The bar is high—the conduct must be "truly extreme and outrageous." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 798 N.E.2d 75, 80, 278 Ill. Dec. 228 (Ill. 2003). The district court reasoned that although pursuing baseless criminal charges against someone could meet that demanding standard, Gimbel's allegations were not unfounded. Indeed, Illinois courts have previously found the act of filing criminal charges to fall below the required level of outrageousness. See, *e.g., Schiller v. Mitchell*, 357 Ill. App. 3d 435, 828 N.E.2d 323, 335, 293 Ill. Dec. 353 (Ill. App. Ct. 2005); *Adams v. Sussman & Hertzberg, Ltd.*, 292 Ill. App. 3d 30, 684 N.E.2d 935, 943, 225 Ill. Dec. 944 (Ill. App. Ct. 1997). We cannot say that the district court committed any error in concluding that no reasonable jury could find Gimbel's decision to lodge a report with the police after feeling threatened to be "intolerable in a civilized community." *Feltmeier*, 798 N.E.2d at 83.

Andersen, 821 F. App'x at 629. Again, how is this anywhere appropriate a motion for summary judgment and/or an uncontested question of material fact? How is it that the Seventh Circuit ignored the questions of credibility... including the fact that the criminal case was tossed out based on Gimbel's lack of credibility (i.e. that he was a blatant perjurer and false witness that Andersen did not even need to put on a defense)? Why did the lower courts ignore that this was Gimbel's second stunt to play the fake victim and press criminal charges? Why did the lower court ignore the fact that Gimbel's conduct of harassment was prolonged/ongoing and over years such that Andersen (not Gimbel) blocked Gimbel on every possible electronic devise, filed three criminal complaints and filed a motion for a protective order? Why did the lower courts ignore the fact that Gimbel, after receiving a very favorable divorce decree to his financial benefit, could not suppress his vengeance against Andersen in divorcing him... as exhibited by the fact that he dragged Andersen through never-ending divorce proceedings post judgment because he is absolutely crazy and vindictive. In sum, the lower courts' ruling is absurd; the reality is that they considered themselves too good for what they perceived as a divorce case .. in complete disregard and indifference to Andersen's civil liberties.

E. <u>The Timing of the Arrest Relative to the Football Game</u>

Judge Tharp also does a "180" on his response to the timing of Andersen's arrest relative to the football game. First, Judge Tharp states that Popkov's waiting until a day before the trip "plausibly supports Andersen's allegation that Popkov was cooperating with Gimbel's alleged plan". Now, based on the same

evidence except the addition of a self-serving affidavit by Popkov, Judge Tharp reaches the opposite conclusion. Here the e-mail relative to the football game, in conjunction with the fact that Andersen was arrested the very next day and on the eve of the game, creates a genuine issue of material fact as to a conspiracy. Indeed, even if not independently actionable in and of itself, it undermines the reasonableness and objectivity and credibility of Popkov relative to the arrest itself. In any event, this is a question of disputed fact.

F. Popkov's Change in Justification

Here, Judge Tharp ignores the fact that Popkov changed his justification for holding Andersen overnight by stating that it is irrelevant. However, it is relevant given that his change in justification shows, yet again, that Popkov has issues of credibility and, as such, nothing should be adjudicated without the jury evaluating the weight of the totality of the evidence relative to the issues of probable cause and qualified immunity relative to Andersen's pre-indictment arrest and detention and their purported excuses.

Moreover, it is a violation of the Fourth Amendment to delay an arrestee's detention if the delay is "for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991). Because the standard for judging an arrestee's claim of unduly extended detention "is one of reasonableness under the circumstances, summary judgment is proper only if there is no room for a difference of opinion." *Bullock v. Dioguardi*, 1990 WL 19527, *3 (N.D.Ill. 1990). Here, Andersen has offered sworn testimony that she was delayed

for improper motives.

> In its cursory response to this point, the Seventh Circuit notes:
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> > But the Fourth Amendment's reasonableness analysis is objective. See *Whren v. United States*, 517 U.S. 806, 814, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996); *United States v. Bullock*, 632 F.3d 1004, 1012 (7th Cir. 2011). Properly placing credibility aside, we agree with the district court that Andersen's evidence did not rebut the presumption that her detention [**9] was reasonable.

Andersen, 821 F. App'x at 628. First of all, how is it that the Seventh Circuit "properly placed credibility aside" on a summary judgment motion? Where there are issues of credibility, summary judgment is not appropriate. *See cases cited supra*. Second, Popkov was acknowledged as a perjurer in the criminal court trial. Are the federal courts seriously saying that it will blindly accept the self-serving affidavit of a perjuring cop in determining "objective" reasonableness? What about Andersen's counter-affidavit saying that Popkov was not objectively reasonable? Do the federal courts now just ignore counter-affidavits at a motion for summary judgment? Do the federal courts disregard the fact that there are contested issues of material fact relative to the "objective" reasonableness of Popkov? Here, the complaint alleges that (a) Gimbel has cronyism ties to the police department: (b) the police did nothing relative to Andersen's 3 police reports against Gimbel prior to the incident (which Popkov ignored); (c) Popkov refused to consider Gimbel's harassing text messages to Andersen's minor son; and (d) Popkov even pre-planned arresting and detaining Andersen even before arresting her...evidence by the fact that he had Gimbel arrange for him to pick up Andersen's minor children from school; and (e)(Popkov even pre-planned arresting and detaining Andersen to further Gimbel's

plan to take the children (over Andersen's objection) to a football game... as evidenced by the timing of the arrest. In other words, there is not only evidence that the arrest was not "objectively" reasonable... the evidence clearly shows railroading by a dirty cop.

CONCLUSION

In sum, the lower courts disregarded proper rules of professional conduct to apparently clear its docket for more significant matters. Andersen was unaware that her civil liberties would be so cavalierly treated in the federal court system. Had she known same, she would have brought her claims in Illinois court... where surely they would have survived and gone to trial. Andersen asks this Court to undo the damage caused by the lower courts relative to an arrestee's/Andersen's civil liberties in the context of false arrest claims. This was the most horrific experience Andersen has ever witnessed and experienced... a story of unethical lawyers, a malicious ex-husband, a dirty cop, and cavalier federal judges.

For the foregoing reasons, the judgment of the lower courts should be reversed and remanded for further proceedings.

Respectfully submitted:
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