

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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JAMES F. GOLDBERG	:	No. 3:07CV-1733 (SRU)
	:	915 Lafayette Boulevard
vs.	:	Bridgeport, Connecticut
	:	
	:	September 17, 2010
TOWN OF GLASTONBURY, ET AL	:	

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MOTION HEARING

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

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1 (9:45 O'CLOCK, A. M.)

2 THE COURT: Good morning. We're here for
3 argument of cross motions for summary judgment in Goldberg
4 v. Glastonbury. Could I have appearances, please?

5 MS. BAIRD: My name is Attorney Rachel Baird and
6 I'm here on behalf of James Goldberg, the plaintiff.

7 MS. PAOFF: I'm Attorney Kera Paoff. I'm here
8 on behalf of James Goldberg, the plaintiff,.

9 MR. GERARDE: Thomas Gerarde, Your Honor, on
10 behalf of the defendants.

11 MR. MADSEN: And, Your Honor, Will Madsen here
12 on behalf of James Goldberg.

13 THE COURT: Okay. Well, we have cross motions
14 for summary judgment. I've reviewed these materials and I
15 think I'd like to start with some questions.

16 First off, it seems to me that the material
17 facts are not in dispute. Does anybody want to suggest
18 that there are material facts that are a problem? You
19 made cross motions. Obviously that doesn't eliminate the
20 possibility of material issues of fact but it seems to me
21 in this case, based upon the record, there really isn't
22 any dispute about what happened, is there?

23 MR. GERARDE: I'll report, Your Honor, that I
24 don't think there is, and certainly since we're at summary
25 judgment, if there's any possible dispute between

1 plaintiff's version and our version, we adopt the
2 plaintiff's version for the purpose of going forward with
3 this motion but I don't think there's anything in dispute.

4 MS. BAIRD: There aren't any genuine issues of
5 material fact in dispute. The only thing in dispute is
6 how those facts are interpreted under the law, Your Honor.

7 I do know that at paragraph 64 of the
8 defendants' local 56(a)(1) statement, they allege that
9 probable cause existed based on Mr. Goldberg's reckless
10 conduct under the breach of conduct -- under the breach of
11 peace statute, and that it resulted in threatening
12 behavior to the general public based upon an interview of
13 Laura Smith. That is a fact that we don't believe is in
14 dispute because it's not based on the record. However, it
15 appears that the defendant is alleging that fact and,
16 really, if you look at paragraph 64 of that local rule
17 56(a)(1) statement, that is the gravamen of the case here,
18 whether the conduct by Mr. Goldberg can be interpreted to
19 fall under the breach of, breach of peace statute
20 constituting threatening behavior, and we submit that it
21 does not; that there's no genuine issue of material fact
22 that Mr. Goldberg, that there was any probable cause or
23 articulable suspicion that he violated the breach of peace
24 statute.

25 THE COURT: Well, the existence of probable

1 cause is a legal issue, and so the fact that that's
2 included in their 56(a) statement I don't think makes it a
3 factual issue.

4 MS. BAIRD: Thank you.

5 THE COURT: So, I mean that's what we're here to
6 figure out.

7 MS. BAIRD: Yes, Your Honor.

8 THE COURT: Was there probable cause or with
9 respect to the qualified immunity issue, was there
10 arguable probable cause for the arrest.

11 MS. BAIRD: Yes, Your Honor.

12 THE COURT: Right. Okay, well, let's start with
13 what I think is also not in dispute and that is that
14 Mr. Goldberg is not making a Second Amendment claim here.
15 The briefs talk a lot about the Second Amendment but this
16 is a Fourth Amendment case.

17 MS. BAIRD: That is correct. No Second
18 Amendment claim has been made. It's a Fourth Amendment
19 unlawful seizure of the person, unlawful arrest, yes.

20 THE COURT: Okay. All right.

21 So, Ms. Baird, let me start with you. We have a
22 911 call. Mr. Goldberg is in the take out area of
23 Chili's. He's got a sidearm. He's wearing a sidearm that
24 is either exposed or partially exposed or, in any event,
25 it's observable, whether it's covered by the shirt

1 completely or not. Officers arrive. Why isn't there --
2 why don't those facts justify a Terry stop to determine
3 whether or not Mr. Goldberg has a valid permit for the
4 gun?

5 MS. BAIRD: Because there was no indication that
6 Mr. Goldberg was engaged in criminal conduct, about to
7 engage in criminal conduct or was threatening criminal
8 conduct. Him possessing a firearm, a pistol, openly
9 carried, inadvertently shown, however the facts show, was
10 no different than him walking into Chili's with a bag,
11 with a wallet, with any other item that it's lawful to
12 carry. The fact it was a firearm made absolutely no
13 difference and it the constituted no reason for any police
14 officer to approach him in any way.

15 THE COURT: Well, the difference is with a
16 firearm, it is illegal for the vast majority of people in
17 Connecticut to carry it into Chili's or to display it or
18 to possess it openly. So, why isn't it -- it's only legal
19 if he has a valid permit. Why isn't there a basis for a
20 Terry stop with a police officer, a brief stop to permit
21 the officer to determine whether or not he has a valid
22 permit?

23 MS. BAIRD: Because in the United States we
24 don't, we don't take the position that police officers, if
25 a person is acting lawfully and there's no indication that

1 there's any crime committed, that they have to be
2 questioned about their conduct. In other words --

3 THE COURT: But you're ignoring the fact that,
4 as I said, for the vast majority of Connecticut residents,
5 it would be illegal to do what Mr. Goldberg did. The fact
6 that he actually had a permit doesn't seem to detract from
7 the officer's authority, proper authority, to stop him
8 briefly to determine whether he had that permit. If he
9 didn't have that permit, he clearly is acting illegally.
10 So --

11 MS. BAIRD: If, if --

12 THE COURT: Let me put it this way. If a police
13 officer sees somebody smash a window on a building, they
14 are authorized to stop that person and find out what's
15 going on. If it turns out that it's the owner smashing
16 his own window and, therefore, it's not illegal, that
17 doesn't mean it was improper for the police officer to
18 stop the person to inquire. That's what we're talking
19 about with a Terry stop.

20 So, if the vast majority of people in
21 Connecticut are not legally able to do what Mr. Goldberg
22 did, why isn't there a justifiable suspicion that Mr.
23 Goldberg is committing a crime that justifies a Terry
24 stop?

25 MS. BAIRD: I think we could equate it to other

1 circumstances where people are required to hold licenses
2 or permits to do certain things; for instance, driving.
3 Clearly there a lot of people that drive under suspension.
4 That does not mean that an officer can stop every car and
5 say do you have a license. He has to have a reason prior
6 to doing that.

7 Clearly we have an issue in this country, or the
8 media would have us believe that there's an issue with
9 illegal immigration. That does not mean in certain areas
10 of the country yet that you can just stop somebody and
11 make them produce papers. And it's the same thing with
12 the pistol permit, it's the same thing with a firearm. If
13 you lawfully hold the firearm and you are doing nothing,
14 then there's, there's no, there's no basis under the law
15 to allow a police officer just to approach somebody any
16 more than there would be if you had a bag from Macy's and
17 they thought that maybe you -- asked for your receipt for
18 the bag because it may not actually be yours.

19 THE COURT: No, the difference is the vast
20 majority of people walking around with a Macy's bag
21 actually bought something from Macy's. The vast majority
22 of people who have a pistol on their side don't
23 necessarily have a valid permit for the gun.

24 I don't have a valid permit. If I walked into
25 Chili's with a gun on my hip, I'm breaking the law. And

1 if that causes -- if my walking in causes a 911 call and
2 the police respond, you're suggesting that the police
3 don't have the right to approach the person and inquire
4 whether they have a valid permit?

5 MS. BAIRD: I'm not only suggesting that, that's
6 my position, Your Honor, because if we take the position
7 that the court is presenting to me, that it all depends on
8 what portion of society holds a license or permit to do
9 something as to whether police officers can approach them
10 for no reason to demand that they show their papers and
11 prove that they are allowed -- so if Connecticut becomes a
12 state where perhaps 80 percent people hold state permits,
13 then the police can't approach people anymore, but it's
14 15 percent, then they can. If it's 40 percent, then they
15 can't.

16 You can't base a constitutional right, a right
17 to be free from seizure, and when a police approaches you
18 and asks for your permit, I think you have a reasonable
19 belief that you're not just allowed to walk away and
20 ignore him, to say I don't have to show that to you. I
21 think you have a reasonable belief that you are detained
22 there until you show your permit.

23 So until -- for one thing, it's not a matter of
24 record how many people in Connecticut hold state permits
25 because from our position that's not the issue. If it's 1

1 percent, if it's 99 percent, the same rule applies.

2 THE COURT: But whether it's 1 percent or
3 99 percent also doesn't matter to my analysis. The
4 analysis is we have somebody in a public place with a
5 dangerous weapon. That restaurant has twice been the
6 subject of armed robberies. They received a 911 call.
7 This is not somebody sitting in their automobile with a
8 weapon. This is not somebody sitting on their front porch
9 with a weapon. This is somebody who has already created a
10 disturbance by walking into a place twice before the
11 subject of a robbery, subject to a 911 call.

12 It doesn't even seem to be a close question to
13 me. When the police get a 911 call about somebody with a
14 gun in a public place, they have to be able, as a matter
15 of public security, they have to be able to ask the person
16 if they have a valid permit.

17 MS. BAIRD: There are a number of ways this
18 could be dealt with. If Chili's was concerned about two
19 prior armed robberies, they are allowed under state
20 statute, the owner of the premises is allowed under state
21 statute to post No Firearms Allowed. Did they do that?
22 No, they didn't do that.

23 THE COURT: But that doesn't matter. What
24 matters is what were the police faced with when they
25 arrived. The totality of the circumstances when they

1 arrived are they got a 911 call. They are approaching
2 somebody who is visibly -- has got a firearm on, and
3 they've got, they've got the authority to at least
4 inquire.

5 MS. BAIRD: This is what the police were faced
6 with when they arrived at Chili's on June 21st, 2007.
7 They were faced with a law on the books in Connecticut
8 passed by our state legislature, never amended, that
9 states you may carry a pistol or revolver in the State of
10 Connecticut if you have a valid permit. It doesn't say
11 concealed. It says you may carry.

12 So that's what our state legislature says you
13 can do. And nobody sought to change that -- actually they
14 have but it's not a matter of record in this case. There
15 have been bills by the DPS to attempt to change that.
16 But, setting that aside, that's the law on the books right
17 now.

18 We have, we have a state legislature that could
19 add to the state statutes if you hold a state permit --

20 THE COURT: But we're not here to talk about
21 what the state legislature could do. What we're here to
22 talk about is whether there's a cause of action under
23 Section 1983 for the police officers making -- first
24 making a Terry stop and later arresting Mr. Goldberg under
25 the totality of the circumstances that they faced at the

1 time.

2 MS. BAIRD: There was -- this is an issue
3 somewhat of state legislature because we have laws on the
4 books and the state -- and the police, when they arrived
5 at Chili's, they did not follow the law. They said to
6 themselves, you know, even though it's legal to openly
7 carry in this state and there's no evidence that this man
8 was doing anything against the law, we're still going to
9 ask him for a valid permit, even though we have no
10 articulable suspicion he was about to commit a crime or is
11 committing a crime.

12 The police have a concern about people carrying
13 firearms, openly carrying firearms. And so what they try
14 to do, because there is no law that can place you under
15 arrest for openly carrying a firearm, is they tried to fit
16 it into the breach of peace statute by saying that he was
17 engaged in threatening behavior. There's no evidence in
18 Laura Smith's affidavit that was submitted by the
19 defendants that Mr. Goldberg engaged in any threatening
20 behavior.

21 Under the breach of peace statute, you have to
22 intentionally cause annoyance or alarm or recklessly
23 create a risk thereof, and do one of the six other things
24 under that statute. One of them is engage in tumultuous
25 or threatening behavior. And, interestingly enough, under

1 the breach of peace statute, under the sixth prong it says
2 in a public -- excuse me. Creates a public and hazardous
3 or physically offensive condition by any act which such
4 person is not licensed or privileged to do so.

5 Even if one wants to take the position that
6 carrying a firearm into Chili's where people can see it is
7 offensive, that it causes annoyance or alarm, well, you
8 know what? That's up for debate, number one, and our
9 state legislature certainly hasn't said that's the law and
10 that's the law we go by in this state. So, so even if one
11 wants to say, oh, it's offensive to me, he had a permit to
12 do it. The state says he can do it.

13 So, even though the police were concerned about
14 Mr. Goldberg carrying a firearm or pistol, it's legal and
15 there's nothing that -- there's nothing that anyone can do
16 or say to get away from that fact that he was engaged in
17 completely lawful behavior and we don't condone our police
18 just walking up to people engaged in completely lawful
19 behavior and demanding from them proof either that they
20 are allowed to drive and they are allowed to be in this
21 country or they are allowed to carry a firearm. That's
22 just not the law and it was clearly established at the
23 time that that's not the law.

24 THE COURT: Well, okay. I think you're shifting
25 between the Terry issue and the probable cause issue. So

1 let's focus first on the Terry issue. The police have to
2 be able to ask someone if they have a valid permit when
3 they are in a place that has -- that feels threatened,
4 under the statute, feels threatened because somebody's
5 there with a weapon and it's been sufficiently serious
6 that they call 911.

7 This is not a policeman wandering into Chili's
8 to buy dinner and seeing Mr. Goldberg and acting on his
9 own. This is a police officer who has responded to a 911
10 call from somebody who was so upset they couldn't describe
11 what Mr. Goldberg looked like.

12 So this is not just a police officer on a whim.
13 The circumstances here are a police officer is called to a
14 scene that he has every reason to believe is a dangerous
15 situation. And you're saying because some people have
16 permits, the police can't even ask for the permit?

17 MS. BAIRD: Not if the person is -- if there's
18 no indication that the person has engaged in any unlawful
19 behavior -- the fact that Ms. Smith says she was upset,
20 people get upset about a lot of things.

21 THE COURT: They do, and that's what the breach
22 of peace statute's all about.

23 MS. BAIRD: It's not. The breach of peace
24 statute is about -- are people upset but did you do
25 anything to make them upset.

1 THE COURT: Right.

2 MS. BAIRD: What did he do to make anybody
3 upset? He did nothing to upset anybody. Nothing except
4 lawfully carry a firearm.

5 THE COURT: So this was just a random 911 call.

6 MS. BAIRD: This was a 911 call where Ms. Smith
7 indicated that someone -- she noticed a firearm on the
8 man's side -- I'm going by her affidavit -- and he was
9 wearing green khaki color pants, the gun was black in
10 color. She was uncomfortable. She became anxious.

11 THE COURT: But you're overlooking the, I think,
12 undisputed record evidence that the police officers were
13 told that she had actually cleared that area of the
14 restaurant of any patrons because she was so nervous that
15 there was going to be a violent incident.

16 MS. BAIRD: I don't, I don't see that in her
17 affidavit. I didn't see it --

18 THE COURT: It's not in her --

19 MS. BAIRD: -- in her report but in Sergeant
20 Furlong's deposition.

21 THE COURT: Correct.

22 MS. BAIRD: Yes.

23 THE COURT: And it's undisputed, as far as I
24 know, that that's what she said.

25 MS. BAIRD: It's hard for us to dispute that's

1 what she said to Sergeant Furlong because we weren't there
2 when this was said. All we can use to dispute that is the
3 affidavit of Laura Smith where she doesn't say anything
4 about that and then in the police report nothing is said
5 about that either.

6 THE COURT: Well, circumstantially there were no
7 people in that area of the restaurant.

8 MS. BAIRD: I mean I do -- the fact, the fact
9 that somebody is scared of lawful activity or anxious
10 about lawful activity, I don't know how to respond to
11 that. It puts all of us in the position of I could be
12 doing something lawful anywhere but if somebody becomes
13 scared of me for any number of reasons, then they can call
14 the police and say, oh, I saw her, I was scared, and
15 everybody rushed out of the room and that's my fault.

16 THE COURT: Well, it becomes somebody's fault if
17 they act recklessly. Under the statute, reckless
18 behavior, the reckless creation of a threatening situation
19 is something that can be subject to arrest.

20 And so what we have here is a gentleman who
21 instead of leaving his gun locked in his car for the few
22 minutes that he has to go in to pick up the dinner,
23 instead, straps it on and walks in. So, you can
24 recklessly do things that are legal. It's not only
25 reckless to do things that are illegal.

1 MS. BAIRD: But you have to -- but you can act
2 recklessly doing things that are legal, but under the
3 breach of peace statute you also have to do one of those
4 six things in addition to the reckless, the reckless
5 allegation. Now the only, the only provision of that
6 statute that the defendants are relying on is threatening,
7 so --

8 THE COURT: Right.

9 MS. BAIRD: So what was the threatening conduct?
10 Having a firearm was the threatening conduct.

11 THE COURT: Displaying the firearm.

12 MS. BAIRD: Yes, which is legal. It's legal to
13 display a firearm. How can a legal --

14 THE COURT: Now we're back where we started.
15 The display of a firearm can or cannot be a legal event.

16 MS. BAIRD: Right.

17 THE COURT: Right. You're saying in the end it
18 turned out that it was a legal event. But what we've got
19 here is not only the question of probable cause but the
20 question of arguable probable cause. Could reasonable
21 police officers arriving on the scene, knowing what these
22 officers knew, decide that there had been a breach of the
23 peace?

24 And so that's the problem that you've got, is
25 it's not only in the end, was he in fact guilty of this

1 conduct, but could a reasonable police officer believe
2 that he had recklessly created a threatening situation?

3 MS. BAIRD: No, absolutely not. No more than a
4 circumstance where, you know, maybe some years ago, you
5 know, before our civil rights laws, you would have a
6 neighborhood where for whatever reason when a person of a
7 different race would come in that neighborhood or a group
8 of people of a different race would come in the
9 neighborhood and they'd call the police and the police
10 would come to the neighborhood and say what are you doing
11 here? You don't live here. We want to know what you're
12 doing here. Get out of here. You're causing annoyance
13 and alarm. And they were placed under arrest for
14 completely lawful behavior.

15 The fact that other people don't agree with your
16 behavior or don't like it or don't think you should be in
17 a certain place has no bearing whatsoever. The only issue
18 is was he doing something legal and, yes, he was. And if
19 we have -- we're not conceding but even if we did concede
20 that they had a right -- a police officer can ask you
21 anything he wants. A police officer can walk up to you
22 and say do you have a permit for that gun? Do you have a
23 license? I could be walking down street and an officer
24 might ask me something. I'll probably answer him. Why
25 not. Most people do. Most people are very accommodating

1 to police officers. Why didn't they just walk in or say,
2 Mr. Goldberg -- or I guess they didn't know his name but,
3 sir, do you have a permit for that gun? And he would have
4 said, yes, I do, here it is. But they didn't do that.

5 So even if you want to get past the articulable
6 suspicion, then you have the problem of they don't say,
7 sir, that is a nice Glock, do you happen to have a permit
8 for that? And then walk away when he gives them the
9 permit. They didn't do that.

10 THE COURT: They didn't do that, but the
11 question of a Terry stop is do they have an articulable
12 suspicion that permits them to do what they did.

13 Walking into a situation where they've been
14 called by 911 to come to a place where the establishment
15 believes there's a danger, and to expect a police officer
16 not to go up as a matter of officer safety, disarm the
17 person before politely asking for the permit, is
18 unrealistic.

19 MS. BAIRD: Well, this is what's going to happen
20 in Connecticut then if that becomes, if that becomes a
21 matter of law. This is what's going to happen. Anybody
22 in Connecticut who exercises their right, which is now a
23 Second Amendment right, to openly carry their pistol with
24 a valid permit is subject to being stopped anytime
25 anywhere whenever somebody makes a call to the police and

1 says I don't like guns, I don't think guns should be
2 legal. I'm really scared of this guy. Come get him.
3 That's what is going to happen. You're going to have
4 people who are engaged in lawful behavior -- fundamental,
5 fundamental constitutional rights are implicated in this
6 behavior now, who anybody's going to be able to say I'm
7 scared, I'm scared, and the police are going to come, they
8 are going to be able to handcuff him and throw him up
9 against the wall and demand his permit.

10 That's -- we just can't agree to that, Your
11 Honor, and if the people of Connecticut want that, then we
12 can pass laws through our state legislature to say conceal
13 carry only. A lot of states have conceal carry only. We
14 can, too, but what's happening here is the police are
15 attempting to circumvent our democratic process. The
16 democratic process in Connecticut says you can openly
17 carry. The police do not like that. And a lot of other
18 people don't like that. And so, to circumvent what our
19 state legislature has said is okay, they say, oh, well,
20 whenever you do that, that's a breach of peace and it
21 scares people and it's threatening so we can place you
22 under arrest if we want. That's not the way it should
23 work.

24 THE COURT: I don't have to worry about every
25 other case. I have to worry about this case.

1 MS. BAIRD: Right.

2 THE COURT: In this case the circumstances are
3 not that the police arbitrarily walk up to him and
4 arbitrarily put him in handcuffs and arbitrarily charge
5 him with breach of peace.

6 What we have here is the police responding to a
7 situation in which the restaurant employee is fearful of a
8 robbery or a shooting, justifiably fearful. The police
9 don't have to respond to that by saying, Oops, we can't do
10 anything, sorry, Second Amendment. The Second Amendment
11 is not unlimited, as the Supreme Court has said -- and
12 this, by the way, is not a Second Amendment case, this is
13 a Fourth Amendment case. And the question quite simply is
14 what were the circumstances facing these officers?

15 The Heller decision had not been decided. We
16 don't have to worry about Heller. The situation facing
17 these officers is a dangerous, potentially dangerous
18 situation. They went in -- three of them, I think, went
19 in. This is not just a simple, oh, routine, we're going
20 to go by and check out what's happening over at Chili's.
21 This is, oh my goodness, we have a potentially volatile
22 situation over at Chili's. There's a guy in there with a
23 handgun who's scaring the heck out of the management.

24 To suggest that the police can't respond -- and
25 what the police did here, at least up until the time that

1 he's arrested is, they approach, they have him show his
2 hands, they turn him around and they put him in handcuffs
3 so they can disarm him and figure out what's going on.
4 Very, very difficult to say that they are not entitled to
5 qualified immunity when they do that.

6 MS. BAIRD: I don't agree.

7 THE COURT: How can a reasonable police officer
8 not believe that that conduct is appropriate under these
9 circumstances?

10 We're not dealing with the case where the police
11 see you walking down the street with a gun and they just
12 tackle you. That's not this case. What we have is a 911
13 call where the restaurant has been partially evacuated and
14 the police are responding to what they think is an
15 extremely dangerous situation.

16 MS. BAIRD: There's no evidence that the
17 restaurant was evacuated. It wasn't.

18 THE COURT: The take out area -- I said
19 partially. The take out area was evacuated. The take out
20 area was cleared out of any other patrons.

21 MS. BAIRD: In Mr. Goldberg's deposition, he
22 indicates that the take out area was empty, so I don't
23 know what -- Laura Smith doesn't say in her affidavit
24 anything about evacuation but, you know what? It doesn't
25 matter. It doesn't matter if Mr. Goldberg walked in,

1 engaged in legal conduct and everybody ran screaming out
2 of the restaurant. It doesn't matter if they all sat
3 there and ate quietly. It doesn't matter what they did.

4 THE COURT: It does.

5 MS. BAIRD: If I can be arrested based on what
6 other people do when I'm doing nothing wrong -- how does
7 that work?

8 THE COURT: Okay, let me try it this way. I
9 have a chainsaw at home. I have the legal right to use my
10 chainsaw. If I walk into Chili's with a chainsaw and
11 create fear in people because I'm walking in with
12 something I'm legally able to carry, I've broken the law,
13 notwithstanding the fact that I have a right to carry my
14 chainsaw.

15 MS. BAIRD: But you haven't broken the law. You
16 can walk into a Chili's with a chainsaw.

17 THE COURT: Not if doing so breaches the peace
18 by recklessly creating a threatening situation.

19 MS. BAIRD: So, if you walk into one Chili's
20 where there's a bunch of loggers having lunch with your
21 chainsaw and they are like, oh, great, great chainsaw,
22 what kind is it? We love it. But then you walk into
23 another Chili's where it's like a birthday party for ten
24 year olds and they are all scared, whether you're
25 committing a crime is completely dependent on who's around

1 you? That can't be true.

2 THE COURT: It depends obviously on the
3 circumstances. Yes, it does.

4 MS. BAIRD: Oh, I --

5 THE COURT: It depends on the circumstances. If
6 the circumstances are such that you have recklessly
7 created a threatening situation, and that does depend on
8 the circumstances, then yes, you've breached the peace.

9 And it doesn't matter here whether he breached
10 the peace or not. What matters is whether reasonable
11 officers could disagree about whether he breached the
12 peace, and the very debate that we're having is the proof
13 of that.

14 You don't think they could. Maybe you're an
15 objective officer. I think they could. I'm an objective
16 police officer. There's the debate right there. That
17 ends the question because qualified immunity applies so
18 long as a reasonable officer could disagree about whether
19 there's a problem here.

20 MS. BAIRD: I think when it comes to firearms
21 and guns, that is problematic because firearms and if you
22 have a valid permit, pistols, revolvers are completely
23 legal to carry openly unless otherwise prohibited by the
24 premises owners or by law, but you're never going to get
25 police officers to agree that it's okay for people to walk

1 around carrying firearms openly.

2 So to say that you're always going to find
3 officers who don't think that's fine and so, therefore,
4 it's reasonable, completely contrary to what -- they
5 are -- because of the emotional impact of firearms, you're
6 never, no matter what the law says, going to have all
7 police officers saying, you know, that people can carry
8 openly and there's no problem with it. The law may say it
9 but police officers will never say it. They are imposing
10 their own law and that's not reasonable.

11 THE COURT: No, it's not their subjective views.
12 It's whether reasonable police officers in the legal
13 context and the factual context that faces them, could
14 disagree. Here, you've got to deal with this situation.
15 You can't deal with the easy hypothetical. You've got to
16 deal with this situation, and in this situation reasonable
17 police officers could in fact disagree under these
18 circumstances whether he acted recklessly and whether
19 there was threatening behavior.

20 MS. BAIRD: So if, if --

21 THE COURT: It's a different thing to wear a gun
22 publicly at say a shooting range and to wear a gun
23 publicly at Kindergarten, for example.

24 MS. BAIRD: It's illegal in a Kindergarten.

25 THE COURT: Well, okay. Let's say outside a

1 Kindergarten, on the street outside a Kindergarten. Now,
2 if you don't think the police are going to react
3 differently to those two situations, somebody walking out
4 in front of a gun shop, somebody walking out in front of a
5 Kindergarten, and if you don't think it's objectively
6 reasonable that they do so, then we just simply disagree.

7 Police officers have to be judged, their conduct
8 has to be judged, by all of the circumstances, the
9 totality of the circumstances. And here, yes, the fact
10 that there was actually fear by people in the restaurant
11 does matter.

12 MS. BAIRD: Well, there certainly isn't any --
13 there's certainly are no statements that were taken by the
14 police of anybody in the restaurant to confirm that fear.
15 There was --

16 THE COURT: I'm talking about the manager of the
17 restaurant alone. That's all I need. She's clearly
18 upset. She's clearly fearful.

19 MS. BAIRD: Well, throughout our history,
20 reasonable police officers have objectively believed -- or
21 reasonable police officers have taken the position in many
22 contexts that unlawful behavior was completely okay. That
23 does not make --

24 THE COURT: I don't follow you.

25 MS. BAIRD: I'll put it bluntly, Your Honor. It

1 used to be if you were in a white neighborhood and there
2 was a black man walking through it, the white residents
3 would become completely alarmed and annoyed. Now, that
4 black man, if he's in a white neighborhood, he should have
5 known that he would create that annoyance and alarm. I
6 mean he knows that, he knows that there have been other
7 circumstances where black people have been in that
8 neighborhood and been picked up and told not to come back.
9 And so -- but he goes in that neighborhood anyway.

10 THE COURT: You might win that case, but that's
11 not this case.

12 MS. BAIRD: But it is this case.

13 THE COURT: No, it's not.

14 MS. BAIRD: It's absolutely not different.

15 THE COURT: Well --

16 MS. BAIRD: The way we feel about guns is
17 different but the case is not different. The only
18 difference in this case is the fact that it's a gun. But
19 guns are legal. Guns are as legal as anything else.

20 THE COURT: But they are not necessarily legal,
21 and the question is not whether they are legal or not.
22 The question is whether a reasonable police officer at the
23 scene can do what these officers did. That's the issue in
24 this case. And there may be lots of great hypotheticals
25 you can spin but you're spinning them away from this case.

1 MS. BAIRD: A reasonable police officer does not
2 seize somebody for entirely legal behavior.

3 THE COURT: People -- police officers stop
4 people all the time to determine whether what they are
5 doing is legal or not and there's nothing wrong with that.
6 When they have a reasonable suspicion that somebody might
7 be doing something illegal, reasonable police officers can
8 disagree about whether they can stop them or not. Period.
9 That's the law.

10 We're not dealing here with whether Mr. Goldberg
11 ought to go to jail. We're dealing here with whether
12 these police officers responding to the scene ought to be
13 liable in damages to Mr. Goldberg for what they did. And
14 qualified immunity says, no, they are not so long as they
15 acted objectively reasonable.

16 MS. BAIRD: You cannot act objectively -- I mean
17 the circumstance of a police officer stopping somebody in
18 a car, perhaps the police officer -- well, hopefully the
19 police officer saw the person do something or has some
20 information that the person did something and that's why
21 they are stopping them. In this case all we have is I'm
22 scared. That's all we have is I'm scared.

23 THE COURT: What we have is a 911 call. Look,
24 if you're walking through any neighborhood, if you're
25 walking through my neighborhood at 3:00 o'clock in the

1 morning, and one of my neighbors calls 911 and says
2 there's somebody outside walking in the neighborhood, I
3 don't know what's going on, can you check it out? The
4 police officers can come and ask you what are you doing.

5 MS. BAIRD: They can and, yes, police officers
6 can ask anybody anything, but they didn't do that in this
7 case though. They didn't just ask questions.

8 THE COURT: Well, but if you're walking the
9 neighborhood at 3:00 o'clock in the morning and they see a
10 gun at your side, maybe they are going to stop you and put
11 in you handcuffs long enough to take the gun away and find
12 out whether you're legally possessing that gun or whether
13 you are illegally possessing that gun.

14 MS. BAIRD: And that's in violation of that
15 person's rights if they do that, because --

16 THE COURT: In your view, it's always a
17 violation of that person's rights and that's where we're
18 disagreeing. You're saying because it's a gun, the police
19 have no rights to do anything whatsoever. It's
20 categorical. And that's where we disagree. I think the
21 law says that I have to look at all the circumstances, and
22 the fact that it's a gun creates obvious danger to the
23 police officers, to the persons who are in the restaurant,
24 et cetera, to Mr. Goldberg himself frankly. And when they
25 respond to a 911 call, someone who's scared about what's

1 happening at their restaurant, they have the right to ask
2 him what's going on.

3 MS. BAIRD: They did, they did have the right to
4 ask him what was going on. I do agree they had the right
5 to do that.

6 THE COURT: And they had the right to do what's
7 called a Terry stop of him, which can include a brief
8 detention to allow them to get the situation under control
9 and find out what's going on.

10 MS. BAIRD: Once he had a permit or once he told
11 them he had the permit, it was over. The handcuffing,
12 the --

13 THE COURT: The Terry stop was over and the
14 question then becomes did they have probable cause to
15 arrest him for breach of peace, and we've gone over that
16 as well.

17 MS. BAIRD: I'm not -- I don't concede, however,
18 that they had the right to ask him what was going on, but
19 since there was no criminal conduct or no articulable
20 suspicion that he engaged in criminal conduct, if he had
21 refused to answer he would have been well within his
22 rights. You don't have to respond to the police. You
23 don't have to answer the questions. They can ask you
24 whatever they want but you don't have to respond.

25 THE COURT: Fair enough, but that's not an issue

1 in this case either. He did respond.

2 MS. BAIRD: He did.

3 THE COURT: So the fact he had a right not to
4 respond is irrelevant to deciding whether there was an
5 invalid Terry stop violating the Fourth Amendment or
6 whether there was not probable cause to arrest violating
7 the Fourth Amendment.

8 Well, let me hear from Mr. Gerarde.

9 MR. GERARDE: Just following up on that point
10 that Your Honor just made, this is a different case
11 because when the police have a 911 call to see a
12 complainant, all right, and that's this store manager who
13 wants to speak to them. They walk in and there's the man
14 with the gun that's referenced in the dispatch and, in
15 terms of what the police knew, the dispatcher is the one
16 who reported to them that the manager has cleared the
17 restaurant partially. And that's in the testimony of all
18 three officers. They remember hearing on the dispatch
19 that, to go to Chili's for this reason and the manager's
20 cleared the restaurant.

21 So, their mission is they certainly have to
22 speak to this manager but the first thing they do, and
23 everyone knows that they are trained to do this, is you
24 have to secure the scene, and securing the scene where you
25 have a man with a gun with public members in the area, is

1 let's take the gun away from Mr. Goldberg and take his --
2 and secure him so that I can figure out from this manager
3 what happened and then I can decide if there is a crime.

4 So this is a classic Terry situation, and I
5 agree with everything Your Honor said about this is
6 articulable suspicion, we go by the totality of the
7 circumstances. This is not that different than someone
8 who is stopped on the street and there is a complainant.
9 Say it's a male/female situation. Many times the male is
10 put in the back of the cruiser. You're not under arrest
11 but I want you to stay here while I go and talk to her.
12 And then they talk it out and then a decision is made,
13 okay, you can go, or you know, I have further
14 investigation or probable cause to arrest.

15 There obviously isn't a police cruiser to put
16 Mr. Goldberg in inside Chili's and so what they do is put
17 him in handcuffs. This way he won't run. If he runs he's
18 not going to get far. He's not going to try to take a
19 swing, try to grab another officer's police weapon of some
20 kind and make something happen. It is the safer for
21 Mr. Goldberg for it to be that way, safer for the police,
22 safer for everyone at Chili's. You freeze the situation
23 briefly and then figure it out.

24 Now, Mr. Goldberg has a different case and so
25 these scenarios that we get about, you know, what about if

1 someone was just walking down the street or an African
2 American man in a white neighborhood, Mr. Goldberg -- it's
3 on page two of my brief, but we have his own testimony, he
4 was trained that efforts should be made to conceal a
5 weapon when in public so you don't scare the people, so
6 that you don't cause alarm. That's at page 71 of his
7 deposition.

8 He testified under oath to me he knew and
9 understood he ran the risk of causing alarm in members of
10 the public or wait staff at Chili's if they saw his gun on
11 his person at the time he entered, and he actually
12 testified that he made an effort to conceal the gun by
13 pulling his tee-shirt down so as not to, quote, scare
14 anyone. That was his word.

15 Well, what were they going to be hypothetically
16 scared of? Scared of the fact that he might use that gun
17 on them. And so this is a classic threatening type
18 behavior and he doesn't have to pull the gun out and
19 commit the crime of threatening. It's if reasonable
20 persons would perceive a threat based on the conduct,
21 then -- so then you have the probable cause for arrest and
22 breach of peace. And we certainly have arguable probable
23 cause.

24 And I'm not sure if Your Honor wants to jump to
25 another issue on probable cause, but I think it's well

1 versed in my brief that this is not the necessary
2 favorable termination in order to proceed with a Section
3 1983 false arrest case. Mr. Goldberg testified that his
4 lawyer negotiated with the prosecutor --

5 THE COURT: But the problem with that is the
6 more recent cases are saying that Rose v. Motorola doesn't
7 apply to false arrest as opposed to malicious prosecution
8 and the Supreme Court of Connecticut hasn't decided that
9 issue, but -- you know, that's a weaker basis for a
10 ruling.

11 MR. GERARDE: Understood. Well, I'll rely on
12 the brief with that.

13 And the Terry stop is more than just to see if
14 he has a legitimate permit. This is not a scenario where
15 someone walks up to him at the counter and says, hey, nice
16 Glock, do you have a permit for it, or whatever. This is
17 more than just does he have a permit, although I do think
18 that that's legitimate, that's a legitimate question.
19 This is to see whether or not, the Terry stop is to see
20 whether there was something to the alarm voiced by this
21 manager who has made a 911 call. And I agree 100
22 percent with Your Honor, people don't just pick up the
23 phone and dial 911 casually. If someone has got to the
24 point where they are going to go through their own mental
25 analysis of the situation and then get themselves to the

1 point where I am scared enough and threatened enough to
2 pick up the phone and have police come, then that means
3 something. That's a different, it's a different scenario
4 than somebody, you know, who hasn't called 911 and it's
5 just a casual encounter by police.

6 So you have someone who is worried enough that
7 they've called 911 about someone with a gun and then you
8 walk in and there is the man with the gun, there's no
9 question that that's who they are talking about, the very
10 first thing you have to do is make sure everything is safe
11 and secure the scene and now I'll go talk to the
12 complainant to see if there is a breach of peace, and I
13 think that there was.

14 So, on the Terry stop and the probable cause to
15 arrest, that's what I have to say. And I think the case
16 is well versed in the brief about the issue of use of
17 force. Once we have the Terry stop valid, we do have the
18 right to put Mr. Goldberg in handcuffs, and he testifies
19 about a bump on the head as he was turned around. And the
20 case law on excessive force, Your Honor, I'm sure Your
21 Honor knows, it doesn't really depend on the injury --
22 whether there is an injury or there isn't an injury is
23 kind of beside the point. The issue is what was the
24 degree of force used and was it done in a malicious or a
25 reckless manner with some type of intent to injure or

1 reckless disregard of someone's right to be secure in
2 their person.

3 And the way Mr. Goldberg described it, his
4 version of the event is, no, they didn't push me into the
5 wall, no one had their hand on the back of my head, they
6 had me by the arm and as I turned around, my head, my
7 forehead contacted the wall, I got a bump or a bruise and
8 I didn't get any treatment and that was the end of that.

9 So, when you look at it, that is -- negligence
10 will never get you Fourth Amendment liability or Section
11 1983 liability. And I think as a matter of law, that
12 doesn't rise to an excessive use of force. Having someone
13 turn around who has a weapon on their side and take their
14 arm behind their back, incidental contact would not lead
15 to Section 1983 liability.

16 And I do think you can actually have qualified
17 immunity in this scenario to the extent that the police
18 officers thought it was necessary to quickly turn this man
19 around and get him in handcuffs before he made a further
20 move or made a break for it or made a move for his gun or
21 whatever.

22 So, the last comment I would like to make is
23 that there is a Monell claim that looks, you know, it
24 never went anywhere in the evidence, I can tell you that,
25 on the failure to train issue. They took a deposition of

1 the chief of police and we have the necessary affidavits.
2 The officers are fully trained on Fourth Amendment law,
3 they are fully certified, they have all their
4 recertification training and there is no history with any
5 one of these three, for instance, that would give rise to
6 a need to train that person or retrain them because
7 they've had, for instance, five complaints about use of
8 force and internal investigations that have documented
9 them or whatever. Sometimes you can get failure to train
10 liability in this scenario. We don't have any of that
11 evidence at all and so we ask for summary judgment on that
12 claim as well. Thank you.

13 MS. BAIRD: May I move, Your Honor, in the
14 interest of justice that Mr. Goldberg be allowed to submit
15 the 911 tape as a supplement to his motion for summary
16 judgment? I know what was said on the 911 tape. It's not
17 in the record. I think it's important to this court's
18 decision as the fact of the 911 call was made, has been
19 brought up numerous times, and what was actually said in
20 that 911 call I think is important to the resolution of
21 this case.

22 THE COURT: What was said, as I understand it,
23 is is it legal for someone to carry a weapon.

24 MS. BAIRD: Yes.

25 THE COURT: Right, right.

1 MS. BAIRD: And the tone of the 911 call is
2 important as well if we're going to be relying on
3 statements that there was some sort of fear or chaos or
4 intimidation involved. I think the tone of the phone call
5 is also important. And we have it.

6 MR. GERARDE: Your Honor, my response to that is
7 that I would object to any need to supplement the record.
8 I mean I -- Your Honor has understood correctly a part of
9 what that 911 call was and -- but there isn't any dispute
10 that it was reported to the police that the restaurant had
11 been partially evacuated or words to that effect, that
12 people are out.

13 And it was also reported to the police that she
14 was not able to give a description because she was too
15 nervous. We have Laura Lee Smith's affidavit in evidence,
16 I mean, so the police are not -- I mean this case isn't
17 going to turn on what's on the tape. The tape gets the
18 police to the Chili's Restaurant and I think that even if
19 we assumed that nothing was said on the tape except go to
20 Chili's, there's a man with a gun there and someone has
21 called, period, then they would have a right to walk in
22 and put Mr. Goldberg in investigative detention.

23 MS. BAIRD: I just think the --

24 THE COURT: What matters is what the police
25 officers knew. The police officers, I think it's

1 undisputed, did not hear the 911 call. What they heard
2 was the dispatch sending them there. So that's what
3 matters in terms of the information available to them.
4 The other thing that matters in terms of being available
5 to them is what they were told at the scene by the
6 manager. Again, that's not going to -- that's not going
7 to be disclosed by what's in the 911 call. So, as far as
8 I can tell, the 911 call is irrelevant.

9 MS. BAIRD: I had just --

10 THE COURT: And I've talked about the 911 call
11 but the point is not what's said in the 911 call but the
12 fact that a 911 call results in police being dispatched to
13 a place where there's a man with a gun. That's what
14 matters, because those police officers are arriving at a
15 place where they understand the 911 operator's been called
16 because there's a man with a gun and that the restaurant
17 has taken measures to protect the safety of its patrons
18 and when they arrive they learn that the manager is upset
19 and apprehensive and concerned and feels threatened.

20 MS. BAIRD: I just became concerned when there
21 was a lot of reliance -- when I heard comments about
22 people don't make 911 calls for nothing -- actually they
23 do.

24 THE COURT: Well, fair enough, yes, people ask
25 for directions --

1 MS. BAIRD: They do, yes.

2 THE COURT: I understand. But the point, to be
3 more precise, the point here that matters is what the
4 officers knew and, therefore, I don't think supplementing
5 the record with the 911 tape in the absence of any
6 indication that they heard that tape before they arrived
7 at the scene makes any sense. So I'm going to deny the
8 motion to supplement. And my comments should be really
9 taken, when I talked about the 911 call, it should be
10 taken as the dispatcher sending the police to the
11 restaurant, not what the restaurant person said in the 911
12 call.

13 MS. BAIRD: Even if there may be some indicia
14 that the 911 tape, which is the better evidence of what
15 Ms. Laura Smith was feeling at the time because it's
16 contemporaneous in nature to the actual incident is
17 probably more telling than an affidavit that it appears
18 she made almost two years or, yes, two years -- two
19 and-a-half years after the incident.

20 THE COURT: But, you know, then we're going to
21 have a little mini trial about when she makes the call.
22 Did she make the call as soon as the guy went in? And did
23 she become nervous the longer it took the police to
24 arrive? I mean it's not inconsistent -- the fact that she
25 wasn't -- I'm assuming she wasn't nervous on the 911 call,

1 let's start there.

2 MS. BAIRD: Okay.

3 THE COURT: If you assume that, that's not
4 inconsistent with her telling the police I'm really scared
5 and I cleared out the restaurant, this part of the
6 restaurant because, you know, we've had problems before.
7 Do you see what I'm saying? In other words, her initial
8 call may have been find out what the law is and then she
9 may have become more and more apprehensive as she thought
10 about it.

11 MS. BAIRD: And also, the police's response to
12 her question, is it lawful to have a firearm, I mean that
13 goes to whether it was arguably reasonable for the police
14 to respond in the way they did.

15 THE COURT: Well, it's not the defendants who
16 responded to her in any way on that, so there can't be
17 liability on any of these defendants for what the 911
18 operator might have told the manager.

19 MR. GERARDE: Just one additional thought on
20 that issue, Your Honor. There's no dispute in this case
21 that when the police arrived, Ms. Smith said that she was
22 frightened and that she did back that up with an affidavit
23 when it became time for to us to move for summary
24 judgment. She was free at that point to say all I really
25 wanted to know is whether or not he had a right, and I'm

1 okay and thanks for coming, it's nothing. She could have
2 said that but she didn't. She did say that she was
3 frightened and alarmed and that's what supports the breach
4 of peace claim.

5 THE COURT: All right. Ms. Baird, do you want
6 to be heard on the Monell claim or on the excessive force
7 claim?

8 MS. BAIRD: Well, not on the Monell claim, Your
9 Honor. But on the excessive force claim, if you, you
10 know, if you accept what I've been saying thus far, in
11 part or in all, then certainly the force they used was
12 excessive if you accept that they had no arguable right to
13 approach Mr. Goldberg in the first place, except perhaps,
14 which they did, ask for his permit and which he did tell
15 them he had one and it was available to them and that it
16 should have stopped there, then certainly anything that
17 occurred after that or anything that occurred in the
18 course of that, to handcuff him or throw him up against
19 the wall, was excessive when the most any reasonable
20 person could say they had a right to do was ask him if he
21 had a permit, which is an issue in this case because he
22 said he did. So --

23 THE COURT: Well, okay. I understand your
24 position except the part about throwing him up against the
25 wall. I don't understand even Mr. Goldberg to assert that

1 he was thrown up against the wall.

2 MS. BAIRD: I'm sorry, I probably misphrased it.
3 Whatever Mr. Goldberg alleged happened. They handcuffed
4 him and spun him around --

5 THE COURT: Spun him around to handcuff him.

6 MS. BAIRD: Yes, right.

7 THE COURT: Right.

8 MS. BAIRD: So, our argument was if they
9 shouldn't have detained him to handcuff him, they
10 certainly shouldn't have spun him around and that was
11 excessive.

12 THE COURT: All right. Okay.

13 I'm going to go ahead and rule on these motions
14 at this time. I'm not going to issue a written decision
15 and the transcript of this proceeding will serve as the
16 decision on these motions.

17 We have cross motions for summary judgment. And
18 looking at cross motions, I have to follow the traditional
19 standard for summary judgment motions which is to take the
20 evidence in the light most favorable to the nonmoving
21 party, resolve all inferences in favor of that party and
22 decide, looking at the evidence in that light, whether any
23 reasonable fact finder could rule for the nonmoving party
24 or, put differently, whether there are any genuine issues
25 of material fact for the fact finder to resolve.

1 When we have cross motions, that standard has to
2 be applied separately with respect to each motion. So
3 that with respect to the plaintiff's motion I'll look at
4 the evidence in the light most favorable to the defendant;
5 on the defendant's motion, I'll look at the evidence in
6 the light most favorable to the plaintiff.

7 Looking at the record in that light with respect
8 to each motion, I'm going to deny the plaintiff's motion
9 for summary judgment and grant the defendant's motions
10 defendant's motion for summary judgment in its entirety.

11 I believe that I've essentially set forth the
12 basis for the ruling in colloquy with counsel but I'll try
13 and summarize it briefly here.

14 In my view, looking at the totality of the
15 circumstances that faced these police officers when they
16 arrived at Chili's Restaurant, there was reasonable
17 suspicion to make a Terry stop and probable cause to make
18 an arrest for breach of the peace. Even if I'm wrong
19 about that, I believe that certainly there is qualified
20 immunity for those actions because reasonable police
21 officers could disagree about whether there was either
22 reasonable suspicion or probable cause to do what the
23 police officers did.

24 As a result, I believe there was no Fourth
25 Amendment violation with respect to either the stop or the

1 arrest, but that qualified immunity protects the police
2 officers in any event.

3 With respect to the excessive force claim, I
4 believe that there was not, as a matter of law, any
5 excessive force. As Mr. Goldberg admits, he was in effect
6 negligently injured as the police officers turned him
7 around to put handcuffs on him. There was not any
8 reckless or intentional conduct on their part to injure
9 him and he doesn't even suggest that there was.

10 The conduct that they engaged in was authorized
11 under the circumstances because there was both reasonable
12 suspicion and probable cause to support putting him in
13 handcuffs and the, the incidental contact that he suffered
14 as a result of being put in handcuffs is not excessive as
15 a matter of law.

16 It also does not satisfy the 1983 standard that
17 the conduct of the officers be either reckless or willful.

18 With respect to the Monell claim, there simply
19 is not any evidence about what the specific deficiencies
20 in the training program of the town were, nor is there any
21 evidence from which a reasonable fact finder could find
22 that the Town acted with deliberate indifference with
23 respect to its training on these issues or with respect to
24 these officers. And, accordingly, summary judgment will
25 be granted in favor of the defendants on each of these

1 counts.

2 I'm happy to articulate that ruling in greater
3 detail if either of you would like me to, or to try and
4 clarify any ambiguities in it if you'd like me to do that
5 at this time.

6 MS. BAIRD: Did I hear Your Honor to say you
7 were or were not going to issue a written decision?

8 THE COURT: I am not.

9 MS. BAIRD: I don't need --

10 THE COURT: Therefore, if you want any further
11 articulation, this is the time to request it so I can get
12 it down on the record now.

13 MS. BAIRD: If I could have a moment.

14 THE COURT: Sure.

15 (Pause)

16 MS. PAOFF: Your Honor, if we could just kind of
17 a description of the activity that serves as the basis for
18 the probable cause finding?

19 THE COURT: Sure. Before I do that I should
20 probably note that the qualified immunity ruling also
21 applies to the excessive force claim because, because the
22 officers were entitled to put Mr. Goldberg into handcuffs,
23 you know, the incidental injury that resulted from that
24 conduct is something that reasonable officers would not
25 have understood was something they were not permitted to

1 do. In other words, there was no intentional conduct
2 here. They didn't hit him. They didn't push him. They
3 didn't shove him. This was simply turning him around to
4 put the handcuffs on him, and certainly reasonable
5 officers could believe they were entitled to do that. The
6 fact that he happened to be injured as a result of turning
7 around --

8 MR. GERARDE: Excuse me, Your Honor.

9 Regarding -- if this is a request at this moment for an
10 articulation, I'd ask that the articulation include
11 everything that's been said already as well as what you're
12 about to say now, because a summary sometimes becomes the
13 capsule that winds up at the Court of Appeals and nothing
14 else counts, so either -- hate to say it -- write it all
15 out in detail or at least incorporate what we've already
16 said already.

17 THE COURT: Well, I'm happy to incorporate what
18 I've already said already.

19 MR. GERARDE: All right.

20 THE COURT: I think I tried to explain in some
21 detail why I believe there was probable cause, but I'm
22 also happy to try and articulate it further.

23 Let me start with the breach of peace statute,
24 which basically provides that a person is guilty of breach
25 of peace in the second degree when, with intent to cause

1 inconvenience, annoyance or alarm, or recklessly creating
2 a risk thereof, such person engages in fighting -- I'm
3 leaving some of it out -- or threatening behavior in a
4 public place.

5 What we have here in my view is reckless conduct
6 by Mr. Goldberg by his decision, first, not to leave the
7 gun in his car during the brief time that he was going to
8 get food at Chili's, which he certainly -- the record
9 demonstrates he was capable and able to do. He made a
10 decision not to do that. Instead, he placed the gun on
11 his hip in a manner that was visible to, obviously visible
12 to those who saw it because the restaurant manager saw and
13 called a 911 operator so clearly it was visible.

14 That conduct was perceived, reasonably perceived
15 by those persons at the restaurant as being threatening
16 conduct. It was threatening to them. And by putting the
17 gun on his hip in a visible way, he recklessly created a
18 risk that those in this facility would feel threatened.

19 He attempted to cover the gun with his shirt
20 because he knew that the sight of it might, in fact, cause
21 others to be frightened or intimidated. He was sitting in
22 the take out area with the gun exposed to view, having
23 already admitted that he, or having later admitted that he
24 knew that that conduct was potentially threatening to
25 others. And in light of the fact that the officers arrive

1 at the scene and determine that he, in fact, is wearing a
2 gun, that the manager, in fact, feels threatened, has, in
3 fact, taken steps to clear at least a portion of the
4 restaurant of patrons in order to avoid harm to them, the
5 fact that they are being dispatched to a location to
6 respond to a situation in and of itself is some evidence
7 that there is a dangerous, potentially dangerous situation
8 in effect at the restaurant.

9 And so it's not necessary that Mr. Goldberg have
10 intended to cause the harm under the statute. You can do
11 this recklessly. And it doesn't matter that he didn't
12 become violent, although that is one way of violating the
13 statute. It seems to me the statute here was potentially
14 violated sufficient to give rise to probable cause in the
15 police officer's minds that it had been violated by the
16 fact that he took the steps that I just mentioned.

17 So, that's the essential basis of the probable
18 cause determination. As I've said before, even if on
19 review it's determined that that is insufficient to give
20 rise to probable cause, in June of 2007 reasonable police
21 officers certainly could have disagreed as to whether
22 there was probable cause to arrest Mr. Goldberg for
23 violating the breach of peace statute. Not every person
24 who is not convicted of a violation is wrongfully
25 arrested, and it seems to me that these police officers

1 came into a situation that they reasonably believed was
2 dangerous, that they reasonably believed Mr. Goldberg had
3 caused and could have avoided causing, and that they acted
4 reasonably in charging him with a crime and leaving it to
5 the court systems to decide whether in fact he was guilty
6 of that crime. So I believe that they are protected by
7 qualified immunity in the event that there's a later
8 determination that in fact they did not have probable
9 cause to arrest him.

10 MR. GERARDE: Thank you.

11 THE COURT: All right.

12 MS. BAIRD: Thank you.

13 THE COURT: Any further articulation requested?

14 MR. GERARDE: No, Your Honor.

15 MS. BAIRD: No.

16 THE COURT: Thank you all. We'll stand in
17 recess.

18 (Whereupon the above matter was adjourned at
19 11:00 o'clock, a. m.)
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C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ Susan E. Catucci

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