UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STANLEY BRICKEL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil Docket No. 97-7-P-H***
	)	
TODD JOHNSON, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS CITY OF LEWISTON, FRENCH, PILOTE, BROCHU AND KELLY AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff seeks relief under federal and Maine law in connection with a series of incidents involving his former landlord and members of the Lewiston, Maine police department. The former landlord, Todd Johnson, is a defendant, as are the City of Lewiston, Police Chief Michael F. Kelly, and three Lewiston police officers: Guy Pilote, Alice French[1] and William Brochu. Now before the court is a motion for summary judgment filed jointly by the municipality, Kelly, Pilote, French and Brochu, all of whom will be referred to collectively herein as the Lewiston defendants. They assert immunity under federal and state law as a complete defense to the action. Also pending is the plaintiff's motion for partial summary judgment, seeking to resolve the issue of liability in his favor, leaving only the matter of damages for trial. For the reasons that follow, I recommend that both motions be granted in part and denied in part.

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[1] French is identified in the amended complaint and the Lewiston defendants' motion for summary judgment under her former name of Alice Laliberte.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

Prior to discussing the merits of either pending summary judgment motion, it is necessary to resolve an issue about the summary judgment record raised by the Lewiston defendants. They

have moved to strike portions of the Local Rule 56 factual statement submitted by the plaintiff in support of his motion for partial summary judgment. The factual assertions to which the Lewiston defendants object rely on certain enumerated paragraphs in the Plaintiff's Affidavit in Support of the Motion for Summary Judgment ("Brickel Aff. I") (Docket No. 18) and the Affidavit of Walter Lantz ("Lantz Aff.") (Docket No. 19). The motion to strike (Docket No. 22) takes issue with factual statements made by the plaintiff and Lantz that are allegedly not based on personal knowledge, factual assertions by the plaintiff that the Lewiston defendants regard as legal conclusions, and factual assertions by Lantz that the Lewiston defendants characterize as inadmissible hearsay. To the extent that any sworn assertions are not based on personal knowledge, or any factual assertions are properly regarded as legal conclusions, I have not credited them in accordance with the applicable standards under Fed. R. Civ. P. 56. Further, as the plaintiff points out, the statements objected to on hearsay grounds are not offered for their truth. Accordingly, it is not necessary to strike anything from the record and the Lewiston defendants' motion is therefore denied.

II. The Lewiston Defendants' Motion

a. Factual Context

The summary judgment record developed in connection with the motion of the Lewiston defendants, viewed in the light most favorable to the plaintiff, reveals the following: In March 1995, the plaintiff received a notice to quit from Johnson in connection with certain property on Fairlawn Avenue in Lewiston, where the plaintiff was renting an apartment from Johnson. Plaintiff's Affidavit in Opposition to Motion for Summary Judgment ("Brickel Aff. II") (Docket No. 25) at ¶ 2. Johnson ultimately obtained a favorable judgment in Maine District Court, which the plaintiff

appealed. *Id.* at ¶ 3. On June 7, 1995 — while the appeal was pending — Johnson made a complaint about the plaintiff to the company for which the plaintiff delivered newspapers.[2] *Id.* at ¶ 4. Four days later — on June 11, 1995 — Johnson moved all of the plaintiff's personal property out of a garage on the rental premises and changed the locks on the garage. *Id.* at ¶ 5. Certain tools owned by the plaintiff disappeared. *Id.* Believing Johnson had taken them, the plaintiff called the police. *Id.* at ¶ 6.

French was dispatched to the scene. Affidavit of Alice French ("French Aff."), Exh. A to Lewiston Defendants' Statement of Uncontroverted Facts (Lewiston SMF I) (Docket No. 15), at ¶ 2. Once there, she spoke with the plaintiff, who told her that he was involved in eviction proceedings instituted by Johnson. *Id.* The plaintiff reported that Johnson had taken some of the plaintiff's belongings from his apartment and a garage and had placed them outside. *Id.* The plaintiff told French that the tools formerly located in the garage were missing, and he accused Johnson of having taken them. *Id.* French then spoke with Johnson, who admitted having removed certain property belonging to the plaintiff from the garage because the plaintiff had stopped paying rent. *Id.* at ¶ 3. However, Johnson told French that he had not taken any of the plaintiff's property. *Id.* French advised the plaintiff to pursue civil remedies against Johnson. *Id.* at ¶ 4. She decided that insufficient evidence existed for her to take any additional action, such as arresting Johnson on suspicion of theft. *Id.* The plaintiff told French that, in light of the circumstances, he planned to cut Johnson's locks off the garage and replace them with new ones of his own. Brickel Aff. II at ¶ 6. French told the plaintiff that if he did so, she would arrest him for criminal mischief. *Id.* She then

[2] The plaintiff has made certain representations concerning the contents of this letter, purporting to have attached a copy of it to his affidavit. The referenced document is not attached to the affidavit on file with the court.

left, and had no further contact with the plaintiff. French Aff. at ¶ 4.

Later that evening, at approximately 11 p.m., Johnson summoned a towing company to the premises to remove one of the plaintiff's vehicles. Brickel Aff. II at ¶ 7. Upset, and believing that the police would not protect him from Johnson's actions, the plaintiff sought to force the towing company to leave by driving his vehicle against the tow truck. *Id.* Summoned to the scene, Pilote and Brochu observed damage to both the plaintiff's vehicle and the tow truck, and saw the plaintiff sitting behind the wheel of his vehicle. Affidavit of Guy M. Pilote ("Pilote Aff."), Exh. B to Lewiston SMF I, at ¶ 3; Affidavit of William Brochu ("Brochu Aff."), Exh. C to Lewiston SMF I, at ¶ 3. Brochu approached the plaintiff and asked him what was going on. *Id.* The plaintiff refused to acknowledge the presence of the police officers and, instead, shifted his vehicle into reverse and rammed it into the tow truck. *Id.* Pilote then placed the plaintiff under arrest; he was handcuffed and taken to the Androscoggin County Jail.[3] Pilote Aff. at ¶ 4.

The tow truck driver complained to the police of a back injury sustained in the course of the ramming incident. *Id.* at ¶ 5. Following the arrest, and at the request of Johnson rather than the police, a different towing company came to the scene and removed the plaintiff's vehicle from the premises.[4] *Id.* at ¶ 6.

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[3] According to the Lewiston defendants, the plaintiff was charged by indictment with aggravated criminal mischief, but the district attorney dismissed the case in light of medical evidence suggesting a lack of criminal responsibility. Lewiston SMF I at ¶ 8. The portions of the summary judgment record cited for this proposition by the Lewiston defendants support only the existence of the indictment rather than the facts surrounding its dismissal.

[4] The plaintiff contends that his vehicle was removed by the second towing company "under the supervision of the Lewiston Police Department." Plaintiff's Statement of Facts re Summary Judgment ("Plaintiff's SMF I") (Docket No. 17) at ¶ 7 (quoting Brickel Aff. at ¶ 8). In his affidavit, Pilote states that the towing was neither requested nor supervised by the department. Pilote Aff. at (continued...)

Another incident involving a tow truck took place on June 13, 1995, when the plaintiff and Walter Lantz were present at the plaintiff's apartment. Lantz Aff. at ¶¶ 2-3, 6; Deposition of Stanley Brickel ("Brickel Dep.") at 49. On that date, Johnson summoned a third towing company to the premises. Lantz Aff. at ¶ 6; Brickel Dep. at 52.[5] Because he was tired and upset, Brickel asked Lantz to deal with the situation. Lantz Aff. at ¶¶ 5, 7. Lantz went outside to speak with the driver of the tow truck and at least two cruisers from the Lewiston Police Department arrived at the scene. *Id.* at ¶¶ 8-9. Lantz was carrying a portable telephone and used it to call the Androscoggin County Sheriff's Department. *Id.* at ¶ 10. He asked the sheriff's dispatcher if it was legal for the plaintiff's landlord to have the plaintiff's vehicle towed off the rental premises while the plaintiff was still living there. *Id.* The dispatcher replied that it would not be legal to take such action. *Id.* Lantz also asked the dispatcher if it was appropriate for the police to become involved in the dispute between the plaintiff and Johnson, given that the dispute was not a criminal matter, and the dispatcher again responded in the negative. *Id.* Lantz then spoke with the police officers and the tow truck driver, explaining that he had spoken with the sheriff's dispatcher, stating that towing the car would not be lawful in the circumstances, and advising that the dispatcher wanted to speak with them about the situation. *Id.* at ¶ 11. In Lantz's words, "[o]ne of the officers responded that they were the law in Lewiston, they could tow the car if they wanted to and that they were not going to talk to the sheriff's department about it." *Id.* The officer told Lantz that if he interfered further he would be arrested.

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[4](...continued)
¶ 6. The plaintiff has not explained how he gained personal knowledge of the police's involvement, and I therefore disregard his assertion as speculative.

[5] Both the plaintiff and Lantz state that they assume, but do not know, that it was Johnson who summoned this third tow truck. Consistent with a plaintiff-favorable view of the record, it is appropriate to draw such an inference in the circumstances.

Id. The driver of the tow truck asked if he could tow the car and one of the officers responded affirmatively. *Id.* at 12. The officers remained at the scene to supervise the towing, leaving only after the tow truck driver had hooked up the plaintiff's car and towed it away. *Id.* at ¶¶ 12-13.

The final incident began early in the morning of June 14, 1995, which was a Sunday, prior to 7:00 a.m. Brickel Aff. II at ¶ 10. Johnson arrived at the plaintiff's apartment and threatened to have towed away a trailer the plaintiff used in connection with his delivery business. *Id.* Upset over what he regarded as Johnson's harassment and the Lewiston Police Department's having taken Johnson's side in the dispute, the plaintiff attempted to dissuade those present from towing his trailer.[6] *Id.* at ¶ 11. The plaintiff telephoned the Lewiston Police and spoke to Officer Ivan Boudreau, telling Boudreau that he was suffering from a panic attack. *Id.* at ¶ 12; Brickel Dep. at 55. Boudreau called an ambulance to transport the plaintiff to a local hospital. Brickel Aff. II at ¶ 12. Although Boudreau told the plaintiff he would not send the police to the scene, a police cruiser arrived with the ambulance.[7] *Id.* At the hospital, the plaintiff received a psychiatric examination.

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[6] The record sheds no light on who, other than the plaintiff and Johnson, was present at this point.

[7] Relying on the plaintiff's deposition testimony and the affidavit of Officer David Barrett, who responded to the June 14 dispatch, the Lewiston defendants contend the plaintiff was uncooperative with the ambulance crew, gave erroneous information to the crew and was subjected to a pat-down search but was not otherwise subjected to force by the police in connection with the June 14 incident. Lewiston SMF I at ¶ 9. However, the substance of the plaintiff's deposition testimony is only that he was "out of it" and thus gave no information to the ambulance crew. Brickel Dep. at 58. He stated that he had no recollection of any pat-down search. *Id.* In his affidavit, the officer stated only that "no force was used" on the plaintiff. Affidavit of Dwight Barrett, Exh. D to Lewiston SMF I, at ¶ 2. Likewise, relying on the plaintiff's deposition testimony, the Lewiston defendants contend that a psychiatrist evaluated the plaintiff at the hospital, discharged to the care of Tri-County Mental Health Services. Lewiston SMF I at ¶ 9. However, the plaintiff testified at his deposition only that he remembered speaking to a doctor at the hospital — not identified as a psychiatrist — but that he did not recall what occurred with the doctor and that he (continued...)

Id. at ¶ 13. He was not admitted to the hospital as an inpatient. Brickel Dep. at 64. The plaintiff ultimately received his vehicles back, but only after paying an unspecified sum of money to the towing companies involved. *Id.* at 53; Brickel Aff. II at ¶¶ 8-9.

At all times relevant to this action, French, Pilote, Brochu and Barrett were employed as police officers by the City of Lewiston. French Aff. at ¶ 1, Pilote Aff. at ¶ 1; Brochu Aff. at ¶ 1; Barrett Aff. at ¶ 1. All graduated from the Maine Criminal Justice Academy prior to the events giving rise to this litigation, and all received training in arrest procedures. *Id.* Kelly was the Lewiston police chief during the relevant periods. Lewiston, Maine Police Department Standard Operating Procedures [Concerning] Removal/Towing of Vehicles ("Operating Procedures"), Exh. 17 to Deposition of Alice French, at 402.[8] In June 1995, and at all other times relevant to this litigation, the City of Lewiston was a participant in the Maine Municipal Association Property & Casualty Pool. Affidavit of Richard T. Metivier ("Metivier Aff."), Exh. F to Lewiston SMF I, at ¶ 2. This coverage pool provides for payments of up to $300,000 per occurrence in connection with liabilities and obligations imposed by the Maine Tort Claims Act, limited to those areas for which

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[7](...continued)
remembered only being "sent . . . down the hall" to some other area of the hospital thereafter. Brickel Dep. at 59, 61-63.

[8] Relying solely on this deposition exhibit, the plaintiff contends that Kelly "is the municipal official with final policy-making authority in the relevant area of the City of Lewiston's business." Plaintiff's SMF I at ¶ 24. The referenced exhibit bears an indication that it was apparently created in August 1995 and was revised in January 1996. Operating Procedures at 402. It bears the signature of "Michael F. Kelly, Chief of Police." Therefore, the most this document establishes is that Kelly was police chief, and had authority to promulgate the department's policies concerning the towing of vehicles, as of August 1995. The plaintiff and the Lewiston defendants are in agreement that Kelly was chief of police in June 1995. Amended Complaint (Docket No. 12) at ¶ 6; First Amended Answer and Affirmative Defenses of Defendants City of Lewiston, et al. (Docket No. 11) at ¶ 6.

governmental immunity has been specifically waived pursuant to the statute. *Id.* at ¶ 4. At all relevant times, the City of Lewiston was not covered by any other liability insurance policy or program of self-insurance. *Id.* at ¶ 5.

b. Section 1983

Count IV of the plaintiff's amended complaint seeks relief under 42 U.S.C. § 1983, alleging that Johnson, Pilote, Brochu and French acted under color of state law to deprive him of his property without due process of law in violation of the Fourth Amendment to the United States Constitution. The amended complaint further alleges that this deprivation of constitutional rights was substantially caused by policies, practices, customs and procedures of the City of Lewiston, as carried out by Kelly and the defendant police officers. Count V seeks punitive damages in connection with the section 1983 claim.

In support of their contention that Pilote, French and Brochu are entitled to summary judgment on the section 1983 claims, the Lewiston defendants invoke case law that discusses when a warrantless arrest is sufficiently egregious to overcome principles of immunity and trigger a police officer's civil liability for violating the Fourth Amendment. In so arguing, the Lewiston defendants essentially ignore the plaintiff's theory of section 1983 liability, which raises no issues relative to his arrest but, rather, alleges that the police officers acted in concert with Johnson to seize the plaintiff's property unlawfully during the towing incidents.

Opposing this aspect of the motion, the plaintiff relies principally on *Soldal v. Cook County, Illinois*, 506 U.S. 56 (1992), in which the Supreme Court determined that the physical removal of a plaintiff's trailer home from its foundation was a seizure within the meaning of the Fourth

Amendment, *id.* at 72, and *Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987), in which the First Circuit held that a private citizen was subject to liability under section 1983 with regard to the plaintiff's false arrest and imprisonment because the evidence adduced at trial permitted the jury to conclude that the private citizen was "a willful participant in joint activity with the state or its agents," *id*. at 209.

The Lewiston defendants made no reply to this or any other argument made by the plaintiff in opposition to their summary judgment motion. Accordingly, I see no reason to deviate from the plaintiff's articulated position, grounded in *Soldal*, that the removal of his vehicles from the premises he rented from Johnson is actionable under section 1983 if the seizure was unlawful.

As for *Wagenmann*, I note that in assessing whether the state actors — as distinct from the private citizen who acted in concert with them — were subject to liability, the First Circuit applied the familiar standard of qualified immunity set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). *Wagenmann*, 829 F.2d at 208-09. *Harlow* teaches that a public official who is sued under section 1983 is entitled to qualified immunity based on an assessment of the "objective reasonableness" of the official's conduct, "as measured by reference to clearly established law." *Harlow*, 457 U.S. at 818. If the applicable constitutional principle was clearly established, the immunity defense fails unless the official "can prove that he neither knew or should have known of the relevant legal standard." *Id*. at 819. Applying the *Harlow* standard in *Wagenmann*, the First Circuit determined that no prudent police officer in the shoes of the relevant defendants "should have failed to recognize that arrest and imprisonment on the flimsy basis of unsubstantiated hearsay and self-interested rumor would strike a mortal blow at [the plaintiff's] civil rights." *Wagenmann*, 829 F.2d at 209. The court made the same determination concerning "what the jury apparently believed

were trumped-up paperwork charges pertaining to a purported infraction of the motor vehicle code." *Id.*

Reviewing the summary judgment record in the requisite plaintiff-favorite light yields a scenario that, while perhaps not the compellingly "egregious trespass into constitutionally well-marked terrain" that comprised the false imprisonment in *Wagenmann*, *id*., certainly permits the court to conclude that French, Pilote and Brochu intervened on the side of Johnson in the latter's effort to remove the plaintiff's personal property from premises of which the plaintiff, for all that appears, was in lawful possession at the time of the incidents in question.[9] The Lewiston defendants do not suggest that the plaintiff's right to quiet enjoyment of his rental property, notwithstanding the pendency of a landlord-tenant dispute not yet reduced to judgment, is not a clearly established right under the rubric of the Fourth Amendment. In these circumstances, summary judgment in favor of French, Pilote and Brochu on the plaintiff's section 1983 claim would not be appropriate.

The question of Kelly's liability, and that of the municipality itself, presents quite another matter. As the amended complaint makes clear, the plaintiff's theory of liability as to Kelly is that in his capacity as Lewiston's police chief he was responsible for inadequately training and supervising the officers who violated the plaintiff's constitutional rights. *See Seekamp v. Michaud*, 109 F.3d 802, 808 (1st Cir. 1997) (section 1983 liability of supervisor requires evidence of "supervisory encouragement, condonation or acquiescence" or "gross negligence amounting to deliberate indifference") (citations and internal quotations marks omitted). Similarly, although a municipality cannot be liable for violating section 1983 under a theory of *respondeat superior*, a

[9] I stress that it is this intervention, allowing the towing of the plaintiff's vehicles to go forward, which generates the genuine issue of material fact at trial. Not at issue is the question of probable cause to arrest the plaintiff.

municipality's policy or custom can become the basis of liability if it is the cause of injury to the plaintiff. *Board of the County Comm'rs of Bryan County, Oklahoma v. Brown*, 117 S.Ct. 1382, 1388 (1997) (citations omitted). Invoking the principles recently summarized by the Supreme Court in *Brown*, the Lewiston defendants contend that no basis exists for finding Kelly or the municipality liable. I agree and so, apparently, does the plaintiff, inasmuch as he has not responded to the Lewiston defendants' position on the issue.

Simply put, the plaintiff has failed to identify any policy or custom that forms the basis of the municipality's section 1983 liability. Since this is a prerequisite to municipal liability under the statute, *id*. (citations omitted), summary judgment in favor of the municipality is appropriate. Similarly, although a police chief such as Kelly might be liable in an appropriate case arising under section 1983 for inadequately training his officers, *id*. at 1390 (citation omitted), an inference of inadequate training does not automatically arise simply because the officers violated the plaintiff's constitutional rights. Rather, the plaintiff must identify a "deficient training program, necessarily intended to apply over time to multiple employees." *Id.* (citations and internal quotation marks omitted). Evidence of only a single violation of constitutional rights does not necessarily foreclose liability for inadequate training, but the plaintiff must still generate evidence that the municipality failed to offer appropriate training in the handling of "recurring situations presenting an obvious potential for such a violation." *Id*. at 1391 (citation omitted). Here, the summary judgment record offers nothing on the issue of training, much less on the issue of how training impacted on what transpired on the property the plaintiff rented from Johnson.

Finally, the Lewiston defendants contend they are entitled to summary judgment on Count

V, which is the plaintiff's separate request for punitive damages under section 1983.[10] A municipality is absolutely immune from punitive damages under section 1983. *City of Newport v. Fact Concerts,* Inc., 453 U.S. 247, 271 (1981). In any event, the issue is moot as to the municipality and Kelly given their entitlement to summary judgment on the underlying claim. As to the remaining Lewiston defendants, punitive damages are permissible under section 1983 if the plaintiff proves that their conduct was "motivated by evil motive or intent" or involved "reckless or callous indifference to the federally protected rights" of the plaintiff. *Smith v. Wade*, 461 U.S. 30, 56 (1983). In my view, a plaintiff-favorable gloss on the summary judgment record lends itself to the inference that the officers acted with callous indifference to the plaintiff's federally protected rights when they opted to intervene on the side of his landlord and assist his efforts to remove the plaintiff's property from the rental premises. The issue of punitive damages on the section 1983 claim against Pilote, French and Brochu is appropriately left for trial.

c. Maine Tort Claims Act

Counts VI and VII of the amended complaint state claims of negligence against the City of Lewiston and the individual Lewiston defendants, respectively. The Lewiston defendants contend they are entitled to summary judgment on these claims in light of the immunity provisions of the Maine Tort Claims Act. I agree, again noting the plaintiff's decision not to address the issue in his opposition to the Lewiston defendants' motion.

The Act provides that a governmental entity such as the City of Lewiston is immune from

[10] Actually, the Lewiston defendants contend they are not amenable to punitive damages on any of the plaintiff's claims, including those arising under state law. However, because the amended complaint plainly seeks damages only under section 1983, it is not necessary to address any state-law principles governing punitive damages.

suit on any claim resulting from

> [p]erforming or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid.

14 M.R.S.A. § 8104-B(3). The plaintiff does not contest the Lewiston defendants' assertion that this provision affords the municipality immunity in the circumstances of this case. To the extent that a municipality obtains liability insurance covering areas in which it would otherwise be immune, the immunity is waived to the extent of the coverage. 14 M.R.S.A. § 8116. The plaintiff does not dispute the Lewiston defendants' assertion that no such insurance coverage applicable to the City of Lewiston existed at any relevant time. Accordingly, the City of Lewiston is entitled to summary judgment on the plaintiff's negligence claim against it.

A substantially similar discretionary function immunity provision applies to employees of governmental entities. *See* 14 M.R.S.A. § 8111(1) (also noting that discretionary function immunity applicable "whenever a discretionary act is reasonably encompassed by the duties of the governmental employee" and specifically available to police officers, "who are required to exercise judgment or discretion in performing their official duties."). Again, the plaintiff does not address the Lewiston defendants' contention that this immunity provision protects Kelly, French, Pilote and Brochu from liability on the state-law claim against them. I agree with the Lewiston defendants that anything these individuals did was well within the realm of the discretionary function immunity described in section 8111. Accordingly, the individual Lewiston defendants are entitled to summary judgment on the plaintiff's negligence claim.

III. The Plaintiff's Motion

The plaintiff has moved for partial summary judgment on the issue of liability, as to all defendants. To the extent that the Lewiston defendants demonstrated their entitlement to summary judgment in connection with their motion , i.e., on all claims against them with the exception of the section 1983 claim against French, Pilote and Brochu, the plaintiff's motion is moot.

The Lewiston defendants have filed an opposition to the plaintiff's motion; Johnson has not. The Local Rules of this court provide that a party who fails to object to a motion is deemed to have waived opposition to it. Loc. R. 7(b). When a party fails to object to a summary judgment motion, that party is deemed to have waived his right to controvert the factual assertions made by the moving party. *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984). Summary judgment will be granted in such circumstances if the moving party's factual assertions support such a judgment as a matter of law. *Id.* (citation omitted).

The factual assertions made by the plaintiff in connection with his summary judgment motion are virtually identical to those he made in connection with his opposition to the summary judgment motion of the Lewiston defendants, although each set of factual assertions is supported by a separate affidavit of the plaintiff. These two affidavits are substantially similar, though not identical, the plaintiff having refined his factual allegations somewhat in his more recent sworn statement. In any event, rather than recapitulate the entire factual scenario already described from a plaintiff-favorable standpoint in connection with the Lewiston defendants' motion, I proceed directly to my legal analysis. To the extent that the papers (or lack thereof) submitted in connection with the plaintiff's motion require a different factual construction than that previously adopted, given the *McDermott* principle (as applied to Johnson) and the Lewiston defendants' right to have the facts viewed in the

light most favorable to them, I so indicate *seriatim*.[11]

a. The Tort Claims Against Johnson

Count I of the amended complaint asserts a claim against Johnson for negligent infliction of emotional distress. To prevail on such a claim under Maine law, a plaintiff must demonstrate (1) "that the defendant acted or failed to act in a manner which a reasonably prudent person . . . would act in the management of [his] affairs taking into account all of the circumstances," (2) "that emotional distress was a reasonably foreseeable result of the defendant's negligent act," and (3) that the plaintiff "suffered serious emotional distress as a result of the defendant's negligence." *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 622 (Me. 1996) (citation omitted). Negligent infliction of emotional distress is properly viewed not as a distinct cause of action, but rather as a branch of the general negligence tort that permits a plaintiff to recover for purely psychic injury if the defendant violated a duty of care to the plaintiff. *Id.* at 621; *Devine v. Roche Biomedical Labs., Inc.*, 637 A.2d 441, 447 (Me. 1994) (citations omitted). The facts presented by the plaintiff certainly support his contention that he suffered psychic injury as a reasonably foreseeable result of Johnson's actions. Missing is any suggestion, either in the amended complaint or the motion papers submitted by the plaintiff, of what duty of care Johnson violated. All of the actions complained of would appear to be intentional ones, and I am thus constrained to determine that the plaintiff is not entitled to judgment as a matter of law on his claim of negligent infliction of emotional distress.

Count II of the amended complaint states a cause of action against Johnson for conversion.

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[11] As noted, *supra*, the Lewiston defendants' motion to strike two affidavits submitted by the plaintiff in support of his summary judgment motion, as well as certain portions of the plaintiff's factual statement, is denied. However, I do not credit assertions not made on personal knowledge nor legal conclusions purporting to be factual assertions.

The plaintiff invokes the Law Court's recent formulation of this tort, requiring the plaintiff to show a property interest in the goods allegedly converted, the right to their possession at the time of their alleged conversion and, if the holder acquired possession lawfully, a demand for their return followed by a refusal to surrender. *Bradford v. Dumond*, 675 A.2d 957, 962 (Me. 1996) (citations omitted). The "gist" of conversion is "an invasion of the plaintiff's possession or right to possession; the tort "entails 'an intent to exercise a dominion or control over the goods which is in fact inconsistent with the Plaintiff's rights.'" *Id*. (quoting *Ocean Nat. Bank of Kennebunk v. Diment*, 462 A.2d 35, 39 (Me. 1983); other citations omitted).

The *Restatement (Second) of Torts* draws a distinction between trespass to chattel, which is essentially any invasion of a possessory interest in personal property, and the more serious tort of conversation, which it defines as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Restatement (Second) of Torts* §§ 218 (trespass to chattel) and 222A (conversion). I am not aware that the Law Court makes such a distinction. If it did, the facts adduced by the plaintiff would seem to be more consistent with trespass than conversion. In any event, the issue goes to the question of what remedy is appropriate. The plaintiff has certainly demonstrated an actionable interference with his possessory interest in the vehicles removed from the rental premises by Johnson, through his agents. I therefore agree with the plaintiff that he is entitled to partial summary judgment on the conversion claim, fixing the liability of Johnson and leaving the issue of damages for trial.

b. The Section 1983 Claims

The plaintiff also contends that he is entitled to judgment against Johnson, as well as the three police officers, on his section 1983 claim. He concedes that Johnson is not a state actor for section 1983 purposes, but asserts that Johnson is liable because he acted in concert with the Lewiston defendants. His position is that the summary judgment record establishes that all four of these defendants illegally seized his property, i.e., the two vehicles that were towed from his rental premises, in violation of the Fourth Amendment.

"Where a private individual is a defendant in a section 1983 action, there must be a showing that the private party and the state actor jointly deprived plaintiff of [his] civil rights." *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 351 (1st Cir. 1995) (citations omitted). The basis of section 1983 liability in such circumstances would be evidence of any "plan, prearrangement, conspiracy, custom, or policy" that could allow a factfinder to determine there was "concerted action tantamount to substituting the judgment of a private party for that of the police or allowing the private party to exercise state power." *Id*. at 351-52 (citations omitted).

In my opinion, Johnson's failure to file an opposition to the plaintiff's motion for partial summary judgment is the outcome-determinative factor on the section 1983 claim. The plaintiff has submitted no direct evidence of any plan, prearrangement or conspiracy between Johnson and the Lewiston police to seize his property unlawfully. However, certain assertions in the Lantz affidavit support an inference of such a plan or prearrangement. These assertions concern the events of June 13, 1995, two days after the plaintiff's arrest for seeking to prevent Johnson from towing a vehicle from the property. According to Lantz, (1) another tow truck arrived on June 13 along with at least two Lewiston police cruisers, Lantz Aff. at ¶¶ 2, 6, 9; (2) one of the officers told Lantz that the

Lewiston police was "the law" in the city, "could tow the car if they wanted to," would not discuss the matter with anyone at the sheriff's department, and would arrest Lantz if he interfered, *id*. at ¶ 11; (3) one of the police officers specifically gave permission to the tow truck driver to remove the plaintiff's vehicle, *id*. at ¶ 12; and (4) the police remained at the scene to supervise the towing, *id.* at ¶¶ 12-13. A factfinder could determine that the actions of these police officers were an affirmative effort to assist Johnson in causing the plaintiff's car to be seized. Pursuant to the principle articulated in *McDermott*, the court should so determine — but only as to Johnson in light of his failure to oppose the plaintiff's motion.

On the other hand, as to Pilote, French and Brochu, who have duly filed an opposition, the court is required to draw every reasonable inference in their favor. Consistent with such a view of the summary judgment record, the court may not impose section 1983 liability prior to trial because a reasonable factfinder could determine that none of these officers did anything to effect an unlawful seizure. The sole involvement of French was her refusal, upon being dispatched to the scene in response to a call to the police by Brickel on June 11, 1995, to become involved in the dispute because she regarded it as a civil rather than a criminal matter. French Aff. at ¶¶ 4. The only involvement of Pilote and Brochu was their arrest of the plaintiff after observing him ram a tow truck with his vehicle. Pilote Aff. at ¶ 4; Brochu Aff. at ¶ 4. Pilote avers that when the plaintiff's vehicle was finally towed away following the arrest, it was done at Johnson's request without the involvement of the Lewiston police. Pilote Aff. at ¶ 6. Neither French, Pilote nor Brochu were identified as being among the officers involved in the June 13, 1995 incident that was the subject of the Lantz affidavit. This falls far short of establishing the lack of any genuine factual issue such that

these three defendants should be subjected to section 1983 liability as a matter of law.[12]

IV. Conclusion

For the foregoing reasons, I recommend that the motion for summary judgment of the Lewiston defendants be **GRANTED** in favor of defendants Kelly and City of Lewiston on the section 1983 claims (Counts IV and V), in favor of defendants Pilote, French, Brochu, Kelly and City of Lewiston on the negligence claims (Counts VI and VII) and otherwise **DENIED.** I further recommend that the plaintiff's motion for partial summary judgment be **GRANTED** in favor of the plaintiff on the issue of liability, as against Johnson only, on the state-law conversion claim (Count II) and the section 1983 claim (Count IV), and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of August, 1997.

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David M. Cohen
United States Magistrate Judge

[12] Because the plaintiff, in his motion for partial summary judgment, specifically leaves the issue of damages to trial, I do not take up his separate requests for punitive damages against Johnson (Count III) and the Lewiston defendants (Count V) in connection with his motion.