UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:11-CV-11997-JGD

MARIA BARBOSA, HENRIQUETA BARBOSA, MANUEL BARBOSA and ANGELA BARBOSA,
Plaintiffs

vs.

WILLIAM K. CONLON IN HIS CAPACITY AS, CHIEF OF POLICE FOR CITY OF BROCKTON, MA, THOMAS HYLAND, BRYAN MAKER, JESSE DRANE, KENNETH LOFSTROM, BRIAN DONAHUE, STEVEN E. JOHNSON, MARK CELIA, MICHAEL DUBE, FRANK BAEZ, ANTHONY GIARDINI, EMANUEL GOMES, LEON MCCABE AND JOHN DOE 1-3,
Defendants

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR A NEW TRIAL PURSUANT TO FED. R. CIV. P. 59(a)(1)(B) AND 59(a)(2)

Defendants' motion for new trial must be denied, as Defendants have not marshaled sufficient argument, nor shown sufficient factual basis, for disturbing this Court's careful, well-reasoned decision. It is axiomatic that a Rule 59 motion may not be used to re-litigate an action already decided by the Court, or to raise a new argument, or to present evidence that was available and could have been presented at trial. Mere disagreement with the decision, which is all that is persuasively presented by Defendants, should be addressed via appeal.[1] Moore's Federal Practice, §59.30[6].

After a four-day bench trial, during which this Court listened carefully to all of the evidence and had the opportunity to closely evaluate the credibility of each of the eleven (11) witnesses, and received from both sides detailed proposed findings and rulings of law, this Court

[1] Defendants have already filed a Notice of Appeal.

rendered a thoughtful 73-page decision which contained 42-plus pages of detailed factual findings about each and every event which transpired during and after the Defendants' illegal entry into the Plaintiffs' home, and included substantial and specific explanation as to why the Court gave weight and credibility to certain evidence and testimony over others. The decision is free of any manifest factual or legal error, and Defendants do not even suggest that there exists any "newly discovered evidence" that would somehow entitle them to a new trial. There was ample evidence supporting each and every finding, including but not limited to the finding that the community safety doctrine is inapplicable given the fabricated testimony of the Defendants. There is no substantial injustice arising from this Court's decision.[2]

STANDARD OF DECISION

This Court has discretion with regard to the instant Rule 59 motion. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435 (1996). Under Fed. R. Civ. P. 59(a)(1)(B) and (a)(2), following a nonjury trial, the district court either may grant a new trial on some or all of the issues or open the judgment, take additional testimony, amend findings of fact and conclusions of law or make new ones and direct the entry of a new judgment. Defendants have made no mention, let alone argument, under Rule 59(a)(1)(B). As for Rule 59(a)(2) the purpose of that provision "is to correct manifest errors of law or fact, or in some limited situations to present newly discovered evidence." Fairest-Knight v. Marine World Distributors, 2010 WL 500409 (D. Puerto Rico 2010) (unreported) *quoting* Lyons v. Jefferson Bank & Trust, 793 F.Supp. 989, 991 (D. Colo. 1992). As succinctly stated by the Fairest-Knight court:

> "[A] trial court should not grant a new trial merely because the losing party can probably present a better case on another trial." 6A James W. Moore et al., *Moore's Federal Practice* ¶ 59.08[2], at 59-97 (2d ed.1989); *see also* 11 Charles A. Wright et al., *Federal Practice & Procedure* § 2804, at 53 (2d ed. 1995) ("A

[2] As discussed in greater detail below, the first sixteen (16) pages of Defendants' motion is nothing more than attempt to re-characterize trial testimony and is replete with misstatements of what was testified to at trial.

> motion for a new trial in a nonjury case ... should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons."). Furthermore, Rule 61 of the Federal Rules of Civil Procedure counsels that no error "is ground for granting a new trial ... unless refusal to take such action appears to the court inconsistent with substantial justice."

ARGUMENT

I. DEFENDANTS ADVANCE NO ARGUMENT WHATSOEVER UNDER FED. R. CIV.P. 59(a)(1)(B).

Under Fed. R. Civ. P. 59(a)(1)(B), a new trial may be granted after a nonjury trial "for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." Although Defendants title their motion for new trial as being brought pursuant to Rule 59(a)(1)(B), that is the last mention of Rule 59(a)(1)(B) in their motion. Nowhere do Defendants cite "any reason for which a rehearing has heretofore been granted in a suit in equity in federal court", nor any precedent to help the Court understand their reasoning. Therefore, Defendants have not met the standard of proving their entitlement to a new trial according to the Rule 59(a)(1)(B) standard and their motion should be denied pursuant to that Rule.

II. DEFENDANTS CANNOT MEET THE STANDARD FOR A NEW TRIAL UNDER FED. R. CIV. P. 59(a)(2).

A) The Court's Rulings of Law Contain No Manifest Errors of Law or Fact.

1) Warrantless Entry

Defendants first cite U.S. v. Rohrig, 98 F.3d 1506 (6th Cir. 1996) in support of their contention that a warrantless entry into the Barbosa home was justified to "abat[e] an ongoing nuisance" of allegedly loud music. Defendants already tried that issue to the Court and lost.[3] Again, they claim that Hyland announced himself twice at the door before entering the Barbosa

[3] Defendants made the same argument in their first motion for summary judgment which was also unsuccessful. As discussed, *infra*, Defendants did not advance any argument or claim of protection under the Community Caretaking Doctrine in their first attempt at summary judgment.

home in keeping with the Rohrig requirement for police to use "various measures" to abate the nuisance prior to entering a home without first seeking a warrant.

The Court here found that Hyland did not knock on the side door to the Barbosa home or ring the side doorbell. (Court Findings of Fact and Rulings of Law at 6-7). The Court also found that Hyland and Donahue entered the Barbosa house before engaging in conversation with anyone inside the home or announcing themselves. (Id. at 10). Henriqueta, along with the rest of the Barbosas, likewise had testified at trial that the first she knew of the police at her home was seeing Hyland and Donahue standing just inside her back [side] door. (Id.).

Further, Defendants have already requested from this Court a ruling on the Rohrig case. (Defendants' Proposed Findings of Fact at ¶ 17). The Court specifically declined to apply Rohrig to the instant matter both because it is from another federal circuit and it is factually distinguishable. (Court Findings of Fact and Rulings of Law at 51).

Defendants next seek to revisit the issue of the community caretaking doctrine justifying their warrantless entry. The Defendants raise two points: the first is the Court finding that Hyland did not mention his concern for the children during his deposition testimony. The Court determined that Hyland's testimony under the community caretaking doctrine was a fabrication.[4] [5] (Court Findings of Fact and Rulings of Law at 15). The basis for the Court's finding was Hyland's testimony at deposition and at trial that he did not remember the age, gender, or number of children in the Barbosa home and his characterization that none of the children

[4] This Court noted in its decision that the word "fabrication" was not used lightly.

[5] On Page 9 of their motion, Defendants' claim that the Court made a factual error when it stated that Defendants moved for summary judgment on the Community Caretaking Doctrine for the first time on July 12, 2013 (the night before trial was get underway), and that Defendants actually moved for summary judgment months earlier and only supplemented their motion on the eve of trial with a newly found decision. This is a severely misleading as the record clearly reflects that Defendants' argument under the "Community Caretaking Doctrine" does not appear in any of its filings or motions until July 12, 2013, hence this Court's determination that Officer Hyland fabricated his testimony in an attempt to bring his actions on the night in question under the doctrine as recently articulated by Judge Sterns in McDonald v. Town of Eastham.

seemed at risk. Hyland also was not, the Court found, concerned about what would become of the children when he ordered all of the adult occupants out of the Barbosa home. Lastly, Hyland testified that Henriqueta was not intoxicated (and therefore was an appropriate supervisor of the children). (Court Findings of Fact and Rulings of Law at 18).

The other point Defendants raise is that the $25,000 damages awarded to Henriqueta and Manuel is unjustified.[6] Defendants claim that when Manuel awakened and came into the kitchen, he did not know whether his family had consented to the entry of the police. This claim is implausible given the Court findings that Manuel was awakened by the sound of loud voices speaking English in his home. Manuel then entered the kitchen where he saw his grandchild's father John Andrade being roughly arrested, during which the arresting officer Hyland fell on Henriqueta. Manuel asked in Creole for an explanation, but was ignored. (Court Findings of Fact and Rulings of Law at 21). Under these circumstances, although Manuel may not have initially witnessed the unlawful entry into his home, he could reasonably conclude upon waking that the police were acting without consent in his home, and it was undisputed that he witnessed his wife being dragged and thrown out of his home by Officer Hyland. Manuel certainly would have known that he had not consented to the police entering his home as he was sleeping when Hyland came inside.

As far as the damages awarded to Henriqueta, Defendants claim that none of her injuries were as a result of the entry into her home (but instead her arrest) so her damages award is unjustified. The Court found that Henriqueta's physical injuries were "bruises and pain." (Court Findings of Fact and Rulings of Law at 59). It is plausible that even prior to her violent arrest, the scuffle between Andrade and Hyland would have bruised Henriqueta. The Court described

[6] In yet another misstatement of fact, the Defendants incorrectly claim that Manuel's award of "$25,000.00" was unjustified. Manuel Barbosa was actually awarded $7,500.00, which was very much justified given the factual circumstances developed at trial.

Hyland as variously "knocked into," "bumped into" and "fell on" Henriqueta while arresting Andrade. (Court Findings of Fact and Rulings of Law at 20 and 21) Witness Nilda Barbosa testified at trial that Hyland fell into Henriqueta while arresting Andrade—before Henriqueta's own arrest—and knocked Henriqueta to the floor. (Id.) Henriqueta is a woman of slight stature, standing only approximately five (5) feet tall. (Court Findings of Fact and Rulings of Law at 21) Hyland by contrast is 6'1" tall and weighs 240 lbs. (Id.). The impact of Hyland falling on petite Henriqueta could bruise her. There is no way to know which bruises on Henriqueta were from before her arrest when Hyland fell on her and which were inflicted during her arrest. Regardless, there is basis for a finding that Henriqueta sustained physical injury as a result of the warrantless entry prior to her arrest.

Most importantly, Defendants cite Tyree v. Keane, 400 Mass. 1, 10 (1987) as standing for the proposition that Manuel and Henriqueta are entitled only to nominal damages of $1.00 because they were found to have no injury from the warrantless entry. This is a misstatement of law. The Court in Tyree wrote:

> The Supreme Court has held that a plaintiff must prove actual injury as a prerequisite to the recovery of damages in a §1983 claim. Damages are available under §1983 for actions found ...to have been violative of...constitutional rights and to have caused compensable injury. The Supreme Court has defined compensable injury to include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation..., **personal humiliation, and mental anguish and suffering**.

Id. (internal citations and quotations omitted) (emphasis added) According to Tyree, then, unlike Defendants' statement in their motion, emotional distress is "actual injury". The Court here found that since the incident on November 16, 2008, Manuel has insomnia, nervousness, and depression. (Court Findings of Fact and Rulings of Law at 28-29). Likewise, Henriqueta

suffered from emotional pain and distress since November 16, 2008. (Court Findings of Fact and Rulings of Law at 59). These findings of actual injury entitle Manuel and Henriqueta to compensatory, not just nominal, damages. For all of the above reasons, there was no manifest error of fact or law regarding the Court's judgment on the warrantless entry and Defendants are not entitled to a new trial.

2) Excessive Force

Defendants argue that because Henriqueta and Angela pled in their criminal matters to have the charges of assault and battery with a dangerous weapon and resisting arrest Continued Without a Finding ("CWOF"), they cannot make a §1983 claim of excessive force. The Court here found, however, that said charges were in effect being dismissed by the CWOF, so Henriqueta and Angela chose that course of action because it was expedient and less costly than challenging the charges. (Court Findings of Fact and Rulings of Law at 42-43).

As Plaintiffs argued in their Reply to Defendants' Supplemental Summary Judgment Memorandum which is incorporated by reference herein, the seminal case on the issue, Heck v. Humphrey, 512 U.S. 477 (1994), carves an exception to the general rule argued by Defendants. Under the exception, a § 1983 action can be maintained by a former criminal defendant if the success of the § 1983 action will not invalidate his/her prior conviction.[7] Id. at 487. Notably, the holding of the case cited by Defendants, Sholley v. Town of Holliston et al., 49 F.Supp. 2d 14 (1999) relies squarely on Heck, and is therefore subject to the same exception noted in Heck. For this reason, there was no manifest error of fact or law regarding the Court's judgment on excessive force, and Defendants are not entitled to a new trial. (*See also* Campos v. City of Merced, 709 F. Supp. 2d 944, 961 (E.D. Cal. 2010) holding "the *Heck* doctrine does not bar

[7] Plaintiffs also note, as they have throughout, that the disposition of the Barbosas' underlying criminal case was a "CWOF" which eventually operated as a dismissal of the charges, and is not considered a "conviction" for the purposes of Heck.

Plaintiff's claim regarding excessive force because such a claim does not impugn the underlying conviction.").

III. DEFENDANTS ARE NOT ENTITLED TO PRESENT A BETTER CASE AT A SECOND TRIAL.

Another trial court in the First Circuit held "based on the purpose of Fed. R. Civ. P. 59(a)(2), and there being no manifest error of law or newly discovered evidence, the request for reconsideration and/or for new trial is denied. The Court declines a detailed analysis of the arguments and relies on its previous findings and conclusions. 'A trial court should not grant a new trial merely because the losing party can probably present a better case on another trial.'" Fairest-Knight, supra, *citing* 6A James W. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 59.08 [2], at 59-97 (2d ed. 1989); *see also* 11 Charles A. Wright et al., FEDERAL PRACTICE & PROCEDURE § 2804, at 53 (2d ed. 1995) ("A motion for a new trial in a nonjury case...should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons.").

The first sixteen (16) pages of Defendants' motion are captioned as "***Factual Errors and Errors of Law Made By the Court***," and contain specific quotations of the Court's written decision and the Defendants "Response" thereto. The "Responses" are nothing more than an attempt to restate certain testimony in a more flattering light and, at times, an attempt to completely alter what was actually testified to at trial.[8]

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[8] Some of the Findings called into question by Defendants are completely irrelevant and in any event do not even seem to be in dispute. For instance, Page 4 of Defendants' motion contains the following:

Court's Finding: "There was beer in the refrigerator and some of the adults had some beers to drink."

Response: Both the Plaintiffs testified to drinking beer and Hyland testified to observing strewn beer bottles outside the house before entering the home.

The reference to "both" plaintiffs is confusing as there are four (4) Plaintiffs. Further, while some of the Plaintiffs' witnesses testified that beers were consumed at the house, none of the Plaintiffs actually testified that they

There is no evidence of any manifest error in law or fact. The judge in this bench trial was required to make findings from the oftentimes directly contradictory testimony of Plaintiffs and Defendants. This Court is well within its discretion to determine the Plaintiffs were more credible in several instances than the Defendants. Simply because the Defendants are dissatisfied with the judgment does not prove that the judge committed manifest errors entitling them to a new trial.

For all of the reasons expressed above, Plaintiffs request this Honorable Court to DENY Defendants' Motion for New Trial and order any other relief it deems meet and just under the circumstances.

Dated: March 11, 2014

By Plaintiffs' counsel,
/s/ Christopher S. Malloy

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CERTIFICATE OF SERVICE

I, Christopher S. Malloy, hereby certify that on this 11th day of March 2014, I served the foregoing electronically to Stephen C. Pfaff, Esq., Louison, Costello, Condon & Pfaff, LLP, 101 Summer Street, Boston, MA 02110.

/s/ Christopher S. Malloy

Christopher S. Malloy, Esq.

themselves consumed any alcohol that evening. In any event, this is the type of "factual error" which Defendants repeatedly assert throughout their motion as the foundation for being entitled to a new trial.