

CITATION: Gigliotti v. Fantino, 2010 ONSC 852

COURT FILE NO.: 29263

DATE: 2010-03-04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)

ROSARIO GIGLIOTTI)

Plaintiff)

Faisal B. Joseph, for the Plaintiff)

- and -)

JULIAN FANTINO, RON HETINGA,
JOHN DOE and THE LONDON POLICE
SERVICES BOARD)

Defendants)

David S. Thompson, for the Defendants)

HEARD: February 3, 4, 5, 8, 2010)

W.A. JENKINS J.

- [1] The plaintiff sues the defendants for damages for negligence, false arrest and unlawful confinement. The plaintiff also seeks aggravated and punitive damages.

Facts

- [2] The plaintiff is a store manager who lives in Niagara Falls. He is married with two children. At the time of his arrest, he was single and living in London.
- [3] On April 8, 1998, the plaintiff and his girlfriend went to bed in his condominium at Unit #7-1225 Cheapside Street in the City of London, at approximately 2:00 a.m. At approximately 8:00 a.m. they awoke to a commotion outside the unit. The plaintiff looked out the window but was unable to see anything unusual.
- [4] Since the commotion continued, the plaintiff went downstairs. As he approached the front door he heard someone calling for the occupants of Unit #7 to come out with their hands up. When he opened the door he was confronted by police officers in Emergency Response

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dress pointing automatic weapons at him. He could see two officers immediately in front of him and five or six officers behind them. There was also a sniper on a nearby roof.

- [5] One of the officers told the plaintiff to put his hands up and to come out of the unit. The officer told him to walk backwards towards the rear of the unit with his hands over his head. Although the plaintiff was only dressed in boxer shorts with nothing on his feet he complied.
- [6] As he walked backwards towards the rear of the unit he noticed a TV camera crew following him and recording his movements. When he arrived at the parking lot at the rear of his unit he was told to kneel down and his arms were handcuffed behind him. An officer told him that he was under arrest in connection with a double homicide investigation. He was then placed in a cruiser.
- [7] He said that he was very cold and he asked for a blanket. He was told that he would be given clothing when he got to the police station. He said that he was terrified.
- [8] The plaintiff said he was handed over to a uniformed officer and driven to the police station in the back of a cruiser. He recalls being read his rights to counsel and indicating that he would call a lawyer when he got to the station.
- [9] The plaintiff said that as he was walking to the cruiser with his hands up he noticed that his neighbours were looking out their windows and watching the events unfold. He said his girlfriend was also removed from the unit and taken to the police station.
- [10] At the station the plaintiff was given prison coveralls and shoes. Sometime later he was taken to the front lobby of the police station and told to wait. About 15 minutes later, the defendant police officer, Hetinga, came to the lobby and asked him a number of questions. The plaintiff was then allowed to call one of his employees to open his store in the Galleria Mall.
- [11] Shortly thereafter he was asked to sign a consent to allow the police to search his unit. He was then told he could leave and the police drove him back to his condominium. When he got there he found six officers searching his residence.

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- [12] About ten minutes later his roommate arrived home from Toronto. She also signed a consent to allow the police to search the condominium.
- [13] On April 8th, Channel 10 TV had a tape of his arrest on the noon newscast and the tape showed him in his underwear being removed from his residence. He said his face was clearly visible, and he was identified as a suspect in the murder of two members of the Outlaws Motorcycle gang. On the 6 p.m. news the same tape was shown but his face was blocked out and his name was not mentioned.
- [14] On Thursday, April 9, 1998, the front page of the London Free Press had a photograph of the police armed with automatic weapons standing in front of his condominium. The plaintiff said he saw the article that day.
- [15] The plaintiff said that the photograph of the police at his residence was shown in the Free Press on Sunday, January 3, 1999, as a leading news item from the previous year. He said he saw the article and it brought back memories of his ordeal.
- [16] The plaintiff testified that after the publicity involving his arrest, his neighbours treated him like a criminal. He said he was constantly asked about the homicides and his business suffered because of his suspected association with the Outlaws Motorcycle gang.
- [17] He said he lost the franchise for his store, his business failed and the landlord evicted him. He subsequently lost his condo which was sold under power of sale by Canada Trust. He had to pay a shortfall of approximately \$34,000.
- [18] The plaintiff testified that he left London in June, 1999, to go to a job in the retail industry in Toronto. He said one of the reasons he left London was because he was afraid for his life since he had been identified as a suspect in the killing of two bikers.
- [19] The plaintiff testified that he was treated by his doctor, and a psychologist for anxiety, depression and post traumatic stress disorder. He said that he continues to have trouble sleeping and to fear the police and biker gangs.

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The Plaintiff's Claim

[20] As a result of these events, the plaintiff commenced this action against the London Police Services Board, the Chief of Police, Julian Fantino and other police officers. He is claiming damages, aggravated damages and punitive damages for injuries he alleges he suffered as a result of the defendants' negligence, his false arrest and his unlawful confinement.

The Defence

[21] The defendants deny that they were negligent or that the plaintiff was falsely arrested or unlawfully detained. Brad Duncan, the Deputy Chief of Police who was a staff sergeant in April, 1998, was called to testify about this matter.

[22] He said that he was called at home on the evening of April 8th and told that two members of the Outlaw Motorcycle gang had been shot at the Beef Baron club on York Street. He said he went to the police station to take charge of the deployment of the police forces.

[23] When he arrived, he learned that one of the victims had died and the other was not expected to live. He was also told that there was an eye witness to the shootings which occurred in the parking lot and that the perpetrators escaped in a maroon or red Intrepid vehicle. He was told that seven shell casings had been found at the scene of the homicide so he knew they were dealing with individuals armed with an automatic weapon or weapons. As a result, he assigned members of the major crime division to locate the vehicle.

[24] Deputy Chief Duncan learned that the vehicle was associated with the Lewis brothers who were members of the Outlaws Motorcycle gang who frequented the Beef Baron. At 1:30 a.m. a maroon Intrepid vehicle was located in the parking lot at 1215 Cheapside Street, London. Its licence number was 626 VPJ. Since that vehicle was associated with the Lewis brothers, Deputy Chief Duncan had the officer who found the vehicle remain at the scene and keep it under surveillance.

[25] Deputy Chief Duncan learned that Duane Barker, an associate of the Lewis brothers and the Outlaw Motorcycle gang, lived in Unit 7 at 1225 Cheapside Street which was adjacent to the 1215 Cheapside Street address. As a result, he assigned the mobile surveillance unit to

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secure an outer perimeter around the complex in which Unit 7 – 1225 Cheapside Street was located and he told his officers to keep the Intrepid vehicle and Unit 7 under surveillance.

- [26] At about 3:00 a.m. Deputy Chief Duncan arranged for a search warrant for the Intrepid vehicle. He also met with Inspectors Goble, Gilmour, Lucio and Frue. He said that they were all concerned that the Lewis brothers were in Unit 7 with Duane Barker. They believed that the situation was very dangerous as the killers were armed and Duane Barker had been arrested on weapons charges in the past.
- [27] At 3:15 a.m. it was decided to send in the Emergency Response Unit. Deputy Chief Duncan directed his officers to tell the occupants of the units adjoining Unit 7 to go to their basements. He said he was concerned about public safety as there were a number of condominium units in the area and a public school.
- [28] At approximately 6:00 a.m., Inspector Lucio tried to make contact with the occupants of Unit 7 by telephone. He said that even with the assistance of Bell telephone they were unable to contact anyone in the unit. He said they also tried to contact someone in Unit #6 as there had been some movement between Units 6 and 7 during the night. When that was unsuccessful he said the Emergency Response Unit was told to carry out “a door knock” and to take the occupants of Unit 7 into custody.
- [29] Shortly before 8:00 a.m. the front door of Unit 7 was approached by the Emergency Response Unit and a bull horn was used to instruct everyone in the unit to come out with their hands up. Deputy Chief Duncan was advised at 8:05 a.m that a male and two females were found in the unit and that they were being brought to police headquarters for questioning. Officer Hetinga was assigned to interview the plaintiff.
- [30] Deputy Chief Duncan said the plaintiff was handcuffed as the police did not know if he was connected to the homicides and the Lewis brothers. He said both the Intrepid vehicle and Unit 7 were searched but nothing was found. The Lewis brothers were later arrested and charged with the murder of the two victims.

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- [31] Deputy Chief Duncan testified that they did not seek a search warrant for Unit 7 as they could not make the link to the homicide. He said they did not know who the plaintiff was but that did not matter because the occupants of the unit were to be taken into custody.
- [32] He said the plaintiff was arrested because it was a dynamic situation and the police did not know who else was behind the door. He said they needed to have control of the situation and arresting the plaintiff was standard procedure.
- [33] Deputy Chief Duncan said that before the Emergency Response Unit entered the plaintiff's residence, they spoke with people in the adjoining units and tried to ascertain what, if any, name was on the mailbox.
- [34] He agreed that the members of the Emergency Response Unit were dressed in tactical gear and armed with automatic weapons. He said there would be officers at the front and rear of the premises and he was not surprised to hear that there was a sniper on a nearby roof. He said this was a significant man hunt.
- [35] He said that the description given by the cab driver who witnessed the shootings matched that of the Lewis brothers. The fact that Duane Barker lived in Unit 7 came from police intelligence sources and he believed that Unit 7 was Duane Barker's current address.
- [36] On cross-examination, Deputy Chief Duncan said he did not know how the media learned of the police presence at Unit 7 but he was certain that no one in the police department advised them. He said the first press release that was issued was released at approximately 3:00 p.m. on April 8.
- [37] Deputy Chief Duncan said he was not aware of the coverage that the media gave the plaintiff. He said he did not refer to the plaintiff as no longer being a suspect in the press release because it was very early in the investigation and the plaintiff had not yet been cleared of all potential charges.
- [38] Constable Brian Pinkney testified that he took charge of the plaintiff at 8:02 a.m. and he and Officer Hogan walked him to a nearby cruiser. They placed him in the car with the motor running to warm up the vehicle. Officer Pinkney said he told the plaintiff that he was under arrest in connection with a homicide investigation.

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- [39] At 8:13 a.m. Officer Pinkney turned the plaintiff over to Constable Laird who drove him to the police station. He transferred the plaintiff to Officer Laird's marked cruiser and the plaintiff was read his rights to counsel. Constable Laird testified that on his way to the police station he received a radio transmission advising him that the plaintiff was now downgraded to the status of a witness.
- [40] Officer Laird said that when he got to the station he removed the handcuffs from the plaintiff and obtained prison coveralls and shoes for him. He then took him to the waiting at the major crime office.
- [41] Officer Ronald Hetinga said he interviewed the plaintiff at 9:05 a.m. on April 8, 1998. He said the plaintiff told him that he did not know anything about the *Intrepid*. He had been at home all night and Barker no longer lived in Unit 7. Officer Hetinga said the plaintiff signed a consent to have the unit searched and he arranged for the plaintiff to telephone one of his employees to open his store. Officer Hetinga said he then drove the plaintiff home.
- [42] During the course of the interview Officer Hetinga said the plaintiff told him that his telephone at Unit 7 was disconnected. He said he understood that the plaintiff was a witness and that he advised the plaintiff that he was a witness when he interviewed him. He said he didn't know that the plaintiff had been handcuffed and brought to the station in his underwear. He expressed surprise at that.
- [43] As a result of the foregoing, the defendants contend that they acted reasonably in arresting the plaintiff and that they are entitled to the protection afforded under s. 25(1) of the *Criminal Code of Canada*. They therefore deny that they are liable for any damages suffered by the plaintiff as a result of his arrest and detention.

Analysis

- [44] Section 25(1) of the *Criminal Code* provides that a police officer is justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose if he acts on reasonable grounds. Section 42(1)(a) to (h) of the *Police Services Act* requires the police to preserve the peace, prevent crimes and apprehend criminals and other offenders who may lawfully be taken into custody.

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- [45] In *R. v. Mann*, [2004] S.C.J. No. 49 (S.C.C.), the court dealt with the issue of investigative detention and Iacobucci J. said at para. 34:

34. The case law raises several guiding principles governing the use of a police power to detain for investigative purposes. The evolution of the *Waterfield* test, along with the *Simpson* articulable detention must be viewed as reasonably necessary on an objective view of the totality of the circumstances, informing the officer's suspicion that there is a clear nexus between the individual to be detained and a recent or on-going criminal offence. Reasonable grounds figures at the front-end of such an assessment, underlying the officer's reasonable suspicion that the particular individual is implicated in the criminal activity under investigation. The overall reasonableness of the decision to detain, however, must further be assessed against all of the circumstances, most notably the extent to which the interference with individual liberty is necessary to perform the officer's duty, the liberty interfered with, and the nature and extent of that interference, in order to meet the second prong of the *Waterfield* test.

- [46] In *R. v. Clayton*, [2007] S.C.J. No. 32 the Supreme Court of Canada dealt with a case involving arbitrary detention and a warrantless search and seizure. The issue was whether the police acted within the scope of common law police powers when they detained and searched the accuseds. The accuseds alleged that their rights under s. 8 and 9 of the *Charter* were violated. The case is important because it deals with the power of the police to detain members of the public for investigative purposes.

- [47] In the *Clayton* case, Abella J. said at para. 32:

32. In my view, both the initial and the continuing detentions of Clayton and Farmer's car were justified based on the information the police had, the nature of the offence, and the timing and location of the detention.

- [48] Then at para. 40 she said:

40. The police had reasonable grounds to believe that public safety was at risk, that handguns could be in the possession of those leaving the parking area, and that stopping cars leaving that area could result in their apprehension. The steps taken by the police in this case in stopping the car, based on the information they had, were reasonable and reasonably tailored to the information they had.

41. In the totality of the circumstances, therefore, the initial detention in this case was reasonably necessary to respond to the seriousness of the offence and the threat to the police's and public's safety inherent in the

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presence of prohibited weapons in a public place, and was temporally, geographically and logistically responsive to the circumstances known by the police when it was set up. The initial step was consequently a justifiable use of police powers associated with the police duty to investigate the offences described by the 911 caller and did not represent an arbitrary detention contrary to s. 9 of the *Charter*.

- [49] In the case before me, the circumstances of the plaintiff's arrest and detention must be viewed against the information Deputy Chief Duncan had and his suspicion that there was a connection between the double homicide at the Beef Baron and the individuals in Unit 7 at 1225 Cheapside Street, London. The plaintiff's arrest must have been necessary for the police to carry out their duties. This is the two prong test the defendants must meet in order to avoid liability for the damages allegedly suffered by the plaintiff.
- [50] The critical time in assessing the conduct of the police was 3:15 a.m. on April 8, 1998, when Deputy Chief Duncan made the decision to send the Emergency Response Unit to 1225 Cheapside Street to remove and detain the occupants of Unit 7. Once that decision was made, the defendants admit that whoever was in Unit 7 was going to be arrested at least for investigative purposes.
- [51] When Deputy Chief Duncan made the decision to send in the Emergency Response Unit he knew that there had been a double shooting at the Beef Baron. He had a description of the shooters who were seen leaving the parking lot in a red or maroon Intrepid vehicle.
- [52] He knew that the vehicle had been used by or associated with the Lewis brothers and that it was located in the parking lot at 1215 Cheapside Street. He also knew that the description of the shooters could fit the Lewis brothers.
- [53] He knew that Duane Barker, an associate of the Lewis brothers, lived in Unit 7 - 1225 Cheapside Street which was adjacent to the parking lot where the vehicle was found. He knew that the shooters were armed with automatic weapons and he believed that they might be in Unit 7.
- [54] He knew that there were people in Unit 7 as the police had observed people coming and going between Unit 6 and Unit 7 during the night. He knew that the police with the

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assistance of Bell telephone had attempted to contact the occupants of Unit 7 without success.

[55] Deputy Chief Duncan knew that the murder victims, the Lewis brothers, and Duane Barker were all associated with the Outlaw Motorcycle gang. He believed that it was important to arrest and disarm the occupants of Unit 7 before anyone else was killed or injured.

[56] The police have a common law duty to investigate crimes and maintain the peace. They must follow the information they obtain through their investigations and they are entitled to apprehend people involved in crimes.

[57] In this case they had a reasonable basis to believe that the occupants of Unit 7 were involved in a homicide and that public safety was at risk. They suspected that the Lewis brothers were in Unit 7 and they were concerned as the Lewis brothers had automatic weapons which they would not hesitate to use. They also knew that Duane Barker had possessed weapons in the past.

[58] The offence in this case was serious and the threat to the police and the public was potentially great.

[59] Investigative detention is not limited to people the police are actively searching for. It relates to anyone who might be involved in criminal activity. Harboursing fugitives would qualify as criminal activity.

[60] Based on the information he had I am satisfied that Deputy Chief Duncan was justified in deploying the Emergency Response Unit to Unit 7-1225 Cheapside Street, London. Further, I am satisfied that in the circumstances of this case the members of the Emergency Response Unit were justified in arresting and detaining the occupants of Unit 7, including the plaintiff.

[61] After the plaintiff was arrested, he was taken from the unit in his underwear and handcuffed. The fact that he was in his underwear was immaterial to the perceived risks involved in the police intervention.

[62] The evidence is that handcuffing the plaintiff was standard procedure in the circumstances of this case and I accept that it was a reasonable step given the seriousness of the crime the

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police were investigating and the suspected involvement of the plaintiff in harbouring the Lewis brothers.

- [63] I am also satisfied that the police acted reasonably in downgrading the plaintiff to the status of a witness at the first opportunity. Thereafter, Officers Laird and Hetinga treated him with deference and respect. He was provided with clothing, allowed to use the telephone and detained for less than an hour. He was then driven back to his residence and allowed to go about his business.
- [64] It was unfortunate that the plaintiff's arrest was captured on video by the local television station. However, I do not accept the plaintiff's evidence that the camera man was allowed to come within ten feet of him while filming his arrest. The police officers deny that that occurred and I am satisfied that the scene was cordoned off and that no one was allowed near Unit 7.
- [65] As Deputy Chief Duncan stated the police did not alert the media to the events that unfolded at 1225 Cheapside Street and they had no way of controlling the actions of the media other than to keep them outside the area that was cordoned off.
- [66] The plaintiff complains that he was described as a suspect in the television broadcast at noon on April 8, 1998. He contends that the police should have corrected that statement.
- [67] It was very early in the investigation and I accept Deputy Chief Duncan's statement that the police were not in a position to make such a statement. The television reporters could easily have ascertained that the plaintiff was released by 9:00 a.m. that morning and the plaintiff's complaint is with the television station and not the London Police Services Board.
- [68] In view of the foregoing, I find that the plaintiff's arrest and detention for investigative purposes was lawful and the police did not violate his rights under s. 9 of the *Charter*. Further, I find that the police were not negligent in carrying out their duties. The plaintiff's action is therefore dismissed.

Damages

- [69] Although I have dismissed the plaintiff's action, I am obliged to assess his damages. The plaintiff alleges that as a result of the actions of the police, he was embarrassed and humiliated in front of his neighbours and exposed to media coverage in which he was described as a suspect in a double homicide.
- [70] He said that he suffered from fear, shock and emotional upset as a result of the police invasion of his residence. The fact that he was described in the television coverage as a suspect in the murder of the two Outlaw bikers caused him to fear for his life as he was concerned that the Outlaws might seek revenge. He was also embarrassed by questions raised by his family, friends and customers as a result of the media coverage.
- [71] The plaintiff said that he suffered from anxiety, depression and post traumatic stress disorder. He said that he missed a considerable amount of time at work and his business suffered. He was referred to Dr. Sidney Freedman, a registered psychologist. He saw Dr. Freedman approximately 14 times over the next two and a half years.
- [72] The plaintiff testified that because of the adverse publicity and his inability to attend at his clothing store, his sales declined. He said his store was a franchise that sold blue jeans and trendy clothing.
- [73] The plaintiff said that he had trouble sleeping and relations with his friends and family were affected by his condition. He said that his parents blamed him for the adverse publicity he received and the decline in his business.
- [74] Eventually the plaintiff lost his franchise for the store and he had to change the name of his business. His sales continued to decline and he was unable to pay his rent. As a result, the landlord evicted him.
- [75] The plaintiff also lost his condominium due to his failure to keep up the mortgage payments. It was sold under power of sale and there was a shortfall of approximately \$34,000 which he was obliged to pay.

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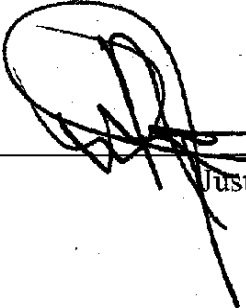
- [76] The plaintiff testified that he eventually obtained employment with a retail outlet in Toronto in 1999 and then in 2000 he went to work at a Value Village thrift store in Niagara Falls as a manager.
- [77] In 2006 he got married and he and his wife now have two children. That year he earned approximately \$79,000.
- [78] The plaintiff claims special damages of \$50,000 for the loss of the franchise fee for his store. In addition, he is claiming loss of income from his business and the \$34,000 he had to pay as a result of the loss on the sale of his condominium.
- [79] Dr. Freedman testified that he saw the plaintiff approximately 14 times between October 5, 1998, and March 23, 2001. He said during that time he counselled the plaintiff and treated him with hypnosis.
- [80] Dr. Freedman said that the plaintiff suffered from depression, anxiety and post traumatic stress disorder as a result of the events that occurred following the shooting at the Beef Baron. Dr. Freedman said that the plaintiff was humiliated, angry, confused and fearful. He said he was depressed and at times he had suicidal thoughts.
- [81] Dr. Freedman tested the plaintiff's cognitive skills and said that he had difficulty concentrating. He said the plaintiff was paranoid and did not trust other people. As a result, he was fearful of going out and he practiced avoidance. He had all of the symptoms of chronic Post Traumatic Stress Disorder.
- [82] Dr. Freedman felt the plaintiff would have benefited from further treatment and he wanted to refer him to a colleague in Toronto. The plaintiff did not however return to see Dr. Freedman after March of 2001.
- [83] In assessing the plaintiff's damages, it is important to recognize that the defendants are not responsible for the actions of the newspaper reporters or the television station. The defendants did not notify the media of their intention to arrest the occupants of Unit 7 and I am satisfied that when faced with the presence of the media the police took all reasonable steps to keep them away from the immediate vicinity of the arrests.

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- [84] The plaintiff however suffered Post Traumatic Stress Disorder as a result of his arrest and detention and I accept his evidence that he is still suffering from the effects of that condition. If the plaintiff had succeeded, I would have assessed his general damages for negligence, false arrest and unlawful confinement at \$40,000.
- [85] The plaintiff's claim for the loss of the franchise fee of \$50,000 was not proven. The plaintiff did not call his accountant or file sales figures from his business. He did file his tax returns but they only showed results from 1998 to 2007 and his income improved steadily. I further note that the franchise fee that he is claiming was paid by his father and I am not satisfied that he is under any obligation to repay his father for that amount.
- [86] The plaintiff did not lose his condominium under power of sale until the year 2000. At that time he was earning over \$34,000 a year and in 2001 he earned over \$45,000. As a result, I am not satisfied that he lost the condominium due to the actions of the police. I therefore find that the claims for special damages are not proven.
- [87] Even if the plaintiff had succeeded, this is not a case for aggravated or punitive damages. There is no evidence of excessive force or intentional misconduct by the police.

Judgment

- [88] As a result of the foregoing, the plaintiff's action against the defendants will be dismissed. If necessary, the parties may make written submissions relating to costs within 30 days of the date of this judgment.



Justice W.A. Jenkins

Released: March 4, 2010

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ROSARIO GIGLIOTTI

Plaintiff

- and -

**JULIAN FANTINO, RON HETINGA, JOHN DOE and
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Defendants

REASONS FOR JUDGMENT

Justice W.A. Jenkins

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