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June 1, 2012

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Re: Wharton v. County of Nassau, et al.  
U.S. District Court, Eastern District of New York, 07-CV-2137

1. Pursuant to plaintiff's request and in accordance with Federal Rules of Civil Procedure, Rule 26 (a) (2), I have prepared this report, which constitutes my evaluation and conclusions within a reasonable degree of professional certainty of the actions and procedures employed by members of the Nassau County Police Department (NCPD) in connection with this matter. My fee for preparation is \$300 per hour and \$2400 per day or part thereof for deposition or trial testimony. This evaluation is written on the basis of a review of the documents provided and on my experience, training, education, and professional background, which are described below. I reserve the right to revise this opinion upon the receipt of additional information.

2. I am a retired member of the New York City Police Department (NYPD), having served for more than (31) thirty-one years. During my tenure, I held the ranks of Police Officer, Sergeant, Lieutenant, Captain, Deputy Inspector, and Inspector, and served in numerous capacities, including patrol officer, patrol sergeant, anti-crime sergeant, lieutenant tour commander, Executive Captain of the 46<sup>th</sup> Precinct, Bronx; Commanding Officer, Manhattan North Public Morals Division; Commanding Officer of the 79<sup>th</sup> Precinct in Bedford-Stuyvesant, Brooklyn; Commanding Officer, Staff Services Section of the Personnel Bureau; Commanding Officer, 24th Precinct., Upper Manhattan; Executive Officer, Bronx Narcotics Division; Commanding Officer, License Division; Executive Officer, Narcotics Division; Executive Officer, Manhattan North Narcotics Initiative; and Executive Officer, Brooklyn South Detective Division. All of the foregoing positions entailed conducting, supervising, and training activities pertaining to arrests, investigations, and use of force.

3. Since my retirement from NYPD, I have taught police science and criminal law courses at John Jay College of Criminal Justice and St. John's University, including courses in police administration, criminal investigations, constitutional law, and criminal law. I have been retained as a consultant by both plaintiffs and defense in a number of police liability cases, and have testified as a police procedures expert in both State and Federal courts.

## MATERIALS REVIEWED

4. The following is a list of materials pertaining to the incident and individuals involved that I reviewed thus far:

- a. Notice of Claim;
- b. Summons and Complaint;
- c. Decision After Trial of Judge Pardes;
- d. Deposition of Detective Charles DeCaro;
- e. Deposition of Joshua Wharton;
- f. Deposition of Detective Phillip Kouril;
- g. Deposition of Lieutenant Michael McGovern;
- h. Deposition of Jonathan Wharton;
- i. Deposition of Gail Wharton;
- j. NCPD Crime Report, Arrest Report, Memo books, Misc. Documents, Notes, and Procedures;
- k. Witness statement of Suraya Sweetey;
- l. Witness statement of Swama Jebahu;
- m. Criminal court records;
- n. Criminal court affidavit, dated January 20, 2004;
- o. Criminal court affidavit, dated June 18, 2004.

## SUMMARY OF FACTS

5. On January 20, 2004, Nassau County Police Officers George Kouril and Charles DeCaro arrested Joshua Wharton, a 17-year-old male inside a Dunkin' Donuts at 2458 Jericho Turnpike, Garden City Park, NY. The officers were on duty, in plainclothes, in an unmarked department car. They received a call regarding a "male creating a disturbance" at Mineola High School. As they approached the school, they observed four young males walking away from the school toward Jericho Turnpike. When the officers arrived at the school, they learned that one individual had been creating a disturbance and was asked to leave. They were advised that he had just left the school in the company of three other males. The officers drove down Jericho Turnpike and observed three males in the Dunkin' Donuts who "matched the description" the young men they had seen walking away from the school.

6. The officers entered the Dunkin' Donuts and approached two of the males and asked them to move away from the counter and sit down so that they could talk to them. According to the officers, at this point, another male, Joshua Wharton, began to shout at them, using obscene and offensive language. The officers had their badges displayed on a chain around their necks, but they had not verbally identified themselves as police officers. (Kouril, 22:11-15). The officers then approached Mr. Wharton and asked him for identification. Mr. Wharton refused to show identification and then sat down at a table with his sandwich. The officers approached him at the table, and they asked him for identification a second time. Wharton refused to show his identification. The officers asked again, and when Wharton refused again, according to Officer DeCaro, the officers

told him that they “were going to place him under arrest.” (37:4-10). DeCaro testified that up to this point, Wharton had not used any physical means to threaten the officers (51:16-25). Wharton refused the officers’ order to stand up and place his hands behind his back. (53:22-24). When the officers moved to arrest him, Wharton stood up and shoved the table into Officer Kouril. (57:3-7).

7. According to Officer Kouril, Wharton “stood up and he, as he stood up, he pushed the table into me.” (44:23-23). In contradiction to Officer DeCaro, Officer Kouril testified that the officers had not told Wharton that he was under arrest until after Wharton pushed the table. (48:18-24). However, neither the narrative in the crime report nor the affidavit of Officer Kouril on January 20, 2004 states that Wharton pushed a table toward him either before or after the arrest.

8. In any case, according to the officers, Wharton allegedly pushed the table and it allegedly struck Officer Kouril. The officers grabbed Wharton’s arms. He resisted arrest by flailing his arms, and the officers had to “take him to the ground” in order to handcuff him. They used physical force to handcuff him, and then they took him to the police station.

9. Wharton testified in his deposition that when the officers asked for his identification the second time, he said, “Fuck that. I’m not talking to you.” (49:10-11). He testified that “The officer behind me tackled me. I’m sitting down. He just basically put me in a headlock . . . They took me down from my seat and both officers are on me.” (40: 13-10). He also testified that when he was on the floor, “They were putting me in all types of headlocks and body maneuvers . . . the taller one . . . he was towards my upper body. When I was on the ground he kept kneeling me in the head, really hard.” (53:8-14).

10. Officer Kouril testified that when they were on the ground, he twisted Wharton’s wrist behind his back and possibly told him that he would break his wrist. (146:7-17).

11. On January 20, 2004, the police charged Wharton with the following:
- a. Disorderly Conduct, P.L. 240.20(3),
  - b. Obstructing Governmental Administration, P.L. 195.05,
  - c. Resisting Arrest, P.L. 205.30.

The affidavit of Officer Kouril in support of the Obstructing Governmental Administration charge stated that Wharton interfered with an investigation by instructing the individuals the police were attempting to talk to, by yelling out to them not to give the officers the information they were trying to obtain. It omitted any allegation that Wharton pushed the table toward the officers.

12. On June 18, 2004, the district attorney filed a superseding information, which included the following charges:

- a. Disorderly conduct, P.L. 240.20(1),
- b. Disorderly conduct, P.L. 240.20(7),
- c. Obstructing Government Administration, P.L. 195.05.

The affidavit of Officer Kouril in support of the disorderly conduct charge stated, "The defendant then pushed a table at myself and Officer DeCaro." The affidavit of Officer Kouril in support of the obstructing governmental administration charge stated, "He (Wharton) pushed a table into me."

13. In December 2005, a criminal bench trial was held before Honorable Sandra K. Pardes. In a written Decision after Trial, the Judge acquitted Wharton of all the charges.

## OPINION

### Stop and Question Procedures

14. In my opinion, it was a violation of the standards of proper police procedure and practices for the officers to stop and question the two males and then Wharton. Officer DeCaro testified that four males had been involved in a disturbance, but no one at the school complained of a crime being committed. The officers decided to leave the school, "To see if we can locate the males to see what the problem was." (23:7-9). He also testified he was not investigating any specific crime at that point. (23:24-25; 24:2). When the officers saw the males in the Dunkin' Donuts, they approached two of the males and instituted a stop and question procedure. Officer DeCaro testified that he had stopped the two males in that he, "Move them over to the side, have them sit down and talk to them." (27:20-21). Police officers are trained that to stop and question a person they must have reasonable suspicion of criminal activity. The officers have not alleged facts that would meet that standard. In addition, when the officers turned their attention to Wharton, they stopped and questioned him without reasonable suspicion of criminal activity.

### Arrest Procedures

15. In my opinion, it was a violation of the standards of proper police procedure and practices for Officers Kouril and DeCaro to have arrested the plaintiff under the circumstances of this case. Police officers are trained that to make a lawful arrest they must have probable cause, and they are trained that probable cause consists of facts and circumstances that would lead a reasonable person to conclude that the person to be arrested committed, was committing, or was going to commit a crime. The officers have not alleged facts that would meet that standard. The officers had no information that a trespass or other crime had occurred at the school. They had received a report of a disturbance, but a disturbance is not a crime. Furthermore, even if, hypothetically, a crime had occurred at the school, they had no information that Mr. Wharton was involved. In fact, Officer DeCaro, when asked whether he had probable cause to arrest Wharton for trespassing at Mineola High School, testified that he did not. (59:4-10).

16. Officers are also trained that they may make an arrest for violations that occur in their presence. Disorderly conduct is a violation; however, in my opinion, the arrest for disorderly conduct was a violation of the standards of proper police procedure and

practices. Officer DeCaro testified that he had a legal right to ask Wharton for identification because Wharton was creating a disturbance. (42:21-22). When Wharton refused to show identification, the officers told him that they were going to place him under arrest (47:21-25). However, officers are trained that it is not a crime or a violation to refuse to show identification or answer an officer's questions. Therefore, the arrest would have to be based on something other than the refusal.

17. The officers testified that Wharton committed disorderly conduct by using obscene and offensive language, but he had not been using such language until the officers entered the location and initiated the stop and question. Wharton's language was in response to the actions of the officers. Furthermore, none of the employees or customers complained about Wharton's conduct or that they were annoyed or alarmed by it. Moreover, police officers are trained that in consideration of First Amendment free speech rights they are expected to use a high degree of restraint when confronted with obscene or offensive language. The fact that the officers may have been annoyed or alarmed by the language does not amount to public annoyance or alarm. In my opinion, it was a violation of the standards of proper police procedure and practices for the officers to arrest the Wharton for disorderly conduct.

18. The officers testified that they arrested Wharton for obstructing governmental administration; however, officers are trained that such a charge contemplates physical obstruction, not just verbal responses to the actions of an officer; otherwise, any verbalized disagreement or protest would constitute obstructing. In this case, Officer DeCaro testified that Wharton had not used any physical means to threaten the officers. (51:6-25; 130:2-4). In my opinion, it was a violation of the standards of proper police procedure and practices for the officers to arrest the Wharton for obstructing governmental administration solely on the basis of his speech.

19. The alleged shoving of the table was not included in the crime report or the affidavit prepared on January 20, 2004. Even if, in fact, it occurred, it took place after the arrest, and, therefore, it could not justify the initial arrest for either disorderly conduct or obstructing governmental administration. (DeCaro, 51:16-22; 54:2-11).

20. In my opinion, the initial arrest of Wharton was improper; therefore, the charge of resisting arrest was invalid because the underlying arrest was not authorized.

#### Use of Force

21. Police are trained that they may use physical force to make an arrest only when the arrest was proper; therefore, because the underlying arrest was improper, the use of force to arrest Wharton was a violation of the standards of proper police procedures and practices.

22. Assuming, hypothetically, that the arrest was proper, nevertheless, the amount and type of force the officers used violated the standards of proper police procedure and practice. Police officers are trained that they may use force only when

necessary and reasonable, and they should use only the minimal amount of force necessary to accomplish the task. Officers are trained to use “continuum of force” procedures, meaning that, when possible, an officer should try to persuade a suspect to submit to handcuffing before resorting to force. In cases in which force is necessary, hand pressure should be applied before resorting to more violent types of force. Here, according to the plaintiff, the officers immediately applied a headlock, took the him to the ground, and used substantial force rather than attempting less violent methods to handcuff him.

### CONCLUSION

23. In my opinion, because the officers did not ascertain that a crime had been committed at the school, it was a violation of proper police procedure and practice to stop and question the three males, including the plaintiff. Furthermore, since citizens are not required to show identification upon demand by the police, it was a violation to arrest the plaintiff either on the grounds that he refused to provide identification or that the language he used constituted an offense or a crime. Moreover, the amount and type of force used by the officers was in violation of the standards of proper police procedures and practices.

  
Walter Signorelli