UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PLAINTIFF A,

Plaintiff,

- against -

xx Civ. xxxx (xxx)

DEFENDANT B, et al.,

Defendants.

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DEFENDANT UTOPIA STATE TROOPER DEFENDANT B'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Defendant, Utopia State Trooper Defendant B submits this memorandum of law in support of his motion for judgment as a matter of law on plaintiff's Fourth Amendment claim of unreasonable search and seizure pursuant to Fed. R. Civ. Pro. 50 or, in the alternative, for a new trial on that claim pursuant to Fed. R. Civ. Pro. 59(a).

PRELIMINARY STATEMENT

Plaintiff commenced this action under 42 U.S.C. Section 1983 for alleged violations of protections guaranteed by the Fourth Amendment. Plaintiff alleged, inter alia, that the defendant, acting under color of State law, violated her constitutional right to be free from unlawful arrest and excessive force during her 1998 arrest for animal cruelty and resisting arrest. Plaintiff also alleged that Witness 1, a civilian co-defendant, violated her right to be free from false arrest and malicious prosecution. Plaintiff alleged that Witness 1 gave the police false information that led to her arrest.

On its face, the jury's finding against Trooper Defendant B on the claim of false arrest is not only contrary to the evidence but also

inherently inconsistent. Trooper Defendant B had probable cause to arrest plaintiff and the jury verdict in favor of Witness 1 on the false arrest claim supports this. Trooper Defendant B is moreover, entitled to a judgment as a matter of law on qualified immunity grounds because at the time of the challenged action, it was objectively reasonable, based on the evidence presented at trial, for Trooper Defendant B to believe that his behavior did not violate plaintiff's clearly established rights. It is illogical for a jury to have found that Witness 1, the civilian co-defendant, was not liable because he had probable cause to support the arrest of plaintiff, but that Trooper Defendant B did not.

Trooper Defendant B is entitled to judgment as a matter of law on plaintiff's claim of false arrest, or entitled to a new trial of the false arrest claim based on the overwhelming evidence of the reasonableness of his actions. In the alternative, because the evidence does not support a claim for punitive damages, the award for punitive damages must be vacated as a matter of law.

STATEMENT OF FACTS

The jury in this case considered whether the defendant's actions violated plaintiff's following constitutional rights: (1) her Fourth Amendment right to be free from false arrest; (2) her Fourth Amendment right to be free from the use of Excessive Force, and (3) her right to be free from having Trooper Defendant B provide false information for the purpose of obtaining a search warrant.

The third claim, plaintiff's right to be free from having Trooper Defendant B provide false information for the purpose of obtaining a search warrant, was dismissed as a matter of law upon defendant's Rule 50

motion on Monday, July 2, 2001.

The jury found in favor of Plaintiff A on only one of her claims. The jury concluded that Trooper Defendant B unlawfully arrested plaintiff for animal cruelty pursuant to Agricultural & Market Law Sections 26, 353.

The jury found in favor of defendant Trooper Defendant B on plaintiff's Fourth Amendment claim, which alleged that Trooper Defendant B grabbed plaintiff's breast and threw her into the back seat of his Trooper car, causing her permanent back injury.

The evidence elicited at trial established that on April 17, 1998, Witness 1 and Witness 2 went to the Utopia State Police barracks to file complaints against Plaintiff A, because her horse appeared to be malnourished and suffering from other ailments such as infestation with lice and cracked hooves. Mr. Witness 1 and Ms. Witness 2 both have extensive backgrounds in horse care. Mr. Witness 1 and Ms. Witness 2 told Trooper Defendant B about their observations and their conclusions about the condition of the horse. Mr. Witness 1 gave Trooper Defendant B a sworn statement he had already prepared, while Ms. Witness 2 provided a statement at the barracks. Trooper Defendant B then looked through photographs provided by Ms. Witness 2. He asked both complainants what he should look for when observing the horse for himself. He spoke with another Trooper, Trooper X, and together they found the applicable section of the Agriculture & Market law. Trooper Defendant B then left the barracks to observe the horse for himself.

Trooper Defendant B arrived at the property, and examined the horse. He observed the ailments described by the complainants, and made the

decision to place plaintiff under arrest. Prior to driving up plaintiff's driveway, Trooper Defendant B decided he would issue plaintiff an appearance ticket, which is the preferred form of arrest for a misdemeanor crime.

Trooper Defendant B drove up the property and found Ms. Plaintiff A in front of her home, along with a client, Witness 3, and Witness 3's daughter. Trooper Defendant B asked who owned the horse, at which time Ms. Plaintiff A began acting loud and uncooperative, not allowing Trooper Defendant B to get any information for the appearance ticket. Moments later, plaintiff's companion, Witness 4, came from behind the home and started yelling at Trooper Defendant B, calling him the Gestapo. Despite Trooper Defendant B's warnings to not walk any closer, Witness 4 came closer and spit at Trooper Defendant B. Trooper Defendant B placed Witness 4 under arrest.

Trooper Defendant B then turned to take Ms. Plaintiff A into custody, but she was actively avoiding him, stating that she could not leave her property, and she would not go with Trooper Defendant B. When Trooper Defendant B attempted to place her in handcuffs, she actively avoided the cuffs by moving her hands away. Once the handcuffs were on and despite Trooper Defendant B's numerous requests, she refused to walk to the vehicle. On the way to the vehicle, Ms. Plaintiff A stopped and claimed that Trooper Defendant B was grabbing her breast. Trooper Defendant B denied any contact, and Ms. Witness 3 stated she saw no contact. Once at the Trooper's vehicle, plaintiff refused to put her feet in the vehicle. Despite Trooper Defendant B's numerous requests to her feet in the car, she refused to do so. Trooper Defendant B said that

if she did not put her feet in the car, he would put them in for her. She still did not put her feet in the car. So he bent down and put her feet in the car. Witness 3 testified that the force used was minimal.

On the way to the barracks, plaintiff claimed that she left the stove on at her home, and asked Trooper Defendant B to turn the car back. He turned the car back, and she went back into her home. After a few minutes, Trooper Defendant B hollered for plaintiff to come outside. When plaintiff came out, she had her phone in her hand, stating that her veterinarian wanted to speak to Trooper Defendant B. Trooper Defendant B took the phone from her, and hung it up, and took her back to the vehicle.

At the barracks, Trooper Defendant B had someone call a Sergeant to the barracks, due to the allegations of excessive force made against him by plaintiff. While at the barracks, plaintiff, who was alone in the juvenile room, placed herself up against the wall and slowly slid down to the floor. She was unresponsive. Trooper Defendant B had another Trooper call Mobile Life, and then was given smelling salts to administer to plaintiff. Before Trooper Defendant B could place the salts near her face, plaintiff opened her eyes and stated that Trooper Defendant B was an idiot and he should not give smelling salts to a conscious person. Mobile Life came soon thereafter and took plaintiff to Arden Hill hospital.

A search warrant was executed on plaintiff's property the following day. However, the horse was not removed from the property. The veterinarian on the property stated that the horse was infested with lice and gave plaintiff a series of recommendations for the care of her horse

in the future.

Sergeant Sgt. Y conducted the investigation into the allegations made against Trooper Defendant B. He found that plaintiff's allegations were unsubstantiated.

A. The Testimony of Witness 4

On April 17, 1998, at approximately 6:30 p.m., Witness 4 was feeding the dogs, when at about 7:00 p.m., he saw a trooper pull into the property (TT: p. 56- 57). Witness 4 finished watering the dogs, and walked up to plaintiff and Trooper Defendant B (TT: p. 57). He approached and asked plaintiff, "What's going on here" (TT: p. 59). Witness 4 testified that she was handcuffed when he came up, and she was arrested for animal cruelty to a horse (TT: p. 59). Plaintiff told him this. To this, Witness 4 stated "the horse is under a vet's care already, so what is the animal cruelty here" (TT: p. 60).

Witness 4 testified that the horse was underweight, the same way it was every spring, and the hooves were cracked, but no more than normal (TT: p. 74). Although plaintiff owned the horse on her property, it was mainly Witness 4's responsibility to take care of the horse (TT: p. 84).

B. The Testimony of Plaintiff, Plaintiff A.

On April 17, 1998, Ms. Witness 3 brought her dog to plaintiff's property pursuant to a breeder's contract (TT: p. 111). Witness 3 arrived at approximately 6:45 p.m. (TT: p. 111). As plaintiff was talking with Witness 3, a trooper car came down plaintiff's driveway (TT: p. 112). Plaintiff walked off her deck and approached the trooper, and asked if she could help him. (TT: p. 113) Trooper Defendant B yelled "Are there any dogs loose?" (TT: p. 113). Plaintiff responded "No. What

seems to be the problem", to which Trooper Defendant B responded that he was arresting her for animal cruelty (TT: p. 113). Plaintiff testified that she stated "How could you arrest me for animal cruelty when the horse is under a veterinarian's care?" (TT: p. 114). Plaintiff testified that Trooper Defendant B responded "I don't care". She then asked him if he had a search warrant, written complaint or verbal complaint, to which he responded no (TT: p. 114).

Plaintiff asked Trooper Defendant B what he was doing there, and he responded that he was driving by and saw the horse (TT: p. 115). Plaintiff asked Trooper Defendant B what he thought was wrong with the horse, and he responded "Well, look at her", to which plaintiff responded "I did, that's why I called my vet you know, why don't you call him?" "No" was how Trooper Defendant B responded. Plaintiff testified that she felt that Trooper Defendant B was under the influence of something (TT: p. 115).

Trooper Defendant B then came around to handcuff her. Plaintiff testified that she did not resist in any way, and she put her arms up so that he could handcuff her (TT: p. 115). Plaintiff testified that at this point, she asked if she could use the bathroom, and told Trooper Defendant B that she had five spinal operations and had medical problems and need to get her pocketbook and medications (TT: p. 116). Trooper Defendant B responded that he did not care. Plaintiff asked if Trooper Defendant B could loosen the handcuffs, and he said no (TT: p. 116). Plaintiff repeated that the horse was under a vet's care, to which Trooper Defendant B either would not respond, or would say, "I don't care" (TT: p. 116).

At some point Witness 4 walked up. Witness 4 asked what was going on, and plaintiff told him that she was being arrested for animal cruelty for the horse, to which Witness 4 responded "How can you be arrested if the horse is under a vet's care?" (TT: p. 118). Witness 4 made a comment about the Gestapo, and plaintiff then asked Witness 4 to go into the house to get her pocketbook and medications (TT: p. 118). He started to go, then he started coughing, and he coughed up phlegm and he spit it out to his side (TT: p. 118). Witness 4 took a few steps at which point Trooper Defendant B said to Witness 4 that he was under arrest too (TT: p. 119). Witness 4 was handcuffed an placed in the trooper vehicle (TT: p. 119).

Plaintiff claims that she was in shock and just stood there, and panicked because she was concerned about her dogs and she had never been arrested before (TT: p. 120). She pleaded with him to allow her to take care of her dogs, to which he did not respond. Plaintiff would take a few steps, then stop and plead again (TT: p. 121). This happened one more time, at which point Trooper Defendant B grabbed her arm and grabbed her breast (TT: p. 122). Trooper Defendant B kept his hand there, then slid his hand down towards her wrist and picked her wrist up and away from her body and said to Witness 3 "See, I'm not touching her breast" (TT: p. 123). She again continued to plead with him about her dogs, and began feeling desperate (TT: p. 123).

Plaintiff testified that she got to the vehicle, sat down with her feet outside the car (TT: p. 124). She again pleaded with him about her dogs, and Trooper Defendant B asked her to put her feet in the car. She pleaded again, and plaintiff testified that Trooper Defendant B bent

down, grabbed her feet and threw her into the car (TT: p. 124).

When they were leaving plaintiff's driveway, plaintiff asked to turn back because she left the stove on. Trooper Defendant B responded no (TT: p. 127). At some point thereafter, Trooper Defendant B turned around and went back to plaintiff's house (TT: p. 128). When they got back to plaintiff's property, plaintiff went into her house, shut off her stove, let a sick dog into the house, and called her veterinarian, Dr. Vet (TT: p. 129). Plaintiff walked over to Trooper Defendant B with the phone and stated that she had her veterinarian on the phone. Trooper Defendant B responded by yelling "But you promised you were just going to turn off the stove" and he took the phone from her, disconnected it and put it on one of the cars (TT: p. 130). Plaintiff then gave Witness 3, who was still on her property, her dog back, and also gave Witness 3 the phone numbers of her lawyer and a neighbor to call (TT: p. 131). Plaintiff got back into the car (TT: p. 131-132). Plaintiff claims to have had pain and very bad tingling at this point in time (TT: p. 132).

On July 2, 1998, both charges of animal cruelty and resisting arrest were dismissed by the Wallkill Town Court (TT: p. 149-150). Other than Dr. Vet, another veterinarian, Dr. Vet #2, examined the horse and gave recommendations for a course of treatment for the horse (TT: p. 151-152). Ms. Plaintiff A did not comply with these recommendations because there "was nothing really to comply to." (TT: p. 151).

Plaintiff admitted that since 1995, she had been making an income, but did not file any income tax reports (TT: p. 172). Plaintiff currently has a website from which she sells and breeds her dogs (TT: p. 173). Plaintiff testified that her veterinarian did not see her horse

Veil from 1995 to 1998 (TT: p. 181).

After plaintiff's arrest in 1998, Dr. Vet #2 gave Dr. Vet recommendations on how the horse should be treated and cared for (P. 204-205). He recommended that plaintiff should buy or maintain something on the property to hold the hay for the horse to eat out of. He recommended that a pelleted diet of concentrated grain be added to his diet to supplement his diet. He recommenced certain medications for the horse to treat lice, three treatments at two week intervals. He recommended that a farrier come every eight weeks. He recommended floating the horses's teeth, and deworming the horse every four months (TT: p. 242-243). Plaintiff did not follow any of these recommendations (TT: p. 205-206).

Plaintiff testified that when Trooper Defendant B was on her property on April 17, 1998, Trooper Defendant B had to ask plaintiff numerous times to walk with him to his trooper car (TT: p. 247). Once at the trooper car, Trooper Defendant B had to ask plaintiff numerous times to place her feet in the car (TT: p. 247).

Plaintiff testified on rebuttal that, as opposed to what Witness 3 had testified to in Court, Trooper Defendant B's demeanor during arrest was not professional, but more like a "mute anger" (TT: p. 1201). Plaintiff testified that Witness 1 and Witness 2's testimony regarding the horse's condition, specifically with respect to the open sores, was incorrect (TT: p. 1209).

C. The Testimony of Witness 1

On April 17, 1998, Mr. Witness 1 walked into Troop F headquarters with Witness 2 to file a complaint (TT: p. 292). He first met with a desk officer, and then met with Trooper Defendant B (TT: p. 292-293).

Ms. Witness 2 stated to Trooper Defendant B that the horse was not being provided with proper food, and that the horse was not being taken care of properly (TT: p. 293). Mr. Witness 1 told Trooper Defendant B that he had a concern for the general health care of the horse, that there was hair loss and scabbing (TT: p. 294-295). Mr. Witness 1 provided Trooper Defendant B with a typed, sworn statement containing information about the horse and Mr. Witness 1's prior involvements with the horse. This statement also includes Mr. Witness 1's extensive credentials (TT: p. 295-296).

At the barracks on April 17, 1998, Mr. Witness 1 spoke with the troopers and showed them photographs (TT: p. 317). The trooper stated that he was going out to plaintiff's property, but before doing so had Ms. Witness 2 fill out a supporting deposition (TT: p. 317).

During the meeting with Trooper Defendant B, Trooper Defendant B asked Mr. Witness 1 questions, such as whether Mr. Witness 1 could be more explicit about the condition of the horse, what would be the signs of a horse that was neglected or having problems (TT: p. 342).

The sworn statement Mr. Witness 1 gave to Trooper Defendant B included a page of credentials that talked of Mr. Witness 1's experience with horses (TT: p. 360-361). During the interview on April 17, Trooper Defendant B asked a lot of detailed questions with respect to the care of the horse. (TT: p. 362). After their initial interview, Trooper Defendant B indicated that he was going out to the property to continue the investigation. Trooper Defendant B did not say he was going to plaintiff's property to arrest her (TT: p. 363). At no time during his meetings with Trooper Defendant B did Mr. Witness 1 talk about ill-will

he had towards the plaintiff. Mr. Witness 1 does not have ill-will or bad feelings about the plaintiff (TT: p. 365).

While on plaintiff's property on April 18th, Mr. Witness 1 spoke to the veterinarian on the property, Dr. Vet #2. Dr. Vet #2 indicated that the horse had a very bad infestation with lice, and that you could see the lice moving around the horse (TT: p. 367). The vet also stated that the horse looked between 350-400 pounds underweight (TT: p. 367).

On cross-examination, Mr. Witness 1 testified that the horse, in 1998, had deep cracks in its hooves. He also testified that hair loss on a horse signifies malnutrition and parasite problems (TT: p. 832-833). Mr. Witness 1 explained that keeping hay on the ground for a horse to eat can lead to moldy hay, which could kill a horse (TT: p. 834). Mr. Witness 1 was questioned about seasonal weight loss in a horse (TT: p. 852-855). He was also questioned about the contents of the statement that he provided the Utopia State Police (TT: p. 863-864).

D. The Testimony of Trooper Thomas Defendant B

On April 17, 1998, Trooper Defendant B went to plaintiff's property in uniform (TT: p. 382). He went alone (TT: p. 382). He did not have an arrest warrant or a search warrant (TT: p. 383). On that day, Trooper Defendant B arrested plaintiff for animal cruelty and resisting arrest (TT: p. 383-384). Trooper Defendant B was made aware that both these charges were dismissed by the Town of Towns Justice Court on July 2, 1998. However, he never attended court with respect to either of these charges (TT: p. 384). As of April 17, 1998, Trooper Defendant B had no experience with horses, and no training with respect to horses (TT: p. 391).

Trooper Defendant B testified that two complainants walked into Troop F on April 17, 1998, and spoke with Trooper X (TT: p. 486) Trooper X then advised Trooper Defendant B of the complaint, and was advised by Trooper X, who was working the front desk, that there was an animal cruelty type of complaint, and was given a brief synopsis (TT: p. 486). The complainants were Witness 1, Witness 2 and her daughter (TT: p. 384-385). Witness 2 told Trooper Defendant B, in substance, that she believed that the horse was not being provided proper food, that the horse was not being taken care of, and answered several of Trooper Defendant B's questions (TT: p. 386). Mr. Witness 1 told Trooper Defendant B that there was a horse on Town Road that was being neglected as far as being provided food and general health care, and that the horse looked thin with some patchiness on the skin, information about bugs he saw on the horse, and that the horse had cracked hooves (TT: p. 387-389). Trooper Defendant B did not recall if Witness 1 had told him that day about his 1995 contact with plaintiff (TT: p. 389-390).

Trooper Defendant B was also shown photographs at the barracks from the two walk-in complainants (TT: p. 391). Mr. Witness 1 indicated that he had significant experience with horses, and he explained the significance of the photographs, that the horse was in poor condition, and that the horse was underweight (TT: p. 392).

Both complainants provided statements to Trooper Defendant B (TT: p. 488). He learned of the complainant's extensive credentials with respect to horse car (TT: p. 491, 493). Both statements gave details as to the condition of the horse (TT: p. 494). Trooper Defendant B assessed the credibility of both complainants and had no reason to doubt their

credibility (TT: p. 494).

After receiving this information from the complainants, Trooper Defendant B consulted with Trooper X, and they tried to look up the applicable section of the law (TT: p. 495). They found the section in the Agriculture and Markets law (TT: p. 496).

After speaking with Trooper X, Trooper Defendant B went out to the property. He had not yet made the determination as to whether he was going to arrest plaintiff (TT: p. 499).

Trooper Defendant B left the barracks to further investigate Mr. Witness 1's claim, with the intent to take a look at the horse (TT: p. 395). Trooper Defendant B arrived at the property, and examined the animal from approximately 20 feet away (TT: p. 396). Trooper Defendant B also spoke with an unknown man outside plaintiff's property. The man was a stranger to Trooper Defendant B (TT: p. 396). Trooper Defendant B spoke to this man initially to confirm plaintiff's address (TT: p. 500). Trooper Defendant B asked this man if he had any experience with horses, to which the man replied yes. Trooper Defendant B then asked this man about the horse, and this man told Trooper Defendant B that the horse looked like it was in poor condition (TT: p. 502).

Trooper Defendant B observed the horse and noticed protruding areas on the horse (TT: p. 397). The horse stood approximately 15-20 feet from Trooper Defendant B (TT: p. 502). Trooper Defendant B saw what was told to him by the complainants, the protrusion of the ribs, the bloated belly, the patchiness of the skin, and the hooves (TT: p. 503). This was the first arrest that Trooper Defendant B made for animal cruelty (TT: p. 398).

After making his own observations of the horse, Trooper Defendant B decided that they would issue plaintiff an appearance ticket. An appearance ticket is a non-custodial arrest. A non-custodial arrest is an arrest, but as opposed to taking someone into custody, you obtain quite a bit a information from them and you give them an appearance ticket, which is basically a summons to appear in court. It is an arrest, you are just not taking the individual into custody (TT: p. 503). It is within the trooper's discretion as to whether or not you give an appearance ticket or take the individual into custody (TT: p. 504). Trooper Defendant B was not required to have an arrest or search warrant when he entered plaintiff's property on April 17, 1998 (TT: p. 506).

When Trooper Defendant B got to the house, he saw Witness 3 (TT: p. 400). Prior to April 17, 1998, Trooper Defendant B did not know Witness 3, and only met with her on one occasion after this date (TT: p. 401). Witness 3 and Witness 3's daughter were standing in the driveway near plaintiff's residence (TT: p. 404). Trooper Defendant B stated to plaintiff why he was there (TT: p. 405). There was a lot of commotion once Trooper Defendant B pulled up and exited the car, so he did not precisely remember the conversation between himself and plaintiff (TT: p. 406).

Trooper Defendant B attempted to ask who owned the property, and who owned the horse, but Ms. Plaintiff A became very agitated, asking Trooper Defendant B what he was doing on property, how he got onto the property, and telling him he could not be there (TT: p. 509). Plaintiff began screaming and was not cooperating with Trooper Defendant B (TT: p. 509). Trooper Defendant B could not get any of the necessary pedigree

information from plaintiff. (TT: p. 509). At some point she shouted to someone else to come to her because she was being arrested (TT: p. 510). At this point, Trooper Defendant B had not taken his handcuffs out, and he did not state that they were going to the barracks (TT: p. 511).

Approximately one to two minutes after arriving on the property, Witness 4 came over to plaintiff and Trooper Defendant B (TT: p. 411). Plaintiff was not yet cuffed (TT: p. 412). Witness 4 either asked "What the hell are you doing here" or "How the hell did you get onto the property", to which Trooper Defendant B responded "Don't come any closer". (TT: p. 412). Trooper Defendant B heard Witness 4 making references to the Nazis and the Gestapo (TT: p. 413). Trooper Defendant B tried to get Witness 4 to stop approaching by ordering him not to come any closer (TT: p. 414). Trooper Defendant B instructed Witness 4 to stay where he was (TT: p. 510-511). Witness 4 did not stay where he was. He continued to walk towards Trooper Defendant B. Trooper Defendant B continued to instruct Witness 4 not to come any closer, and Witness 4 ignored these orders (TT: p. 511). Once Witness 4 was within 3 feet from Trooper Defendant B, Witness 4 spit at Trooper Defendant B. At this time, Trooper Defendant B arrested Witness 4 (TT: p. 414). Witness 4 complained that his handcuffs were too tight. After they had left the premises and returned again, Trooper Defendant B changed Witness 4's cuffing position (TT: p. 415).

After placing Witness 4 in the police car, Trooper Defendant B instructed plaintiff that she would be cuffed. Plaintiff walked away, stepped away, and would avoid Trooper Defendant B (TT: p. 421). He received no cooperation. Plaintiff continued to say that she could not

be arrested. She did not give Trooper Defendant B her hands (TT: p. 515). Once Trooper Defendant B had a cuff on one wrist, there was a struggle trying to get the other wrist (TT: p. 421). Plaintiff was still irate and screaming (TT: p. 514). Trooper Defendant B continued to ask for her other hand, but plaintiff was flailing it around. Trooper Defendant B was finally able to grab it and put the second cuff on (TT: p. 515).

Upon cuffing plaintiff, Trooper Defendant B grabbed plaintiff's upper arm (TT: p. 422). Witness 3 was directly in front of Trooper Defendant B and plaintiff at this time (TT: p. 422). Ms. Plaintiff A responded to this by saying, "You just grabbed my breast" (TT: p. 422). After plaintiff stated this, Trooper Defendant B shifted his arm, and, in sum and substance, stated "you see, I am not touching her breast." (TT: p. 423). Plaintiff was pleading with Trooper Defendant B not to be arrested (TT: p. 424). Trooper Defendant B led plaintiff to the car. Trooper Defendant B continued to escort plaintiff to the car, and plaintiff continued screaming "you can't arrest me" and trying to walk away. Eventually, Trooper Defendant B got her to his car (TT: p. 518). He opened the door, and eventually, plaintiff sat down in the car (TT: p. 425). It was only after Trooper Defendant B instructed Ms. Plaintiff A several times to sit down that she sat down (TT: p. 425-426). Plaintiff did not tell Trooper Defendant B that it was hard for her to enter the car, or that she had five spinal operations, prior to entering the car (TT: p. 426).

At this point, Ms. Plaintiff A was sitting in the car with her feet still outside the car (TT: p. 427). Trooper Defendant B gave plaintiff

several instructions to put her feet in the car, and plaintiff ignored it and continued to speak with Witness 3 (TT: p. 428). After approximately the third time of instructing plaintiff to put her feet in the vehicle, Trooper Defendant B instructed her again that if she did not put her feet in the car, he would have to do it for her (TT: p. 429). Plaintiff kept her feet in the ground (TT: p. 429). Trooper Defendant B then reached down with both hands, placed them around both of her ankles and put her feet in the car (TT: p. 429-430). After Trooper Defendant B put her feet in the car, he witnesses plaintiff fall backwards in a dramatic theatrical way (TT: p. 430). At this time plaintiff stated "You idiot, I've had five back surgeries." (TT: p. 432).

After plaintiff was placed in the vehicle, on the way back to the trooper barracks, plaintiff advised Trooper Defendant B that she had left something on the stove (TT: p. 438). After driving approximately five minutes, Trooper Defendant B turned the car around to go back to plaintiff's house (TT: p. 440). Upon arriving at her home, Trooper Defendant B instructed plaintiff that she was to go into her home and turn off the stove, and come back outside (TT: p. 440). Plaintiff remained in her home for sometime between five and ten minutes (TT: p. 441). Trooper Defendant B hollered from plaintiff to come outside (TT: p. 441). When plaintiff came from inside her home, she had a phone with her, and stated to trooper Defendant B that her veterinarian was on the phone (TT: p. 441-442). Plaintiff handed Trooper Defendant B the phone, he took it, hung it up, and placed in on the vehicle (TT: p. 442). Trooper Defendant B did not feel it was the appropriate time to speak with anybody, due to the fact that the arrest was complete, plaintiff was

already in custody, and he did not know who was on the other end of the telephone line. Trooper Defendant B instructed plaintiff to get back in the vehicle and trooper Defendant B drove back to the trooper barracks (TT: p. 524). When plaintiff exited the car to go back to her house, she did not appear to be in any pain (TT: p. 525). When she was in the house moving about, she did not appear to be in any pain (TT: p. 525). Plaintiff did not ask to the emergency room (TT: p. 525). After Trooper Defendant B put the phone down, he handcuffed plaintiff, and they returned to the car (TT: p. 445).

Upon arrival at the barracks, Trooper Defendant B walked to the door of the patrol room, and asked Trooper X to contact a sergeant because of the verbal allegations plaintiff had make against Trooper Defendant B. (TT: p. 527). Other than these verbal complaints, plaintiff never filed a formal complaint against Trooper Defendant B (TT: p. 527). Once Trooper Defendant B notified a sergeant in this type of situation, Trooper Defendant B's part in the case ceases (TT: p. 528).

Trooper Defendant B placed Ms. Plaintiff A into the juvenile room, and he remained right outside the juvenile room (TT: p. 446). The juvenile room is a glass enclosed room in the patrol room. You could see in the juvenile room as well as you could see out (TT: p.447). Trooper Defendant B was speaking with Trooper X requesting a sergeant to return to the station (TT: p. 450). At no time during the next 30 minute time frame did plaintiff call out for medical attention (TT: p. 450).

E. The Testimony of Witness 2

Ms. Witness 2 had a background in horse care. Ms. Witness 2 and her daughter inherited a horse, and to learn more, together they got involved

with the 4H, and joined a horse club. Ms. Witness 2 became a co-leader with the horse club, and learned how to care for horses and what to do to maintain horses (TT: p. 877). There were horse science levels, levels one through nine. As a leader, Ms. Witness 2 got a manual, and would guide the kids through their instruction (TT: p. 877). The training started with basic information, such as the five basic colors of the horse, grooming materials, first aid, and things to look for in a healthy and sick horse (TT: p. 878). It gets more intense, when it gets into all the organs of the horses, parasites, internal and external. Feeds and grains was a major part of the education (TT: p. 879). Caring for the hooves was another level (TT: p. 879).

In Spring, 1998, Ms. Witness 2 traveled on Town Road, and her daughter would always notice the mare in the field and say that the horse was awfully skinny (TT: p. 881). Ms. Witness 2 thought that the horse's weight was a little extreme, even though horses tend to lose some weight during the winter (TT: p. 881). There are supplements and different mashes you can give them when this happens (TT: p. 881).

Ms. Witness 2 and her daughter kept an eye on the horse, and it did not seem like she was gaining any weight. On April 15, 1998, Ms. Witness 2 decided to pull over to take a better look at the horse (TT: p. 881). When the horse came over to the fence, she saw that the horse was not healthy. The horse was in bad shape. The hooves were cracked, she had sores from rubbing, the ribs stuck out, her belly was so rounded, which can be attributed to poor nutrition or parasites, her buttocks area was very pointy, her backbone was very rigid (TT: p. 883-884).

Ms. Witness 2 went back to her home, and made many phone calls out

of concern for the horse. Ms Witness 2 contacted Animal Rescuer. Animal Rescuer runs an animal rescue center (TT: p. 884).

Animal Rescuer referred Ms. Witness 2 to Witness 1. She called him that same day (TT: p. 885). Mr. Witness 1 asked Ms. Witness 2 to write out a statement and fax it to him (TT: p. 886). Ms. Witness 2 wrote out a statement and faxed it to him (TT: p. 886). Mr Witness 1 also asked Ms. Witness 2 to take pictures of the animal. Ms. Witness 2 and her daughter went back to the property and took pictures of the horse (TT: p. 887).

Mr. Witness 1 told Ms. Witness 2 that he would be down to see the horse the following day. On April 16, 1998, Witness 1 came to the house. They started making phone calls, and then went back to see the horse (TT: p. 894-895). Mr. Witness 1 left that night, and returned the following day (TT: p. 895). On the 17th, Ms. Witness 2 helped type a statement for Mr. Witness 1, and then they went together to the police barracks (TT: p. 895).

When they entered the barracks, they met with Trooper X. Trooper X spoke with them, and then took them into a conference room. (TT: p. 895). Trooper Defendant B came into the conference room as well, but she does not remember when (TT: p. 895). The troopers looked at the pictures that Mr. Witness 1 and Ms. Witness 2 brought to the barracks. Ms. Witness 2 wrote out a statement for the police (TT: p. 895-896). Ms. Witness 2 told the state police about the observations that she had made with respect to the horse, and showed the photographs she took of the horse (TT: p. 896). Mr. Witness 1 also made statements about what he had observed (TT: p. 896).

After Ms. Witness 2 met with Trooper X and Trooper Defendant B, the troopers had some discussions, and they felt it was warranted to go out and investigate themselves (TT: p. 899).

Ms. Witness 2 was asked about one of Mr. Witness 1's picture exhibits, which was taken on April 18, 1998, which showed that the horses hay was spread all over the ground, and it was not fresh hay. It was subjected to weather wetness, which causes mildew, and mildew to a horse causes colic (TT: p. 910). There was mold and mildew on the hay in the pictures (TT: p. 911). Mr. Witness 1 also had Ms. Witness 2 go through the pictures to identify sores, hair loss, and hoof problems (TT: p. 910-918). It was Ms. Witness 2's opinion that this horse needed supplements, needed care, need a veterinarian, needed a farrier, and needed love (TT: p. 919).

F. The Testimony of Sergeant Sgt. Y

On April 17, 1998, Sergeant Sgt. Y received a radio transmission from Trooper X that his presence was required at the station, regarding a problem that they were having with a prisoner (TT: p. 1065). When Sergeant Sgt. Y arrived at the barracks, he attempted to speak with the plaintiff, and she did not respond (TT: p. 1067). At the hospital, Sergeant Sgt. Y attempted to interview plaintiff again, and she again refused to speak with him (TT: p. 1075).

Sergeant Sgt. Y, from the time he arrived at the barracks that evening, was in charge of plaintiff's criminal investigation, as well as the internal investigation of the allegations made against Trooper Defendant B (TT: p. 1071).

Sergeant Sgt. Y testified that it is Utopia State Police procedure that when a complaint is made, a trooper would interview the complainant, assess their credibility regarding the complaint, and then usually take a sworn statement, and follow up with further investigative acts (TT: p. 1081). The statement that Witness 1 gave Trooper Defendant B constitutes a sworn statement due to the writing at the end of the statement: "I understand any false statement is a class A misdemeanor by New York State Law" (TT: p. 1083). In this case, an example of direct knowledge would be Trooper Defendant B's observation of the horse, while he was on the property (TT: p. 1082). Trooper Defendant B could make an arrest based on his own observations, without having the sworn statements (TT: p. 1082).

Sergeant Sgt. Y is familiar with Agricultural and Markets law Article 26, the section on animal cruelty (TT: p. 1086). There is no law

or existing Utopia State Police procedure that requires or even recommends that a state trooper speak to a suspect's veterinarian prior to arresting the suspect for animal cruelty (TT: p. 1086). There is no state police procedure or statute that states that in order to evaluate a case for probable cause, a trooper must interview a suspect's veterinarian prior to arresting that suspect for animal cruelty (TT: p. 1086).

In Sergeant Sgt. Y's experience, it is State police procedure that when a suspect refuses to answer questions in relation to a desk appearance ticket, the trooper would make a summary arrest and bring the suspect back to the station (TT: p. 1089-1090). Additionally, if a person is told he or she is under arrest, and does not want to go willingly with a trooper, he or she can be charged with resisting arrest (TT: p. 1090). A trooper does not need an arrest warrant to go out to suspect's property and effectuate an arrest for animal cruelty (TT: p. 1093). A trooper does not need a search warrant to walk or drive up a driveway to effectuate an arrest for animal cruelty (TT: p. 1094).

On cross examination, Sergeant Sgt. Y testified that just allowing an animal to come into this condition would be a violation of the statute, even if a veterinarian was contacted (TT: p. 1097-1098). Sergeant Sgt. Y was asked about the blotter entry in detail (TT: p. 1103-1111). Sergeant Sgt. Y was asked if plaintiff provided the Sergeant with her version of events (TT: p. 1116). The Sergeant replied that plaintiff was not speaking with the Sergeant, but was talking out loud in the presence of everyone (TT: p. 1116). First she said that she was literally picked up off the ground and thrown head first into the trooper

car. A few minutes later, she changed her story to say that she was sitting on the seat of the police car and then trooper Defendant B lifted her legs and put them in a vehicle (TT: p. 1117). Sergeant Sgt. Y testified that a review of Witness 4's statement taken at the barracks that same evening would not have changed the Sergeant's opinion as to whether there was probable cause to arrest Ms. Plaintiff A (TT: p. 1137).

G. The Testimony of Trooper X

On April 17, 1998, Trooper X was assigned desk duty and met with Witness 1 and Pati Witness 2. He took information from them and assigned the case to Trooper Defendant B (TT: p. 1142). He gave the complaint to trooper Defendant B and advised him of the situation. He introduced Trooper Defendant B to the complainants and the Complainants and Trooper Defendant B went into a small area of the lobby where they discussed the case (TT: p. 1143). About 20-25 minutes later, Trooper Defendant B came out of the room and talked to Trooper X about what was going on. Together, they went over the animal cruelty section of the Agriculture and Market law, and then Trooper Defendant B left the building to observe the animal (TT: p. 1143-1144).

About 25 minutes or so later, Trooper Defendant B arrived back at the station with the plaintiff, and Trooper X recalls seeing Trooper Defendant B take plaintiff to the juvenile room (TT: p. 1144). Trooper Defendant B asked Trooper X to contact a Sergeant because of the allegations plaintiff was making against Trooper Defendant B. Trooper Defendant B also asked Trooper X to contact an ambulance (TT: p. 1144-1145). Trooper X walked over to the patrol room and observed the plaintiff lying on the ground with her eyes closed. Plaintiff did not

respond to Trooper Defendant B calling her name, so Trooper X went out and got an ammonia inhalant (TT: p. 1145). He gave the inhalant to Trooper Defendant B, and when Trooper Defendant B went to bend over, plaintiff said, "You don't use them on a conscious person." (TT: p. 1145).

H. The Testimony of Witness 3

Witness 3 first met the plaintiff in 1996, when she picked up a puppy from plaintiff's home. On April 17, 1998, Witness 3 was on plaintiff's property because when she got the puppy from plaintiff in 1996, it was on Breeder's terms, which meant that she had to bring the dog to plaintiff to breed, and plaintiff got the puppies (TT: p. 692). Witness 3 got to plaintiff's property with her dog at approximately 6:45 p.m. Approximately one-half hour later, a trooper car drove up and parked in front of plaintiff's house (TT: p. 693). The trooper got out an approached Ms. Plaintiff A, and asked her if it was her horse that he had seen from the road (TT: p. 693). Plaintiff said yes, and asked if there was a problem (TT: p. 693). Trooper Defendant B responded that he had reason to think that the animal might be abused (TT: p. 693). Trooper Defendant B then stated that he would like her to go with him for questioning. He asked her to get in the car (TT: p. 693). When Trooper Defendant B told plaintiff to come with him, plaintiff stated "I can't go now" (TT: p. 695-696). Then the two walked away from Witness 3 (TT: p. 696)

Plaintiff and Trooper Defendant B were standing in front of the police car, and Witness 4 came from the rear of the house, approached the plaintiff and Trooper Defendant B, and said "What's going on"? (TT: p.

696-697). Plaintiff said "He wants me to go to the station house". At that point, Witness 4 said something to the effect of "Nazi" or "Gestapo" and spit on the ground in front of the trooper (TT: p. 697). Witness 4 spit approximately two to three feet in front of the trooper (TT: p. 697). Trooper Defendant B then told Witness 4 that he was under arrest and put him in handcuffs (TT: p. 698). After the trooper put Witness 4 in the car, he turned to plaintiff and told the plaintiff that she was under arrest. Witness 3 does not remember when Trooper Defendant B put the handcuffs on plaintiff. It was unremarkable to her (TT: p. 698). Once in handcuffs, Trooper Defendant B put her back in the patrol car, and plaintiff yelled to Witness 3 that would she please call a friend of hers and an attorney (TT: p. 699). They left the property, and Witness 3 got the phone from the truck, and made the calls for plaintiff (TT: p. 700).

After approximately 15-20 minutes, the patrol car came back, the Trooper let Witness 4 out of the car, moved his handcuffs from the back to the front, and Witness 3 learned that plaintiff had left something cooking on the stove (TT: p. 701). Plaintiff went into her house and was in there for approximately five to ten minutes, while the trooper called for her to come out several times (TT: p. 702). Plaintiff eventually came out with a phone in her hand and told Trooper Defendant B that she had a vet on the phone, and she wanted him to get on the phone (TT: p. 702). Trooper Defendant B took the phone out of her hands and put it down (TT: p. 702-703). Witness 3 recalled Ms. Plaintiff A telling Trooper Defendant B that the horse was under a veterinarian's care, but she does not remember when plaintiff said it (TT: p. 703).

After Trooper Defendant B put the phone down, Ms. Plaintiff A kept saying "I can't go now" (TT: p. 703). Plaintiff, because the dogs had now separated, go a rope, and gave Witness 3 back her dog, and put her male dog back in the house (TT: p. 703). Trooper Defendant B said "Let's go", and although plaintiff did not really resist physically, she did not want to go, she was yelling, she was loud, she was upset (TT: p. 703). The Trooper then wound up having to escort her to his vehicle (TT: p. 704). He was holding her upper right arm with his left hand (TT: p. 704). When they got to the car, Trooper Defendant B kept telling plaintiff to get in the car, and plaintiff did not want to get in the car (TT: p. 706). He kept telling her, and then plaintiff stated "Stop touching my breast, you are touching my breast" (TT: p. 706). She said it again, at which time Trooper Defendant B raised plaintiff's arm up a little bit with his hand and said to Witness 3, "Well, you can see that I am not touching her breast." (TT: p. 706). At that point, she sat down in the car, with her feet on the ground outside the car (TT: p. 706). Trooper Defendant B told her two or three times to get in the car, and she just sat there. The Trooper Defendant B told her, "If you don't get into the car, I am gonna have to put you in the car." She thought he said that twice (TT: p. 706). She did not move, so Trooper Defendant B bent down and picked up her legs, and swung then into the car (TT: p. 707).

Ms. Plaintiff A was asked how many time she saw Trooper Defendant B handcuff plaintiff, to which she responded "I know he did, but I don't remember actually watching it. I've been try to remember, but I don't" (TT: p. 708).

On cross examination, Witness 3 testified that when Trooper Defendant B first approached plaintiff, he was not carrying handcuffs. He did not say he was going to handcuff her. He did not say she needed handcuffs. In fact, when he approached her, he was asking her questions (TT: p. 710).

Witness 3 described Trooper Defendant B's demeanor as professional, matter of fact, calm, and not excited at all (TT: p. 710). At no time during Witness 3's observations of Trooper Defendant B did his demeanor change from professional, matter of fact, calm, and not excited at all, and Witness 3 was amazed by this, because the situation had gotten heated (TT: p. 710).

Soon thereafter Witness 4 came from behind the house, and he walked towards plaintiff and Trooper Defendant B (TT: p. 711). Then, from approximately five or six feet, Witness 4 spit in Trooper Defendant B's direction. Prior to Witness 4 spitting, she does not recall Witness 4 coughing (TT: p. 711). At this point, Ms. Plaintiff A was still not in handcuffs (TT: p. 712).

Witness 3 had clear vision of everything that whole time that she was there (TT: p. 712). Plaintiff was very agitated (TT: p. 712-713). Plaintiff got louder and louder, and more excited as time progressed (TT: p. 713). Plaintiff was very unhappy when the Trooper first drove onto the property, and was extremely annoyed that he was there (TT: p. 713). She was not cooperative at all, as far as Witness 3 recalls (TT: p. 713). It was not until after Witness 4 was arrested that plaintiff was placed in handcuffs (TT: p. 714-715).

ARGUMENT

POINT I

TROOPER DEFENDANT B IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Rule 50(b) gives this Court a last chance to order the judgment that the law requires. 9 Wright & Miller Federal Practice and Procedure: Civil § 2521 at 537 (1971 ed.). Such a judgment may be based on a pure question of law, Kladis v. Brezek, 823 F.2d 1014, 1017 (7th Cir. 1987), or upon consideration of whether the evidence, viewed in the light most favorable to the non-movants, without considering credibility or weight, reasonably permits only a conclusion in the movant's favor. Jund v. Town of Hempstead, 941 F.2d 1271, 1290 (2d Cir. 1991).

Here, Trooper Defendant B is entitled to judgment as a matter of law on plaintiff's only successful claim, the right to be free from unlawful arrest, because it is clear from all the testimony that Trooper Defendant B had probable cause to arrest the plaintiff for both animal cruelty and resisting arrest. Even assuming, arguendo, that this Court finds that, as a matter of law, Trooper Defendant B did not have probable cause to arrest plaintiff, the credible evidence supports that Trooper Defendant B is entitled to qualified immunity.

With respect to the issue of probable cause, the jury was instructed the Fourth Amendment of the United States Constitution makes it a violation to arrest a person without probable cause. Jury Instructions, p. 1385. The jury was instructed that on the issue of probable cause, it is the defendants that bear the burden, not the plaintiff. (Jury Instruction, p. 1385). The jury was instructed that probable cause exists if a reasonably prudent person in the position of the defendants

would have believed, on the basis of the facts known to the defendants at the time, that plaintiff committed the violations of animal cruelty and resisting arrest. (Jury Instruction, p. 1386). The jury was also instructed that probable cause exists if the facts and circumstances known to the reasonably prudent person, and of which he had reasonable, trustworthy information, are sufficient to warrant a prudent person in believing that the suspect has committed a crime. (Jury Instruction, p. 1386). It was further explained to the jury that the fact that the charges against the plaintiff are ultimately dismissed is not evidence that defendant Defendant B lacked probable cause at the time of arrest. (Jury Instruction, p. 1386). The instructions then explained the elements of the crimes of animal cruelty and resisting arrest. (Jury Instructions, p. 1386).

It is clear and undisputed, based on the above facts elicited through the testimony from all witnesses, that based on the sworn statements Trooper Defendant B received from both Witness 2 and Witness 1, when taken together with his own observations, it was reasonable to believe that plaintiff was, in fact, committing animal cruelty.

A. Probable Cause to Arrest

Probable cause is a "complete defense to an action for false arrest." Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996). The Court must consider the "totality of the circumstances" when determining if probable cause exists. See Jakes v. Meybaum, 99 Civ 1204 (CLB)(S.D.N.Y. December 14, 1999)(Breiant, J.)(citing Illinois v. Gates, 462 U.S. 213 (1983)).

Probable cause exists "when facts and circumstances within the

officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." See Brown v. The City of New York, 2000 U.S. Dist LEXIS 18266 *6 (S.D.N.Y. December 19, 2000)(citing Weyant v. Okst, 101 F.3d 845, 852 (2d. Cir. 1996); United States v. Fox, 788 F.2d 905, 907 (2d Cir. 1986)).

"It is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness." Martinez v. Simonetti, 202 F.3d 625, 634 (2d Cir. 2000) (citation omitted). In evaluating the probable cause determination, "we consider the facts available to the officer at the time of the arrest." See Brown v. The City of New York, 2000 U.S. Dist LEXIS 18266 *6 (S.D.N.Y. December 19, 2000)(The police had probable cause based on the complainant's report of an attempted robbery as well as their own observation of plaintiff's disposal of an illegal weapon); See also Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 128 (2d Cir. 1997) (citations omitted).

Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest. See Brown v. The City of New York, 2000 U.S. Dist LEXIS 18266 *6 (S.D.N.Y. December 19, 2000)(citing Ricciuti, 124 F.3d at 128; Krause v. Bennett, 887 F.2d 362, 372 (2d Cir. 1989)("It is up to the factfinder to determine whether a defendant's story holds water, not the arresting officer.")); See also Campbell v. Giuliani, 2001 U.S. Dist. LEXIS 609 (E.D.N.Y. January 21, 2001)(police have no duty to investigate an exculpatory

statement of the accused, and their refusal to do so does not defeat probable cause)(citing Torchinsky v. Siwinski, 942 F.2d 257, 264 (4th Cir. 1991); Dukes v. City of New York, 879 F. Supp. 335, 343 (S.D.N.Y. 1995); Grant v. City of New York, 848 F. Supp. 1131, 1135 (S.D.N.Y. 1994); Steiner v. City of New York, 920 F. Supp. 333, 338 (E.D.N.Y. 1996)).

Nor does the evidence required to establish probable cause need to reach the level necessary to support a conviction. Even subsequent acquittal would have no bearing on the determination of whether probable cause to arrest existed. See Brown v. The City of New York, 2000 U.S. Dist LEXIS 18266 *6 (S.D.N.Y., December 19, 2000)(citing Krause, 887 F.2d at 370). Because defendant Trooper Defendant B had probable cause to arrest plaintiff, his false arrest claim fails.

1. Animal Cruelty

The facts uncovered during Trooper Defendant B's investigation are sufficient to establish probable cause for arrest for the violation of Agriculture and Markets Law, Article 26, section § 353, which states:

> A person who overdrives, overloads, tortures, or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or another, or deprives any animal of necessary sustenance or drink, or causes, procures, or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated, or killed, or to be deprived or necessary food or drink, or who willfully sets foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by fine of not more that one thousand dollars, or by both.

(See Sabatini declaration; Agricultural and Market law, ¶ 1, Exhibit A).

Trooper Defendant B used the totality of all his findings in

reaching his conclusion to place Ms. Plaintiff A under arrest for animal cruelty. Here, the totality of the information that Trooper Defendant B was provided with, including his own observations and investigation, gave Trooper Defendant B an abundance of evidence to support making an arrest of the plaintiff.

Firstly, Trooper Defendant B was given information on the horse from two individuals who had training and experience with horses, Mr. Witness 1 and Ms. Witness 2.

Mr. Witness 1 testified that he first observed the horse on April 16, 1998. He saw that the horse was approximately 400 pounds underweight, there were large areas of hair loss, the skin was scaled and scabby, with bleeding and lymph fluid on the face. There was lice on the horse (Witness 1, TT: p. 804). On April 17, 1998, Mr. Witness 1 and Witness 2 went to the trooper barracks to file a complaint about the horse (Witness 1, TT: p. 294, 295, 317). Mr. Witness 1 told Trooper Defendant B that he had concern for the health of the horse, and showed photographs of the horse (TT: p. 294, 295, 317). Mr. Witness 1 also provided Trooper Defendant B with a typed sworn statement containing information about the horse (Witness 1, TT: p. 295-296). The sworn statement also included a page of credentials that talked of Mr. Witness 1's experience with horses (TT: p. 360-361).

In addition, Trooper Defendant B asked Mr. Witness 1 specific questions about the horse's condition and what would be signs of a horse that was neglected or having problems (Witness 1, TT: p. 342). After their interview, Trooper Defendant B indicated that he was going out to investigate the allegations.

Ms. Witness 2 testified that she has an extensive background in horse care (Witness 2, TT: p. 877). On April 15, 1998, Ms. Witness 2 and her daughter stopped to look at the horse. Ms. Witness 2 saw the hooves were cracked, the horse had sores, the ribs stuck out, the belly was rounded, the buttocks were pointy and the backbone was rigid (Witness 2, TT: p. 883-884). On April 17, 1998, at the trooper barracks, Ms. Witness 2 told the state police about the observations she made, showed the troopers photographs she took of the horse and wrote out a statement documenting her observations of the horse for the police (Witness 2, TT: p. 895-899).

After speaking with both complainants, Trooper Defendant B assessed the credibility of both complainants and had no reason to doubt their credibility (Defendant B, TT: p. 491-495). Trooper Defendant B did an investigation in the barracks with the assistance of other Troopers to determine which, if any, sections of the Penal Law or Agricultural Law this horse owner was violating (Defendant B, TT: p. 495, 496; X, TT: 1143, 1144).

Next, Trooper Defendant B went to examine the plaintiff's horse. He spoke with one of plaintiff's neighbors, and Trooper Defendant B asked this man if he had any experience with horses, and this man told Trooper Defendant B that the horse looked like it was in poor condition (Defendant B, TT: p. 502). Trooper Defendant B then personally observed the horse, and found that the horse looked and acted as Mr. Witness 1 and Ms. Witness 2 had described. When he made his own observations, he saw protrusion of the ribs, the bloated belly, the patchiness of the skin, and the hooves (Defendant B, TT: p. 503).

All of these factors, when taken together, established that Trooper Defendant B acted reasonably when he determined that plaintiff should be arrested for the crime of animal cruelty.

Strikingly, there is evidence in the record that two veterinarians were in conflict as to the condition and treatment for plaintiff's horse. Plaintiff claims that her horse was not neglected, and that Dr. Vet, plaintiff's vet, supports this. Although plaintiff's veterinarian, Dr. Vet, stated that the horse was in relative good health and free of lice, there is testimony in evidence of a veterinarian who had an opposing view on the health of plaintiff's horse. Not only did Dr. Vet #2 find that plaintiff's horse had lice, (Witness 1, TT: p. 804), but Dr. Vet #2 suggested a series of treatments, including ways and means to supplement the horse's diet and care for the horses skin, all of which the plaintiff ignored (Plaintiff, TT: p. 151, 152, 205, 206). Clearly, if two veterinarians could not agree on the condition of the horse, Trooper Defendant B's act of arresting the plaintiff for animal cruelty cannot be deemed unreasonable or reckless.

Plaintiff argued during trial that Trooper Defendant B was reckless in not contacting plaintiff's veterinarian prior to placing plaintiff under arrest. As argued earlier, defendant's failure to speak with the veterinarian does not preclude a finding of probable cause. See Point I(A), supra. Furthermore, had defendant consulted plaintiff and her veterinarian on April 17, 1998 there would have been no reason for defendant to believe them over the expertise of Witness 1 and the observations he made that day with his own eyes concerning evidence of animal abuse. See Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 128

(2d Cir. 1997)(in dismissing false arrest claims against defendant officer, the court held that while the officer "would have been entitled to believe [plaintiff's] version of events... he was not required to do so".); See also, Witness 3 v. United States, 25 F.3d 98, 102 (2d Cir. 1994)(Probable cause can exist even where it is based on mistaken information, so long as the arresting officer acted reasonable and in good faith in relying on that information).

And lastly, with respect to plaintiff's argument that Trooper Defendant B was reckless by not calling plaintiff's veterinarian, we heard Sergeant Sgt. Y testify that he is familiar with the Agriculture and Market Law and the section on animal cruelty (Sgt. Y, TT: p. 1086). There is no law or existing Utopia State Police procedure that requires or even recommends that a state trooper speak with a suspect's veterinarian prior to an arrest for animal cruelty (Sgt. Y, TT: p. 1086). Accordingly, based on all the evidence, it is clear that Trooper Defendant B had probable cause to arrest plaintiff for animal cruelty.

2. Resisting Arrest

The testimony elicited from both Trooper Defendant B and Witness 3, together with testimony from the plaintiff, is sufficient to establish probable cause for arrest for the misdemeanor of Resisting Arrest, New York State Penal Law § 201.30, which states:

> A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person.

To attempt to prevent an arrest, for purposes of establishing the crime of resisting arrest under New York law, the person need not use physical force, but rather, need merely engage in some conduct with

intent to prevent officer from affecting arrest. See Reid v. City of New York, 736 F. Supp. 21 (1990); see also People v. Stevenson, 31 N.Y.2d 108 (1972)(defendant guilty of resisting arrest when officer told defendant he was under arrest and defendant said "No, for what?", showing a refusal to submit to authority of arresting officer when defendant was advised of arrest); See also People v. Blandford, 37 A.D.2d 1003 (3d Dept., 1971); See also People v. Bauer, 614 N.Y.S. 2d 871(1994)(resisting arrest when defendant refused to cooperate with officer, forcing officer to lift defendant from seated position and carry defendant to patrol car). In other words, the resistance by the defendant can be passive. See People v. Williams, 31 N.Y.2d 108 (1972)(resisting arrest where defendant's refusal to act as directed delayed defendant's own arrest and the arrest of others).

Trooper Defendant B's testimony clearly establishes that plaintiff was resisting arrest at all stages of the arrest process on her property. Trooper Defendant B arrived on plaintiff's property and exited his car. Trooper Defendant B began to ask her questions, but plaintiff became very agitated, telling him he could not be there (Defendant B, TT: p. 509). Plaintiff began yelling and not cooperating (Defendant B, TT: p. 509).

After placing Witness 4 into custody plaintiff was instructed that she would be cuffed. In response, she walked away, stepped away, avoiding Trooper Defendant B (Defendant B, TT: p. 421). Plaintiff continued to say that she could not be arrested and would not give Trooper Defendant B her hands (Defendant B, TT: p. 515).

After being cuffed, plaintiff continued pleading not to be arrested.

Trooper Defendant B led plaintiff to his car, but plaintiff continued yelling and trying to walk away. Eventually, Trooper Defendant B got her to his car (Defendant B, TT: p. 518). It was only after Trooper Defendant B instructed plaintiff several times to sit down that she sat down (Defendant B, TT: p. 425-426).

Ms. Plaintiff A sat in the car with her feet still outside the car. Trooper Defendant B gave plaintiff several instructions to put her feet in the car, and plaintiff ignored him. After approximately the third time of instructing plaintiff to put her feet in the vehicle, Trooper Defendant B instructed her again that if she did not put her feet in the car, he would do it for her. She did not respond, so Trooper Defendant B put her feet in the car (TT: p. 427-429).

Witness 3's testimony corroborates Trooper Defendant B's testimony. Witness 3 testified that when Trooper Defendant B arrived on plaintiff's property, plaintiff was very agitated, and got louder and louder as time progressed. Plaintiff was upset as soon as the trooper first drove onto the property, and was extremely annoyed that he was there (Witness 3, TT: p. 712-713). She was not cooperative at all (Witness 3, TT: p. 713). Witness 3 testified that when Trooper Defendant B arrived on plaintiff's property, when Trooper Defendant B told plaintiff to come with him, plaintiff stated "I can't go now" (Witness 3, TT: p. 695-696). Witness 3 testified that although plaintiff did not resist physically, it was clear she did not want to go, she was yelling, she was loud and she was upset (Witness 3, TT: p. 703).

Witness 3 also observed that when Trooper Defendant B and plaintiff got to the Trooper's car, the trooper kept telling her to get in the car

and plaintiff did not want to get in the car (Witness 3, TT: p. 706). And once seated in the car, plaintiff would not put her feet in the car. Trooper Defendant B told her two or three times to get in the car and she just sat there (Witness 3, TT: p. 706).

The only part of plaintiff's attempt to resist arrest that Witness 3 did not recall seeing was when plaintiff resisted the handcuffs. Although she was asked over and over again, Witness 3 does not remember when Trooper Defendant B put handcuffs on the plaintiff (Witness 3, TT: p. 698). She did not remember watching it. She tried to remember, but she did not (Witness 3, TT: p. 708).

Plaintiff herself admitted to resisting arrest. Plaintiff testified that when Trooper Defendant B was on her property, he had to ask plaintiff numerous times to walk with him to the trooper car (Plaintiff, TT: p. 247). Once at the trooper car, Trooper Defendant B had to ask plaintiff numerous times to place her feet in the car (Plaintiff, TT: p. 247). Accordingly, the testimony of both Trooper Defendant B and Witness 3 both establish support Trooper Defendant B's determination that plaintiff was in fact resisting arrest.

B. If Probable Cause Exists for the Charge of Animal Cruelty, Plaintiff's Claim of False Arrest for Resisting Arrest must Fail.

Assuming, arguendo, that this Court determines that Trooper Defendant B had probable cause to arrest plaintiff for animal cruelty, plaintiff's claim of false arrest with respect to the charge of resisting arrest must fail. As the Court noted in Cooperstein v. Procida, if an officer has "arguable" probable cause to arrest plaintiff on one charge, plaintiff's claims must fail regardless of whether probable cause existed to arrest plaintiff on the other charges. See Cooperstein v. Procida,

2001 U.S. Dist. LEXIS 7785 (E.D.N.Y. June 4, 2001).

Accordingly, if this Court finds that Trooper Defendant B had arguable probable cause to arrest plaintiff for animal cruelty, plaintiff's claim of false arrest with respect to resisting arrest must fail, regardless of whether the arrest for resisting arrest was supported by probable cause.

POINT II

TROOPER DEFENDANT B IS ENTITLED TO QUALIFIED IMMUNITY

The doctrine of qualified immunity protects government officials, such as defendant Thomas Defendant B, from suits lodged against them in their individual capacities for money damages where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See Saucier v. Katz, No. 99-1977, 2001 U.S. LEXIS 4664 (S. Ct. June 18, 2001) (granting qualified immunity to defendants facing claims of Fourth Amendment violations); See Taylor v. Sullivan, 166 F. 3d 1201 (2d Cir. 1998); Roucchio v. Coughlin, 29 F. Supp. 72 (E.D.N.Y. 1998); and Jackson v. Johnson, 15 F. Supp. 2d 341 (S.D.N.Y. 1998). See also Diamondstone v. Macaluso, 148 F. 3d 113 (S.D.N.Y. 1998) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)); Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987); and Krause v. Bennett, 887 F. 2d 362 (2d Cir. 1989).

"The operative inquiry on qualified immunity is not whether the defendants actually abridged the plaintiffs' constitutional rights, but whether defendants' conduct was objectively unreasonable, given the constitutional understandings then current." See Crooker v. Metallo, 5 F. 3d 583, 585 (1st Cir. 1993); Anderson v. Creighton, 483 U.S. 635, 640, 97

L. Ed. 2d 523, 107 S. Ct. 3034 (1987); Davis v. Scherer, 468 U.S. 183, 190, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984); Quintero de Quintero, 974 F.2d at 228; Amsden, 904 F.2d at 751.

The Supreme Court recently advocated summary judgment for a police officer accused of a Fourth Amendment violation for his alleged use of unnecessary force during his arrest of a protestor. See Saucier, 2001 LEXIS 4664 at *1. The Saucier Court granted defendant summary judgment based on the doctrine of qualified immunity because even if the officer violated plaintiff's Fourth Amendment rights by conducting an unreasonable and warrantless search, it would not have been clear to a reasonable officer in defendant's position that his conduct was unlawful. See Id. at *3 (citing Wilson v. Layne, 526 U.S. 603, 615 (1999)). The Court further ruled that "if the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity would be appropriate". Id.[1] In light of Saucier, even

[1] In an attempt to circumvent the material issue of notice, plaintiff argued, in response to defendant's renewal of its Rule 50 motion, that she was not required to produce a case on point which would have put Trooper Defendant B on notice that his arrest may have been unconstitutional. See TT: p.1223. The Saucier Court disagreed with plaintiff's assessment of the notice requirement, granting qualified immunity in large part because of the prosecuting party's inability to identify "any case demonstrating a clearly established rule

assuming a lack of probable cause, defendant's arrest of plaintiff was, at the worst, nothing more than a reasonable and permissible mistake. See Id. at *21.

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prohibiting the officer from acting as he did", along with the Court's unawareness of any such rule. See Saucier, 2001 LEXIS 4664 at *27. Defendant is entitled to qualified immunity because the uncontested absence of such a clearly established rule that a Trooper must consult a veterinarian, renders the arrest reasonable as a matter of law.

A. The Consideration of Qualified Immunity must Be Made Separately from That of Probable Cause

At trial, plaintiff continually urged the court and jury that the jury should examine the totality of the evidence in determining probable cause and, ultimately, their verdict. This argument suggests that the inquiries into probable cause and qualified immunity may be simultaneously considered. The Supreme Court and Second Circuit, however, have carefully drawn a distinction between the reasonableness standards for probable cause and qualified immunity. See Saucier, 2001 LEXIS 4664 at *20-23; Whitton v. Williams, 90 F. Supp. 2d 420; 2000 U.S. Dist. LEXIS 4095, *24 (holding that "the question of qualified immunity is distinct from the question of probable cause").

Plaintiff's attempt to diminish the effect of the doctrine of qualified immunity by denying its existence as a separate and distinct inquiry was contrary to the current legal standard. See Defendant's Renewal of Rule 50 motion, TT: p. 1223. Furthermore, it is demonstrative of the type of logic that may have been employed by the jury. Absent an instruction to the contrary, this improper concurrent consideration of qualified immunity and probable cause led the jury to an expectation that Defendant B have the type of "20/20 vision of hindsight" that the Supreme Court cautioned against in favor of deference to the judgment of a reasonable officer on the scene. See Saucier, 2001 LEXIS 4664 at *20, citing, Graham v. Connor, 490 U.S. 386, 393 S. Ct. 1865 (1989). The possibility that it was beneficial to speak to Ms. Plaintiff A's veterinarian or that the horse was healthy for its age were properly considered by the jury. The jury erred, however, by not considering Trooper Defendant B's decisions in context, but rather in hindsight;

thereby improperly applying the doctrine of qualified immunity to this litigation.

B. Under the Doctrine of Qualified Immunity, Plaintiff's Argument That Defendant Had a Duty to Investigate Every Plausible Claim of Innocence Before Making the Arrest is Inaccurate as a Matter of Law

The primary ground on which plaintiff based her false arrest charge was her allegation that defendant "failed to fully investigate", specifically alleging that defendant had a duty to call plaintiff's veterinarian before making his arrest. Not only is there an utter absence of legal precedent to support plaintiff's claim that defendant had a duty to call plaintiff's veterinarian, there is case law exactly to the contrary. Defendant firstly reiterates its position that Trooper Defendant B did, in fact, have more than enough evidence to establish probable cause without calling plaintiff's veterinarian. In evaluating the reasonable of an officer's assessment of probable cause, the Second Circuit clearly articulated that an officer "is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." See Point I(A), Probable Cause to Arrest, supra. A jury verdict predicated upon plaintiff's only argument as to her false arrest claim, the expectation that defendant had such a duty of exploration, must be overturned as a matter of law in this Circuit.

However, even if the jury reached the conclusion that probable cause did not exist to arrest plaintiff, they failed to properly address the legally determinative question, as framed by the doctrine of qualified immunity, of whether defendant reasonably believed that such probable cause existed. If the jury had considered the relevant inquiry, they would have necessarily come to the conclusion that Defendant B's failure

to speak to plaintiff's veteranarian was, at the worst, a reasonable mistake permissible under qualified immunity. "If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the qualified immunity defense." See Saucier, 2001 LEXIS 4664 at *21. In light of language from the Second Circuit that directly refutes plaintiff's only false arrest argument, that Trooper Defendant B was to call a veterinarian, the jury's finding that defendant acted unreasonably based on that legally untenable argument should be corrected by this Court.

C. Recent Binding Decisions Involving Qualified Immunity Have Carved out a Reasonableness Standard Which Was Easily Met by Defendant Defendant B

The objective reasonableness of defendant's arrest is strengthened by the fact that a police officer is entitled to qualified immunity for an arrest without probable cause when "reasonable officers could disagree as to whether there was probable cause to arrest". Ricciuti v. NYC Transit Auth., 124 F.3d 123, 128 (2d Cir. 1997). The Northern District recently granted summary judgment to a defendant police officer, holding that under the doctrine of qualified immunity 'arguable' probable cause is sufficient to defeat a claim of false arrest. See Cooperstein v. Procida, 2001 U.S. Dist. LEXIS, *7. The law in this Circuit clearly sets out to create a broad standard of reasonableness for state actors which prevents the "excessive disruption of government", and allows for reasonable mistakes to be made in the line of duty. See Saucier, 2001 LEXIS 4664 at *15.

Before effecting plaintiff's arrest, defendant conferred with other

troopers in the barracks in trying to determine what law Ms. Plaintiff A was violating. After meeting with both complainants, Trooper Defendant B consulted with Trooper X, and together they looked up the applicable section of the Agriculture and Market Law (Defendant B, TT: p. 495, 496; X, TT: p. 1143, 1144). Ms. Witness 2 also recalls that after she met with the troopers, that the troopers had some discussions and then determined it was warranted to go out to investigate (Witness 2, TT: p. 899).

Additionally, Sergeant Sgt. Y testified that just allowing an animal to come into this condition would be a violation of the statute, even if a veterinarian was called (Sgt. Y, TT: p. 1097). Furthermore, even after Trooper Defendant B was taken off the case, as a result of Ms. Plaintiff A's accusations, Sergeant Sgt. Y and other troopers continued with the investigation on their own, and applied for a search warrant based on Trooper Defendant B's and their own information.

This evidence demonstrates that reasonable officers could disagree as to the existence of probable cause. As such, defendant meets the arguable probable cause burden necessary for qualified immunity as defined by the courts.

D. Defendant Witness 1's Acquittal Entitles Defendant Defendant B to Judgment as a Matter of Law

In exonerating co-defendant Witness 1 of the false arrest charge against him, the jury found that Witness 1, an individual willfully participating with a police officer, had sufficient probable cause to make the arrest. See Jury Instructions, p.1385. The jury also found defendant Defendant B's arrest to have lacked the same probable cause

that existed for Witness 1. Id.

Viewing the evidence in a light most favorable to plaintiff, plaintiff's allegation that Trooper Defendant B intended to arrest plaintiff on violations of animal cruelty before arriving to plaintiff's property may be assumed to be true. Therefore, defendants Defendant B and Witness 1 were basing their assessments of the existence of probable cause on the same evidence. That evidence included reports of animal cruelty by Witness 1 and Witness 2, and the defendants' visual inspections of plaintiff's horse. The relevant difference between the co-defendants is that while Witness 1 was an expert on horses, expected to make a reasonable assessment of probable cause based on that expertise, Defendant B, under qualified immunity, was only required to act as a reasonable officer in his position would have acted. See Saucier, 2001 LEXIS 4664 at *3. The verdict is therefore unconscionably inconsistent because it deemed a horse expert to be less capable of identifying animal cruelty than a non-expert. Even absent the existence of qualified immunity, the verdict is inconsistent as a matter of common sense. Given the presence of qualified immunity, however, the verdict is inconsistent as a matter of law.

The Seventh Amendment right to a jury trial precludes entry of a judgment based on an inconsistent jury verdict. See Finnegan v. Fountain, 915 F.2d 817, 820 (2d Cir. 1990)(citing Auwood v. Harry Brandt Booking Office, Inc., 850 F.2d 884, 890-91 (2d Cir. 1988)). Furthermore, if an irreconcilable inconsistency is not noticed until after the jury has been dismissed, the judgment must be vacated and a new trial ordered. See Id. The jury in this case clearly ignored or failed to properly

apply the doctrine of qualified immunity to its verdict, as evidenced by Witness 1's acquittal. Whether the verdict was a result of the jury's misunderstanding or misapplication of the law, its fundamental inconsistency necessitates a judgment as a matter of law. Accordingly, Trooper Defendant B is entitled and should be granted qualified immunity.

POINT III

THIS COURT SHOULD ORDER A NEW TRIAL OF PLAINTIFF'S FALSE ARREST CLAIM

A district court should grant a new trial motion if the jury has reached a seriously erroneous result or if the jury's verdict is a miscarriage of justice. Sorlucco v. New York City Police Dep't, 971 F.2d 864, 875 (2d Cir. 1992). Under this standard, the Court is free to weigh the evidence on its own and need not view it in light most favorable to the non-movant. Song v. Ives Laboratories Inc., 957 F.2d 1041, 1047 (2d Cir. 1992). Moreover, a court may order a new trial even if there is substantial evidence to support the jury's verdict. Id. The new trial may be limited to certain issues. Rule 59(a) (a new trial may be granted on all or part of the issues).

Based on the arguments and facts presented above, if judgment as a matter of law is denied and defendant is not found to be entitled to qualified immunity, a new trial must be granted in light of the overwhelming evidence presented to show the reasonableness of defendant's actions.

POINT IV

THE EVIDENCE DOES NOT SUPPORT AN AWARD OF PUNITIVE DAMAGES

Even if the claims upon which the jury returned a verdict for plaintiff could be sustained as a matter of law, the award of punitive

damages must be vacated as a matter of law. Regardless of whether the finding of liability is allowed to stand, defendants respectfully submit that punitive damages are inappropriate here, based upon the record. The stated purpose of punitive damages is to punish defendants, to deter similar conduct in the future. Smith v. Wade, 461 U.S. 30, 49, 54 (1983). In Smith, the Supreme Court concluded that punitive damages may be awarded in Section 1983 cases under the same principles governing awards of punitive damages under the common law. Id. 461 U.S. at 48-49, 51. Those principles are that punitive damages may be awarded "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith, 461 U.S. at 56. However, "'[w]here there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice, the trial court need not, and indeed should not, submit the issue of punitive damages to the jury." Kolstad v. American Dental Association, 527 U.S. 526, 539 (1999).

The threshold of proof for awarding punitive damages is the same as that for finding liability. However, an award of punitive damages is discretionary, reflecting a "moral judgment." Vasbinder v. Ambach, 926 F.2d 1333, 1342 (2d Cir. 1991)(quoting Smith, 461 U.S. at 52). Further, plaintiff must prove the involvement of each defendant in order to justify a recovery of punitive damages. McFadden, 710 F.2d 907, 914 (2d Cir. 1983), cert. denied, 464 U.S. 961 (1983). See also Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989); Satchell v. Clark, 725 F. Supp. 691, 695 (E.D.N.Y. 1989)("an award of punitive damages may be set

aside in the face of evidence demonstrating a defendant's lack of personal involvement in the constitutional violation and lack of evil motive or intent").

Punitive damages may not be awarded where the evidence does not support a finding of intentional misconduct or reckless action. Thus, even where the court finds liability against state officials, the court or the jury should not award punitive damages where the evidence did not support a finding of egregious conduct. See, e.g., Patterson v. Coughlin, 722 F. Supp. 9, 12 (W.D.N.Y. 1989)(defendants made some effort to comply with due process standards); Pino v. Dalsheim, 605 F. Supp. 1305, 1320 (S.D.N.Y. 1984)(declining to award punitive damages despite finding due process disciplinary violation).

Here, there was no evidence of recklessness or actual malice on the part of Trooper Defendant B, and no conduct sufficiently egregious to give rise to an inference of recklessness or malice. Plaintiff attributed horrendous acts to Trooper Defendant B, such as grabbing her breast and throwing her into a Utopia State Trooper vehicle. However, the jury did not credit any of her testimony with respect to these actions, which was clearly demonstrated when the jury found no liability on the excessive force claim, and awarded plaintiff $0 in compensatory damages for false arrest. Furthermore, at no time during plaintiff's arrest did Witness 3 observe Trooper Defendant B's demeanor change from professional, matter of fact and calm (Witness 3, TT: p. 710).

Based upon the evidence, the jury returned a verdict of nominal and punitive damages. Thus, they could not have credited plaintiff's testimony that she suffered serious injuries. However, the resulting

harm, as demonstrated by the nominal damages award, shows that the defendant's actions were not egregious enough to rise to the level of "evil motive or intent" or "reckless or callous indifference to the federally protected rights of others" to warrant punitive damages. Accordingly, the award should be vacated in its entirety.

CONCLUSION

For the foregoing reasons, this Court should grant defendant Utopia State Trooper Defendant B's motion for judgment as a matter of law on plaintiff's claim for violation of the Fourth Amendment, or in the alternative, this Court should enter an order for a new trial of the Fourth Amendment claim.

Dated: New York, New York
July 20, 2001

Respectfully submitted,
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