

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>TAWNYA WELLINES, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Civil No. 98-395-P-C</i>
)	
<i>CITY OF PORTLAND, et al.,</i>)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’
MOTIONS FOR SUMMARY JUDGMENT**

In this action stemming from the conduct of Portland police officers in response to complaints of loud music on the night of July 22, 1997, defendants City of Portland, Michael Chitwood, Sullivan Rizzo, Robert Doherty and Troy Bowden collectively move for partial summary judgment and defendant Richard Gagliano separately moves for summary judgment as to all counts against him. Amended Complaint (“Complaint”) (Docket No. 27) ¶¶ 9-45; Motion for Summary Judgment, etc. (“Defendants’ Motion”) (Docket No. 16); Defendant Richard J. Gagliano’s Motion for Summary Judgment, etc. (“Gagliano Motion”) (Docket No. 33).¹

¹On June 15, 1999, the same day the defendants filed their motion for summary judgment, the plaintiffs moved to file an amended complaint naming Gagliano as a defendant. Defendants’ Motion; Motion for Leave To Amend Plaintiffs’ Complaint (“Motion To Amend”) (Docket No. 20). The Motion To Amend was granted on July 8, 1999, and an Amended Complaint naming Gagliano (continued...)

Rizzo, Doherty and Bowden seek dismissal of Counts I (due process, based on 42 U.S.C. § 1983 and the Fifth and Fourteenth amendments to the U.S. Constitution), VII (assault and battery), VIII (false imprisonment), IX (malicious prosecution), X (abuse of process), XI (intentional infliction of emotional distress), XII (negligent infliction of emotional distress) and XIII (punitive damages based on state-law claims). Defendants' Motion at 1-2; Complaint ¶¶ 46-48, 63-84. The City of Portland moves for summary judgment as to Counts III (municipal liability, based on 42 U.S.C. § 1983 and custom and practice), IV (municipal liability, based on 42 U.S.C. § 1983 and negligence), V (due process, based on Maine constitution and Maine Civil Rights Act), VI (search and seizure, based on Maine constitution) and VII-XIII. Defendants' Motion at 1-2; Complaint ¶¶ 52-84. Chitwood seeks dismissal of all unspecified counts against him. Defendants' Motion at 2. Finally, Gagliano seeks dismissal of all counts against him, namely Counts I, II (search and seizure, based on 42 U.S.C. § 1983 and the Fourth and Fourteenth amendments to the U.S. Constitution) and V-XIII. Gagliano Motion at 1-2; Complaint ¶¶ 46-51, 58-84.

The plaintiffs, Tawnya Wellnes, Donald Drake and Troy Nason,² concede that Chitwood is entitled to dismissal as to all counts against him in his individual capacity and that the City of Portland is entitled to dismissal as to Counts VII-XIII. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs' Opposition") (Docket No. 23) at 1, 8. For the reasons that follow, I recommend that both of the defendants' motions for summary judgment be granted in part and denied in part.

¹(...continued)
was filed on July 12, 1999. Endorsement to Motion To Amend; Complaint.

²A fourth plaintiff, Raymond Arsenault, dismissed his complaint by Stipulation of Dismissal filed April 19, 1999. Stipulation of Dismissal (Docket No. 13).

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

II. Factual Context

The summary-judgment record, viewed in the light most favorable to the plaintiffs, reveals the following regarding the events leading to the filing of the instant complaint:

On July 22, 1997 Portland police received an anonymous complaint of “very loud music” coming from 1375 Forest Avenue, Building I, Apartment #6, with a request to “please quiet them down for good.” Log marked as Bates No. 1300, attached to Affidavit of Henry N. Berry III, Esq. (“Berry Aff.”) (Docket No. 25). The apartment in question was rented by Nason, who was on that evening hosting a party. Deposition of Troy E. Nason (“Nason Dep.”), filed with Plaintiffs’ Opposition, at 20-21. Rizzo, Doherty and Bowden, acting in their capacity as police officers for the

Portland Police Department, responded to the complaint. Statement of Material Facts (“Defendants’ SMF”) (Docket No. 17) ¶¶ 13, 15; Plaintiffs’ Statement of Material Facts (“Plaintiffs’ SMF”) (Docket No. 24) ¶¶ 13, 15.

At about 1 a.m. there was a knock on Nason’s door. Nason Dep. at 33. Nason answered, whereupon two police officers informed him of a noise complaint and told him that if he did not control it they would come back again and he would go to jail. *Id.* Nason replied, “no problem,” closed the door and sat down with some of his guests. *Id.* The officers quickly reappeared.³ *Id.* at 34. Nason asked to call a cab for his guests and was given ten seconds in which to do so.⁴ *Id.* at 34-35. One of the officers kept his foot in Nason’s door. *Id.* at 35. Nason asked the officer to remove his foot, which the officer would not do. *Id.* A third officer appeared behind the other two and nodded his head at the officer with his foot in the door. *Id.* at 35-36. The officer who had had his foot in the door then came at Nason, handcuffing one of his wrists and choking him. *Id.* at 36. To demonstrate that he was not resisting arrest, Nason moved his free arm into a position in which it could easily be cuffed, but the officer kept choking him. *Id.* Nason told the officer that he could not breathe, finally grabbing the officer’s arm and pulling it off his neck. *Id.* Nason’s other arm was handcuffed and he was maced in the eyes. *Id.* at 36-37.

³Evidence as to the manner in which the officers entered the apartment the second time is conflicting. Wellnes stated that within seconds after Nason closed the door it flung open again and officers swarmed Nason and tackled him. Deposition of Tawnya R. Wellnes (“Wellnes Dep.”), filed with Plaintiffs’ Opposition, at 40-42. Drake stated that he thought the door was already open when the officers reentered. Deposition of Donald A. Drake (“Drake Dep.”), filed with Plaintiffs’ Opposition, at 25-26.

⁴Nason explained that he felt it was his responsibility to arrange for alternative transportation for guests because “I kind of felt that something wasn’t right and if they wanted people to leave, they were going to start bagging people for OUIs if they were drunk. I didn’t want to take the chance.” Nason Dep. at 34.

During these events everyone in the apartment was “yelling and screaming,” and the scene was “crazy.” Drake Dep. at 33. Wellnes, shocked to witness the tackling of Nason, commented that the city had just paid \$35,000 to a complainant for the same type of behavior, hoping this would make the officers think about what they were doing. Wellnes Dep. at 42, 44-45; *see also* Nason Dep. at 38 (Wellnes was “screaming 35,000”). Drake also protested, saying something to the effect, “Hey, what the heck are you guys doing?” Drake Dep. at 24. Drake, who was standing between a couch and coffee table, was then knocked onto the couch and finally onto the floor by two officers who knelt on him. *Id.* at 23-24. He was maced when he fell to the floor and hit with a baton when unable to comply with a request that he put his hands behind his back because he was wedged between the two pieces of furniture. *Id.* at 24, 32-33. Wellnes screamed, “What are you doing?” Wellnes Dep. at 48. The police then threw her to the ground, handcuffed her and sprayed mace in her face. *Id.* An officer then forcibly picked Wellnes up and walked her from the apartment to a police car while repeatedly calling her a “fucking slut.” *Id.* at 50. Wellnes was then suddenly yanked out of the police car and thrown into an arrest van. *Id.* at 50-51. In the arrest van, observing the suffering of her companions, she angrily kicked the door. *Id.* at 51. An officer whom she later identified as Rizzo then opened the door and struck her twice with a baton. *Id.*

When Gagliano arrived at the scene the plaintiffs were sitting or lying on the floor of Nason’s apartment. Supplemental Investigation Report marked as Bates No. 836, attached to Affidavit of Troy Nason (Docket No. 40). Gagliano observed Wellnes being transferred from the cruiser to the van and heard her calling the officers “pussies,” “mother fuckers,” “assholes” and other offensive names. Affidavit of Richard J. Gagliano (“Gagliano Aff.”) (Docket No. 35) ¶ 2. At no time did Wellnes, who was handcuffed, in pain and restrained by two large officers, strike at, kick at or

physically abuse any of the officers. Affidavit of Tawnya Wellnes (Docket No. 39) ¶¶ 6-7, 10. While officers were in the process of placing Wellnes in the van, Gagliano struck her once in the area of her right knee and shin with his baton. Gagliano Aff. ¶¶ 8, 10.⁵ After being placed in the van the plaintiffs were transported to Cumberland County Jail. *Id.* ¶¶ 11-12.

Upon their release from jail the following morning, Nason and Drake went to the Portland Police Department to file a complaint. Nason Dep. at 62-63. The clerk with whom they spoke refused to take their complaint, informing them that they would need permission from the lieutenant on duty during that shift, Lieutenant Gagliano. *Id.* at 63. The plaintiffs did not file an internal complaint with the Portland Police Department regarding their arrests on July 22, 1997. Defendant Michael Chitwood's Answers to Plaintiffs' Interrogatories, attached to Defendants' SMF, ¶ 26. The Federal Bureau of Investigation ("FBI") did investigate a complaint filed by the plaintiffs. *Id.* The FBI concluded that "it could not prove a Civil Rights violation in this matter based on insufficient evidence to prove [the police officers'] criminal intent and insufficient evidence to prove use of force was excessive." Letter from Tanya S. DeGenova to Michael Chitwood, attached to Defendant City

⁵Gagliano sharply disputes both Wellnes' version of events leading to his use of force and the admissibility of the Nason and Wellnes affidavits, which he contends contradict earlier deposition testimony. Gagliano Aff. ¶¶ 3-10 (Gagliano struck Wellnes with baton because she was resisting arrest and kicking at officers throughout transport to van); Defendant Gagliano's Reply Memorandum ("Gagliano Reply") (Docket No. 41) at 2-3 (citing *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994)). Whatever the merits of Gagliano's argument with respect to the Nason affidavit, I do not rely on the Nason affidavit inasmuch as it is cumulative of Wellnes' testimony. Gagliano identifies only one respect in which the Wellnes affidavit contradicts her earlier deposition testimony: that Wellnes testified at deposition that officers "threw" her into the van, whereas she states in her affidavit that they placed her on a seat, implying that she was cooperating in the transport. Gagliano Reply at 2. This single discrepancy does not justify exclusion of the entire Wellnes affidavit. Wellnes' original testimony that she was thrown into the van is not necessarily inconsistent with her allegations that she was beaten despite posing no physical threat to the officers.

of Portland's Response to Plaintiff's Second Request for Production of Documents, attached to Defendants' SMF.

After attempting to file a complaint with the Portland Police Department on the morning of his release from jail, Nason went to the hospital because he "felt really hurt." Nason Dep. at 52. He received no followup medical care. *Id.* at 52-53. Drake sought medical attention for a bruised arm, headache and cuts suffered at the hands of the officers. Drake Dep. at 34. He was given an aspirin and had no lingering effects. *Id.* Wellnes sustained a bruise on her thigh as a result of being hit twice with a baton after the door of the transport wagon had been closed and reopened, as well as swelling and bruising of her right knee. Wellnes Dep. at 62-63.

III. Discussion

A. Count I: Due Process

The plaintiffs assert that their Fifth and Fourteenth Amendment due-process rights were violated in two ways: (i) that during the course of their arrests some property (including Nason's contact lenses, a wall and furniture) was damaged and that as a result of the arrests certain medical, legal and other expenses or losses were incurred, and (ii) that the City of Portland wrongly refused to permit them to file a complaint without the concurrence of an officer who had participated in the very events of which they sought to complain. Plaintiffs' Opposition at 1-3. Neither claim is viable.

The plaintiffs' first claim transparently arises from the officers' alleged use of excessive force and hence must be predicated on the Fourth Amendment rather than asserted in the guise of a substantive due-process claim. *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Today we make explicit what was implicit in *Garner's* analysis, and hold that *all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop,

or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.”) (emphasis in original).⁶

The second claim founders on a different shoal: that the protections of procedural due process attach only when a deprivation of life, liberty or property is at stake. *See, e.g., Fournier v. Reardon*, 160 F.3d 754, 757 (1st Cir. 1998). Here, the plaintiffs allege at most denial of access to an internal complaint mechanism that may have been related to, but had nothing directly to do with, any process by which deprivation of their lives, liberty or property was at stake.

The plaintiffs finally, in Count I, assert claims predicated not only on due-process violations but also on alleged malicious prosecution. Complaint ¶¶ 49-51; Plaintiffs’ Opposition at 1-2.⁷ Rizzo, Doherty, Bowden and Gagliano argue that, to the extent the plaintiffs plead malicious prosecution, they provide neither legal nor factual underpinnings for their asserted cause of action. Defendants’ Reply Memorandum (“Defendants’ Reply”) (Docket No. 29) at 2; Gagliano Motion at 2-3. I cannot conclude that the plaintiffs’ malicious-prosecution claim is, on its face, non-viable as a matter of law; however, I agree that the plaintiffs fail to adduce sufficient evidence to survive

⁶Even assuming *arguendo* that the plaintiffs could bring such a claim, they neither illuminate a recognized manner in which their property interests are protected by the Fourteenth Amendment nor contend that the conduct at issue shocks the conscience. *See* Plaintiff’s Opposition at 1-3; *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 531 (1st Cir. 1995) (“There are two theories under which a plaintiff may bring a substantive due process claim. Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state’s conduct ‘shocks the conscience.’”) (citation omitted).

⁷The plaintiffs explain that although they bring their malicious-prosecution claim in the context of Count I, it derives from the Fourth Amendment. *See* Plaintiffs’ Opposition at 1-2.

summary judgment with respect to it.

The plaintiffs cite First Circuit authority leaving open the possibility that a malicious-prosecution claim might lie under section 1983 on the basis of the Fourth Amendment. Plaintiffs' Opposition at 1; *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256 n.5 (1st Cir. 1996). More recently the First Circuit — although not called upon to rule directly on the viability of such a cause of action — had occasion to describe its contours. *Meehan v. Town of Plymouth*, 167 F.3d 85, 88-89 (1st Cir. 1999) (section 1983 malicious-prosecution action based upon deprivation of Fourth Amendment rights requires showing of absence of probable cause to initiate proceedings). *Roche* and *Meehan*, while not squarely addressing the issue, counsel against a ruling that an action for malicious prosecution is unavailable under the Fourth Amendment as a matter of law.⁸

The plaintiffs nonetheless present too thin a factual predicate to withstand summary judgment. The plaintiffs' statements of material facts contain only the following touching on their malicious-prosecution claim: "Each plaintiff had to hire an attorney to defend the maliciously instituted criminal charges." Plaintiffs' SMF ¶ 34; Plaintiffs' Statement of Material Facts Regarding Defendant Gagliano (Docket No. 38). The statements of material fact describe neither the nature of the claims brought against the plaintiffs, the role any of the defendants played in bringing those claims nor the outcome of the proceedings instituted. *See generally id.* Rizzo, Doherty, Bowden and Gagliano accordingly are entitled to summary judgment with respect to this claim. *See Shorette*

⁸This court recently declined to recognize a cause of action for malicious prosecution arising from the Fourth Amendment in a case in which the plaintiffs never were arrested, detained or required to pay bond but rather were "seized" merely by the necessity to appear in court. *Trafton v. Devlin*, 43 F.Supp.2d 56, 62 (D. Me. 1999). The instant case is distinguishable inasmuch as the plaintiffs were arrested and detained, however briefly, in the Cumberland County Jail.

v. Rite Aid of Maine, Inc., 155 F.3d 8, 12 (1st Cir. 1998) (non-movant may not rely on “conclusory allegations, improbable inferences, and unsupported speculation” to defeat motion for summary judgment) (citation and internal quotation marks omitted).

Defendants Rizzo, Doherty, Bowden and Gagliano are accordingly entitled to summary judgment on Count I.

B. Count II: Search and Seizure

Turning to Count II, Gagliano argues that he is entitled to qualified immunity with respect to this excessive-force claim inasmuch as his sole use of force — one blow to Wellines’ knee — reasonably could have been viewed as lawful under the circumstances. Gagliano Motion at 5-8; *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (qualified immunity afforded to extent that reasonable person would not have known conduct wrongful based on state of law as it existed at time of acts in question). I cannot agree that Gagliano is entitled to summary judgment on Count II with respect to Wellines. Wellines does not deny that she cursed the officers; however, she avers that she never kicked at or otherwise physically abused them. A reasonable officer would not have been justified in believing even a sole baton blow lawful in response to taunts alone. *See, e.g., Sweatt v. Bailey*, 876 F. Supp. 1571, 1577 (M.D. Ala. 1995) (denying qualified immunity on summary judgment to officer who, according to plaintiff, beat him after he referred to officer as an “ass”).

Gagliano next contends that in any event Nason and Drake adduce no evidence of his use of any excessive force against them, entitling him to summary judgment as regards them. Gagliano Motion at 8. Here Gagliano stands on solid ground. By the time Gagliano arrived at Nason’s apartment, the plaintiffs already were lying or sitting on the floor. The plaintiffs, in opposing Gagliano’s motion for summary judgment as to Count II, identify only actions taken against

Wellines. Plaintiffs' Memorandum of Law in Opposition to Defendant Gagliano's Motion for Summary Judgment ("Plaintiffs' Gagliano Opposition") (Docket No. 37) at 2-3.

Gagliano hence is entitled to summary judgment as to Count II with respect to Nason and Drake but not to Wellines.

C. Counts III - IV: Municipal Liability

A municipality may be held liable in a section 1983 case only to the extent that its "policy or custom" inflicts the asserted harm. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (citation and internal quotation marks omitted). The plaintiffs contend that the Portland Police Department had a custom of failing to train or supervise its officers properly with respect to the use of force, including the administration of so-called "OC" spray. Plaintiffs' Opposition at 3-8. In support thereof the plaintiffs rely primarily on an affidavit of their attorney, Henry N. Berry III, in which Berry summarizes or draws conclusions from documents and other raw data obtained from the Portland Police Department. *Id.*; *see generally* Berry Aff. The defendants vigorously challenge the admissibility of the entire Berry affidavit and accompanying unauthenticated Bates-stamped documents on grounds that none of those materials is supported by the testimony of a qualified witness as required by Fed. R. Civ. P. 56(e). Defendants' Reply at 3-7. They assert that Berry is neither an expert witness nor qualified pursuant to Fed. R. Evid. 701 to provide lay opinion testimony, which must be "rationally based on the perception of the witness." *Id.* at 3. The defendants demonstrate, through the detailed affidavit of Bethanne L. Poliquin, police attorney for the Portland Police Department, that a number of statements in the Berry affidavit are premised on incorrect assumptions, omit consideration of relevant data or are otherwise erroneous. Defendants' Reply at 3-7; Affidavit of Bethanne L. Poliquin ("Poliquin Aff.") (Docket No. 30). The defendants

thus go well beyond disputing material facts; they illuminate the unreliability (and hence inadmissibility) of the critical data and assumptions upon which the plaintiffs build their case that the City of Portland should be held liable. The defendants, for example, persuasively attack the following data upon which the plaintiffs heavily rely:

(i) That on 116 occasions the City of Portland failed to reprimand officers for not immediately decontaminating the eyes of subjects who have been sprayed with O.C. spray despite the existence of a standard operating procedure requiring the officers to do so. Plaintiffs' Opposition at 3-4. The defendants counter that Use of Control reports do not always describe decontamination efforts, and officers are not disciplined in circumstances in which it is impossible for them to decontaminate an individual before transportation to jail. Poliquin Aff. ¶ 6. Moreover, according to the defendants, it is inaccurate to conclude based only on Use of Control reports and Internal Affairs Histories that an officer has not been disciplined. *Id.* ¶ 7. Counseling and/or oral reprimands would not be recorded in the documents reviewed by Berry. *Id.*

(ii) That the City of Portland failed to take any action with respect to 296 of 328 excessive force/unnecessary force/assault complaints filed with the Portland Police Department (ninety-nine percent). Plaintiffs' Opposition at 5. The defendants counter that, in addition to calculating the wrong percentage (the correct figure is ninety percent), the plaintiffs misperceive the nature of the internal complaint process. Defendants' Reply at 6 n.3; Poliquin Aff. ¶ 11. Many complaints are resolved informally with the consent of the complainant; many of the complaints that are investigated formally are not sustained for a number of reasons, including lack of follow-through by the complainant. Poliquin Aff. ¶ 11. Both complaints resolved informally and those not sustained following formal investigation are reflected in the figure of 296 complaints referred to by the

plaintiffs. *Id.*

Stripped of this data, the plaintiffs' proof reduces to events on the night of their arrest coupled with statistics showing that some Portland Police Department officers missed mandatory training sessions and were not disciplined for their failure to do so.⁹ *See generally* Plaintiff's Opposition at 3-7. A plaintiff may not rely on an isolated event, at least not in the absence of a showing of a deficient training program, to impute liability for officers' misbehavior to a municipality. *See, e.g., Swain v. Spinney*, 117 F.3d 1, 11 (1st Cir. 1997) (noting that in "a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations.") (citation and internal quotation marks omitted); *Bordanaro v. McLeod*, 871 F.2d 1151, 1156-57 (1st Cir. 1989) ("it is true that evidence of a single event alone cannot establish a municipal custom or policy"). That some officers missed mandatory training sessions and that the City of Portland did not mete out discipline in all such cases fails to evidence the existence of a deficient training program. *See, e.g., Canton*, 489 U.S. at 390-91 (that a particular officer not satisfactorily trained not dispositive, for shortcomings may have resulted from factors other than faulty training program, or an otherwise sound program might be occasionally negligently administered).

The City of Portland accordingly is entitled to summary judgment with respect to Counts III and IV.

D. Counts V-VI: State Constitutional Claims

The City of Portland and Gagliano next seek dismissal of Counts V and VI, asserting due-

⁹Poliquin also questions the validity of the training data, averring that officers who were not disciplined may have had a legitimate excuse for missing training sessions and/or may have attended makeup sessions. Poliquin Aff. ¶ 16.

process and search-and-seizure claims under the Maine constitution and (in the case of Count V) the Maine Civil Rights Act (“MCRA”). Defendants’ Motion at 1; Gagliano Motion at 1.

Gagliano correctly observes that under Maine law a claim brought pursuant to the Maine constitution may be asserted only through the vehicle of the MCRA. Gagliano Motion at 5 n.1; *Andrews v. Department of Env’tl Protection*, 716 A.2d 212, 220 (Me. 1998). Inasmuch as the plaintiffs base Count VI solely on the Maine constitution, *see* Complaint ¶¶ 61-62, it fails to state a claim upon which relief may be granted.

Turning to Count V, Gagliano and the City of Portland are entitled to summary judgment for the same reasons articulated in the context of Count I. The MCRA was modelled on 42 U.S.C. § 1983. *See, e.g., Hegarty v. Somerset County*, 848 F. Supp. 257, 269 (D. Me. 1994), *rev’d in part on other grounds*, 53 F.3d 1367 (1st Cir. 1995). The plaintiffs identify no respect in which the substance of the due-process claim in Count V differs from that asserted in Count I. *See generally* Plaintiffs’ Opposition at 3-8; Plaintiffs’ Gagliano Opposition at 2-3. Thus, the same analysis pertains.

E. Counts VII-XIII: State Tort Claims

Turning finally to the plaintiffs’ state tort claims, the individual defendants seek summary judgment on the ground that they are shielded from immunity by virtue of the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-18 (“Act”). Defendants’ Motion at 15-17; Gagliano Motion at 9-10. Section 8111 of the Act affords absolute immunity to municipal employees, *inter alia*, for:

Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid.

14 M.R.S.A. § 8111(1)(C).

The effectuation of a warrantless arrest, including forcible entry and subsequent use of force, qualifies as a “discretionary function” for purposes of the Act. *See, e.g., Hegarty*, 848 F. Supp. at 269; *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991). Discretionary immunity is afforded officers “except to the extent they act in a manner so egregious as to clearly exceed, as a matter of law, the scope of any discretion [they] could have possessed in [their] official capacity as [police officers].” *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1236 (D. Me. 1996) (citation and internal quotation marks omitted).

The plaintiffs claim that, on the basis of the alleged excessive force used against them on the evening of their arrests, the defendant officers transgressed the bounds of any discretion they may have possessed, forfeiting their immunity under the Act. Plaintiffs’ Opposition at 8-11. The plaintiffs’ argument implicates all tort claims predicated on the use of excessive force (Counts VII, VIII, XI, XII and XIII) but not those premised on the malicious-prosecution and abuse-of-process aspects of their alleged maltreatment (Counts IX and X).¹⁰ As to these latter claims, the plaintiffs fail to delineate any manner in which the officers exceeded the scope of allowable discretion. Hence, all individual defendants are entitled to discretionary immunity and summary judgment with respect to Counts IX and X.

Turning to those counts that implicate the use of excessive force, the plaintiffs adduce sufficient evidence to preclude a finding of entitlement to discretionary immunity as a matter of law except with respect to Gagliano’s conduct toward Nason and Drake. Rizzo, Doherty and Bowden

¹⁰The plaintiffs’ claim of false imprisonment apparently rests at least in part on the use of excessive force. Complaint ¶¶ 66-68. The use of excessive force, under Maine law, can form the predicate for a claim for false imprisonment. *Nadeau v. State*, 395 A.2d 107, 116 (Me. 1978).

allegedly participated jointly in acts that, if credited by a fact-finder, could be found to have constituted the use of excessive force — including the choking of Nason, the spraying of the three plaintiffs’ eyes after they already were handcuffed and the beating of Wellnes twice on the thigh with a baton in response to an angry kick against the closed door of the police van. Gagliano allegedly beat Wellnes once with a baton in response to mere verbal provocation. Discretionary immunity does not extend to such an unreasonable and excessive use of force. *See, e.g., Comfort*, 924 F. Supp. at 1228, 1236-37 (finding genuine issue of material fact as to whether police officers exceeded scope of discretion based on evidence that they handcuffed plaintiff and shoved his head against door jamb).

IV. Conclusion

For the foregoing reasons, I recommend that Gagliano’s Motion be **GRANTED** (except as to Counts II, VII-VIII and XI-XIII with respect to Wellnes only, as to which I recommend it be **DENIED**); and that the Defendants’ Motion be **GRANTED** in part and **DENIED** in part as follows: as to the City of Portland and Chitwood, **GRANTED**; and as to Rizzo, Doherty and Bowden, **GRANTED** with respect to Counts I, IX and X and **DENIED** with respect to Counts VII-VIII and XI-XIII. I also recommend that the court *sua sponte* dismiss Counts I and II as against the City of Portland for the reasons stated in my discussion of Counts I, III and IV, and Counts V and VI as against Rizzo, Doherty and Bowden for the reasons stated in my discussion of those counts.

Assuming that this recommendation is adopted, the only issues remaining for trial will be: as against Rizzo, Doherty and Bowden, Counts II, VII-VIII and XI-XIII; and as against Gagliano and with respect to Wellnes only, Counts II, VII-VIII and XI-XIII.

NOTICE

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

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

Dated this 29th day of September, 1999.

*David M. Cohen
United States Magistrate Judge*