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19-P-1107

Appeals Court

JOHN GOUDREAU vs. PAUL NIKAS<sup>1</sup> & others.<sup>2</sup>

No. 19-P-1107.

Essex. April 9, 2020. - August 17, 2020.

Present: Vuono, Lemire, & McDonough, JJ.<sup>3</sup>

Firearms. Police, Prosecution of criminal cases. Immunity from suit. Malicious Prosecution. Probable Cause. Consumer Protection Act, Sale of handgun. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on March 28, 2016.

The case was heard by Jeffrey T. Karp, J., on a motion for summary judgment.

The case was submitted on briefs.

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<sup>1</sup> Individually and in his capacity as chief of police of Ipswich.

<sup>2</sup> Jonathan Hubbard, individually and in his capacity as a lieutenant in the Ipswich police department; and town of Ipswich.

<sup>3</sup> Justice McDonough participated in the deliberation on this case and authored this opinion while an Associate Justice of this court, prior to his reappointment as an Associate Justice of the Superior Court.

Joseph Spinale for the plaintiff.  
Leonard H. Kesten, Jeremy Silverfine, & Deidre Brennan  
Regan for the defendants.

McDONOUGH, J. The issue presented by this appeal is whether the provisions of G. L. c. 140, § 131L (a), governing proper firearm storage, apply to commercial firearm dealers such as the plaintiff, John Goudreau, whose guns are kept in a commercial setting, such that a reasonable police officer could conclude there was probable cause to charge Goudreau with criminal violation of § 131L (a) when two of those guns were stolen. Pursuant to § 131L (a), "[i]t shall be unlawful to store or keep any firearm . . . in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user." A firearm "shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user." Id.

In March 2014, Ipswich police officers investigated the theft of two guns from Patriot Arms, a local gun shop co-owned by Goudreau and Richard Munyon. The investigation culminated in the issuance of a criminal complaint charging Goudreau with two counts of improperly storing a firearm, in violation of § 131L.

After a hearing on Goudreau's motion to dismiss the charges, a District Court judge was persuaded by Goudreau's argument that § 131L does not apply to guns kept in a gun shop. In July 2014, the judge allowed Goudreau's motion to dismiss the criminal complaint for lack of probable cause. Nearly two years later, Goudreau filed a verified complaint seeking damages from the town of Ipswich, its police chief, Paul Nikas, and Ipswich police lieutenant John Hubbard, for malicious prosecution, tortious interference with contractual relations, and defamation. The defendants moved for summary judgment on the verified complaint, which a judge of the Superior Court (motion judge) allowed after a hearing. See Mass. R. Civ. P. 56, 365 Mass. 824 (1974). On appeal, Goudreau argues that the motion judge misinterpreted § 131L in concluding that a reasonable police officer could have believed there was probable cause to charge Goudreau under § 131L, and therefore Hubbard was entitled to qualified immunity.<sup>4</sup> We affirm.

Background. The following material facts are undisputed. Goudreau held the firearm licenses required for Patriot Arms to operate in his name. He and Munyon stored firearms that were not on display at Patriot Arms in unlocked boxes that were

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<sup>4</sup> Goudreau challenges only the dismissal of the complaint as to Hubbard in his individual capacity, and makes no argument as to the dismissal of the counts against the town or Hubbard and Nikas in their official capacities.

placed on open shelving in a rear area of the store, which connects to a garage. None of the guns in the store were equipped with engaged trigger locks. All interior areas of Patriot Arms were monitored by video surveillance cameras.

On February 28, 2014, Goudreau's adult son Stephen had recently been released from jail and was in Patriot Arms. Stephen was not an employee and had multiple felony convictions. At some point after Stephen left, Munyon went to the storage area to retrieve a particular firearm and discovered that it was missing. Two days later, he and Goudreau conducted an inventory and discovered that another gun was also missing. The next day, Munyon viewed video surveillance footage from February 28 and observed Stephen wandering around unsupervised in the storage area. The footage showed Stephen walking away from the shelves where the guns had been stored and toward the garage, with something concealed under his shirt. When Munyon went to the area of the garage where Stephen was seen on the video, he found empty boxes that had previously contained the missing guns. The thefts were reported to the Ipswich police department the following day, after Goudreau and Munyon viewed the surveillance footage together, and after Stephen failed to return the guns.

Patrolman Jason Sinclair, Detective P. Dziadose, and Lieutenant Hubbard responded to investigate the report. Sinclair and Hubbard drafted police reports documenting their

investigation. On April 7, 2014, a criminal complaint issued charging Goudreau with improperly storing the stolen firearms.<sup>5</sup> The application for the criminal complaint is not in the record. However, the complaint bears Dziadose's signature. Goudreau's firearm licenses, and therefore Patriot Arms's ability to operate, were suspended as a result of the charges.

Goudreau moved to dismiss the charges on the ground that § 131L does not apply to commercial gun owners, and therefore the complaint was not supported by probable cause to believe that Goudreau had committed a crime. As previously stated, a District Court judge dismissed the criminal complaint because he agreed with Goudreau's argument. On March 28, 2016, Goudreau filed the verified complaint, alleging that Hubbard, Nikas, and the town of Ipswich were liable to Goudreau because they had destroyed his reputation, and his ability to realize the fruits of his partnership with Munyon, by charging Goudreau criminally without probable cause to believe that he had committed a crime. As pertinent here (see note 4, supra), the motion judge concluded in a written decision that summary judgment in favor of Hubbard was appropriate: Because "an objectively reasonable police officer could have believed that there was probable cause to charge Goudreau with violation of G. L. c. 140, § 131L,"

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<sup>5</sup> Stephen was charged with two counts of larceny of a firearm and two counts of unlawful possession of a firearm.

Hubbard was entitled to qualified immunity, and therefore was not personally liable to Goudreau.<sup>6</sup>

On appeal, Goudreau claims that the motion judge erred in reaching this conclusion because § 131L does not apply to firearm dealers or guns kept in a commercial setting. Therefore, Goudreau argues, a reasonable juror could find that Hubbard lacked probable cause to believe that Goudreau had committed a crime. For the first time on appeal, Goudreau also argues in the alternative that summary judgment was inappropriate because whether the stolen firearms were "under the control of the owner or other lawfully authorized user," and whether Patriot Arms qualifies as a "locked container" within the meaning of § 131L, were disputed questions of fact.

Standard of review. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as

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<sup>6</sup> The motion judge viewed the disputed fact whether Hubbard was personally involved in prosecuting Goudreau in the light most favorable to Goudreau. And, although the motion judge considered it "a close question," he concluded, "viewing the facts in the light most favorable to Goudreau, that the seeking of charges against him for violating G. L. c. 140, § 131L, deprived [Goudreau] of his well-established right to be free from having to answer to criminal charges absent probable cause." Thus, the motion judge proceeded to consider "whether an officer similarly situated to Lt. Hubbard would have known that assertion of the charges against Goudreau violated his constitutional rights."

to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. Juliano v. Simpson, 461 Mass. 527, 529-530 (2012). Where, as here, the moving party does not bear the burden of proof at trial, summary judgment is appropriate if the moving party can demonstrate that the opposing party "has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

Goudreau's claim that § 131L does not apply to firearms kept in a commercial setting presents a question of statutory construction, which we also review de novo under established principles. Commerce Ins. Co. v. Commissioner of Ins., 447 Mass. 478, 481 (2006). A statute must be interpreted to effectuate the Legislature's intent in enacting it, Water Dep't of Fairhaven v. Department of Env'tl. Protection, 455 Mass. 740, 744 (2010), which we discern by examining "[t]he statutory language itself." Ruggiero v. Police Comm'r of Boston, 18 Mass. App. Ct. 256, 258 (1984). Statutory words and phrases are to be "construed according to the common and approved usage of the language." G. L. c. 4, § 6 (Third). "[W]here the language of a statute is plain and unambiguous, it is conclusive as to

legislative intent." Thurdin v. SEI Boston, LLC, 452 Mass. 436, 444 (2008).

Discussion. 1. Applicability of § 131L to commercial firearm owners. Section 131L was inserted by § 47 of St. 1998, c. 180, "An Act Relative to Gun Control in the Commonwealth" (Act). The Act is meant to "limit access to deadly weapons by irresponsible persons," Ruggiero, 18 Mass. App. Ct. at 258, and to "enhance the safety of sales, rentals, and storage of guns." Sullivan v. Department of State Police, 57 Mass. App. Ct. 10, 12 (2003). Section 131L plays an "important role" in the statutory scheme, by protecting "all unauthorized users from the negligent storage of firearms, rifles, or shotguns." Commonwealth v. Reyes, 464 Mass. 245, 250 & n.5 (2013). By its plain terms, the statute applies to "any firearm," § 131L (a), except for antique and replica guns, § 131L (f), when the firearm is "neither carried nor under the control of [its] owner or other authorized user." Commonwealth v. Patterson, 79 Mass. App. Ct. 316, 318 (2011).

As the motion judge observed, § 131L contains no exception for firearm dealers or guns kept in a commercial setting. We decline Goudreau's invitation to read such an exception into the statute. First, doing so would violate the well-settled tenet that "an express exception in a statute . . . comprises the only limit on the operation of the statute and no others will be

implied." Thurdin, 452 Mass. at 444. Second, "common sense" dictates that § 131L applies to commercial gun owners, who store "a potential majority" of the firearms in this Commonwealth, because the "impact on the public would be greater" if commercial gun owners failed to secure their inventory. Cf. id. at 448 (discussing plaintiff's ability to sue employer not covered by antidiscrimination statutes).

The context and purpose of § 131L's enactment supports our conclusion. Section 47 of the Act inserted G. L. c. 140, §§ 131K through 131P. Sections 131K and 131L exempt antique and replica guns from their provisions, and § 131K also exempts particular uses of firearms. Section 131M exempts certain law enforcement officers from its provisions; §§ 131N and 131O contain no exemptions; and § 131P exempts law enforcement and government officials. Section 47 of the Act therefore identifies the weapons and uses for which the Legislature deemed exemptions necessary or appropriate. None of those exemptions are for gun dealers. Contrast G. L. c. 140, § 121 (exempting "manufacturers or wholesalers of firearms, rifles, shotguns or machine guns").

The other provisions of the Act confirm that § 131L applies in commercial contexts. Under § 131P, applicants for certification as a firearm safety course instructor -- a commercial endeavor -- are specifically "not exempt from the

requirements of this chapter or any other law or regulation of the commonwealth or the United States." § 131P (b). Section 41 of the Act amended G. L. c. 140, § 131 (a), to provide that "[a]ny large capacity weapon or large capacity feeding device kept on the premises of a lawfully incorporated shooting club shall, when not in use, be secured in a locked container."

Pursuant to G. L. c. 140, § 123, Fourteenth, inserted by § 19 of the Act, gun shop owners must "conspicuously post" the statutory storage requirements "at each purchase counter" as a condition of operating their commercial enterprise. It makes no sense that gun sellers are required to post the statutory storage requirements as a condition of operation, but are not required to adhere to them. Finally, although not part of the Act, we note that it is "an unfair or deceptive trade practice [under G. L. c. 93A, the consumer protection act] to transfer a handgun without explaining how to safely store it." Reyes, 464 Mass. at 251 n.7, citing 940 Code Mass. Regs. § 16.06(2) (1997).<sup>7</sup> These

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<sup>7</sup> Reyes also notes that "the purchase of a firearm that is not equipped with a device that fully blocks its use by unauthorized users is required to receive . . . from the gun seller [a statutory] warning from the Massachusetts Attorney General: . . . [that], '[i]n order to limit the chance of . . . misuse, it is imperative that you keep this weapon locked in a secure place and take other steps necessary to limit the possibility of theft or accident. Failure to take reasonable preventative steps may result in innocent lives being lost, and in some circumstances may result in your liability for these deaths'" (emphasis omitted). Reyes, 464 Mass. at 251 n.7, quoting 940 Code Mass. Regs. § 16.06(1) (1997).

provisions, and the fact that § 131L is applicable to "any firearm" in this Commonwealth, regardless of the owner's occupation, leave us with "no doubt that [§ 131L] was intended to . . . criminaliz[e] negligent storage" of all nonantique and nonreplica firearms. Reyes, supra at 250-251. Any other reading of the statute would result in "those prohibited from purchasing a firearm . . . nonetheless gain[ing] ready access to an unsecured firearm that is not under the immediate control of the [gun shop] owner," as happened here. Commonwealth v. McGowan, 464 Mass. 232, 242 (2013).

2. Qualified immunity. Goudreau's claim of error in the motion judge's conclusion that Hubbard is entitled to qualified immunity depends on Goudreau's interpretation of § 131L, which we reject. To the extent Hubbard was personally involved in prosecuting Goudreau, we agree with the motion judge that Hubbard is entitled to qualified immunity because a reasonable officer could conclude that Goudreau violated § 131L.

Hubbard's investigation revealed that Goudreau had allowed Stephen to be in Patriot Arms unsupervised on February 28, even though Stephen was neither an employee nor a person authorized to access firearms, given his criminal history. Stephen's unfettered access enabled him to place two boxes beneath his shirt, walk to the garage, remove guns from the unlocked boxes, and walk away without anyone noticing. While Goudreau is

correct that "[w]hether a particular gun is under a [person]'s control 'will depend on the facts and circumstances of any given case,'" Commonwealth v. Cantelli, 83 Mass. App. Ct. 156, 172 (2013), quoting Patterson, 79 Mass. App. Ct. at 320, no reasonable juror could conclude from these undisputed facts that the firearms were under the control of Goudreau, Munyon, or any other authorized user when Stephen walked out of Patriot Arms. "[A] firearm is within the 'control' of its owner or authorized user only when that person has it sufficiently nearby to prevent immediately its unauthorized use." Patterson, supra at 319. Goudreau was not present at Patriot Arms on February 28; Munyon did not notice that a firearm was missing until later that day; neither realized that two guns were missing until March 2; and, as Hubbard observed in his police report, no one knew that Stephen had taken the guns until March 3, three days later, when Munyon finally reviewed the surveillance footage. There simply is no dispute, and therefore it was reasonable for Hubbard to conclude, that the stolen firearms were being "stored or kept" within the meaning of § 131L (a).

Goudreau's argument, that Hubbard could not reasonably have believed Goudreau violated § 131L because a door lock, surveillance cameras, and the constant presence of employees

rendered Patriot Arms a "locked container,"<sup>8</sup> "ignores the requirement that a container must not only be locked but also secure" in order to comply with § 131L (quotations omitted). Commonwealth v. Parzick, 64 Mass. App. Ct. 846, 848 (2005). "At a minimum, to be secure, any qualifying container must be capable of being unlocked only by means of a key, combination, or other similar means." Reyes, 464 Mass. at 252. Goudreau and Munyon both reported to Hubbard that Patriot Arms was open for business and not locked at the time of the thefts. Hubbard could conclude that the open shelving in the storage area "did not prevent ready access by anyone other than" Goudreau or Munyon, Parzick, supra at 850, since Stephen was able to remove items and walk alone into the garage. Hubbard was also entitled to conclude that the surveillance measures had been "easily defeated," id., where the thefts went unnoticed for two days. Where (1) the undisputed facts support Hubbard's conclusion in his police report, that the thefts occurred "[b]ecause these weapons were left unattended and unsecured and they were left readily accessible to a person known to the owner as a career criminal with multiple felony convictions," and (2) § 131L is

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<sup>8</sup> Goudreau's repeated assertions in his brief regarding the constant presence of employees in his store are not supported by citations to the summary judgment record, which contains no admissible information about Patriot Arms's employees, other than that Stephen was not one.

intended to punish storing firearms in such a way that unauthorized persons can gain access, we conclude that a reasonable official "could have believed his actions [in seeking criminal charges against Goudreau] were lawful." Clancy v. McCabe, 441 Mass. 311, 322 (2004). It does not matter if, as Goudreau claims, "[s]cores of reasonable officers and officials visiting or inspecting the store prior to the incident involved in this case found no probable cause to bring charges." "The standard is entirely objective." Longval v. Commissioner of Correction, 448 Mass. 412, 418 (2007).

Judgment affirmed.