

**FILE COPY**

**IN THE SUPREME COURT OF THE STATE OF ALASKA**

YONG H. YI,

Appellant,

vs.

HARRIS S. YANG, SHARON YANG,  
MAX ARTHUR LAMOUREAUX, Y & I  
CORPORATION, OFFICER LAWRENCE  
PEYTON MERIDETH and the CITY OF  
FAIRBANKS,

Appellees.



Supreme Court Case No. S-13427

Superior Court Case No. 4FA-04-2761 CI

APPEAL FROM THE DECEMBER 8, 2008 JUDGMENT OF THE SUPERIOR  
COURT, FOURTH JUDICIAL DISTRICT AT FAIRBANKS THE  
HONORABLE RANDY M. OLSEN, PRESIDING

**BRIEF OF APPELLEES**  
**LAWRENCE PAYTON MERIDETH AND CITY OF FAIRBANKS**

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## AUTHORITIES PRINCIPALLY RELIED UPON

### **42 U.S.C. Sec. 1983. Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

### **AS 09.65.070. Suits against incorporated units of local government.**

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(d) An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim

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(2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;

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(e) In this section

(1) "municipality" has the meaning given in AS 01.10.060 and includes a public corporation established by a municipality;

(2) "village" means an unincorporated community where at least 25 people reside as a social unit.

**AS 12.25.010. Persons authorized to arrest.**

An arrest may be made by a peace officer or by a private person.

**AS 12.25.030. Grounds for arrest by private person or peace officer without warrant.**

(a) A private person or a peace officer without a warrant may arrest a person

(1) for a crime committed or attempted in the presence of the person making the arrest;

(2) when the person has committed a felony, although not in the presence of the person making the arrest;

(3) when a felony has in fact been committed, and the person making the arrest has reasonable cause for believing the person to have committed it.

(b) In addition to the authority granted by (a) of this section, a peace officer

(1) shall make an arrest under the circumstances described in AS 18.65.530;

(2) without a warrant may arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer,

(A) committed a crime involving domestic violence, whether the crime is a felony or a misdemeanor; in this subparagraph, "crime involving domestic violence" has the meaning given in AS 18.66.990;

(B) committed the crime of violating a protective order in violation of AS 11.56.740; or

(C) violated a condition of release imposed under AS 12.30.016 (e) or 12.30.027;

(3) without a warrant may arrest a person when the peace officer has probable cause for believing that the person has



- (A) committed a crime under or violated conditions imposed as part of the person's release before trial on misdemeanor charges brought under AS 11.41.270;
- (B) violated AS 04.16.050 or an ordinance with similar elements; however, unless there is a lawful reason for further detention, a person who is under 18 years of age and who has been arrested for violating AS 04.16.050 or an ordinance with similar elements shall be cited for the offense and released to the person's parent, guardian, or legal custodian; or
- (C) violated conditions imposed as part of the person's release under the provisions of AS 12.30.

## JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to AS 22.05.010.

### STATEMENT OF THE CASE

#### A. Statement of Facts.

While the last parties still standing in this case are the Appellant Yong H. Yi and Appellees Lawrence Payton Merideth and the City of Fairbanks, this is really the tale of Max Arthur Lamoureux.<sup>1</sup> On the morning of December 19, 2004, at around 9:30 a.m., Max Lamoureux and Jung (John) Lee stepped out of the office of the Klondike Inn in Fairbanks intending to drive to a local restaurant to get something to eat [Exc. 247]. At his deposition, Lamoureux described what happened next:

Q Okay. So you went out into the car, okay, and . . .

A We started to drive off this direction, we pulled out, backed out, and started driving off like that.

Q Okay. And –

A Because we were going to go over here and go back to that restaurant.

Q Okay. Now when was your first contact with the Yis?

A Right out here when I was pulling out they stopped the truck and – who's there, Kenny and who's the other guy?

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<sup>1</sup>Lamoureux's name is misspelled (Lamoureu) on Appellant's title page.

Q Well, there s – I think the two that you're talking about might be Kenny and Jeff or . . .

A Okay. Who's the heavier set one?

Q Yi Yong (ph) or Jeff –Jeff.

A Okay, Jeff. Yeah, see I don't even know who the heck these guys were. But I – it was the heavier set one gets in front of the truck so I stop and then Kenny runs over and he's screaming get out of the fucking truck, get out of the fucking truck, I'm going to fucking kill you, get out of the truck. I go, well I ain't going to get out, so then he tries to punch the window real hard, I thought he was going to bust it but he didn't, and he punched it with his right arm, I believe, and – but the glass didn't bust. And then the other fellow that was in front of the truck he's like, I mean, this is like un – out of a movie, this is just unbelievable, they're – freaking out, they're screaming at me. His – somebody's wife or girlfriend out there screaming at me, and the fellow in front of me he's like looking around for something to pick up and he finds this big cement cinder and I'm thinking I'm going to die when this thing hits the window, and he throws it up, bam, smashes out the window, right, caves in a little bit. He runs back over, picks it up again, throws it again, Kenny goes and jumps in the back of the truck and he's looking around for something and – to go ahead and bust – he's trying to bust the window, he's punching it, and he's looking around for something to try to bust the window with. I'm still sitting there, right, I'm thinking what the hell am I going to do, these guys are going to kill me. And so I go ahead and start to pull off, it's a really snowy day, it's super slick out, the truck's barely moving. The – one of the gals jumps on the side of the truck on the mirror, holds onto it for about five foot and lets go. Meantime, Kenny he – he finds a broom in the back, he grabs it, he twists it off the handle, I mean, this guy's thinking about how he's going to get me. He twists it off the handle, he goes ahead and jabs it through the back window, shatters it, goes ahead and hits John in the back of the head with it, he had some cuts on the top of his head, and he went ahead and starts jamming it at me. He jabs it at me I would say a good 20, 25

times then he pulls it out and he looks at it and he goes, ahhh (ph) and he busts it in half, he looks at the point, he goes ahhhh (ph) and then he starts stabbing it through the window again at me.<sup>2</sup> And I'm – I'm thinking all this time how the hell could he be stabbing me so many times and he's not getting me and I'm trying to spin around the parking lot to get rid of these guys, he jumps out, his brother jumps in, grabs the same stick, starts doing the same thing. I spin the truck around here, I get it to come around, I'm driving this way and there's a road here and – and I'm going to try to get to some pavement to get rid of these – to get rid of this guy in the back because he's trying to kill me. I'm sliding, he – he's got a good hold, and I'm getting jabbed, I've got nowhere to go, I can't get out of the truck because these guys are going to get me, John, he's frozen stiff like a dead man he's so scared, and so I'm driving this way and suddenly this red van plows into the side of me, okay, and the dents are clearly on the side and clearly on the front of her truck, plows in front of me, she spins off and hits the ditch, and the truck just kept kind of going, it moved a little bit but it didn't – you know, it was really slick out. And so then I come out and I spin around in this parking lot while the heavier set fellow is still jabbing at my head, and I'm wondering why I'm still alive at this point, and I go ahead and get back around over to the hotel, so we run in the hotel, and call the cops [Exc. 247-248].

Lamoureaux summed it up like this: “It was a terrifying experience. I firmly believe the Yis would have killed me, if they could have” [Exc. 88].

He was not alone in this dire evaluation of the situation that confronted him that December morning in Fairbanks. Valerie Hopson was just looking to buy a newspaper that morning [Exc. 78]. She stated she thought that if the Yis had had a

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<sup>2</sup>To fully appreciate their situation, it should be noted that the Ford truck being operated by Lamoureaux was not an extended cab pickup, “they were right on me” [Exc. 249].

gun they would have killed Lamoureaux and John Lee, "They had no mercy at all" [Exc. 78]. Another witness, Samantha Bergman, described the scene as follows:

Personally, I wasn't really paying attention but I did happen to see a man chasing the 2 managers and trying to hit the managers with the stick. Then the managers came to the front door in the truck, stopped, immediately ran from the truck to inside. At the same time the "crazy" guy was still chasing them managers with the stick and threatening [sic] them. Then we locked the door and called you people [the police] [Exc. 81].

Prior to the attack on Lamoureaux and Lee, the Fairbanks Police Department had received a series of calls to its 911 system regarding the Klondike and requesting police assistance [Exc. 64-77]. At least two of the calls appear to have been made at or near the same time and overlapped [Exc. 66-70]. In response to these calls, police officers were dispatched to the Klondike [Exc. 71].

The Klondike Inn/Restaurant is located on Bedrock Street in Fairbanks [Exc. 94]. The Inn is on one side of the street, and the bar/restaurant is across the street from the Inn [Exc. 94]. Superior Court plaintiff Harris Yang owned the Klondike and prior to the time of the assault on Max Lamoureaux had leased the restaurant/bar portion of the business to Appellant Yong H. Yi [Exc. 6-7]. A dispute regarding this lease and the operation of the bar/restaurant prompted Yi to file the original superior court action on December 13, 2004, six days before the altercation described above [R. 3323].

Lawrence Payton Merideth has been employed as an officer with the Fairbanks Police Department since July of 2000 [Exc. 94]. He is currently a detective with the department, but back in December of 2004, he was working as an officer assigned to a regular patrol shift [Exc. 94]. He was dispatched to the Klondike Inn/Restaurant on the morning of December 19, 2004 [Exc. 94]. Also responding to the scene were Fairbanks Police officers Doug Welborn, David McKillikan, and James Geier [Exc. 94-95].

As he approached the area, Merideth observed a silver Chrysler minivan stuck in a snow bank near the intersection of Bedrock and Rewak Streets, very close to the Klondike Inn [Exc. 95]. When he arrived at the Klondike, he observed a white Ford pickup truck, Alaska license plate DMS745 [Exc. 95]. The truck was parked outside the Klondike Inn, it was parked at an odd angle, it was running, and the driver's-side door was open [Exc. 95]. He observed that the rear windows and the front windshield of the truck were shattered [Exc. 95].

Officer Welborn contacted the group of people standing in front of the restaurant/bar [Exc. 100]. Yong Yi was among the people in this group, which included his brother Kenny Yi [Exc. 100]. Welborn questioned the people in the group in an attempt to ascertain what had happened [Exc. 100]. Kenny Yi and Yong Yi admitted that they had broken out the windows of the Ford pickup [Exc. 100].

Officer Merideth contacted the people who were inside the Inn portion of the Klondike, including Lamoureaux and Jung (John) Lee [Exc. 95]. Lamoureaux told Merideth what happened, essentially the same rendition of the facts as is set out above [Exc. 95-96]. Merideth radioed to Officer Welborn and asked him to have Kenny Yi and Yong Yi stand clear of the other people so that Lamoureaux could see them [Exc. 97]. Lamoureaux identified them as the two men who had broken the windows and windshield of the truck and tried to stab him and Lee with the broken broom handle [Exc. 97].

Lamoureaux told Merideth that he had helped Jung Lee post eviction notices on the door of the Klondike bar and restaurant earlier that morning [Exc. 97]. These notices were photographed by the officers, along with another posted notice which read: "Temporarily CLOSED!!! UNDER Renovation!!! We will be opening soon. Thank you, KLONDIKE MANAGEMENT" [Exc. 90-93].

Lamoureaux signed a "Citizen's Arrest Report" [Exc. 83] and completed and signed a "Statement" [Exc. 84]. The Statement that accompanied the Citizen's Arrest Report stated:

On 12-19-2004 I Max attempted to drive away from the Klondike Inn, John Lee, the manager, was with me. As we were pulling through the parking lot a van crossed in front of us cutting us off to stop. One of the men jumped in the back, shattered out back window of the truck. Then he jumped out of the back and then tried to scatter the front drivers window. Then the other male, man in black jacket, threw a cement block through the front window. We tried to pull away in fear of our lives. Man in black jacket jumped in back of truck, grabbed a

broom, removed broom part and started to stab at back window to shatter it further in order to stab Max in back of head and hands. Then a silver van rammed into the side of us. At that point the male in the back broke broom handle to get sharp point to try and stab Max again. We were able to make it back the office of the Klondike Inn, lock the doors and call 911 [Exc. 84].

Officer Merideth went across the street to where Officer Welborn and the Yis were standing [Exc. 97]. He asked who had broken out the windows of the white truck, and Kenny Yi and Yong Yi confirmed that they had [Exc. 97]. Merideth then told Yong Yi and Kenny Yi that they were under arrest [Exc. 97].

**B. Statement of Proceedings.**

This action was filed on December 13, 2004, six days prior to the incident at the Klondike Inn that resulted in the arrest of Appellant [R. 3323]. Appellees Merideth and the City of Fairbanks were named as defendants in the Second Amended Complaint lodged with the court on July 24, 2006 [Exc. 1] and accepted for filing by the court's order dated September 13, 2006 [Exc. 37]. Merideth and the City filed a motion for summary judgment on February 20, 2007 [Exc. 41]. Appellant filed an opposition [Exc. 113], and Merideth/City filed a reply [Exc. 273]. The superior court finally ruled on the summary judgment motion during a hearing held on April 14, 2008 [Exc. 284], granting the motion and dismissing the claims against the City and Merideth [Exc. 278]. The court issued Findings of Fact and Conclusions of Law on December 8, 2008 [Exc. 279].



## STANDARD OF REVIEW

This court independently reviews an order granting summary judgment, determining whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law.<sup>3</sup> The record is read in the light most favorable to the non-moving party, with all reasonable inferences made in its favor.<sup>4</sup> The party opposing summary judgment must set forth specific facts showing genuine issues and cannot rest on mere allegations.<sup>5</sup> This court may affirm a grant of summary judgment on any basis appearing in the record.<sup>6</sup> The applicability and scope of official immunity raise only questions of law to which this court is free to substitute its own judgment for that of the trial court.<sup>7</sup>

## ARGUMENT

Yi presents five arguments on appeal: (1) That he was arrested by Officer Merideth and not by Max Lamoureaux (no citizen's arrest); (2) that because Yi's crimes were not committed in Merideth's presence, Merideth had no legal authority to arrest Yi; (3) that because Merideth had no legal authority to arrest

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<sup>3</sup> *Prentzel v. State, Dept. of Public Safety*, 169 P.3d 573, 581 (Alaska 2007).

<sup>4</sup> *Witt v. State, Dept. of Corrections*, 75 P.3d 1030, 1033 (Alaska 2003).

<sup>5</sup> *Braun v. Alaska Comm. Fishing & Agriculture Bank*, 816 P.2d 140, 144 (Alaska 1991).

<sup>6</sup> *Parker v. Tomera*, 89 P.3d 761, 765 (Alaska 2004), *see, also, Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912, 919 (9th Cir. 2001), *citing Jensen v. Lane County*, 222 F.3d 570, 573 (9th Cir. 2000)(summary judgment may be affirmed on any ground supported in the record, including reasons not relied upon by the district court).

<sup>7</sup> *Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150, 154 (Alaska 1987).

him, Merideth's actions violated Yi's civil rights (42 USC § 1983 claim) and were a state law tort (false arrest); (4) That the City of Fairbanks is liable under 42 USC § 1983 for its failure to train Officer Merideth; and (5) that the City of Fairbanks is liable under a *respondeat superior* theory for Yi's state law tort claim.

Yi argues that the superior court erred because it did not decide the initial question of whether Officer Merideth's conduct violated Yi's constitutional rights before making findings regarding immunity for Merideth and the City. Yi notes that in a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence.<sup>8</sup> While this "rigid order of battle" has been criticized and brought into question,<sup>9</sup> the citizen's arrest issue and whether Yi's constitutional rights were violated will be addressed first.

Yi's claims against Merideth are based entirely on the erroneous argument that there was no citizen's arrest of Yi by Lamoureux. An examination of the

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<sup>8</sup> *Saucier v. Katz*, 533 U.S. 194, 200 (2001).

<sup>9</sup> As noted by this court in *Sheldon v. City of Ambler*, 178 P.3d 459, 466 n. 37 (Alaska 2008), requiring this sequence has been controversial. At least some members of the Supreme Court have questioned this "rigid 'order of battle,'" *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004), Breyer, J., Scalia, J., and Ginsburg, J. *concurring*. In that case, the majority exercised its summary reversal procedure to simply correct a clear misapprehension of the qualified immunity standard and expressed no view on the correctness of the Court of Appeals' decision on the constitutional questions. *Id.* at 198, n.3.

record shows that this claim has no merit. Once this point is debunked, the remainder of Yi's arguments topple like so many dominos.

**I. Lamoureaux Had The Authority To Arrest Yi.**

Under Alaska law, Lamoureaux, as a citizen, has the authority to make an arrest.<sup>10</sup> The grounds for arrest without a warrant by a private person are set out in AS 12.25.030 and include "a crime committed or attempted in the presence of the person making the arrest."<sup>11</sup> The lawfulness of a citizen's arrest is measured by the same standard as any arrest undertaken without a warrant, that is, was it based upon probable cause.<sup>12</sup> Probable cause exists if the facts and circumstances known to the citizen making the arrest would warrant a prudent man in believing that an offense had been committed.<sup>13</sup> In dealing with probable cause, as the name implies, a court deals with probabilities, "These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."<sup>14</sup>

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<sup>10</sup> AS 12.25.010.

<sup>11</sup> AS 12.25.030(a)(1). This statutory provision applies to civil false arrest claims. See *City of Nome v. Ailak*, 570 P.2d 162, 169 (Alaska 1977).

<sup>12</sup> *Merrill v. State*, 423 P.2d 686, 699 (Alaska 1967), cert. denied 386 U.S. 1040 (1967).

<sup>13</sup> *Id.*

<sup>14</sup> *McCoy v. State*, 491 P.2d 127, 130 n.9 (Alaska 1971), quoting *Brinegar v. United States*, 388 U.S. 160, 175 (1949).

Where there is no factual dispute, what constitutes probable cause to make an arrest is a matter of law to be decided by the court.<sup>15</sup> In this case, Yi admitted to Fairbanks police officers that he smashed the windshield and the back windows of the truck being driven by Lamoureaux [Exc. 97,100]. This conduct, committed in Lamoureaux's presence, is a crime under Alaska law.<sup>16</sup> Lamoureaux also stated that he was in fear for his life because of the actions of Kenny Yi and Yong Yi [Exc. 247-248]. Yi arguably committed the offense of assault in the third degree, a felony,<sup>17</sup> but was only charged with assault in the fourth degree, a misdemeanor.<sup>18</sup>

The validity of Yi's arrest does not depend on whether he was ultimately convicted of the crimes charged.<sup>19</sup> The only relevant inquiry is whether the facts and circumstances within Lamoureaux's knowledge were sufficient to warrant a prudent person in believing that Yi committed a crime. In this case, Lamoureaux was fully justified in arresting Yi.

## **II. Lamoureaux Did Arrest Yi.**

Yi claims that Lamoureaux's citizen's arrest of Yi was not effective because of (1) lack of intent and (2) unnecessary delay. As noted by the Alaska Court of Appeals in *Moxie v. State*, "it is not the sole responsibility of a person making a

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<sup>15</sup> *City of Nome v. Ailak*, 570 P.2d at 170.

<sup>16</sup> AS 11.46.484(a)(1). Criminal Mischief in the Fourth Degree.

<sup>17</sup> AS 11.41.220(a)(1)(A).

<sup>18</sup> AS 11.41.230(a)(3).

<sup>19</sup> *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979).

citizen's arrest to subdue, control and transport the arrestee into the formal custody of the state."<sup>20</sup> Lamoureux's situation was a classic example of why the law does not require a person making a citizen's arrest to confront the person to be arrested.

In the California case of *Green v. Department of Motor Vehicles*,<sup>21</sup> the perpetrator was arrested within 35 to 40 minutes of the time that the citizen making the arrest had observed her enter her driveway, after the citizen had observed her commit multiple public offenses.<sup>22</sup> The court noted that the citizen had "very wisely" chosen "to enlist the aid of the police in effectuating the arrest rather than risking his own safety."<sup>23</sup> In the present case, Lamoureux was running for his life<sup>24</sup> and very wisely chose to enlist the aid of the police in arresting Yi.

**A. Intent.**

Yi argues that Lamoureux did not make the arrest and cites to Lamoureux's deposition testimony to support his argument.<sup>25</sup> In response to questions from Yi's counsel, Lamoureux stated that he did not know he was the

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<sup>20</sup> *Moxie v. State*, 662 P.2d 990, 991 (Alaska App. 1983).

<sup>21</sup> 137 Cal. Rptr. 368, 68 Cal.App.3d 536 (1977).

<sup>22</sup> *Id.* at 541.

<sup>23</sup> *Id.*

<sup>24</sup> "It was very clear to me that they [the Yis] were trying to kill me" [Exc. 242]; "these guys were trying to kill me, that's all I know" [Exc. 249] "I don't know what he [one of the Yis] was attempting to do, I wasn't looking back at him, I was running" [Exc. 251]; "I don't know if they actually made an attempt to come in or not cause I ran in and the manager locked the door" [Exc. 251]; "I was more hiding than anything else" [Exc. 251].

<sup>25</sup> Appellant's Brief at p. 20, referencing Exc. 257.

only one arresting the Yis [Exc. 257]. He testified that he assumed that the Yis were being arrested because they broke the law and that he was just agreeing to what he saw [Exc. 257]. He testified that he thought the police were making the arrest [Exc. 257]. It should be noted that Lamoureaux's deposition was taken three years to the day from when he was assaulted outside the Klondike Inn [Exc. 225].

He explained to Yi's attorney:

A Unfortunately after this long, the only parts that stick out in my mind real clear is the scary parts [Exc. 235].

and,

A You know, I want to mention that when I was talking to the police officer that there was just an assault on my life, it was very clear to me that they were trying to kill me.

In considering whether a citizen's arrest was made, the citizen need not use any "magic words," and the arrest "may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect."<sup>26</sup> That is exactly what happened in this case. The police were summoned to the scene by calls to 911 by both sides of this dispute [Exc. 66-71]. Lamoureaux reported the crimes to Officer Merideth at the scene and identified the perpetrators [Exc. 97].

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<sup>26</sup> *Arpin*, 261 F.3d at 920, citing *Johanson v. Dept. of Motor Vehicles*, 36 Cal. App. 4th 1209, 1216-17, 43 Cal. Rptr.2d 42, 47 (1995).

In *Padilla v. Meese*,<sup>27</sup> the citizen making the arrest, an inspector for the California Department of Food and Agriculture, testified that it was not his procedure to make a citizen's arrest and that he did not intend to arrest the plaintiff.<sup>28</sup> The court, in finding that there had been a valid citizen's arrest, reiterated that there were not any "magic words" and that the inspector's misunderstanding of what constitutes a citizen's arrest did not render the arrest unlawful.<sup>29</sup>

A full examination of Lamoureux's deposition testimony reveals that Lamoureux did intend to make a citizen's arrest. He testified that the police officer explained the citizen's arrest process:

Q Okay. Did they tell you that you would actually be the person – did one of the officers tell you that you were the person who was actually making the arrest?

A I would assume so.

Q You recollect that?

A Yes, I – believe they told me that somewhere along the line. I – you know, I was so excited at the time I just wanted them out of there and I would have agreed to jump off the top of the roof to get them out of there.

Q Well, I guess I'm still a little confused. Did you know at the time that you were the one who was actually arresting Yong Yi and Kenny Yi?

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<sup>27</sup> 229 Cal.Rptr. 310, 184 Cal.App.3d 1022 (1986).

<sup>28</sup> *Id.* at 1025.

<sup>29</sup> *Id.* at 1032.

A I knew that I was participating in their arrest, I didn't know that I had the sole discretion in arresting them [Exc. 257].

Lamoureaux also noted that "I would have had them arrested if I'd a known, I'll just say that, because I was scared that they were – that I couldn't leave" [Exc. 257].

Merideth's testimony confirmed that the citizen's arrest procedure was explained to Lamoureaux and that he was told that he was making the arrest.

Q Did you ever explain to him [Lamoureaux] the citizen's arrest procedure?

A I – don't recall specifically speaking with him about that. I've been involved with I don't know how many dozens and dozens of citizen's arrest in my career. I would have presented him the form and explained it to him.

Q Why?

A There's no reason why I would not have done that [Exc. 206].

\* \* \* \*

Q So it would be common procedure that you would explain that you could not arrest these people?

A Yes. And they would – they would have to sign a citizen's arrest form . . .

Q Okay.

A Absolutely [Exc. 207].

\* \* \* \*



Q Okay. And you don't know whether or not Mr. Lamoureaux ever told you that he want – that he initiated and told you, I want those – I'm arresting those people?

A Sir, I don't recall exactly what he told me.

Q Uh-huh.

A But I would not have done that if he had not had signed that form and I would have explained it to him.

Q Well, I'm not asking – I assume that that's the case.

A I – I don't – I don't recall exactly what he told me.

Q I'm just trying to figure out who suggested the form.

A Well, I would have suggested to [sic] form, because he doesn't know about that, I assume.

Q Okay.

A So I would have suggested, well, basically, here's our options, here's what I can do. But I would not have sent somebody to sign a citizen's arrest form without explaining it to them. I mean, that's a serious document, you're placing somebody under arrest. I've done this dozens and dozens and dozens of times [Exc. 211].

Lamoureaux was not required to use any “magic words” to validate his arrest of Yi. His confusion about the process is understandable in light of the fact that he had just been placed in fear for his life. But his misunderstanding of the process does not render the arrest invalid or unlawful.

**B. Delay.**

In *Herrin v. State*,<sup>30</sup> this court set out the rule with regards to “delay” in making a misdemeanor arrest without a warrant:

An officer must act promptly at the time of the offense. If he does not act immediately after the offense has been committed, he can thereafter make arrests only by procuring a warrant and proceeding in accordance to its terms.<sup>31</sup>

An officer (or a citizen) making an arrest “cannot delay for any purpose which is foreign to the accomplishment of the arrest.”<sup>32</sup> In this case, there was no delay other than the time it took the officers to complete their on-scene investigation.

Yi claims that Lamoureux did not sign the citizen’s arrest report until nearly four hours after the incident and that Lamoureux “apparently” went to the Fairbanks Police Department to sign the documents.<sup>33</sup> These claims appear to be based upon notations at the bottom of the Citizen’s Arrest Report forms.<sup>34</sup> These assertions are contrary to the testimony of Lamoureux and Merideth, who both stated that the citizen’s arrest paperwork was executed on the scene before the Yis were taken to jail:

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<sup>30</sup> 449 P.2d 674 (Alaska 1969).

<sup>31</sup> *Id.* at 677-678, quoting *Jackson v. Superior Court*, 98 Cal.App.2d 183, 219 P.2d 879, 882 (1950).

<sup>32</sup> *Id.* at 678.

<sup>33</sup> Appellant’s Brief at 7, 20.

<sup>34</sup> At the bottom of the Citizen’s Arrest Report forms are boxes to be completed by the officer [Exc. 82, 83]. Exc. 82 shows the entries: “12/19/04 1312 Merideth Pro LPM.” Exc. 83 shows the entries: “12/19/04 1320 Merideth Pro 1059 LPM.” These entries do not reflect the time that Lamoureux signed the forms.

[Merideth]

Q Okay. Now, you indicated – I noticed in your report that there's no mention of a civil arrest.

A I – I don't believe that's accurate, sir. I – there's all the citizen's arrest paperwork that is attached to this report that goes to the district attorney's office. So . . .

Q When was that filled out?

A Well, the actual citizen's arrest would have been signed – it would have been signed that day. It has to be.

Q Was it signed before or after you took the Yis into custody?

A Well, if I could find it. Hang on one second. Common procedure, I can't think of a time where it would not have been signed either before or at the same time that they were being taken into custody.

Q Okay.

A I'm not going to take somebody to the jail and then go back and have somebody sign a citizen's arrest. That just – that doesn't work like that [Exc. 206].

And Lamoureux:

Q Okay. And do you remember signing these documents, the two Citizen's Arrest forms and the Statement on that – the day of the incident?

A I believe so, yes.

Q Now you said you left Fairbanks then fairly soon after this happened on the same day?

A Yes.

Q So it would be correct to assume that these were done within an hour or so of the police arriving, or an hour or two?

A Yes [Exc. 256].

While the timing of the signing of the citizen's arrest form is not critical,<sup>35</sup> both Merideth and Lamoureaux confirmed that the paperwork was signed contemporaneously with Yi's arrest.

### III. Qualified Immunity.

#### A. 42 U.S.C. § 1983.

The court must consider whether, taken in the light most favorable to Yi, the facts alleged show that Merideth's conduct violated Yi's constitutional rights.<sup>36</sup> Since Yi was arrested pursuant to a valid citizen's arrest, there was no violation of his constitutional rights, and there is no necessity for further inquiries concerning qualified immunity.<sup>37</sup>

Assuming that Lamoureaux's arrest of Yi was not valid and that Yi was actually arrested by Merideth, that alone does not establish a violation of Yi's Fourth Amendment rights. A violation of state law (AS 12.25.030 in this case) does not itself establish a federal constitutional violation; the test is whether an

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<sup>35</sup> See *California v. Sjosten*, 68 Cal.Rptr. 832, 262 Cal.App.2d 539, 542 (1968)(citizen indicated she wanted appellant arrested but asked officer to make the arrest for her because she was in her robe and nightgown. She later signed a citizen's arrest form).

<sup>36</sup> *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

<sup>37</sup> *Id.*

officer had probable cause to believe that an individual committed an offense in his presence.<sup>38</sup>

A police officer is not limited by the “in the presence” requirement for making an arrest if the offense is a felony.<sup>39</sup> Even though Yi was only charged with misdemeanor assault under AS 11.41.230 and misdemeanor criminal mischief under AS 11.46.484 [Exc. 131], there was probable cause to charge him with a felony assault under 11.41.220(a)(1)(A)(recklessly placing another person in fear of imminent serious physical injury by means of a dangerous instrument). Lamoureux was certainly placed in fear of imminent serious physical injury [Exc. 247-248], and a broom handle with a pointed end used in the manner described by Lamoureux would qualify as a dangerous instrument under AS 11.81.900(b)(15). Thus, even if Merideth erred in undercharging Yi, Yi cannot be heard to complain about the constitutionality of his misdemeanor arrest when he legally could have been arrested by Merideth and charged with a felony.

Another exception to the requirement that an offense must be committed in an officer’s presence occurs when the offender admits the offense to the officer.<sup>40</sup> Yi admitted to Officer Merideth and to Officer Welborn that he smashed the windshield and/or the back window of the Ford pickup truck [Exc. 97,100]. This

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<sup>38</sup> *Prentzel v. State*, 169 P.3d 573, 588-89 (Alaska 2007).

<sup>39</sup> AS 12.25.030(a)(2) and (3).

<sup>40</sup> *State v. Morse*, 252 A.2d 723, 725 (N.J. 1969).

admission, coupled with the witness statements and the corroborating evidence, provided the necessary probable cause to arrest Yi. As the court in *Morse* noted, “We see nothing unreasonable in an arrest made upon the basis of the individual’s own statement. Indeed, it may be absurd to let the offender go when the chances of finding him thereafter are remote.”<sup>41</sup>

If one assumes that Merideth’s actions did violate Yi’s constitutional rights, the next question would be whether those rights were so “clearly established,”<sup>42</sup> that in light of pre-existing law, the unlawfulness of the alleged misconduct was apparent.<sup>43</sup> Merideth is immune unless “the law clearly proscribed the actions” taken by him.<sup>44</sup> Even assuming Yi’s constitutional rights were violated, it was not, as he argues, a *per se* violation of his Fourth Amendment rights. The inquiry into whether a right was clearly established must take into account the specific context of the case at hand and not be considered as a broad general proposition.<sup>45</sup>

In the specific context of this case, the question is whether it should have been apparent to Merideth that Lamoureaux’s citizen’s arrest was invalid, thereby making Merideth’s action of taking Yi into custody an unconstitutional arrest.

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<sup>41</sup> *Morse*, 252 A.2d at 726.

<sup>42</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>43</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

<sup>44</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

<sup>45</sup> *Saucier*, 533 U.S. at 201.

When the inquiry is framed to take into account the specific context of this case, the court must conclude that Merideth was entitled to immunity.

If it can be said that the law in this area is “clearly established,” it is established in favor of immunity for Merideth. The cases discussed above, *Moxie*,<sup>46</sup> *Green*,<sup>47</sup> *Arpin*,<sup>48</sup> *Johanson*,<sup>49</sup> *Padilla*,<sup>50</sup> *Sjosten*,<sup>51</sup> and *Prentzel*,<sup>52</sup> all support the legality of Lamoureaux’s citizen’s arrest and bolster Merideth’s reliance upon it. The best Yi can argue is that three years after the fact Max Lamoureaux was unclear about whether he alone was arresting Yi. Under the specific facts of this case, Merideth is entitled to qualified immunity.

**B. State Law.**

Yi’s tort claim of false arrest is more properly designated as a claim for false imprisonment. False arrest is not a tort separate and apart from the tort of false imprisonment.<sup>53</sup> The elements of the false imprisonment/arrest tort are: (1) restraint upon plaintiff’s freedom; (2) without proper legal authority.<sup>54</sup>

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<sup>46</sup> 662 P.2d 990.

<sup>47</sup> 68 Cal.App.3d 536.

<sup>48</sup> 261 F.3d 912.

<sup>49</sup> 43 Cal.Rptr.2d 42.

<sup>50</sup> 184 Cal.App.3d 1022.

<sup>51</sup> 262 Cal.App.2d 539.

<sup>52</sup> 169 P.3d 573.

<sup>53</sup> *Waskey v. Municipality of Anchorage*, 909 P.2d 342, 345 (Alaska 1996).

<sup>54</sup> *Id.*

As discussed above, Yi was arrested by Max Lamoureaux not Officer Merideth. Lamoureaux was the victim of a crime, actually two crimes, committed in his presence. Alaska law grants Lamoureaux the authority to arrest the perpetrators of these crimes.<sup>55</sup> Any restraint upon Yi's freedom was done with proper legal authority, and, therefore, Yi has no valid claim for false imprisonment.

Alaska Statute 09.65.070(d)(2) exempts Alaska municipalities and their agents, officers, or employees from liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved is abused." This court has characterized the grant of immunity under AS 09.65.070(d)(2) as a type of qualified immunity.<sup>56</sup> Under this qualified immunity, a public official is shielded from liability when discretionary acts within the scope of the official's authority are done in good faith and are not malicious or corrupt.<sup>57</sup> Discretionary functions are actions that require personal deliberation, decision, and judgment.<sup>58</sup> This court has adopted the federal immunity standard for determining whether a police officer is entitled to immunity under AS 09.65.070(d)(2): (1) whether an officer's actions were objectively

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<sup>55</sup> AS 12.25.010; AS 12.25.030.

<sup>56</sup> *Estate of Logusak v. City of Togiak*, 185 P.3d 103, 109 (Alaska 2008).

<sup>57</sup> *Id.*, quoting *Pauley v. Anchorage School Dist.*, 31 P.3d 1284, 1286 (Alaska 2001).

<sup>58</sup> *Id.*



reasonable, and (2) whether the officer might have reasonably believed that his actions were reasonable.<sup>59</sup>

Merideth's action in assisting with a citizen's arrest was objectively reasonable given the facts known to him. Lamoureux's description of the events was consistent with the physical evidence and consistent with the statements of independent witnesses [Exc. 95,78,81]. Yi admitted he committed the acts complained of by Lamoureux, acts which under Alaska law are crimes [97,100]. Merideth not only "might have" but also "did" believe that his actions were reasonable.

#### **IV. The City Has No Liability.**

The City cannot be held liable under 42 USC § 1983 unless action pursuant to official municipal policy caused a constitutional injury.<sup>60</sup> With regards to Yi's claims that the City failed in its training of Merideth, the Supreme Court has held that "inadequate training of police officers could be characterized as the cause of the constitutional tort if – and only if – the failure to train amounted to 'deliberate indifference' to the rights of persons with whom the police come into contact."<sup>61</sup>

##### **A. Fourth Amendment Claim.**

Because Yi suffered no constitutional injury, the inquiry into the City's liability ends there. Even assuming *arguendo* that Yi could somehow show he

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<sup>59</sup> *Estate of Logusak*, 185 P.3d at 109, adopting the test from *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

<sup>60</sup> *Monell v. Dept. of Soc. Servs. Of City of New York*, 436 U.S. 658, 691 (1978).

<sup>61</sup> *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 123-124 (1992).

suffered a constitutional injury, he has offered no evidence of an official policy or pattern of practice by the City of Fairbanks that gave rise to his alleged injury.

Yi states in his brief that the City has a policy “of following the laws of the State of Alaska.”<sup>62</sup> Yi alleges that Merideth knew the law, but in an attempt to get around it, “he disguised the arrest as a citizen arrest by Lamoureaux.”<sup>63</sup> This allegation undermines the very argument Yi is attempting to make. Taking Yi’s argument at face value, his constitutional violation was not caused by a City policy but rather by Merideth opting not to follow the City’s policy.

**B. Due Process Claim.**

Yi claims that he suffered a constitutional deprivation of property when the City denied him and his agents and his employees access to the bar and restaurant at the time of the arrest to secure personal property, including cash. Yi offers no evidence to support this allegation, only that the City failed to properly train Merideth on the proper civil standby procedures.

This situation did not involve a civil standby. Yi creates this argument from a phone call to the Fairbanks Police Department by a person identifying himself as Joe Hayes [Exc. 64]. While the dispatcher did explained to Hayes police department procedures for civil standbys [Exc. 65], Merideth and the other officers were not dispatched to the Klondike for a civil standby. They were dispatched to investigate

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<sup>62</sup> Appellant’s Brief at 33.

<sup>63</sup> *Id.*

the competing reports to 911 from John Dockery [Exc. 66] and Kenny Yi [67]. By the time the officers arrived, events had escalated, and the officers properly conducted a criminal investigation.

Before the melee at the Klondike, Jung Lee had already posted a copy of a “NOTICE TO QUIT” letter dated December 10, 2004, from Attorney John C. Pharr addressed to Yong Yi and Kenny Yi [Exc. 91]. In the letter, Pharr stated that he was writing on behalf of Harris Yang, the owner of the Klondike [Exc. 91]. The letter stated that Yang had physically removed the liquor license from the bar, instructed the Yis not to sell any liquor on the premises, and gave the Yis five days to vacate the premises [Exc. 91].

The action to evict the Yi from the Klondike Bar/Restaurant had already been initiated by Harris Yang before the Fairbanks police arrived. Yang’s eviction of Yi was one of the contested issues in the superior court case [Exc. 23; Count I Breach of Contract – Unlawful Ouster]. If Yang’s actions deprived Yi of property, Yi’s cause of action is against Yang and not the City. Nothing in the Due Process Clause of the Fourteenth Amendment requires the City to protect the life, liberty, and property of its citizens against invasion by private actors.<sup>64</sup>

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<sup>64</sup> *DeShanney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195 (1989).

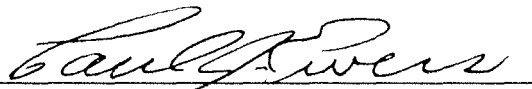
**CONCLUSION**

Yong Yi was arrested by Max Lamoureaux. The citizen's arrest of Yi by Lamoureaux was lawful and valid. Officer Merideth is authorized to assist in an arrest by a citizen and, as noted earlier in this brief, Lamoureaux very wisely chose to enlist the aid of Fairbanks police officers in arresting Yi.

Since Yi suffered no violation of his constitutional rights, there would have been no necessity for the superior court to address the issue of qualified immunity. But it did, and its conclusion, that Merideth and the City were entitled to immunity, was correct and should be affirmed.

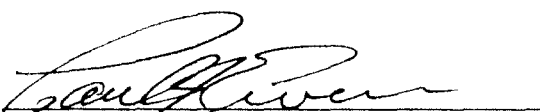
Dated this 18th day of February 2011 at Fairbanks, Alaska.

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