IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHELE OWEN BLACK,	:	
Plaintiff,	:	CIVIL ACTION
	:	No. 14-6702
v.	:	
MONTGOMERY COUNTY, et al.,	:	
Defendants.	:	

August _15TH , 2018 **Anita B. Brody, J.**

MEMORANDUM

Plaintiff Michele Owen Black brings suit against State Trooper Robert Pomponio, Montgomery County, Montgomery County Detective John Fallon, Lower Merion Township, Lower Merion Chief Fire Officer Charles McGarvey, Lower Merion Deputy Fire Marshal Frank Hand and Lower Merion Detectives Gregory Henry and Bryn Garner (collectively, "Defendants"). Black brings claims under 42 U.S.C. § 1983 against Pomponio, Fallon, McGarvey, Hand, Henry and Garner (collectively, "Individual Defendants"). Black also brings *Monell* claims under 42 U.S.C. § 1983 against Defendants Montgomery County and Lower Merion Township ("Lower Merion"). Additionally, Black brings state law claims of malicious prosecution, intentional infliction of emotional distress and false imprisonment against the Individual Defendants.[1]

Three motions are pending: (1) the motion for summary judgment of Lower Merion, Henry, Garner, McGarvey and Hand (collectively, "Lower Merion Defendants"); (2) the motion for summary judgment of Montgomery County and Fallon (collectively, "Montgomery County

[1] There is federal question jurisdiction over Black's § 1983 claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over Black's state law claims pursuant to 28 U.S.C. § 1367.

Defendants"); and (3) the motion for summary judgment of Pomponio. I will grant summary judgment on the § 1983 claims against the Individual Defendants and the *Monell* claims raised against Lower Merion and Montgomery County. I will grant summary judgment as uncontested on all state law claims against Pomponio. I will grant summary judgment as uncontested on the state law claims of intentional infliction of emotional distress and false imprisonment against Fallon, Hand, McGarvey, Garner and Henry. However, I will deny summary judgment on the state law claim of malicious prosecution against Fallon, Hand, McGarvey, Garner and Henry.

I. Background[2]

On November 21, 2012, a fire broke out in a third floor room of the childhood home of Plaintiff Michele Owen Black in Lower Merion, Montgomery County, Pennsylvania. Pl.'s Statement of Undisputed Facts ¶¶ 1, 11, ECF No. 80 (hereinafter "Pl.'s SUF"). Black's mother, Paula Owen, had sold the house two days before the fire occurred. Pl.'s SUF ¶ 3. The house had "knob and tube" wiring that created a fire hazard. Pl.'s SUF ¶ 3. The buyers could not get homeowner's insurance unless this wiring was upgraded. Pl.'s SUF ¶ 3. The parties entered into a post-settlement possession addendum that allowed Owen to remove her possessions from the house and allowed the buyers' contractor to begin electrical work. Pl.'s SUF ¶ 6. Black flew in from California to help her mother pack and remove the family's possessions from the house. Pl.'s SUF ¶ 7.

On the day of the fire, Black was sorting through possessions by the window sill of a third floor room. Montgomery Cty. Defs. Statement of Undisputed Facts ¶¶ 3-4, ECF No. 92-2 (hereinafter "MC SUF"). Around 3:15 p.m., Black left the room and went downstairs to greet her mother's realtor, Maureen Algeo. MC SUF ¶¶ 13-14. No one else was in the room when Black left. MC SUF ¶ 15.

[2] Unless otherwise noted, the facts presented are undisputed for purposes of summary judgment.

Minutes later, Michael Janiszewski, one of the electricians, heard a faint alarm and discovered a fire in the room where Black had been sorting through possessions (hereinafter "fire room"). Lower Merion Defs.' Statement of Undisputed Facts ¶¶ 27-28, ECF No. 89 (hereinafter "LM SUF"). At 3:27 p.m., one of the electricians called 911 to report the fire. Dispatch Report, Pl.'s Ex. P, ECF No. 85-35. At 3:30 p.m., one of the electricians reported to 911 that the fire had been extinguished. Pl.'s Ex. P. Although the electricians had worked in the fire room that morning, their work in the afternoon was confined to the second floor and the basement. Pl.'s Ans. to Montgomery Cty. Defs. 14, ECF No. 82 (hereinafter "Pl.'s Ans. to MC"). One of the electricians had gone to the bathroom on the third floor that afternoon and could hear someone in the fire room. Pl.'s SUF ¶ 128.

Shortly after the 911 call, Gladwyne Fire Chief Blaine Leis and other firefighters arrived at the scene. Pl.'s Ex. P. Leis reported to dispatch that an "electrical fire in the wall spread to a window frame." Pl.'s Ex. P. Defendants Lower Merion Deputy Fire Marshal Frank Hand and Lower Merion Chief Fire Officer Charles McGarvey, also arrived at the scene. Pl.'s SUF ¶¶ 28, 320. After Hand and McGarvey arrived, one of the electricians accompanied Hand to the basement to look at the electrical panels and McGarvey spoke with the electricians. Pl.'s SUF ¶¶ 71-72, 77, 324-25. When McGarvey spoke with the electricians, he discovered that they did not have a permit on site for the work they were performing at the house. Pl.'s SUF ¶ 325. While in the basement, Hand only examined the one source of electricity that the electrician pointed out to him. Pl.'s SUF ¶ 77. Hand did not conduct his own investigation of all the possible electrical sources in the basement. Pl.'s SUF ¶ 77.

While at the house, Hand also went to the fire room. Pl.'s SUF ¶ 35. Firefighters in the room noticed that the fire had occurred near the window sill area where Black had been sorting

through possessions. Pl.'s SUF ¶¶ 22-23. The window sill area of the fire room contained a 220-volt outlet that did not have anything plugged into it. Pl.'s SUF ¶¶ 9, 42. This outlet did not have the hazardous knob and tube wiring that the electricians were replacing, but instead had modern non-metallic sheathed (Romex) wiring. Pl.'s SUF ¶ 10. While Hand was present, a firefighter disassembled this outlet to check for evidence of an electrical fire. Pl.'s SUF ¶¶ 35, 38. Hand took photos of the scene. Pl.'s SUF ¶¶ 35.

At some point during his investigation, Hand called Defendant Detective John Fallon, a certified fire investigator with the Montgomery County District Attorney's Office, and Defendant State Trooper Robert Pomponio, an Alternate Deputy Fire Marshal,[3] to the scene to assist with the cause and origin investigation. Pl.'s SUF ¶¶ 66, 83, 200, 206. Hand left the fire room intact to the best of his ability until the other investigators arrived. Pl.'s SUF ¶ 57.

Fallon arrived and examined the fire room and the disassembled outlet. LM SUF ¶ 19; Pl.'s SUF ¶ 158. Fallon was informed by Hand that the circuit running to the outlet was de-energized since Hand's arrival and that Hand had spoken with the electricians who said that they de-energized that circuit the day before. Pl.'s SUF ¶¶ 105-06. Fallon did not go into the basement to investigate electrical sources, although it was his normal practice to do so. Pl.'s SUF ¶ 109. Fallon also took photos of the scene. Pl.'s SUF ¶173.

When Pomponio arrived, he examined the fire room but did not look through the hole in the wall at the rear of the outlet box. Pl.'s SUF ¶ 231. Pomponio did not know how to test the

[3] Pomponio attended the Pennsylvania State Fire Academy in 2011, where he took courses in fire investigation, building construction and electrical systems. Pomponio's Statement of Undisputed Facts ¶ 364, ECF No. 87-1 (hereinafter "Pomponio SUF"). As of November 21, 2012, Pomponio had investigated 15 fires, 6 of which he found to be arson and 3 of which were the result of electrical malfunction. Pl.'s SUF ¶ 201; Pomponio SUF ¶ 367. Pomponio had not investigated a fire that was caused by the improper installation of outlets or light switches. Pl.'s SUF ¶ 204.

outlet to determine whether it was energized prior to the fire. Pl.'s SUF ¶ 228. He also did not go into the basement. Pl.'s SUF ¶ 229.

At some point during the investigation, McGarvey informed Hand, Fallon and Pomponio that the electricians were working without a permit.[4] Pl.'s SUF ¶ 330. Additionally, investigators found a matchbox in the fire room. Pl.'s SUF ¶¶ 141, 232, 344. Although the matchbox was partially full, the investigators recovered no evidence that the matchbox had been used to start the fire. Pl.'s SUF ¶ 142.

Defendant Lower Merion Detectives Gregory Henry and Bryn Garner were also called to the scene to conduct interviews. Pl.'s SUF ¶¶ 244-45. They interviewed the electricians and the electricians also gave written statements. Pl.'s SUF ¶¶ 129-30, 267, 301. The electricians provided statements that did not contain any reference to their purported de-energization of the circuit running to the outlet, even though Hand told Fallon that the electricians had stated that they had de-energized the circuit the day before the fire. Pl.'s SUF ¶¶ 129-131. After completing the interviews of the electricians, Henry also interviewed Black, with Fallon present. Pl.'s SUF ¶¶ 270, 273.

During her interview, Black was asked "whether, if there were matches in the fire room, would her fingerprints be on them," and she "responded that she imagined her fingerprints could be on everything in that room because as far as she knew she had put everything in there." Pl.'s Ans. to MC at 16. Henry showed Black the matchbox in a bag and asked if she recognized what he was holding. Pl.'s Ans. to MC at 16. Black responded "No." Pl.'s Ans. to MC at 16. The matchbox was never submitted for testing. Pl.'s SUF ¶ 283.

[4] This is disputed by Fallon and Pomponio, who claim that the first time they learned that the electricians were working without a permit was at the criminal trial. Pl.'s SUF ¶¶ 125, 240.

Based on their investigation, Hand, Fallon and Pomponio all reached the conclusion that the fire was incendiary, that is, set by human hands. *See* Aff. of Probable Cause/Police Criminal Compl., Pl.'s Ex. CC, ECF No. 85-48; Pl.'s SUF ¶ 60. Hand, Fallon and Pomponio all filed reports regarding their investigation. *See* Pl.'s SUF ¶¶ 60, 122, 215.

On November 27, 2012, Fallon reported that the camera that he used to take pictures of the scene on the day of the fire was lost or stolen and returned to the scene to take additional photos. *See* Initial Report (Lost/Stolen Property), Pl.'s Ex. X, ECF No. 85-43; Pl.'s SUF ¶ 177.

The following day, Fallon emailed Assistant District Attorney (ADA) Erik Crocker a report.[5] Pl.'s SUF ¶ 185. In his report to ADA Crocker, Fallon stated that "[t]he burn patterns on the walls, ceiling, window sash and frame and the window sill clearly indicated that the fire originated on or just above the window sill on the left (north side)" and "a few inches below" the outlet. Fallon Report to ADA Crocker, Pl.'s Ex. AA, MC123, ECF No. 85-46. Fallon reported that "[w]hile there was obvious external heat damage on the Bakelite surface of the receptacle, there were no signs of internal electrical faults or failures and it was evident that the receptacle could not be considered a potential ignition source." Pl.'s Ex. AA at MC123. He also stated that the outlet "had no signs of internal damage," although he later admitted that he should have reported that the outlet had "no internal *electrical* damage." Pl.'s SUF ¶ 161; Pl.'s Ex. AA at MC123. Fallon explained that he "believe[d] that the perpetrator(s) used an open flame, possible [sic] a match, to ignite the ordinary combustible present at or on the window sill at the dormer window." Pl.'s Ex. AA at MC124. He also stated that he took additional photos of the scene on November 27, 2012. Pl.'s Ex. AA at MC124.

[5] Prior to sending the report to ADA Crocker, Fallon filed two reports regarding the investigation on November 27, 2012, and Fallon's report to Crocker was nearly identical to one of these reports. Pl.'s SUF ¶ 185; Initial Report (Fire/Arson), Pl.'s Ex. Q, ECF No. 85-36; Supplemental Report/Origin & Cause, Fallon Dep. Ex. 1, ECF No. 85-15 at 47-49.

Subsequently, on December 3, 2012, Fallon filed a supplemental report in which he again documented the photos that he had taken on his November 27, 2012 return to the scene. Supplemental Report/Additional Information, Pl.'s Ex. R, ECF No. 85-37. Fallon reported that the electricians had removed the outlet from the window well and taped up the exposed ends of the wire. Pl.'s Ex. R; Pl.'s SUF ¶ 184. The outlet was not submitted for testing because Fallon "would never consider testing an outlet like that when the damage was pretty obvious to [him]." Pl.'s SUF ¶ 114. Although not included in his reports, Fallon speculated that Black had started the fire because "she was in a panic about getting things out of that house" and wanted to buy more time. Fallon Dep., Pl.'s Ex. I, 159:24-160:14, ECF No. 85-12.

On December 6, 2012, Hand also prepared a report detailing his investigation.[6] In his report, Hand incorrectly stated that there was a second outlet in the window sill area of the fire room that was not hooked up to an electrical source, although there was in fact no such second outlet. Pl.'s SUF ¶¶ 60, 64. Photographs taken the day of the fire show that the wire running to the only outlet in the window sill area of the fire room was intact and connected to an electrical source. Pl.'s SUF ¶ 52.

Pomponio likewise prepared a report. He reported that the outlet had "external heat damage but no signs of internal faults or failures were observed." Pomponio Report, Pl.'s Ex. T, MC118, ECF No. 85-39. Pomponio concluded that the fire was incendiary and "the point of origin was the result of an open flame to ordinary combustibles that were located on the window sill of the window on the east wall." Pl.'s Ex. T at MC119. Pomponio later explained that he formed his opinion based on the interview "somebody" did with the electricians "who had told them that, that outlet was no longer working," Henry's interview with Black, and the statement of an investigator who told him that the outlet "was not functioning, the power was off." Pl.'s

[6] Fallon never read this report. Pl.'s SUF ¶ 135.

SUF ¶ 218; Pomponio Dep., Pl.'s Ex. J, 78:22-79:20, ECF No. 85-19. Pomponio also stated that someone, although he could not recall who, told him the wire to the outlet was cut and that's how he knew that the outlet wasn't operational. Pl.'s SUF ¶ 231.

Fallon and Henry swore out a police criminal complaint/affidavit of probable cause for Ms. Black's arrest, which was approved by ADA Crocker and which stated in part:

> On Wednesday, November 21, 2012 at 3:27 PM, Lower Merion Police and Fire units were dispatched to 1401 Spring Mill Road, Gladwyne, Lower Merion Township on a report of a house fire. Officer Kirk Gardner, LMPD arrived on location at 3:31 PM and observed smoke coming from a third floor window. The Gladwyne Fire Company arrived on location at 3:34 PM. Assistant Chief John Remillard located a fire in the window well of a third floor dormer. The fire was quickly extinguished . . .
>
> BLACK stated that she arrived at 1401 Spring Mill Rd between 2:00 and 3:00 PM. She was going through some bags in the fire room, when Algeo arrived. This was just a few minutes before the fire was discovered, according to BLACK. While speaking to us, BLACK muttered a mostly unintelligible sentence ending with the word "matches". When asked to repeat what she said, BLACK changed the subject. During this interview, I showed BLACK a box of matches that were found in the fire room and asked if there was any reason that I would find her fingerprints on the box. BLACK answered that she probably touched the box at some point, therefore it would be likely that her prints would be on the box.
>
> Detective Fallon and Trooper Pomponio are experts in determining the origin and cause of fires. Following a thorough, systematic and exhaustive examination of the scene, it was both Detective Fallon's and Trooper Pomonio's [sic] opinion that this is an incendiary fire, that is, intentionally set by human hands. These investigators believes [sic] that the perpetrator(s) used an open flame, possibly a match, to ignite the ordinary combustibles present at or on the window sill of the dormer window . . .
>
> Due to the fact that Detective Fallon and Trooper Pomponio determined that this fire had been intentionally set by a human and that it was likely caused by an open flame; that Michele Owen BLACK admittedly was the only person in the room, in which the fire occurred and that she exited this room shortly before the fire was discovered; and lastly, she stated that it was likely that her fingerprints would be found on a matchbook, which was located in the (fire) room; it was our conclusion that Michele Owen BLACK intentionally set this fire, with intent or reckless disregard for the potential damage to the property or the persons working inside the premises.

Pl.'s Ex. CC; MC SUF ¶ 17.

On December 17, 2012, the magistrate judge signed the affidavit of probable cause/police criminal complaint. Pl.'s Ex. CC. The complaint charged Black with arson endangering persons and property, reckless burning or exploding, failure to report or control dangerous fires, risking catastrophe, criminal mischief, and recklessly endangering another person. *See* Pl.'s Ex. CC. Before proceeding to trial, Black flew in from California for her preliminary hearing and twelve additional hearings. Second Am. Compl. ¶¶ 104-06, ECF No. 30. In April of 2014, Black's trial occurred. Pl.'s SUF ¶ 187. During the trial, Fallon testified that that his November 27, 2012 photos that showed the wire to the outlet was cut, accurately depicted the outlet on the day of the fire and Hand also testified that the wire to the outlet was initially cut. Pl.'s SUF ¶¶ 184, 189-90. However, photographs taken the day of the fire show the wire was initially intact. Pl.'s SUF ¶ 52. Black presented the testimony of John Lentini, an expert in the area of fire investigation, who testified that the fire was electrical in nature. LM SUF ¶¶ 168, 172. The jury deliberated for less than forty minutes and found Black not guilty of all charges. LM SUF ¶ 38.

II. Legal Standard

Summary judgment is granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Id.* In ruling on a motion for summary judgment, the court must draw all inferences from the facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party has met its initial burden, the nonmoving party must then "make a showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. Both parties must support their factual positions by: "(A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). The materials in the record that parties may rely on include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). In opposing a motion for summary judgment, the nonmoving party may not "rely merely upon bare assertions, conclusory allegations or suspicions." *Fireman's Ins. Co. of Newark, N.J. v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982).

In essence, the usual inquiry at summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[7] *Anderson*, 477 U.S. at 251-52.

III. Discussion

Black brings claims against the Individual Defendants under 42 U.S.C. § 1983 for the roles they played in the investigation of the fire and her subsequent prosecution for arson and related offenses. Black alleges that (1) Fallon maliciously prosecuted her in violation of the Fourth Amendment, (2) Fallon and Hand deprived her of procedural due process in violation of

[7] As discussed *infra* at section III(A)(a)(i), the standard seems to be somewhat adjusted when the Court examines probable cause in the Fourth Amendment context.

the Fourteenth Amendment by fabricating, suppressing and/or destroying exculpatory evidence, and (3) the Individual Defendants conspired to commit these constitutional violations. Black also brings *Monell* claims against Lower Merion and Montgomery County. Additionally, Black brings state law claims for false imprisonment, malicious prosecution and intentional infliction of emotional distress against the Individual Defendants.

A. § 1983 Claims Against Individual Defendants

Black brings § 1983 claims against Fallon, Hand, Pomponio, McGarvey, Garner and Henry in their individual capacities. These Individual Defendants argue that as government officials, they are entitled to qualified immunity.

"To establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a violation of a right protected by the Constitution or the laws of the United States committed by a person acting under the color of state law." *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 580-81 (3d Cir. 2003). Qualified immunity under § 1983 shields officials from liability "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). Thus, a court must decide whether the facts shown by the plaintiff "make out a violation of a constitutional right," and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). A court has discretion to decide which of the two prongs of this analysis it should address first. *Pearson*, 555 U.S. at 236.

"Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Malley v.*

Briggs, 475 U.S. 335, 341 (1986)). In assessing qualified immunity, "the Court considers only the facts that were knowable to the defendant officers." *White v. Pauly*, 137 S. Ct. 548, 550 (2017).

Because the Court has discretion to decide which of the two prongs of the qualified immunity analysis should be analyzed first, I will focus on whether a constitutional right was violated.

a. § 1983 Malicious Prosecution – Fourth Amendment and § 1983 Conspiracy

Black alleges that Fallon maliciously prosecuted her in violation of her Fourth Amendment rights and that all of the Individual Defendants, including Fallon, conspired to do so. I will first address Black's underlying claim of malicious prosecution raised against Fallon, and then will examine Black's claims of conspiracy.

i. § 1983 Malicious Prosecution – Fourth Amendment: Fallon (Count I)

The elements of a malicious prosecution claim are that "(1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in [her] favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." *Johnson v. Knorr*, 477 F.3d 75, 82 (3d Cir. 2007). Fallon argues that Black failed to adduce sufficient evidence to survive summary judgment on the first, third and fourth elements. Because Black failed to adduce sufficient evidence to survive summary judgment on the element of probable cause, I will focus the discussion on this element.[8]

[8] While the parties disagree as to whether Fallon may be held responsible for the initiation of the prosecution, the parties agree that the initiation of the criminal proceeding in this matter commenced with

Although the probable cause determination in the Fourth Amendment context is usually a question for the jury, "summary judgment may be granted on the question of probable cause if a court concludes that 'the evidence, viewed most favorably to [the nonmoving party], reasonably would not support a contrary factual finding.'" *Dempsey v. Bucknell U.*, 834 F.3d 457, 468 (3d Cir. 2016) (quoting *Sherwood v. Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997)).

In this case, a police criminal complaint/affidavit of probable cause was filed, initiating court proceedings against Black and serving as the basis for the magistrate judge's issuance of a warrant for her arrest. To establish probable cause in requesting a criminal complaint or arrest warrant, the attesting officers must show a "probability" of criminal activity. *Wesby*, 138 S. Ct. at 586. The probable cause analysis is centered on whether an officer "knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create[d] a falsehood in applying for a warrant." *Andrews v. Scuilli*, 853 F.3d 690, 697 (3d Cir. 2017) (quoting *Sherwood*, 113 F.3d at 399). A court must focus on two elements: first, whether "the officer, with at least a reckless disregard for the truth, 'made false statements or omissions that create[d] a falsehood in applying for a warrant,' and second, that those assertions or omissions were 'material, or necessary, to the finding of probable cause.'" *Dempsey*, 834 F.3d at 468-69 (quoting *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000)).

"[I]n conducting this analysis, the district court must identify any improperly asserted or omitted facts and, if it determines there were reckless misrepresentations or omissions, 'excise the offending inaccuracies and insert the facts recklessly omitted' from the affidavit and assess whether the reconstructed affidavit would establish probable cause." *Dempsey*, 834 F.3d at 470 (quoting *Wilson*, 212 F.3d at 789). Thus, where the original affidavit contains reckless

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the filing of the Affidavit of Probable Cause/Police Criminal Complaint on December 17, 2012. Pl.'s Ans. to MC at 4; Montgomery Cty. Defs.' Reply 12-13, ECF No. 92 (hereinafter "MC Reply").

misrepresentations or omissions, the court "perform[s] a word-by-word reconstruction of the affidavit." *Dempsey*, 834 F.3d at 470. Likewise, "where additional information in the record bears on the materiality of the recklessly omitted information to probable cause, that additional information also should be included [in] the reconstructed affidavit." *Id.* at 475. If the reconstructed affidavit would still establish probable cause, "the plaintiff's claim fails because 'even if there had not been omissions and misrepresentations' in the affidavit presented to the magistrate judge, there would have been probable cause for the charges against the plaintiff." *Id.* at 470 (quoting *Wilson*, 212 F.3d at 789).

Following this precedent, district courts must follow a three-step procedure to ascertain whether probable cause existed to initiate the proceeding. *Dempsey*, 834 F.3d at 470. First, the court assesses the evidence that the plaintiff asserts was recklessly asserted or omitted. Second, the court reconstructs the affidavit to correct any reckless misrepresentations and omissions, including any additional information that bears on the materiality of the recklessly omitted information to probable cause. Third, the court assesses the materiality of any misrepresented or omitted information to the probable cause determination. Summary judgment is appropriate where "'no reasonable jury could find facts that would lead to the conclusion' that the reconstructed affidavit 'lacked probable cause.'" *Id.* at 477 (quoting *Wilson*, 212 F.3d at 787).

Although the original affidavit contained reckless misrepresentations and omissions, the Court's reconstructed affidavit continues to establish probable cause for the charges against Black. Therefore, because no Fourth Amendment violation occurred, Fallon is entitled to summary judgment on the malicious prosecution claim.

1. Whether Evidence was Recklessly Omitted or Asserted

In reviewing the original affidavit of probable cause, a court applies different standards to determine whether facts were recklessly omitted or were recklessly asserted. *Wilson*, 212 F.3d at 783.

"[O]missions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would know that a judge would want to know . . . ." *Id.* The court only considers omitted information that is "relevant" to the existence of probable cause. *Dempsey*, 834 F.3d at 471. The relevancy inquiry ensures than an officer does not make "unilateral decisions about the materiality of information," while recognizing that for practical reasons, courts "cannot demand that police officers relate the entire history of events leading up to a warrant application with every potentially evocative detail that would interest a novelist or gossip . . . ." *Wilson*, 212 F.3d at 787. *See also Dempsey*, 834 F.3d at 471. "Indeed, in many cases it is not only appropriate but desirable for officers to provide the magistrate with a distilled version of the circumstances giving rise to probable cause." *Dempsey*, 834 F.3d at 471 n.10.

By contrast, "[a]n assertion is made with reckless disregard when 'viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.'" *Wilson*, 212 F.3d at 788 (quoting *U.S. v. Clapp*, 46 F.3d 795, 801 n.6 (8th Cir. 1995)). "Misleading assertions can relate to even 'minor details,' and do not need a separate determination of relevance. The focus in these instances is upon evidence demonstrating that the affiant willingly and 'affirmatively distort[ed] the truth.'" *Andrews*, 853 F.3d at 698 (quoting *Wilson*, 212 F.3d at 788).

A court does not engage in the "deliberately slanted perspective" of summary judgment when compiling the facts into a reconstructed affidavit. *Dempsey*, 834 F.3d at 471 (quoting

Reedy v. Evanson, 615 F.3d 197, 214 n.24 (3d Cir. 2010)). Likewise, a court does not accept the plaintiff's representations of the record at face value and instead conducts its analysis "based on the evidence reflected in the record itself." *Dempsey*, 834 F.3d at 471 n.11. "[T]he probable cause standard by definition allows for the existence of conflicting, even irreconcilable, evidence." *Id.* at 468.

This creates a "tension" in evaluating probable cause at the summary judgment stage, because,

> [w]hile it is axiomatic that at the summary judgment stage, we view the facts in the light most favorable to the nonmoving party, it does not follow that we exclude from the probable cause analysis unfavorable facts an officer otherwise would have been able to consider. Instead, we view *all* such facts and assess whether any reasonable jury could conclude that those facts, considered in their totality in the light most favorable to the nonmoving party, did not demonstrate a "fair probability" that a crime occurred. Only then would the existence of conflicting evidence rise to the level of a "genuine dispute as to any material fact" such that summary judgment would be inappropriate.

Id. Thus, the Third Circuit has cautioned that "the effort to determine whether an affidavit is false or misleading must be undertaken with *scrupulous neutrality*." *Reedy*, 615 F.3d at 214 n.24 (emphasis added).

In this case, Black puts forth a litany of facts that she alleges were omitted from, or misrepresented in, the affidavit of probable cause. Black also provides her own version of the reconstructed affidavit, containing numerous additional purported facts, some of which are supported and numerous of which are unsupported and irrelevant. For those facts that she provides some argument, they may be grouped into the following seven categories: (a) evidence regarding the origination point of the fire; (b) Fallon's and Pomponio's credentials; (c) Leis' statement to dispatch; (d) activities of the electricians on site; (e) allegations that the matchbox

was "planted;" (f) criticisms of the quality of the investigation; and (g) details regarding Black's interrogation.

a. Evidence Regarding the Origination Point of the Fire

Black contends that evidence regarding the origin of the fire, and specifically information about the outlet in the window sill area near the point of origin, was recklessly omitted from the affidavit.

First, Black argues that the affidavit recklessly omitted that the fire started "right at" the outlet. However, the record is clear that the facts available to Fallon during his investigation led him to conclude that the burn patterns indicated that the fire started "a few inches below" the outlet. Pl.'s Ex. AA at MC123. Because reckless omissions can only include facts knowable to Fallon at the time, the assertion that the fire started "right at" the outlet was not recklessly omitted. However, because the proximity of the fire's origin to an outlet is something a judge would want to know and is relevant to the probable cause determination, this fact was recklessly omitted and will be included in the affidavit.

Black also contends that the affidavit should have stated that the fire caused a "V" pattern of burning that is indicative of an electrical fire. The parties do not dispute Black's description that the fire "created an evident 'V' pattern of fire damage extending from the base and right side of the outlet in the window sill, and extended upward and outward toward the right upper side of the window sill" and that Fallon could see a "V" pattern. *See* MC Reply at 14; Pl.'s SUF ¶ 14. This description of the fire will be included in the reconstructed affidavit because it is information that a judge would want to know and is relevant in evaluating probable cause in an arson investigation. However, Black does not point to any evidence that Fallon knew that a "V"

pattern may be indicative of an electrical fire, and thus, this alleged fact was not recklessly omitted.

Additionally, Black argues that the affidavit recklessly omitted that the electricians were replacing old knob and tube wiring so that the new homeowners could get insurance, and that the outlet that was near the point of origin had upgraded Romex wiring. It is undisputed that the wiring of an outlet that was in the immediate vicinity of the origin of a fire is both relevant and something a judge would want to know. Likewise, the state of the wiring of the rest of the house also provides the magistrate judge with an explanation as to what work the electricians were performing and whether this work potentially implicated the outlet near the point of origin. Therefore, these facts were recklessly omitted.

Finally, Black states that the affidavit recklessly omitted the purported facts that the disassembled outlet showed that internal parts of the outlet were damaged and that this damage is evidence of an electrical fire. It is undisputed that Fallon observed internal damage to the outlet. As with the facts regarding the proximity of the fire to the outlet, this fact was recklessly omitted. However, Black does not point to evidence in the record that Fallon knew that the outlet's internal damage was evidence of an electrical fire. In fact, the record indicates that Fallon did not believe the damage was evidence of an electrical fire. *See* Pl.'s Ex. AA at MC123. Therefore, Fallon's alleged knowledge that the internal damage was evidence of an electrical fire is not supported by the record and was not recklessly omitted.

Having found that certain facts regarding the outlet were recklessly omitted, the Court must also consider additional information in the record that bears on the materiality of the recklessly omitted information to the probable cause determination. *Dempsey*, 834 F.3d at 475. In this case, two additional facts should be included in the reconstructed affidavit.

First, the reconstructed affidavit should include that Hand informed Fallon that the outlet was de-energized. Black does not dispute that Fallon was informed by Hand that the circuit running to the outlet was de-energized from the time Hand arrived and that the electricians reported to Hand that they had de-energized the circuit to the outlet the day before the fire. This information bears on the materiality of the recklessly omitted information regarding the damage to the outlet and its proximity to the point of origin because it provides the magistrate judge with information relevant to whether the outlet could be excluded as a possible ignition source. Therefore, Hand's report to Fallon regarding the supposed de-energization of the outlet will be included in the reconstructed affidavit.

Second, the reconstructed affidavit should include that Fallon observed external damage to the outlet but found no signs of internal electrical faults or failures and concluded that the outlet was not an ignition source.[9] The record shows that Fallon reported to ADA Crocker that, "[w]hile there was obvious external heat damage on the Bakelite surface of the receptacle, there were no signs of internal electrical faults or failures and it was evident that the receptacle could not be considered a potential ignition source."[10] Pl.'s Ex. AA at MC123. Because Fallon's complete observations regarding the damage to the outlet bears on the materiality of the omitted information regarding the outlet's internal damage, these observations will likewise be included in the reconstructed affidavit.

[9] Because Fallon observed the disassembled outlet, the reconstructed affidavit must also include that the outlet was disassembled in Hand's presence.

[10] "Receptacle" is used interchangeably with "outlet" by Black, and the Court therefore understands the terms to be interchangeable. *See* Pl.'s SUF at p. 40 ("Receptacle (Outlet) Not Seized As Evidence").

b. Fallon's and Pomponio's Credentials

Black argues that in the affidavit, Fallon recklessly omitted facts relevant to his lack of experience in dealing with electrical fires, and both misrepresented and recklessly omitted details about Pomponio's experience.[11]

Black contends that the affidavit must include that Fallon had little training in electrical fires. Fallon admits to his lack of experience in dealing with electrical fires. MC Reply at 19. Because Fallon's experience investigating electrical fires is relevant to probable cause and something that a judge would want to know in considering an affidavit involving a fire occurring in close proximity to an outlet, this fact was recklessly omitted, and will be included in the reconstructed affidavit.

Black also states that the affidavit misrepresented that Pomponio was an expert in determining the origin and cause of fires and omitted details regarding Pomponio's experience investigating fires. Fallon originally swore that Pomponio was an "expert," and it therefore can be inferred that Fallon had knowledge of Pomponio's fire investigation credentials, which were limited. Because Pomponio was one of the investigators who determined that the fire was incendiary and likely caused by Black, his fire investigation experience is both relevant and something that a judge would want to know. Therefore, because of Pomponio's limited experience, the expert qualification will be excised and facts relevant to Pomponio's fire investigation experience will be included in the reconstructed affidavit.

[11] Black also asserts that Pomponio should have been described as an "Alternate Fire Marshal" instead of a "Fire Marshal," the latter of which was how he was described in the original affidavit. Pl.'s Sur-Reply to Montgomery Cty. Defs. 17, ECF No. 94 (hereinafter "Pl.'s Sur-Reply to MC"). Although Black does not point to evidence in the record that Fallon asserted this incorrect title with reckless disregard for the truth, the parties do not dispute that Pomponio was an "Alternate Fire Marshal," and therefore this proper description will be included in the reconstructed affidavit.

Black also alleges that the affidavit should include that Pomponio had no experience investigating electrical fires. Although Pomponio had not investigated a fire that was caused by the improper installation of outlets or light switches, he had concluded that three of the fires he investigated were the result of electrical malfunctions. Pomponio SUF ¶ 367. Therefore, this purported fact was not recklessly omitted.

c. Leis' Statement to Dispatch

Black argues that the affidavit recklessly omitted the statement that "Gladwyne Fire Chief Leis concluded that this was an electrical fire that spread to the window sill." Pl.'s Ans. to MC at 13. The record shows that Leis reported to dispatch that an "electrical fire in the wall spread to a window frame." *See* Pl.'s Ex. P. The record is unclear as to whether Leis discussed this statement with Fallon or Pomponio. Leis testified that he did not discuss his statement with anyone at the scene "because I didn't investigate it." Leis Dep., Pl.'s Ex. F, 74:1-9; 75:10-14, ECF No. 85-7. However, Fallon testified that he spoke with Leis about his statement "in connection with this investigation," but that he "didn't get that information until sometime later." Pl.'s Ex. I at 171:17-172:6. Because it is undisputed that Leis told dispatch that an "electrical fire in the wall spread to a window frame" and there is evidence in the record that Leis discussed this statement with Fallon at a later point in the investigation, it can be concluded that the fact that Leis' statement was relayed at a later point in the investigation is relevant, something a judge would want to know, and therefore was recklessly omitted. However, Black's argument that Leis "concluded" that it was an electrical fire does not appear to be supported by the evidence because at the time of Leis' statement, no investigation had taken place.

d. Activities of the Electricians On Site

Black also argues that the affidavit recklessly omitted that the electricians on site had a motive to start the fire because they were working without a permit and that Black did not have a motive to start the fire.[12]

There is conflicting evidence as to whether Fallon knew at the time of the initiation of the proceedings that the electricians were working without a permit. Fallon testified that the first time he learned that the electricians were working without a permit was at Black's criminal trial. However, McGarvey claimed that he informed Fallon that the electricians didn't have a permit for the work they were doing. Fallon denied that the lack of a permit gave the electricians a motive to cover up the fire, testifying that if he had known that the electricians were working without a permit, he wouldn't have found that fact "germane" because "[i]f they didn't have a permit they would simply be told to go down and get a permit." Pl.'s Ex. I at 146:4-6. Despite this denial, because there is evidence in the record that Fallon knew the electricians were working without a permit, the electricians' possible motive to cover up the fire was "knowable" to Fallon at the time. The electricians' permit status and corresponding potential motive are relevant to the issue of probable cause and something a judge would want to know, and will therefore be included.

Black also argues that the affidavit recklessly omitted that she did not have a motive to start the fire. Contrary to Black's assertion, Fallon testified that her motive in starting the fire was to buy more time because "she was in a panic about getting things out of that house." *Id.* at 159:24-160:14. Because Black's purported motive for starting the fire "bears on the materiality"

[12] Black also argues that the affidavit recklessly omitted either that the electricians had almost extinguished the fire prior to calling 911 or that the electricians extinguished the fire before the fire company arrived. *See* Pl.'s Ans. to MC at 13, 19. When the fire was extinguished, however, is not relevant to the probable cause determination because it is has no bearing on how, or by whom, the fire was started.

of the electricians' motive to cover up the fire, her alleged motive will likewise be included in the reconstructed affidavit. *Dempsey*, 834 F.3d at 475.

e. Allegations that the Matchbox was "Planted"

Black asserts that the affidavit should state that there is conflicting evidence of who found the matchbox and when and where it was found, and that the matchbox may have been "planted." Although Black states that there is conflicting evidence as to where and when the matchbox was found, she does not point to corroborating evidence in the record that the matchbox was found elsewhere, or that Fallon knew of any supposed conflicting evidence. Fallon testified that he couldn't remember *who* specifically found the matchbox first, but that it *was* found in the fire room and it was noticed during the initial investigation. *See* Pl.'s Ex. I at 239:6-10; 240:24, ECF No. 85-13 ("We - - we were looking around at what we saw. And we were -- we were making mental notes . . . And one or more of us noticed the matches and at some point we mentioned them to each other . . . the matches were in the room."). Although Fallon doesn't know who specifically found the matchbox, the affidavit does not purport to identify the finder, and therefore does not misrepresent the facts. Because Black does not point to corroborating evidence that the matchbox was planted, the alleged facts put forth by Black on this issue were not recklessly omitted or misrepresented.

Black also includes in her version of the affidavit that "there was no evidence that a match from the matchbox was used to start the fire." Pl.'s Ans. to MC at 18. This statement is undisputed by the parties and is supported by the record. Because this fact is relevant to a determination of probable cause and something a judge would want to know, this fact was recklessly omitted.

f. Criticisms of the Quality of the Investigation

Black asserts that Fallon misrepresented the thoroughness of the investigation and includes several omitted purported facts in her reconstructed affidavit regarding the investigation.

Black first argues that Fallon and Pomponio misrepresented that they engaged in a "thorough, systematic and exhaustive" investigation of the scene because they did not investigate the electrical source in the basement. It is undisputed that neither Fallon nor Pomponio went into the basement to investigate the electrical source, even though Fallon stated he would normally do so. Because Fallon did not engage in his normal investigative practice, he had obvious reason to doubt the truth of his assertion that the investigation was "thorough, systematic and exhaustive," and this statement must be revised appropriately in the reconstructed affidavit.

Additionally, Black includes several facts in her reconstructed affidavit regarding the investigators' minimal investigation into the electricians' statements, namely that: (1) Fallon and Pomponio did not go into the basement to check the circuit breaker or other electrical source; (2) no investigator tested the outlet or circuit breaker to determine if it had been energized; (3) the investigators did not question the electricians about the outlet's purported de-energization in their signed statements; (4) the outlet was not preserved and tested by someone with "requisite experience"; and (5) Pomponio never looked through the hole in the wall at the rear of the outlet box. Because these facts pertain to the purported negligence of the officers, these alleged facts are only relevant if the negligence of the officers conducting an investigation is relevant to the probable cause determination in the Fourth Amendment context.

The Third Circuit has held that in the Fourth Amendment context, "whether the officers conducted the investigation negligently is not a material fact" to the issue of probable cause.

Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995). "Indeed, for Fourth Amendment purposes, the issue is not whether the information on which police officers base their request for an arrest warrant resulted from a professionally executed investigation; rather, the issue is whether that information would warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *Id.* Therefore, facts pertaining to the alleged negligence of the officers in conducting the investigation is not relevant to the determination of probable cause, and were not recklessly omitted from the affidavit.[13]

g. Details Regarding Black's Interrogation

Finally, Black includes a lengthy recollection of her interrogation in her reconstructed affidavit. *See* Pl.'s Ans. to MC at 15-16. Because Black's recollection attempts to "relate the entire history of events leading up to a warrant application with every potentially evocative detail that would interest a novelist or gossip," which is not required in an affidavit of probable cause, the Court declines to examine or include the entirety of her version in the reconstructed affidavit. *See Wilson*, 212 F.3d at 787. Rather, the Court will focus its review on two purportedly omitted and/or misrepresented facts: (1) Black's response to the investigators' inquiry regarding whether her fingerprints would be on the matchbox; and (2) Black's statement that she did not recognize the matchbox.[14]

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[13] Because negligence is not relevant to the probable cause determination, Black's argument that the affidavit recklessly omitted that the investigation violated various National Fire Protection Association (NFPA) standards also fails. *See* Pl.'s Sur-Reply to MC at 19.

[14] The parties also contest whether the following statement in the original affidavit was a misrepresentation: "While speaking to us, BLACK muttered a mostly unintelligible sentence ending with the word 'matches.' When asked to repeat what she said, BLACK changed the subject.'" *See* Pl.'s Ans. to MC at 15; MC Reply at 17. Black contends that this statement was fabricated by Fallon to suggest consciousness of guilt. The Court will not belabor this issue, because, as explained below, probable cause for Black's arrest still existed without this contested statement in the affidavit. Therefore, at the request of Black, this statement will be removed from the affidavit.

Black's reconstructed affidavit rewrites both the wording of Fallon's inquiry into whether Black's fingerprints would be on the matchbox as well as her answer to this questioning. Black removes the original affidavit's statement that Black was "asked if there was any reason that I would find her fingerprints on the box" and "answered that she probably touched the box at some point, therefore it would be likely that her prints would be on the box." Pl.'s Ans. to MC at 15-16. Black replaces this statement with "Black was then asked whether, if there were matches in the fire room, would her fingerprints be on them. Black responded that she imagined her fingerprints could be on everything in that room because as far as she knew she had put everything in there." *Id.* at 16. Fallon does not dispute that Black's revision is appropriate. Because a misrepresentation can relate to even "minor details," the discussion regarding Black's fingerprints on the matchbox will be replaced with the complete version set forth by Black.

Black also includes in her version of the affidavit the statement that Henry showed Black the matchbox in a bag, asked if she recognized what he was holding and that Black answered "No." Pl.'s Ans. to MC at 16. Fallon does not dispute the substance of this addition. Because Black's response to a question regarding whether she had seen the matchbox is relevant and something the judge would want to know in an arson investigation, this fact was recklessly omitted and will be included in the reconstructed affidavit.

2. The Reconstructed Affidavit

The Court reconstructed the affidavit to include the recklessly omitted information, to excise any misrepresentations and to include other information that gives context to omitted information as follows:[15]

Your Affiants are Detective John T. Fallon and Detective Gregory I. Henry.

[15] Additions to the affidavit are noted in bold, and excised information is noted with a strikethrough. An explanation of a minor addition not discussed above is included as a footnote, and this footnote should not be read as part of the reconstructed affidavit. *See infra* at note 16.

Detective John T. Fallon is a Detective with the Montgomery County Detective Bureau, the investigative branch of the Montgomery District Attorney's Office. He has been a County Detective since 1991. He has been a police officer since 1974, and a detective since 1984. He is presently assigned to the Special Investigations Unit. In that assignment, he investigates fires, insurance frauds. Detective Fallon is a Certified Fire Investigator.

Detective Henry is a Detective with the Lower Merion Police Department. He has been employed as a police officer since 1984 and was assigned to the Investigations Unit in 1993.

On Wednesday, November 21, 2012 at 3:27 PM, Lower Merion Police and Fire units were dispatched to 1401 Spring Mill Road, Gladwyne, Lower Merion Township on a report of a house fire. Officer Kirk Gardner, LMPD arrived on location at 3:31 PM and observed smoke coming from a third floor window. The Gladwyne Fire Company arrived on location at 3:34 PM. Assistant Chief John Remillard located a fire in the window well of a third floor dormer. The fire was quickly extinguished. **Fire Chief Leis informed dispatch that an "electrical fire in the wall spread to a window frame." This statement was not discussed at the scene.**

1401 Spring Mill Road is a three story residence situated on a wooded lot which occupies approximately three (3) acres on the northeast corner of Spring Mill and Conshohocken State Roads in the Gladwyne section of Lower Merion Township, Montgomery County. The fire was confined to a room located in northeast corner of the third floor.

Lower Merion Chief Fire Officer Charles McGarvey also responded to the scene along with Deputy Fire Marshal Frank Hand. At approximately 4:15 PM that same date, Chief McGarvey requested assistance with the investigation of this fire and Detective Henry, Detective Fallon and Trooper Robert Pomponio, Pennsylvania State Police **Alternate** Fire Marshal, were assigned.

Detectives Henry and Garner interviewed Joshua Trisdorfer, William Warren and Michel Summers. All are employed by Generation 3, an electrical contractor, which was replacing wiring and doing other electrical work in the home. **Specifically, the electricians, who were working without a permit, were replacing 100 year-old knob and tube wiring, which is a fire hazard, so that the new owners could get insurance. The 220-volt outlet in the window sill area of the room where the fire occurred, however, did not have knob and tube wiring, but rather had been previously installed using modern non-metallic sheathed (Romex) wiring.** A third employee of this company, Michael Janiszewski, was interviewed by DFM Hand. All three employees stated that they had been doing work in the room, in which the fire started, earlier in the day. During the afternoon hours, their work was confined to the second floor and the basement.

Janiszewski stated that he was en route to the second floor of the house, when he heard an alarm. He continued to the third floor and observed a fire, in the area of a window on the east side of the home. He yelled "fire" and went to fill a can with water. He was assisted by William Warren and Trisdorfer, while Summers called 9-1-1. They were able to extinguish the fire and then went outside to wait for fire personnel. According to Janiszewski, he did not observe anyone else on the third floor when he discovered the fire.

Trisdorfer, Warren and Summers echoed this account. Summers added that he went to use the third floor bathroom between 2:50 and 3:00 PM. When he was heading back down the stairs, he heard someone in the "fire room". According to Summers, he did not see anyone, but stated that it sounded like someone was rummaging through some papers or bags.

Maureen Algeo, a realtor with Prudential/Fox & Roach stated that she arrived at the house at 3:15 PM, just as the movers were arriving. When she entered the home, she observed Michele Owen BLACK walking down the stairs, towards the foyer. About ten minutes after Algeo arrived, the fire was discovered.

Lastly, we interviewed BLACK. BLACK is the daughter of the previous owner, Paula Owen. BLACK had been on scene to remove some small, personal items that had been left behind by her mother after she moved out.

BLACK stated that she arrived at 1401 Spring Mill Rd between 2:00 and 3:00 PM. She was going through some bags in the fire room, when Algeo arrived. This was just a few minutes **or more**[16] before the fire was discovered, according to BLACK. ~~While speaking to us, BLACK muttered a mostly unintelligible sentence ending with the word "matches". When asked to repeat what she said, BLACK changed the subject.~~ During this interview, ~~I showed BLACK a box of matches that were found in the fire room and~~ **BLACK was** asked **whether, if there were matches in the fire room, would her fingerprints be on them.** ~~if there was any reason that I would find her fingerprints on the box.~~ BLACK answered that she ~~probably touched the box at some point, therefore it would be likely that her prints would be on the box~~ **imagined her fingerprints could be on everything in that room because as far as she knew she had put everything in there**. **Detective Henry left the room, came back with a bag containing a matchbox, and asked if she recognized what he was holding. BLACK responded "No." There was no evidence that a match from the matchbox had been used to start the fire.**

Detective Fallon **is an** ~~and Trooper Pomponio are~~ expert~~s~~ in determining the origin and cause of fires**, but has little training in electrical fires**. **Trooper Pomponio attended the Pennsylvania State Fire Academy in 2011, where he took courses in fire investigation, building construction and electrical systems. As of November 21, 2012, Trooper Pomponio had investigated 15 fires, 6 of which he found to be arson and 3 of which were the result of electrical malfunction. The improper installation of outlets or light switches has not caused a fire that Trooper Pomponio has investigated and he does not know how to test the outlet to determine whether it was energized prior to the fire.**

The burn patterns on the walls, ceiling, window sash and frame and the window sill indicate that the fire started on or just above the window sill, in the immediate vicinity of the 220-volt outlet. The burn patterns created an evident "V" pattern of fire damage extending from the base and right side of the outlet in the window sill, and extending upward and outward toward the right upper side of the window sill.

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[16] Black includes this addition without explanation, but it appears supported by the original affidavit's uncontested statement that Ms. Algeo arrived ten minutes before the fire was discovered, and is therefore included.

Deputy Fire Marshal Hand was present when a firefighter disassembled the outlet to determine whether this was an electrical fire. Detective Fallon inspected the disassembled outlet. He observed external heat damage on the Bakelite surface of the receptacle, and internal damage to the outlet, but no signs of internal electrical faults or failures. Detective Fallon considered it evident that the receptacle could not be considered a potential ignition source.

Detective Fallon was informed by Deputy Fire Marshal Hand that the circuit running to the outlet was de-energized from the time of Hand's arrival. DFM Hand also stated that the electricians had informed him that they had de-energized it the day before.

The electricians' lack of permit gave them a possible motive to cover up the fire. Additionally, because Ms. Black was in a panic about getting things out of the house, she had a possible motive to start the fire in order to buy more time.

Following a **less than** thorough, systematic and exhaustive examination of the scene, it was both Detective Fallon's and Trooper Pomonio's [sic] opinion that this is an incendiary fire, that is, intentionally set by human hands. These investigators believes [sic] that the perpetrator(s) used an open flame, possibly a match, to ignite the ordinary combustibles present at or on the window sill of the dormer window. Detective Fallon and Trooper Pomponio concur that this fire does not appear to have burned for an extended period of time. While it is impossible to estimate the exact burn time, given the fuel load and construction of the building, it is evident that the fire did not burn long before it was at least partially extinguished. The fire did not spread to any structural members and did not fully consume all of the potential fuel sources located on top of the window sill.

Due to the fact that Detective Fallon and Trooper Pomponio determined that this fire had been intentionally set by a human and that it was likely caused by an open flame; that Michele Owen BLACK admittedly was the only person in the room, in which the fire occurred and that she exited this room shortly before the fire was discovered; and lastly, she stated that it was likely that her fingerprints would be found on a matchbook, which was located in the (fire) room; it was our conclusion that Michele Owen BLACK intentionally set this fire, with intent or reckless disregard for the potential damage to the property or the persons working inside the premises.

Based on the above information, your affiants request that an Arrest Warrant be issued charging Michele Owen BLACK, a white female, age 55, date of birth 12-20-1956, of 1155 Lark Song Lane, Encenitas, CA 92024 with the following violations of the Pennsylvania Crimes Code: ARSON ENDAGERING PERSONS û Pa. C.C. 3301(a)(1)(i) [F-1]; ARSON ENDAGERING PERSONS û Pa. C.C. 3301(a)(1)(ii) [F-1]; ARSON ENDAGERING PROPERTY û Pa. C.C. 3301(c)(1) [F-2]; ARSON ENDAGERING PROPERTY û Pa. C.C. 3301(c)(2) [F-2]; RECKLESS BURNING OR EXPLODING û Pa. C.C. 3301(d)(2) [F-3]; FAILURE TO REPORT OR CONTROL DANGEROUS FIRES û Pa. C.C. 3301(e)(2) [M-1]; RISKING A CATASTROPHE û Pa. C.C. 3302(b) [F-3]; CRIMINAL MISCHIEF û Pa. C.C. 3304(a)(1) [M-2]; and RECKLESSLY ENDANGERING ANOTHER PERSON û Pa. C.C. 2705 [M-2].

3. Materiality of Omitted or Misrepresented Statements

The third step in the *Dempsey* analysis is the determination of whether the recklessly omitted or misrepresented statements, considered in the context of the affidavit as a whole, were "material, or necessary, to the finding of probable cause." *Dempsey*, 834 F.3d at 477 (quoting *Wilson*, 212 F.3d at 787). In other words, does the reconstructed affidavit establish probable cause? Because Black raises a malicious prosecution claim, the court must assess whether any reasonable jury could find a lack of probable cause as to any of the nine crimes charged against her. *Dempsey*, 834 F.3d at 477. Both parties assume, and therefore agree, that the issue of probable cause for all the charges against Black turn on whether there was probable cause to believe that Black intentionally started the fire. *See* Pl.'s Ans. to MC at 11-12; MC Reply at 21-22.

Probable cause is a "fluid concept" that "deals with probabilities and depends on the totality of the circumstances." *Wesby*, 138 S. Ct. at 586 (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) and *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). "[T]he standard does not require that officers correctly resolve conflicting evidence or that their determinations of credibility, were, in retrospect, accurate." *Wright v. City of Philadelphia*, 409 F.3d 595, 603 (3d Cir. 2005). Probable cause "is 'not readily, or even usefully, reduced to a neat set of legal rules,'" and "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Wesby*, 138 S. Ct. at 586 (quoting *Illinois*, 462 U.S. at 232, 243-44 n.13). In other words, "[p]robable cause 'is not a high bar.'" *Wesby*, 138 S. Ct. at 586 (quoting *Kaley v. U.S.*, 571 U.S. 320, 338 (2014)).

Here, summary judgment will be reluctantly granted on Black's Fourth Amendment malicious prosecution claim, because "'no reasonable jury could find facts that would lead to the

conclusion' that the reconstructed affidavit 'lacked probable cause.'" *Dempsey*, 834 F.3d at 477 (quoting *Wilson*, 212 F.3d at 792). The reconstructed affidavit provides that: (1) Fallon, an expert in determining cause and origin, and Pomponio, both concluded that the fire was set intentionally using an open flame; (2) Black was the only person in the fire room around the time the fire occurred; (3) Black exited the room shortly before the fire was discovered; (4) a matchbox was located in the room in which the fire occurred; and (5) Black admitted that as far as she knew, she had placed everything in the fire room, and therefore her fingerprints could be found on the matchbox. Based on these facts, no reasonable jury could conclude that Fallon had failed to show the required "probability" of criminal activity by Black.

"Having determined that inculpatory evidence, reflected in the reconstructed affidavit, gives rise to probable cause" the question remains whether the additional evidence "'outweigh[s]' the probable cause otherwise established by the affidavit of probable cause." *Dempsey*, 834 F.3d at 479 (quoting *Wilson*, 212 F.3d at 790). In light of the totality of the facts, even considering the recklessly omitted and misrepresented information, no reasonable jury could determine that the affidavit lacked probable cause.

The evidence regarding the outlet and Leis' opinion does not undermine probable cause because Fallon inspected the outlet and did not find supporting evidence of an electrical fire. Unlike other parts of the house, the outlet had upgraded, modern wiring. Additionally, Fallon was also informed by Hand that the outlet had been de-energized since Hand arrived and the electricians had stated that they de-energized the outlet the day before the fire. Likewise, because "the [probable cause] standard does not require that officers correctly resolve conflicting evidence," the fact that no evidence of the matchbox being used (such as burnt matches) was found does not diminish probable cause. *Wright*, 409 F.3d at 603.

Similarly, the fact that Black denied recognizing the matchbox also does not diminish probable cause. Although Fallon, in believing that Black caused the fire, "may have made a mistake, [his] belief was not unreasonable in light of the information the officers possessed at the time." *Id.* The investigators had concluded that the fire was started intentionally by an open flame, Black was the only person in the fire room around the time the fire occurred, and Black was seen leaving the room shortly before the fire was discovered. Additionally, the matchbox was found in the fire room and Black stated her fingerprints could be on everything in the room. Under these circumstances, Fallon was not unreasonable in discrediting Black's claim that she did not recognize the matches.

Additionally, the inclusion of details reflecting Fallon's and Pomponio's experiences with electrical fires and the fact that their investigation was not "thorough, systematic and exhaustive" does not diminish probable cause because in the Fourth Amendment context, "whether the officers conducted the investigation negligently is not a material fact" to the issue of probable cause. *Orsatti*, 71 F.3d at 484. Moreover, Fallon was an expert in determining the cause and origin of fires, and the information on which he based his affidavit "would warrant a reasonable person to believe that an offense has been . . . committed by the person to be arrested." *Id.*

Finally, although the electricians' lack of a permit gave the electricians a possible motive to cover up the fire, when viewed in the context of the totality of the facts, this possible motive does not outweigh probable cause. Although Fallon's determination that Black was not credible and the electricians were credible was quite possibly wrong, the probable cause standard does not require that an officer's determination of credibility was, in retrospect, accurate. *Wright*, 409 F.3d at 603. In light of the evidence outlined above, including that the investigators determined

that the outlet was de-energized and the fire was started by an open flame, no reasonable jury could conclude that there was not probable cause, notwithstanding the added evidence of the electricians' potential motive to cover up the fire.

In sum, because probable cause is "not a high bar," and only requires, based on the totality of the circumstances, a "probability" of criminal activity, no reasonable fact finder could find that the reconstructed affidavit does not establish probable cause. The reconstructed affidavit establishes that the investigators, including a certified fire investigator, concluded that the fire was started intentionally with an open flame. It also establishes that Black was the only person in the fire room around the time of its occurrence, was seen leaving the room shortly before the fire was discovered, and admitted that her fingerprints could be found on the matchbox. Because a malicious prosecution claim fails upon a finding of probable cause, summary judgment will be granted on Count I.[17]

ii. § 1983 Conspiracy – Malicious Prosecution: All Individual Defendants (Counts II, V, VIII, X, XII, XIV)

Black also contends that all of the Individual Defendants, including Fallon, conspired to maliciously prosecute her in violation of the Fourth Amendment. To succeed on a § 1983 conspiracy claim, a plaintiff must prove an actual deprivation of a constitutional right. *See Black v. Montgomery Cty.*, 835 F.3d 358, 372 n.14 (3d Cir. 2016). Because the underlying claim of

[17] Although I am constrained to follow the law of this Circuit and I believe I have done so here, I pause to note that I believe that the law could well require more to protect citizens from overly aggressive prosecutions. This is particularly the case where, as here, the only way to determine whether there is a "probability" that a person committed a crime is to utilize an expert to assess potential non-intentional causes of the alleged crime. Although Fallon was considered an "expert" in determining the cause and origin of fires, he admittedly was not experienced in the specific circumstances of the case, namely, a potential electrical fire. It may be more in line with justice to expand the information that a judge should be required to take into consideration when reviewing probable cause in circumstances where the responding officers are not necessarily equipped to make an informed decision as to the cause of an alleged crime, and as a result, greatly impact an innocent person's life. This is especially true where, as here, the time between the alleged crime and the filing of the complaint allows for such an investigation.

malicious prosecution fails, Black's claims of conspiracy to commit malicious prosecution also fail. Therefore, summary judgment will be granted on the § 1983 claims of conspiracy to commit malicious prosecution raised against the Individual Defendants (Counts II, V, VIII, X, XII, and XIV).

b. § 1983 Procedural Due Process – Fourteenth Amendment and § 1983 Conspiracy

Black alleges that Fallon and Hand deprived her of her Fourteenth Amendment procedural due process rights by fabricating, suppressing and/or destroying exculpatory evidence. Black claims that both Hand and Fallon lied during the course of the investigation and at trial, conducted negligent investigations and engaged in the destruction of evidence by failing to preserve the outlet. Black states that the failure to preserve the outlet prevented her from having the outlet independently examined and tested. Black also alleges that Fallon planted evidence. Additionally, Black alleges that all of the Individual Defendants, including Fallon and Hand, conspired to deprive her of her Fourteenth Amendment procedural due process rights.

"To sustain a claim under § 1983 based on a violation of procedural due process, [a plaintiff] 'must, at a minimum, prove recklessness or gross negligence and in some instance may be required to show a deliberate decision to deprive the plaintiff of due process.'" *Mulholland v. Gov't Cty. of Berks, Pa.*, 706 F.3d 227, 238 (3d Cir. 2013) (quoting *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir.1994)). "[N]egligence by public officials is not actionable as a due process deprivation of a civil right." *Wilson*, 212 F.3d at 789 n.5. *See also Riddle v. Riepe*, 866 F.3d 943, 948 (8th Cir. 2017) ("'Negligence . . . is not enough' to show that evidence was fabricated.") (quoting *Livers v. Schenck*, 700 F.3d 340, 351 (8th Cir. 2012)).

In the appeal of this case at the motion to dismiss stage, the Third Circuit made clear for the first time that even an acquitted criminal defendant may have a stand-alone fabricated

evidence claim under the due process clause of the Fourteenth Amendment. *Black*, 835 F.3d at 371. For such a claim to be viable there must be "a reasonable likelihood that, absent that fabricated evidence, the defendant would not have been criminally charged." *Id.* There are, however, a number of "hurdles facing a plaintiff alleging a due process violation for fabrication of evidence." *Id.* at 372. First, the plaintiff must "demonstrate that the fabricated evidence 'was so significant that it could have affected the outcome of the criminal case.'" *Id.* (quoting *Halsey v. Pfeiffer*, 750 F.3d 273, 295 (3d Cir. 2014)). "[T]estimony that is incorrect or simply disputed should not be treated as fabricated merely because it turns out to have been wrong." *Halsey*, 750 F.3d at 295. Instead, "[t]here must be 'persuasive evidence supporting a conclusion that the proponents of the evidence' are aware that [the] evidence is incorrect or that the evidence is offered in bad faith."[18] *Black*, 835 F.3d at 372 (quoting *Halsey*, 750 F.3d at 295).

Where a plaintiff raises a claim for a due process violation based on the destruction of potentially useful evidence, "[t]he Supreme Court's decision in *Arizona v. Youngblood*, establishes the standard for determining whether law enforcement officials have infringed on a defendant's due process rights by failing to preserve 'evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'" *Yarris v. Cty. of Delaware*, 465 F.3d 129, 142 (3d Cir. 2006) (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (internal citation omitted)). Unless a plaintiff "can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood*, 488 U.S. at 58.

"The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence

[18] The Third Circuit has cautioned that "it will be an unusual case in which a police officer cannot obtain a summary judgment in a civil action charging him with having fabricated evidence used in an earlier criminal case." *Black*, 835 F.3d at 372 (quoting *Halsey*, 750 F.3d at 295).

at the time it was lost or destroyed." *Id.* at 56 n.*. Thus, "the exculpatory value of the evidence must be apparent '*before* the evidence was destroyed'" *Id.* at 56 n.* (quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984)). It is not enough that the police were negligent in failing to preserve the evidence or that the evidence was "an avenue of investigation that might have led in any number of directions." *Id.* at 56 n*, 58. The police do not have "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.* at 58. "[R]equiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.,* those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.*

i. § 1983 Procedural Due Process – Fourteenth Amendment: Fallon (Count III)

Black's claim of fabricated, suppressed and/or destroyed evidence against Fallon can be divided into four categories: (1) Fallon's incorrect testimony at the criminal trial; (2) criticisms of Fallon's investigation and evaluation of the evidence; (3) allegations of lying and planting evidence; and (4) Fallon's failure to preserve the outlet. For the reasons explained below, although Black's allegations are disturbing, the facts presented do not support a finding of a constitutional violation.

1. Fallon's Incorrect Testimony at the Criminal Trial

Black contends that Fallon offered knowingly false testimony at trial when he said that the photos he took on November 27, 2012 that showed the wire to the outlet was cut, accurately depicted the outlet on the day of the fire. In order to demonstrate that this testimony violated her

procedural due process rights, Black must show that "there is a reasonable likelihood that, absent that fabricated evidence, [she] would not have been criminally charged." *Black*, 835 F.3d at 371.

Although it is undisputed that Fallon's testimony at trial that the photos accurately depicted the outlet on the day of the fire was incorrect, Black does not point to evidence that these photos were falsely represented to ADA Crocker prior to the filing of criminal charges. Rather, in his December 3, 2012, supplemental report, Fallon properly identified the photos as being taken on a subsequent visit to the house and that the electricians had removed the outlet from the window well and taped up the exposed ends of the wire. Likewise, in his correspondence with ADA Crocker (and corresponding report), Fallon described the photos as being taken on November 27, 2012. Black only puts forward evidence of Fallon's incorrect testimony and this testimony occurred after the filing of charges. Thus, Black cannot show a reasonable likelihood that absent this testimony, she would not have been criminally charged. Therefore, this testimony does not support her procedural due process claim.

2. Criticisms of Fallon's Investigation and Evaluation of the Evidence

Black lists numerous alleged failings in Fallon's investigation and evaluation of the evidence and argues that these failings constitute "fabrications." To show that these failings violated her procedural due process rights, Black must put forward evidence that these failings amounted to more than negligence by Fallon and the other investigators. *See Wilson*, 212 F.3d at 789 n.5; *Mulholland*, 706 F.3d at 238.

Black alleges that Fallon fabricated evidence by accepting Hand's statement that the outlet was not energized, failing to investigate the circuit breakers in the basement, "[i]ntentionally ignoring the obvious relationship between the outlet and the origin of the fire" and not following National Fire Protection Association (NFPA) protocol or technique. Pl.'s Ans.

to MC at 25-26. At best, the purported investigatory failings listed by Black, if proven, demonstrate negligence in the investigation and no more. Therefore, these criticisms of the investigation do not support Black's procedural due process claim.

3. Allegations of Lying and Planting Evidence

Black also argues that Fallon was not truthful with respect to the inquiry into the matchbox, the damage to the outlet and the electricians' lack of permit. Testimony that is simply disputed or wrong does not rise to the level of fabrication absent "'persuasive evidence supporting a conclusion that the proponents of the evidence' are aware that [the] evidence is incorrect or that the evidence is offered in bad faith." *Black*, 835 F.3d at 372 (quoting *Halsey*, 750 F.3d at 295). Moreover, negligence by investigators is not enough to sustain a procedural due process claim. *See Wilson*, 212 F.3d at 789 n.5; *Mulholland*, 706 F.3d at 238.

With regard to the inquiry into the matchbox, Black asserts that Fallon fabricated her "blurt out" of the word "matches" and her alleged failure to respond to follow up questions, and "fail[ed] to tell the truth" about planting the matches. Pl.'s Ans. to MC at 26. However, Black has not directed the Court to persuasive evidence showing that Fallon acted in bad faith or was knowingly incorrect in stating that Black blurted out the word "matches" and refused to answer follow up questions. Black also points to no persuasive evidence in the record that Fallon planted the matchbox or was not truthful as to where the matchbox was found.

Black also takes issue with the fact that Fallon "alternatively" claimed that there was no internal damage to the outlet, or that the damage was caused by the external heat of the fire. Although Fallon admitted that he should have reported that the outlet had "no internal electrical damage," as opposed to "no signs of internal damage," Black does not put forward persuasive evidence that the original wording was knowingly incorrect or offered in bad faith, especially

because Fallon's report also specifically stated that the outlet had "no signs of internal electrical faults of failures." Pl.'s Ex. AA at MC123.

Finally, Black contends that Fallon ignored or lied about being told that the electricians were working without a permit. However, even if Fallon did know that the electricians were working without a permit, Black has not pointed to evidence that Fallon acted in bad faith or was more than negligent when he failed to tell ADA Crocker that the electricians were working without a permit. Because Black has failed to support her allegations that Fallon planted evidence, or suppressed evidence, the evidence identified does not support her procedural due process claim.

4. Fallon's Failure to Preserve the Outlet

Finally, Black argues that Fallon violated her Fourteenth Amendment right to due process by "[i]ntentionally failing to preserve the outlet and its component parts for testing by someone with electrical expertise in derogation of established fire investigation protocol, and in stark contrast to the matchbox that was seized with rubber gloves and placed into a plastic bag." Pl.'s Ans. to MC at 25-26. Black argues that "[t]he spoliation of evidence prevented Ms. Black from having the actual receptacle inspected and tested by an expert to refute Fallon's testimony and clearly would be of such significance to affect the outcome." Pl.'s Ans. to MC at 27.

Pursuant to *Youngblood*, unless a plaintiff "can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law" and the presence or absence of bad faith turns on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. 488 U.S. at 56 n.*, 58. Here, Black points to no evidence that Fallon knew of the potentially exculpatory value of the outlet prior to its spoliation. The undisputed facts show that Fallon did not consider the outlet to be exculpatory

evidence. Pl.'s SUF ¶¶ 112-13. Fallon testified that he and Pomponio were confident in their conclusions that the outlet was not a source of ignition and that he "would never consider testing an outlet like that when the damage was pretty obvious to [him]." Pl.'s SUF ¶ 114. Therefore, although Fallon's failure to preserve the outlet may have been negligent, the undisputed facts show that he did not consider the evidence to be potentially exculpatory, and therefore he did not act in bad faith. Thus, Fallon did not violate Black's due process rights by failing to preserve the outlet.

5. Conclusion

Because Black cannot succeed on her claim that Fallon fabricated, suppressed and/or destroyed exculpatory evidence in violation of her Fourteenth Amendment procedural due process rights, I will grant summary judgment on Count III.

ii. § 1983 Procedural Due Process – Fourteenth Amendment: Hand (Count VI)

Black's claim that Hand fabricated evidence can be divided into three categories: (1) Hand's fabrication that the wire leading to the outlet was cut; (2) criticisms of Hand's investigation and evaluation of the evidence; and (3) Hand's failure to preserve the outlet. For the reasons explained below, although Black's allegations are troubling, the facts presented do not support a finding of a constitutional violation.

1. Hand's Fabrication that the Wire to the Outlet was Cut

Black contends that Hand fabricated evidence by stating that the wire running to the outlet was cut. It is undisputed that the wire to the outlet was cut at some point, but that photographs taken on the day of the fire show that the wire was at least initially intact. *Compare* Pl.'s SUF ¶ 23 (showing wire running to the outlet) *with* Pl.'s SUF ¶ 187 (showing no wire running to the outlet). Black appears to allege that Hand committed this fabrication by (1)

incorrectly stating in his report that there was a second outlet in the window sill area of the fire room that was not hooked up to an electrical source, although there was in fact no such second outlet and (2) allegedly misrepresenting during the investigation that the wire running to the outlet was cut prior to the fire.[19] In order for these allegations to rise to the level of a constitutional violation, Black must show that "there is a reasonable likelihood that, absent that fabricated evidence, [she] would not have been criminally charged."[20] *Black*, 835 F.3d at 371.

It appears from the record that any fabrication that the wire was cut upon Hand's arrival did not influence the decision to charge Black. First, this fabrication did not influence Fallon. Fallon never read Hand's report which stated that the wire to a second outlet was not hooked up to an electrical source. Furthermore, Fallon did not include the cut wire in his reports to support his conclusion that the outlet was de-energized. *See* Pl.'s Ex. Q; Pl.'s Ex. R; Det. Fallon's Suppl. Report/Arrest of Michele Owen Black, Pl.'s Ex. S, ECF No. 85-38; Pl.'s Ex. AA. Rather, Fallon concluded that the outlet was de-energized because Hand informed him that the circuit to the outlet was de-energized from the time of Hand's arrival, and the electricians had informed Hand that they had de-energized the circuit the day before.

Finally, this fabrication does not appear to have influenced ADA Crocker. ADA Crocker's correspondence with Fallon does not mention the wire to the outlet at all. *See* Pl.'s Ex.

[19] It is unclear from Black's allegations to whom Hand purportedly made this misrepresentation.

[20] Black also takes issue with Hand's testimony at trial that the wire to the outlet was cut. However, because to succeed on her fabrication of evidence claim, Black must show that "there is a reasonable likelihood that, absent that fabricated evidence, [she] would not have been criminally charged" and this trial testimony occurred after she was charged, the trial testimony does not support her claim. *Black*, 835 F.3d at 371.

AA. Likewise, the police criminal complaint/affidavit of probable cause does not mention the outlet at all.[21] *See* Pl.'s Ex. CC.

Because Black cannot show that there is a reasonable likelihood that she would not have been criminally charged absent Hand's fabrication regarding the wire to the outlet, this fabrication does not support her procedural due process claim.

2. Criticisms of Hand's Investigation and Evaluation of the Evidence

Black claims that Hand's allegedly faulty investigation of the scene constitutes fabrication of evidence. In order for Hand's allegedly faulty investigation to rise to the level of a procedural due process violation, Hand's actions must have been more than just negligent. *See Wilson*, 212 F.3d at 789 n.5; *Mulholland*, 706 F.3d at 238.

Black alleges that Hand failed to follow NFPA technique or protocol when he: (1) did not ask Leis or the other first responders what their opinion was regarding the cause of the fire; (2) did not check the circuit breakers in the basement to determine whether this was an electrical fire; and (3) accepted the word of the electricians, without question, that the circuit running to the outlet was de-energized and did not record this information.[22] These allegations, even if true, at most amount to negligence by Hand. However, "negligence by public officials is not actionable as a due process deprivation of a civil right." *Wilson*, 212 F.3d at 789 n.5. Therefore, these allegations do not support Black's claim that Hand fabricated evidence.

Additionally, Black alleges that Hand "intentionally ignored the obvious internal damage to the outlet, and fraudulently claimed that whatever damage that existed was caused by heat"

[21] Additionally, Black does not point to evidence that Hand's fabrication influenced Pomponio. Although Pomponio testified that someone told him that the wire was cut, he could not recall who had told him.

[22] Black also alleges that Hand "lied" that he had followed NFPA technique or protocol, but fails to point to supporting evidence.

and not an electrical fire. Pl.'s Sur-Reply to Lower Merion Defs. 22, ECF No. 98. However, Black does not point to evidence, let alone "persuasive evidence" suggesting that Hand's evaluation of the evidence was more than just negligent nor that his conclusion that the damage was caused by heat was knowingly false or offered in bad faith.[23] *Black*, 835 F.3d at 372. Therefore, these allegations do not support Black's allegation that Hand fabricated evidence.

3. Hand's Failure to Preserve the Outlet

Finally, Black alleges that Hand fabricated evidence by failing to preserve the outlet, despite his recognition that it should have been preserved. Hand testified that even though he had determined the outlet was not the source of the fire, he *did* preserve the outlet because he left the room the way he had found it to the best of his ability until the other investigators arrived. Pl.'s SUF ¶ 57. As an initial matter, Black does not explain how Hand's preservation of the scene for the other investigators, such as Fallon, amounted to spoliation of evidence.

Moreover, to the extent that Black is arguing that Hand had an independent obligation to ensure that the outlet was preserved as evidence, Black does not point to facts showing that Hand had "knowledge of the exculpatory value of the [outlet] at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56 n*. In fact, Hand testified that he determined that the outlet was not responsible for the fire and the outlet's evidentiary purpose was to show that the fire was *not* electrical. *See* Hand Dep., Pl.'s Ex. H, 166:8-9, ECF No. 85-9 ("Q. And what is that outlet evidence of? A. That it was not the cause of the fire."). Because Black does not point to evidence showing that Hand had knowledge of the exculpatory value of the outlet at the time it

[23] Black also alleges that Hand lied or recklessly disregarded the evidence when he stated the electricians' lack of permit would not have made a difference to his investigation. Even if Hand knew during the investigation that the electricians were working without a permit, Black fails to point to any facts to contradict Hand's assertion that this knowledge would not have impacted his investigation.

was lost or destroyed, as required by *Youngblood*, his failure to independently ensure the preservation of the outlet does not support Black's fabrication of evidence claim.

4. Conclusion

Black's allegations that Hand fabricated, suppressed and/or destroyed exculpatory evidence, thereby violating her procedural due process rights, fail as a matter of law. Therefore, summary judgment will be granted on Count VI.

iii. § 1983 Procedural Due Process – Conspiracy: All Individual Defendants (Counts IV, VII, IX, XI, XIII, XV)

Black also contends that all of the Individual Defendants, including Fallon and Hand, conspired to deprive her of her Fourteenth Amendment procedural due process rights. As explained above, because the underlying claims of a violation of her procedural due process rights fail, Black's conspiracy claims also fail. Therefore, summary judgment will be granted on Black's claims that the Individual Defendants conspired to deprive Black of her Fourteenth Amendment procedural due process rights (Counts IV, VII, IX, XI, XIII, XV).

B. § 1983 *Monell* Claims: Lower Merion and Montgomery County (Counts XVI, XVII)

Black brings claims of municipal liability under § 1983, pursuant to *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658 (1978), against Lower Merion and Montgomery County.

"A municipality or other local government may be liable under [42 U.S.C. § 1983] if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting 42 U.S.C. § 1983). "Under *Monell*, for municipal liability to attach, any injury must be inflicted by 'execution of a government's policy or custom.'" *Santiago v. Warminster Twp.*, 629 F.3d 121, 135 (3d Cir. 2010) (quoting *Monell*, 436 U.S. at 694). "A policy is made 'when a decisionmaker

possess[ing] final authority to establish municipal policy with respect to the action issues a final proclamation, policy or edict.'" *Natale*, 318 F.3d at 584 (quoting *Kneipp v. Tedder*, 95 F.3d 1199, 1212 (3d Cir. 1996)). "A custom is an act 'that has not been formally approved by an appropriate decisionmaker,' but that is 'so widespread as to have the force of law.'" *Natale*, 318 F.3d at 584 (quoting *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404 (1997)).

It is not enough for a plaintiff to identify conduct properly attributable to the municipality, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bryan Cty.*, 520 U.S. at 404. "[F]or there to be municipal liability, there . . . must be a violation of the plaintiff's constitutional rights." *Brown v. Commonwealth of Pennsylvania, Dep't of Health Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 482 (3d Cir. 2003).

a. Montgomery County (Count XVI)

Black concedes "that if this Court finds that Fallon did not violate Plaintiff's constitutional rights, there can be no *Monell* violation." Pl.'s Ans. to MC at 47. *See Black*, 835 F.3d at 372 n.14 (District court correctly reasoned that *Monell* claims should be dismissed if the underlying constitutional claims were dismissed). Based upon this concession, summary judgment will be granted as to the *Monell* claim raised against Montgomery County (Count XVI).

b. Lower Merion (Count XVII)

Black asserts that summary judgment is inappropriate as to her claim of *Monell* liability against Lower Merion. Black asserts two theories of liability: (1) that Lower Merion's failure to

train its employees led to a violation of her constitutional rights and (2) that Lower Merion's employees themselves implemented a policy or custom that violated her constitutional rights.[24] As explained below, because both of these arguments fail as a matter of law, summary judgment will be granted.

i. Failure to Train

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick*, 563 U.S. at 61. The deficiency in training must have caused the constitutional violation. *Thomas v. Cumberland Cty.*, 749 F.3d 217, 222 (3d Cir. 2014). "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick*, 563 U.S. at 61. A failure to train "must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.' Only then 'can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983.'" *Id.* (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388, 389 (1989) (internal citation omitted)).

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty.*, 520 U.S. at 410. "[W]hat is required is deliberate indifference to a plaintiff's constitutional right." *Id.* at 415. "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick*, 563 U.S. at 62 (quoting *Bryan Cty.*, 520 U.S. at 409). In rare cases, "the need for training 'can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate

[24] Local governments are not vicariously liable under § 1983 for the actions of their employees. *Connick*, 563 U.S. at 60. Thus, to the extent that Black seeks to hold Lower Merion vicariously accountable for its officers' actions, her claim fails as a matter of law.

indifference" to constitutional rights' even without a pattern of constitutional violations." *Thomas*, 749 F.3d at 223 (quoting *Canton*, 489 U.S. at 390 n.10). Under this "single-incident" theory of liability, the risk of injury must be a "highly predictable consequence" of the failure to train. *Thomas*, 749 F.3d at 225. "[S]howing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. '[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct' will not suffice." *Connick*, 563 U.S. at 68 (quoting *Canton*, 489 U.S. at 391).

Black's *Monell* claim for a failure to train appears to be based on her allegation that McGarvey and Hand failed to follow National Fire Protection Association (NFPA) protocols in this investigation. Black does not allege any pattern of similar constitutional violations that are "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Instead, Black alleges that Hand and McGarvey were Lower Merion policymakers and states that they "engaged in the very conduct from which it is obvious that there is a need to train, supervise and discipline its arson investigators."[25] Pl.'s Ans. To Lower Merion Defs. 33, ECF No. 83 (hereinafter "Pl.'s Ans. to LM"). To the extent she argues that her alleged injury could have been avoided if Hand and McGarvey had better training, such an allegation is insufficient under *Connick.* Additionally, Black has failed to point to facts demonstrating that a risk of injury was a "highly predictable consequence" of an alleged failure to provide adequate training in the

[25] Black includes Fallon in her list of Lower Merion policymakers under both theories because he is "the sole CFI in Montgomery County which encompasses Lower Merion Township . . . ." Pl.'s Ans. to LM at 32. Notwithstanding the fact that Fallon is employed by Montgomery County, Black points to no evidence that Fallon is a Lower Merion policymaker or that his conduct is attributable to Lower Merion.

NFPA.[26] Because Black has failed to support her assertion of *Monell* liability for failure to train, her *Monell* claim fails on this theory of liability.

ii. Implementation of a Policy or Custom

Black also argues that "Hand and McGarvey, as the highest ranking fire personnel in Lower Merion, had a practice and policy of using an outdated and repudiated protocol, failed to use and refused to acknowledge and consider exculpatory evidence, failed to consider the opinion of an renown [sic] fire expert that was based upon accepted fire investigation protocol." Pl.'s Ans. to LM at 32. Black, however, has not pointed to facts that any of these alleged deficiencies were Lower Merion's policy or custom. To the extent that Black is arguing that Lower Merion may be liable because McGarvey or Hand's actions implement official policy, this argument fails. The Third Circuit has stated:

> An individual's conduct implements official policy or practice under several types of circumstances, including when (1) the individual acted pursuant to a formal government policy or a standard operating procedure long accepted within the government entity, (2) the individual himself has final policy-making authority such that his conduct represents official policy, or (3) a final policy-maker renders the individual's conduct official for liability purposes by having delegated to him authority to act or speak for the government, or by ratifying the conduct or speech after it has occurred.

Hill v. Borough of Kutztown, 455 F.3d 225, 245 (3d Cir. 2006).

Here, the second prong is relevant. The Third Circuit has explained:

> In order to ascertain if an official has final policy-making authority, and can thus bind the municipality by his conduct, a court must determine (1) whether, as a matter of state law, the official is responsible for making policy *in the particular area* of municipal business in question, and (2) whether the official's authority to make policy in that area is *final and unreviewable.*

[26] *Compare Thomas*, 749 F.3d at 225 (Frequency of fights in prison and volatile nature of prison could lead jury to conclude that it was predictable that officers' lack of de-escalation and intervention training would violate prisoners' constitutional rights) and *Mann v. Palmerton Area Sch. Dist.*, 872 F.3d 165, 175 (3d Cir. 2017) (No *Monell* liability for failure to train high school football coaches in concussion recognition and protection where there was no evidence of a pattern of recurring head injuries or deliberate exposure of injured players to continuing risk of harm and no legislative mandated training).

Id. at 245 (internal citations omitted). *See also Mulholland*, 706 F.3d at 237.

The Lower Merion Defendants contend that McGarvey and Hand are not policymakers. Although Fallon testified that McGarvey is the Chief of the Fire Department, McGarvey (who is Hand's supervisor) testified that he reports to his own boss. McGarvey Dep., Pl.'s Ex. M, 106:4-5; 109:15-19, ECF No. 85-31. Critically, Black fails to point to any evidence showing that McGarvey or Hand were policymakers whose authority to make policy in a particular area was *final and unreviewable*, as required by *Hill*.[27]

Because Black has failed to point to evidence of a policy or custom of Lower Merion that was the source of any alleged constitutional violation, her *Monell* claim fails on this basis as well.

iii. Conclusion

Because Black cannot succeed on her *Monell* claim against Lower Merion, I will grant summary judgment on Count XVII.

C. State Law Claims

Black brings claims under Pennsylvania law against the Individual Defendants for malicious prosecution, false imprisonment, and intentional infliction of emotional distress. Because I will dismiss the federal claims over which I have original jurisdiction, I must address whether to decline to exercise supplemental jurisdiction over the state law claims.

Under 28 U.S.C. § 1367(c), a district court has discretion to decline to exercise supplemental jurisdiction over state law claims if it has dismissed all claims over which it has

[27] The title of "Chief" alone is not necessarily dispositive to having final and unreviewable authority. *See Santiago*, 629 F.3d at 135 n.11 ("[A]s a matter of Pennsylvania state law, a township Police Chief is not a final policymaker.").

original jurisdiction.[28] 28 U.S.C. § 1367(c). "Even if only state-law claims remain[] after resolution of the federal question," a district court has "discretion, consistent with Article III, to retain jurisdiction." *Osborn v. Haley*, 549 U.S. 225, 245 (2007). Once a court "has invested time and resources" in a case, "'[c]onsiderations of judicial economy, convenience and fairness to litigants,' make it reasonable and proper for a federal court to proceed to final judgment" upon the state law claims. *Id.* (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (internal citation omitted)).

This case was filed in November of 2014, some of the issues were already appealed to the Third Circuit and the case has been remanded for further proceedings. The Court is well-versed in the factual and legal issues presented, discovery is complete and the case is ready for final adjudication. Considerations of judicial economy, convenience and fairness to the parties make it reasonable and proper to proceed to final judgment on the state law claims. Therefore, I retain supplemental jurisdiction over Black's state law claims.[29]

a. Malicious Prosecution (Count XIX)

In addition to her Fourth Amendment malicious prosecution claim, Black alleges the tort claim that the Individual Defendants maliciously prosecuted her in violation of Pennsylvania law. "A cause of action for malicious prosecution [in Pennsylvania] has three elements. The defendant must have instituted proceedings against the plaintiff 1) without probable cause, 2)

[28] The parties do not dispute that this Court has supplemental jurisdiction over Black's state law claims pursuant to 28 U.S.C. § 1367(a).

[29] Prior to her appeal, Black conceded that the state law claims against Pomponio should be dismissed on sovereign immunity grounds. *See* ECF No. 36-2 at 1. She does not raise these claims against Pomponio here. Therefore, summary judgment will be granted on the state law claims brought against Pomponio.

with malice, and 3) the proceedings must have terminated in favor of the plaintiff."[30] *Kelley v. Gen. Teamsters, Chauffeurs & Helpers, Local Union 249*, 544 A.2d 940, 941 (Pa. 1988). It is undisputed that the criminal proceedings underlying this litigation resulted in Black's acquittal. "Malice may be inferred from the absence of probable cause." *Id.* Therefore, the key issue is whether the proceedings were instituted without probable cause under Pennsylvania law. Although "[u]sually, the existence of probable cause is a question of law for the court rather than a jury question," it "may be submitted to the jury when facts material to the issue of probable cause are in controversy." *Id.*

In Pennsylvania, "[p]robable cause is defined as 'a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation in believing that the party is guilty of the offense.'" *Id.* at 942. "The reasonable ground of suspicion, however, must not be based upon an inadequate and unreasonable investigation of the circumstances concerning the alleged criminal conduct." *Wainauskis v. Howard Johnson Co.*, 488 A.2d 1117, 1123 (Pa. Super. 1985). Accordingly, in the malicious prosecution context, the Pennsylvania Supreme Court has recognized:

> One of democracy's principal functions is to prevent, to the extent that it is possible, the abuse of governmental power. The authority of a police officer to cause the arrest of anyone is almost absolute . . . However, *when no immediate action is called for and time may be devoted to adequate preliminary investigation, the protection of the individual demands such an investigation* because the hardships, humiliation, suspense and expense to which an innocent person is subjected in an improper prosecution cannot be compensated for by a mere acquittal.

Neczypor v. Jacobs, 169 A.2d 528, 531 (Pa. 1961) (emphasis added). *See also Combs v. Blowes*, No. 1561 C.D. 2013, 2015 WL 5162166, at * 5 (Pa. Commw. Ct. Feb. 17, 2015). Thus, "the

[30] Law enforcement, even though they are not tasked with prosecuting the case, may be liable for malicious prosecution in Pennsylvania. *See Neczypor v. Jacobs*, 169 A.2d 528 (Pa. 1961); *Wright v. Schreffler*, 618 A.2d 412 (Pa. Super. 1993).

general public is entitled to protection from abuse of authority and from the embarrassment, humiliation, and expense of being wrongfully prosecuted for a crime. Therefore, if immediate action is not required, the protection of the individual demands precautions such as adequate preliminary investigation." *Cosmas v. Bloomingdales Bros., Inc.*, 660 A.2d 83, 87 n.3 (Pa. Super. 1995) (internal citations omitted).

Despite waiting nearly a month to charge Black, the Individual Defendants concededly did not have the outlet tested or inspected by an electrical expert, failed to test the matchbox and failed to thoroughly examine the circuit breakers in the basement, among other deficiencies. *See* Pl.'s SUF ¶¶ 77, 113; LM SUF ¶ 62. Somewhat astoundingly, the investigators failed to elicit from the electricians in their written statements that they had de-energized the outlet the day before the fire. Pl.'s SUF ¶¶ 129-31.

Although negligence is not enough in the Fourth Amendment context, pursuant to Pennsylvania case law, if immediate action on the part of the officers is not required, then the accused individual is entitled to protection, including an adequate preliminary investigation. Because immediate action was not required and there are genuine disputes of material fact as to the adequacy of the investigation, Black has raised a genuine dispute of material fact as to whether the Individual Defendants initiated the proceedings against her without probable cause and with malice.[31] Therefore, this claim is appropriate for jury consideration. Summary judgment will be denied as to Fallon, Hand, McGarvey, Garner and Henry on Count XIX.

[31] The Court is aware that the Individual Defendants have raised a defense of testimonial immunity as to any testimony offered by the Individual Defendants at Black's criminal trial. The Court's assessment of the viability of the state law malicious prosecution claim is not based on statements made by the Individual Defendants at trial.

b. False Imprisonment (Count XVIII) and Intentional Infliction of Emotional Distress (Count XX)

Black agrees that the claims of false imprisonment and intentional infliction of emotional distress should be dismissed as to all of the Individual Defendants. *See* Pl.'s Ans. to LM at 33-34; Pl.'s Ans. to MC at 51-52. Therefore, summary judgment will be granted on Counts XVIII and XX.

IV. Conclusion

For the reasons stated above, summary judgment will be granted on the § 1983 claims against the Individual Defendants and the *Monell* claims against Lower Merion and Montgomery County. Summary judgment will be granted as unopposed on all state law claims against Pomponio.[32] Summary judgment will additionally be granted as unopposed on the state law claims of intentional infliction of emotional distress and false imprisonment against Fallon, Hand, McGarvey, Garner and Henry. Summary judgment will be denied, however, on the state law claim of malicious prosecution against Fallon, Hand, McGarvey, Garner and Henry.

s/Anita B. Brody

ANITA B. BRODY, J.

[32] *See supra* at note 29.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHELE OWEN BLACK,	:	
Plaintiff,	:	CIVIL ACTION
	:	No. 14-6702
v.	:	
MONTGOMERY COUNTY, et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 15th _ day of August, 2018, it is **ORDERED** that:

- Trooper Pomponio's Motion for Summary Judgment (ECF No. 78) is **GRANTED**;
- The Lower Merion Defendants' Motion for Summary Judgment (ECF No. 76) and the Motion of Defendants Montgomery County and Detective John T. Fallon for Summary Judgment Pursuant to Rule 56(b) (ECF No. 77) are **GRANTED-IN-PART and DENIED-IN-PART** as follows:
    - The motions are **DENIED** as to the state law claim of malicious prosecution (Count XIX);
    - The motions are **GRANTED** as to all other counts.

s/Anita B. Brody

_____
ANITA B. BRODY, J.

Copies **VIA ECF** on _____ to: