

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

JAMES J. GALLO, JR., et al. : CIVIL ACTION
 :
v. :
 :
CITY OF PHILADELPHIA and :
LT. RENALD PELSZYNSKI : NO. 96-3909

MEMORANDUM

Dalzell, J.

December 17, 1999

This is the latest installment in litigation that has been before this Court since May, 1996. Before us now is the defendants' motion for summary judgment on the sole remaining claims under 42 U.S.C. § 1983 against the City of Philadelphia and Lt. Renald Pelszynski of the Philadelphia Fire Department.

I. Background

A. Facts

For a more comprehensive review of the facts in this case, refer to our prior opinion in Gallo v. City of Philadelphia, 975 F. Supp. 723, 723-25 (E.D. Pa. 1997), rev'd, 161 F.3d 217 (3d Cir. 1998). Here, we outline only those facts pertinent to the instant motion.

On the morning of June 11, 1989, a fire occurred at Gallo Cabinets, a cabinet shop plaintiff James J. Gallo owned in South Philadelphia. The Philadelphia Fire Department quickly put out the fire, and thereafter Lt. Renald Pelszynski, an Assistant Fire Marshal, arrived on the scene to investigate the fire's cause. Following his investigation, Pelszynski ultimately filed a report suggesting that the fire was intentionally set.

On May 31, 1994, a federal grand jury indicted Gallo on one count of malicious destruction of a building by fire, two counts of mail fraud (relating to insurance claims on the building), and one count of making a false statement to obtain a loan.¹ While Gallo on January 13, 1995 entered a plea of guilty to the charge of making a false statement to obtain a loan, he went to trial on the other counts of the indictment and was acquitted on April 19, 1995.

B. Plaintiffs' Claims

Plaintiffs (hereinafter "Gallo") filed a suit against defendants on May 23, 1996, including, inter alia, claims against Lt. Pelszynski and the City of Philadelphia under 42 U.S.C. § 1983. Gallo alleged that Lt. Pelszynski's initial report on the cause of the fire had stated not that the fire was intentionally set but rather that it was the accidental consequence of a hot electrical appliance.² Pelszynski, Gallo claims, altered his report to suggest intentional setting at the behest of fire

¹The charge of making a false statement to obtain a loan arose from a 1989 transaction with the Bell Savings Bank of Upper Darby, Pa. in which Gallo submitted, in support of his loan application, false copies of his prior tax returns, listing income nearly ten times its actual level. Although this act occurred some time before the June 11, 1989 fire, defendants argue that all the charges in the indictment were related, and we will discuss this further below.

²Specifically, a heating iron, used in the cabinetry trade for application of laminate, had been left energized and had ignited adjacent combustible material.

investigators hired by Gallo's insurance company, one of whom, Joseph Rizzo, was the former Philadelphia Fire Commissioner.

Gallo claims that Lt. Pelszynski's contact with the insurance fire investigators was not properly documented, and that Lt. Pelszynski did not properly report that changes had been made to his investigation report (and had in fact covered up the existence of the initial report). Gallo also contends Lt. Pelszynski falsely swore in an affidavit that his initial findings were that the fire was intentionally set and that he had not been influenced by his contact with the insurance fire investigators. These acts, Gallo claims, violated his constitutional rights and led to, inter alia, his criminal prosecution.

Gallo also contends that Pelszynski's behavior was not unusual, but was merely an example of a broader and ongoing custom or practice within the Philadelphia Fire Marshal's office. He claims that former employees of the Fire Department routinely become employed by insurance companies and law firms in the Philadelphia area, and that these former employees use their contacts in the Fire Department wrongfully to gain access to confidential information about fire investigations which other members of the public can't obtain. These former employees are alleged to have off-the-record conversations with fire investigators in an effort to influence the results of investigations. Gallo claims that current Fire Department employees are unwilling to take actions that might jeopardize

their future employment with the insurance companies and law firms. Moreover, Gallo contends that fire investigators make a practice of making changes to incident reports in the computer system without acknowledging that such changes have been made, and that the computer system's design permits and encourages such behavior.

The City of Philadelphia, Gallo asserts, has actual knowledge of these customs, and an absence of disciplinary actions against fire officers for following these practices demonstrates the City's tacit toleration and approval. Gallo further alleges that the City as a matter of policy and practice has with deliberate indifference failed adequately to discipline, supervise, and train fire officers to prevent the wrongdoing. This behavior allegedly deprived Gallo of his constitutional rights and led to, inter alia, Gallo's federal prosecution.

C. Procedural History

We issued Orders dated August 15, 1997 and January 12, 1998, granting dismissal or summary judgment as to all defendants on all claims. With respect to the 42 U.S.C. § 1983 claims against the City and Pelszynski, we found that such claims did not lie because the restrictions on Gallo's liberty while awaiting trial did not constitute a violation of his Fourth Amendment rights.³ Gallo appealed these Orders, and on December

³For various reasons, set forth in detail in our prior opinion, see Gallo, 975 F. Supp. at 725-26, Gallo's § 1983 claims
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7, 1998 the Court of Appeals reversed our findings with respect to the § 1983 claims, holding that Gallo's pretrial release conditions could indeed constitute a "seizure" violative of his Fourth Amendment rights, see Gallo v. City of Philadelphia, 161 F.3d 217, 224-25 (3d Cir. 1998). The Court of Appeals denied the Government's motion for rehearing en banc on February 8, 1999. All other claims having been dismissed,⁴ we now consider the City's and Pelszynski's renewed motion for summary judgment.⁵

³(...continued)
essentially sound in malicious prosecution. Because malicious prosecution is not per se proscribed under § 1983, a plaintiff must allege a deprivation of specific constitutional rights. Here, Gallo was released on own-recognizance bond while awaiting trial, was restricted to travel within Pennsylvania and New Jersey, and was required to check in with Pretrial Services weekly; this, he contended, was a violation of his Fourth Amendment right to be free of unreasonable seizure.

⁴On appeal, plaintiffs dismissed all claims except the § 1983 claims against the City and Pelszynski and Bivens claims against two Bureau of Alcohol, Tobacco and Firearms agents involved in the investigation of the fire, see Gallo, 161 F.3d at 218 n.1. After the Court of Appeals's opinion was issued, plaintiffs first substituted the United States of America as a defendant in place of the BATF agents and then stipulated to a dismissal of all claims against the United States. We are therefore left with the § 1983 claims standing alone.

⁵A summary judgment motion should only be granted if we conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In a motion for summary judgment, the moving party bears the burden of proving that no genuine issue of material fact is in dispute, see Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986), and all evidence must be viewed in the light most favorable to the nonmoving party, see id. at 587. Once the moving party has carried its initial burden, then the nonmoving party "must come forward with 'specific facts showing there is a genuine issue for trial,'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted); see also Celotex Corp. v. Catrett, 477 (continued...)

II. Legal Analysis

A. Elements of the § 1983 Claim

As an initial matter, we must precisely delineate the elements of Gallo's claim under § 1983. In general, to recover under 42 U.S.C. § 1983, a plaintiff must first prove that he was deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Baker v. McCollan, 443 U.S. 137, 140, 99 S. Ct. 2689, 2692 (1979); see also Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913 (1981). Having demonstrated a deprivation of rights, a plaintiff must then prove that the defendant deprived him of these constitutional rights "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." Monroe v. Pape, 365 U.S. 167, 171-88, 81 S. Ct. 473, 475-85 (1961).

Here, Gallo's § 1983 claim is essentially one for malicious prosecution, see Gallo, 975 F. Supp. at 726. In this

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U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

The mere existence of some evidence in support of the nonmoving party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). However, we must "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

Circuit,⁶ in addition to a constitutional injury, an action under § 1983 for malicious prosecution must satisfy the common law elements of malicious prosecution: "(1) the defendant initiate a criminal proceeding; (2) which ends in plaintiff's favor; (3) which was initiated without probable cause; and (4) the defendant acts maliciously or for a purpose other than bringing the defendant to justice." Lee v. Mihalich, 847 F.2d 66, 69-70 (3d Cir. 1988), see also Hilferty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996); Torres v. McLaughlin, 966 F. Supp. 1353, 1361 n.7, rev'd on other grounds, 163 F.3d 169 (3d Cir. 1998) (noting that the precedent expressed in Lee, viewed in the light of Albright v. Oliver, 510 U.S. 266, 114 S. Ct. 807 (1994), shows that the common law elements of malicious prosecution must be shown in addition to the Fourth Amendment seizure).⁷

⁶Circuits are split as to the showing necessary to make out a § 1983 malicious prosecution claim, with our Circuit taking the "most expansive" view, see Albright v. Oliver, 510 U.S. 266, 270 n.4, 114 S. Ct. 807, 811 n.4. Indeed, in this case the Court of Appeals stated that we were "correct" that Gallo's position "constitutionaliz[ed] the tort of malicious prosecution." Gallo, 161 F.3d at 225.

⁷We must note that our Court of Appeals has cast some doubt on Lee's reliance on the common law elements of malicious prosecution in the context of a § 1983 action. In the recent opinion remanding this case, the Court of Appeals noted that "[i]n fact, by suggesting that malicious prosecution in and of itself is not a harm, Albright also suggests that a plaintiff would not need to prove all of the common law elements of the tort in order to recover in federal court. For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice." Gallo, 161 F.3d at 222 n.6 (citing Albright, 510 U.S. at 277 n.1, 114 S. Ct. at 815 n.1). Since the existence of malice on Lt. Pelszynski's part is not at issue here, we need not now
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With this as background, we note that there are several elements of the § 1983 malicious prosecution claim that are distinctly not at issue at this stage. First, defendants do not appear to dispute that Lt. Pelszynski was acting under the color of state law. Further, there is no longer a question, given the holding in the Court of Appeals which has not yet been proffered to the Supreme Court, that Gallo's bond and travel restrictions constituted a Fourth Amendment "seizure".

Defendants do, however, claim that there was no rights violation because the Government had probable cause to detain Gallo even leaving aside Pelszynski's testimony and report. They also argue that the § 1983 claim against Lt. Pelszynski must fail because it was not he who initiated the criminal proceedings against Gallo. With respect to the City of Philadelphia, defendants claim that there is no showing of a policy or custom of deliberate indifference by the City towards the alleged improper behavior of the fire marshals. Defendants also maintain that because Gallo pleaded guilty to the bank fraud charges he cannot now recover § 1983 damages based on his acquittal on related charges.

B. Lt. Pelszynski's Liability Under § 1983

1. The Existence of Probable Cause

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further concern ourselves with the question of whether all the elements of malicious prosecution need be met under § 1983 except to observe that it would be odd indeed to take the "malice" out of [constitutionalized] malicious prosecution.

Defendants argue that irrespective of any of Pelszynski's behavior, the Government had probable cause to prosecute Gallo on the basis of other evidence, and therefore a § 1983 claim for malicious prosecution does not lie.

The parties agree that "in a section 1983 malicious prosecution action, as in a common law action for malicious prosecution, a grand jury indictment or presentment constitutes prima facie evidence of probable cause to prosecute, but that this prima facie evidence may be rebutted by evidence that the presentment was procured by fraud, perjury or other corrupt means." Rose v. Bartle, 871 F.2d 331, 353 (3d Cir. 1989). There is no dispute here that the grand jury indicted Gallo, and so the first question before us with respect to this issue is whether there exists a genuine issue of material fact as to the existence of "fraud, perjury or other corrupt means".

Material fact issues exist here. Gallo, in his response, offers evidence that would allow a reasonable jury to conclude that there was something "corrupt" in Lt. Pelszynski's testimony to the grand jury that arson was the cause of the Gallo Cabinets fire. Gallo has produced what purports to be an initial version of Lt. Pelszynski's investigation report, stating that the fire was accidental, see Pls.' Ex. 4,⁸ as well as the police department initial incident report stating that the fire was

⁸Defendants appear to challenge the authenticity of this document, but of course that is not for us to decide at this stage.

accidental, see Pls.' Ex. 2.⁹ Gallo also provides evidence of contact between Pelszynski and the insurance company's own fire investigators in the period immediately following the fire, see Pls.' Ex. 7, Trial Tr. Mar. 24, 1995 at 94; Pls.'s Ex. 8, Cozen & O'Connor Invoice, and also evidence that this contact was not made pursuant to the Fire Department's policy regarding contact between members of the public and Fire Department officials regarding fire investigations, see Pls.' Ex. 9, Fire Department Policy on Consultations.

Defendants, in moving for summary judgment, do not claim that these disputed elements of material fact do not exist. Instead, they argue that probable cause existed for Gallo's prosecution separate and apart from Pelszynski's testimony, whatever its character, and for this reason we should find a claim of malicious prosecution foreclosed. "Probable cause" is defined as "facts and circumstances sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." United States v. Boynes, 149 F.3d 208, 211 (3d Cir. 1998) (internal quotation marks omitted)

⁹Naturally, the discrepancy between the initial reports and the subsequent testimony might be explained by a reconsideration or change of mind on the part of Lt. Pelszynski. Pelszynski, however, maintains that his immediate and only conclusion about the fire was that it had been intentionally set, see Pls.' Ex. 1, Aff. of Renald Pelszynski ¶ 4. It would be for a jury to resolve the inconsistency between the written reports and Pelszynski's testimony.

(quoting Sharrar v. Felsing, 128 F.3d 810, 817-18 (3d. Cir. 1997)).¹⁰

Defendants point us to the prosecution memorandum, which, they say, contains information distinct from Pelszynski's testimony that is sufficient to render probable cause. According to the prosecution memorandum, Fire Department Lt. Michael Rokaski, one of the firefighters who responded to the Gallo Cabinets fire, would testify that upon entry into the burning structure, "it appeared that there were two separate areas of fire". Defs.' Ex. G, Prosecution Mem. at 5.¹¹ Similar testimony would be offered by firefighter Eric Tingle, see id. at 6. The prosecution memorandum also contained reference to testimony by Gerald Kufta, a "licensed private insurance investigator" who had been hired to investigate the Gallo Cabinets fire and who concluded that the fire was deliberately set, see id. at 6.¹²

¹⁰Since a § 1983 malicious prosecution action incorporates the state common law elements of the offense, we also look to Pennsylvania's standard for probable cause: "a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent [person] in the same situation in believing that the party is guilty of the offense." Tomaskevitch v. Specialty Records Corp., 717 A.2d 30, 33 (Pa. Commw. 1998) (internal quotation marks omitted). For the purposes of resolving the instant motion, the Federal and state formulations are equivalent.

¹¹The existence of two separate areas of fire origin is "prima facie" evidence of a deliberately set fire, according to an arson treatise cited by Pelszynski, see Defs.' Ex. F, Aff. of Renald Pelszynski ¶ 8.

¹²Kufta, it should be noted, was hired by Gallo's insurance company, and Gallo alleges that he was one of the investigators who improperly contacted and influenced Pelszynski.
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In addition, the prosecution memorandum also contains reference to potential testimony by the neighbor who first noticed the fire, several of Gallo's employees, Gallo's former business partner, and Gallo himself. This testimony, to sum up, would go to show that: (a) the fire broke out shortly after Gallo had visited the shop on the morning of June 11, 1989; (b) only one other employee besides Gallo had keys to access the shop; and (c) the electric appliance which Gallo alleges¹³ had caused the fire was not in use on the last workday before the fire (and indeed was almost never used). The prosecution memorandum also makes reference to testimony pointing to Gallo's financial motive for setting a fire, see Defs.' Ex. G, Prosecution Mem. at 10-11.

Standing alone, this evidence would certainly appear to provide information sufficient to convince a "prudent" person that Gallo had set the fire, and thus to provide probable cause for the prosecution. The problem, however, is that this

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It does not appear disputed that Kufta did in fact contact Pelszynski in the period immediately following the fire, see Pls.' Ex. 7, Trial Tr. Mar. 24, 1995 at 94.

¹³The "initial" fire investigation report Gallo proffers states that the cause of the fire was a malfunction of an electric appliance. This appliance, a heating iron used in the application of laminate, was allegedly left plugged in and came in contact with combustible material, starting the fire. The heating iron in question had no internal "on/off" switch but rather was energized simply by plugging it into the wall. The Government's intended implication from the testimony, referred to in the text, that the heating iron was not used on the workday (a Friday) immediately preceding the fire (which occurred on a Sunday) is that the heating iron was not left plugged in at the close of work and thus could not have started the fire unless deliberately plugged in later.

information did not and could not have stood alone. As a result of having investigated the fire at Gallo Cabinets, Lt. Pelszynski issued a report, and the prosecutors undoubtedly took it into account. We cannot properly calculate probable cause with respect to this constitutionalized malicious prosecution action by merely "subtracting" the allegedly corrupted testimony from the totality of the Government's case, particularly where the testimony was that of a crucial witness within the investigation. Instead, the pertinent question is how the probable cause calculus would have come out had Lt. Pelszynski's report stated that the fire was accidental, as Gallo claims it would have absent the wrongful acts.

Pelszynski was one of two witnesses the prosecution memorandum cited who had personally investigated the scene of the fire, and the only one who testified before the grand jury.¹⁴ The other witness who had personally investigated the scene, Gerald Kufita, was not a Fire Department official but rather a private investigator in the employ of Gallo's insurance company.¹⁵ Pelszynski's report, therefore, was of real importance to the Government's charges. As a consequence, taking

¹⁴The conclusions arrived at by Mr. Kufita, the insurance company's hired fire investigator, were relayed to the grand jury through the testimony of BATF Agent Rooney, however. See Defs.' Ex. E, May 31, 1994 Test. of Thomas Rooney at 7-12.

¹⁵We note that this observation is not intended to reflect upon Mr. Kufita's integrity, but rather only to suggest that his unofficial capacity would not weigh in the probable cause calculation as much as Lt. Pelszynski's testimony.

all inferences in favor of the plaintiffs (as we must), the factual dispute over the character of Pelszynski's report prevents us from concluding, on a motion for summary judgment, that such hypothesized probable cause existed for the prosecution. Pelszynski's argument that he warrants summary judgment on this point therefore must fail.

2. Lt. Pelszynski's Role
in Initiating the Prosecution

Defendants also urge us to grant them summary judgment because Lt. Pelszynski did not, they say, initiate the

prosecution against Gallo and therefore cannot be held liable for [constitutionalized] malicious prosecution. They point out that members of the Philadelphia Fire Department are not granted arrest or prosecution powers by the Philadelphia Code, and that in a federal case the United State Attorney's office has the sole responsibility of deciding if a case goes before a grand jury. In fact, the defendants argue, it was the BATF that was responsible for the investigation, not Lt. Pelszynski.¹⁶

It is well settled, however, that one may be liable for malicious prosecution if he "fail[s] to disclose exculpatory evidence to prosecutors, make[s] false or misleading reports to the prosecutor, omit[s] material information from the reports, or otherwise interfere[s] with the prosecutor's ability to exercise independent judgment." Rhodes v. Smithers, 939 F. Supp. 1256, 1273-74 (S.D.W.Va. 1995) (citing cases from four circuits); see also Restatement (Second) of Torts § 653 cmt. g (noting that a person knowingly giving false information to a prosecutor may be liable for malicious prosecution). Here, plaintiffs' claim, about which there are disputed material facts, is that Pelszynski deliberately altered his report under influence from the insurance investigators, and thereby misled the investigative

¹⁶The defendants make much of the fact that during his deposition, Gallo himself was unable to state who had initiated the criminal proceedings, and was unable to make an argument as to why it was Pelszynski who had done so. Given that this is essentially a legal point, we do not find it persuasive that the plaintiff, a layperson, was not able to make an argument during his deposition for the legal bases of his case.

process, including the BATF investigation and the eventual decision to prosecute made by the United States Attorney's office. If Pelszynski did so, he will not escape liability because it was others and not he who physically arrested Gallo and decided to take his case to the grand jury.¹⁷ Summary judgment must therefore be denied to Pelszynski on this ground.¹⁸

¹⁷Defendants also call to our attention that the United States Attorney's office continued to pursue the case even after the existence of the alleged initial investigation report came to light. However, when asked about the document by the AUSA, Lt. Pelszynski denied knowledge of it or suggested that it might be the result of a data entry error, see Pls.' Ex. 22, Dep. of Thomas Rooney at 140-41. Thus, to the extent that plaintiffs make out a claim that Pelszynski's reporting was corrupt, his behavior after the alleged initial report was a part of this activity, and the fact that the AUSA continued with the case does not relieve Pelszynski of any liability he might have.

¹⁸There is also before us a question of qualified immunity. In a footnote, defendants argue that "there is no rule of clearly established law that dictates a reasonable fire marshall [sic] would know that it would violate clearly established constitutional law if he/she were to speak to members of the public [the insurance investigators] regarding their ongoing investigation of a suspicious fire," Defs.' Mem. of Law in Supp. of Their Mot. for Summ. J. at unnumbered 10 n.10, and that consequently if we were to find that such activity did make out a constitutional violation, Pelszynski should be granted qualified immunity from these claims. While this claim might be correct (something upon which we do not take a position), it is irrelevant. Pelszynski is not before us on the allegation that his off-the-record conversations alone violated anyone's rights, but rather on the allegation that he allowed off-the-record conversations to wrongfully influence his reports of fire investigations. There is no claim here that the impermissibility of false reporting of investigation results is something novel in the law.

As far as the immunity of the City of Philadelphia goes, municipalities do not have qualified immunity for § 1983 claims of constitutional violations, see Owen v. City of Independence, 445 U.S. 622, 657, 100 S. Ct. 1398, 1418 (1980).

B. The City of Philadelphia's Liability Under § 1983

Having found above that the § 1983 claims against Lt. Pelszynski survive summary judgment, we now consider how Gallo's claims against the City of Philadelphia fare.

Under § 1983, municipalities do not have respondeat superior liability for the acts of their agents. Instead, liability under § 1983 will lie for a municipality "when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978). That is, the plaintiff must show that the official policy or custom caused the deprivation of a constitutionally-protected right, see id. at 690; Beck v. City of Pittsburgh, 89 F.2d 966, 972 n.6 (3d Cir. 1996) ("The plaintiff bears the burden of proving that the municipal practice was the proximate cause of the injuries suffered.").

Our Court of Appeals has identified two ways in which a government policy or custom can be established:

Policy is made when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, such practices of state officials [are] so permanent and well settled as to virtually constitute law.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citations and internal quotation marks omitted).

Moreover, "[i]n either of these cases, it is incumbent upon a plaintiff to show that a policymaker is responsible either for the policy or, through acquiescence, for the custom." Id.¹⁹

Here, with respect to Gallo's claims against the City outlined in Part I.B above, defendants argue that there is no evidence that the policymaker for the Fire Department had reason to know that fire investigators were conducting off-the-record discussions with insurance investigators for the purpose of violating citizens' constitutional rights. They also contend that there is no evidence that the Fire Department demonstrates deliberate indifference in failing to train its personnel.

¹⁹The precise degree of culpability that must be shown in a "policy or custom" case is not clear from our Court of Appeals's jurisprudence. In Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996), the court noted that the standard requiring a showing "deliberate indifference" to the rights of those persons affected that was initially developed in the context of inadequate training of law enforcement officers, see City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989) (setting forth the deliberate indifference standard), had been adopted in other policy and custom contexts, see Beck, 89 F.3d at 972. Beck, however, went on to note that Bielevicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990) required only proof of the custom and causation, see Beck, 89 F.3d at 972, leaving open the question of whether the higher "deliberate indifference" standard is appropriate outside the "inadequate training" circumstance. Other cases in this District have taken the Beck language to mean that a custom or policy must exhibit deliberate indifference, see, e.g., Basile v. Elizabethtown Area Sch. Dist., 61 F. Supp.2d 392, 405 (E.D. Pa. 1999); Estate of Henderson v. City of Philadelphia, No. 98-3861, 1999 WL 482305 at *18 (E.D. Pa. July 12, 1999). Since, as discussed below, Gallo does not demonstrate causation, we need not resolve whether the higher standard of deliberate indifference needs to be met.

Defendants thus argue that they should be granted summary judgment as to the § 1983 claims against the City.

Gallo does not appear to argue that there is a "policy" supporting the alleged improper behavior. Indeed, he points out that the Fire Department's written policy requires that contacts between fire investigators and members of the public be requested in writing and follow a set procedure, and that such contacts are forbidden while the investigation is ongoing, see Pls.' Ex. 9, Consultation Procedures; see also Pls.' Ex. 27, Fire Department Staff Note 85-09 (stating that all requests for fire information should be relayed to the Fire Marshal's office and that, if appropriate, consultation procedures should then be implemented). Rather, Gallo argues that this procedure is ignored in practice. In support of this, he presents deposition evidence from current and former Fire Department investigators, including Lt. Pelszynski, who state that it is common practice for insurance fire investigators to speak directly to the investigating fire marshal while the investigation is ongoing without going through the consultation procedure,²⁰ and that other members of the public, particularly the owner of the property with the alleged arson, would not be granted such access.

²⁰Gallo also points out that to the extent that such information-sharing amounts to the disclosure of confidential information in order to advance the financial interests of the insurance companies, this behavior amounts to a violation of Philadelphia Code § 20-609 and the City's Guide to Ethical Conduct for City Officers and Employees § I(C)1.

Gallo also produces evidence to show a similar pattern with respect to the preparation of fire investigation reports: the official policy is that any amendments to a report must be set forth in a separate addendum, but in practice fire investigators (now facilitated by the computerization of the report form) routinely modify fire investigation reports without properly documenting the addendum. See Pls.' Resp. to Defs.' Mot. for Summ. J. at 25-26. Taken together, the argument goes, the routine improper informal contacts and the easily-changed reports allowed the insurers to "play a covert, behind-the-scenes role in developing inculpatory evidence and feeding it to investigators." Id. at 26.

Gallo then seeks to show the City's "deliberate indifference" though an elaboration of the Fire Department's investigation of the allegations against Pelszynski. Based primarily on the deposition testimony of Fire Commissioner Harold B. Hairston, Gallo argues that the initial investigation ended when the department accepted Pelszynski's representation that there had been two areas of origin for the fire, that the fire was of incendiary origin, and that any report to the contrary was in error. See Pls.'s Ex. 32, Mem. from Pelszynski to Carr. Subsequent investigation (evidently spurred by the instant litigation) was comprised largely of an effort to determine the origin of the "initial" report, which suggested that an electrical appliance origin for the fire, and to discredit that report as a fabrication. See Pls.' Resp. to Defs.' Mot. for Summ.

J. at 28-29. Gallo characterizes the investigation as a "sham" and argues that the absence of aggressive investigation of the allegations against Pelszynski demonstrate the City's deliberate indifference to "the pattern and practice of manipulation of official fire investigations by private insurance companies, illegal changes to fire department records, and of unlawful collusion between fire marshals and insurance investigators." Id. at 30.²¹

As noted above, Andrews v. City of Philadelphia established a dichotomy of approaches for proof of municipal liability under § 1983, see Andrews, 895 F.2d at 1480, and plaintiffs here clearly seek to show that the City, through a course of conduct, has established a "custom" supporting the alleged improper behavior.²² A "custom" may be evidenced through knowledge and acquiescence, see Beck, 89 F.3d at 971, or "may be inferred from omissions and informal acts," Freedman v. City of Allentown, 853 F.2d 1111, 1116 (3d Cir. 1988) (citations omitted), and the plaintiff must identify a particular practice that is "so permanent and well settled as to have the force of law." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990) (internal quotation marks omitted).

²¹Gallo does not offer any evidence to support the allegations regarding inadequate training made in their complaint, see Compl. ¶¶ 117-18.

²²That is, there is no claim of a "official proclamation, policy, or edict" supporting the alleged bad acts; to the contrary, such policy as has been brought to our attention forbids these behaviors.

As Gallo concedes, a single incident is generally not sufficient to prove a custom, see Tuttle v. City of Oklahoma City, 471 U.S. 808, 823-24, 105 S. Ct. 2427, 2436 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."); see also, e.g., Turner v. City of Philadelphia, 22 F. Supp.2d 434, 437 n.2 (E.D. Pa. 1998). On the other hand, municipal liability may be found where an incident provides proof of an underlying custom, see Bordanaro v. McLeod, 871 F.2d 1151, 1157 (1st Cir. 1989).

On the facts before us, we cannot conclude that the City of Philadelphia had a unconstitutional custom regarding the conduct of the Fire Marshal's office. At the most, Gallo's evidence could²³ go to establish that there was a custom of

²³Because we conclude that there is no showing of causation even if the customs alleged were in place, we do not need to resolve whether there exists disputed material fact as to the custom's actual existence. However, we note that although Gallo has strong evidence that certain practices contrary to written policy are prevalent among Fire Department investigators, there is less of a showing that the pertinent policymakers had knowledge of the practices and that they acquiesced to them. Certainly, Joseph Rizzo, who is a former Fire Commissioner, having retired in 1984, and who is now a private fire insurance investigator, testified that he condoned Fire Department officials' attending a Cozen & O'Connor Christmas party. However, the subsequent commissioner, William Richmond, barred that practice, see Pls.' Ex. 25, Dep. of Joseph Rizzo at 54-56. Although Rizzo admitted that he was aware that private individuals did contact fire investigators about investigations, he did not know if that was before or after the determination of

(continued...)

allowing contact between the Fire Department investigators and private insurance fire investigators that was contrary to established regulations, and also a custom of allowing the modification of fire investigation reports in ways contrary to established procedures. But the constitutional violation alleged here is not merely that Lt. Pelszynski violated some City rules and regulations in the course of his investigation of the Gallo fire. Rather, the issue here is whether he deliberately falsified his report, reporting a fire he knew to be accidental as one deliberately set.

What is missing is the necessary link of causation between the alleged custom and the constitutional harm. The customs allowing contact with fire investigators and easy modification of investigation reports, if they existed, may have been helpful in facilitating Lt. Pelszynski's alleged wrongful acts, and they may perhaps in a philosophical sense have been necessary to them. But there is nothing to suggest that these policies were a proximate cause of Lt. Pelszynski's unconstitutional acts of malicious prosecution, nor even that Lt.

²³(...continued)

the fire's cause, see id. at 91. In his deposition, William Richmond, Commissioner from 1985 to 1988, admitted that he had felt that the "consultation" procedures were being violated and that he had promulgated a directive stressing that the consultation proceedings were to be followed, see Pls.' Ex. 26, Dep. of William Richmond at 14-16. Thus, although Richmond may have had knowledge, in this case his actions do not evince acquiescence, but rather the opposite. This mixed evidence, even taken in the light most favorable to Gallo, would appear to fall short of the requisite knowledge and acquiescence.

Pelszynski's acts were made "reasonably probable" by these customs, see Bielikovich, 915 F.2d at 851 (noting that a "sufficiently" close causal nexus is provided if the specific violation was made "reasonably probable" by the custom). There is a great causal gulf between a public official's hearing the impermissible input of private fire investigators and his later deciding to characterize as arson a fire that he knows to be, in fact, accidental.²⁴ Thus, because the putative customs are not causally linked to Lt. Pelszynski's alleged wrongdoing with respect to the Gallo fire, we will grant summary judgment to the City of Philadelphia.

C. Damages

Defendants claim that under Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), Gallo can recover no damages on his § 1983 claim because an award of damages would impliedly invalidate his conviction for bank fraud, to which he pleaded guilty prior to his trial on arson and mail fraud. This is so, say defendants, because the bank fraud charges, which involved making false statements in order to obtain a loan, were indisputably related to the arson charges because the grand jury indicted Gallo on all counts, including bank fraud. Moreover,

²⁴If Lt. Pelszynski were accused of resolving a fire of questionable origin in the direction of "arson" after some nudges by private fire investigators, this would be a closer case. But here, again, the allegation is that Lt. Pelszynski initially concluded and reported that the fire was accidental, and then, knowing the fire to be accidental, changed his report to reflect incendiary origin.

defendants maintain, his liberty would have been restricted irrespective of the arson charge, and so any action by Lt. Pelszynski or the City could not have caused his Fourth Amendment seizure.

While these arguments have some appeal, we reject them. Heck v. Humphrey explicitly concerns plaintiffs who seek monetary relief under § 1983 when that relief would effectually invalidate a conviction, see Heck, 512 U.S. at 486-87. Here, Gallo's complaint concerns the charges stemming from his alleged arson of his cabinetry business. Although his bank fraud charge was in the same indictment as those relating to the fire, and although the United States Attorney evidently believed that the two offenses were related in some way, they were distinct in time and place. The prosecution memo itself, while discussing the mail fraud and arson charges together, discusses the bank fraud charges separately, see Defs.' Ex. G, Prosecution Memorandum at 11. The only connection between the arson and the bank fraud suggested in the prosecution memorandum -- aside from the blanket statement that the bank fraud charges "arise from an arson fire at Gallo Cabinets", id. at 1 -- is that the bank fraud showed that Gallo was "desperate" for money, and that this helped the arson case, id. at 13. Therefore, because this case revolves around the allegations of arson, and not the bank fraud charges, Heck v. Humphrey does not bar damages in this case.²⁵

²⁵There is also serious doubt as to whether Heck
(continued...)

Neither does defendants' "proximate cause" argument prove convincing. This argument relies on the assertion that the bank fraud charges standing alone would have led to the same degree of seizure as Gallo experienced under all four counts of the indictment. This is speculation. Moreover, the existence of a second causal factor for Gallo's harm does not immunize the first from liability. Defendants' claim for summary judgment on these grounds must fail.

III. Conclusion

There remain disputed issues of material fact with respect to Lt. Pelszynski's liability under § 1983 for his actions during the investigation of the Gallo Cabinets fire, and so we will deny defendants' motion for summary judgment as to the claims against him. Gallo cannot, however, show that any "custom" within the Fire Department was the cause of Lt. Pelszynski's alleged wrongful behavior, and so we will grant summary judgment as to the claims against the City of Philadelphia. An appropriate order follows.

²⁵(...continued)
applies to litigants who, like Gallo, are not in custody, see Spencer v. Kemna, 118 S. Ct. 978, 989 (1998) (Souter, J. concurring).

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

JAMES J. GALLO, JR., et al. : CIVIL ACTION
 :
v. :
 :
CITY OF PHILADELPHIA and :
LT. RENALD PELSZYNSKI : NO. 96-3909

ORDER

AND NOW, this 17th day of December, 1999, upon consideration of defendants' motion for summary judgment, and plaintiffs' response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendant's motion for summary judgment is GRANTED IN PART and DENIED IN PART in accordance with the Memorandum; and
2. JUDGMENT IS ENTERED in favor of defendant and against plaintiff as to Count I of the Complaint.

BY THE COURT:

Stewart Dalzell, J.

BY THE COURT:

Stewart Dalzell, J.

jury charge questions:

malice?

knowledge of incorrectness of reporting

if no liability for Pelszynski, can the City be liable

nonetheless?-"independent municipal liability" see Fagan v. City
of Vineland, 22 F.3d 1283 (3d Cir 1994).