IN RE CITY OF PHILADELPHIA LITIG.

849 F. Supp. 331 (1993) | Cited 0 times | E.D. Pennsylvania | October 6, 1993

REPORT AND RECOMMENDATION

WILLIAM F. HALL JR.

UNITED STATES MAGISTRATE JUDGE

This is an action for damages brought by Ramona Africa, a MOVE member, pursuant to § 1983 and § 1985(3) of the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985(3). She has also raised claims based on state law and directed to our pendent jurisdiction. The main part of the plaintiff's suit is a claim of excessive force in the execution of search and seizure warrants, based on the action of the Philadelphia police and other City and state government officials on May 13, 1985. The plaintiff claims that this alleged constitutional tort not only caused her to suffer burns of her body, but also that the defendants' action that day deprived her of the freedom of religion and association guaranteed by the First Amendment of the federal constitution. The plaintiff further claims that the defendants' actions constituted a conspiracy to deprive her of her constitutional rights in violation of 42 U.S.C. § 1985(3). For the wrongs alleged, she seeks compensatory and punitive damages.

I. EXCESSIVE FORCE CLAIMS

A. The Act of Dropping the Bomb on the MOVE Residence.

On March 26, 1992 I filed a Report and Recommendation in which I recommended the denial of motions for summary judgment on qualified immunity grounds filed by defendants, W. Wilson Goode, Leo Brooks, Gregore Sambor, William Richmond, Frank Powell, William Klein, Morris Demsko and Richard Reed. In the same Report and Recommendation it was recommended that the motions for summary judgment filed by defendants Michael Tursi, Albert Revel and Edward Connor should be granted on qualified immunity grounds. On August 18, 1992, the Honorable Louis H. Pollak entered an order approving and adopting the Recommendation pertaining to the latter defendants.

The remaining defendants filed timely objections to the Report and Recommendation; and on December 8, 1992, Judge Pollak issued a memorandum which in effect rejected the Recommendation and remanded the matter for further consideration.

The basis for my recommended denial of the defendants' motions for summary judgment was

summarized by Judge Pollak in his memorandum as follows:

In his Report and Recommendation, Magistrate Judge Hall decided that the defendants involved either in the plan to drop the bomb on the MOVE residence or in the decision to let the bunker burn should not be granted qualified immunity at the summary judgment stage. On his view, the qualified immunity question was inextricably intertwined with the unresolved merits of plaintiff's excessive force claim, since each turned on the same question -- whether, under the totality of the circumstances, the use of force in question was "objectively reasonable." Applying this unitary standard of objective reasonableness, Magistrate Judge Hall found that there was sufficient record evidence to support a jury finding that the use of the bomb constituted excessive force and that each of the remaining defendants, with the exception of Fire Commissioner William Richmond, was involved in the plan to drop the bomb. Similarly, Magistrate Judge Hall determined that a juror could conclude that allowing the fire to continue to burn to facilitate the arrest of the MOVE occupants was objectively unreasonable, and that the decision had been made or approved by defendants Sambor, Richmond, Brooks, and Goode. Accordingly, Magistrate Judge Hall recommended that a decision on whether the movants had qualified immunity for the harm caused by the dropping of the bomb and ensuing fire should await trial.

Memorandum, Pollak, J. at 5-6.

Based on his extensive analysis of the law governing qualified immunity determinations, Judge Pollak was not persuaded that summary judgment should be denied. Instead, he thought that the matter should be remanded to me for further consideration in light of the views expressed in his Memorandum. Id. at 2. The standard that Judge Pollak determined should have been applied was summarized in his Memorandum as follows:

The court must determine, on plaintiff's well-documented version of the facts, whether a reasonable officer in each defendant's position, to the extent that this defendant could be found to have some responsibility for the use of force in question, could have believed that the force employed was necessary to protect the safety of himself or others. See Good, 891 F.2d at 1092, 1094-95. If the answer to that question with respect to any of the defendants is in the affirmative, then summary judgment should be granted in his favor; by contrast, for those defendants to whom the answer is in the negative, summary judgment on qualified immunity grounds should be denied (though it may be raised anew once facts are further developed and explored at trial).

Accordingly, I will remand this case to Magistrate Hall so that he can apply the new standard discussed above, indicating on which parts of the record he is relying for plaintiff's version of the facts.

Id. at 17-18. (emphasis as in original) (footnotes omitted).

In my Report and Recommendation, as Judge Pollak noted, I viewed the dropping of the bomb and the decision to let the fire burn to be the critical conduct that precluded the grant of summary judgment on qualified immunity grounds for all of the defendants except Connor, Revel and Tursi. In reviewing the validity of the defendants' claim of immunity, I did not consider either the reports of the federal and state grand juries or the Report of the MOVE Special Investigation Commission. The City defendants objected to the Report and Recommendation based, in part, on their belief that it contained factual determinations which had no support in the record but were instead, derived from the MOVE Commission Report. [1]" Objections of Defendants' City of Philadelphia, W. Wilson Goode, Leo Brooks, Gregore Sambor, William Richmond, Frank Powell to the Report and Recommendation at 3-4 (hereinafter, "City Defendants' objections").

Among those allegedly unsupported facts in pages 13 through 15 of the Report and Recommendation were the following assertions:

Implementation of Plan B began with the police creating a bomb consisting of "Tovex", an industrial explosive, and "C-4", a military explosive.

Report and Recommendation at 13. This statement was described as being specifically contradicted by the record. City Defendants' Objections at 3-4. The record, however, refutes that claim because in its pleadings, the City defendants admitted that the bomb consisted of "tovex" and "C-4."

As set forth in the Report and Recommendation, many lawsuits, separate from the present one, were filed in this court following the events of May 13, 1985. The defendants filed answers and other pleadings. In their answers they raised affirmative defenses including that of qualified immunity. Those lawsuits were consolidated by Judge Pollak under Civil Action No. 85-2745. The City defendants then joined Ms. Africa as an additional defendant. Her motion to dismiss the third party complaint was denied.

On May 7, 1987, Ms. Africa filed this action, and on May 27, 1987, it was added to the consolidated Civil Action No. 85-2745 (Document No. 3). However, the City defendants did not file an answer to Ms. Africa's action until December 10, 1991 (Document No. 16). In their answers, the defendants asserted affirmative defenses which included qualified immunity. In response, the plaintiff moved to strike the affirmative defenses on the grounds that the defendants' answer was not timely filed. (Civil Action No. 85-2745, Document No. 646). The defendants then filed a response in opposition to the plaintiff's motion to strike (which was ultimately denied) averring, inter alia, that:

All pending cases arising out of the May 13, 1985 MOVE incident in the federal court system have been consolidated under the Master File No. 85-2745.

As the attached pleadings clearly indicate, plaintiff was fully aware of all affirmative defenses, even prior to filing the subject law suit (emphasis as in the original).

City Defendants' Response to Plaintiff's Reply in Support of its Motion to Strike Defendants' Affirmative Defense (sic) at 3.

The City defendants attached to its response Exhibits "B" through "K" and averred that "[the attached Exhibits] indicate that both the plaintiff and her counsel received pleadings which made them well aware of all [of] the City Defendants' affirmative defenses." Id. "Exhibit G" is the Answer of Defendants Powell, Klein, Tursi, and Revel in Daniel Gaddie, et al. v. Frank Powell, et al., Civil Action No. 85-6531 dated January 20, 1986. In the following paragraphs of the answer, details of the bomb were given:

7. Denied as stated. It is admitted that defendant Powell was the commanding officer of the Bomb Disposal Unit and that he did drop a satchel charge unto the roof of 6221 Osage Avenue on May 13, 1985. Otherwise denied.

8. Denied as stated. It is admitted that defendant Klein was the member of the Bomb Disposal Unit who prepared the satchel charge. Otherwise denied.

30. Admitted in part; denied in part. Defendant Klein admits that the satchel charge contained both Tovex and C-4. Otherwise, denied. (Emphasis added).

Id., Exhibit G. Exhibit I is the answer of defendants, Goode, Brooks, Tate, White, Sambor, Richmond, Powell, Klein, Tursi, Revel, and the City of Philadelphia in Cassandra Carter, et al. v. City of Philadelphia, Civil Action No. 85-6558. In the answer, the defendants provided further details about the bomb as follows:

95. Denied as stated. It is admitted that defendant Powell did drop a satchel charge onto the roof of the MOVE house from a helicopter owned by the Commonwealth of Pennsylvania and piloted by defendants Reed and Demsko; that this occurred at approximately 5:30 p.m. on May 13, 1985; and that defendant Klein did construct the charge with Tovex and C-4. Otherwise, all allegations set forth in this paragraph are denied. (Emphasis added).

Id., Exhibit I. It is noteworthy that in paragraph 96 of the defendants' answer in Exhibit I, the defendants admitted that "the office of the Fire Marshal [had] issued a report concluding that the fire was caused by the mechanical ignition of combustible liquid vapor, occurring as a result of detonation."

Evidence that the bomb consisted of Tovex and C-4 is also found in the deposition of defendant Klein on July 10, 1991.

By Ms. Africa:

Q. Now, you also testified that Sambor and Brooks believed they wanted to know what two pounds of plastique would do?

A. Yes, I believe it was Brooks wanted to know it.

Q. So. Brooks wanted to know what two pounds of plastique would do. You felt like, in talking about plastique, he was talking about C-4?

A. Yes.

Q. Now, when you made the bomb, you had two pounds of Tovex and one and-a-quarter pounds of C-4?

A. Yes.

Q. Well, if the discussion was about two pounds of explosive, how did it go to three and-a-quarter pounds?

A. Let's go back a little tiny bit. He [Brooks] asked what would two pounds of plastique do. I told him C-4 comes in pound and-a-quarter. It was my impression we were going to use two-and-a-half pounds of C-4 in the bomb. When I went back into the box, all I could find was the C-4 that I had. I had to add Tovex to it because I couldn't find anything else. That's how Tovex got into it.

Q. Rather than adding one and-a-quarter pound of C-4, you added Tovex to the one and-a-quarter pound?

A. Yes. Tovex, I've never even heard of before the year before -- I knew about it for about a year. All my career, I never even heard of Tovex until probably 1984.

Q. So, it was something relatively --

A. I didn't know, you know, I didn't use it whole lot. If I used it a couple times, it was a lot. I just didn't know what it done, or what it was really -- my impression it was used for mining, Tovex.

Q. So, you were prepared to use two pounds of something you weren't even --

A. Two and-a-half. I know it was C-4.

Q. I'm talking about two pounds of Tovex?

A. Yes.

Q. And you didn't really know what --

A. No. I felt it was less powerful than C-4. How much less powerful, I didn't know.

Q. Less powerful in conjunction with one and-a-quarter pounds of C-4?

A. Yes.

Q. When you had this discussion with Managing Director Brooks, was Lieutenant Powell present also?

A. Yes.

Q. Is it your understanding he heard this conversation as well?

A. Yes.

Deposition of Defendant Klein at 66-67.

The depositions of Lieutenant Powell and Officer Klein differ somewhat as to who actually manufactured or constructed the bomb as distinguished from the question of who created or designed it. Officer Klein stated that although it was his impression that the bomb was to consist of two and one-half pounds of C-4, he discovered that he had only one and one quarter pounds of C-4 and that he had to add Tovex to it because he could not find anything else. Deposition of Officer Klein, July 10, 1991 at 67. Lieutenant Powell, on the other hand, testified that he told Commissioner Sambor that instead of putting shrapnel in the bomb, an ingredient he said Sambor had suggested, he put Tovex in the bomb because they had plenty of Tovex. Deposition of Powell, July 10, 1991, at 26. In any event, there can be no dispute that a bomb consisting of military [2]" and commercial explosives, i.e., C-4 and Tovex, was dropped on the roof of the MOVE residence by Lieutenant Powell.

It is fair to conclude, therefore, that when the police resorted to the use of the bomb after having failed to penetrate the MOVE house through the adjoining house in order to infiltrate it with tear gas, they had introduced an increased and unconventional level of violent force. It may also be fairly said that one of the undeniable characteristics of that tactic is that it applied to the roof of an urban rowhouse [3]" explosive components of industrial and military strength.

After the bomb was dropped, a fire started. There is evidence in the record that the fire was caused by the detonation of the bomb. See supra at 8. Moreover, there is evidence that once started, the fire was allowed to burn out of control on the orders of either Police Commissioner Sambor or Fire Commissioner Richmond.

In that regard, Commissioner Sambor testified as follows before the MOVE Special Investigation Commission:

Q. Let me ask you this. At five of 6:00 that evening did you tell the Fire Commissioner to let the bunker burn?

A. I did not order the Fire Commissioner to do anything. I requested of him that if we let the roof burn to get the bunker could we then subsequent to that control the fire.

* * * *

Q. If we consider the word "tells" as something other than order is it accurate?

A. Yes, sir. It was a recommendation and a request. I wanted to get the bunker. I wanted to be able to somehow have tactical superiority without sacrificing any lives if it were at all possible. And in that vein I asked him -- I'm a police officer. I am not a firefighter. I asked him for his concurrence, that if we let the roof burn to get the bunker, could we then control the fire. And whatever the response was, it was in the affirmative.

We then proceeded. Shortly thereafter, sometime thereafter -- I don't know whether it was five, ten minutes, or whatever -- we received a call from the Managing Director on the radio, that he had spoken to the Mayor. The Mayor was concerned about the flames. . . .

* * * *

Q. Do you know whether by that hour, which is actually 6:27 in the evening, whether or not there had been any order to put the fire out?

A. Yes, sir. To the best of my recollection, the Managing Director sometime prior to that and sometime prior, subsequent to our discussion, whether it was five minutes, ten minutes, I don't recall.

* * * *

Q. After that order was given to put the fire out and turn the water on, did you convey that order to anyone else?

A. Yes, sir.

Q. To whom?

A. The Fire Commissioner was still there.

Q. And once that order was given, was it carried out?

A. There was water turned on, sir, and it was also turned off again, and turned on again and turned off again, because of conditions at the scene. I did not pay specific attention to the duration or the frequency.

Q. Who made the decision to turn off the water once it had been turned on?

A. It was not I.

Q. Who was it?

A. I don't know.

Q. Did you ask -- did you notice that the water was not on after --

A. I heard people yelling that we could not see because of smoke and water, and -- subsequent to that. So I presume, and as I said, the water was turned on and off several times.

Q. Did you try and find out why the water was not on?

A. Not particularly, sir.

Q. Why not?

A. Because it was not my job.

Q. Whose was it?

A. The Fire Department's.

Q. Commissioner Richmond?

A. Commissioner Richmond is the Commissioner of the Department but -- I don't think that, under extreme conditions, that people have to wait for orders. So we try and be specific. As to whether they had to wait for Bill Richmond to give the order, I can't answer that.

Q. At this point, Commissioner, was this a fire operation or still a police operation, or some combination of both?

A. It was a combination of both.

Q. Is it your testimony that it was not your job in this combination situation to tell the Fire Commissioner to fight the fire?

A. I don't know anything about fighting fires, sir. And it would be presumptuous of me to try and tell him how to fight one. I wouldn't even know where to begin.

Appendix to City Defendants' Motion for Summary Judgment, Volume I at 141-145.

In his deposition, Fire Commissioner Richmond testified that he was aware that the fire started "sometime after 5:30 p.m." or ten to twelve minutes after the bomb was dropped. Richmond Deposition, July 10, 1991, at 19. The Fire Commissioner's version of who had responsibility for controlling the fire differed from that of the Police Commissioner.

By Ms. Africa:

Q. When it was agreed to let the fire burn, could you, on your own, as fire commissioner, decide that you could not do that, that, you know, you needed to put the fire out then?

A. Could I have?

Q. Yes.

A. I could have articulated that to Sambor, yes.

Q. What about actually doing it?

A. No, I did not. I told him I thought we could control the fire.

Q. I'm asking you, could you have said -- I mean was it within your authority to have said no, I got to put this fire out now and proceed to do what you could to put it out?

A. No, it was not within my authority. If there was a disagreement between Sambor and I, it would have been resolved at Brooks' level.

Q. So, your saying if you had disagreed with Sambor's, you know, premise to let the fire burn, that you would have gone to Brooks to have him decide what you should do.

A. That's correct.

Q. Did anybody, on the scene, that you know or disagree with letting that fire burn?

A. There were only two people involved in that decision. The answer is no.

Q. I didn't ask you about the decision.

A. Not to my knowledge.

Q. Now, do you remember at all stating that you would characterize the decision to let the bunker burn as a strong recommendation from Police Commissioner Sambor?

A. I think, yes that sounds familiar.

Q. Now, had the Police Commissioner not asked you that, and let you do what you wanted to do, told you it was up to you, what action would you have taken, if any?

MR. KENNEDY: Objection, it's hypothetical. You can answer the question. It would be speculation on his part.

THE WITNESS: I would have started the squirts.

BY MS. AFRICA:

Q. Do you remember saying that you believe the fire was of a relatively minor nature at that point?

A. Yes.

Q. Now, believing that, is it still, you know, your belief that you may not have been able to put the fire out by putting the squirts on it at that point?

MR. KENNEDY: Objection.

THE WITNESS: I could never have guaranteed the squirts to put out the fire, at any time.

Id. at 51-54. (Emphasis added).

For the reasons set forth in the above discussion, I consider the City defendants' objections to the factual, background descriptions of this matter contained in my previous Report and Recommendation to be meritless. I shall not repeat those details now except as it may become necessary in order to comply with the mandate set by Judge Pollak's remand order.

When the initial effort to drill holes in the walls of the adjoining houses failed, resort was had to another scheme which provided for an explosive device which was to be used to dislodge a bunker

from the roof of the MOVE residence so that tear gas could be infiltrated in the house. Another objective sought in removing the bunker was to eliminate it as a shield which protected the MOVE members who were believed to be shooting at the policemen and firemen. See Testimony of Officer Klein, July 10, 1991, Vol. I, Appendix to City Defendants' Motion for Summary Judgement at 217. Commissioner Sambor also testified before the MOVE Commission and accepted responsibility for this plan and described its objectives as follows:

To assist your inquiry, let me make it clear that I approved the details of the plan to an extent where it can be fairly called my plan. I selected the date of the operation. I personally commanded the overall police operation. I determined that the bunker had to be removed. I decided that an explosive device should be used and that it should be dropped from a helicopter.

I made each of these decisions because I thought they were proper and that they maximized protection of life.

Testimony of Defendant Sambor, October 17, 1985, Vol. I. Appendix to City Defendants' Motion for Summary Judgment at 107.

It appears from the record that defendants City Managing Director Brooks and Mayor Goode approved the plan developed by Sambor. As to Brooks, according to his testimony before the MOVE Commission, he was made aware of alternative plans for removing the bunker and making a hole in the roof all of which were discarded in favor of dropping an explosive device from a helicopter. His presence during the planning process and his active participation during the discussion relative to the plan ultimately devised leads to the conclusion that he, in fact, did approve the plan. The following dialogue supports that conclusion.

By Mr. Lytton:

Q. Did there come a time during the afternoon where there was a discussion about an alternative to removing the bunker which did not include mechanical devices?

By Managing Director Brooks:

A. At one point we talked about inserting officers through the skylight next door and lobbing it over. We talked about -- we -- at this point this is where the subject of an explosion --

Q. That's what I was getting to.

A. Came in. Because we talked about some way to get, if you can't get on the roof, you have to get an explosion -- explosive device on the roof that will penetrate the roof surface and may also dislodge the bunker because the significant amount of water had been heaved against those wooden

structures and they have knocked off much of the plywood but they had not done very much to the actual structures themselves. They were all covered with plywood or tarpaulins.

Testimony of Defendant Brooks, Oct. 16, 1985 Vol I, Appendix to City Defendants' Motion for Summary Judgment at 87-88 (emphasis added). It also appears from the record that Brooks advised Mayor Goode of the plan to destroy the bunker which had been developed and that the plan was approved by the Mayor. According to Brooks, he kept the Mayor informed of the day's events by telephone. In his testimony before the MOVE Commission, he described his conversation with the Mayor at or about 5:00 o'clock on May 13.

By Mr. Lytton:

Q. And can you tell us exactly what you told the Mayor in that phone call?

By Managing Director Brooks:

A. I told the Mayor that we had come to the point of a crane not working, we could not insert anyone to the skylight, we could not -- we could find no other way at this time to achieve this by dark, that it was going to be difficult to secure that area during the night. That the neighbors were clamoring to return to their homes, that there was -- it would be very difficult even to light it up so that you could see in those alleys during the night, and that the commissioner wanted to drop a device on the roof to destroy the bunker and penetrate the roof.

Q. Did you tell the Mayor that it was going to be dropped from a helicopter?

A. I did.

* * * *

Q. Now, the Mayor testified as to May 13 that he, the Mayor, saw no reason to have to end the confrontation on May 13 and he was willing to go over to the next day and the next day.

Did you have a conversation with him about that?

A. I did.

Q. And did he suggest going into the next day or not?

A. I do not recall him suggesting that to me. He did not suggest that to me.

Q. And did you explain to him that you could not go into the next day that it had to end on May 13th.

A. No. I said these are the reasons to go ahead and attempt to conclude this today. I did not say that we cannot go till tomorrow. I said the information as the Commissioner has passed to me is that he cannot guarantee a good lighted alley throughout the night, that there is a possibility that people may come out of that house from, though a tunnel system or some other way that the neighbors are clamoring to get back in and the other things to which I already alluded.

Id. 93, 100-101. Although neither defendant Brooks nor defendant Goode appear to have been involved in the implementation of the plan, they, in my view, approved the plan and thus to that extent were responsible for the act of dropping the bomb.

Of those defendants who engaged in the execution of the plan, the extent to which defendants Klein and Powell did so has been described supra at 8-12. The remaining defendants who engaged in the execution of the plan were defendant State Troopers Demsko and Reed. They, at the request of defendant Sambor, piloted the helicopter from which defendant Powell dropped the bomb onto the MOVE house. It appears clear from the record that defendants Demsko and Reed received their information regarding the resistance the police had met when attempting to serve the arrest warrants from defendants Sambor and Powell. Demsko Affidavit, November 16, 1988 at P 13; Demsko Deposition at 28-30; Reed Deposition I at 29-31. Specifically, both defendants Demsko and Reed were aware that there had been gunfire exchanged between MOVE members and the police earlier on May 13, 1985. Demsko Deposition at 80-81; Reed Deposition I at 54. Moreover, defendant Reed was concerned that gunfire might come from the bunker on top of the MOVE house while he and defendant Demsko were piloting the helicopter into position so that defendant Powell could drop the bomb. Reed Deposition I at 44. Thus, he and defendant Demsko requested that the squirt guns be directed at the bunker and not shut off until they were atop the bunker and prepared to descend in order to drop the bomb. Demsko Deposition at 105; Reed Deposition I at 36, 40, 43-44. Finally, defendant Richmond did not participate in either the decision to drop the bomb or in the execution of that decision. Accordingly, the question of his liability will be discussed infra at 27-28.

In the motions for summary judgment, each defendant asserts, as grounds for relief, the defense of qualified immunity and the further defense that no constitutional violation has been shown by the plaintiff. For the reasons that follow, I conclude that defendants Goode, Brooks, Sambor, Powell, Klein, Demsko and Reed are entitled to qualified immunity insofar as the act of dropping the bomb on the MOVE house is concerned. I further conclude that all defendants, including defendant Richmond, are entitled to summary judgment because the plaintiff has not established, as a matter of law, that any defendant violated her constitutional rights with respect to the decision to drop the bomb or the act of dropping the bomb.

In his memorandum, Judge Pollak, citing Tennessee v. Garner 471 U.S. 1 (1985), concluded that on May 13, 1985

The clear constitutional parameters for use of deadly force -- whether incorporated into a substantive

due process test or a Fourth Amendment reasonableness test -- were the standards set forth in § 508 [4] " and given constitutional pedigree by the Supreme Court two months before the bomb was dropped on the MOVE residence.

Memorandum, Pollak, J. at 11-12. He ruled, therefore, that

in this case the relevant question for qualified immunity purposes is whether a reasonable person in each defendant's position could have believed that [the] use of a bomb and/or the decision to let the fire burn was necessary to "prevent death or serious bodily injury" to the police officers on the scene or other persons.

Id. at 12. (Footnote omitted).

Judge Pollak further ruled that:

Notwithstanding that defendants should have been aware of the governing legal principles embodied in § 508 and Garner, this does not end the qualified immunity inquiry. Defendants are 'nevertheless entitled to immunity if based on the information available to them, they could have believed their conduct would be consistent with these principles'. Good, 891 F.2d at 1092. [5]"

Id. at 12-13.

As was described in my Report and Recommendation and by Judge Pollak in his memorandum, the defendants had information available to them that acts of violence would be inflicted by MOVE members upon their neighbors, defendant Goode, police officers and others if the police took action against them. Among the averments in the probable cause affidavit filed in support of the issuance of the warrants was this report, attributed to neighborhood residents, who described threats of violence made by MOVE members.

On April 29, 1985 they heard MOVE members say over the loudspeaker that they have wired the entire block with explosives and that if any neighborhood resident speaks with the press, or the police take action against MOVE, MOVE will blow up the entire block.

Probable Cause Affidavit at 4. In addition, a neighborhood resident reported that:

On April 29, 1985 she heard MOVE members state over the loudspeaker that they wanted their people out of prison because they "didn't kill that policeman" (a reference to the murder of Officer James Ramp on August 8, 1978 by MOVE). The witness further stated that MOVE also said no one should talk to the police "or we will get you. We have guns too."

Id. at 5. It does not appear to be in dispute that, when the police attempted to execute the warrants,

they were confronted with gunfire directed at them from the MOVE residence. As a result, the police were prevented from effecting the arrest of the plaintiff and the other MOVE members who were the subjects of the warrants. Thus, not only did the defendants have information available to them with respect to the threats of violence reported to have been made by the MOVE members, but the police and others on the scene actually encountered violent acts of deadly force by the gunfire directed at them from the MOVE residence.

Further, the police had assessed the feasibility of using alternatives to a bomb. The fire department had throughout the day used the squirt guns to direct many gallons of water at the bunker. This attempt to dislodge the bunker had failed. Testimony of Defendant Brooks, Oct. 16, 1985 Vol I, Appendix to City Defendants' Motion for Summary Judgment at 88. The police had also thought that a crane might be used to knock the bunker off with a wrecking ball. Defendants Reed and Demsko had flown a police officer and a private contractor around the MOVE house earlier in the day and they had determined that a crane could not be used because, for its operator to have been out of the line and range of fire from the MOVE bunker, he would have to have been located too far away from the MOVE house to be effective. Reed Deposition I at 25-27; Demsko Deposition at 29; Testimony of Defendant Brooks, Oct. 16, 1985 Vol I, Appendix to City Defendants' Motion for Summary Judgment at 79-80. The police had also decided against attempting to send its officers into the MOVE house through the adjoining building's skylight because that alternative would have exposed those officers to possible MOVE gunfire. Testimony of Defendant Brooks, Oct. 16, 1985 Vol I, Appendix to City Defendants' Motion for Summary Judgment at 88, 90-91. The police also considered the feasibility of waiting another day before taking action to serve the warrants. That option was rejected, however, because the police did not believe that they could adequately light the alley behind the MOVE house so that it would be secure during the evening hours. Id. at 91D-91E. Upon considering each of these options, police officials decided not to pursue them because, they were not feasible or they would expose police officers and others death or serious bodily harm.

Accordingly, in view of the foregoing, I conclude that a reasonable person in each of the defendants' position could have believed that the use of an explosive device to remove the bunker from the roof and to provide access to the interior of the house for tear gas was necessary to "prevent death or serious bodily injury" to the police officers on the scene or other persons. In addition, based on the information available to them regarding MOVE's threats of violence and MOVE's use of force in resisting arrest, they could have believed that the use of the bomb would be conduct that was consistent with the principles embodied in § 508 and Garner.

There is no evidence in the record that defendant Richmond participated in the decision to drop the bomb. As explained supra at 18-21, that decision was made by defendant Sambor and approved by defendants Brooks and Goode. Because defendant Richmond did not participate in the decision or in the act of dropping the bomb, as a matter of law, he cannot be liable to the plaintiff for any constitutional injury that dropping the bomb might have caused. Accordingly, defendant Richmond should be granted summary judgment with respect to this part of the plaintiff's claim.

Moreover, I conclude, as a matter of law, that, based on all the circumstances surrounding the police department's attempt to serve the arrest warrants on the MOVE members which I have summarized supra at 25-26, the defendants' conduct was consistent with the principles embodied in § 508 and Garner. Accordingly, as a matter of law, the plaintiff has not demonstrated that any defendant violated her constitutional rights and summary judgment should be granted for all of the defendants. [6] " The decision to let the fire burn, however, is an entirely different matter.

B. Allowing the Fire to Burn.

After the bomb was dropped on the roof a fire ensued, the results of which Judge Pollak and I have previously described. Another facet of the plaintiff's excessive force claim rests, therefore, in her allegation that the defendants deliberately refused or failed to extinguish the fire even after it had destroyed the bunker and spread to the interior of the MOVE house. According to the plaintiff, the failure to put out the fire at that stage was a deliberately chosen means of exterminating the occupants of the MOVE residence.

Of the named defendants, the only ones who conceivably could have been involved in the failure to extinguish the fire were defendants Goode, Brooks, Sambor, and Richmond.

Mayor Goode has given deposition testimony that he had no participation in a decision to let any part of the MOVE house burn, and further, that when he learned the building was on fire, he gave orders that it be put out. Defendant Sambor supports the Mayor's testimony. In his pre-trial deposition, he testified as follows:

Q. Did you at any point instruct the fire commissioner or any fireman to start fighting the fire?

A. After I was informed by the managing director that the Mayor had told him regardless of what [I] wanted, to put the fire out. That was quarter after, 20 after 6:00 or so, somewhere in that area. Could even have been a couple minutes later or earlier; I don't know.

It was somewhere around that area that I got a call from the managing director that he had spoken to the Mayor and the Mayor didn't care what reason we had, but that he wanted the fire out.

At that time, there was a deputy commissioner from the fire department within several feet. I went over and told him the managing director's order and he said he would relay it to the fire commissioner.

Q. Do you know if, in fact, he did?

A. I can't answer that question.

Q. Is it your understanding that the fire was fought from that point on?

A. No.

Sambor Deposition at 118-119.

Defendant Brooks gave an essentially similar account of his own role regarding the fire. At his deposition he testified as follows:

By Defendant Brooks:

A. . . . I was just reminded that I didn't -- or when I observed that there was a fire on that roof, I immediately attempted to find the police commissioner. Upon finding him, I ordered the police commissioner that the objective had been accomplished, put out the fire. Then the mayor called me after that. That's what I did do.

By Ms. Africa:

Q. You're saying, you ordered the police commissioner to put out the fire before you got a call from the mayor.

A. Yes. That's been testimony repeated over and over again. What I said to the mayor is I've already given the order.

Q. Do you know, at the point that you gave that order, to put the fire out, that the police commissioner -- did you have any information at that point, as to why the fire wasn't being put out?

A. Well, not until I got in touch with the police commissioner, no, because I was a long ways away.

Q. At the point you got in touch with the police commissioner, did you receive any information as to why the fire was not being out?

A. I do not recall the words, but the effect was that I want to burn the bunker off some more.

MR. WAXMAN: When you say I, are you referring to yourself?

THE WITNESS: No, the police commissioner said I would like for the bunker to burn off some more, that was when I used the expression you've already accomplished your mission, put out the fire.

BY MS. AFRICA:

Q. So, at that point, you superseded the wishes of the police commissioner?

A. I gave him a direction to do that. If that is superseding, fine, if that's the word you want to use.

Q. You didn't feel like you had to contact the mayor before?

A. Well, I didn't have time. I saw fire.

Q. So, I take it that was something you considered a very, like, serious --

A. Very, very.

Brooks Deposition at 129-130.

Police Commissioner Sambor has testified that although he had urged the Fire Commissioner to allow the roof to burn, so that the bunker would be destroyed, that request was made by him only after being told by the Fire Commissioner that the fire could be controlled and prevented from spreading further. Sambor has also testified that the failure to extinguish the fire in the house itself was the responsibility of the fire-fighting officials on the scene, not the police. See supra at 12-15. Fire Commissioner Richmond has gone on record with three reasons for not putting out the fire: (1) that the Police Commissioner, Sambor, had asked him not to; (2) that smoke resulting from water on the flames would have impaired the vision of the police in a dangerous situation; and (3) that the firefighters could not have effectively fought the flames in the house without positioning themselves in a way that would have exposed them to possible gunfire from the MOVE house. Richmond Deposition, July 10, 1991 at 18.

The foregoing exculpatory explanations go to the factual responsibility of the defendants for allowing the fire, once started, to continue to burn to the interior of the MOVE house. These defenses thus go to the question of whether either Goode, Brooks, Sambor or Richmond violated, with respect to the fire, any constitutional right of Ms. Africa. Although that question is usually distinct and separate from the defense of qualified immunity, Mitchell v. Forsyth, 472 U.S. 511 (1985), it is important to keep in mind that each of the above defendants, in his motion for summary judgment has put forth both grounds. That is, as discussed supra at 22, 27, each of the motions for summary judgment asserts, as grounds for relief, the defense of qualified immunity and the further defense that no constitutional violation has been shown by the plaintiff. With regard to the plaintiff's claim concerning the fire and the failure to extinguish it, the issue of qualified immunity will be addressed first.

In their assertions of qualified immunity the defendants first rely on § 508, which authorizes peace officers to use deadly force when they believe that an arrestee presents a serious threat of death or serious bodily harm to the officers or others. With regard to the failure to extinguish the fire which

had spread to the interior of the house, the claim of qualified immunity in terms of § 508 is tantamount to an assertion by the defendants that the occupants of the MOVE house continued to present a deadly danger to the police after the bunker was neutralized, which warranted the use of deadly force, and that such force could be in the form of allowing flames to force the occupants from the building. The defendants also point to the decision in Ginter v. Stallcup, 641 F. Supp. 939 (E.D. Ark. 1986), affirmed in part, 869 F.2d 384 (8th Cir. 1989), which involved the police use of fire as a means of forcing an armed and dangerous murderer from a house in June of 1983. The Ginter decision, both at the district court and Court of Appeals levels, held that such police action was entitled to the protection of qualified immunity under the standards of Harlow v. Fitzgerald, 457 U.S. 800 (1982), because the plaintiff had not shown that the use of fire to flush an armed and dangerous fugitive from a residence violated any statutory or constitutional right which had been established as of the date of the occurrence, June 3, 1983.

According to the defendants in this case, the Ginter decisions provide at least some indication of the law as it existed as of June 1983, the date of the Ginter incident. They also argue that no legal development contrary to that holding had occurred up to the date of the May 13, 1985 MOVE events. Thus, according to the defendants, the state of the law on May 13, 1985, would not have caused the City of Philadelphia defendants to think that the law prohibited the deliberate use of fire to drive the MOVE resisters from their residence. The defendants also argue that under Harlow v. Fitzgerald, and the subsequent case of Anderson v. Creighton, 483 U.S. 635 (1987), it is incumbent upon plaintiff Ramona Africa to demonstrate that the state of law at the time in question was such that no reasonable officer could have believed it lawful to use fire to force the surrender of MOVE. The defendants additionally argue that the plaintiff has not met that burden.

In assessing the validity of these arguments for qualified immunity, I begin with their contention that the Pennsylvania "deadly-force" statute, 18 Pa.C.S.A § 508 would provide authorization for the use of fire under the circumstances existing at the MOVE residence on May 13, 1985 to drive the MOVE occupants from the building. As noted previously, the Pennsylvania statute authorizes the use of deadly force only when the peace officer believes that the subject poses a serious threat to life or safety of the officers or others. Another provision relating to that statute is § 501 which requires that the officer's belief of deadly or serious danger must be reasonable. [7]" The question presented here is whether, after the fire had destroyed the roof-top bunker, there remained any reasonable basis for the police to believe that allowing the fire to burn was necessary to quell some perceived imminent peril. For the reasons that follow, I conclude there was not.

According to Police Commissioner Sambor, who was in command of the police field operations, the danger to his police officers was posed by the bunker. When the fire destroyed that structure, the principal source of perceived danger was eliminated. [8]" If any further risk was presented by the occupants of the MOVE house, which by that time had no roof, I find it difficult to imagine why allowing the fire to continue burning could be reasonably considered a necessary means of forcing a surrender. Therefore, it is my view that a decision to allow the fire to burn did not meet the

requirement of reasonably-perceived necessity contained in 18 Pa.C.S.A. § 508.

As for Ginter v. Stallcup, I am not convinced that the facts of that case made it applicable here. In Ginter, a handful of police officers had to take immediate action against an armed murderer who, according to police testimony, was believed to have returned automatic-weapon gunfire just before the building was set afire. In the case at bar, the police presence surrounding the MOVE house on May 13, 1985, was on a massive and well-equipped scale. I cannot imagine how a decision to squirt water onto the flames would have made it more difficult to force the surrender of people in a building with no roof and probably full of smoke.

I conclude, therefore, that had the City of Philadelphia defendants deliberately allowed the MOVE house to continue burning as a means of forcing surrender, the circumstances under which such action was taken would not justify the protection of qualified immunity. Having reached that conclusion, I turn now to the other aspect of the defendants' summary judgment motions: whether the plaintiff has proved that the fire was the result of constitutionally violative behavior.

As noted, defendants Goode and Brooks have included in their motions for summary judgment, in addition to claims of immunity, assertions that the plaintiff has not proved any violations on their part of her constitutional rights. With regard to the plaintiff's allegations about the fire, defendants Goode and Brooks have testified that they had no participation in any decision to let the fire burn. The plaintiff's response to the summary judgment motions contains no proof to rebut or contest the representations by Goode and Brooks. It must follow, then, that there is no genuine issue of fact as to the nonculpability of those defendants for the fire; and they are entitled to summary judgment regarding the plaintiff's claim concerning the fire. As to defendants Sambor and Richmond, the evidence of their participation regarding the fire is in a different posture. It is undisputed that each of them shared the decision to let the fire burn. Because that decision, in my view, was not justified by a peril to police officers or others, that decision amounts to unconstitutional excessive force subjecting defendants Sambor and Richmond to liability unless they can convince a fact finder of facts that warranted letting the fire burn. Accordingly, their motion for summary judgment must be denied.

As an additional dimension to her claim of excessive force, the plaintiff alleges in Paragraph 34 of her complaint as follows:

MOVE people, includin [sic] our babies, screamed repeatedly that we're bringin [sic] the children out but we continued to encounter gunfire which interfered with and/or prevented our escape from the burnin [sic] building and left my family burned or shot to death.

It is doubtful that this allegation is sufficient to state a cause of action against any of the defendants in this case. Nevertheless, giving the allegation a generous reading and interpretation, it can be taken as an assertion that unnamed members of the Philadelphia police used gunfire to force the plaintiff

and other occupants of the MOVE house back into the burning building when they sought to leave and surrender, and further, that such tactic was part of an officially sanctioned plan of action against MOVE. If this allegation is true, such conduct would be, in my view, so maliciously sadistic and shocking to the con science of civilized people that no known standard of qualified immunity could insulate the perpetrators from suit or liability. Such a tactic would have as its sole purpose the death of or serious injury to the plaintiff, without giving her an option of avoiding that consequence by surrender. See Brower v. Inyo County, 489 U.S. 593 (1989).

The plaintiff's additional problem in attempting to use the above allegation to establish a constitutional violation, either on a theory of unlawful force or due process, is the deficiency of her evidence in response to the summary judgment motions. The plaintiff has not presented any deposition, answer to interrogatories, affidavit or other acceptable evidence to demonstrate that if she was shot at by police officers to drive her back into the fire, such conduct resulted from the direction or acquiescence of any of the named defendants. For the plaintiff to tie such conduct to Mayor Goode, Leo Brooks, Gregore Sambor or William Richmond, there would have to be a showing that those officials directed or acquiesced in such a tactic. See Rizzo v. Goode, 423 U.S. 362 (1975); Black v. Stephens, 662 F.2d 181, 195-96 (3d Cir. 1981). Where on a motion for summary judgment by a defendant, it appears to the court that the plaintiff has not presented evidence to demonstrate that she can prove a necessary element of her claim, the defendant is entitled to summary judgment in his favor regarding that claim. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

Therefore, to the extent that Ms. Africa's claim of constitutional violations rests on her allegation that unnamed policemen used gunfire to drive her back into the burning structure, her lack of documentary evidence as to the role of the defendants entitles those defendants to summary relief, not on the basis of qualified immunity but under the evidentiary principle of Celotex.

II. PLAINTIFF'S OTHER CIVIL RIGHTS CLAIMS

As for the plaintiff's claim that the actions of the Philadelphia police in assaulting the MOVE house, and the actions of other governmental officials, deprived her of the freedoms of religion, speech, and association guaranteed by the First and Fourteenth Amendments of the Constitution, those claims must fail. The plaintiff has made no evidentiary showing, or basis for inferring, that the conduct of the governmental officials on May 13, 1985, had any purpose other than the implementation of lawfully issued arrest warrants and search warrants. Thus, all of the defendants are entitled to judgment as a matter of law on the plaintiff's First and Fourteenth Amendment claims.

Relying on another part of the Civil Rights Act of 1871, 42 U.S.C. § 1985(3), the plaintiff also seeks damages and other relief based on allegations that the actions of the police and other City defendants against her and other MOVE members in the May, 1985 confrontation were the result of a conspiracy between several officials of the City government, including the Mayor, Managing Director, Police Commissioner, and Fire Commissioner to deprive her of rights existing under the United States

Constitution and other federal laws. In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court held that an action under 42 U.S.C. § 1985(3) requires the plaintiff to allege that there is some racial or otherwise class-based, invidiously discriminatory animus behind the acts of the alleged conspirators. 403 U.S. at 102. Ms. Africa's complaint presents no such allegation; nor has she offered any evidence to show that she could sustain her burden of proving the requisite animus. For those reasons, I must conclude that all of the defendants are entitled to summary judgment as to the plaintiff's action under § 1985(3).

III. THE LIABILITY OF DEFENDANT CITY OF PHILADELPHIA

The City of Philadelphia, in moving for summary judgment, relies first on the rule set forth in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), restricting the liability of municipal corporations in actions brought under the federal Civil Rights Act of 1871. In the Monell case, the United States Supreme Court, while holding that municipal corporations and other local government units were amenable to suit under 42 U.S.C. § 1983, also held that traditional concepts of respondeat superior and vicarious liability did not apply. 436 U.S. at 691. That is, § 1983 liability cannot be imposed on a municipality solely because the wrongdoer had an employment relationship with it. Id. at 691, 694. Under Monell, a municipality or other local governing unit cannot be held liable under § 1983 unless the constitutional injury complained of was caused by some action pursuant to municipal custom or official policy. 436 U.S. at 690-91. As was later observed in Oklahoma City v. Tuttle, 471 U.S. 808, 821 (1985), the Monell standard was intended to prevent the imposition of municipal liability "where no wrong could be ascribed to municipal decisionmakers."

In support of its motion, the City contends that plaintiff Ramona Africa has failed to show that the bombing of the MOVE house, the decision to let the fire burn, or any other act alleged by her in her suit, were part of any pre-existing municipal policy. According to the City, the plaintiff has not presented any evidence from which such a policy could even be inferred. The City asserts, moreover, that it had no official, operative policy or custom which could be said to contemplate the kind of confrontational events that took place between it and MOVE on May 13, 1985. Positing that the plaintiff's civil rights action against the City itself is based on unprecedented actions and decisions of its police and other officials, the City argues that those acts cannot be deemed to be the result of a pre-existing official policy, and thus, cannot be grounds for subjecting the City to liability for damages under that statutory provision. A flaw in the City's reasoning is that it ignores the Supreme Court's decision in Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

In Pembaur, the Supreme Court addressed the questions of whether, and under what circumstances, a single decision by a municipal officer to take a particular action on a single occasion can establish the kind of "official policy" required by Monell as a predicate to municipal liability under 42 U.S.C. § 1983. The Court answered the first question in the affirmative, holding "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." Pembaur, 475 U.S. at 480 (emphasis added). In that regard, the Court further held that "where action

is directed by those who establish governmental policy, the municipality is equally responsible whether the action is to be taken only once or to be taken repeatedly." Id. at 481.

Pembaur involved a § 1983 action against a city government and a county, with the plaintiff alleging that certain deputy sheriffs unlawfully and forcibly entered his business premises to effect an arrest. It was established that the deputies had acted upon the instructions of the county prosecutor; it was also established that the prosecutor was the final decisionmaker for the county with respect to such matters. The Supreme Court, applying the principles articulated, held that the act of the prosecutor in so instructing the deputies was sufficient to constitute "official policy" within the meaning of Monell, and thus subjected the county to liability under § 1983.

The United States Supreme Court has not always been of a single voice in identifying those municipal officers or employees whose decisions represent the official policy of the local government unit. However, cases subsequent to Pembaur reinforce its guiding proposition that actions by municipal officers with final policymaking authority may subject the government to § 1983 liability. See, e.g., Jett v. Dallas Independent School District, 491 U.S. 701 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112 (1988). Whether or not a particular local official has "final policymaking authority" is a question of state law. Jett; City of St. Louis v. Praprotnik. In resolving that question, the plaintiff bears the burden of proof. E.g. Oklahoma City v. Tuttle, supra.

Philadelphia's document of government, its Home Rule Charter, [9]" provides inter alia that the Police Commissioner is the head of the Police Department, and that the Fire Commissioner is the head of the Fire Department. 351 Pa. Code § 3.3-102. As such, the Police Commissioner's function is to "exercise the powers and perform the duties vested in and imposed upon" the Police Department; the same is true of the Fire Commissioner in his relationship to the Fire Department. 351 Pa. Code § 3.3-102.

Under Philadelphia's Home Rule Charter, one of the functions or duties of the Police Department is to "preserve the public peace, prevent and detect crime . . . train, equip and supervise . . . the Philadelphia Police. 351 Pa. Code § 5.5-201. Given the broad powers and duties of the Police Commissioner under the Home Rule Charter, it is my conclusion that such official has final decisionmaking powers regarding the functions of that department.

The Home Rule Charter also provides that the Fire Department has the power and duty to "extinguish fires at any place," "administer and enforce statutes, ordinances and regulations relating to fire and explosion hazards," and "train, equip, supervise, and discipline" firemen. 351 Pa. Code § 5.5-400. Since the Fire Commissioner is, by City Charter, given the duty of seeing that those functions are carried out, I conclude that he is an official with final decisionmaking powers as to that department of City government. Accordingly, in my view, Police Commissioner Sambor and Fire Commissioner Richmond was each a municipal official with final decisionmaking powers.

Notwithstanding the foregoing discussion, the plaintiff's § 1983 action against the City is confronted with another obstacle. The City, as a municipal defendant, has no liability for acts of policymaking officials that do not amount to constitutional violations. City of Los Angeles v. Heller, 475 U.S. 796 (1986); see Owen v. City of Independence, 445 U.S. 622 (1980). I have concluded that the decisions of the City of Philadelphia defendants to bomb the bunker did not constitute excessive force, and thus did not amount to a constitutional violation. Accordingly, there can be no basis for municipal liability regarding that decision. As to the decision to let the fire burn, my previous conclusion concerning the apparent lack of necessity for that decision or conduct leaves open a basis for holding that such action was constitutionally-violative excessive force. Since that conduct resulted from either the Police Commissioner or Fire Commissioner or both, the City would be subject to liability under Monell for that aspect of official behavior.

Here, the decision to let the MOVE house burn, resulting as it did from decisions by Commissioners Sambor and Richmond, must be deemed a policy decision within the meaning of Pembaur, and thus could subject the City itself to § 1983 liability. The decision to let the fire burn presents factual issues whose resolution could establish a constitutional violation for which the City would be liable. For that reason, the City's motion for summary judgment must be denied insofar as it relates to the plaintiff's allegations or claims concerning the decision to let the fire burn.

IV. THE PENDENT STATE LAW CLAIMS

The plaintiff has also advanced pendent state claims against all of the defendants. Specifically, she claims that:

The actions by the named defendants as described herein were extreme, outrageous, intentional and reckless. As a direct result of these actions, plaintiff suffered and continues to suffer from emotional trauma and physical injuries in the form of severe burns that are permanent scars, all of which is a direct result of the actions described herein. These actions are careless, negligent and/or constituted assault and battery and other unlawful conduct by defendants.

Complaint at P 59 (emphasis as in original). Consideration of the defendants' motions for summary judgment with respect to these claims follows.

A. The City of Philadelphia Defendants

The plaintiff seeks an award of money damages against the City of Philadelphia Defendants. What each defendant did on May 13, 1985 has been extensively recounted by Judge Pollak and me and will not be repeated here. Each defendant has moved for summary judgment with respect to his alleged conduct. The standard that has been applied herein with respect to the defendants' motions for summary judgment on all of the plaintiff's constitutional injury claims will be applied here. That is, to be entitled to summary judgment each defendant must show that based on the undisputed

material facts with respect to his conduct on May 13, 1985, he is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c).

The Political Subdivision Tort Claims Act (hereinafter "PSTCA"), 42 Pa. C.S.A. §§ 8541 et seq., grants immunity to employees of local government agencies to the same extent as their employing local agencies. 42 Pa. C.S.A. § 8545. Local government agencies are granted broad immunity under § 8541. There are only eight exceptions to the broad grant of immunity. The exceptions cover the following activities: (1) vehicle liability, (2) care, custody or control of personal property, (3) real property, (4) trees, traffic controls and street lighting, (5) utility service facilities, (6) streets, (7) sidewalks, (8) care, custody or control of animals. 42 Pa. C.S.A. § 8542 (b)(1)-(8). Since the events that occurred on May 13, 1985 do not involve any of the eight exceptions, all City defendants would seem to qualify for immunity under § 8545.

However, 42 Pa. C.S.A. § 8550 provides another exception to the immunity granted local officials under § 8545. Section 8550 provides that if "it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of section[] 8545 . . . shall not apply." 42 Pa. C.S.A. § 8550. In order to be entitled to summary judgment, each City defendant would have to show, as a matter of law, that his conduct on May 13, 1985, did not constitute a crime, actual fraud, actual malice or willful misconduct. Inasmuch as defendants Richmond and Sambor's motions for summary judgment should be denied on the plaintiff's § 1983 claims for their decision to let the fire burn, they cannot show as a matter of law that their decision did not constitute willful misconduct. Accordingly, they are not entitled to summary judgment with respect to the plaintiff's pendent state claims based on the provisions of the PSTCA. All other City defendants [10]" have been granted summary judgment on all of the plaintiff's claims for their conduct on May 13, 1985. Thus, they have demonstrated, as a matter of law, that their conduct did not constitute a crime, actual fraud, actual malice or willful misconduct. Accordingly, they are entitled to immunity under the PSTCA and they should be granted summary judgment with respect to the plaintiff's pendent state claims.

B. The City of Philadelphia

Under the PSTCA, the City of Philadelphia is granted broad immunity. 42 Pa. C.S.A. § 8541. Section 8542 provides exceptions to the broad grant of immunity which permit the City to be liable for certain acts of its employees. Section 8542 (a)(2) provides that the City can only be liable for negligent acts of its employees. Specifically, the City cannot be held liable for any acts by its employees which constitute a crime, actual fraud, actual malice or willful misconduct. § 8542 (a)(2). Further, the City can only be liable for the negligent acts of its employees which fall into at least one of the following eight categories: (1) vehicle liability, (2) care, custody or control of personal property, (3) real property, (4) trees, traffic controls and street lighting, (5) utility service facilities, (6) streets, (7) sidewalks, (8) care, custody or control of animals. 42 Pa. C.S.A. § 8542 (b)(1)-(8).

The City cannot be liable for the conduct of any of the City defendants because none of the defendants' conduct involved any of the activities listed in § 8542 (b)(1)-(8). Further, the decision by defendants Sambor and Richmond to let the fire burn constituted willful misconduct. Therefore, pursuant to § 8542 (a)(2), the City would not be liable for their decision to let the fire burn for this reason as well.

Although the City is entitled to immunity under the PSTCA, the question remains as to the effect of now repealed Chapter 21-700 of the Philadelphia Code. It provided that "the City shall not plead governmental immunity as a defense in any civil action commenced by any person sustaining bodily injury or death caused by negligence or unlawful conduct of any police officer while the latter is acting within the scope of his office or employment." Philadelphia Code § 21-701 (a). Obviously this provision would only apply to the conduct of defendants Sambor, Klein, Powell, Connor, Revel and Tursi since they are the only City defendants who were police officers on May 13, 1985.

On December 4, 1990, the Mayor signed into law Bill No. 1057 which repealed Chapter 21-700, including § 21-701. Section 2 of Bill No. 1057 provided that the ordinance would take effect immediately and that it would apply to all pending civil actions and to all civil actions commenced on or after the effective date of the ordinance. The City asserts that this retroactive repeal applies to the plaintiff's case since it was pending at the time Bill No. 1057 was signed by the Mayor. Memorandum of Law in Support of City Defendants' Motion for Summary Judgment (Document No. 638) at 39-43. If the City is correct, the City may successfully plead immunity as to the acts committed by defendants Sambor, Klein, Powell, Connor, Revel and Tursi on May 13, 1985.

However, the City's argument must fail. In City of Philadelphia v. Patton, 148 Pa. Commw. 141, 609 A.2d 903 (1992), the Commonwealth Court of Pennsylvania addressed that claim and held that the retroactive application of Bill No. 1057 to actions which had accrued prior to its enactment and were pending at the time of its enactment violated due process. [11]" Id. at 906. In Strauss v. Springer, 817 F. Supp. 1203 (E.D. Pa. 1992), the court addressed the same issue and it also concluded that the Bill No. 1057 could not be applied retroactively to an already accrued cause of action. Id. at 1210. Strauss was decided on May 18, 1992, one day before the Commonwealth Court decided Patton. Thus, in Strauss, the court did not have the benefit of the Commonwealth Court's decision in Patton. Nonetheless, the court in Strauss came to the same conclusion as that of the court in Patton.12

Since this court and the Commonwealth Court of Pennsylvania have recently held that the retroactive application of Bill No. 1057 to an already accrued cause of action would violate due process, the only question which remains is whether the plaintiff's cause of action had accrued at the time the repealer ordinance was enacted. "In Pennsylvania, a tort cause of action generally accrues on the date of the accident or injury." Patton, 609 A.2d at 905 (citing Gibson v. Commonwealth, 490 Pa. 156, 415 A.2d 80 (1980)). Applying this rule, the plaintiff's cause of action accrued on May 13, 1985, the date of the conflagration at the MOVE house. Since her cause of action had accrued and was pending at the time that Bill No. 1057 was enacted, Bill No. 1057 cannot be applied retroactively to

her cause of action. Accordingly, pursuant to Philadelphia Code § 21-701 (a), the City may not plead its immunity under the PSTCA with respect to the acts taken by defendants Sambor, Powell, Klein, Tursi, Revel and Connor on May 13, 1985.

C. The state defendants [13"]

Title 1, Section 2310 of the Pennsylvania Consolidated Statutes provides that "the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoin sovereign and official immunity from suit except as the General Assembly shall specifically waive the immunity." Id. The Commonwealth has enacted 42 Pa. C.S.A. § 8522, which is a limited waiver of sovereign immunity. Section 8522 waives sovereign immunity for only nine types of activities: (1) vehicle liability, (2) medical-professional liability, (3) care, custody or control of personal property, (4) Commonwealth real estate, highways or sidewalks, (5) potholes and other dangerous conditions, (6) care, custody or control of animals, (7) liquor store sales, (8) National Guard activities, (9) toxoids and vaccines. 42 Pa. C.S.A. § 8522 (b)(1)-(9).

Here, the state defendants' activities on May 13, 1985 did not fall within any one of the nine activities listed in 42 Pa. C.S.A. § 8522 (b)(1)-(9). Since none of the exceptions to immunity apply in this case, defendants Reed and Demsko are entitled to the immunity granted them by 1 Pa. C.S.A. § 2310. Because defendants Reed and Demsko have demonstrated, as a matter of law, that they are entitled to immunity under 1 Pa. C.S.A. § 2310 for their activities on May 13, 1985, they should be granted summary judgment with respect to the plaintiff's pendent state law claims.

V. THE SUMMARY JUDGMENT MOTIONS OF DEFENDANTS TURSI, REVEL AND CONNOR

As noted, supra at 2, the motions for summary judgment filed by defendants Tursi, Revel and Connor on qualified immunity grounds were granted by Judge Pollak on August 18, 1992. The rationale for that action was that these defendants had only been involved in the initial plan to drill holes for the insertion of tear gas from walls adjoining the MOVE residence. Judge Pollak agreed with my view that the defendants were entitled to qualified immunity because their actions involved a reasonable use of force in making the arrests and, hence, were objectively reasonable. See Memorandum, Pollak J. at 5 n.5. As I read the defendants' motion, they claim entitlement to judgment as a matter of law on all of the plaintiff's claims upon her failure to demonstrate that any of them had violated any of her constitutional rights or her rights under state law.

There is no evidence in the record that they participated in the planning or the dropping of the bomb or the decision to let the fire burn. Thus, they are entitled to summary judgment on the plaintiff's Fourth Amendment claim of excessive force. Further, they are entitled to judgment on the plaintiff's First Amendment claim and § 1985(3) claim for the reasons set out supra at 39-40. Finally, they are entitled to summary judgment on the plaintiff's pendent state claims on the grounds set forth supra at 46-48.

RECOMMENDATION

AND NOW, this 6th day of October, 1993, it is RECOMMENDED that the following motions for summary judgment be GRANTED in part and DENIED in part:

1. The motions of defendants Reed and Demsko for summary judgment (Documents No. 450, 608) on qualified immunity grounds and with respect to liability on all of the plaintiff's substantive federal and state claims should be GRANTED;

2. The motions of defendants Revel, Tursi and Connor for summary judgment (Document Nos. 634, 637, 645, 733) on all of the plaintiff's substantive federal and state claims should be GRANTED;

3. The motions of defendants Powell and Klein for summary judgment (Document Nos. 635, 673) on qualified immunity grounds and with respect to liability on all of the plaintiff's substantive federal and state claims should be GRANTED;

4. The motions of defendants Goode and Brooks for summary judgment (Document Nos. 643, 641) on qualified immunity grounds and with respect to liability on all of the plaintiff's substantive federal and state claims should be GRANTED;

5. The motions of defendants Sambor and Richmond for summary judgment (Document Nos. 636, 642, 653) on qualified immunity grounds and with respect to liability on plaintiff's First and Fourteenth Amendment grounds as well as her claims under 42 U.S.C. § 1985(3) should be GRANTED;

6. The motions of defendants Sambor and Richmond for summary judgment (Document Nos. 636, 642, 653) on qualified immunity grounds and with respect to liability on plaintiff's substantive federal and state claims based on their alleged dropping of the bomb on the MOVE residence should be GRANTED;

7. The motions of defendants Sambor and Richmond for summary judgment (Document Nos. 636, 642, 653) on qualified immunity grounds and with respect to liability on plaintiff's substantive federal and state claims based on their alleged action in "letting the fire burn" should be DENIED;

8. The motion of defendant City of Philadelphia for summary judgment (Document No. 638) with respect to liability on plaintiff's substantive federal claims based on the alleged dropping of the bomb on the MOVE residence should be GRANTED;

9. The motion of defendant City of Philadelphia for summary judgment (Document No. 638) with respect to liability on plaintiff's substantive federal claims based on defendants Sambor and Richmond's alleged action in "letting the fire burn" should be DENIED;

10. The motion of defendant City of Philadelphia for summary judgment (Document No. 638) with respect to liability on plaintiff's First and Fourteenth Amendment grounds as well as her claims under 42 U.S.C. § 1985(3) should be GRANTED;

11. The motion of defendant City of Philadelphia for summary judgment (Document No. 638) with respect to liability on the plaintiff's pendent state claims arising out of the actions of defendants Goode, Brooks and Richmond is GRANTED;

12. The motion of defendant City of Philadelphia for summary judgment (Document No. 638) with respect to liability on the plaintiff's pendent state claims arising out of the actions of defendants Sambor, Klein, Powell, Tursi, Revel and Connor is DENIED.

WILLIAM F. HALL, JR.

UNITED STATES MAGISTRATE JUDGE

1. The sole reference to the MOVE Commission Report in the Report and Recommendation is in the following paragraph at page 5: Following the tragic events of May 13, 1985, a Special Investigation Commission was established by Mayor Goode and the events were also investigated by a state, as well as a federal grand jury. Hundreds of pages of findings and reports were made by these bodies and there were months of extensive media coverage. The transcripts of the sworn testimony given before the MOVE Commission and referred to in the appendices to the City defendants' motion for summary judgment, however, have been considered.

2. In his deposition, defendant Klein in describing C-4 said that the "army calls C-4 plastique. The Marines call it C-4. When somebody says plastique to me, it's automatically C-4". Deposition of Officer Klein at 33. In his deposition Lieutenant Powell testified about the police department's acquisition of C-4 as follows: By Ms. Africa: Q. How do you get C-4? A. From the military, usually. * * * * Q. What's the procedure for using or obtaining explosives from the bomb disposal unit for testing, for use, whatever? A. For us obtaining it? Q. Yes. A. If we obtain commercial explosives, we just go to a commercial outfit that sells it, present our license, and they sell it to you over-the-counter. Q. What about C-4? A. C-4 we used to have to get from the military generally. C-4 is generally only sold to the military and they give it to us. Deposition of Lieutenant Powell at 30. During oral argument on the City defendants' motion for summary judgment, counsel for defendant Powell represented to the court that C-4 is a military explosive. Motion hearing, February 28, 1992 at 54.

3. Judicial notice is taken of the fact that the MOVE house was one of adjoining rowhouses on Osage Avenue.

4. Section 501 of the Pennsylvania Crimes Code defines deadly force as "Force which under the circumstances in which it is used is readily capable of causing death or serious bodily injury. Section 508 of the Pennsylvania Crimes Code provides, in relevant part that: (a) Peace officer's use of force in making arrest -- (1) A Peace officer, or any other person whom he had summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he believes to be necessary

to effect the arrest and of any force which he believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using deadly force only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person or when he believes both that: (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon, or otherwise indicates that he will endanger life or inflict serious bodily injury without delay. 18 Pa.C.S.A §§ 501, 508(a).

5. Good v. Dauphin County Social Services, 891 F.2d 1087 (3d Cir. 1989).

6. The plaintiff's suit against defendants Demsko and Reed in their official capacity as State Troopers is barred by Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). However, the plaintiff's suit against these defendants in their individual capacity is not barred by Will and it was proper for her to proceed upon it. Hafer v. Melo, 112 S. Ct. 358, 362-63 (1991). When sued in their individual capacity, these defendants may assert, as they have, "personal immunity defenses such as objectively reasonable reliance on existing law." Hafer, 112 S. Ct. at 362.

7. Section 501 of the Pennsylvania Crimes Code defines believes or belief as "reasonably believes or reasonable belief".

8. According to defendant Brooks, the bunker would have been neutralized even if it was not completely destroyed by the bomb. He testified to that effect as follows: By Mr. Lytton: Q. Now, if the bunker didn't fall off, but you had the hole in the roof, what were you going to do? A. Well, the bunker would have been -- by dropping that explosive on that roof, the bunker would have been pretty much neutralized even if it didn't knock it off [of the roof]. Appendix to City Defendants' Motion for Summary Judgment, Volume I at 94-95. According to defendant Sambor by 6:20 p.m. the "bunker was consumed and fell into the second floor [of the MOVE house]". Id. at 141.

9. The Philadelphia Home Rule Charter was enacted pursuant to the Home Rule Provision of the Pennsylvania Constitution, Article 9, E2, and the enabling statute enacted thereunder.

10. For the sake of clarity, all other City defendants include defendants Goode, Brooks, Klein, Powell, Connor, Revel and Tursi.

11. In so holding, the court noted that the City had erroneously relied upon McHugh v. Litvin, Blumberg, Matusow & Young, 525 Pa. 1, 574 A.2d 1040 (1990). City of Philadelphia v. Patton, 148 Pa. Commw. 141, 609 A.2d 903, 905 (1992). Here, the City's Memorandum of Law also suffers from the same erroneous reliance upon McHugh which the Commonwealth court discussed in Patton. Compare Memorandum of Law in Support of City Defendants' Motion for Summary Judgment (Document No. 638) at 41-42 with Patton, 609 A.2d at 905.

12. In Strauss, the court did not explicitly hold that retroactive application of the repealer ordinance would violate due process. However, that argument had been presented to the Strauss court, Strauss, 817 F. Supp. at 1209, and the court applied Gibson v. Commonwealth, 490 Pa. 156, 415 A.2d 80 (1980) as the controlling law in Pennsylvania in resolving that issue. Strauss, 817 F. Supp. at 1209. In Patton, the Commonwealth Court also cited Gibson as the controlling case when it held that the retroactive application of the repealer ordinance violated due process. Patton, 609 A.2d at 905-06. Thus,

Strauss is properly viewed as holding that the retroactive application of the repealer ordinance would violate due process.

13. The state defendants are State Troopers Reed and Demsko.