

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DONALD D. CHISHOLM,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 94-274-P-C
)	
CITY OF PORTLAND, et al.,)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON DEFENDANTS’
MOTION FOR SUMMARY JUDGMENT**

This action arises out of events leading to the plaintiff’s conviction in the Maine Superior Court (Cumberland County) of the crime of manslaughter and a subsequent civil action in which he was found liable for wrongful death. Proceeding under 42 U.S.C. § 1983, the plaintiff, Donald D. Chisholm, alleges that the defendants, the City of Portland (“ City”); Francis Amoroso, its former chief of police; Michael Chitwood, its current chief of police; and six individual Portland police officers, deprived him of rights protected by the United States Constitution in the investigation of an automobile accident that occurred in Portland late on the night of October 3, 1987, and in the subsequent police reports and testimony concerning that event. The defendants move for summary judgment on all counts of the complaint. For the reasons set forth below, I recommend that the motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and “give that party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). “Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial.” *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2). A fact is “material” if it may affect the outcome of the case; a dispute is “genuine” only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Background

Viewed in the light most favorable to the plaintiff, the summary judgment record reveals the following material facts. At approximately 11 p.m. on October 3, 1987 Chisholm was driving a one-ton pickup truck on Commercial Street in Portland and was involved in a collision with a Ford automobile driven by Robert Beale. Deposition of Donald D. Chisholm at 4-5; Trial Transcript, *State v. Chisholm*, Cum. CR-87-1955 (“Tr.”), at 30, 143, 145. Mr. Beale was killed. Exh. 3 to Defendants’ Statement of Material Facts as to Which There are No Genuine Issues to be Tried (Docket No. 14) (“Defendants’ Statement”). Chisholm’s blood alcohol level was measured at 0.23

grams per 100 milliliters at 12:50 a.m. Tr. at 71; Transcript, Hearing on Motion to Suppress, *State v. Chisholm*, at 96; Exh. 5 to Defendants' Statement. In a jury-waived trial that concluded on November 23, 1988, Chisholm was convicted of manslaughter and operating a motor vehicle under the influence of alcohol as a result of this incident. Tr. at 514, 522. His appeal from that conviction was denied by the Maine Supreme Judicial Court ("Law Court"). *State v. Chisholm*, 565 A.2d 92 (Me. 1989).

A civil action was subsequently filed against Chisholm seeking damages for the wrongful death of Mr. Beale. *Beale v. Chisholm*, Cum. CV-89-1271. After trial, the jury in that case found that Beale had been negligent, but that Chisholm's negligence had exceeded that of Beale. Jury Verdict Form (certified copy), Exh. A to Plaintiff's Objection to Defendant's [sic] Motion to Add Affirmative Defense (Docket No. 9). An appeal from the judgment in that action was denied summarily by the Law Court. *Beale v. Chisholm*, CUM-94-919 (Me., December 13, 1995) (unpublished disposition) (certified copy attached to Defendants' Supplement to the Record Submitted in Support of Their Motion for Summary Judgment (Docket No. 35)).

At the criminal trial defendants Dean Mazziotti, William Ridge, Dale White, Russell Gauvin, and Thomas Joyce all testified. Tr. at 73, 139, 184, 231, & 299. Defendant Stephen Mazziotti is alleged to have been the supervisor of some or all of the other individual defendants at the time of the events giving rise to this action. Amended Complaint (Docket No. 5), Count II ¶ 2. D. Mazziotti was a patrol technician at the time of the collision; he assisted Joyce, an evidence technician, in collecting physical evidence at the scene. Tr. at 75-76. Joyce had primary responsibility for collecting evidence and reconstructing the accident. *Id.* at 76, 304. White, a hit and run investigator, assisted Joyce and D. Mazziotti. *Id.* at 184, 186. Gauvin, who was also an evidence technician,

assisted with the gathering of physical evidence. *Id.* at 232, 235. Ridge, a patrolman, was the first police officer on the scene. *Id.* at 139, 141.

During the criminal trial, each of the individual officers testified that he had seen an impression on the wet pavement at the scene of “dual tires” crossing the center line. *Id.* at 81-82, 120, 159, 190, 237, 309. Some of the officers placed cones along the line of the impressions, and photographs of the area with the cones in place were taken and offered into evidence. *Id.* at 81, 159, 239. Chisholm’s truck had dual rear tires. *Id.* at 83. Both vehicles involved in the collision were found in the eastbound lane, in which the Beale vehicle had been traveling before the impact. *Id.* at 30, 143. The officers observed debris and gouge marks only in that lane. *Id.* at 121, 189, 238, 243. Gauvin returned to the scene in daylight the next day and found no marks in the westbound lane. *Id.* at 243-44. Joyce and D. Mazziotti testified that a gouge in the eastbound lane appeared to have been made by a piece of the frame of the Beale car. *Id.* at 136-37, 321.

Joyce testified that he had concluded that the Chisholm truck had crossed the center line and hit the Beale car. *Id.* at 329. Chisholm offered the expert testimony of Alfred Moseley, who opined that a gouge he found in the westbound lane at the scene seven months after the accident could only have been made by the door of the Beale car, *id.* at 399, 449, that the “dual tire” impressions could not have existed as described by the officers, *id.* at 461, and that the reconstruction of the accident by the police was not adequate, *id.* at 478.

The trial justice found Chisholm guilty on both counts. He stated, *inter alia*, that “[i]f the state is unable to prove, by proof beyond a reasonable doubt, that Mr. Chisholm crossed the centerline and hit Mr. Beale’s vehicle, the state cannot prove that fact, I don’t think that there can be a conviction.” *Id.* at 515. At the sentencing, the trial justice also stated, “We have a person who

was clearly innocent, clearly minding his own business and was wrongfully and tragically killed.” Sentencing Transcript at 34, App. 7 to Plaintiff’s Memorandum in Opposition to Defendants’ Motion for Summary Judgment (“Plaintiff’s Memorandum in Opposition”) (Docket No. 23). On his appeal from the conviction, Chisholm argued the insufficiency of the tire impression evidence and stressed the differences between Moseley’s testimony and that of the officers and the sole eyewitness who testified. Brief for Appellant, *State v. Chisholm*, CUM-89-48, at 19-21.

Summary judgment was granted in favor of the plaintiff on liability in the civil action, based on the criminal conviction. Order and Supplementary Decision (certified copies), *State v. Chisholm*, Cum. CV-89-1271, App. 14 to Plaintiff’s Memorandum in Opposition. In his successful appeal from that judgment, Chisholm argued that the officers had perpetrated a fraud in the criminal case. Brief for Appellant, *Beale v. Chisholm*, CUM-92-239, at 57-77. After judgment was entered on the jury’s verdict against him in the civil action, Chisholm again appealed, arguing once more that the police had engaged in “extrinsic and intrinsic fraud” in investigating the accident and in testifying at the criminal trial. Statement of Issues to be Raised on Appeal, *Beale v. Chisholm*, CUM-94-919, Exh. 11 to Defendants’ Statement of Material Facts (Docket No. 14). As noted earlier, that appeal has been finally resolved and the jury’s verdict upheld.

III. Legal Analysis

Chisholm alleges that the individual defendants, other than S. Mazziotti and the two chiefs of police, conspired to deny him equal protection of the laws of the United States and otherwise deprived him of rights secured by the United States Constitution by creating evidence that did not

in fact exist (the “dual tire” impressions),¹ producing “fraudulent and incompetent reports,” failing to adequately photograph the accident scene, failing to record the names of eyewitnesses to the accident, failure to report other unspecified evidence, and testifying falsely at his criminal trial. Amended Complaint, Count I, ¶¶ 4, 7. The complaint also raises a due process claim in this regard. Count II of the Amended Complaint charges S. Mazziotti with liability due to his responsibility for supervising and training the other individual defendants. Count III asserts claims against Amoroso, Chitwood and the City for failure to train Portland police officers, and violation of the Fifth and Fourteenth Amendments to the United States Constitution and 29 M.R.S.A. § 891.² Chisholm seeks punitive as well as compensatory damages on all counts.

The defendants have moved for summary judgment on several grounds: collateral estoppel, absolute immunity, qualified immunity, failure to state a claim for which relief may be granted, and absence of any question of material fact on the liability issues. Chisholm admits that the evidence of “the fraudulent investigative methods of the Portland Police Department” that he will present in this action was presented to the jury in the state civil action. Plaintiff’s Memorandum in Opposition

¹ In his Response to Defendant’s [sic] Objection to Plaintiff’s Report on the Status of This Matter (Docket No. 38), Chisholm raises a claim under 14 M.R.S.A. § 870 that the officer defendants committed perjury in his criminal trial. This state-law claim is not raised in the Amended Complaint, and Chisholm has not moved for leave to amend his complaint in order to include it. Under these circumstances, the court will not address the claim, despite the parties’ invitation to do so.

² This state statute governing accident reports was repealed and replaced by 29-A M.R.S.A. § 2251, effective January 1, 1995. Neither version of the statute provides for a private cause of action; rather, violation of the statute constitutes a Class E crime. It is not clear from the amended complaint whether Chisholm intended to raise a claim under this statute in this action. In any event, no such claim will lie. *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 101 (Me. 1984) (no private right of action under statute providing criminal penalty in absence of direct expression of legislative intent to create private right of action).

(Docket No. 23) at 26.

Heck v. Humphrey, 114 S.Ct. 2364 (1994), is dispositive of Chisholm's claims.

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

Id. at 2372. Chisholm presents no evidence that his conviction has been invalidated. A careful review of his amended complaint reveals no claims that, if successful, would not “necessarily imply the invalidity of his conviction.” *Id.* Indeed, the invalidity of his conviction is the gravamen of each count of Chisholm's amended complaint. Amended Complaint, Count I, ¶¶ 4, 6; Count II, ¶¶ 1, 2; Count III, ¶¶ 1,3. As an example, Chisholm vigorously attacks the testimony concerning the “dual tire” impressions, evidence which by his own argument was central to his conviction.³ This claim, like each of the other specific allegations in the amended complaint of acts or failures to act by the defendants, necessarily implies the invalidity of Chisholm's conviction. *See also Mastracchio v. Ricci*, 498 F.2d 1257, 1260 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (state criminal conviction can have collateral-estoppel effect upon federal civil rights action).

³ Chisholm's argument is based on the finding of the jury in the wrongful death action that the late Mr. Beale was causally negligent, although Chisholm's negligence was greater than Beale's. Chisholm contends that this finding requires rejection of the police “model” based on the existence of the tire impression. However, there are possible bases for finding Beale negligent that do not require rejection of the opinion testimony of White and Joyce that Chisholm had crossed into Beale's lane of travel at the time of impact. The outcome of the civil trial provides no evidence of constitutional violations preceding the criminal trial. If Chisholm had a cognizable claim under section 1983, this argument would not provide a defense against a motion for summary judgment.

III. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 27th day of November, 1996.

*David M. Cohen
United States Magistrate Judge*