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

MICHAEL POLLINO,	:	CIVIL ACTION
Plaintiff	:	
	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, *et al*,	:	
Defendants	:	NO. 03-6288

M E M O R A N D U M

Gene E.K. Pratter, J. February 15, 2005

Michael Pollino filed a Complaint on November 17, 2003 asserting four claims against the City of Philadelphia, Officer Richard Fitzgerald, and Police Commissioner Sylvester Johnson.[1] The claims were assault and battery, malicious prosecution, invasion of privacy - casting in a false light, and civil rights violation.[2] The underlying event that led to these claims is the non-fatal shooting of Mr. Pollino during his arrest by Officer Fitzgerald. Defendants now seek summary judgment.

The viability of the claims alleging civil rights violations by Officer Fitzgerald and the City of Philadelphia depends upon whether there is a genuine issue of material fact regarding the nature of the shooting, namely, whether it was accidental or intentional. If the shooting was accidental, there is no constitutional violation and summary judgment should be granted; if the

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[1] By Stipulation dated January 27, 2005, Mr. Pollino withdrew his claims against Commissioner Sylvester Johnson.

[2] By Stipulation dated January 27, 2005, Mr. Pollino withdrew all state law claims against the City of Philadelphia and the malicious prosecution and invasion of privacy claims against Officer Fitzgerald. Consequently, the Court is addressing only the civil rights claims against the City of Philadelphia and Officer Richard Fitzgerald and the assault and battery claim against Officer Fitzgerald.

shooting was intentional, the civil rights claim against Officer Fitzgerald, and possibly the civil rights claim against the City,[3] would survive summary judgment.

This issue also determines whether Officer Fitzgerald is immune from the assault and battery claim under the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §§ 8541 *et seq.* If the shooting was accidental, the assault and battery claim is barred by the Political Subdivision Tort Claims Act; if the shooting was intentional, the assault and battery claim would survive summary judgment.

The only material Mr. Pollino was able to refer to in order to argue that the shooting was intentional are the unsworn statements of three witnesses. Therefore, the Court finds that Mr. Pollino has not met the demands placed on him by Federal Rule of Civil Procedure 56 for defeating a motion for summary judgment because, notwithstanding having been given several opportunities to do so, Mr. Pollino has not presented an appropriate explanation as to how the *record* presents a genuine issue of material fact challenging the evidence of the accidental nature of the shooting. An accidental shooting does not give rise to a constitutional violation, and, thus, Mr. Pollino's civil rights claims cannot proceed. Likewise, the assault and battery claim fails against Officer Fitzgerald because there is no genuine issue of material fact as to whether he acted willfully, and the admissible evidence presented supports the conclusion that he did not.

[3] If the shooting was intentional, the civil rights claim against the City would depend on whether Mr. Pollino can produce the requisite evidence to demonstrate that a genuine issue of material fact exists as to whether or not the City had a "policy" or "custom" of deliberate indifference to the rights of its citizens. As the Court finds the evidence does not support a conclusion that the shooting was intentional, the Court does not address whether the City had such a "policy" or "custom."

I. FACTUAL BACKGROUND

The record presented to the Court is summarized below.

A. Shooting Incident

On September 13, 2001, Officer Richard Fitzgerald, working undercover, saw Michael Pollino selling drugs near 5th and Shunk Streets in Philadelphia. Officer Fitzgerald was in plain clothes with his badge hidden under his shirt. After Mr. Pollino walked past Officer Fitzgerald, Officer Fitzgerald began to follow him. After Officer Fitzgerald observed Mr. Pollino reaching towards his rear pocket and front waistband, the officer drew his gun. Officer Fitzgerald caught up to Mr. Pollino and noticed that Mr. Pollino's hands were unexpectedly empty. While attempting to holster his weapon, Officer Fitzgerald then grabbed Mr. Pollino and identified himself as a police officer.

Mr. Pollino states that he did not hear Officer Fitzgerald identify himself as a police officer, but believed that Officer Fitzgerald was attempting to rob him. Officer Fitzgerald claims that Mr. Pollino elbowed him in the face when he grabbed him, but Mr. Pollino denies ever hitting Officer Fitzgerald. In any case, before he was able to holster his gun, Officer Fitzgerald's gun discharged at this point, hitting Mr. Pollino in the back. Fortunately for all concerned, the injury was not severe. After a brief struggle, during which Mr. Pollino insists he still did not know that Officer Fitzgerald was a police officer, Mr. Pollino was arrested.

Mr. Pollino pled guilty to drug charges and the lesser offense of simple assault. Nonetheless, Mr. Pollino maintains that he never hit Officer Fitzgerald and claims he pled guilty to the simple assault charge "just to get out."

B. Officer Fitzgerald's Prior Shooting Incidents

Officer Fitzgerald graduated from the Philadelphia Police Academy in June 1995. Before the incident involving Mr. Pollino, Officer Fitzgerald had two prior occasions on which he discharged his weapon. The first occurred in 1998 when he intentionally shot and killed a dog that was approaching during the officer's efforts to execute a search and seizure warrant. The second shooting was in 1999, also during an attempt to execute a search and seizure warrant. Officer Fitzgerald had allegedly grabbed a suspect, while trying to holster his weapon. When the suspect began to flail his arms about, Officer Fitzgerald's weapon accidentally discharged. Neither prior weapons discharge resulted in any adverse actions against Officer Fitzgerald.

C. City's Policies and Procedures Regarding Firearms

The Philadelphia Police Department has several training programs related to use of firearms. Each police recruit attends ten full days of intensive firearm training. Additionally, all officers undergo annual refresher training.[4] The annual training includes both classroom instruction and "hands on" training. In addition, if an officer discharges his weapon, either intentionally or accidentally, he must attend Discharge of Firearm ("DFA") training, an eight-hour training session that includes both classroom and hands-on elements. DFA training does not differentiate between accidental or intentional discharges.

These training programs include basic firearm safety. The training is reinforced and supplemented by "Assist Officer" bulletins provided to all officers. Assist Officer Bulletin 229-

[4] The Police Department provided Officer Daniel Bechtel to testify on behalf of the City about the Department's firearms training. Officer Bechtel has been a police officer since 1977, and a firearms instructor since 1984. He is also currently the Chief Armorer/Firearms Instructor for the Police Department, a position he has held since 1998.

B, covering "Glock Pistol Readiness," for example, states "Keep your finger off the trigger and outside the trigger guard until you have acquired your target and intend to shoot." Furthermore, all officers are trained never to point their weapon at a person unless they are prepared to shoot, and would be justified in doing so.

Finally, if any discharge does occur, the Philadelphia Police Department has a standardized investigation protocol. Any officer involved in a discharge must immediately contact the Department by police radio. That officer will be met at the location of the discharge by a supervisor, who will take control of the firearm and transport the officer to Internal Affairs Division ("IAD"). An investigation by the "Shooting Team" then commences, including interviews of witnesses and examination of physical evidence. The assigned investigator prepares a report which is reviewed and submitted for approval by the Commanding Officer of the Shooting Team, and, ultimately, by the Inspector, the Chief Inspector, and the Deputy Commissioner of IAD.

Once approved by IAD, the report is submitted to the Police Department's Firearms Discharge Review Board. The Board either accepts or rejects the conclusion of the IAD, and refers the matter for appropriate action. Every one of these actions was taken in this case. The shooting at issue here was determined to be "accidental" by IAD, and the Board approved that conclusion.

In 1999, 149 Philadelphia Police Officers discharged weapons. All of these discharges were investigated, and IAD concluded that 14 of the discharges were accidental. In 2000, 119 discharges occurred, and 16 were determined to be accidental. In 2001, 103 discharges occurred, and 9 of the discharges that occurred prior to the incident at issue were ruled accidental.

II. PROCEDURAL HISTORY[5]

On November 15, 2004, the Defendants filed a Motion for Summary Judgment for the City of Philadelphia and a Motion for Partial Summary Judgment on behalf of Officer Fitzgerald. In their Motion for Summary Judgment, the Defendants assert that the civil rights claim against the City fails because there is no evidence of municipal liability, since no "policy" or "culture" of deliberate indifference to the rights of citizens has been demonstrated.

On December 15, 2004, Mr. Pollino responded to the Motion, arguing that the City's failure to train and discipline Officer Fitzgerald in light of his "pattern" of "accidental shootings" is a basis for municipal liability.

On December 27, 2004, the Defendants replied to Mr. Pollino's response and also sought to expand their Motion for Summary Judgment to include the remaining claims against Officer Fitzgerald, namely the assault and battery and the civil rights claims. The ostensible justification for the expanded motion was the theory of liability asserted by Mr. Pollino in his response. The Defendants argue that an accidental shooting can not be excessive force under the Fourth Amendment, so no constitutional violation occurred as a matter of law. Further, Defendants contend that if there was no constitutional violation by Officer Fitzgerald, the issue of municipal

[5] The Court includes an in-depth description of the procedural history to emphasize the numerous opportunities and the time provided by the Court to allow counsel for Mr. Pollino to produce evidence in the form required under Federal Rule of Civil Procedure 56 in order to show a genuine issue of material fact regarding whether the discharge at issue was intentional. Mr. Pollino failed to provide such evidence, relying solely on his pleadings and the unsworn statements of three supposed eyewitnesses that were produced during discovery from an internal police report file concerning the incident. There is no suggestion that this file was not timely produced in discovery. Indeed, during oral argument Plaintiff's counsel acknowledged that he was aware of the witnesses. These witnesses were not deposed, and they did not provide affidavits as part of the summary judgment process.

liability is moot, because there can be no civil rights claim against the City if there is no underlying constitutional violation. Additionally, Defendants argue that the constitutional claim against Officer Fitzgerald is barred by the doctrine of qualified immunity.

On January 6, 2005, Mr. Pollino filed a Motion to Strike Defendants' Supplemental Motion for Summary Judgment. Mr. Pollino argued that since the Supplemental Motion for Summary Judgment was filed after the Court's November 15, 2004 deadline for filing dispositive motions, it should be denied as untimely.[6] Mr. Pollino further argues that, even if the Supplemental Motion is allowed, it is based on the faulty premise that Mr. Pollino conceded that the shooting was accidental. In fact, Mr. Pollino continues to assert that the shooting was intentional, but referred to it in responsive briefs as "accidental" because that it is how it was referred to in the police reports. To counter the defense position that the firearm discharge was accidental, Mr. Pollino seeks to make reference to the unsworn statements of Valerie Burton, Latisha Wilkes, and Phyllis Wright (three civilians who were apparently at or near the location of the altercation between Mr. Pollino and Officer Fitzgerald) that were produced in discovery as material in the file of the Philadelphia Police report on this incident. Mr. Pollino contends these statements represent the requisite evidence of the intentionality of the shooting which would defeat summary judgment.

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[6] The Court finds that in the interests of justice and judicial economy the Motion to Strike should be denied. Deadlines should be respected and the Court does not endorse or encourage any failure to adhere to scheduled deadlines. Moreover, the Court is cognizant of the fact that the Defendants could have raised the issue of an accidental discharge not satisfying the requirements of the Fourth Amendment earlier in the summary judgment motion process. The Court is also mindful, however, that allowing a claim to reach trial when there is no admissible evidence in the record to support it would be a waste of judicial resources and is against the interests of the parties and of justice. Therefore, the Motion to Strike is denied, and the Court has determined to review all of the substantive arguments presented by the parties.

Oral argument on the Motions was held on January 6, 2005. The Defendants asserted that Mr. Pollino had conceded the discharge was accidental, and, even if Mr. Pollino had not so conceded, there is no contradictory record evidence acceptable under Rule 56 that demonstrates the shooting was intentional. While the Defendants admitted that their original Motion did not address the issue of an accidental discharge, they claim that it was the arguable concession of the "accidental" nature of the incident by Mr. Pollino in his response that prompted this new argument. In reply, Mr. Pollino argued that no such concession was made and that he does indeed dispute that the discharge was accidental. Mr. Pollino cites to the three unsworn statements mentioned above that, Mr. Pollino claims, demonstrate the discharge was intentional. The Court allowed additional filings by both parties to address any of the issues raised for the first time at the oral argument, including Rule 56 evidentiary submission requirements.

On January 13, 2005, the Defendants submitted a supplemental brief. In this filing, the Defendants argued that the three unsworn statements are not sufficient under Rule 56 to defeat summary judgment and that Mr. Pollino is estopped from arguing the discharge is accidental due to his response to the original Motion for Summary Judgment where he supposedly conceded the discharge was accidental. Also on January 13, 2005, Mr. Pollino submitted a supplemental filing. In this filing, without citation to any case law, Mr. Pollino argued that because the unsworn statements were produced in lieu of an answer to an interrogatory question, the documents have been incorporated into evidence.

On January 27, 2005, the Court granted leave for both sides to file yet additional supplemental responses to specify which interrogatories and interrogatory answers incorporated the unsworn statements. Mr. Pollino, on February 2, 2005, filed his second supplemental

response, arguing that in response to the interrogatory requesting the City of Philadelphia "[i]dentify each witness whom you may call at trial... [and] give a summary of the testimony that will be offered and attach copies of any statements that were given by each witness," the Defendants incorporated the unsworn testimony into the interrogatory answer. The Court assumes that Mr. Pollino is suggesting that this configuration satisfies the rigors of Rule 56(c) and allows him to rely on the unsworn statements to create a sufficient fact issue to defeat summary judgment. Upon close review, however, the actual interrogatory answer submitted by Defendants provides for less of Rule 56-type admissible evidence than Plaintiff might have hoped. The actual interrogatory answer is:

> Defendants refer plaintiff to the Philadelphia Police Department's Internal Affairs Division Investigation, a complete copy of which is produced herewith.[7] Defendants reserve the right to call as witnesses any and all persons identified in the IAD investigation, including but not limited to the police and civilian witnesses to the incident, and any and all police personnel who were in the vicinity at the time of the incident.

The final filing in response to the Court's inquiries was on February 7, 2005, when the Defendants filed their supplemental memorandum. The Defendants argue that the inclusion of the Police Department's investigation report in an answer to an interrogatory asking for the identity of potential trial witnesses does not make the unsworn statements included in the file equivalent to an affidavit for Rule 56(c) purposes or otherwise. Furthermore, the Defendants note that Mr. Pollino had ample opportunity to depose one or more of the three witnesses or obtain sworn statements from them, but did not do so.

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[7] The unsworn statements of Valerie Burton, Latisha Wilkes, and Phyllis Wright were part of the IAD investigation file. As indicated above, although this information was supplied to Plaintiff, no effort was made to depose any of these individuals or to secure affidavits from them.

Having extended repeated invitations to the parties to make their best argument on the points at issue, the Court now believes they have been given full and fair opportunity to address the summary judgment considerations and the matter is ripe for resolution.

III. STANDARD OF REVIEW

Summary judgment is appropriate "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). Reviewing the record, the Court is obliged to "resolve all reasonable inferences in [the non-moving party's] favor." Jones v. Sch. Dist. of Phila., 198 F.3d 403, 409 (3d Cir. 1999). The moving party, here the City of Philadelphia and Officer Fitzgerald, bear the burden of showing that the record reveals no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law. FED. R. CIV. P. 56(c). Once the moving party has met its burden, the non-moving party, here Mr. Pollino, must go beyond the pleadings to set forth specific facts showing that there is a genuine issue for trial. Id. However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts," but must produce *competent evidence* supporting their opposition. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). An unsworn statement can not be construed as "competent evidence," and should not be relied upon when reviewing summary judgment. See Woloszyn v. County of Lawrence, 2005 U.S. App. LEXIS 1417, at 22-23 (3d Cir. Jan. 28, 2005) (holding an unsworn statement is not "sufficient... to rely upon... in disposing of the pending motion for summary judgment" (quoting opinion of district court)).

To defeat a motion for summary judgment standard, disputes must be both material and genuine. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material if it is predicated upon facts that are relevant and necessary and that may affect the outcome of the matter pursuant to the underlying law. Id. An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id. at 248-49. Summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Celetox Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, if there is only one reasonable conclusion from the record regarding the potential verdict under the governing law, judgment must be awarded to the moving party. Anderson, 477 U.S. at 250. With this background, the Court will review the "competent evidence" presented here.

IV. DISCUSSION

A. Civil Rights Claim Against the Defendants

To recover against a municipality, a plaintiff must show that municipal liability has attached. In this case, Mr. Pollino argues that Officer Fitzgerald used excessive force in violation of the Fourth Amendment in course of seizing Mr. Pollino. Mr. Pollino further argues this violation resulted from the City's failure to train or discipline police officers involved in discharges of their firearms.

An excessive force claim under § 1983 arising out of law enforcement conduct is based on the Fourth Amendment's protection from unreasonable seizures of the person. Graham v. Connor, 490 U.S. 386, 394- 95 (1989). A cause of action exists under § 1983 when a law

enforcement officer uses force so excessive that it violates the Fourth and Fourteenth Amendments to the United States Constitution. Brown v. Borough of Chambersburg, 903 F.2d 274, 277 (3d Cir. 1990). Police officers are privileged to commit a battery pursuant to a lawful arrest, but the privilege is negated by the use of excessive force. Edwards v. City of Phila., 860 F.2d 568, 572 (3d Cir. 1988). When a police officer uses force to effectuate an arrest, the force must be reasonable. Graham, 490 U.S. at 396.

The reasonableness of the officer's use of force is measured by "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. The reasonableness inquiry is objective, but should give appropriate consideration to the circumstances of the police action, which are often "tense, uncertain, and rapidly evolving." Id. at 397.

Furthermore, for a municipality to be liable for the actions of a police officer, the plaintiff must establish that not only did the officer violate a constitutionally-protected right, but the violation resulted from a municipal “custom” or “policy” of *deliberate indifference* to rights of citizens. Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 694-95 (1978); Andrews v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990). A “custom” arises from practices engaged in by state officials that are entrenched behavior in the municipal employees. Monell, 436 U.S. at 691. A plaintiff must “present scienter-like evidence of indifference on part of a particular policymaker or policymakers.” Simmons v. City of Phila., 947 F.2d 1042, 1060-61 (3d Cir. 1991).

In Brower v. County of Inyo, 489 U.S. 593 (1989), the Supreme Court held “a Fourth

Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied." Id. at 596-97. In Brower, for example, a suspect was involved in a car chase with the police that resulted in his death when he crashed into a police barricade. Id. at 594. Even though the intent of the police was to stop the car, the car crash at the end of the chase, which was alleged by the suspect's heirs to be excessive, was unintentional and, therefore, negated any Fourth Amendment claim. Id. at 597.

In similar cases concerning accidental discharges of a firearm by a police officer, courts have consistently held that an accidental discharge did not give rise to an excessive force claim. See Dodd v. City of Norwich, 287 F.2d 1, 3 (2d Cir. 1987) (holding that negligence principles do not apply to Fourth Amendment claim since it "makes little sense to apply a standard of reasonableness to an accident"); Clark v. Buchko, 936 F. Supp. 212, 218 (D.N.J. 1996) (holding that "the Fourth Amendment addresses 'misuse of power,' not the accidental effects of otherwise lawful government conduct"); Troublefield v. City of Harrisburg, 789 F. Supp. 160, 166 (M.D. Pa. 1992), aff'd. 980 F.2d 724 (3d Cir. 1992) (holding that no Fourth Amendment rights were violated when officer "did not intend the bullet to bring plaintiff within his control"); Glasco v. Ballard, 768 F. Supp. 176, 180 (E.D. Va. 1991) (stating "a more appropriate understanding of the case law, as well as the history of the Fourth Amendment, suggests that a wholly accidental shooting is not a 'seizure' within the meaning of the Fourth Amendment").

In this case, there was certainly a determinative question of whether the discharge of

Officer Fitzgerald's weapon on September 13, 2001 was intentional or accidental. After significant time was spent conducting discovery, Mr. Pollino's sole basis for arguing that a genuine issue of material fact exists as to the question of intentionality are the unsworn statements produced as part of the police investigation report. Mr. Pollino argues, without any reference to legal authority, that the Defendants' reference to the police investigation report as an acceptable way of answering an interrogatory inquiring as to the identity of potential trial witnesses means that the unsworn statements included in the report file are incorporated into "evidence." While the Court is aware that substantive answers to interrogatories could certainly be used as "competent evidence" to defeat a summary judgment motion, FED. R. CIV. P. 56(c), the Court does not see how the mere reference to a police report in an answer to an interrogatory inquiring about the names of potential witnesses and production of a copy of the report file including the potential witnesses' unsworn statements would result in anything more than raw information the recipient can – and should – use for pursuing further discovery. Only upon subjecting the witnesses to an oath would their respective statements become usable for summary judgment purposes.

To allow Mr. Pollino to use the Defendants' reference to the police report in the manner Mr. Pollino now urges would frustrate the express language of Rule 56 of the Federal Rules of Civil Procedure, which requires, for example, that affidavits be based on personal knowledge. See FED. R. CIV. P. 56(e). Mr. Pollino's expansive interpretation would have an unsworn statement be treated as the equivalent of an affidavit without the speaker swearing to the accuracy of the statement or testifying under oath that he or she is competent to give such testimony. Furthermore, an interrogatory answer can only "be used to the extent permitted by the rules of

evidence." FED. R. CIV. P. 33(c). The unsworn statements alleged to be incorporated by reference in the interrogatory answer are clearly nothing more than hearsay that would not be admitted at trial for substantive purposes.[8] Inadmissible hearsay is not considered when reviewing a motion for summary judgment. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 159 & 159 n.19 (1970) (material, which included hearsay testimony, upon which the nonmoving party relied failed to meet the requirements of FED. R. CIV. P. 56(e)).

The Court also notes that notwithstanding several opportunities Mr. Pollino has provided no explanations as to why affidavits or depositions of Ms. Burton, Ms. Wiles, and/or Ms. Wright are unavailable. Inasmuch as no reasons have been given that would explain the unavailability of the witnesses, the Court should not attempt to use the remedial measures provided for in Rule 56(f) of the Federal Rules of Civil Procedure. Because Mr. Pollino has not cited to any credible evidence and has failed to provide reasons to reopen discovery on this matter, the Court finds that there is no genuine issue of material fact concerning the accidental nature of the firearm discharge.[9] The competent evidence supports the defense contention that the firearm discharge was accidental.

The claim of excessive force in this case relies exclusively on the discharge of Officer

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[8] It is possible that such statements could be used for impeachment purposes, but the rules of evidence would only allow use of the statements for the limited purpose of impeachment, and not as substantive evidence. It is also conceivable that the unsworn statements might be usable at trial as a recorded recollection, if one of the witnesses who gave the unsworn testimony were to testify. See FED. R. EVID. 803(5).

[9] The Court will not address the issue of whether Mr. Pollino was judicially estopped from arguing the discharge was accidental as a result of the written submissions in his briefs in this matter, since that issue is moot as a result of the Court's finding that the "evidence" of intentional conduct cited to by Mr. Pollino is not competent.

Fitzgerald's weapon. There is no evidence to support a finding that the discharge was intentional and, therefore, a "seizure." Accordingly, the Court must dismiss the civil rights claims against Officer Fitzgerald. Without an underlying constitutional violation by one of the City of Philadelphia officers, the civil rights claims against the City of Philadelphia must likewise be dismissed.

B. Assault and Battery Claim Against Officer Fitzgerald

A government employee has immunity under the Political Subdivision Torts Claim Act, unless his actions fall within a specific exception, such as where his conduct constituted a "crime, actual fraud, actual malice or willful misconduct." 42 Pa. C.S.A. § 8550. "Willful misconduct" is conduct where the actor desires the result or is aware that it was substantially certain that the result would follow. Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994).

As discussed above, there is no evidence showing that the discharge at issue here was intentional or willful. Therefore, the assault and battery claim against Officer Fitzgerald is barred by the Political Subdivision Torts Claim Act.

V. CONCLUSION

For the foregoing reasons, the Court grants the Defendants' Motion for Summary Judgment. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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

MICHAEL POLLINO,	:	CIVIL ACTION
Plaintiff	:	
	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, *et al*,	:	
Defendants	:	NO. 03-6288

O R D E R

Gene E.K. Pratter, J. February 15, 2005

AND NOW, this 15th day of February, 2005, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 14), Plaintiff Michael Pollino's Memorandum of Law in Response to the Motion (Docket No. 16), Defendants' Memorandum Regarding the Motion for Summary Judgment (Docket No. 17), Mr. Pollino's Motion to Strike Defendants' Supplemental Motion for Summary Judgment (Docket No. 18), the presentations of counsel for the parties at oral argument on January 6, 2005, Defendants' Response in Support (Docket No. 20), Mr. Pollino's Supplemental Response in Opposition (Docket. No. 21), Mr. Pollino's Second Supplemental Response in Opposition (Docket No. 25), and Defendants' Supplemental Memorandum of Law in Further Support (Docket No. 26), it is hereby ORDERED that:

1. Plaintiff Michael Pollino's Motion to Strike Defendants' Supplemental Motion for Summary Judgment (Docket No. 18) is DENIED;

2. Defendants' Motion for Summary Judgment (Docket No. 14) is GRANTED; and

3. The Clerk of the Court is directed that this matter is CLOSED for statistical purposes.

BY THE COURT:

/S/
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE