Circuit Court for Howard County
Case No.: C-13-CV-21-000085

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 9

September Term, 2024

ADLAI S. LAVINE

v.

WILLIAM HARRIS, ET AL.

Nazarian,
Albright,
Hotten, Michele D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Hotten, J.

Filed: March 21, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Appellant, Adlai Lavine, appeals the denial of his motion for summary judgment and the grant, by the Circuit Court for Howard County, of summary judgment in favor of appellees William Harris, Christopher Lowman, and Howard County, on all nine counts of Lavine's complaint. Lavine presents four questions for this Court's review,[1] which we have consolidated and rephrased, as follows:

1. Did the circuit court err in granting summary judgment to the individual defendants on the ground that they had probable cause to arrest and prosecute Lavine?

2. Did the circuit court err in granting summary judgment to the county defendant on the ground that it was immune from liability for its officers' torts?

For the reasons that follow, we affirm in part and reverse in part the judgment of the circuit court, and remand for further proceedings consistent with this opinion.

BACKGROUND

On Friday, February 9, 2018, at approximately 3:15 pm, the Howard County Police Department received a 911 call from Tara Reid. Ms. Reid reported that she was driving on Hall Shop Road toward Guilford Road in Howard County when she saw a man wearing a bright red winter coat, a red hat, and a bright green gym bag on his back, walking around

[1] Lavine presented the following questions on appeal:
1. Did the Circuit Court err in ruling that, under Maryland law, probable cause existed to arrest Appellant?
2. Did the Circuit Court err in ruling that the Appellees' admitted violation of Maryland law did not provide Appellant with a cause of action under Maryland law?
3. Did the Circuit Court err in ruling that, under Maryland law, probable cause existed to prosecute Appellant?
4. Did the Circuit Court err in ruling that Maryland law precluded Appellee Howard County from any liability as the employer of Appellees Harris and Lowman, as well as liability for its failure to train its co-Appellees?

the curve from Guilford Road onto Hall Shop Road. Ms. Reid stated that as she drove by, the man pulled down his gray sweatpants and exposed himself to her.

At the time, Harris and Lowman ("the officers") were employed as police officers by Howard County. Shortly after Ms. Reid reported what she had observed to the 911 operator, Harris received a police dispatch that "a female had called in saying that she was driving on Hall Shop, and a male on the side of the road had exposed himself to her." When Harris arrived on Hall Shop Road, he saw an individual who matched the description given to the 911 operator. Harris identified the individual as Lavine. Harris directed Lavine to wait, and Lavine complied. Harris explained to Lavine why he was being stopped, and he asked Lavine whether he had "removed his clothing sufficient to expose himself." Lavine responded that "[a]t some point, [] he was adjusting his pants." However, Lavine denied that he had exposed his penis in any way.

At this point, Harris continued to "hold [Lavine] on the side" while Lowman tried to "make contact with the victim." At 3:45 pm, approximately twenty-eight minutes after Ms. Reid's 911 call was dispatched to Harris, Lowman arrived at Hall Shop Road to assist Harris. Lowman told Harris that he had successfully contacted Ms. Reid, and she confirmed that she had in fact seen Lavine's penis. Lowman then told Harris that he was going to meet with Ms. Reid in person. Eventually, Lowman met with Ms. Reid and she told him that "she was coming up the road, she looked to her left, she saw [Lavine] walking around the corner. She said his hands were in his pants. He pulled his pants down [and] exposed himself to her." Lowman then had Ms. Reid complete a form entitled "Voluntary Statement" pertaining to what she witnessed. At about 4:15 pm, she wrote:

> Was driving on Hall Shop Road approx 3:15 pm 2/9/18 Friday to pick my daughter up from school when I saw a man at the corner of Guilford with his hand inside his grey sweatpants "adjusting" his privates and I saw I don't believe he was "flashing" but I saw his "private" parts – his penis.

Based on that information, Lowman told Harris that they "had probable cause for the arrest." Harris subsequently placed Lavine under arrest. Lavine was then transported to the District Court Commissioner in Jessup, Howard County, Maryland, where he was placed in a holding cell while Harris presented his statement to the Commissioner. The officers based their probable cause determination on (1) Lavine's location near two schools around their time of dismissal, (2) Lavine's physical appearance, and (3) the consistency of Ms. Reid's positive identification and description of the incident to police dispatch, to Lowman, and in her written statement.

On March 8, 2018, the State filed a motion to enroll the criminal case against Lavine as *nolle prosequi*, the sole reason being that the "State does not believe there is sufficient evidence to proceed." On March 13, 2018, the District Court enrolled into the docket the entry of the case as *nolle prosequi* by the Office of the State's Attorney.

Lavine initially filed a complaint against Harris, Lowman, and Howard County (collectively "Appellees") on February 3, 2021, in the Circuit Court for Howard County. Following months of discovery, Lavine filed an Amended Complaint against Appellees on November 12, 2021. The Amended Complaint alleged two counts of false arrest against Harris, two counts of false arrest against Lowman, one count of malicious prosecution against Harris, one count of malicious prosecution against Lowman, one count of

respondeat superior against Howard County, one count of failure to train against Howard County, and one count of "unlawful misdemeanor arrest" against Howard County.

Counts One and Four averred that the officers deprived Lavine of his liberty without his consent and without legal justification or probable cause. Counts Two and Five averred that the officers arrested Lavine for a misdemeanor that was committed outside of their presence, in violation of the Maryland Constitution. Counts Three and Six averred that the officers initiated criminal proceedings against Lavine without legal justification or probable cause, for a purpose inconsistent with the administration of justice. Count Seven averred that the officers' actions were conducted within the scope of their employment as police officers employed by Howard County. Count Eight averred that Howard County had a duty to train the officers about the contours of probable cause, and that Howard County failed to perform this duty. Finally, Count Nine averred that Howard County sought to overturn the Maryland Constitution in training its police officers to make arrests for misdemeanors committed outside the presence of the officers. Appellees filed an Answer to the Amended Complaint on November 23, 2021.

On December 13, 2021, Lavine filed a Motion for Summary Judgment. In this Motion, Lavine argued that he was entitled to summary judgement, as a matter of law, on all counts. Then, on December 29, 2021, Appellees filed their own Motion for Summary Judgment, arguing that they were entitled to judgment as a matter of law on all counts. The circuit court heard arguments from both parties on their respective motions for summary judgment on March 9, 2022, and proceeded to hold the matter *sub curia*. For about two years following the hearing, the parties repeatedly filed motions to postpone trial,

requesting that the court first decide their cross-motions for summary judgment. This did not happen until February 9, 2024, when the circuit court granted Appellees' motion for summary judgment and denied Lavine's motion for summary judgment.

In a nine-page Memorandum Opinion accompanying its order, the circuit court explained its reasoning for granting summary judgment in favor of Appellees on each count. As for Counts One and Four, the court explained that Ms. Reid repeatedly described observing Lavine's penis, and that the officers had no reason to doubt her reliability. The court further found that the officers made their probable cause determination based on Lavine's location near two schools around their time of dismissal, Lavine's physical appearance, and the consistency of Ms. Reid's positive identification and description of the incident to police dispatch, to Lowman, and in her written statement. Based on this, the court found that the officers had probable cause to arrest Lavine, and accordingly held that Lavine could not prevail on his false arrest claims.

As for Counts Two and Five, the circuit court held that Lavine could not prevail on his claims for false arrest because the alleged incident occurred in close proximity to two schools around the time of their dismissals, so the officers had cause to believe that, unless they arrested Lavine immediately, he may cause further harm by exposing himself to children who were being released from the nearby schools. The court also held that Lavine could not prevail on his claims for malicious prosecution in Counts Three and Six, reiterating its earlier finding that the officers had probable cause to make the arrest, and adding that, even if the officers did not have probable cause, Lavine failed to establish by

clear and convincing evidence that the officers had actual malice or a "wrongful or improper motive for instigating the prosecution."

Turning to Counts Seven, Eight, and Nine, the circuit court swiftly disposed of Lavine's claims against Howard County. As to Count Seven, the court held that Lavine's claim for respondeat superior failed because respondeat superior is not an independent cause of action; rather it is a means of imputing liability for the acts of an employee. As to Count Eight, the court held that Lavine's claim for failure to train failed because Maryland's counties are immune from tort liability if the allegedly tortious conduct occurred in the exercise of a governmental function, and the operation of a police force is a quintessential governmental function. Finally, as to Count Nine, the court held that Lavine's claim for unlawful misdemeanor arrest failed because there is no cognizable tort claim of "unlawful misdemeanor arrest," and because the arrest was supported by ample probable cause.

Lavine noted this timely appeal on March 4, 2024.

STANDARD OF REVIEW

Pursuant to Maryland Rule 2–501, when reviewing a pre-trial motion for summary judgment, a trial court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2–501(f). When a trial court grants a motion for summary judgment, our appellate standard of review is *de novo*. *Webb v. Giant of Md., LLC*, 477 Md. 121, 135 (2021). We determine whether the trial court was correct as a matter of law "[o]nly when there is an

absence of a genuine dispute of material fact." *Dashiell v. Meeks*, 396 Md. 149, 163 (2006). "A trial court does not have any discretionary power in granting a motion for summary judgment when there are no disputes of material fact." *Webb*, 477 Md. at 135.

A trial court does have discretionary power, however, "when affirmatively denying a motion for summary judgment or denying summary judgment in favor of a full hearing on the merits." *Dashiell*, 396 Md. at 164. "This discretionary power 'exists even though the technical requirements for the entry of such a judgment have been met.'" *Webb*, 477 Md. at 135 (quoting *Metro. Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25, 28 (1980)). In other words, "no party is entitled to a summary judgment as a matter of law. It is within the discretion of the judge hearing the motion, if he finds no uncontroverted material facts, to grant summary judgment or to require a trial on the merits." *Foy v. Prudential Ins. Co. of Am.*, 316 Md. 418, 424 (1989). "Thus, on appeal, the standard of review for a denial of a motion for summary judgment is whether the trial judge abused his discretion and in the absence of such a showing, the decision of the trial judge will not be disturbed." *Dashiell*, 396 Md. at 165.

DISCUSSION

I. The Circuit Court Erred in Granting Appellees' Motion, and Abused its Discretion in Denying Lavine's Motion, for Summary Judgment on Counts One and Four

As to Counts One and Four of the Amended Complaint, Lavine argues that the circuit court erred in granting summary judgment to Appellees because it erroneously found that the officers had probable cause to arrest him. Lavine first contends that the circuit court cherry-picked facts to support its probable cause determination, and that a full

review of the record would reveal that the officers did not, in fact, have probable cause to make an arrest. Second, Lavine contends that the circuit court disregarded issues with Ms. Reid's credibility in finding probable cause. Appellees, on the other hand, argue that the officers did have probable cause to arrest Lavine due to Ms. Reid's consistent version of events.

Both parties in their arguments, and the circuit court in its decision below, focus on probable cause to arrest as the critical issue in Counts One and Four of the Amended Complaint. However, probable cause is *not* an element of the tort of false arrest. The elements for false arrest are: (1) a deprivation of the liberty of another; (2) without consent; and (3) without *legal justification*.[2] *Heron v. Strader*, 361 Md. 258, 264 (2000). The test for determining whether legal justification exists in a particular case "is judged by principles applicable to the law of arrest." *Rovin v. State*, 488 Md. 144, 180 (2024). In some cases, "the elements of legal justification and probable cause overlap." *Id.* at 181. These include cases where an officer makes an arrest "under a warrant which appears on its face to be legal," as well as cases where an officer makes a warrantless arrest for a felony

[2] Appellees do not dispute that the first and second elements of false arrest were satisfied here. Lavine was detained on the side of a road by Harris for about an hour before he was arrested. After he was arrested, Lavine was transported to the District Court Commissioner in Jessup, where he was placed in a holding cell. Thus, Lavine was clearly deprived of his liberty. Additionally, although Lavine complied with Harris's order to stop and made no attempts to flee, these were not acts of voluntary consent, but rather, were his submission to a show of authority. Therefore, "like the vast majority of false arrest cases, our focus is on the last element—whether the deprivation was without legal justification." *Rovin v. State*, 488 Md. 144, 180 (2024).

offense. *Ashton v. Brown*, 339 Md. 70, 120 (1995).[3] But "[t]o the extent that the lawfulness of an arrest does not turn upon probable cause under Maryland law, probable cause will not be determinative of the legal justification issue in a false [arrest] action based on that arrest." *Id.*

Where a police officer makes a warrantless arrest for a misdemeanor offense, the Supreme Court of Maryland has held that the arrest "is legally justified only to the extent that a misdemeanor was actually committed in a police officer's view or presence." *Id.* at 121. Thus, probable cause is not a defense to a false arrest claim based on "a police officer's warrantless arrest for the commission of a non-felony offense." *Id.*

The Maryland General Assembly codified the common law rule governing warrantless arrests in Section 2–202 of the Criminal Procedure Article. The statute allows a police officer to make a warrantless arrest for a felony or misdemeanor if the officer has probable cause to believe that the felony or misdemeanor "is being committed in the presence or within the view of the police officer." Md. Code Ann., Crim. Proc. ("CP") § 2–202(b). Only for felonies, however, may an officer make a warrantless arrest whether or not it was committed in the presence or within the view of the police officer. CP § 2–202(c). Thus, under both the common law and CP § 2–202, a warrantless arrest for a misdemeanor that was not committed within the presence or view of an officer would not be legally justified.

[3] *Ashton v. Brown* concerned the tort of false imprisonment, not false arrest. 339 Md. 70, 84 (1995). However, "[t]he elements of false arrest and false imprisonment are identical." *Heron v. Strader*, 361 Md. 258, 264 (2000). Therefore, the Court's decision in *Ashton* is instructive here.

Section 2–203 of the Criminal Procedure Article, however, provides an exception to this general rule for certain crimes designated as "subject to warrantless arrest." CP § 2–203. One of the listed crimes is indecent exposure. CP § 2–203(b)(6). Under Section 2–203(a), an officer may arrest a person for indecent exposure, without a warrant, if the officer has probable cause to believe:

> (1) that the person committed the crime; and
>
> (2) that unless the person is arrested immediately, the person:
>
> (i) may not be apprehended;
>
> (ii) may cause physical injury or property damage to another; or
>
> (iii) may tamper with, dispose of, or destroy evidence.

CP § 2–203(a).

Section 2–203 therefore presents a two-part test that must be satisfied for an arrest to be legally justified. First, the officer must have probable cause that a person committed the crime. Second, the officer must also have probable cause that one of three enumerated grounds exists for an immediate arrest. Even if the officer does have probable cause that a crime was committed, an arrest for a misdemeanor committed outside of the officer's presence will not be legally justified if none of the enumerated grounds for immediate arrest are satisfied.

A. The Officers had Probable Cause to Believe that Lavine Committed Indecent Exposure

"[P]robable cause to arrest exists where 'the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are

sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.'" *Rovin*, 488 Md. at 183 (quoting *Elliott v. State*, 417 Md. 413, 431 (2010)). In determining whether an officer had probable cause to make an arrest, "the reviewing court necessarily must relate the information known to the officer to the elements of the offense that the officer believed was being or had been committed." *Okwa v. Harper*, 360 Md. 161, 184 (2000) (quoting *DiPino v. Davis*, 354 Md. 18, 32 (1999)).

Here, the officers believed that Lavine had committed the crime of indecent exposure. Thus, to lawfully arrest him, they must have had probable cause as to each element of indecent exposure. There are three elements of indecent exposure: (1) a public exposure, (2) made willfully and intentionally, as opposed to an inadvertent or accidental one; (3) which was observed, or was likely to have been observed, by one or more persons, as opposed to performed in secret, or hidden from the view of others. *Wisneski v. State*, 398 Md. 578, 593 (2007). While Lavine denies Ms. Reid's allegations, he does not dispute the fact that in her statements to the 911 operator, to Lowman, and in her written statement, she claimed to have seen Lavine's penis on the side of a public road. Based on the consistency of Ms. Reid's statements concerning the alleged incident, the officers had probable cause as to the first and third elements of indecent exposure. Somewhat trickier, however, is determining whether the officers had probable cause that the alleged exposure was "made willfully and intentionally." *Wisneski*, 398 Md. at 593.

In describing the alleged incident, Ms. Reid wrote that she saw Lavine "with his hand inside his grey sweatpants 'adjusting' his privates." Separately, in response to

questioning from Harris, Lavine similarly explained that "[a]t some point, [] he was adjusting his pants." When reviewing the grant of a motion for summary judgment, "[w]e must review the facts, and the reasonable inferences that can be drawn from them, in the light most favorable to the non-moving party." *Bourne v. Ctr. on Child., Inc.*, 154 Md. App. 42, 51 (2003). Viewing the facts in the light most favorable to Lavine, the statements about him "adjusting" his pants suggest that he did not intend to expose his penis to anyone. Unfortunately for Lavine, however, indecent exposure "is a general intent crime." *Duran v. State*, 180 Md. App. 65, 86 (2008).

"General intent is the intent to commit the immediate act." *Harris v. State*, 353 Md. 596, 605 (1999). Specific intent, on the other hand, is "not simply the intent to do an immediate act, but the 'additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result.'" *Harris*, 353 Md. at 603 (quoting *Shell v. State*, 307 Md. 46, 63 (1986)). In other words, "the term 'specific intent' designates some specific mental element or intended purpose above and beyond the mental state required for the mere *actus reus* of the crime itself." *Harris*, 353 Md. at 605 (quoting *Wieland v. State*, 101 Md. App. 1, 39 (1994)).

In the context of indecent exposure, the "element of intent can be express, or inferred from the circumstances and the environment of the exposure." *Wisneski*, 398 Md. at 593. "When the defendant exposes himself at such a time and place that a reasonable person knows or should know that his or her act will be observed by others, his acts are not accidental and his intent may be inferred." *Id.* "[R]eckless exposure, determined by time, place and manner, can inform intent." *Id.* at 594.

Even assuming, arguendo, that Lavine did not have the specific intent to expose his penis to anyone, the intent element could still be "inferred from the circumstances and the environment of the exposure." *Wisneski*, 398 Md. at 593. When the alleged exposure occurred, Lavine was on the side of a public road near two schools around the time of dismissal. A reasonable person standing on the side of a public road in the middle of the day would know, or at least should know, that if they reached down to adjust their pants, that act would likely be observed by others. The crime of indecent exposure "includes an innumerable variety of offenses, ranging from 'reprehensible to the arguably innocuous,' or from 'moral depravity' to 'momentary poor judgment.'" *Duran*, 180 Md. App. at 86 (quoting *Ricketts v. State*, 291 Md. 701, 709–10 (1981)) (internal citations omitted). If Lavine adjusted his pants while walking along the side of the road and, in doing so, briefly exposed his penis, it would certainly qualify as momentary poor judgment given the circumstances. When factoring in the surrounding area and the time of day when the alleged exposure occurred, Lavine's acts were not accidental and his intent may be inferred.

Since the facts and circumstances within the officers' knowledge were sufficient to warrant a belief as to each element of indecent exposure, the officers had probable cause to believe that Lavine had committed the offense.

B. The Officers did not have Probable Cause to Believe that Any Enumerated Ground Existed for Lavine's Immediate Arrest

Indecent exposure is a misdemeanor offense, and neither Harris nor Lowman were present when Lavine allegedly committed the crime. Therefore, in addition to having probable cause to believe that the crime was committed, the officers must have also had

probable cause to believe that immediate arrest was warranted for the arrest to be legally justified. Immediate arrest was warranted if the officers had probable cause that, but for immediate arrest, Lavine (1) may not be apprehended; (2) may cause physical injury or property damage to another; or (3) may tamper with, dispose of, or destroy evidence. CP § 2–203(a).

In its decision below, the circuit court held that immediate arrest was warranted because "Harris and Lowman had cause to believe that, unless they arrested [Lavine] immediately, he may cause further harm by exposing himself to children who were being released from the schools nearby." The court made this finding under the second enumerated ground for immediate arrest. However, that ground states that immediate arrest is warranted if the suspect "may cause *physical injury* or property damage to another." CP § 2–203(a) (emphasis added). The General Assembly did not define the term "physical injury" in CP § 2–203, but it has done so elsewhere.

In Section 3–203 of the Criminal Law Article, "physical injury" is defined as "any impairment of physical condition, excluding minor injuries." Md. Code Ann., Crim. Law § 3–203(c)(1). When used in its ordinary dictionary sense in this context, the word "physical" means "of or relating to the body." *Physical*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/physical [https://perma.cc/3Y8A-LNFG]. In other words, a physical injury is an impairment of bodily condition. It does not follow from this definition then, from the circumstances presented, that Lavine posed any threat of physical injury to anyone else at the time he was arrested, even though there may have

been a risk that Lavine would expose himself to children released from the nearby schools, from a mental or psychological injury standpoint.

There is no evidence supporting any other ground for immediately arresting Lavine without a warrant. When Harris asked Lavine to stop, Lavine complied. Both officers stated that Lavine made no attempt to flee nor made any indication that he was attempting to flee. Lavine even volunteered his home address. Thus, there is no evidence that Lavine may not have been apprehended if he was not immediately arrested. Additionally, Harris testified that concern about tampered or destroyed evidence did not apply to an indecent exposure case, and there is no indication that Lavine posed any risk of destroying evidence.

Since none of the enumerated grounds for immediate arrest were present here, Lavine's warrantless arrest for indecent exposure was without legal justification.[4] The circuit court therefore erred in granting summary judgment in favor of the officers on Counts One and Four, and abused its discretion in denying Lavine's motion for summary judgment as to those counts.[5]

[4] The officers are not immune from liability in their individual capacities for the tort of false arrest. False arrest is an intentional tort, and public officials do not enjoy immunity from liability when they commit intentional torts. *See Cooper v. Rodriguez*, 443 Md. 680, 713 n.14 (2015) ("A public official is not entitled to common law public official immunity where the official committed an intentional tort or acted with malice"); *Houghton v. Forrest*, 412 Md. 578, 586 (2010) ("For more than twenty years, however, this Court has held that common law public official immunity does not apply to intentional torts"); *DiPino v. Davis*, 354 Md. 18, 49 (1999) ("[A] police officer, who might otherwise have the benefit of this immunity, does not enjoy it if the officer commits an intentional tort or acts with malice.").

[5] "An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court ... or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts (continued)

II. The Circuit Court Did Not Err in Granting Appellees' Motion for Summary Judgment on All Other Counts

A. Counts Two and Five

As to Counts Two and Five of his Amended Complaint, Lavine argues that the officers violated the Maryland Constitution when they arrested him for a misdemeanor, without a warrant, despite not having been present when Lavine allegedly committed the crime. According to Lavine, the officers violated Section 2–203 of the Criminal Procedure Article and, in doing so, also violated the Maryland Constitution. Appellees, on the other hand, contend that the officers did not violate Section 2–203 and that, even if they did, a violation of the statute does not rise to the level of a violation of Lavine's state constitutional rights.

As explained previously, the officers did violate Section 2–203. Although they had probable cause to believe that Lavine committed indecent exposure, they did not have probable cause of any enumerated ground under the statute for an immediate, warrantless arrest. The statute does not, however, alter the rights afforded to Lavine by the Maryland Constitution. In his Motion for Summary Judgment, Lavine argued that his arrest

and inferences before the court ... or when the ruling is violative of fact and logic." *Sibley v. Doe*, 227 Md. App. 645, 658 (2016) (quoting *Bacon v. Arey*, 203 Md. App. 606, 667 (2012)) (cleaned up). The circuit court's denial of Lavine's motion for summary judgment was an abuse of discretion as to Counts One and Four, because it was based on the faulty conclusion that the officers had legal justification for their warrantless arrest of Lavine. As explained, the officers did not, in fact, have legal justification to arrest Lavine without a warrant, so Lavine is entitled to judgment as a matter of law on his false arrest claims against the officers in Counts One and Four.

implicated Article 24 of the Maryland Declaration of Rights.[6] Article 24, which is ordinarily interpreted *in pari materia* with its federal analog, the Fourteenth Amendment,[7] does not provide a substantive right to be free from arrest without probable cause. *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (finding that pretrial deprivations of liberty are addressed by the Fourth Amendment, not the Fourteenth).

Lavine does not explicitly raise Article 26 of the Maryland Declaration of Rights[8] as a basis for his constitutional claims. However, to the extent that his claims are based on Article 26, those claims also fail. Like Article 24, Article 26 is ordinarily interpreted *in pari materia* with its federal analog, the Fourth Amendment.[9] All the Fourth Amendment requires for an arrest to be lawful is for the arrest to be based on probable cause. *See Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("[W]e have equated a lawful arrest with an arrest based on probable cause"); *In re T.L.*, 996 A.2d 805, 816 (D.C. 2010) ("'For an arrest

[6] Article 24 provides: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Maryland Declaration of Rights, Art. 24.

[7] "'Article 24 has been interpreted to apply in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution, so that decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities.'" *Frey v. Comptroller of Treasury*, 422 Md. 111, 176 (2011) (quoting *Attorney General of Maryland v. Waldron*, 289 Md. 683, 704–05 (1981)) (internal citations and quotation marks omitted).

[8] Article 26 provides: "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." Maryland Declaration of Rights, Art. 26.

[9] The Supreme Court of Maryland "has interpreted historically Article 26 *in pari materia* with the Fourth Amendment of the U.S. Constitution," and has "not held, to date, that it provides greater protection against state searches than its federal kin." *King v. State*, 434 Md. 472, 482–83 (2013).

to be lawful, the Fourth Amendment requires that it be supported by probable cause'") (quoting *Perkins v. U.S.*, 936 A.2d 303, 305 (D.C. 2007)). Since the officers here had probable cause to arrest Lavine for indecent exposure, their actions complied with Article 26.

Courts have frequently refused to allow state statutory arrest limitations to govern the limitations of the Fourth Amendment, with which Article 26 is interpreted *in pari materia*. *See Moore*, 553 U.S. at 176 ("[S]tate restrictions do not alter the Fourth Amendment's protections"); *Street v. Surdyka*, 492 F.2d 368, 372 (4th Cir. 1974) (rejecting plaintiff's attempt to make the Fourth Amendment have the same limitations as Maryland law, and holding that while states "are free to impose greater restrictions on arrests[,]" their "citizens do not thereby acquire" greater constitutional rights); *U.S. v. Humphries*, 372 F.3d 653, 658 (4th Cir. 2004) (citing *Surdyka* approvingly and noting that it sanctioned a warrantless arrest in a public place for "a misdemeanor committed outside an officer's presence"). Thus, to the extent that Lavine asserts violations of his rights under the Maryland Constitution, summary judgment was properly granted to Appellees.

B. Counts Three and Six

As to Counts Three and Six, Lavine argues that the officers committed the tort of malicious prosecution because they lacked probable cause to institute a criminal proceeding against him, and that malice can be inferred from a lack of probable cause. Appellees, however, argue that the circuit court properly granted summary judgment in favor of the officers because they had probable cause to arrest Lavine for indecent exposure, and they did not act with malice or improper purpose.

"The necessary elements for a malicious prosecution claim are: (1) a criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; and (4) 'malice,' meaning that the primary purpose in instituting the proceeding was something other than bringing an offender to justice." *Rovin*, 488 Md. at 180 (citing *Heron*, 361 Md. at 264). Our focus here is on the latter two elements—probable cause and malice.

As was established previously, the officers did have probable cause to arrest Lavine for indecent exposure, so his malicious prosecution claims fail for that reason alone. If the officers did not have probable cause to arrest Lavine, the Supreme Court of Maryland "has long held that 'the "malice" element of malicious prosecution may be inferred from a lack of probable cause.'" *Okwa*, 360 Md. at 188 (quoting *Montgomery Ward v. Wilson*, 339 Md. 701, 717 (1995)); *see also Havilah Real Prop. Servs., LLC v. Early*, 216 Md. App. 613, 633 (2014) (finding that, for the purposes of malicious use of process, malice "may be inferred from a lack of probable cause"). Since the officers had probable cause to arrest, however, we need not reach the malice element.

C. Counts Seven, Eight, and Nine

Lavine argues that, since it was error to enter judgment for the officers, the County is, as a matter of law and fact, liable for its employees' torts. Appellees contend, however, that the circuit court correctly granted summary judgment in favor of the County on Count Seven, because *respondeat superior* is not an independent cause of action under Maryland law; Count Eight, because the County is immune from tort liability for conduct occurring in the exercise of a governmental function; and Count Nine, because there is no such cause

of action in Maryland law, whether in common law or statute, for an "unlawful misdemeanor arrest."

Appellees are correct that *respondeat superior* is not, itself, an independent cause of action. Rather, it is "'a means of holding employers ... vicariously liable for the tortious conduct of an employee acting within the scope of his/her employment.'" *Davis v. Frostburg Facility Operations, LLC*, 457 Md. 275, 296–97 (2018) (quoting *Serio v. Balt. Cnty.*, 384 Md. 373, 397–98 (2004)). Thus, a *respondeat superior* claim cannot be brought in a vacuum; it must be connected to some other independent cause of action. Here, although Lavine failed to state it explicitly in his Amended Complaint, it is clear that his *respondeat superior* claim against Howard County was not brought in a vacuum; it is directly connected to his false arrest claims against the officers. However, Howard County is immune from liability for its officers' conduct in this case.

"Under Maryland common law, a local government is immune from tort liability when it functions in a 'governmental' capacity, but it enjoys no such immunity when it is engaged in activities that are 'proprietary' or 'private' in nature." *Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 192 (2015); *see also DiPino*, 354 Md. at 47 ("A local governmental entity is liable for its torts if the tortious conduct occurs while the entity is acting in a private or proprietary capacity, but, unless its immunity is legislatively waived, it is immune from liability for tortious conduct committed while the entity is acting in a governmental capacity."). This immunity does not apply, however, to "certain types of torts, such as nuisance actions; tort actions arising under the Maryland Constitution; and

tort liability for violations of federal constitutional or statutory rights." *Rios v. Montgomery Cnty.*, 386 Md. 104, 124 (2005) (citations omitted).

In 1987, the General Assembly enacted the Local Government Tort Claims Act ("LGTCA") to "'provide a remedy for those injured by local government officers and employees acting without malice and in the scope of employment.'" *Rios*, 386 Md. at 125–26 (quoting *Faulk v. Ewing*, 371 Md. 284, 298 (2002)). Before the LGTCA, local governments enjoyed immunity from tort liability "only with respect to non-constitutional torts based on activity classified as 'governmental,' and such immunity could be waived by the General Assembly or local enactments." *Id.* at 125. "This limitation on the immunity from tort action with respect to local governments *remains applicable today* under the LGTCA." *Id.* (emphasis added).

Here, Harris and Lowman committed the non-constitutional tort of false arrest while acting within the scope of their employment as Howard County police officers. *See Williams v. Prince George's Cnty.*, 112 Md. App. 526, 549 (1996) (describing false arrest as a non-constitutional tort). In their capacity as County police officers, they were purporting to enforce the State criminal law. "That is quintessentially governmental in nature." *DiPino*, 354 Md. at 48. Therefore, there is no common law liability on the part of the County for Counts Seven or Eight.

Finally, as the court below found, there is no cognizable tort claim of "unlawful misdemeanor arrest." To the extent that Count Nine seeks to assert a violation of Lavine's rights under the Maryland Constitution against Howard County for its officers' violation of state statutory law, the circuit court correctly granted summary judgment in favor of

Howard County. As explained previously, the right that Lavine claims was violated—his right to be free from warrantless arrest for a misdemeanor committed outside the presence of police—is a right of statutory creation. The state constitution provides the minimum probable cause requirement for arrest, which was satisfied here. Section 2–203 of the Criminal Procedure Article provides the additional requirement that a warrantless arrest for indecent exposure, when committed outside of an officer's presence, is allowed only when one of three statutory criteria are met, but Section 2–203 does not expand the rights and limitations provided by the Maryland Constitution. Thus, Lavine does not have a state constitutional claim for the violation of his state statutory rights.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY IS AFFIRMED IN PART AND REVERSED IN PART. CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.